OSHA NOW PERMITS UNION ORGANIZER TO ACCOMPANY OSHA COMPLIANCE OFFICER DURING WALK AROUND INSPECTION IN NON-UNION FACILITY

OSHA has literally opened the door for union organizers to enter an employer's non-union facility during an OSHA walkaround inspection. In a February 21, 2013 interpretation letter, Richard E. Fairfax, OSHA's Deputy Assistant Secretary, opined that employees without a collective bargaining agreement may designate a person affiliated with a union or community organization to act on their behalf as a walkaround representative. Mr. Fairfax opined that the OSH Act, specifically, 29 U.S.C. § 657(e), authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by the employer's employees." Mr. Fairfax further attempts to support his opinion by citing to the underlying OSHA regulations, 29 C.F.R. § 1903.8, which explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is "reasonably necessary to the conduct of an effective and thorough inspection."

Mr. Fairfax's interpretative letter conveniently fails to acknowledge that permitting a non-employee to participate in the walkaround inspection is an exception to the express part of the regulation that provides that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer." Further, Mr. Fairfax fails to acknowledge that the exception permits only those third parties with special expertise or knowledge to participate in a walkaround inspection, such as a hygienist or a safety engineer. OSHA's interpretative letter fails to clarify what special skill or knowledge a union or community organizer may bring to the inspection.

OSHA's interpretative letter also fails to clarify when an alleged "employee representative" is "authorized" by the employees. Can a minority faction of employees claim that an union organizer is their "authorized" representative when other employees may object to such individual as their authorized representative? It appears that OSHA's interpretative letter takes a very liberal interpretation of who is or can be an "authorized" employee representative. If an employer is confronted with this scenario, should it halt the inspection and provide the compliance officer the option of conducting the walkaround without the union organizer or should the employer require OSHA to seek a warrant if the compliance officer insists that he or she will only conduct the walkaround if the union organizer is permitted to accompany the compliance officer? Obviously, these significant issues, as well as others, should be discussed with experienced legal counsel prior to permitting an OSHA compliance officer to proceed with a walkaround inspection under such circumstances.

DOES YOUR "AT-WILL" EMPLOYMENT STATEMENT VIOLATE THE NATIONAL LABOR RELATIONS ACT?

To maintain its relevancy and expand the scope of its authority, the NLRB continues its attack upon non-union employers' policies. This time the NLRB has positioned its cross-hairs upon employers' "at-will" employment policies or statements. Most non-union employers include within their employee handbook a statement that employees' employment is "at-will," meaning either the employee or the employer may end the employment relationship at any time, for any reason, either with or without notice. Most "at-will" statements further provide that no agent or representative of the employer may enter into any agreement to the contrary unless done so in writing and signed by the president or CEO of the company. These types of statements reflect nothing more than the reality of the legal relationship between the employer and the employee.

The NLRB, however, has recently taken a different viewpoint, finding that such "at-will" statements have a chilling effect upon employees' Section 7 rights. In American Red Cross Arizona Blood Services Region, an administrative law judge found that the employer had violated Section 8(a)(1) by maintaining the following language in a form that employees were required to sign acknowledging their at-will employment status: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The NLRB found this language to essentially constitute a waiver by the employee of his/her Section 7 rights to "advocate concertedly … to change his/her at-will status."

The NLRB applies a two-step inquiry to determine if a work rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restricted protected activities, it will nonetheless be found to violate the National Labor Relations Act upon a showing that: (1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Due to a significant uproar from employers, the NLRB issued two sets of advice memoranda on October 31, 2012 and February 4, 2013, back-pedaling on its position with regard to "at-will" employment statements. In these advice memoranda, the NLRB now takes the position that an "at-will" statement will not be considered to interfere with employees' Section 7 rights if the statement (1) does not explicitly restrict Section 7 rights, or (2) was promulgated in response to union or other protected activity, or (3) that the policy had been applied to

restrict protected activity.

While most employers' at-will statements will pass the NLRB's scrutiny relative to employees' Section 7 rights, this does not mean that all "at-will" statements, especially those that imply that there can never be any other employment relationship between the employee and employer, will be considered lawful under the National Labor Relations Act. To be prudent, employers should review their "at-will" employment statements in their employee handbooks to make sure that such statements do not foreclose to its employees the possibility of a potential modification of the at-will relationship.

NLRB ASSERTS THAT TELLING EMPLOYEES TO MAINTAIN CONFIDENTIALITY DURING INTERNAL INVESTIGATIONS VIOLATES SECTION 7 RIGHTS

The National Labor Relations Board (NLRB) has taken the position, in a recent Advice Memorandum dated January 29, 2013, that an employer's confidentiality rule may unlawfully interfere with employees' Section 7 rights. Section 7 of the National Labor Relations Act (29 USC § 157) guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Many employers incorrectly assume that if they do not have a unionized workforce, the NLRA does not apply to them. However, many of the protections afforded under the NLRA apply to both union and non-union employers alike.

Many employers have written policies providing that employees must maintain the confidentiality of internal investigations for such matters involving employee misconduct, employee theft or workplace harassment. During the investigation process, most employers warn employees involved with the investigation to keep matters discussed during the investigation strictly confidential and not to share such information with other employees. The obvious purpose of such admonition is to maintain the integrity of the investigation and to prevent employees from fabricating or colluding to get their respective stories straight.

The NLRB, however, takes a different view. The NLRB holds that an employer violates Section 8(a)(1) of the NLRA when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. According to the NLRB, employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees.

An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs

employees' Section 7 rights. The NLRB's position is that the employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must show that in any particular investigation that witness(es) needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or that there was a need to prevent a cover-up. Consequently, any blanket rule prohibiting employee discussions of ongoing investigations is invalid and will be held by the NLRB to violate employees' Section 7 rights.

Most, if not all, employers recognize the importance of employees maintaining the confidentiality of any pending internal investigation. Even the NLRB has not gone as far as to hold that employees have an unfettered right to communicate about internal investigations. Employers should review their employee handbook and other policies that address confidentiality of internal investigations and make sure such policies do not contain a blanket rule regarding confidentiality. In addition, where applicable, employers should add savings clauses to their policies providing that the employer's policy shall not be construed or interpreted to interfere with employees' Section 7 rights. Finally, to avoid NLRB interference, employers should address the issue of maintaining the confidentiality of any internal investigation on a case-by-case basis when it can be demonstrated that maintaining confidentiality is significant to preserving the integrity of the investigation. When such a need arises, employees should be instructed on an individual basis regarding the need to maintain confidentiality about the investigation.

ATTORNEY JIM DEJONG ELECTED CHAIR OF THE CARROLL UNIVERSITY BOARD OF TRUSTEES

James DeJong has been elected the next chair of the Carroll University Board of Trustees. He will serve as chairman for three years on the board, which oversees academic, financial, and operational decisions for the private Waukesha University.

James G. DeJong, a 1973 graduate of Carroll, is president of the Milwaukee law firm O'Neil, Cannon, Hollman, DeJong and Laing and has served as a member of the University's board since 2008.

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ATTORNEY JIM DEJONG FEATURED IN MARQUETTE LAWYER MAGAZINE

Attorney Jim DeJong was featured in an article appearing in the 2013 Summer Edition of the *Marquette Lawyer Magazine*. Read the article about Jim here.

WHAT CONSTITUTES "NET INVESTMENT INCOME" FOR PURPOSES OF THE 3.8% MEDICARE NET INVESTMENT INCOME SURTAX

Effective January 1, 2013, pursuant to the Patient Protection and Affordable Care Act, 26 U.S.C. § 1411 imposes a 3.8% Net Investment Income Tax on individuals, estates and trusts which have "Net Investment Income" and modified adjusted gross income above specified statutory threshold amounts. For individuals, the tax is imposed on the lesser of: (A) the Net Investment Income for the taxable year, or (B) the excess of modified adjusted gross income for the taxable year over the threshold amount ($250,000 for married individuals filing jointly; $125,000 for married individuals filing separately; $200,000 for single individuals). For estates and trusts which are subject to the tax, the tax is imposed on the lesser of: (A) the undistributed Net Investment Income for the taxable year, or (B) the adjusted gross income for the taxable year over the dollar amount at which the highest tax bracket for an estate or trust begins for the taxable year.

For purposes of the tax, "Net Investment Income" is defined as the sum of the following, less any applicable deductions:

- Gross income from interest, dividends, annuities, royalties and rents, which amounts were derived from a passive trade or business activity (as defined by 26 U.S.C. § 469), or from a trade or business involved in trading in financial instruments or commodities (as defined in 26 U.S.C. § 475(e)(2))
- Other gross income derived from a passive trade or business activity, or from a trade or business involved in trading in financial instruments or commodities
- Net gain, to the extent it is taken into account in computing taxable income, which is attributable to the disposition of property from a passive trade or business activity, or from a trade or business involved in trading in financial instruments or commodities

Applicable deductions may include expenses related to investment interest, advisory and brokerage fees, rental and royalty income, and state and local income taxes which are allocable to items included in Net Investment Income.

Net Investment Income specifically does not include such items as wages, unemployment compensation, operating income from non-passive business activities, social security benefits, alimony, tax exempt interest, self-employment income, Alaska Permanent Fund Dividends, and distributions from certain qualified retirement plans. However, these items may be subject to the .9% Additional Medicare Tax.

The following paragraphs highlight a few of the rules specific to particular types of income which may or may not be subject to the tax. The information provided herein is not intended to address all sources of income subject to the tax, or provide an exhaustive summary of the applicable rules.

S-Corporations. Generally, an interest in a pass-through entity such as an S Corporation is not property held in a trade or business, so that any gain or loss from the sale of such interest would be Net Investment Income. However, the IRS has limited the amount of gain or loss from the disposition from an interest in an S Corporation to the net gain or loss that would result if the S Corporation sold all of its assets at fair market value immediately before the disposition of the interest.

Working Capital. Any income, gain or loss attributable to capital set aside for the future needs of a trade or business is Net Investment Income.

Child's Interest. Any amount included on a parent's Form 1040 as a result of filing Form 8814 for Parent's Election to Report Child's Interest and Dividends is included in calculating Net Investment Income, but does not include any amount excluded on Form 1040 due to threshold requirements.

Pension and Deferred Compensation Distributions. While Net Investment Income does not include distributions from certain qualified employee benefit plans, such distributions are included in determining the threshold amounts if they are included in the taxpayer's gross income.

The rules regarding the Net Investment Income Tax are complex and continue to evolve as final regulations are determined. In making a determination of how you may be impacted by the tax, it is important to contact a professional who may advise you as to the application of specific rules to your particular situation.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.

STATE BAR OF WISCONSIN RECOGNIZES MILWAUKEE JUSTICE CENTER VOLUNTEERS ON 2012 HONOR ROLL

The Milwaukee Justice Center, organized by Milwaukee County, Milwaukee Bar Association, and Marquette University School of Law provides legal assistance to individuals who cannot afford legal representation. In 2012, the volunteers of the Center served nearly 9,000 hours of *pro bono* service to 10,659 unrepresented civil litigants.

Sixteen attorneys from the law firm of O'Neil, Cannon, Hollman, DeJong and Laing contributed to the success of the Milwaukee Justice Center to include:

- Doug Dehler
- Megan Eisch
- Miles Goodwin
- Megan Heinzelman
- Grant Killoran
- Justinian Koenings
- Claude Krawczyk
- Gregory Lyons
- Sarah Matt
- Joseph Newbold
- Laura Now
- Jason Scoby
- Steven Slawinski
- Steven Strye
- Timothy Van de Kamp
- Peter Walsh

ATTORNEY GRANT KILLORAN ELECTED TO THE BOARD OF DIRECTORS OF THE MILWAUKEE DEBATE LEAGUE

Grant Killoran has been elected to serve on the Board of Directors of the Milwaukee Debate League.

The Milwaukee Debate League works in partnership with Milwaukee-area high schools to support academic debate teams. Created in 2007, the Milwaukee Debate League provides unique youth development programming targeting high school students, blending competition and rigorous work in academic high school debate with fun. Through this spirited competition, students have the opportunity to become articulate and informed leaders in their schools and effective advocates for themselves, their families and their community. For more information on the Milwaukee Debate League, visit www.debatemilwaukee.org.

Grant Killoran is the Chair of the Litigation Practice Group at O'Neil, Cannon, Hollman, DeJong and Laing. He previously was involved with academic debate at both the high school and collegiate levels, both as a debater and debate coach. He continues to benefit in his legal practice from the skills gained during his involvement with academic debate and is honored to serve on the Board of the Milwaukee Debate League.

Grant Killoran has significant and diverse trial experience representing clients in Wisconsin State and Federal Courts, and courts around the country, focusing on complex business and health care disputes. Mr. Killoran devotes a portion of his practice to arts and entertainment law, with an emphasis on the music and film industries. He is a Fellow with the American Bar Foundation, has served as one of the State Bar of Wisconsin's five Delegates to the American Bar Association's House Delegates and is a Co-Editor of the ABA Section of Litigation's *Health Law Litigation Newsletter*.

USES OF MARITAL PROPERTY AGREEMENTS IN ESTATE PLANNING

Wisconsin is a marital property state, and the applicable laws are set forth in the Marital Property Act (the "Act"), codified in Chapter 766 of the Wisconsin Statutes. The Act determines the property rights of married spouses during life and at death. The Act applies to a married couple after their "determination date," which is the date on which the last of the following requirements is met: (i) marriage; (ii) both spouses are domiciled in Wisconsin; and (iii) 12:01 a.m. on January 1, 1986.

Under the provisions of the Act, marriages are generally considered equal partnerships, and after the determination date married spouses are treated as sharing equally in most assets acquired by either spouse during the marriage. Such assets, which include property acquired from the earnings of either spouse, are presumed to be marital property. In effect, each spouse is presumed to own an undivided one-half interest in each item of marital property acquired during the marriage, regardless of how the property is titled. On the other hand,

property acquired by a spouse prior to the determination date, and property acquired by a spouse during marriage by gift or inheritance from a third party, is presumptively classified as the individual property of the acquiring spouse. The non-acquiring spouse does not have ownership rights in the acquiring spouse's individual property during life or at death.

Importantly, the Act sets forth the "default" rules, but a married couple may enter into a marital property agreement to alter any of the provisions of the Act, including the classification of any or all assets as marital or individual property. There are many benefits to entering into such an agreement, especially because determining with exactitude the property classification of an item of property under the Act is at best an uncertain process. A marital property agreement provides certainty as to the classification of property, which is especially important when the couple has created a comprehensive and tax-conscious estate plan for the disposition of their assets at death.

In Wisconsin, it is common for a married couple to enter into a marital property agreement classifying all property of both spouses as marital property, including property which would otherwise be classified as the individual property of one spouse. These "opt-in" agreements are especially suitable for a first marriage where neither spouse has children from a prior relationship. Classifying all property as marital property simplifies estate administration because it is no longer necessary for the couple to keep marital and individual property separate, and because it will not be necessary to analyze which assets are marital property and which are individual property upon the death of a spouse. Additionally, there are ordinarily significant income tax advantages to opt-in marital property agreements. Classifying all of a married couple's assets as marital property as part of a comprehensive estate plan equalizes each spouse's estate, and will usually enable the couple to maximize the estate tax exemptions available for each spouse. Further, at the time of death, the basis of assets passing from a decedent for purposes of determining gain or loss for income tax purposes is "stepped-up" (or "down") to an amount equal to a fair market value of the assets as of the date of death. In the case of marital property, the basis of a surviving spouse's marital property interest is also stepped-up. "Opt-in" marital property agreements often also contain what is known as a "Washington Will" provision, which states that upon the death of either spouse, all or any of the property of one or both spouses passes to a designated person, trust or other entity by nontestamentary disposition, and without probate. As such, the provision is a simple mechanism whereby the spouses contract for the disposition of all or a portion of their community property at the time of each of their deaths, and simultaneously avoid probate as to that property.

Alternatively, a married couple may choose to enter into a marital property agreement reclassifying all property of both spouses as the individual property of each spouse, including property which would otherwise be classified as marital property. In these "opt-out" agreements, the wages earned by each spouse, and all property acquired with the earnings, will be classified as the individual property of the earning spouse. The non-earning spouse

will not have any ownership rights in such assets, either in life or at death. An "opt-out" marital property agreement may be advantageous in second marriage situations, where one or both spouses have children from a prior relationship, because the agreement will allow each spouse to bequeath his or her individual property to his or her own children at death.

Marital property agreements may also reclassify only certain assets. For example, a spouse may want to bequest a specific asset to a person other than his or her spouse at death. A marital property agreement could classify only the specific asset as the individual property of the spouse. As a result, the spouse would have full ownership rights in the asset during life, and the right to bequeath the entire asset to the third party at death. Without such an agreement, the spouse would only have the right to bequeath his or her one-half interest in the asset.

Marital property agreements are essential tools for creating a comprehensive estate plan tailored to the individual needs of the couple, and have a significant impact on the disposition of a couple's assets both during life and at death.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.

GIFTING CLAUSES IN DURABLE POWERS OF ATTORNEY

In a durable power of attorney, the principal appoints someone to oversee his financial affairs, including in the event he becomes incompetent as a result of injury or illness. A broad durable power of attorney may authorize the agent to take any action as fully and effectually in all respects as the principal could do if personally present. However, even the most broadly stated power of attorney does not authorize the agent to make gifts on behalf of the principal unless the power of attorney expressly grants the agent such power. The law requires that gifting powers be expressly stated in the durable power of attorney in order to reduce the risk that the agent will engage in financial abuse of the principal.

Gifts are an important estate planning tool, as making gifts during life often results in significant tax savings at the principal's death. Therefore, it is advantageous for an agent under a durable power of attorney to be authorized to make gifts for estate planning purposes. Generally, it is best if the scope of an agent's power to make gifts on behalf of the principal is limited, so as to reduce the potential for abuse.

If the durable power of attorney states in general language that the agent is authorized to make gifts, without express limitations, by law the agent is authorized to make a gift up to the amount of the annual federal gift tax exclusion, or twice that amount if the principal's spouse consents to a split gift, as defined by the tax code. Further, such general language authorizes the agent to make a gift of the principal's property if the agent determines doing so is consistent with the principal's objectives, if known, or if unknown, with the principal's best interest, based on all applicable factors, including: (i) the value and nature of the principal's property; (ii) the foreseeable obligations and need for maintenance of the principal; (iii) the minimization of all taxes; (iv) the principal's eligibility for any benefit, program or assistance; and (v) the principal's personal history of making such gifts.

A durable power of attorney may expressly provide that the agent is only authorized to make gifts to specified classes of persons, such as the principal's descendants. Such a provision may be advisable if the agent is someone other than the principal's spouse or family member, in order to reduce the risk that the agent will make gifts to himself or third parties he wishes to benefit, contrary to the principal's desires or best interest.

A durable power of attorney may also expressly require that the agent make gifts only in a manner which continues the principal's previously established pattern of gift-making for estate planning purposes. Such a provision helps ensure that the agent will make gifts which align with the principal's desires and objectives.

Further, a durable power of attorney may expressly provide that the aggregate of all gifts to any one recipient in any one year shall not exceed the amount of the annual federal gift tax exclusion. Such a provision provides the agent with the flexibility to maximize tax-free annual gifts for estate planning purposes, and reduces the risk that the agent will deplete the principal's estate.

It is also possible for the principal to expressly authorize the agent to make any gifts that the agent believes will benefit the principal or the principal's estate, including gifts to the agent himself. Such a provision grants the agent the broadest authority to make gifts on behalf of the principal, but it also provides the greatest potential for abuse. Therefore, it is crucial that a principal granting such broad authority trust the agent unconditionally.

In drafting a durable power of attorney as part of a comprehensive estate plan, it is important to consider what gifting powers should be granted in light of the principal's personal and financial situation. While gifting powers are useful for estate planning purposes, it is also important to limit gifts to those the principal might have made, and minimize the risk for financial abuse.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.