EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2018 FSA, TRANSPORTATION, AND EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service has released the cost-of-living adjustments to the dollar limits under various employer-sponsored benefit plans for 2018. Several key limits (indicated in bold, below) have been increased for 2018.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2018 limits and ensure that any new limits are incorporated into relevant participant communications, enrollment materials and summary plan descriptions, as applicable.

Health FSA Employee Contribution and Transportation Plan Limits

- For 2018, the maximum dollar limit on employee contribution to health flexible spending arrangements (FSAs) will increase to **$2,650** from the prior limit of $2,600. An Employer is not required to adopt the new Health Care FSA increase, but may do so as long as the Health FSA Plan document is expressly amended for this purpose.
- The maximum pre-tax value of a qualified transportation plan for employee parking or transit passes will increase by $5 to **$260** per employee, per month in 2018.

2018 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2018, the following dollar limitations apply for tax-qualified retirement plans:

- The elective deferral limit under Section 402(g) or the Internal Revenue Code (Code) will increase from $18,000 to $**18,500** for employees who participate in:
    - Code Section 401(k) plans;
    - Code Section 403(b) plans; and
    - Most Code Section 457 plans.
- The catch-up contribution limit for those age 50 and over under will remain unchanged at $6,000 for all plans other than SIMPLE 401(k) and SIMPLE IRAs. (For these SIMPLE plans, the catch-up contribution limit for those age 50 and over under will remain unchanged at $3,000).
- The limitation on the annual benefit for a defined benefit plan will increase from $215,000 to **$220,000**.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from $54,000 to **$55,000**.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from $270,000 to **$275,000**.
- The limitation used in the definition of a highly compensated employee (HCE) under

Code Section 414(q) will remain unchanged at $120,000.
- The limitation used in the definition of a key employee in a top-heavy plan under Code Section 416 will remain unchanged at $175,000.
- The dollar amount under Code Section 409(o) for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period will increase from $1,080,000 to **$1,105,000**.
- The dollar amount used to determine the lengthening of the five-year distribution period will increase from $215,000 to **$220,000**.

Prior Guidance on Additional 2018 Limits

Social Security Taxable Wage Base

As announced in mid-October (and adjusted in November), the Social Security Administration announced that the Social Security wage base for 2018 will increase slightly (from $127,000) to **$128,400**. This is the maximum wage base subject to the FICA tax and is also the maximum "integration level" for retirement plans using "permitted disparity." (The 2018 increase is about 1% higher than the 2017 wage base. In contrast, the 2017 wage base increase was more than 7% higher than the 2016 amount).

2018 Health Savings Account Limits

In May of this year, the IRS announced that combined annual contributions to a Health Savings Account (HSA) in 2018 must not exceed the maximum annual deductible HSA contribution, which will be **$3,450** for single coverage and **$6,900** for family coverage. These limits reflect a $50 and $150 increase over the 2017 maximums, respectively. The catch-up contribution for eligible individuals who will attain age 55 or older by year end remains at $1,000.

SEVENTH CIRCUIT UPHOLDS WISCONSIN RIGHT-TO-WORK

In March 2015, Wisconsin Governor Scott Walker signed Right-to-Work legislation into law, which allowed workers covered by union representation to not pay union dues if they do not wish to. Since its passage, the law has been under legal fire, including a failed bid for preliminary injunction to halt the law and a state circuit court ruling that found the law unconstitutional. However, in 2015, the federal district court sitting in the Eastern District of Wisconsin upheld the Right-to-Work law as constitutional, relying heavily on the Seventh Circuit's 2014 decision, *Sweeney v. Pence*, which upheld Indiana's right-to-work statute.

On Wednesday, the Seventh Circuit doubled down on its holding in *Sweeny* and upheld Wisconsin's Right-to-Work law as constitutional. The Court found that the plaintiff unions had failed to provide "any compelling reason" to overturn the *Sweeny* decision. The ruling stated that there have been no intervening developments in statutory, Supreme Court, or even intermediate appellate court law that would cause them to reevaluate their decision in *Sweeney* and that the strong dissent in *Sweeney* and a close vote to rehear the case en banc were not compelling reasons that would justify overturning a three-year old decision. The Court also rejected the unions' takings clause argument, whereby they claimed that members of the union who did not pay dues but benefitted from the unions' bargaining and political activities would be taking the unions' property without compensation. The Court found that, in the event that a taking occurred, state courts could "provide an adequate route for seeking just compensation." Although the union has stated that it is considering its next steps, it appears that Wisconsin's Right-to-Work law will continue to pass judicial scrutiny and be enforceable and constitutional.

EMPLOYMENT LAWSCENE ALERT: WHAT PRESIDENT TRUMP'S SUPREME COURT NOMINEE COULD MEAN FOR EMPLOYERS

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill the vacant seat on the U.S. Supreme Court left open by the death of Justice Antonin Scalia in early 2015. Many employers are wondering what impact a potential Justice Gorsuch would have on employment law decisions, and the news is generally positive. Judge Gorsuch, during his time on the Tenth Circuit, has issued decisions that have gone in favor of both employers and employees. However, he favors a straight forward application of facts to the law to reach conclusions and has been critical of administrative agencies overstepping their authority.

Judge Gorsuch, in line with holdings from the Seventh Circuit, has been critical of the *McDonnell Douglas* burden shifting framework that is frequently used in employment discrimination cases. Judge Gorsuch favors focusing on the real question – whether discrimination actually took place – instead of focusing on whether a *prima facie* case can be established. This straight-forward approach to the facts will likely be welcomed by employers who want to avoid getting bogged down in technicalities.

As we have covered multiple times, in recent years, administrative agencies such as the EEOC, OSHA, and particularly the NLRB have expanded the scope and reach of the

employment laws they oversee by broadly interpreting existing laws, often to the confusion and detriment of employers. This expansion could be significantly curbed by a U.S. Supreme Court conservative majority anchored by Judge Gorsuch. In particular, Judge Gorsuch has issued opinions limiting the judicial deference that should be given to administrative agencies and stating that lawmaking should be left to Congress. For example, in his dissent in *Trans Am Trucking Inc. v. Administrative Review Board, U.S. Department of Labor,* Judge Gorsuch penned a dissent that stated that nothing in the Surface Transportation Assistance Act stated that an employee could operate a vehicle in a way the employer forbid and that the DOL did not have the authority to expand the law to say so. He also opined in a case involving the NLRB that the agency did not provide a persuasive explanation to reverse its long-standing precedent that interim earnings should be deducted from back pay awards and, therefore, should not be allowed to change its policy.

Finally, Judge Gorsuch has issued opinions favorable to arbitration agreements, which is of particular interest to employers as the Supreme Court has agreed to hear cases regarding whether the NLRB is correct in its interpretation that arbitration agreements that bar workers from pursuing class actions are illegal restraints of employees' Section 7 rights. If confirmed, Judge Gorsuch may be able to weigh-in on this important issue as the U.S. Supreme Court, yesterday, indicated that it will not address this issue during the Court's current term, but will address it next term. Hopefully, by that time Judge Gorsuch will be confirmed by the U.S. Senate. As a result, then Justice Gorsuch could be the deciding vote on this important issue.

Although Judge Gorsuch's confirmation process is likely to be long and contentious, a Justice Gorsuch anchored U.S. Supreme Court can be something that employers can look forward to in providing common sense to employment laws.

FEDERAL COURT HOLDS WISCONSIN'S RIGHT-TO-WORK 30-DAY REVOCATION PROVISION UNCONSTITUTIONAL

Wisconsin's Right-to-Work law provides employees the ability to choose as to whether they want to become or remain members of a labor union. Intertwined with that decision is an employee's right to decide not to pay union dues. In order for an employee to effectively exercise his or her right not to be a member of a union without coercion or duress is the ability to also timely revoke their dues check-off authorizations so they are not committed to pay union dues when they no longer want to be a member of the union.

Wisconsin's Right-to-Work law was designed to address this issue by prohibiting any dues checkoff authorizations unless such authorizations are revocable upon 30 days' written notice by an employee. This means, under Wisconsin's Right-to-Work law, that an employee can terminate a dues checkoff authorization upon 30 days' written notice and, moreover, a labor union cannot bind an employee to a period of more than 30 days in which to exercise that right. However, this provision under Wisconsin law runs contrary to the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)) which permits an employee's authorization for dues check-off to be effective for a period of up to one year or up until the termination date of the applicable collective bargaining agreement, whichever occurs sooner.

Recently, a federal district court in Wisconsin addressed this conflict between the two laws and found that the 30-day revocation provision for dues checkoff authorizations under Wisconsin's Right-to-Work law to be preempted by the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)), and, as a result, unconstitutional under the Supremacy Clause of the U.S. Constitution. The federal district court premised its holding on a finding that a state law *limiting* the irrevocability of dues checkoff agreements to 30 days directly conflicts with the federal law *permitting* unions to bargain for longer periods of irrevocability. The federal district court further held that the fact that this provision was made part of Wisconsin's Right-to-Work law does not exempt it from federal preemption within the § 14(b) exception to federal preemption.

The federal district court's decision means that a dues check-off authorization that is not revocable for more than one year is lawful and enforceable under 29 U.S.C. § 186(c)(4) despite Wisconsin's Right-to-Work law to the contrary limiting the irrevocability of such authorizations.

The significance of this decision is that labor unions can and will bind employees to continue to pay union dues for up to a year before they can exercise their right to revoke their dues check-off authorization (and usually within a tight revocation window) even though the employee may have decided they no longer want to remain a member of the union. As a result, this federal court decision will have a chilling effect upon employees' right to decide as to whether they want to remain a member of a labor union when they will be compelled by the same union they want to disassociate themselves from into continuing to pay union dues – exactly what labor wanted to accomplish in commencing the lawsuit challenging this provision of Wisconsin's Right-to-Work law.

EXECUTIVE ORDER AFFIRMS COMMITMENT TO

REPEAL THE ACA; MAKES NO IMMEDIATE CHANGES FOR EMPLOYERS

Within hours of being sworn in on Friday, January 20, 2017, President Trump signed an executive order (the Order), that affirmed the administration's policy of seeking "the prompt repeal" of the Affordable Care Act (ACA). The Order, however, neither specifically mentions employers nor has any immediate impact on employers' obligations under the ACA.

It is important to note that the one-page Order does not repeal any specific provision of the ACA, much of which is governed by existing law and regulations that cannot be eliminated with the stroke of even the Presidential pen.

Instead, the Order directs the Secretary of the Department of Health and Human Services the heads of other federal agencies "with authorities and responsibilities under" the ACA to "exercise all authority and discretion available to them", "to the maximum extent permitted by law," to:

- "waive, defer, grant exemptions from, or delay the implementation of any provision or requirement" of the ACA that "would impose a fiscal burden on any State or a cost, fee, tax , penalty, or regulation burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchaser of health insurance, or makers of medical devices, products, or medications"; and to

- "provide greater flexibility to States and cooperate with them in implementing healthcare programs."

Each "department or agency with responsibilities relating to healthcare or health insurance" is directed, "to the maximum extent permitted by law," to:

- "encourage the development of a free and open market in interstate commerce for the offering o healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers."

While some pundits have quipped that the Order is a license for employers to cease complying with the ACA or to cease offering health insurance, no such authority is contained in the Order. What the Order may permit is greater discretion in granting "hardship exemptions" from the individual mandate. Federal officials in the new administration might also be more receptive to state requests for waivers under Medicaid.

We advise employers to continue to observe the ACA status quo, which includes continuing to focus on complying with ACA Employer Reporting obligations (using IRS Form 1095-C) for the

2016 calendar year.

This is because, as the Order specifically states, any revision of existing regulations can only be changed under the rules of the Administrative Procedures Act, which requires the public issuance of proposed rules, followed by a period of public input. Despite the new administration's Order (and the House of Representative's January 13 vote to begin repealing the ACA), there is no specific change currently available for employers in 2017.

Instead, employers should continue to heed ACA requirements. Only agency rulemaking or congressional action could relieve employers of ACA reporting and other obligations, but either type of action would likely take significant time.

We will continue to monitor developments regarding the possible repeal of the ACA and how any subsequent actions may affect employers' obligations.

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE – WHAT WISCONSIN EMPLOYERS NEED TO KNOW

Tuesday, November 8, 2016 is Election Day. While there is no federal law that requires employers to grant employees leave to vote, Wisconsin law does require voting leave. Wis. Stat. § 6.67. What Wisconsin employers need to know:

- All Wisconsin employers are required to give employees who are eligible to vote up to three consecutive hours of leave to vote while the polls are open. Wisconsin's polls are open from 7:00 AM – 8:00 PM.
- Employers cannot deny this leave on the basis that employees would have adequate time outside of their working hours to vote while the polls are open.
- The law does not require that these hours are paid. However, employers should be cautious about reducing an exempt employee's pay.
- The employee must request the time off to vote prior to the election.
- The employer can specify which three consecutive hours an employee is permitted to utilize as voting leave.
- Employees cannot be penalized for utilizing voting leave.

Two other provisions that Wisconsin employers should be aware of are 1) they may not refuse to let employees serve as election officials under Wis. Stat. § 7.30 or make any threats or inducements to prevent employees from doing so; and 2) they cannot distribute printed materials to employees that contain a threat that if a particular party or candidate is elected

that the business will shut down, in whole or in part, or that the salaries or wages of employees will be reduced. Wis. Stat. § 12.07(2)-(3).

EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS FINDS NONSOLICITATION OF EMPLOYEES PROVISION UNENFORCEABLE UNDER RESTRICTIVE COVENANT STATUTE

In *Manitowoc Co. v. Lanning*, 2015AP1530 (Aug. 17, 2016), the Wisconsin Court of Appeals ruled—for the first time—that Wisconsin Statute § 103.465, which governs the enforceability of restrictive covenants in employment relationships, applies to employee non-solicitation provisions.

In 2008, John Lanning, an employee at The Manitowoc Co., entered into an agreement that prohibited him, for a period of two years after his employment ended, from either directly or indirectly soliciting, inducing, or encouraging "any employee to terminate their employment with Manitowoc" or to "accept employment with any competitor, supplier or customer of Manitowoc." The Manitowoc Co. claimed that, after leaving the company in 2010 to work for a direct competitor, Lanning communicated with at least nine employees in connection with possible employment opportunities at his new employer. The Manitowoc Co. claimed this was a violation of the employee non-solicitation provision and filed suit against Lanning. The Circuit Court granted summary judgment in The Manitowoc Co.'s favor, awarding damages and attorneys' fees. Subsequently, Lanning appealed to the Wisconsin Court of Appeals, which ultimately reversed the lower court's ruling.

On appeal, The Manitowoc Co. argued that § 103.465 should not apply to employee non-solicitation provisions but, rather, only to covenants not to compete The Court quickly dismissed that argument, stating that any covenant between an employer and employee that "seeks to restrain competition" or operates as a "trade restraint" clearly falls within the confines of § 103.465. The Court noted that the employee non-solicitation provision limited how Lanning could compete with The Manitowoc Co. and "did not allow for the ordinary sort of competition attendant to a free market, which includes recruiting employees from competitors." Therefore, the Court determined that the employee non-solicitation provision had to comply with § 103.465.

With the applicability of § 103.465 to employee non-solicitations decided, the Court then embarked to determine whether the provision The Manitowoc Co. sought to enforce was

reasonably necessary to protect the Company's legitimate business interests from unfair competition from a former employee. The Manitowoc Co. argued that it had a legitimate interest in preventing Lanning from "systematically poaching" its employees, and it believed the provision was narrowly tailored to protect it from such a threat.

The Court disagreed, however, determining that the actual terms of the agreement, as written, were far too broad and, therefore, unenforceable. As drafted, the non-solicitation provision prevented Lanning from soliciting *any* employee, whether entry level or a key employee, to leave The Manitowoc Co. for *any* reason, whether to retire to spend more time with family or work for a competitor. Because the Court found that the provision restricted "an incredible breadth of competitive and noncompetitive activity," it concluded that the employee non-solicitation provision, as drafted, did not protect a legitimate business interest and, as such, the provision could not pass the strict scrutiny that § 103.465 required and, accordingly, found the covenant unenforceable.

In light of this decision, employers should review their current agreements that contain employee non-solicitation agreements. Although employers have the right to require employees to enter into agreements with employee non-solicitation provisions, the provisions must be crafted narrowly and carefully—just like covenants not to compete—to meet the strict scrutiny analysis required by § 103.465. To be enforceable, employee non-solicitation provisions must focus on protectable interests, such as restricting former employees from soliciting current employees with whom the former employee had a direct business relationship with from ending their employment in order to engage in direct competitive activity adverse to the employer. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF "SUBSTANTIAL FAULT" IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what "substantial fault" means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for "substantial fault by the employee connected with the employee's work." The statute defines "substantial fault" as

"those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment." Wis. Stat. 108.04(5g)(a).

In *Operton v. Labor and Indus. Review Comm'n et al.*, 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC's arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes "substantial fault." The Court of Appeals found that there had been no evidence presented that the cash handling errors were "infractions" that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee's cash handling errors fell into the second category of what is not substantial fault because they were "inadvertent," and it did not matter that warnings had been given because that is not a part of the "inadvertent error" analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance-related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.

EMPLOYMENT LAWSCENE ALERT: DANE

COUNTY JUDGE FINDS RIGHT-TO-WORK LAW UNCONSTITUTIONAL

On March 9, 2015, Governor Scott Walker signed Act 1 (Wisconsin's Right-to-Work legislation) into law, which allows workers covered by a collective bargaining agreement to not pay union dues if they choose not to do so (our previous blog on the law can be found here). Opponents of the law immediately went to work trying to defeat the new law. In late March, the Dane County Circuit Court denied the Wisconsin State AFL-CIO and two labor unions' bid for a preliminary injunction that would have halted implementation of the law. However, this past Friday, the same Court ruled that Wisconsin's Right-to-Work law is unconstitutional (full opinion here).

The unions argued that Act 1 effects an unconstitutional taking of their property without just compensation in violation of Article I, § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representative service which unions continue to be obligated to provide" by law. Article I, § 13 of the Wisconsin Constitution provides "[t]he property of no person shall be taken for public use without just compensation therefor." The unions successfully argued that their service of providing collective bargaining representation to all employees constitutes "property" subject to a protectable interest under Wisconsin's Constitution. The unions then successfully convinced the circuit court that Act 1 effectuates a taking of their property by requiring the unions to provide services to non-paying nonmembers, because the exclusivity principle of Section 9 of the National Labor Relations Act requires that a union elected by a majority of workers in a bargaining unit must represent all employees, whether or not such employees support the union. The circuit court then opined that Act 1 creates a "free-rider" problem whereby non-union members could refuse to pay for services that the unions are required, by law, to provide to them under the duty of fair representation.

Right-to-Work laws have been enacted in twenty-four other states, and none have been struck down. The Seventh Circuit, which Wisconsin is a part of, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), rejected similar arguments brought by unions challenging Indiana's recently enacted right-to-work law. The circuit court, however, was not persuaded by the decisions in other jurisdictions and expressly held that it was not obligated to reconcile its decision with the Seventh Circuit's decision in *Sweeney*. In justifying its decision, the circuit court found that one important difference between the Indiana and Wisconsin laws is what qualifies as "just compensation." Applying Indiana law, the Seventh Circuit ruled that the ability to exclusively bargain on behalf of employees was a special privilege that qualified as "just compensation;" whereas, under Wisconsin law, the circuit court rejected such a theory and found that Wisconsin has a long history of equating "just compensation" with the payment of money.

Wisconsin's Attorney General and the Department of Justice have already stated that the State will appeal the ruling, which is likely to be overturned on appeal. In the meantime, the Department of Justice is likely to file a motion to stay the ruling until a higher court can decide the issue. We will keep you posted as matters develop.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ENACTS LAW ON FRANCHISOR JOINT EMPLOYER LIABILITY

Although federal administrative agencies such as the National Labor Relations Board, the Occupational Safety and Health Administration, and the Department of Labor have recently pushed to expand the definition of "joint employer" under their respective laws, employers in Wisconsin can take some solace in recent legislation. Under Wisconsin Senate Bill 422, which became effective March 2, 2016, there is now a presumption that a franchisor is not an employer of a franchisee's employees for the purposes of Wisconsin unemployment insurance, Wisconsin workers' compensation, Wisconsin wage and hours laws, and Wisconsin fair employment laws. A franchisor can only be subject to liability for its franchisee's employees under those laws if 1) it agrees in writing to assume liability or 2) it exercises a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised for the purpose of protecting the franchisor's trademarks and brand.

The law is meant to prevent franchisors who use a traditional franchisor-franchisee model from being held legally responsible for matters over which they did not exert control. Wisconsin franchisors should make sure that they are not taking any control over day-to-day operations of their franchisees, as that could expose them to liability under Wisconsin laws. Additionally, this does not impact how such franchisors would be treated under federal law, as mentioned above.