Brody Wilkinson PC
Attorneys and Counselors at Law

WINTER 2014

Southport Harbor

Dear Clients & Friends,

We have prepared this annual update to inform you about developments in the law that may be important to your business and your family, and to share firm developments – big and small.

Inside this issue, we cover recent legislation regarding DOMA, private placement of securities, employee personnel files and youth coaching liability and summarize what these changes represent. We also provide information on the advantages that flexible trusts presently offer. Finally, we share a significant number of firm initiatives and accomplishments that have transpired over the past year.

We hope this information is of interest and benefit to you.

Best Regards,

Brody Wilkinson PC

Brody Wilkinson Announces A New Principal

WE ARE PLEASED TO ANNOUNCE that Heather J. Lange was named a principal of the firm. Ms. Lange joined Brody Wilkinson in 2009 as counsel and is a member of the firm's Trusts & Estates and Dispute Resolution Groups. She practices in the areas of estate planning, trust and estate administration, estate settlement, and probate, trust and fiduciary litigation. Ms. Lange represents high net worth individuals and family groups with the preparation of sophisticated wills, revocable trusts, private foundations and charitable trusts and when necessary, litigates probate proceedings. In addition, she has developed a niche practice in equine law where she bridges her legal capabilities and equestrian interests.

Ms. Lange is admitted to practice in Connecticut, Massachusetts and Pennsylvania. She is a member of the American, Connecticut and Fairfield County Bar Associations. Ms. Lange serves on the Executive Committee of the Probate Section of the Connecticut Bar Association. She received her B.A. from the University of Michigan in 1988, J.D. from Rutgers University School of Law in 1997, and LL.M. in Taxation from New York University School of Law in 1999.

Ms. Lange serves on the Board of Directors of the Bridgeport YMCA, where she chairs the Strong Kids Campaign. She also volunteers at Pegasus Therapeutic Riding, a non-profit organization that provides equine-assisted activities and therapies to children and adults with physical, cognitive and emotional disabilities.

Amended Personnel File Law Imposes Additional Burdens On Employers

CONNECTICUT LAW has long required employers to allow a current or former employee to inspect his or her employee personnel file "within a reasonable time after receipt of a written request." This law, however, was amended as of October 1, 2013, imposing considerable burdens upon employers throughout the state. Public Act 13-176, An Act Concerning Employee Access to Personnel Files specifies how quickly an employer must provide a current or former employee access to his or her personnel file, provides additional requirements for employers in connection with a disciplinary action or termination, and sets forth the penalties for violations of the Act.

The new requirements imposed by the Act on employers are summarized as follows:

CURRENT EMPLOYEES

An employer must allow a current employee to inspect his or her personnel file within seven (7) business days of a written request. Upon request, an employee is also entitled to copy his or her file.

FORMER EMPLOYEES

An employer must permit a former employee to inspect his or her personnel file within ten (10) business days of a written request, provided such request is made within one (1) year after the termination of employment. An inspection by a former employee must take place "at a location mutually agreed upon by the employer and former employee." If a location cannot be agreed upon, the employer may satisfy its obligations by mailing a copy of the personnel file to the employee within ten (10) days of receipt of the written request.

WRITTEN DISCIPLINARY ACTIONS

An employer must provide a copy of any documentation of any disciplinary action imposed on that employee within one (1) business day after the action is taken. However, this requirement appears to relate only to written disciplinary actions and does not mandate that employers document all disciplinary actions.

TERMINATION

An employer must immediately provide an employee with a copy of any documented notice of the termination of the employee's employment. Similar to disciplinary actions, an employer is not required to document a termination, but if it chooses to do so, the employer must provide such documentation to the former employee.

RIGHT TO SUBMIT REBUTTAL

An employer must provide an employee with notice, "in clear and conspicuous language," that if the employee disagrees with any of the information contained in a documented disciplinary action or notice of termination, he or she may submit a written statement explaining his or her position. The statement thereafter becomes part of the personnel file and must be retained by the employer. In addition, the statement must be included in any disclosure of the personnel file to third parties, such as the Department of Labor (DOL) or Commission on Human Rights and Opportunities (CHRO).

PENALTIES

An employer may be penalized up to $500 for the first violation of the Act and up to $1,000 for each subsequent violation. The commissioner of the DOL has the discretion to consider all factors which the commissioner deems relevant in levying a penalty.

WHAT SHOULD EMPLOYERS DO?

Employers must become familiar with these new requirements and should review all company policies and employee handbooks to ensure compliance with the new provisions of the Act. *For more information, please contact Daniel B. Fitzgerald (dfitzgerald@brodywilk.com).*

Drafting Flexible Trusts To Take Advantage Of Step-Up In Basis

WITH THE FEDERAL ESTATE TAX EXEMPTION currently at $5.25 million per person and with portability made permanent (discussed in previous newsletters available on our website), most couples can pass their unused federal estate tax exemption to the surviving spouse, and on both spouses' deaths leave their entire estates to their families, free of federal estate tax, without the need for any planning with credit shelter trusts or equalizing of

assets between spouses. In addition, when each spouse dies, the basis of most assets (assets like IRAs are an exception) are "stepped-up" to date of death value so that capital gains until date of death are eliminated (the basis of assets may be stepped-down as well). This step-up in basis can be a significant savings since federal long-term capital gain rates are 20% for those in the highest income tax bracket plus a 3.8% net investment income tax for certain high income taxpayers, and Connecticut income tax of up to 6.7%.

There are many reasons why a married couple may wish to have a trust for the surviving spouse despite the availability of portability and the large federal estate tax exemption, such as taking advantage of the Connecticut $2 million estate tax exemption, sheltering post-death appreciation from future estate taxes, having the flexibility to benefit children and grandchildren in addition to the surviving spouse, and protecting assets from future creditors and future spouses. For married couples with combined assets of over $4 million, setting up a $2 million credit shelter trust for the surviving spouse rather than leaving those assets outright may save up to $240,000 of Connecticut estate tax on the surviving spouse's death.

A potential downside of setting up the credit shelter trust is that assets in the trust do not receive a second step-up in basis on the surviving spouse's death. This disadvantage can be mitigated by broad trustee powers which we have added to our trust documents. The trustee has the power to distribute low basis assets to the spouse prior to his or her death. The trustee may also grant the spouse the power to decide how the trust assets will pass at his or her death (a "general power of appointment"). Granting a general power of appointment allows the trust assets to be included in the spouse's estate without the necessity of distributing the assets to the spouse.

Whether it is advisable for the trustee to distribute assets or grant the spouse a general power of appointment will be different for each couple depending on the size of their estates, the income tax basis of the trust assets, the likelihood that an asset will be sold, and the likelihood that the surviving spouse will benefit the same people as the first spouse to die. The trustee will need to consider the potential that the distribution will increase estate taxes payable at the surviving spouse's death, versus the potential capital gains tax on a future sale of the asset if it is retained in the trust. *For more information, please contact Lisa F. Metz (lmetz@brodywilk.com).*

Can Youth Coaches Be Liable For Berating Their Players?

YOUTH SPORTS COACHES SHOULD TAKE NOTE of a recent Connecticut Superior Court case in which the court considered whether a coach's motivation tactics, which included berating his players, amounted to an actionable tort.

In *Civitella v. Pop Warner Football,* the father of a Pop Warner football player sued the league and the head coach of his son's team, alleging slander and intentional infliction of emotional distress, after the coach called his son various names and insulted him in front of his teammates. The defendant coach claimed that he was attempting to motivate the young player.

The defendants filed a Motion to Strike, challenging the legal sufficiency of the claims in the Complaint, which successfully eliminated the plaintiff's slander claim. However, the Court *(Radcliffe, J.),* allowed the plaintiff's claims of intentional infliction of emotional distress to be considered on their merits. In her ruling, Judge Radcliffe deemed the coach's behavior to be unacceptable:

> Although generations of high school and college football players can probably recall coaches who employed insensitive, insulting and what would now be politically incorrect language in an effort to motivate and inspire players, that approach is now as obsolete as the single wing offense.
>
> Where once coaches may have enjoyed free rein, and used that latitude to employ equal opportunity insults, in this era of political correctness, speech codes on college campuses, and heightened sensitivity, comments which would have produced a shrug of the shoulders decades ago, may now be considered "outrageous" and unacceptable, without regard to motive or intent.

Following Judge Radcliffe's ruling, the defendants filed a Motion for Summary Judgment, under which the defendant must demonstrate that there is no genuine issue of material fact to be decided by the court. The Motion was heard by Judge Matasavage, who found that the plaintiff failed to demonstrate that his son had suffered any emotional distress as he had not sought

medical treatment for anger or depression and his friends, grades, activities and hobbies did not change. Judge Matasavage also addressed the coach's behavior:

> Everyone, at one time or another, will experience the less pleasant side of a teacher, coach, official, supervisor, boss, colleague, or even a friend. Those cases of embarrassment, humiliation, hurt feelings and other less debilitating, more transient forms of suffering... are not sufficient to impose liability.

In a good-natured footnote, Judge Matasavage also took issue with Judge Radcliffe's assertion that the defendant coach's approach was as "obsolete as the single wing offense," noting that the popular wildcat offense is a direct offshoot from the single wing.

The defendant ultimately prevailed in this case because the plaintiff was unable to prove damages. However, the takeaway for youth coaches is that the courts may view certain coaching tactics, such as berating players, as obsolete, especially when young players are involved. *For more information, please contact Daniel B. Fitzgerald (dfitzgerald@brodywilk.com).*

Recent Supreme Court Decision Overturns DOMA: What It Means For Same-Sex Couples

ON JUNE 26, 2013, THE U.S. SUPREME COURT granted federal recognition and rights to legally married same-sex couples. The Court in *Windsor v. United States* overturned the Defense of Marriage Act (DOMA) declaring as unconstitutional its definition of marriage as only between a man and woman.

The *Windsor* case centered on Edith Windsor's claim for refund of the more than $300,000 paid in federal estate tax at her wife's death. She sought to take advantage of the federal marital deduction. The Supreme Court, in a 5-4 decision, held that DOMA was unconstitutional and served no legitimate purpose in treating same sex couples differently than heterosexual couples.

Fourteen states, including Connecticut and New York, currently allow same sex couples to marry. Same sex spouses in Connecticut must now consider the implications of federal law.

- Couples are already required to file a joint state income tax return. Now they must file their federal returns as "married filing jointly" or "married filing separately." For prior years, couples should consider whether tax would have been saved had the couple been previously able to file their federal returns as "married filing jointly." Federal income tax returns can be amended for up to three years following the date the returns were originally filed.
- Similarly, federal estate tax returns filed upon the death of a same sex spouse should be reviewed to determine if an amendment is appropriate. IRS guidance suggests such amended returns would be allowed in the three-year period after the original return was filed.
- Employer provided insurance will no longer be considered taxable income to the employee spouse.
- A same sex spouse may now elect to "roll over" retirement benefit assets. The spouse will also need to waive claim to any retirement benefit assets intended to be left to another beneficiary.
- Spouses will now be able to claim Social Security and Medicare benefits. A spouse's assets will now also be considered for purposes of Medicaid eligibility.

Windsor does not require all states to recognize same sex marriage, so it remains important for same sex couples to have powers of attorney, health care instructions or powers, and HIPAA authorizations granting spouses the ability to make medical and financial decisions for each other. A state that does not recognize same sex marriage may not recognize a Connecticut or New York marriage. As a result, it may not grant a same sex spouse access to a hospital bedside or the opportunity to make medical decisions. Proper documentation would eliminate this problem. *For more information, please contact Heather J. Lange (hlange@brodywilk.com).*

JOBS Act Makes It Easier For Companies To Raise Money From Accredited Investors

ON SEPTEMBER 23, 2013, THE AMENDMENTS TO RULE 506 of Regulation D under the JOBS Act (Jumpstart Our Business Startups Act) became effective following the adoption of implementing rules by the Securities and Exchange Commission (SEC). These amendments lift the longstanding ban on general solicitations and advertisements to accredited investors. As a result, companies can now pitch their private investment opportunities to accredited investors through newspaper, television and website advertisements, and other previously prohibited means, if they comply with certain requirements. This change will significantly increase the number of potential investors for small businesses and start-up companies.

BACKGROUND OF RULE 506

In general, when a company raises money by offering investments in its securities, including its equity or debt, it must register the offering under federal law and any applicable state securities laws unless exemptions from registration are available. Non-public companies normally seek to avoid registration under securities laws because the costs of compliance are prohibitive. They will most commonly rely on Rule 506 of Regulation D under the Securities Act of 1933, also known as the "private placement exemption," as the exemption from federal registration. Under Rule 506, companies will typically issue their securities only to persons and entities that qualify as "accredited investors." An accredited investor is one who is assumed, by virtue of the investor's financial position, sophistication and/or relationship with the company, to be capable of obtaining the information necessary to evaluate the benefits and risks of the potential investment.

Rule 506 is an attractive exemption to companies issuing securities ("issuers") because it does not mandate disclosures of detailed financial and other information when the offerings are limited to accredited investors. Thus, it greatly reduces the costs of compliance. Rule 506 also has the advantage of preempting substantive regulation of the offering by state governments. Prior to the JOBS Act amendments, the main drawback of Rule 506 was that it banned issuers from generally soliciting or advertising their offerings to accredited investors. Unless issuers hired an intermediary (such as a registered broker-dealer) to find investors, Rule 506 effectively limited their pool of accredited investors to their preexisting contacts and /or those who were active in their local area.

AMENDMENTS TO RULE 506

Rule 506 has now been amended to add a new provision – Rule 506(c) – which allows issuers to engage in general solicitations and advertisements to accredited investors, provided that the following conditions are met: (1) the issuers take reasonable steps to verify that the purchasers of their securities ("purchasers") are accredited investors; (2) the purchasers are, in fact, accredited investors; and (3) the terms and conditions of the other applicable rules have been satisfied.

The most challenging requirement for issuers is to ensure they are taking reasonable steps to verify their purchasers accredited investor status. Issuers can choose from a list of four specific methods established by the SEC in order to satisfy the verification requirement. Alternatively, issuers can use a general principles-based approach to fulfill the same requirement.

PRESERVATION OF THE OLD RULE 506

Certain companies may decide that it is not worth the additional time and expense to comply with the verification requirement of Rule 506(c). It is important to note that these companies can still utilize the exemption under the old Rule 506 (which is now codified as Rule 506(b)) when raising money. Under Rule 506(b), they can still offer securities to accredited investors without any mandatory disclosure requirements as long as they refrain from general solicitations and advertisements.

POTENTIAL BENEFIT OF THE AMENDMENTS

Rule 506(c) may encourage more companies and investors to become involved in private offerings. Some companies have been deterred from private investment offerings in the past because they did not want to hire registered intermediaries to locate accredited investors. In addition, the SEC estimates that over 8 million households qualify as accredited investors, but only a few hundred thousand of them have invested in private offerings. General solicitations and advertisements could open up the investment market to a wider range of companies and accredited investors.

POTENTIAL CAUSES FOR CONCERN

The SEC has already proposed additional rules that may limit the benefits of Rule 506(c) and/or increase the costs of compliance. For example, these

proposed rules would require issuers to submit their general solicitation materials to the SEC and would increase the Form D exemption notice requirements. In addition, the SEC adopted "bad actor rules," prohibiting convicted felons and other bad actors from participating in Rule 506 offerings under either the old rule or the new rule, concurrently with its rules regarding the JOBS Act amendments. To ensure that your company is complying with the requirements of Rule 506, you should consult with an attorney prior to offering any investment to prospective investors. *For more information, please contact Mark W. Klein (mklein@brodywilk.com).*

Accolades & Credits

Thomas J. Walsh, Jr. was appointed to serve as chairman of the American Bar Association's Middle Market and Small Business Committee. He currently serves as vice chairman and will begin his term as chairman in September 2014. The Committee serves corporate and transactional lawyers who counsel small and mid-sized enterprises controlled by families, entrepreneurs, private equity groups or venture capital firms, and smaller publicly held companies.

Peter T. Mott, Ronald B. Noren and **James E. Rice** were selected by their peers for inclusion in the 2014 edition of *The Best Lawyers in America.* Mr. Mott and Mr. Noren were recognized in the area of Trusts and Estates and Mr. Rice was recognized in the area of Energy Law. Published since 1983, *Best Lawyers* is the oldest and preeminent peer-review publication that serves as an important reference guide to the legal profession in the United States. Through an exhaustive and confidential peer-review process comprising more than 2.8 million evaluations by top attorneys in the country, *Best Lawyers* compiles lists of attorneys in 78 different practice areas across all 50 states. For more information, visit *www.bestlawyers.com/aboutus/selectionprocess.aspx.*

Barbara S. Miller was again recognized as a leading environmental lawyer in Connecticut by *Chambers USA* in its 2013 edition. Ms. Miller has held this distinction since 2010. Chambers is an international publisher of legal profession guides and is widely respected throughout the world for its comprehensive research and review process. For more information, visit *http://www.chambersandpartners.com/Rankings-Explained.*

William J. Britt, Douglas R. Brown, Stephen J. Curley, Barbara S. Miller, Peter T. Mott and **Ronald B. Noren** were named to the 2013 "Connecticut Super Lawyers" list. In addition, **Daniel B. Fitzgerald** was selected as a "Connecticut Rising Star." All seven attorneys will be featured in a special supplement of the February 2014 issue of *Connecticut Magazine.* Based on a rigorous, multiphase peer-review process, Super Lawyers is a credible, comprehensive and diverse listing of attorneys in more than 70 practice areas. Super Lawyers is published by *Law & Politics* as a special supplement in top newspapers and regional magazines across the country. The published list represents no more than 5% of the lawyers in the state. For more information, visit *www.superlawyers.com.*

Brody Wilkinson was recognized as a 2014 "Top Ranked Law Firm" by *Fortune Magazine* and a 2013 "Top Ranked Law Firm in the New York Area" by *New York Magazine.* Both achievements are based on the firm's high percentage of AV® Preeminent™ rated lawyers by Martindale-Hubbell®. These esteemed distinctions are given to firms with at least 33% or more lawyers who are AV® Preeminent™ rated through a survey of their peers. In fact, Brody Wilkinson is one of only 147 firms in the New York area that attained the 2013 ranking with 75% of the firm's partners AV® Preeminent™ rated. To compile a list of top law firms in the United States, LexisNexis® Martindale-Hubbell® researched their comprehensive database of 1 million lawyers and firms in over 160 countries. The AV® Preeminent™ rating indicates that the lawyer is deemed by his or her peers to demonstrate the highest level of ethical standards and legal ability. For more information about these ratings, visit *www.martindale.com/ratings.*

William J. Britt, Douglas R. Brown, Seth L. Cooper, Stephen J. Curley, Barbara S. Miller, Peter T. Mott, Ronald B. Noren, James E. Rice, S. Giles Payne, Thomas J. Walsh, Jr. and **Robert L. Teicher** were recognized as "Top Lawyers of 2013 in Fairfield County" by publisher Moffly Media. All 11 attorneys were featured in a special section of the November/December 2013 issues of Moffly Media publications, including *Fairfield Living, Greenwich, New Canaan/Darien and Westport Magazines.* Attorneys are selected on the basis of their LexisNexis® Martindale-Hubbell® AV® Preeminent™ peer review ratings. For more information, visit *www.mofflymedia.com or www.martindale.com/Products_and_Services/Peer_Review_Ratings.aspx.*

Peter T. Mott was editor of *A Practical Guide to Probate in Connecticut* published by MCLE, Inc. in 2013. Jennifer A. Basciano was associate editor and Heather J. Lange was a featured author. Mr. Mott was also a co-author with Lisa F. Metz of a chapter on "Lifetime Asset Transfers" in *A Practical Guide to Estate Planning in Connecticut,* also published by MCLE in 2013.

Douglas R. Brown was a featured presenter at a joint program for the Connecticut Probate Judge Assembly and Connecticut Bar Association on "The New Probate Court Rules of Procedure: What Attorneys Need To Know." The presentation concerned the adoption of new probate court rules of procedure that went into effect in July 2013. Mr. Brown was a member of the Probate Practice Book Advisory Committee that drafted the new rules.

Robert L. Teicher was appointed vice chair of the Tax Section of the Connecticut Bar Association.

Brian T. Silvestro addressed the Greater Board of Fairfield Realtors on the subject of "Attorney/Agent Participation." Mr. Silvestro spoke about the difficulties today in dealing with open building permits and repeated mortgage contingency extensions.

Alyssa V. Sherriff was admitted to practice in Florida. She practices in the areas of estate planning, trust administration and elder law. Along with our strategic affiliation with the law firm of Jeck, Harris, Raynor & Jones, PA in Juno Beach, Florida, Ms. Sherriff's admission to the Florida Bar will enable the firm to offer continuous service to the many clients who have changed their tax residence to Florida.

Mark W. Klein co-authored a comment letter on crowdfunding submitted by the American Bar Association's Federal Regulation of Securities Committee to the Securities and Exchange Commission (SEC). The letter, prepared in response to the SEC's request for public comments on the crowdfunding rules it is implementing through the JOBS Act, made 15 recommendations.

Brody Wilkinson Launches New Website!

AMONG THE MANY MARKETING INITIATIVES the firm undertook over the past year, the most visible is the new website we launched in August. Our new site is fast to load, easy to navigate, fully optimized and built on a platform that allows us to communicate and share information with clients rapidly and frequently. In addition to this development, we also recently launched a mobile website to give our clients better access to the firm when using a phone or other smart device. Please visit us at *www.brodywilk.com.*

Pro Bono Spotlight

BRODY WILKINSON IS NOW ACTING AS GENERAL COUNSEL on a *pro bono* basis to the Fairfield County Community Foundation (FCCF) based in Norwalk. As the region's center of philanthropy, FCCF provides philanthropic advisory services and financial stewardship to donors and partners; visionary leadership and strategic initiatives to address key regional issues; and grants, counsel and leadership training to local nonprofits. Peter T. Mott and Ronald B. Noren are long-time members of FCCF's Board of Directors.

Brody Wilkinson Underwrites A Trio Of Local Musical Performances

BRODY WILKINSON LENDED SUPPORT to the Fairfield Theatre Company in 2013 by underwriting three special performances spread throughout the year at both The Klein Auditorium in Bridgeport and StageOne in Fairfield. The first performance featured musical artists Buddy Guy and Jonny Lang, followed by Joan Osborne, and, finally, David Sanborn.

"Brody Wilkinson has been a phenomenal supporter of the Fairfield Theatre Company. They not only enjoy and appreciate our programming, they also understand the value we bring to the community both as an arts organization and an economic engine. They are a model corporate partner," said Joseph Rog, Director of Corporate and Community Partnerships at Fairfield Theatre Company.

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Alyssa V. Sherriff
Brian T. Silvestro
Robert L. Teicher
Thomas J. Walsh, Jr.

Brody Wilkinson Opens Office in NYC

CLIENTS WHO RESIDE AND/OR WORK IN THE BIG APPLE can now meet with their Brody Wilkinson attorney at the firm's new office at 420 Lexington Avenue in the Graybar Building at Grand Central Terminal. The decision to establish this office was in response to the growing number of clients we are serving in New York City, primarily in the Trusts and Estates area, and the growing number of attorneys we now have admitted to practice in New York. "We are enthusiastic about our growth and the opportunities that we believe a physical presence in New York City will present for the firm," said principal Peter T. Mott. Principal Robert L. Teicher will now be dividing his time between the Connecticut and New York City offices. Mr. Teicher practices in the areas of estate planning, estate and trust administration, taxation and business law.

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Southport Harbor photo by Diana DeLucia