CAN PAYMENTS TO INDEPENDENT CONTRACTORS BE INCLUDED IN CALCULATING PAYROLL COSTS UNDER THE PAYCHECK PROTECTION PROGRAM? UNCERTAINTY EXISTS.

On March 31, 2020, the Small Business Administration (SBA) posted guidance on the Paycheck Protection Program (PPP). This guidance follows the passage of the CARES Act, and the guidance includes the PPP loan application, which can be found here on the U.S. Department of the Treasury website, along with information sheets for borrowers and lenders.

Based on the application and the information sheets, uncertainty exists as to whether borrowers can include payments to independent contractors when calculating payroll costs (as defined in the CARES Act) on their PPP applications. Although the text of the CARES Act appears to contemplate including payments to independent contractors in payroll costs, the additional guidance suggests that payments to independent contractors from a borrower ***will not*** be included in calculating payroll costs. However, the SBA has not yet provided definitive guidance on this issue. Accordingly, borrowers should consult their advisors, including their bank, when calculating payroll costs and should specify in their PPP loan application how their payroll costs were calculated.

The attorneys at O'Neil, Cannon, Hollman, DeJong and Laing are closely monitoring all guidance released from the SBA. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

APPLICATIONS FOR PAYCHECK PROTECTION PROGRAM LOANS NOW AVAILABLE

Applications for loans under the Paycheck Protection Program (PPP) are now available. The application can be found here. The completed application and the required documentation should be submitted to an approved lender as soon as possible and prior to June 30, 2020.

The Small Business Administration also provided additional information regarding PPP loans:

1. Any loan will be fully forgiven if the funds are used for payroll costs, interest on

mortgages, rent, and utilities; however, the SBA indicated that due to the high demand for these loans, it is anticipated that at least 75% of the forgiven amount must have been used for payroll costs.
2. All payments are deferred for a period of six months; however, interest will continue to accrue over this period.
3. Any portion of the loan not forgiven will have a maturity date of two years and an interest rate of 0.5% (The CARES Act provided for a maturity of not more than 10 years and an interest rate of not more than 4%).
4. No collateral or personal guarantees are required.
5. Neither the government nor lenders will charge small businesses any prepayment penalties or fees.

When can you apply?

- Starting April 3, 2020, small businesses and sole proprietorships can apply for PPP loans through SBA lenders.
- Starting April 10, 2020, independent contractors and self-employed individuals can apply for PPP loans through SBA lenders.
- Other regulated lenders will be available to make the PPP loans as soon as they are approved and enrolled in the program.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

SMALL BUSINESS ADMINISTRATION LOAN RELIEF OPPORTUNITIES IN RESPONSE TO THE CORONAVIRUS PANDEMIC

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the coronavirus pandemic.

The CARES Act directs $349 billion towards job retention and business operating expenses by allowing small businesses to obtain forgivable loans of up to $10 million to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses (referred to as the Paycheck Protection Program).

Click here for an article authored by attorney Jason Scoby of OCHDL which summarizes the key provisions relating to the Paycheck Protection Program, including requirements as to eligibility, use, and forgiveness of loans obtained thereunder.

You will soon be able to apply for a Paycheck Protection Program Loan at any lending institution that is approved to participate in the program through the existing SBA 7(a) lending program as well as additional lenders approved by the Department of Treasury. Businesses are eligible to apply for loans under this program through June 30, 2020.

As an alternative to or prior to obtaining a loan under the Paycheck Protection Program, the SBA offers small businesses an opportunity to apply for other economic relief in light of the coronavirus pandemic:

Economic Injury Disaster Loans and Loan Advance

The SBA's Economic Injury Disaster Loan program provides small businesses the ability to obtain working capital loans of up to $2 million, which can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

Small business owners may immediately apply for an Economic Injury Disaster Loan advance of up to $10,000. Funds will be made available within three days of a successful application and will not have to be repaid.

If you receive an Economic Injury Disaster Loan related to coronavirus prior to the date which the Paycheck Protection Program becomes available, you may be able to refinance the Economic Injury Disaster Loan into the Paycheck Protection Program Loan for loan forgiveness purposes. However, you may not take out an Economic Injury Disaster Loan and a Paycheck Protection Program Loan for the same purposes. Remaining portions of the Economic Injury Disaster Loan, for purposes other than those laid out in loan forgiveness terms for a Paycheck Protection Program Loan, would remain a loan.

To apply for a COVID-19 Economic Injury Disaster Loan, click here.

SBA Debt Relief

The SBA Debt Relief program provides a reprieve to small businesses as they overcome the challenges created by the coronavirus crisis.

Under this program:

- The SBA will pay the principal, interest and fees of **new 7(a) loans** issued prior to September 27, 2020 for a period of six months.
- The SBA will pay the principal, interest and fees of **current 7(a) loans** for a period of six months.

SBA Express Bridge Loans

The SBA's Express Bridge Loan Pilot Program allows small businesses who currently have a business relationship with an SBA Express Lender to access up to $25,000 with less paperwork. These loans can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing as a result of the coronavirus and can be a term loan or used to bridge the gap while applying for an Economic Injury Disaster Loan. If a small business has an urgent need for cash while waiting for a decision and disbursement on an Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan. Find an Express Bridge Loan Lender by connecting with your local SBA District Office.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to SBA loan relief, please speak to your regular OCHDL contact, or the author of this article, attorney John Schreiber.

SBA ELIMINATES SIX MONTHS OF LOAN PAYMENTS FOR CERTAIN EXISTING SBA LOANS

The Small Business Administration (SBA) will pay (and relieve the borrower of any obligation to pay) the principal, interest, and any associated fees that are owed on certain existing SBA 7(a) loans for a six-month period starting on the next payment due date. Loans currently in deferment would be entitled to an additional six months of payment by the SBA beginning with the next payment. Loans made within six months after the enactment of the legislation would also qualify for six months of deferral payments by the SBA. This opportunity does not apply for new "Paycheck Protection Program" loans made under the CARES Act, which was previously discussed here. Borrowers with existing SBA 7(a) loans should contact their current SBA lender to learn more about this opportunity.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the CARES Act, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

PRACTICAL CONSIDERATIONS IN LIGHT OF EVICTION AND FORECLOSURE STAY

On Friday afternoon, Governor Tony Evers and Secretary-designee Andrea Palm issued Emergency Order #15, a Temporary Ban on Evictions and Foreclosures. The Order generally prevents the commencement and continuation of eviction and foreclosure proceedings statewide for a period of 60 days commencing March 27, 2020. The Order raises some practical considerations for landlords and tenants alike.[1]

The Order contains several provisions that alter the traditional landlord-tenant relationship. Principally, landlords are prohibited from initiating measures to remove tenants from the leased premises. Landlords may not issue notices terminating tenancy, commence civil actions for eviction, or deliver writs of restitution to the sheriff. A narrow exception to this general bar applies. The bar does not prevent landlords from taking legal action based on non-monetary defaults if the basis for the termination of tenancy is that a failure to do so "will result in an eminent threat of serious physical harm to another person." In that event, any notice served, action commenced, or writ delivered by a landlord must be accompanied by an affidavit from an individual with personal knowledge detailing the reasonable belief of eminent threat of serious physical harm that would result if action is not taken.

Importantly, the Order does not work to authorize a period of holdover for a tenant, nor does the Order relieve a tenant from any of its obligations under a lease, including a tenant's responsibility to pay rent.

While the Order works to prevent a near-term spike in eviction proceedings resulting from the economic effects of COVID-19, landlords' eviction-based remedies will be restored eventually. This underscores the importance, for both landlords and tenants, of finding practical solutions to potential rental problems.

One of the first things that landlords and tenants should consider is whether there is business interruption insurance available to cover rental payments. Business interruption coverage can be triggered by unforeseen events that cause business losses. Each policy is unique and should be carefully examined by a qualified professional to determine whether a claim can be made.

If business interruption coverage is not available, landlords and tenants will need to make alternative payment arrangements until each tenant's business stabilizes. The parties may wish to amend their leases so that payment for less than the current rental rate does not constitute an event of default. Repayment of the rental arrearage should also be specified so that parties have a clear understanding of the new terms of the lease. Because most leases contain a clause that requires any modifications of the lease to be in writing, parties to a

lease should be careful to properly document all of their modifications in a lease amendment that satisfies the Statute of Frauds, Section 706.02, Wis. Stats.

Whether you are a landlord or a tenant experiencing lease issues as a result of the economic effects of COVID-19, our experienced legal team at O'Neil Cannon can answer your lease questions and protect your interests.

[1] This article focuses on leasehold interests, but the Order also has practical implications for mortgagees and mortgagors. Mortgagees are prevented from commencing foreclosure actions and scheduling sheriff's sales, and sheriffs are prevented from conducting sheriff's sales and acting on writs of assistance. The only exception to this general bar is for abandoned property pursuant to Section 846.102, Wis. Stats. Mortgagees and mortgagors should consider how their remedies and statutory timelines may be affected by the Order.

CARES ACT PROVIDES FORGIVABLE LOANS TO SMALL BUSINESSES

The CARES Act allows small businesses to receive forgivable loans of up to $10,000,000 to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses. This article summarizes the key provisions relating to the forgivable loan program, including the eligibility, use, and forgiveness requirements.

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic.

Eligible Borrowers

The CARES Act loan program covers any business, nonprofit organization, veterans' organization, or Tribal business that employs 500 or fewer employees. Some employers with more than 500 employees may also be eligible if they meet certain criteria.

Loans under this program do not require collateral or personal guarantees.

Loan Maximum and Permissible Uses

The CARES Act provides for:

- A maximum loan amount of $10,000,000.
- The loan amount is the *lesser of*:
- 2.5 times the average total monthly payroll costs incurred over the past year (excluding any compensation over $100,000 for each employee who makes more than that amount on an annualized basis), or for seasonal employers, the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019;

plus the outstanding amount of any loan made under the Small Business Administration's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

- For businesses that were not in existence during the period from February 15, 2019 to June 30, 2019:

2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020 (excluding any compensation over $100,000 for each employee who makes more than that amount on an annualized basis);

plus the outstanding amount of any loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

    - $10,000,000.
    - Small businesses may, in addition to uses already allowed under the SBA's Business Loan Program, use the loans for:
    - Payroll costs;
        - **Including**: Compensation to employees, such as salary, wages, and commissions; paid leave, such as vacation, parental, family, medical, or sick leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; state and local payroll taxes; and compensation to sole proprietors or independent contractors (including commission-based compensation) up to $100,000 in one year, prorated for the period between February 15, 2020 and June 30, 2020;[1]
        - **Excluding**: Individual employee compensation above $100,000 per year, prorated for the covered period; certain federal taxes; compensation to employees whose principal place of residence is outside of the U.S.; and sick and family leave wages for which credit is allowed under the Families First Act;
    - Rent and lease agreement payments;

    - Utilities; and
    - Interest on any debt obligations incurred before February 15, 2020.

Loan Forgiveness

Loans made under the program may qualify for the CARES Act's broad loan forgiveness provisions. Indebtedness is forgiven (and excluded from gross income) in an amount (not to exceed the principal amount of the loan) equal to the following costs incurred and payments made during the eight-week period beginning on the date of the loan:

- Payroll costs, which include health insurance and retirement benefit payments;
- Interest payments on loans secured by a mortgage on real or personal property;
- Rent; and
- Utility payments.

The amount forgiven will be reduced based on (i) any employee terminations or (ii) reductions in salary or wages of any employee in excess of 25% during the eight-week period beginning on the date of the loan. Borrowers should be aware that detailed accounting and accurate recordkeeping will be critical during this period in order to take advantage of these loan forgiveness provisions.

If a loan is not forgiven, the loan's maturity date will extend up to 10 years from the date that the borrower applies to have the loan forgiven, and the maximum annual interest rate will be 4% per year. There will be no prepayment penalties.

Borrower's Application for a Loan

The loans will be available until June 30, 2020. An eligible borrower under the program applying for a loan must make a good-faith certification that:

- The loan is needed to continue operations during the coronavirus pandemic;
- The funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments;
- The applicant does not have any other application pending under this program for the same purpose; and
- From February 15, 2020 until December 31, 2020, the applicant has not received and will not receive duplicative amounts under this program.

The SBA is expected to provide further details on the application process in the next few days.

Permission from Borrower's Current Lender

A borrower will likely need permission from any existing lender to obtain this loan because many loan agreements restrict a borrower's ability to incur additional indebtedness.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the CARES Act, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

[1]Due to recent guidance from the SBA, uncertainty exists as to whether borrowers can include payments to independent contractors when calculating payroll costs on their Paycheck Protection Program applications.

INSURANCE COVERAGE FOR BUSINESS SHUTDOWNS RELATED TO COVID-19

Some business insurance policies may provide coverage for a "business interruption" resulting from recent government orders requiring the suspension of business operations. On March 24, 2020, Governor Tony Evers and the Wisconsin Department of Health Services issued Emergency Order #12, Safer At Home Order, a copy of which can be found here. The Order is effective March 25, 2020. As a result of this Order, many local businesses are being forced to suspend operations. Most property insurance policies contain "business interruption" coverage triggered by covered losses that cause property damage. For example, if a business is forced to shut down due to a fire, there is often coverage not only for the cost of repairing the fire damage, but also for lost business income. In some cases, these business insurance policies may also provide limited coverage for business shutdowns resulting from communicable diseases like coronavirus (COVID-19). The insurance policy language providing this coverage varies significantly between insurance policies. Our firm's experienced insurance coverage attorneys are available to review business insurance policies to determine whether there may be coverage for business shutdowns resulting from the recent government orders. To arrange for a review of your insurance policies, please contact Attorney Doug Dehler or Attorney Patrick McBride at O'Neil Cannon

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BE MINDFUL OF DEADLINES DURING COVID-19 OUTBREAK

Some court hearings and deadlines have been pushed back in response to the COVID-19 outbreak—but court functions have not stopped, and even in these challenging times, businesses and individuals should be mindful of deadlines.

One of the most important deadlines for an individual or business who has been wrongfully harmed is the deadline to file a lawsuit or initiate an arbitration proceeding. If this deadline is missed, it could result in dismissal of the claims.

In Wisconsin, jury trials have been rescheduled and deadlines to file appellate briefs have been extended. Many state circuit courts and federal district courts have also issued orders regarding deadlines in those specific courts. However, Wisconsin courts have not extended all deadlines, and neither the courts nor the legislature has addressed the filing deadlines found in contracts and statutes of limitations.

Whether in a few weeks or a few months, the public health emergency will end. In the meantime, it is important to be proactive about deadlines to avoid the risk of having a potential claim barred.

Please contact Christa Wittenberg or any other member of the Litigation Practice Group with any questions. O'Neil Cannon remains dedicated to serving its clients, even through these turbulent times.

CITY OF MILWAUKEE'S STAY AT HOME ORDER EXEMPTS CONSTRUCTION

On Tuesday, March 24, 2020, the City of Milwaukee's Health Department issued a written Stay at Home Order, which goes into effect on Wednesday, March 25, 2020. In general, the Order requires City of Milwaukee residents to stay at home, and requires all businesses located within the City to "cease all activities at facilities located within the City except Minimum Basic Operations," as defined in the Order. The Order includes a list of exceptions for "Essential Businesses and Operations," which does not prevent employees from working at facilities that are deemed to qualify.

Under paragraph 13h of the City's Stay at Home Order, construction and construction-related

activities are defined as “Essential Businesses and Operations,” which have been exempted from the mandate of the Stay at Home Order. The Order lists “Building and Construction Tradesman and Tradeswomen” along with “plumbers, electricians . . . operating engineers, HVAC, [and] painting” as “Critical Trades” that are exempt from the Order. “Construction” is also listed in the definition of “Essential Infrastructure,” exempt from the Order under paragraph 10.

Suppliers of materials and equipment for construction activities are also exempt from the Stay at Home Order. Under paragraph 13u, “manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as . . . Construction” are listed among exempt “Essential Businesses and Operations.” Although the Order does not specifically mention architects, engineers or other design professionals, such professionals are arguably also exempt from the Stay at Home Order, as “other service providers who provide services that are necessary to . . . Essential Businesses and Operations” under paragraph 13h—the provision which exempts “critical trades,” including construction.

At least for the time being, the construction industry in Milwaukee will remain open for business.

The full Order can be found here.

If you have questions contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

WISCONSIN’S MASS GATHERING BAN DOES NOT APPLY TO CONSTRUCTION SITES

On Friday, March 20, 2020, the Evers administration issued Emergency Order #8 Updated Mass Gathering Ban. This Order updated and clarified Emergency Order #5, which had been issued three days earlier. Emergency Order #5 imposed “a statewide moratorium on mass gatherings of 10 people or more to mitigate the spread of Covid-19.” Under Emergency Order #5, there were numerous exemptions to the “moratorium on mass gatherings,” but it was unclear whether or not the mass gathering ban applied to construction work, particularly if being performed outdoors. Emergency Order #5 did not specifically address construction sites. Among other things, Emergency Order #8 clarifies and elaborates on the various exemptions to the statewide ban on mass gatherings. Emergency Order #8 adds a specific exemption for “construction sites and projects, including public works and remodeling

projects.” It clarifies that the mass gathering ban does not apply to on site construction work. The construction exemption would appear to apply not only to work done outdoors or in open air conditions, but also to construction work performed indoors. Emergency Order #8 therefore makes clear that the statewide mass gathering ban does not require construction work to be shut down.

If you have questions contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.