HEALTH CARE LAW ADVISOR ALERT: SELLING YOUR MEDICAL PRACTICE? MAKE SURE YOU HAVE TAIL COVERAGE.

When selling a medical practice, the physician-owner must consider multiple issues. From understanding the significance of the letter of intent, to complying with medical record transfer laws, to negotiating the purchase agreement, it can feel overwhelming.

One item to not overlook is the importance of obtaining medical malpractice insurance tail coverage.

To understand what tail coverage is, it is first necessary to understand the difference between a claims-made malpractice insurance policy and an occurrence-based malpractice insurance policy. To have coverage under a claims-made policy, the claim for coverage must be made while the insurance policy is in effect. Occurrence-based insurance, on the other hand, focuses on when the incident giving rise to the claim for coverage occurred. If a covered incident occurs while the occurrence-based insurance policy is in effect, coverage may be available even if the alleged bodily injury is not discovered until years later. So, tail coverage is necessary for claims-made insurance policies, but not for occurrence-based insurance policies. Tail coverage applies to claims-made insurance policies because the "tail" extends the insurance coverage beyond the termination date of the claims-made policy. This is critical because, by obtaining tail coverage, the insured physician will continue to have malpractice coverage for incidents that happened prior to the termination date of the policy, even if the claim occurs after the termination date.

With this termination date often being the date on which the physician sells his or her medical practice, this tail coverage provides valuable peace of mind and liability protection for the selling physician. Accordingly, selling physicians with a claims-made medical malpractice insurance policy should consult their advisors, including their insurance agent, to ensure that tail coverage is in place in connection with the sale of their practice.

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OCHDL CREATES NEW HEALTH CARE LAW BLOG

Welcome to the first edition of the O'Neil, Cannon, Hollman, DeJong and Laing Health Care Law Advisor. We have created this blog as an informational and educational resource for our clients and contacts. The health care industry changes often and quickly, and we seek to help keep you apprised of important legal developments in the health care field.

Over the past few months, we have spent significant time advising clients on issues relating to the COVID-19 pandemic. We include in this inaugural blog post links to some of our recent writings regarding COVID-19 issues, including links of two cover stories in *The Wisconsin Lawyer* magazine. *The Wisconsin Lawyer* is the monthly publication of the State Bar of Wisconsin and addresses issues of interest throughout the state and country.

Christa Wittenberg and Grant Killoran authored the cover article in the April, 2020 edition of *The Wisconsin Lawyer* entitled "Due Process in the Time of the Coronavirus." Their article analyzes legal concepts governing the measures utilized by public health officials to combat an outbreak of contagious disease, focusing on COVID-19. Their article can be found here.

Grant Killoran, Joe Newbold and Erica Reib authored the cover article in the June, 2020 edition of *The Wisconsin Lawyer* magazine entitled "The New Wave of Litigation: An Early Report on COVID-19 Claims." Their article analyzes the types of claims being made related to the COVID-19 pandemic. Their article can be found here.

We also include a link to a recent article on our firm's Employment LawScene blog related to the COVID-19 pandemic entitled IRS Says Reduced-Cost or Free COVID-19 Testing or Treatment Won't Prevent Individuals from Making or Receiving HSA Contributions.

Lastly, in conjunction with last week's start of the Major League Baseball season, we include a link to an article recently posted in our newsroom by Attorney Pete Faust entitled COVID-19 Raises Privacy Issues for Major-League Baseball. The article discusses not only the current state of privacy policy in the baseball world, but also reviews the obligations of other businesses under the ADA, FMLA, CARES Act, GINA, and HIPAA.

We hope you enjoy this blog. If you have any questions about any of the articles or issues discussed in it, please feel free to contact the authors.

NEW ACT PROVIDES MORE FLEXIBILITY TO PPP BORROWERS

Today President Trump signed the Paycheck Protection Program Flexibility Act of 2020 (the "Act") to amend certain provisions of the CARES Act related to the forgiveness of loans under the Paycheck Protection Program ("PPP") and for a number of other purposes.

Here are some of the key takeaways:

- **Deadline to Use the Loan Proceeds**: Borrowers can now use their PPP loan over a period of 24 weeks, tripling the current covered period of eight weeks.[1]
- **Forgivable Uses of the Loan Proceeds**: Borrowers must use at least 60% of their PPP loan on payroll costs, amending the previous rule that required borrowers to use 75% of their PPP loan for payroll costs. The remaining 40% may be used for allowable non-payroll expenses.
- **Extension of Time for Rehiring Workers**: The period to rehire employees has been extended from June 30, 2020 to December 31, 2020.
- **New Exemptions from Rehiring Workers**: Two exemptions were added to the PPP's loan forgiveness reduction penalties.

    1. The forgiveness amount will not be reduced due to a reduced full time employee count if the borrower can document that it attempted, but was unable, to rehire individuals who had been employees on February 15, 2020.
    2. The forgiveness will not be reduced due to a reduced full time employee count if the borrower, in good faith, can document an inability to return to the "same level of business activity" as prior to February 15, 2020 due to sanitation, social distancing, and worker or customer safety requirements.

- **Payroll Tax Deferral**: The payroll tax deferral is now available to a borrower that has its loan forgiven. Previously, the deferral was available only to borrowers that did not have their loan forgiven.
- **Loan Deferral Period**: The loan deferral period has been changed to (i) whenever the amount of loan forgiveness is remitted to the lender, or (ii) 10 months after the applicable forgiveness covered period if a borrower does not apply for forgiveness during that 10 month period. Previously, a borrower's deferral period was to be between six and 12 months.
- **Loan Maturity Date**: The maturity date for the payment of the unforgiven portion of the PPP loan has been extended from two years to five years.[2]

Borrowers are now able to spend their PPP loan proceeds in a more flexible manner than previously permitted. As with the initial rollout of the PPP, it will be up to the Department of the Treasury and the Small Business Administration to provide regulations with respect to the Act.

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 authors of this article, attorneys Jason Scoby and Pete Faust.

[1] If the borrower would like, it can still elect to have the eight week period apply.

[2] This provision of the Act only affects borrowers whose PPP loan is disbursed after its enactment. With respect to an already existing PPP loan, the Act states specifically that nothing in the Act will "prohibit lenders and borrowers from mutually agreeing to modify the maturity terms of a covered loan."

SBA PUBLISHES PPP LOAN FORGIVENESS APPLICATION

On Friday, the SBA published its Paycheck Protection Program Loan Forgiveness Application, which includes instructions for completing the application. The application can be found here. Of note, the application contains further information with respect to the timing of paying and incurring payroll costs as that relates to calculating the amount eligible for forgiveness. Additionally, the application provides certain borrowers (those with biweekly or more frequent payroll periods) flexibility in terms of when the eight-week "covered period" begins.

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SBA ISSUES FURTHER GUIDANCE ON PPP LOAN REPAYMENT SAFE HARBOR; ALL LOANS UNDER $2 MILLION DEEMED TO HAVE BEEN RECEIVED

IN GOOD FAITH

This morning, the SBA issued much anticipated additional guidance with respect to the Paycheck Protection Program's repayment safe harbor. The new guidance provides significant clarity with respect to how the SBA will evaluate whether a borrower made the following certification in good faith when submitting its loan application:

"Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

With the new guidance, the SBA makes clear that all borrowers receiving a loan of less than $2 million will be deemed to have made the certification in good faith. Loans to borrowers and their affiliates will be combined for purposes of calculating this $2 million threshold.

Moreover, borrowers (including their affiliates) receiving more than $2 million will still have the opportunity to demonstrate that they made the certification in good faith, and if the SBA determines that they are not able to do so, the SBA will then permit those borrowers to repay the loan without any further penalties.

The SBA's FAQ #46 states in full:

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than $2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on

their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

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SBA EXTENDS SAFE HARBOR FOR REPAYING PPP LOANS TO MAY 14, PROMISES MORE GUIDANCE ON CERTIFICATION ISSUE

The Small Business Administration has given borrowers another week to decide whether to repay loans under the Paycheck Protection Program without the risk of penalties.

On Tuesday night, the SBA extended the safe harbor for repaying PPP loans from May 7 to May 14. In addition, the SBA indicated that it would provide before May 14 more guidance for the certification question that has caused much consternation for some PPP borrowers.

Applicants for PPP loans certified that, given current economic uncertainty, the loan was necessary to support the ongoing operations of the applicant. The CARES Act waived for PPP loans the requirement that borrowers be unable to obtain credit elsewhere; however, subsequent guidance from the SBA in its series of Frequently Asked Questions left some borrowers confused about the certification. In FAQ #31 and #37, the SBA indicated that the PPP certification must be made in good faith after taking into account the applicant's business activity and access to other sources of capital, causing complaints from some borrowers that the SBA may be retroactively changing the rules for PPP loans.

The SBA's FAQ #43, which was issued Tuesday night, is below:

43. Question: FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA guidance and regulations provide that any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?

Answer: SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

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$310 BILLION ADDED TO PAYCHECK PROTECTION PROGRAM AND $10 BILLION ADDED TO EMERGENCY EIDL GRANT

An additional amount of $310 billion has been added to the Paycheck Protection Program bringing the total amount allocated for potentially forgivable PPP Loans to $659 billion, and an additional amount of $10 billion has been added to the emergency EIDL grant fund bringing the total amount allocated for such EID Loans to $20 billion. On April 24, 2020, President Trump signed the Paycheck Protection Program and Health Care Enhancement Act to, among other things, increase amounts authorized and appropriated for commitments for the Paycheck Protection Program.

This is good news for eligible businesses that missed out on the first round of PPP funding, which ran out of money in approximately two weeks. It is widely anticipated that this second round of funding will go quickly as well, so eligible businesses seeking to obtain a PPP loan should promptly prepare and submit their loan applications if they did not do so during the first round.

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NEW GUIDANCE FROM THE SBA: $100,000 CAP DOES NOT APPLY TO BENEFITS, AND PAYROLL COSTS SHOULD BE CALCULATED ON A GROSS BASIS

On April 6, the SBA updated its Paycheck Protection Program Loans Frequently Asked Questions, which provides much needed guidance to borrowers and lenders.

Many important questions were answered, including these two listed in italics:

***Question**: The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of $100,000. Does that exclusion apply to all employee benefits of monetary value?*

***Answer**: No. The exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including:*

- *employer contributions to defined-benefit or defined-contribution retirement plans;*
- *payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and*
- *payment of state and local taxes assessed on compensation of employees.*

The $100,000 cap on payroll costs for each employee used in calculating the amount of a PPP loan under the CARES Act was widely interpreted to include cash compensation and other employee benefits. The SBA, however, clarified that only cash compensation was subject to the $100,000 cap. Other non-cash employee benefits, such as health insurance premiums and 401(k) contributions, can be included in payroll costs without regard to the $100,000 cap. This allows borrowers to be eligible for larger loan amounts.

***Question**: How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?*

***Answer**: Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax.*

For example, an employee who earned $4,000 per month in gross wages, from which $500 in federal taxes was withheld, would count as $4,000 in payroll costs. The employee would receive $3,500, and $500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the $4,000 in wages are excluded from payroll costs under the statute.

The FAQs state that borrowers and lenders may rely on the guidance provided by the SBA's interpretation of the CARES Act and PPP Interim Final Rule, which was discussed previously here. Further, the SBA makes clear that the U.S. government will not challenge actions taken by PPP lenders that conform to the guidance in the FAQs.

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SBA ISSUES FURTHER GUIDANCE ON PAYCHECK PROTECTION PROGRAM

On the night of April 2, 2020, the SBA issued additional guidance with respect to the Paycheck Protection Program. The guidelines, referred to as the Interim Final Rule, can be found here. While the Rule reiterates many of the things we previously reported on, here are some of the key new takeaways:

- Borrowers SHOULD NOT include payments to independent contractors for purposes of calculating the borrower's payroll costs. The initial legislation was ambiguous on this issue.
- Loans will be provided on a first-come, first-served basis.
- The interest rate will be 1%. Prior guidelines stated that the interest rate would be 0.5%.
- In addition to principal, interest can be forgiven. It was previously believed that only the principal balance of the loan could be forgiven.
- The SBA confirmed that 75% of the loan must be used for payroll costs for the entire

loan to be forgivable. This means that 25% of the loan can be used for other eligible purposes.
- The SBA confirmed that this is the application that borrowers should complete. This is not the same application form that we previously wrote about. Borrowers should include with their application documentation to support their calculation of the payroll costs.

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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.