WISCONSIN'S NIL LAWSUIT AGAINST MIAMI COULD SHAKE UP COLLEGE RECRUITING

In a move that could reshape the college sports landscape, the University of Wisconsin and its name, image, and likeness collective, VC Connect, LLC, sued the University of Miami on Friday, alleging that Miami tampered with former Badgers football player Xavier Lucas and interfered with NIL contracts signed by Lucas.

This is believed to be the first lawsuit by an NCAA university seeking to enforce rights under an NIL contract with one of its athletes, and the outcome could have significant implications for transfers of athletes to other schools.

Wisconsin and VC Connect are seeking unspecified damages for tortious interference with contract and have also asked the court to declare that Miami tampered with Wisconsin's relationship with Lucas. Lucas is not a defendant in the lawsuit, which does not seek to prohibit Lucas from playing for Miami.

On December 2, Lucas, who had just ended his freshman season as a starting defensive back with the Badgers, signed NIL contracts with Wisconsin and VC Connect. Under his NIL contract with Wisconsin, Lucas agreed not to play for any other school and was prohibited from granting any NIL rights to another school.

Lucas participated in the shooting of promotional videos for the UW football program on December 12 and left for Florida on December 15 for the winter semester break. Two days later, Lucas informed a UW assistant coach that he wanted to be placed in the NCAA transfer portal. Wisconsin, citing his obligations under the NIL contracts, denied that request. But by January, Lucas had enrolled at Miami, despite not formally being in the NCAA transfer portal and missing the deadline for transfer applications at Miami.

Wisconsin claims that a member of Miami's football coaching staff and a prominent Miami alumnus met with Lucas and his family when he returned to Florida over winter break, offering financial incentives to lure him away, actions Wisconsin says violated NCAA norms and the terms of the NIL contracts with Lucas.

Wisconsin characterized its two-year NIL contract with Lucas as one of the most lucrative NIL financial deals of any UW football player. The NIL contract with Wisconsin was to take effect on July 1, the first day universities can directly pay athletes under the recently approved House v. NCAA settlement. Lucas was under contract with VC Connect until the effective date of the House settlement. According to the lawsuit, Lucas received payments from VC Connect before departing for Miami.

Miami has yet to comment on the allegations. Lucas's attorney maintained that Lucas has not received any money from Wisconsin or its collective and denied that Lucas met with a Miami coach and a prominent alumnus in December.

Wisconsin argues that Miami's actions undermine the integrity of NIL deals and the broader fairness of collegiate athletics and that NIL contracts would be rendered meaningless if players are allowed to abandon their contractual obligations. If Wisconsin prevails in this litigation, schools may be reluctant to accept a transfer player bound by an NIL contract that prohibits such a move.

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.

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 Pete Faust and Jason Scoby.

BUSINESSES SHOULD NOT OVERLOOK ECONOMIC INJURY DISASTER LOANS

Although not getting as much attention as forgivable Paycheck Protection Program loans, Economic Injury Disaster loans are a viable alternative or complementary emergency loan for businesses — especially businesses that do not have many employees, such as real-estate holding companies.

The CARES Act provide an opportunity for borrowers by waiving certain requirements that otherwise renders many businesses ineligible to receive EID loans. Under the CARES Act, a business that does not meet the Small Business Administration's small business criteria can still qualify for EID loans if the business has no more than 500 employees. The CARES Act also waives for EID loans the SBA's requirement that an applicant demonstrate that it is unable to obtain credit elsewhere, often a significant hurdle for potential borrowers.

Other terms of EID loans include:

Loan Amount: Up to $2 million, as determined by the SBA based on COVID-19 impact on and creditworthiness of applicant.

Payment Terms: Loan term of up to 30 years. Interest rate of 3.75% for businesses and 2.75% for non-profits. Unlike PPP loans, EID loans cannot be forgiven, with the exception of the $10,000 emergency advance described below. Payments deferred for 12 months after disbursement.

$10,000 Advance: Applicants are eligible to receive an emergency advance of up to

$10,000 by submitting an application. If application is denied, the advance is forgiven (though the forgivable advance reduces the amount of any PPP loan that can be forgiven).

Use of Proceeds: EID loans are working capital loans and may be used for fixed debts, payroll, accounts payable, and other expenses that cannot be paid because of COVID-19's impact.

Personal Guaranty: Required of owners with 20% or more of equity, except for EID loans of $200,000 or less.

Collateral : Loans of more than $25,000 require borrowers to pledge available collateral, but lack of available collateral will not cause an application to be rejected.

Underwriting: Based on SBA review of credit score.

Affiliation Rules: EID loans are subject to the SBA's affiliation rules, which are discussed here.

Other Loans: PPP loan applicants may also apply for EID loans, but the loans are not supposed to be used for the same purpose.

Dates: Application deadline is December 21, 2020. The SBA initially indicated that the $10,000 advances would be made within three days after submission of application and certification but the SBA now indicates that the advances will be paid "within days" of a final submission of an application. Loan approval is expected within 21-30 days after complete application submitted. Funding of loan will be within four days after approval.

Application Process: Borrowers apply directly to the SBA, not banks, for EID loans. The application can be found here.

A borrower will likely need permission from any existing lender to obtain an EID loan because loan agreements typically restrict a borrower's ability to incur additional indebtedness and or grant additional security interests or mortgages.

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LOAN FRUSTRATION CONTINUES FOR PE AND VC COMPANIES

Many companies controlled by private-equity firms and venture-capital firms still have not received clearance to apply for emergency loans through the Small Business Administration.

Despite bi-partisan support and lobbying efforts by PE and VC firms late last week, there has been no waiver of the Small Business Administration's affiliation rules, which jeopardizes the ability of companies controlled by PE and VC firms to apply for Paycheck Protection Program loans and other SBA Section 7(a) business loans, including Economic Injury Disaster loans. We previously wrote about these efforts here.

The SBA issued guidelines late Friday excluding faith-based and non-profit organizations from the affiliation rules for PPP loans, but leaving intact the affiliation rules for PE and VC companies. Even if a waiver is eventually issued, it may be too little, too late for PE and VC companies because some SBA-authorized lenders have been accepting PPP loan applications since Friday and have already approved PPP loans.

SBA Affiliation Rules

Under the SBA's affiliation rules, the employees of portfolio companies controlled by a PE or VC firm are combined for purposes of determining whether each company has no more than 500 employees. Companies with more than 500 employees are ineligible for PPP and EID loans, with some limited exceptions. The SBA affiliation rules also do not apply to companies with North American Industry Classification System codes beginning with 72 (the hospitality industry).

It is important to note, though, that being owned by a PE or VC firm does not automatically make a company ineligible for a PPP or EID loan. First, the companies must actually be controlled by the PE or VC firm. Accordingly, mere ownership of less than 50% of the voting interests by a PE or VC firm, without additional rights allowing the PE or VC firm to control the company, would not prevent the company from applying for a loan. Second, a PE or VC firm must actually have more than 500 across its controlled companies.

Control by a PE or VC Firm

The first issue is whether the PE or VC firm controls the company. The SBA clarified Friday night that the applicable affiliation rules are under 13 CFR 121.301. These affiliation rules are not as strict as the affiliation rules under 13 CFR 121.103.

Under 13 CFR 121.301(f), a PE or VC firm may exert control over a company in several ways,

including: (i) owning more than 50% of the voting stock or other voting equity interest of the company, (ii) controlling a majority of the board of directors or managers, or (iii) having veto rights or other protective rights allowing the PE or VC firm to block action by the board or owners of the company.

Combination of Employees

The CARES Act relaxed the eligibility requirements of prospective borrowers by allowing companies with no more than 500 employees to apply for PPP and EID loans, even if they would not have previously satisfied the SBA's size limitations, based, for example, on annual revenues. The SBA, however, combines the employees of all affiliates in determining eligibility. Each part-time employee is counted as one employee

A company controlled by a PE or VC firm is still eligible for a loan if the combined employees of that company and any other companies controlled by the PE or VC firm are not more than 500.

For example, if a PE firm controls five portfolio companies, and each portfolio company has 75 employees, all of the portfolio companies are eligible for a PPP or EID loan because the combined number of 375 employees does not exceed the SBA's 500-employee limit.

Amendment of Organizational Documents

PE and VC firms frustrated by the lack of an SBA affiliation waiver could consider amending the organizational documents of one or more portfolio companies to waive or remove provisions that grant the PE and VC firms effective control over the company (e.g., veto powers) when the PE and VC firms do not own a majority of the voting interests of the company.

There is no guarantee that the SBA would accept an applicant's last-minute changes to its organizational documents, but to increase the chances of acceptance and to protect the applicant from claims of misleading the SBA, any amendment to the organizational documents should be: (i) fully disclosed to the SBA, (ii) effective prior to the date of application and effective through at least the term of the loan (perhaps longer), (iii) in accordance with general contract principles required for enforceable contracts, and (iv) strictly adhered to by all parties, particularly the PE and VC firms.

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 and Economic Injury Disaster loans, please speak to your regular OCHDL contact, or the author of this article, attorney Pete Faust.

COMPANIES OWNED BY PE AND VC FIRMS IN LIMBO OVER PPP LOANS

Many companies owned by private-equity firms and venture-capital firms are in jeopardy of being ineligible to apply for Paycheck Protection Program loans unless Treasury Secretary Steven Mnuchin grants a late reprieve from the Small Business Administration's affiliation rules.

Democratic and Republican lawmakers urged Mnuchin on Thursday to waive the affiliation rule and seemed hopeful that Mnuchin would provide the waiver. See here and here. However, the additional guidance provided by the SBA late Thursday, on the eve of the PPP loan application date, made no mention of the waiver.

Under the SBA's affiliation rules, the employees of portfolio companies controlled by a PE or VC firm are combined for purposes of determining whether each company has no more than 500 employees. Companies with more than 500 employees are ineligible for PPP loans, with some limited exceptions.

For example, if a PE firm controls five portfolio companies, and each portfolio company has 200 employees, none of the portfolio companies or the PE firm would be eligible for a PPP loan. They would all be deemed to have 1000 employees for purposes of a PPP loan.

Under the SBA's affiliation rules, a PE or VC firm may exert control over a company in several ways, including: (i) owning more than 50% of the stock or other equity interest of the company, (ii) controlling a majority of the board of directors or managers, or (iii) having veto rights or other protective rights allowing the PE or VC firm to block action by the board or owners of the company.

The SBA affiliation rules are often viewed in the context of PE and VC firms, but the affiliation rules apply to all affiliated companies (e.g., subsidiaries), not just those owned by PE and VC firms, unless the late waiver is granted.

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