COVID-19 RAISES PRIVACY ISSUES FOR MAJOR-LEAGUE BASEBALL

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After months of delay trying to address COVID-19 issues, the 2020 Major League Baseball ("MLB") season finally opened Thursday night with the New York Yankees defeating the Washington Nationals, 4-1, and the Los Angeles Dodgers pulling away from the San Francisco Giants for an 8-1 victory. Because of the COVID-19 pandemic, this season – assuming it is not called off because of COVID-19 outbreaks – will be unlike any prior MLB season. The regular season has been reduced from 162 games to 60 games, the number of playoff teams was expanded from 10 to 16 teams, games are being played in empty stadiums, and players, coaches, and other staff are subject to extensive COVID-19 testing and daily monitoring.

As of July 17, 80 players have tested positive for COVID-19, 17 of which tested positive after teams began their workouts on July 1. Of those 80 players, the general public knows the identity of only 56 of them. Why only 56, especially since MLB clubs traditionally have disclosed details of a player's injury? For example, when New York Mets pitcher Noah Syndergaard tore the ulnar collateral ligament in his pitching elbow in March, the Mets announced that Syndergaard had suffered the injury and would undergo Tommy John surgery. The Mets later announced that the surgery had been successful, and that Syndergaard was expected to pitch again at some point during the 2021 season.

MLB clubs are more tight-lipped about COVID-19 issues. MLB has effectively created a COVID-19 Related Injured List for players who have tested positive, have been exposed, or have shown symptoms of the COVID-19. The list does not differentiate between players who have tested positive and players who have been exposed to someone who has tested positive for COVID-19, and is not being published as a stand-alone list. Instead, players with positive COVID-19 testing or exposure status will be acknowledged on the normal injury report just like any other injured player. Their injury, however, will be described as an undisclosed injury, an illness, or a non-baseball injury. While naming a player to the injury list with a designation of "undisclosed" does open the door for public speculation regarding a player's health status, the various designations on the list do not function to definitively confirm that a particular player has tested positive for or been exposed to the virus that causes COVID-19.

Why do MLB clubs disclose less about the status of a player who is missing games because of COVID-19 than a player one who is out for the season with a torn elbow ligament?

The simple answer is that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Americans with Disabilities Act ("ADA") provide broad health privacy and confidentiality protections for players. Specifically, HIPAA and the ADA each restrict the clubs' ability to publicize information about employee illness without permission.

How do HIPAA and the ADA Apply?

HIPAA applies to an MLB club in its role as a health-care provider to the players. HIPAA is a federal law that was created to protect sensitive patient health information and prevents disclosure of individual health information without such individual's consent. This privacy rule generally applies only to specified types of covered entities and their associates. Covered entities include healthcare providers and group health insurance plans. Certain business associates and vendors of a covered entity can also be required to observe HIPAA's requirements. Where an entity is either not regulated by HIPAA, or is subject to HIPAA, but has obtained individual consent, the federal privacy law does not prevent the disclosure of personal medical information. Because professional sports teams provide healthcare to their players via team doctors, they are healthcare providers under HIPAA. The terms and conditions of professional athletes' employment, as documented in the applicable collective bargaining agreement, generally requires player consent to disclose individual medical information relevant to team status.

The ADA applies to an MLB club in its role as an employer. The ADA functions to prohibit employers from discrimination against employees on the basis of a disability and to require employers to treat all information about employee illness as a confidential medical record. While federal guidance indicates that COVID-19 status is unlikely to constitute a disability, the Equal Employment Opportunity Commission ("EEOC") has made clear that employers must treat employee COVID-19 status as confidential.

Why is There Different Treatment?

An elbow injury and a positive COVID-19 test are treated differently because of HIPAA, the ADA, and MLB's collective bargaining agreement and standard player contract. MLB players and clubs must operate in accordance with the health information disclosure rules as currently codified under Article XIII.G.(1) of the collective bargaining agreement known as the 2017-2021 Basic Agreement (the "CBA") and by Paragraph 6(b)(1) of each standard player contract, known as the Uniform Player's Contract ("UPC"). Under these agreements, each player is required to execute a HIPAA-compliant authorization for the use and disclosure of health information about the player. By signing the UPC, the player authorizes disclosure of employment-related injuries. The UPC incorporates the relevant health information disclosure provisions of Article XIII.G. of the CBA, Section 4, which provide that:

> [for] public relations purposes, a Club may disclose the following general information

about employment-related injuries: (a) the nature of a Player's injury, (b) the prognosis and the anticipated length of recovery from the injury, and (c) the treatment and surgical procedures undertaken or anticipated in regard to the injury.

If a medical condition, other than an employment-related injury, prevents a player from playing and the player has not provided the club with specific written authorization to disclose information about the medical condition, the club may disclose only that a medical condition is preventing the player from playing and the anticipated absence of the player from the club. COVID-19 status, therefore, is not deemed to be an employment-related injury that would allow an MLB club to disclose details regarding prognosis and treatment. Although a player may authorize a team to disclose his COVID-19 status, such authority is not automatic under either HIPAA or the documents governing the employment relationship. The ADA does not explicitly address employee authorization of an employer to disclose medical information, but does permit limited disclosure as necessary to respond to a request for reasonable accommodation.

In practical terms, this compliance with the HIPAA privacy and ADA confidentiality rules with respect to COVID-19 means that even if a player tests positive, the club or its staff may not disclose that to the public unless granted permission to do so by the player. Any unauthorized disclosure could constitute a HIPAA violation, for which significant federal civil monetary penalties may apply if the U.S. Department of Health and Human Services investigates a compliant or performs a compliance audit. Additionally, a player might be able to bring a collective bargaining grievance, or to allege a breach of the employment contract.

Lessons for the Rest of Us

Of course, most businesses are not professional sports franchises with collective bargaining agreements providing HIPAA disclosure consent. The caution displayed by the MLB in avoiding the disclosure of player COVID-19 status, however, is a reminder to all employers with access to employee health information and records to carefully assess which health-related information disclosures may or may not be permitted under applicable law.

HIPAA

HIPAA is a complex health privacy law with multiple exceptions and with sometimes conflicting state law counterparts. Health care providers, employer sponsors of self-insured group health plans and their business associates are subject to its requirements and should take care to ensure that affirmative compliance actions are taken and maintained. Violations of these rules, as well as the inability to demonstrate operational and documented (written) compliance, can subject the health care providers, health plan sponsors, or their associates, to large civil, or even criminal, penalties.

The ADA, FMLA, and GINA

For employers who, unlike MLB clubs, are not directly subject to HIPAA, it is important to remember that other laws provide separate protections for employee health information. Any information known to an employer regarding an employee's disability or gathered as a result of an employer-provided medical examination (which can include taking a temperature) should remain confidential. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA and EEOC guidance. Similarly, employers subject to the Family and Medical Leave Act ("FMLA") or the Emergency Family Medical Leave ("EMFL") provisions of the CARES Act must confidentially maintain any records and documents relating to employee (and family) medical certifications and medical histories and created for FMLA or EMFL purposes. The Genetic Information Nondisclosure Act ("GINA") also requires employers to keep all genetic information, including information about an individual's genetic tests, the genetic tests of a family member, family medical history, regarding employees confidential. The ADA, FMLA, EFML, and GINA all require that such records be stored separately from the usual personnel files.

If you have questions related to your business's obligations under the ADA, FMLA, CARES Act, or GINA, or HIPAA, or seek attorney-client privileged review of your current compliance program, including as to HIPAA policies and procedures, please contact your regular OCHDL attorney or Pete Faust.

NEW ACT PROVIDES MORE FLEXIBILITY TO PPP BORROWERS

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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 & 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

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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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BUSINESSES SHOULD NOT OVERLOOK ECONOMIC INJURY DISASTER LOANS

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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 & 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

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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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