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.

TAX AND WEALTH ADVISOR ALERT: IRS SAYS EXPENSES PAID WITH FORGIVEN PPP LOANS NOT DEDUCTIBLE

Yesterday, the IRS released guidance in Notice 2020-32 stating that expenses related to forgivable loans through the Paycheck Protection Program (PPP) will not be tax-deductible.

Under the PPP, a program created by the CARES Act to provide coronavirus relief, small businesses can receive forgivable loans of up to $10 million as long as the loan goes to essential expenses, such as maintaining payroll, rent, utilities, and mortgage interest.

While it was clear from the CARES Act that PPP loan forgiveness is not taxable income, the CARES Act said nothing about deducting the expenses paid with such loan proceeds. However, the IRS stated in its guidance yesterday that expenses that result in forgiveness of a PPP loan are not tax-deductible—thereby preventing a double tax benefit. This means that small businesses cannot claim tax deductions for expenses that are normally *fully* deductible, such as wages, rent, utilities, etc., if they are paid with PPP funds that are forgiven.

The IRS cited Section 256 of the tax code in its guidance, which states that deductions cannot be taken if they are tied to a certain class of tax-exempt income. If desired, Congress could override the IRS's stance by passing a law that explicitly allows the deductions. Additionally, it is possible a taxpayer may decide to challenge this position in court.

Nevertheless, given the current IRS guidance, small businesses that manage to get their PPP loans forgiven may find themselves losing valuable tax breaks and should plan accordingly.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act, please contact attorney Britany E. Morrison.

UPDATE: On May 5th, 2020, Senator John Cornyn (R-Tex.) recently introduced the bipartisan Small Business Expense Protection Act (S. 3612), which moves to essentially nullify Notice 2020-32. Senate Bill 3612 provides that business expenses otherwise deductible under Code Section 162 would still be deductible even if they were funded by forgiven PPP loan proceeds. Currently, the bill has picked up 23 sponsors. Neither Senator Ron Johnson nor Senator Tammy Baldwin have yet to express support. Nevertheless, this bill is strongly supported by the American Institute of Certified Public Accountants (AICPA). It was read twice in the Senate

and referred to the Senate Committee on Finance but has been sitting there since. On May 12th, 2020, the House introduced an identical bill (HB6821) and referred it to the House Committee on Ways and Means. It has been sitting with the House Committee on Ways and Means since referral. The attorneys at O'Neil, Cannon, Hollman, DeJong and Laing will continue to monitor the status of both bills and provide information on any federal and state law changes.

ATTORNEYS PETE FAUST AND JASON SCOBY RECENTLY QUOTED IN THE BUSINESS JOURNAL

Attorneys Pete Faust and Jason Scoby were recently quoted in the *Business Journal* in an article about advising their clients on the Economic Injury Disaster Loan (EIDL) program and the Paycheck Protection Program (PPP). The *Business Journal* article, addressed how funds should be applied and documented, and the options available to those who did not receive funds in the initial round. O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the PPP and EIDL programs, please speak to your regular OCHDL contact.

The full article titled "Top tips for Milwaukee-area businesses that received PPP funds, and businesses that didn't" was published on April 23, 2020 in the *Business Journal*.

$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.

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.

EMPLOYMENT LAWSCENE ALERT: CARES ACT PROVIDES EMPLOYERS A TEMPORARY WINDOW TO ASSIST EMPLOYEES BY MAKING TAX-FREE STUDENT LOAN PAYMENTS

For the period from March 27, 2020 through December 31, 2020, the CARES Act permits employers to pay directly, or to reimburse employees for, up to $5,250 of qualifying employee student loan payments.

Like many CARES Act provisions, this new opportunity results from an expansion of an existing law or program. In this case, the ability for an employer to assist employees with student loan payments arises from an amendment to Internal Revenue Code Section 127, which governs Educational Assistance Programs (EAPs). Qualifying payments made as a fringe benefit under an EAP are excluded from the employee's income and are deductible to the employer.

The $5,250 limit is the amount that employers are currently permitted to contribute, tax-free, for tuition assistance under an EAP. Through the end of this calendar year, it is also the combined limit for student loan repayment assistance and any other education-assistance payments that an employee may receive.

Essential business employers seeking ways to reward or retain employees during the pandemic should consider whether tax-free payment of student loan debts would meet

payroll and employee-acknowledgment objectives. If your company currently sponsors an EAP, student loan payments may now be made under the current EAP document. Companies wishing to newly implement an EAP in order to take advantage of this tax-favored student loan repayment assistance opportunity can do so by properly adopting a written plan document satisfying IRS content requirements.

Existing Educational Assistance Program Requirements

The existing tax code EAP rules remain in effect. To qualify for tax (and payroll tax) exclusion under Internal Revenue Code Section 127, an EAP must:

- provide benefits exclusively to employees of the employer;
- provide only qualified educational assistance benefits (and only up to $5,250 per employee);
- be documented as a separate written program established by the employer and disclosed to employees;
- be funded solely by the employer;
- not allow employees a choice between educational assistance benefits and cash (or other taxable remuneration); and
- not discriminate in favor of highly compensated employees ($130,000 in 2020) or provide more than 5% of total benefits in any year to 5%-or-more owners.

Additional Detail

The student loan payments made under an EAP must relate to education of the employee, not of their child or spouse. Employer payments may made be for principal or interest, but employees are not permitted to deduct any interest payment made by employers. Where appropriate, employers making student loan payments under an EAP may, therefore, wish for such payments to be allocated only to principal so as to maximize the tax benefit to employees.

Employers interested in providing tax-free student loan payment assistance to employees should consider doing so, either by amending the operation of an existing, or by adopting a new, EAP. Employers who may already be providing post-tax student loan payment assistance to employees can now temporarily convert this form of compensation into a pre-tax benefit, which will permissibly reduce both employee income taxes and employer payroll tax expenses.

O’Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to employee benefits and fringe benefits as impacted by COVID-19-related business changes or legislation.

ATTORNEYS CHRISTA WITTENBERG AND GRANT KILLORAN FEATURED IN WISCONSIN LAWYER

An article by Attorneys Christa Wittenberg and Grant Killoran on constitutional law issues relating to the current COVID-19 pandemic is featured as the cover story in the April edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article, they take an informative and deep dive look into regulations and due process concerns relating to the current public health emergency.

Read the full article here.

DON'T WAIVE GOODBYE TO YOUR CONSTRUCTION LIEN RIGHTS

Wisconsin's construction lien law provides contractors, subcontractors, suppliers, service providers, and design professionals with a valuable remedy to help them collect payment for their work. On privately owned projects, the law allows these parties to place a lien against the project property as security for payment. The economic fallout from the COVID-19 crisis has made construction lien rights more precious than ever to construction industry businesses. Yet, everyday contractors mishandle lien waivers and unwittingly forfeit their lien rights with the stroke of a pen.

Lien waivers are an integral and unavoidable part of the construction payment process in Wisconsin and throughout the country. Subcontractors and suppliers are typically required to provide a signed lien waiver along with each application for a progress payment. The prime contractor then delivers these lien waivers, together with its own lien waiver, to the owner along with the prime contractor's progress payment application. A savvy owner will refuse to release payment unless it has received all the necessary lien waivers.

Lien waivers are governed by Wis. Stat. Sec. 779.05, which imposes strict rules that can become a trap for the unwary. The statute mandates a default rule that a lien waiver is deemed to waive "all lien rights" unless the lien waiver "specifically and expressly limits the waiver to a particular portion" of the work. The statute further provides that any ambiguity in the lien waiver shall be construed against the person signing it. Therefore, a contractor must ensure that the express language of each lien waiver specifically limits the scope of the

waiver only to the specific work or dollar value for which payment is sought. Otherwise, the default rule will apply, and the lien waiver will be deemed a full waiver, even if only a partial waiver had been intended. Unfortunately, this happens with alarming frequency.

The industry practice is for lien waivers to be provided in advance of payment. Section 779.05 provides that a lien waiver is "valid and binding" regardless of whether or not any consideration was paid for it. That means that the lien waiver is valid and enforceable even if the lien claimant does not subsequently receive the anticipated payment for which the waiver was given. While there is always risk in providing the lien waiver in advance of payment, under normal circumstances the risk is tolerable, especially if the lien claimant is careful to use a properly worded partial lien waiver. But these are not normal circumstances. The economic impact of the coronavirus pandemic requires construction businesses to be extra careful. If a payment problem is anticipated, special measures should be taken to manage the risk of loss of lien rights through the lien waiver process. This can include the use of an escrow agreement, or a simultaneous exchange of the waiver for the payment.

In these extraordinary times, a construction lien may become a contractor's only hope of collecting payment on a problem project. Therefore, contractors must know how to manage the risks associated with lien waivers.

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

EMPLOYMENT LAWSCENE ALERT: WHEN ARE MY EMPLOYEES ENTITLED TO LEAVE UNDER THE FFCRA BECAUSE THEIR CHILDREN ARE HOME FROM SCHOOL OR DAYCARE?

As we previously covered here, the Families First Coronavirus Response Act ("FFCRA") requires that, with certain exceptions, employers with 500 or fewer employees must provide employees with leave in certain circumstances pursuant to the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLA"). Both the EPSLA and the EFMLA require leave if an individual is unable to work or telework because they need to care for their son or daughter under the age of 18 if the child's school or place of care has been closed or if the childcare provider of such child is unavailable due to reasons related to COVID-19.

The Department of Labor ("DOL") has issued some additional guidance regarding leave under the FFCRA. Included is guidance specific to the need for leave to care for a child whose school or place of care has been closed or whose childcare provider is unavailable, further clarifying that (i) such leave is not available if another suitable person is available who can care for a child; (ii) such leave is not available to the extent that an employee can telework while caring for the child; (iii) such leave may be taken intermittently if the employee and employer agree to do so; and (iv) such leave may be taken for a child over the age of 18 if he or she has a disability and cannot care for him or herself due to that disability. The DOL also stated that employers should keep the following records for leave to care for a child whose school or place of care is closed: (i) the employee's name; (ii) the date(s) for which leave is requested; (iii) the reason for leave; (iv) a statement from the employee that he is she is unable to work or telework because of this reason; (v) the name of the child being cared for; (vi) the name of the school, place of care, or childcare provider that has closed or become unavailable; and (vii) a statement from the employee that no other suitable person is available to care for the child. This documentation will be necessary for employers who provide FFCRA leave to receive reimbursement of the costs of that leave through tax credits from the Internal Revenue Service ("IRS"). The DOL also stated that employers should consult IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to support the credit.

The guidance published by the IRS for a leave requested based on a school closing or childcare provider unavailability includes all of the DOL information and also requires that the employee provide the **age** of the child. Additionally, if an employee claims that they are unable to work or telework because of a need to provide care for a child older than 14 during daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care. Although there is no specific guidance regarding what is considered a "special circumstance," a reasonable interpretation would be that it requires some specific reason outside of typical circumstances, such as a disability or medical condition, that the child is not able to care for him or herself. If additional guidance becomes available, we will provide updates.

Employers must request accurate and complete documentation from employees requesting leave under the FFCRA. If that leave is to care for a child over the age of 14 because his or her school or place of childcare is closed, special circumstances must exist in order for the employer to grant such leave. If such leave is granted without proper documentation and appropriate special circumstances, the IRS will deny the employer tax credit for the amount paid for such leave.

O'Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to leave under the FFCRA.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN EXTENDS SAFER AT HOME ORDER

Today, April 16, 2020, the State of Wisconsin has extended the statewide Safer at Home Order through May 26, 2020, with some minor changes. The full text of the Extended Order can be found here and an updated FAQ can be found here. The changes to the Safer at Home Order implemented by the Extended Order will go into effect on April 24, 2020 and will remain in effect until May 26, 2020 or until a superseding order is issued. During today's press conference, the Governor's Chief Legal Counsel, Ryan Nilsestuen, stated that, although the Governor needs the legislature's permission to extend the public health emergency, the Extended Order is legally permitted under the Governor's statutory authority.

Under the Extended Order, some businesses will be allowed to increase their services, including:

- Public libraries may now provide curb-side pickup of books and other materials.
- Golf courses may open, although scheduling and payment must be done online or by phone, and clubhouses and pro shops must remain closed.
- The "Minimum Basic Operations" that Non-Essential Businesses are allowed to perform are expanded to include deliveries, mailings, and curb-side pickup. Non-Essential Businesses must notify workers whether they are necessary for the Minimum Basic Operations.
- Arts and crafts stores may offer expanded curb-side pickup of materials necessary to make face masks and other personal protective equipment.
- Aesthetic or optional lawn care and construction is allowed as long as it can be done by one person.

The Extended Order also includes additional safety practices for Essential Businesses and Operations, including:

- Essential Businesses and Operations must increase cleaning and disinfection practices, ensure that only necessary workers are present, and adopt policies to prevent workers exposed to COVID-19 or symptomatic workers from coming to work.
- Retail stores that remain open as Essential Businesses and Operations must limit the number of people in the store at one time, must provide proper spacing for people waiting to enter, and large stores (i.e., those with more than 50,000 square feet) must offer at least two hours per week of dedicated shopping time for vulnerable populations.
- Essential Businesses and Operations that are essential because they supply, manufacture, or distribute goods and services to other Essential Businesses and Operations can only continue operations that are necessary to those businesses they supply. All other operations must continue only as Minimum Basic Operations.

Additionally, the governors of Illinois, Michigan, Ohio, Wisconsin, Minnesota, Indiana, and Kentucky announced today that they will "work in close coordination to reopen the economy in the Midwest region." These governors stated that they would consider four factors when determining when to reopen the economy: 1) sustained control of the rate of new infections and hospitalizations; 2) enhanced ability to test and trace; 3) sufficient health care capacity to handle resurgence; and 4) best practices for social distancing. The governors indicated that reopening may occur in phases and that, although they will be coordinating, each state may take a different approach.

O'Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN WILL NOT TAX FORGIVEN PAYCHECK PROTECTION PROGRAM LOANS

Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the federal government is providing much needed relief to small businesses in the form of loans that can be forgiven under the Paycheck Protection Program (PPP). A PPP loan can be forgiven if the loan is used for specific costs such as payroll costs, interest payments on loans secured by a mortgage, rent, and utilities, as discussed in more detail here. The federal government will not tax the amount of the loan that is forgiven, and the forgiven amount will not count as taxable income to small businesses; however, this might not be the case in some states. Luckily, Wisconsin small businesses will not have the unexpected tax burden of owing state tax on forgiven PPP loans thanks to A.B. 1038, signed by Governor Tony Evers on April 15, 2020.

Under federal law (see Internal Revenue Code Section 108), if a debt is forgiven, taxpayers must include the forgiven amount in their taxable income and pay taxes on that income unless a certain exception applies. Most states conform with this federal tax code provision and incorporate this code section into their own state tax codes. The CARES Act, however, changes federal tax law and specifically excludes the amount of loan forgiveness under the PPP from this code section, and therefore, the amount of loan forgiveness does not count as taxable income. Since most states follow the federal tax treatment of loan forgiveness, one would expect all states to incorporate this exception as well. However, state conformity to the federal tax code is not automatic in some states, including Wisconsin.

States conform to the federal tax code in one of two ways—either fixed date or static conformity or moving date conformity. In a moving date conformity state, or what is sometimes referred to as a "rolling" conformity state, changes in federal tax law automatically apply to the state tax code as they occur. If the state does not want to conform to a new federal tax law, the state must pass specific legislation doing so. Illinois, Michigan, Iowa, and Missouri are just a few examples of moving date conformity states. In these states and other moving date conformity states, there will be no issue with the state taxation of loan forgiveness under the PPP—the state will automatically conform to the CARES Act exception and they will not tax the forgiveness of federal loans under the PPP unless the state otherwise adopts a law to do so.

With fixed date or static conformity states, like Wisconsin, Minnesota, Indiana, Massachusetts, and California, a state conforms to the federal tax code as it existed on a certain date. The state does not automatically incorporate changes to federal tax law that occur after that date. For instance, if a state's conformity date is January 1, 2017, the state's tax code conforms to the federal tax code (usually by including large references to the Internal Revenue Code) as of January 1, 2017, and any federal code changes after January 1, 2017 are not included in the state tax code unless and until the state changes it's conformity date or makes express provisions conforming to certain federal tax law changes. This means that unless a static state conforms to the most recent version of the Internal Revenue Code, which includes the CARES Act exception, or makes an express provision for the exclusion, small businesses in those states will owe state taxes on forgiven PPP loans.

Typically, each year, lawmakers in static states vote to update their conformity date, but often times this simply doesn't occur. Many static states are usually a year behind—for example, a state will be using the current 2020 legislative session to conform to the Internal Revenue Code as it existed at the end of the 2019 tax year. Unfortunately, there are a few states that are infamous for not updating their conformity dates and Wisconsin is one of them. Wisconsin uses a 2017 conformity date which is not great, but still ahead of California whose conformity date is 2015 and Massachusetts where the individual (but not corporate) conformity date is 2005! While it is not unusual for a state to be behind on its conformity date, this year it is important for PPP loan forgiveness and many other provisions related to the CARES Act.

Although the Wisconsin legislature adopted omnibus legislation on April 15, 2020 to address the coronavirus pandemic, the bill does not update Wisconsin's conformity date. Rather, the bill includes express language that brings the state's tax code into conformity with several federal tax law changes under the CARES Act. The good news for Wisconsin small businesses seeking PPP loans is that the bill expressly conforms to the CARES Act exception that permits loan forgiveness on a tax-free basis under the PPP from February 15, 2020 through June 30, 2020.

Other static state legislators must update their conformity date or provide express provisions before calendar year 2020 tax returns are due (March 15, 2021) so businesses will not owe state taxes on forgiven PPP loans. If these states do not conform by then, small businesses might face the burden of state taxes on this much-needed relief. Business owners in static conformity states seeking PPP loans should be aware of the potential tax burden associated with PPP loan forgiveness and plan accordingly.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act, please contact attorney Britany E. Morrison.

UPDATE: On May 5th, 2020, Senator John Cornyn (R-Tex.) recently introduced the bipartisan Small Business Expense Protection Act (S. 3612), which moves to essentially nullify Notice 2020-32. Senate Bill 3612 provides that business expenses otherwise deductible under Code Section 162 would still be deductible even if they were funded by forgiven PPP loan proceeds. Currently, the bill has picked up 23 sponsors. Neither Senator Ron Johnson nor Senator Tammy Baldwin have yet to express support. Nevertheless, this bill is strongly supported by the American Institute of Certified Public Accountants (AICPA). It was read twice in the Senate and referred to the Senate Committee on Finance but has been sitting there since. On May 12th, 2020, the House introduced an identical bill (HB6821) and referred it to the House Committee on Ways and Means. It has been sitting with the House Committee on Ways and Means since referral. The attorneys at O'Neil, Cannon, Hollman, DeJong and Laing will continue to monitor the status of both bills and provide information on any federal and state law changes.