WISCONSIN CONSTRUCTION LIENS 101

Most Wisconsin construction contractors know that the construction lien law exists, but few know how it works or how to use it. With the economy reeling from the COVID-19 crisis, construction lien rights will become more vital than ever to businesses in the construction industry.

Wisconsin's construction lien law (provided in subchapter I of ch. 779, Wisconsin Statutes) creates a statutory payment remedy available only to construction contractors, subcontractors, suppliers, service providers, and design professionals engaged in the improvement of real property. Excluding public improvements, a construction contractor is entitled to place a lien against the construction site and the improvements being built as collateral to secure payment for the work it has performed. In case of nonpayment, the lien may be enforced through a legal action for foreclosure just like a mortgage. A construction lien claim puts pressure directly on the owner by placing the owner's title to the property at risk. It also allows non-prime claimants (those that did not contract with the owner) to seek payment directly from the owner, providing them with another deep pocket and another path to collect payment aside from the claimant's contract with a higher tier contractor.

To take advantage of the benefits of the construction lien law, a lien claimant must comply with the express requirements of the statute within the short time limits prescribed by law. These steps generally must be followed to the letter and the deadlines cannot be extended. The statutes prescribe in detail what must be done and how it must be done. A failure to comply with the statutory requirements will likely result in a loss of lien rights.

The process of creating a lien generally consists of the following steps. The lien is created by filing a claim for lien with the office of the clerk of circuit court in the county where the property is located. This must be done no later than six months after the claimant has last performed work or provided materials. At least 30 days before filing the lien, the lien claimant must serve the property owner with a written notice of intent to file a lien claim. Within 30 days after the lien claim is filed, the claimant must serve the owner with a copy of the claim for lien. Once the lien has been filed, the claimant has two years in which to enforce it through a foreclosure lawsuit.

Respecting small residential projects (up to four family living units), an additional first step may be required—an early notice of lien rights must also be served upon the owner, subject to certain exceptions. A prime contractor must include this notice in its written contract with the owner, or it must serve the owner with a separate written notice within 10 days of commencing work if there is no written contract. A non-prime claimant must serve the owner with two copies of a written notice within 60 days of commencing its work.

Contractors often wait until a payment problem has festered before scrambling to pursue their lien rights, but that may be too late. It is easy to make a mistake or to miss a deadline, but the Construction Lien Law has zero tolerance for either. With the economic impact of the COVID-19 crisis, construction contractors, suppliers, service providers, and design professionals must take extra care to preserve and to properly exercise their statutory construction lien rights. A failure to do so could mean the difference between getting paid and not getting paid.

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

OCHDL SUPPORTS LOCAL TEENAGER IN FIGHT AGAINST THE PANDEMIC

We are incredibly proud to financially support local Port Washington hero, 16-year-old William "Billy" Schowalter, as he works diligently to create plastic face shields for medical professionals, local police, and other service providers that work with the public. Billy, a son of an OCHDL employee, is using his 3D printer to make personal protective equipment and headpieces to help those on the front lines in the fight against COVID-19. Click here to read more about Billy's story and to be reminded that we are all in this together.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN FOLLOWS FEDERAL EXTENDED TAX DUE DATES

Wisconsin has updated its proposed guidance document discussing how various tax deadlines are affected by IRS Notices 2020-18 and 2020-23, which were issued as a result of the COVID-19 pandemic. As we previously wrote, the IRS notices provide extensions for a variety of tax form filings and payment obligations that are due between April 1, 2020 and July 15, 2020, including estimated tax payments due June 15.

The proposed guidance document from Wisconsin states that federal extensions provided in the IRS notices may be used for Wisconsin income and franchise tax and for pass-through withholding tax purposes. For returns due on or after April 1, 2020 and before July 15, 2020, regardless of whether it is the original or extended due date, the due date is extended to July

15, 2020. See the helpful chart in the document for tax return due dates for 2019 Wisconsin tax returns.

In addition, any estimated income, franchise, or pass-through withholding tax payment that is due on or after April 1, 2020 and before July 15, 2020, is extended to July 15, 2020.

The document also notes that payments from the federal CARES Act (i.e. the federal economic impact payment or stimulus payment) are not taxable for federal or Wisconsin income tax purposes.

Lastly, like the IRS, Wisconsin will be postponing interest and penalties as a result of the extended due dates. Unpaid income and franchise taxes and pass-through withholding taxes due on or after April 1, 2020 and before July 15, 2020 will not accrue interest or penalties until July 16, 2020.

If you are interested in learning more about the new tax filing guidance, please contact attorney Britany E. Morrison at O'Neil Cannon

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TAX AND WEALTH ADVISOR ALERT: IRS EXTENDS MORE TAX DEADLINES TO COVER INDIVIDUALS, TRUSTS, ESTATES, CORPORATIONS AND OTHERS

To help taxpayers, the Department of Treasury and the Internal Revenue Service (IRS) announced April 9, 2020, that Notice 2020-23 extends additional key tax deadlines for individuals and businesses to July 15, 2020. This extension includes a variety of tax form filings and payment obligations that are due between April 1, 2020 and July 15, 2020, including estimated tax payments due June 15.

Background

As we previously reported, on March 18, 2020, the IRS issued Notice 2020-17, which postponed the due date for certain federal income tax *payments* from April 15, 2020 until July 15, 2020 due to the coronavirus (COVID-19) pandemic.

On March 20, 2020, the IRS issued Notice 2020-18, which also postponed the *filing date* to July 15, 2020 for 2019 federal income tax returns and 2020 federal estimated income tax payments that would otherwise be due on April 15, 2020. Then, on March 27, 2020, the IRS

issued Notice 2020-20, which extended the recent income tax filing and payment relief to those taxpayers who have gift tax or GST tax obligations otherwise due by April 15, postponing those deadlines to July 15, 2020 as well. See our original article here for further information.

Notice 2020-23

The new Notice expands upon the relief provided in Notice 2020-17, Notice 2020-18 and Notice 2020-20. As a result, the extensions generally now apply to all taxpayers that have a filing or payment deadline falling on or after April 1, 2020, and before July 15, 2020. Individuals, trusts, estates, corporations and other non-corporate tax filers qualify for the extra time. This means that anyone, including Americans who live and work abroad, can now wait until July 15 to file their 2019 federal income tax return, and pay any tax due. Relief includes extending the following filing and payment deadlines:

Individual income tax payments and return filings on

- Form 1040
- Form 1040-SR
- Form 1040-NR
- Form 1040-NR-EZ
- Form 1040-PR
- Form 1040-SS

Calendar year or fiscal year **corporate** income tax payments and return filings on

- Form 1120
- Form 1120-C
- Form 1120-F
- Form 1120-FSC
- Form 1120-H
- Form 1120-L
- Form 1120-ND
- Form 1120-PC
- Form 1120-POL
- Form 1120-REIT
- Form 1120-RIC
- Form 1120-S
- Form 1120-SF

Calendar year or fiscal year **partnership** return filings on

- Form 1065
- Form 1066

Estate and trust income tax payments and return filings on

- Form 1041
- Form 1041-N
- Form 1041-QFT

Estate and generation-skipping transfer tax payments and return filings on

- Form 706
- Form 706-NA
- Form 706-A
- Form 706-QDT
- Form 706-GS(T)
- Form 706-GS(D)
- Form 706-GS(D-1)
- Form 8971

Gift and generation-skipping transfer tax payments and return filings on

- Form 709 that are due on the date an estate is required to file
- Form 706
- Form 706-NA

Estate tax payments

- of principal or interest due as a result of an election made under IRC Code Secs. 6166, 6161, or 6163 and annual recertification requirements under Code Sec. 6166.

Exempt organization business income tax and other payments and return filings on

- Form 990-T

Excise tax payments on investment income and return filings on

- Form 990-PF
- Form 4720

Quarterly estimated income tax payments calculated on or submitted with

- Form 990-W
- Form 1040-ES
- Form 1040-ES (NR)
- Form 1040-ES (PR)
- Form 1041-ES
- Form 1120-W

This relief is automatic. Taxpayers do not have to call the IRS or file any extension forms or

send letters or other documents to receive this relief. Additionally, the Notice also suspends associated interest, additions to tax, and penalties for late filing or late payment until July 15, 2020.

If you are interested in learning more about the new tax filing guidance, please contact attorney Britany E. Morrison at O'Neil Cannon

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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.

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.

SHOULD A CONTRACTOR STOP WORK DUE TO NONPAYMENT?

As owners and contractors feel the bite of shrinking revenues due to the economic slowdown, contractors are bound to see payment problems arise on ongoing projects. Contractors may find themselves contemplating whether to stop work on-site in response to nonpayment.

At first blush, stopping work on-site may seem like a simple and obvious solution for nonpayment. But in reality, stopping work is fraught with risk, and almost always involves a difficult and complicated decision. If the contractor's entitlement to payment is unclear or in dispute, a work stoppage by the contractor could amount to a breach of contract exposing the contractor to potential liability for substantial damages. For example, the owner may claim to have an arguable contractual right to withhold payment due to some prior alleged breach by the contractor, such as defective work, or a lien claim asserted by a sub-

contractor. Particularly on large and complex projects, it may not be difficult for an owner to find some arguable basis justifying nonpayment. A contractor that stops work due to nonpayment faces the risk that a court may later hold that the owner was legally entitled to withhold payment and that the contractor was not entitled to stop work.

The contract documents may govern how, and under what circumstances, a contractor may stop work due to nonpayment. Often, the contract imposes procedural requirements that a contractor may need to comply with before a work stoppage can be justified. For example, under Article 9.7 of the AIA A201-2017 General Conditions, a contractor is required to give the owner and the architect seven days' written notice before the contractor may stop work for nonpayment. Additionally, a contractor may be required to comply with Article 15, which contains a specific procedure for relevant claims and disputes. Similarly, under Article 9.5 of the ConcensusDocs 200, a contractor must give seven days' written notice to the owner before the contractor may stop work due to nonpayment.

A contractor should always consult legal counsel when considering whether to stop work due to nonpayment. The decision of whether or not to stop work usually requires analysis of the background facts, the contract documents, and the applicable law. The answer is seldom written in black or white, but rather in shades of gray. The contractor and its counsel must carefully identify, judge, and weigh all the risks. If you have questions or need assistance, contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

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.

O’Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to Economic Injury Disaster loans, please speak to your regular OCHDL contact, or the author of this article, attorney Pete Faust.

TAX AND WEALTH ADVISOR ALERT: INDIVIDUAL TAX RELIEF AND RETIREMENT PLAN ACCESS PROVISIONS IN THE CARES ACT

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the coronavirus pandemic. This article summarizes the tax relief provisions for individuals and the retirement plan access provisions that are contained in the CARES Act. A summary of tax relief provisions for business can be found here.

Economic Impact Payments (Recovery Rebates) for Individuals

To help individuals during this time of economic uncertainty, the IRS will send payments of up $1,200 to eligible individual taxpayers and $2,400 for eligible married couples filing joint returns. Parents will get an additional $500 for each qualifying child dependent under age 17 (using the qualification rules under the Child Tax Credit). Thus, the payment for a married couple with two children under 17 will be $3,400.

U.S. citizens and residents are eligible for a full payment if their adjusted gross income (AGI) is under $75,000 (single or married filing separately), $122,500 (head of household), and $150,000 (joint filer). The individual must not be the dependent of another taxpayer and must have a social security number that authorizes employment in the United States. Estates and trusts are not eligible to receive an economic impact payment.

For eligible individuals whose AGI exceeds the above thresholds, the payment amount is phased out at the rate of $5 for each $100 of income. Thus, the payment is completely phased out for single filers with AGI over $99,000 and for joint filers with no children with AGI over $198,000. For a married couple with two children, the payment will be completely phased out if their AGI exceeds $218,000.

Most eligible individuals will not have to take any action to receive a payment. The IRS will automatically calculate and send the payment to those who are eligible. If the individual has already filed his or her 2019 tax return, the IRS will use the AGI and dependents from that return to calculate the payment amount. If the individual has not filed for 2019 yet,

information from the taxpayer's 2018 return will be used. If no 2018 return has been filed, the IRS will use information from 2019 provided in the taxpayer's Form SSA-1099, Social Security Benefit Statement, or Form RRB-1099, Social Security Equivalent Benefit Statement. Individuals who are not otherwise required to file a tax return and do not receive a Form SSA-1099 or RRB-1099, will need to file a simple return to receive an economic impact payment. The IRS will soon provide instructions on how to do this.

The IRS will deposit the payment directly into the bank account reflected on the return. For those that did not provide bank account information on their return, the IRS plans to develop a web-based portal for individuals to provide banking information to IRS, so that payments can be received as a direct deposit rather than by a check sent in the mail. Additionally, no later than 15 days after distributing an economic impact payment, the IRS must mail a notice to the individual's last known address indicating how the payment was made, the amount of the payment, and a phone number for reporting any failure to receive payment to the IRS.

Economic impact payments are nontaxable, and they will not be included in the recipient's income for tax purposes; however, these payments will be considered "advance rebate payments" of a 2020 credit based on a 2019 tax return. Therefore, there will be a "true-up" on the 2020 tax return—the amount of the credit that is allowable on an individual's 2020 tax return must be reduced (but not below zero) by the aggregate advance rebates made or allowed to the taxpayer during 2020. This means that if an individual received an advance payment that was less than the credit to which the individual is entitled to for 2020, the individual will be able to claim the credit or the balance of the credit when filing the 2020 tax return. For instance, while eligible individuals who had a child in 2020 will not receive an advanced payment for this child, they will receive a $500 credit for that child when they file their 2020 tax return. Moreover, individual who weren't an eligible individual for 2019 and received no advance payment but became an eligible individual in 2020 (e.g., the individual was a dependent for 2019 but not 2020) will be able to claim the credit when filing their 2020 tax return. If, on the other hand, the advance payment received was greater than the credit to which the individual is entitled, the individual will not have to pay back the excess because the 2020 credit cannot be reduced below zero.

Waiver of 10% Early Withdrawal Penalty for COVID-19 Related Retirement Plan Hardship Distributions

Typically, an early, hardship-related distribution from a qualified retirement plan (such as a 401(k), profit-sharing, 403(b), 457(b) plan, or an IRA) is subject to a 10% additional tax (an "early withdrawal penalty") unless the distribution meets an exception under Code Section 72(t). However, the CARES Act waives this early withdrawal penalty for certain early distributions by a "qualified individual." A qualified individual is an individual:

(1) who is diagnosed with the virus SARS-CoV-2 or with COVID-19 by a test approved by the

Centers for Disease Control and Prevention (CDC);

(2) whose spouse or dependent (as defined in Code Sec. 152) is diagnosed with such virus or disease by such a test; or

(3) who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off, or having work hours reduced due to such virus or disease; being unable to work due to lack of child care due to such virus or disease; closing or reducing hours of a business owned or operated by the individual due to such virus or disease; or other factors as determined by the Secretary of the Treasury.

Any "coronavirus-related" distribution of up to $100,000 made on or after January 1, 2020, and before December 31, 2020, from a qualified retirement account taken by a qualifying individual will not be subject to the 10% early withdrawal penalty. Qualifying individuals will still be subject to income tax on the distribution, but a retroactive tax credit will be made available if the individual repays the amount as a rollover contribution to any eligible retirement plan within three years following the date of the distribution. In the alternative, if the individual elects not to repay the distribution amount, the distribution will be subject to federal income tax ratably over the three tax years following the distribution (rather than in the year of distribution) unless the participant elects not to prorate the taxation. For distributions to a qualifying individual, the CARES Act also removes the employer's obligation to withhold 20% percent of the distribution for the payment of income tax on behalf of the individual.

Under existing rules, nonqualified individuals may still be able to take a hardship distribution of up to $100,00, with a three-year repayment period, if their state of residence qualifies for individual assistance under a federal disaster declaration. However, in this case, all income taxes will be owed on the amount of the distribution in the first year, and the 10% early withdrawal penalty is not waived.

Note that not all qualified retirement plans permit an early distribution, by their terms. If you have questions regarding whether your plan permits an early withdrawal or hardship distribution, contact your plan administrator or legal counsel, or, in the case of an IRA, your account custodian. An employer is permitted, but not required, to now amend a qualified retirement plan to allow plan participants to access a distribution under the access rules as expanded under the CARES Act.

Expansion of Permitted Retirement Plan Loans

The CARES Act provides for expanded retirement plan loan flexibility under plans whose terms permit (or are amended to permit plan loans). Specifically, during the 180-day period beginning on March 27, 2020, and ending on September 23, 2020, a plan participant who

satisfies the requirements to be a qualified individual, as defined above, may take a plan loan in an amount not to exceed the lesser of $100,000 or 100% of their vested plan account balance. These limits exceed the typically applicable plan loan limits.

For individuals who held outstanding or pending retirement plan loans as of Mach 27, 2020, where the loan was due to be repaid by December 31, 2020, the Act extends the repayment due date by one year. Additionally, for all plan loans, the period from March 27 through December 2020 will be disregarded in calculating either the five-year maximum repayment period, or the period over which interest on the loan must be amortized.

Waiver of Required Minimum Distribution Rules

In general, tax law requires a qualified retirement plan or IRA owner to take required minimum distributions (RMDs) annually once the owner reaches age 72. The CARES Act provides that the otherwise applicable requirement to take an RMD from a retirement plan or IRA in 2020 is waived. Also included in the wavier are distributions that would have been required by April 1, 2020, due to the account owner's having turned age 70 1/2 in 2019. This provides great relief to those whose required minimum distribution amount for 2020 was calculated based on the value of the market at December 31, 2019. The CARES Act does, however, also permit an individual who still wishes to take a 2020 RMD to do so.

Expansion of Charitable Contribution Deduction

The CARES Act makes two significant liberalizations to the rules (see here for a summary of the rules) governing individual charitable deductions:

First, individuals will be able to claim a $300 above-the-line deduction for cash contributions made to public charities in 2020. This rule effectively allows a limited charitable deduction to taxpayers claiming the standard deduction (previously only allowed for those who itemized deductions).

Second, individuals are generally allowed a deduction for cash contributions to certain charitable organizations up to 60% of their contribution base (typically, AGI). Any cash contributions to charities for the tax year that exceed 60% of the individual's contribution base can be carried forward for five years.

Under the CARES Act, the 60% of contribution base limitation on charitable contribution deductions for individuals is increased to 100% of the contribution base for cash contributions made to public charities in 2020 (qualifying contributions). No connection between the contributions and COVID-19 activities is required. However, contributions to a Code Sec. 509(a)(3) supporting organization or a donor advised fund are not qualified contributions. Additionally, the taxpayer must elect to apply this provision with respect to the contribution and in the case of partnership or S corporation, each partner or shareholder must separately

make an election.

Student Loan Repayments

Generally, an employee's gross income does not include up to $5,250 per year of employer payments, in cash or kind, made under an educational assistance program for the employee's education (but not the education of spouses or dependents). The CARES Act adds eligible student loan repayments made before January 1, 2021 to the types of educational payments that are excluded from employee gross income. Therefore, student loan repayments made by an employer, whether paid to the employee or a lender, of principle or interest on any qualified higher education loan for the education of the employee (but not of a spouse or dependent) are excluded from the employee's income up to $5,250 per year.

Implementation of the provisions of the CARES Act is continuing to develop, and O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the CARES Act, please contact attorney Britany E. Morrison.

TAX AND WEALTH ADVISOR ALERT: ESTATE PLANNING DURING THE COVID-19 CRISIS–ENSURING YOUR DOCUMENTS ARE LEGALLY ENFORCEABLE

The estate planning team at O'Neil Cannon is safely helping clients create estate plans, or update existing estate plans, during this COVID-19 crisis. Estate planning documents must comply with Wisconsin's strict signing requirements to be legally enforceable. For example, some documents require two witnesses or a notary to witness a testator's signature. To date, Wisconsin's strict signing requirements have not been relaxed during the COVID-19 crisis. Therefore, it is important to keep in mind Wisconsin's signing requirements during these uncertain times. This post will give an overview of each estate planning document and Wisconsin's signing requirements.

Requirements to Sign a Last Will and Testament or Codicil

A valid Will in Wisconsin must be signed by the testator in the "conscious presence" of two non-relative, disinterested witnesses. Alternatively, Wisconsin does permit the testator to direct someone else to sign his or her name on the Will, but this person must do so in the "conscious presence" of the testator and two non-relative, disinterested witnesses. Neither

the courts nor legislature have addressed whether witnessing a Will over video conferencing (like Zoom or Skype) would satisfy the “conscious presence” requirement to create a valid Will. Notarization is not required unless the Will contains a self-proving affidavit or acknowledgment. Codicils to Last Will and Testaments are required to follow the same signing formalities as a Last Will and Testament.

Trust Signing Requirements

A Trust is a document that holds your assets on behalf of a beneficiary or beneficiaries and tells the trustee how to manage and distribute those assets. A Trust may be signed without a witness or a notary.

Certification of Trust Signing Requirements

A Certificate of Trust is a document that confirms the existence of a Trust. A trust certification must be signed or authenticated by any trustee of the Trust to be valid. A trust certification may be signed without a witness or a notary.

Marital Property Agreement Signing Requirements

A Marital Property Agreement is used to classify ownership of a married couple’s assets and liabilities, as well as governs how each spouse’s assets will be distributed upon his or her death. Wisconsin law simply requires both spouses to sign the Marital Property Agreement. Thus, a Marital Property Agreement may be signed without a witness or a notary.

Health Care Power of Attorney Signing Requirements

A Health Care Power of Attorney authorizes another person to communicate with your health care providers what medical treatments you do and do not want. A valid power of attorney for health care must be signed by two non-relative, disinterested witnesses, but it does not need to be notarized. It is unclear whether witnessing a power of attorney for health care over video conferencing (like Zoom or Skype) would satisfy the statutory requirements.

HIPAA Release Authorization Signing Requirements

A HIPAA Release and Authorization allows you to authorize other individuals to have access to your medical records. A HIPAA Release and Authorization may be signed without a witness or a notary.

Declaration to Physicians (Living Will) Signing Requirements

A Living Will allows you to state your preferences for life-sustaining procedures and feeding tubes in the event the person is in a terminal condition or persistent vegetative state. A

Living Will requires you to sign in front of two non-relative, disinterested witnesses, but it does not need to be notarized. It is unclear whether witnessing a Living Will over video conferencing (like Zoom or Skype) would satisfy the statutory requirements.

Authorization for Final Disposition Signing Requirements

An Authorization for Final Disposition allows you to designate a friend or loved one to make funeral arrangements on your behalf. This document also allows you to state your preferences for final disposition and funeral service. This document can be signed in front of either (a) two non-relative witnesses or (b) a notary. It is unclear whether witnessing an Authorization for Final Disposition over video conferencing (like Zoom or Skype) would satisfy the statutory requirements, and online notaries have not been approved for estate planning documents.

Currently, our team is meeting our estate planning clients and prospective clients over teleconferences to ensure the safety of our community. After the initial consultation, clients are provided drafts of their estate plans for their review. When the estate planning documents are finalized and ready to sign, we are meeting our clients at their homes to witness and notarize their signatures through a glass door or window. Until Wisconsin authorizes electronic witnessing and notarization for estate planning documents, this process ensures that estate plans are properly drafted and executed during these uncertain times.

If you would like to create an estate plan, or review your current estate plan, please contact Attorney Kelly M. Spott at 414-276-5000.

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.