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.

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.

SBA ISSUES FURTHER GUIDANCE ON PAYCHECK PROTECTION PROGRAM

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

- Borrowers SHOULD NOT include payments to independent contractors for purposes of calculating the borrower's payroll costs. The initial legislation was ambiguous on this issue.
- Loans will be provided on a first-come, first-served basis.
- The interest rate will be 1%. Prior guidelines stated that the interest rate would be 0.5%.
- In addition to principal, interest can be forgiven. It was previously believed that only the principal balance of the loan could be forgiven.
- The SBA confirmed that 75% of the loan must be used for payroll costs for the entire loan to be forgivable. This means that 25% of the loan can be used for other eligible purposes.
- The SBA confirmed that this is the application that borrowers should complete. This is not the same application form that we previously wrote about. Borrowers should

include with their application documentation to support their calculation of the payroll costs.

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.

CAN PAYMENTS TO INDEPENDENT CONTRACTORS BE INCLUDED IN CALCULATING PAYROLL COSTS UNDER THE PAYCHECK PROTECTION PROGRAM? UNCERTAINTY EXISTS.

On March 31, 2020, the Small Business Administration (SBA) posted guidance on the Paycheck Protection Program (PPP). This guidance follows the passage of the CARES Act, and the guidance includes the PPP loan application, which can be found here on the U.S. Department of the Treasury website, along with information sheets for borrowers and lenders.

Based on the application and the information sheets, uncertainty exists as to whether borrowers can include payments to independent contractors when calculating payroll costs (as defined in the CARES Act) on their PPP applications. Although the text of the CARES Act appears to contemplate including payments to independent contractors in payroll costs, the additional guidance suggests that payments to independent contractors from a borrower ***will not*** be included in calculating payroll costs. However, the SBA has not yet provided definitive guidance on this issue. Accordingly, borrowers should consult their advisors, including their bank, when calculating payroll costs and should specify in their PPP loan application how their payroll costs were calculated.

The attorneys at O'Neil, Cannon, Hollman, DeJong and Laing are closely monitoring all guidance released from the SBA. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

APPLICATIONS FOR PAYCHECK PROTECTION PROGRAM LOANS NOW AVAILABLE

Applications for loans under the Paycheck Protection Program (PPP) are now available. The application can be found here. The completed application and the required documentation should be submitted to an approved lender as soon as possible and prior to June 30, 2020.

The Small Business Administration also provided additional information regarding PPP loans:

1. Any loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities; however, the SBA indicated that due to the high demand for these loans, it is anticipated that at least 75% of the forgiven amount must have been used for payroll costs.
2. All payments are deferred for a period of six months; however, interest will continue to accrue over this period.
3. Any portion of the loan not forgiven will have a maturity date of two years and an interest rate of 0.5% (The CARES Act provided for a maturity of not more than 10 years and an interest rate of not more than 4%).
4. No collateral or personal guarantees are required.
5. Neither the government nor lenders will charge small businesses any prepayment penalties or fees.

When can you apply?

- Starting April 3, 2020, small businesses and sole proprietorships can apply for PPP loans through SBA lenders.
- Starting April 10, 2020, independent contractors and self-employed individuals can apply for PPP loans through SBA lenders.
- Other regulated lenders will be available to make the PPP loans as soon as they are approved and enrolled in the program.

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SBA ELIMINATES SIX MONTHS OF LOAN PAYMENTS FOR CERTAIN EXISTING SBA LOANS

The Small Business Administration (SBA) will pay (and relieve the borrower of any obligation

to pay) the principal, interest, and any associated fees that are owed on certain existing SBA 7(a) loans for a six-month period starting on the next payment due date. Loans currently in deferment would be entitled to an additional six months of payment by the SBA beginning with the next payment. Loans made within six months after the enactment of the legislation would also qualify for six months of deferral payments by the SBA. This opportunity does not apply for new "Paycheck Protection Program" loans made under the CARES Act, which was previously discussed here. Borrowers with existing SBA 7(a) loans should contact their current SBA lender to learn more about this opportunity.

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 speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

CARES ACT PROVIDES FORGIVABLE LOANS TO SMALL BUSINESSES

The CARES Act allows small businesses to receive forgivable loans of up to $10,000,000 to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses. This article summarizes the key provisions relating to the forgivable loan program, including the eligibility, use, and forgiveness requirements.

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic.

Eligible Borrowers

The CARES Act loan program covers any business, nonprofit organization, veterans' organization, or Tribal business that employs 500 or fewer employees. Some employers with more than 500 employees may also be eligible if they meet certain criteria.

Loans under this program do not require collateral or personal guarantees.

Loan Maximum and Permissible Uses

The CARES Act provides for:

- A maximum loan amount of $10,000,000.
- The loan amount is the *lesser of*:

- 2.5 times the average total monthly payroll costs incurred over the past year (excluding any compensation over $100,000 for each employee who makes more than that amount on an annualized basis), or for seasonal employers, the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019;

plus the outstanding amount of any loan made under the Small Business Administration's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

- For businesses that were not in existence during the period from February 15, 2019 to June 30, 2019:

2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020 (excluding any compensation over $100,000 for each employee who makes more than that amount on an annualized basis);

plus the outstanding amount of any loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

    - $10,000,000.
    - Small businesses may, in addition to uses already allowed under the SBA's Business Loan Program, use the loans for:
    - Payroll costs;
        - **Including**: Compensation to employees, such as salary, wages, and commissions; paid leave, such as vacation, parental, family, medical, or sick leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; state and local payroll taxes; and compensation to sole proprietors or independent contractors (including commission-based compensation) up to $100,000 in one year, prorated for the period between February 15, 2020 and June 30, 2020;[1]
        - **Excluding**: Individual employee compensation above $100,000 per year, prorated for the covered period; certain federal taxes; compensation to employees whose principal place of residence is outside of the U.S.; and sick and family leave wages for which credit is allowed under the Families First Act;
    - Rent and lease agreement payments;
    - Utilities; and
    - Interest on any debt obligations incurred before February 15, 2020.

Loan Forgiveness

Loans made under the program may qualify for the CARES Act's broad loan forgiveness provisions. Indebtedness is forgiven (and excluded from gross income) in an amount (not to exceed the principal amount of the loan) equal to the following costs incurred and payments made during the eight-week period beginning on the date of the loan:

- Payroll costs, which include health insurance and retirement benefit payments;
- Interest payments on loans secured by a mortgage on real or personal property;
- Rent; and
- Utility payments.

The amount forgiven will be reduced based on (i) any employee terminations or (ii) reductions in salary or wages of any employee in excess of 25% during the eight-week period beginning on the date of the loan. Borrowers should be aware that detailed accounting and accurate recordkeeping will be critical during this period in order to take advantage of these loan forgiveness provisions.

If a loan is not forgiven, the loan's maturity date will extend up to 10 years from the date that the borrower applies to have the loan forgiven, and the maximum annual interest rate will be 4% per year. There will be no prepayment penalties.

Borrower's Application for a Loan

The loans will be available until June 30, 2020. An eligible borrower under the program applying for a loan must make a good-faith certification that:

- The loan is needed to continue operations during the coronavirus pandemic;
- The funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments;
- The applicant does not have any other application pending under this program for the same purpose; and
- From February 15, 2020 until December 31, 2020, the applicant has not received and will not receive duplicative amounts under this program.

The SBA is expected to provide further details on the application process in the next few days.

Permission from Borrower's Current Lender

A borrower will likely need permission from any existing lender to obtain this loan because many loan agreements restrict a borrower's ability to incur additional indebtedness.

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 speak to your regular

OCHDL contact, or the author of this article, attorney Jason Scoby.

[1]Due to recent guidance from the SBA, uncertainty exists as to whether borrowers can include payments to independent contractors when calculating payroll costs on their Paycheck Protection Program applications.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS SCOBY AND GAGAN AS SHAREHOLDERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Attorney Jason Scoby and Attorney Bob Gagan were recently elected as shareholders of the firm.

Mr. Scoby has been with the firm since 2009 and is a member of the firm's Business Practice Group and Banking and Creditors' Rights Practice Group. He advises and represents individuals, businesses, and banks on a variety of corporate, banking, and business-related issues, including mergers and acquisitions, commercial loan transactions, corporate issues, contract negotiation and preparation, and business entity selection and formation.

Learn more about Mr. Scoby by visiting his full profile.

Mr. Gagan has been with the firm since 2016. Bob is a respected Wisconsin business law attorney. He focuses his practice on corporate law and commercial litigation as well as municipal law. Mr. Gagan is a Past President of the State Bar of Wisconsin. He previously served as the Brown County representative on the State Bar Board of Governors and also served on the Board of Governors Executive Committee. Mr. Gagan is the co–founder of the Brown County Free Legal Clinic and continues to volunteer his time at this Free Legal Clinic.

Learn more about Mr. Gagan by visiting his full profile.

We are pleased to add both Jason and Bob as shareholders.

SEVENTEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State's attorneys and judges, seeking the State's top attorneys. The lists for 2017 were recently published and, once again, a large number of our attorneys are included thereon.

Dean Laing was named one of the Top 10 attorneys in Wisconsin for the third time. He was also named one of the Top 50 attorneys in Wisconsin for the twelfth straight year. In doing so, he is one of only six attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator in Wisconsin—to make the list all twelve years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named among the Top 50 attorneys in Wisconsin. This is the fifth time that Seth has made the list. Seth was also named one of the Top 25 attorneys in Milwaukee.

Doug Dehler, Jim DeJong, Pete Faust, Bob Gagan, John Gehringer, Joe Gumina, Greg Lyons, Greg Mager, Joe Newbold, Chad Richter, John Schreiber, Jason Scoby, and Steve Slawinski were also named Super Lawyers, a recognition given to the top 5% of attorneys in Wisconsin. Jim DeJong, Pete Faust, John Gehringer, and Greg Lyons have made the list for the past 10 or more years.

Erica Reib was also named Rising Stars, which is limited to 2.5% of the young attorneys in Wisconsin.

We are extremely proud of these recognitions, but even more proud of the quality of service we provide to our clients.