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There and Back Again: A Tax-Focused Tale of COVID Relief for Businesses

By Steven D. Nofziger and Peter A. Evalds, Foster Garvey PC

On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021 (CAA), which included the fourth major piece of relief legislation enacted by Congress in response to the COVID-19 pandemic. This article highlights some of the key features of this legislation for business owners and provides some background on prior COVID relief.

Prior Relief

Prior COVID-relief legislation included the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), both of which included numerous relief provisions for businesses.

The FFCRA required private employers with fewer than 500 employees to provide up to 80 hours of paid sick leave and 12 weeks of paid family leave to their employees for specified COVID-related reasons. To fund this benefit, it provided refundable payroll tax credits to employers. Employers were allowed a credit against their payroll taxes of 100% of the paid-leave costs. Paid leave was considered wages to the employee for income and payroll tax purposes, just as any other paid leave. The employer tax credits were considered income to the employer, for which the employer also received an offsetting compensation expense deduction, such that there was no net tax cost to the employer. These benefits were to expire December 31, 2020. The FFCRA allowed the U.S. Department of Labor (DOL) to promulgate rules to exempt employers with fewer than 50 employees.

As most business persons are aware, the CARES Act established the Paycheck Protection Program (PPP) loans, which are administered by the U.S. Small Business Administration (SBA). These loans were initially intended to allow qualifying employers to borrow an amount sufficient to fund several months of operating costs (payroll, rent, utilities, and business mortgage interest), and up to 100% of these loans were forgivable if used for qualifying expenses. The PPP was an enormously popular benefit, as it got cash into the hands of business owners to keep them afloat and allow them to keep employees on payrolls during the early days of the pandemic when many businesses were forced to close.

PPP loan eligibility was broad from the start. The program was open to businesses that qualified as small business concerns under the federal Small Business Act, had 500 or fewer employees whose principal place of residence was in the United States, or met SBA employee-based size standards for the industry in which they operated.

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Eligibility was not limited to for-profit corporations; tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code and certain tribal business concerns with 500 or fewer employees whose principal place of residence was in the United States were also eligible.

The PPP program was subsequently modified and expanded. One major sticking point was that the IRS came out with guidance stating that to the extent that a business owner received forgiveness of a PPP loan, the qualifying expenses paid with PPP loan funds were not deductible as ordinary and necessary business expenses. See IRS Notice 2020-32. This guidance came somewhat out of the blue and was a major blow to businesses, because they would effectively lose a tax benefit associated with their normal business operations and it would make their tax-return filings more complex. Business owners and tax practitioners were in an uproar about the IRS guidance and petitioned for the IRS to revoke it, or for Congress to clarify that PPP loan forgiveness was not intended to eliminate otherwise allowable deductions. Nothing happened immediately.

The CARES Act also provided for grants under the SBA's Economic Injury Disaster Loan (EIDL) program. Applicants for EIDL loans could also get an immediate $10,000 advance within three days of applying. These funds could be used for payroll costs and were not required to be repaid, regardless of whether the EIDL loan was approved. Thus, the advances effectively became grants of free money to business owners that applied for an EIDL loan, regardless of whether they actually received a loan. Because the legislation contained no express exclusion from gross income, grants that were not repaid would ultimately be considered income to the business owners under general tax principles. However, if an EIDL advance recipient also received a PPP loan, the amount of the EIDL advance reduced the PPP loan forgiveness amount.

The CARES Act also provided repayment assistance to certain borrowers of SBA Section 7 loans. This program provided funding for up to six months of principal and interest payments made on borrowers' outstanding loans.

The CARES Act also included an Employee Retention Credit (ERC) for private employers who did not take a PPP loan or take the paid family or medical leave credits under the FFCRA. The ERC provided a refundable payroll tax credit for 50% of qualified wages paid to employees during calendar quarters in which business operations were at least partially suspended due to COVID or in which gross receipts declined by more than 50% year over year. The credit applied to qualified wages of up to $10,000 per employee paid through December 31, 2020. However, employers with more than 100 full-time employees could only count wages of employees paid while not working (i.e., furloughed), while employers below that threshold could claim wages paid to all employees.

Additionally, President Trump used an executive order in August 2020 to allow employers to defer collection of the employee share of FICA taxes from employee paychecks during payroll periods from September 1, 2020, through December 31, 2020. Any deferred taxes would need to be withheld and paid from employee wages during the four-month period from January 1, 2021, through April 30, 2021—essentially doubling standard FICA withholding during the first four months of 2021. Due to the potential complications and liability for errors or nonpayment, many employers elected not to participate in this deferral program.

The Consolidated Appropriations Act

The CAA included a number of COVID-relief programs for businesses, including modifications to several of the foregoing programs.

CAA Section 286 extended the availability of the FFCRA paid leave credits for an additional three months. The employer credits are now available with respect to wages paid through March 31, 2021 (rather than for wages paid before December 31, 2020). Interestingly, the mandate to provide paid leave was not extended, but qualifying employers who provide it can still receive the credit.

Section 274 of the CAA allows employers that elected to participate in President Trump's payroll tax deferral program to extend the period over which they may withhold and remit the deferred employee taxes.

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These taxes may now be withheld and remitted throughout all of calendar year 2021, rather than the four-month period from January 1 through April 30. This will mean that employees' FICA withholdings would increase for the full year, but by a lesser amount. Businesses that elected to participate should work with their payroll departments and payroll providers to implement the change.

The big news is that the Consolidated Appropriations Act substantially modified and expanded the existing PPP loan program.

CAA Section 278 modified the EIDL advances under the CARES Act. It clarifies that the $10,000 advances are excluded from gross income and that otherwise-deductible business expenses paid with such funds are still deductible. It also clarifies that EIDL advances will not reduce the amount of available PPP loan forgiveness.The CAA contains similar provisions with respect to the repayment assistance received by borrowers of SBA Section 7 loans. According to IRS guidance, for any PPP loans where the SBA remitted a forgiveness payment to a lender that was reduced by an EIDL advance, the SBA will automatically remit a reconciliation payment to the lender for the EIDL advance amount, plus interest, and the PPP lender must either re-amortize the loan or advise the borrower that the loan was fully forgiven (as applicable).

The CAA substantially modified and expanded the CARES Act's ERC program in several ways. First, it extended availability of the credit through June 30, 2021 (from December 31, 2020). Second, beginning on January 1, 2021, the credit rate increased to 70% of qualified wages (up from 50%), and the limit on qualified wages increased to $10,000 per employee per quarter (up from $10,000 total per employee). Third, the threshold for the change in treatment of qualified wages increased from 100 to 500 full-time employees. Fourth, the requirement that an employer's gross receipts decline by more than 50% on a year-over-year basis is reduced to a decline of 20% for the employer to be eligible that quarter. Finally, Congress eliminated the limitation that disallowed the ERC if the employer receives a PPP loan. However, employers may still not "double dip" with respect to wages, as wages taken into account for ERC purposes do not count towards PPP loan forgiveness.

The big news is that the CAA substantially modified and expanded the existing PPP loan program.

First, in Section 276 of the CAA, Congress overruled the IRS's position that PPP loan forgiveness resulted in the disallowance of business-expense deductions. Taxpayers whose PPP loans are forgiven are allowed to claim normal business deductions with funds paid for by forgiven PPP loans. This is effective retroactive to the enactment of the CARES Act, so it applies to loans that have already been forgiven.

Second, the CAA also provided that the IRS can waive information-return reporting requirements for amounts excluded from income when a PPP loan is forgiven.

Third, in CAA Section 307, Congress directed the SBA to develop a simplified forgiveness application and approval process for loans of $150,000 or less. The application form will be limited to one page and will not require submission of supporting documentation (however, borrowers must still retain relevant records for four years).

Congress also expanded the PPP program for borrowers who have not yet applied for forgiveness. Section 304 of the CAA provides for four additional categories of non-payroll costs that are now eligible for forgiveness, subject to the limitation that non-payroll costs cannot exceed 40% of the total costs eligible for forgiveness. These new categories of eligible costs include:

- Software or cloud computing services that facilitate business operations
- Expenses relating to maintenance of sanitation, social distancing, or other worker or customer safety or personal protection equipment required to adapt business activities to comply with governmental COVID safety requirements (e.g., personal protective equipment, sneeze guards and other barriers, air filtration systems, expansion of drive-through or drive-up or outdoor capacity, etc.)
- Purchases of essential goods and supplies on purchase orders or contracts entered into prior to the start of the taxpayer's PPP loan covered period or, with respect to perishables, during the covered period
- Any uninsured property damage, vandalism, or looting incurred due to public unrest during 2020

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For borrowers who have not yet applied for forgiveness, Section 306 of the CAA also provides more flexibility in regard to the covered period under the PPP. Rather than being forced to use either an eight-week or a 24-week covered period for purposes of calculating covered expenses, PPP borrowers may now choose any length of covered period between eight weeks and 24 weeks in length, starting on the date of the loan disbursement.

Finally, CAA Section 311 permits certain small employers who had already received a PPP loan to take a "second draw" PPP loan. An employer is eligible for a second draw PPP loan if it:

- Employs no more than 300 employees per location
- Can demonstrate that it has used or will use the full amount of its first PPP loan
- Has a reduction in gross receipts of at least 25% in any calendar quarter of 2020 relative to the same quarter of 2019 (only applications submitted after January 1, 2021, are eligible to utilize gross receipts from the fourth quarter of 2020)

Borrowers may receive a second-draw PPP loan of up to 2.5 times their average monthly payroll costs during 2019 or the one-year period prior to the loan, up to a maximum loan amount of $2 million. The payroll cost multiple (but not the maximum loan amount) is increased to 3.5 times average monthly payroll cost for hospitality or food-service-industry borrowers (in NAICS Code 72).

Borrowers of no more than $150,000 may submit a certification attesting to the applicable gross receipts reduction. As with original PPP loans, second-draw PPP loans may be forgiven for payroll costs of up to 60% of the total loan amount and non-payroll costs of 40% of the total, and, as noted above, forgiveness of the loan is excluded from gross income and applicable deductible business expenses remain deductible.

As was the case with first-draw loans, the second-draw PPP loan application requires the applicant to certify that the loan is necessary to support the ongoing operations of the borrower due to current economic uncertainty.

Thus, applicants for second-draw PPP loans should maintain adequate documentation supporting the need for PPP funds as of the time they apply for the loan (e.g., financial reports, cash flow projections, management reports and analysis).

Finally, in an apparent nod to struggling restaurants, the CAA also provided that the 50% limit on the otherwise allowable deduction for business meals is suspended for meals provided by a restaurant during 2021 and 2022. Congress's choice of the phrase "by a restaurant" rather than the more limiting "in a restaurant" clearly is intended to allow for take-out and delivery service to qualify.

PPP changes announced by the Biden administration

As we were preparing to go to press, the Biden administration announced several changes to the PPP loan program designed to assist smaller and minority-owned businesses and sole proprietors. Businesses with fewer than 20 employees were given a two-week period (until March 9, 2021) during which they alone could apply for loans. This change was intended to allow these businesses a window to apply without larger firms crowding them out.

Other changes are intended to expand loan access to the self-employed and sole proprietors, including allowing these applicants to apply based on their gross, not net, Schedule C income. Loan amounts for these applicants had been based on their net income, which reduced loan amounts or, in the case of a net loss, excluded them entirely. Proponents of this change believe it will substantially assist minority-owned small businesses, which tend to be self-employed or sole proprietors, especially those who could not previously qualify due to having a Schedule C net loss.

Conclusion

Many of the CAA's changes are welcome relief to taxpayers and tax practitioners alike. Congress righted some wrongs, expanded some programs, and "loosened up" or clarified certain aspects of other programs. However, as with any change in tax law, the devil is in the details and seemingly small facts matter. The Biden administration is also acting to tweak existing relief programs to better assist small businesses. More relief programs will likely follow, given the administration's push for additional economic stimulus.

The various COVID relief programs are complex and often implicate multiple areas of the law, including employment law, tax law, SBA lending, and debtor/creditor law. Business attorneys and their clients should seek out assistance from other professionals when warranted. ◆

A nod and thanks to J. R. R. Tolkien from the authors for providing inspiration for the title of this article.

PPP Loans in M&A: Required Consents and Other Considerations for Keeping the Deal on Track

By Drea Schmidt and Ferdie Ruplin, Tonkon Torp LLP

Drea Schmidt and Ferdinand Ruplin are attorneys in Tonkon Torp's Business Department where they work with the firm's PPP task force and counsel clients on mergers and acquisitions, corporate finance, and securities-law matters.

For many small and mid-size businesses, the Small Business Administration's (SBA) Paycheck Protection Program (PPP) loans have been an essential lifeline during the COVID-19 pandemic, in particular because the loans can be forgiven. However, as the market for mergers and acquisitions rebounds, PPP loans are showing up as a novel and complicating issue in all M&A transactions, regardless of whether the transaction is structured as an asset sale, equity sale, or merger.

In anticipation of an M&A transaction, there are several steps that buyers and sellers should be cognizant of to keep deal timelines on pace and to ensure that all necessary consents have been obtained.

Expect PPP to be a negotiated deal point

In a transaction, the PPP loan will be a point of negotiation between buyer and seller. Sellers with PPP loans want to take advantage of the opportunity to have their PPP loan forgiven. Yet some buyers don't want the risk or hassle of a PPP loan, and will require as a condition of the deal that the loan be paid off at closing along with other debt. In that case, unfortunately, the seller loses the benefit of loan forgiveness.

However, sellers that have already spent their PPP loan proceeds and applied for forgiveness do have an option to retain the forgiveness benefit while also avoiding the need to obtain SBA consent to the transaction. Under SBA guidance, a PPP borrower does not need to obtain the SBA's consent for a change of ownership if the PPP borrower deposits the outstanding amount of the PPP loan in an escrow account with the borrower's lender. In this type of structure, the PPP loan is often treated as a retained liability (in an asset sale) or as excluded indebtedness (in an equity sale), and the seller and buyer agree that (i) the seller will deposit the outstanding amount of the PPP loan into an escrow account with the seller's lender, and (ii) the escrow funds will be released to the seller upon forgiveness of the loan to the extent forgiven by the SBA.

This allows the seller to capture the value of the forgiven amount without requiring the buyer to take on additional risk. Furthermore, eliminating the need for SBA consent provides a significant benefit because the process for obtaining SBA consent could add months to the timeline, as discussed in further detail below.

Be prepared for buyer diligence on PPP loans

Sellers should expect buyers to conduct detailed due diligence on their PPP loans. Buyers will be keenly interested in eligibility, necessity, use of funds, and any forgiveness reductions. Sellers should make sure that they keep meticulous records of all expenses paid with PPP funds, and that they are tracking amounts spent on payroll versus non-payroll costs. PPP borrowers who have been more lax on their recordkeeping should put their records in order before the diligence process gets started to avoid any surprise issues. Detailed recordkeeping will also help sellers avoid any hiccups in the loan forgiveness process.

Understand required consents and talk with your PPP lender early

Securing the required consents of the PPP lender and the SBA to a transaction is another major consideration. The SBA's guidance requires PPP borrowers planning a "change of ownership" to notify their lender in writing of the proposed transaction and provide a copy of the transaction agreements prior to the closing of any such transaction, regardless of whether SBA consent is also required. Under the SBA guidance, a "change of ownership" is deemed to have occurred in one of the following three instances:

- At least 20 percent of the common stock or other ownership interest of the PPP borrower (including a publicly traded entity) is sold or otherwise transferred, whether in one or more transactions, including to an affiliate or an existing owner of the entity

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PPP loans in M&A

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A PPP loan adds complexity to an M&A transaction, but it need not be an insurmountable obstacle.

- The PPP borrower sells or otherwise transfers at least 50 percent of its assets (measured by fair market value), whether in one or more transactions
- The PPP borrower is merged with or into another entity

Furthermore, unless the seller escrows the outstanding amount of the PPP loan (as described above), then the seller will also need to obtain SBA consent, which has significant implications for the transaction timeline. The SBA has 60 days to respond to any request for consent, which in itself entails significant documentation requirements. For these reasons, most parties who wish to keep a PPP loan in place should opt for the escrow approach.

Even if SBA consent is not required, most M&A transactions will require a seller with a PPP loan to obtain consent from their PPP lender if the parties wish to keep the PPP loan in place. When time is of the essence, the parties can attempt to avoid delays by proactively engaging with the PPP lender early in the transaction process.

Keep in mind that the transaction will not eliminate liability for a PPP loan

Sellers should be aware that under SBA rules the original PPP borrower remains responsible for all PPP obligations, as well as the certifications it made in its initial loan application. In addition, buyers will typically require sellers to make representations and warranties about the accuracy of the statements and certifications the seller made in its PPP loan documents, and sellers will generally have an obligation to indemnify the buyer in the event of a breach of such representations and warranties.

A PPP loan adds complexity to an M&A transaction, but it need not be an insurmountable obstacle. With careful planning, attorneys can strategically structure a transaction that allows the seller to realize the benefits of forgiveness, minimizes buyer risk, and gets the deal done on a reasonable timeline. ◆

OSB News

Board of Governors Election

The Oregon State Bar is currently seeking candidates for the Board of Governors election. The Board of Governors governs the bar, determines the general policies of the bar, and approves its budget each year. It consists of fifteen lawyers elected from eight regions, four public members appointed by the board, and the non-voting position of Immediate Past-President. There are three vacant seats open to active bar members:

Region 2 (Lane County): One position
Region 5 (Multnomah County) : Two positions

Candidate statements are due by May 11.

Frequently Asked BOG Election Questions

Unemployment Scam

Numerous OSB members report that unemployment claims have been filed under their names with the Oregon Employment Division. Most discovered the scam through emails or letters to their employers referring to these claims. If you believe you may have been a victim of this scam, please file a report with the Employment Department.

Step One: Know Your Client

By David J. Elkanich and Calon N. Russell, Holland & Knight LLP

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Calon Russell is an associate at Holland & Knight, LLP. He represents lawyers and law firms in both transactional and litigation matters, including: law firm succession planning; partnership disputes; law firm formation/ dissolution; fee disputes; lawyer mobility; lawyer disciplinary proceedings; disqualification motions; and risk management—including managing conflicts of interest.

The first question you as a lawyer should be prepared to answer when faced with a Bar complaint, malpractice suit, or disqualification motion is: Who is the client? That question is important because the vast majority of an attorney's duties flow only to clients. Some cases, therefore, can be defended with the very simple "not my client" defense. However, a surprising number of lawyers have difficulty answering this question—especially corporate lawyers.

The attorney-client relationship usually starts off simply enough: representing a corporate entity on a discrete issue. But then officers, directors, and employees starting asking for advice. Or issues arise involving parents, subsidiaries, or affiliates. Maybe part of the entity gets spun off or the company merges into a new entity. Then who is the client? Is the new entity entitled to the work you did (i.e., the privileged communications or work product generated) before the merger? If your work is completed before the merger, could the new entity be considered a former client for conflicts purposes?

These are difficult questions, but there is a simple solution: make efforts to define who the client is and is not. An engagement letter (or similar document) that clearly spells out who is—and is not—the client will resolve this issue much of the time. There is no rule against saying, for example, that the firm only represents the entity and not its affiliates—or, instead, the firm represents all of the affiliates. Similarly, a merger or spin-off transaction can—and generally should—address whether and to what extent the attorney-client relationship (along with the attorney's files) will transfer to the new entity.

Absent clear documentation, however, these issues become very complex, and determining who is and is not a client is often a very fact-specific inquiry. See *In re Weidner*, 310 Or. 757, 801 P.2d 828 (1990), which sets out a test for the putative client. In the corporate context, as noted above, the main issues the lawyer will face involve corporate constituents, corporate affiliates, and successor entities.

Corporate constituents

Most lawyers are aware of the risk of inadvertently forming an attorney-client relationship with an individual constituent of a corporate client. The risk is ever present because all that is needed to form such a relationship is a client who has an objectively reasonable (and subjective) belief that a relationship exists. See *Weidner, supra*. By its nature, this issue requires corporate lawyers to continuously be on the lookout for individuals who might have the wrong impression and to correct any misimpressions. Oregon Rules of Professional Conduct (RPC) provide guidance. RPC 4.3 states that a lawyer shall make reasonable efforts to correct any misunderstanding of an unrepresented person when the lawyer knows or reasonably should know of the misunderstanding. RPC 1.13(f) states that a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Corporate affiliates

The importance of clearly identifying corporate clients is especially pronounced for large law firms because there are multiple lines of thinking in regard to determining when representation of an entity results in representation of its affiliates.

In 1995, the ABA issued an ethics opinion (Formal Op. 95-390), which took the position that lawyers presumably do not represent an entity's affiliates. See also ABA Model Rule 1.7, Comment 34, stating in part, "A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." However, that was a highly controversial opinion with multiple dissents, and in the end it still does not provide definitive answers.

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Some courts take the position that an affiliate is not a client unless it is essentially an alter ego of the primary client. See, e.g., *Brooklyn Navy Yard Cogeneration Partners, LP v. Superior Court*, 70 Cal. Rptr. 2d 419 (Ct. App. 1997). Others take a substantially less restrictive approach. For example, a recent and often cited case from the Second Circuit looked at multiple factors, including financial interdependence and operational commonality (including shared legal departments). See *GSI Commerce Solutions, Inc. v. Babycenter, LLC*, 618 F.3d 204, 2010 WL 3239436 (2d Cir. 2010).

These cases demonstrate that, absent clear documentation, a lawyer who engages with a corporate entity may be inadvertently engaging with several affiliated entities. The best way to mitigate this risk is by addressing it at the outset. Absent that, the maxim "better late than never" applies. Asking a client to clarify an engagement mid-representation can be an awkward conversation, but it is usually a worthwhile one.

Successor entities

Determining the effect of a corporate transaction on the attorney-client relationship is one of the most complex issues that comes up in this arena. The seminal case involving this issue is *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 (1996). In *Tekni-Plex*, a law firm represented an entity (old entity) in a merger. The new entity then sued the owner of the old entity and the firm represented the owner. The new entity successfully disqualified the firm by arguing that the new entity was a former client of the firm.

Unsurprisingly, case law regarding this type of issue is not uniform, but the lesson corporate attorneys should take from *Tekni-Plex* and similar authorities is that there is a strong likelihood that a successor entity will effectively inherit the attorney-client relationship. That means the successor may inherit the firm's files and the ability to sue or disqualify the firm. There are many ways to mitigate this risk, including by addressing it in the corporate transaction documentation itself and/or by structuring the transaction as an asset sale. Indeed, simply being aware of this issue will put many corporate attorneys ahead of their peers.

Conclusion

Corporate lawyers should always be cognizant of whom they do and do not represent. In addition, lawyers should also document. Those simple steps can mitigate a significant amount of risk, and sometimes provide simple defenses for what otherwise could turn into extraordinarily complex issues. ◆

Corporate lawyers should always be cognizant of whom they do and do not represent.

Electronic-Signature Enforceability in Oregon Contracts

By Nic Mayne, Miller Nash Graham & Dunn LLP

Nic Mayne, a business attorney with Miller Nash Graham & Dunn, focuses on reviewing, drafting, and negotiating a wide variety of contracts for corporations, limited liability companies, partnerships, and joint ventures. Nic also works with business owners and executives on formation and equity-financing issues, and assists buyers and sellers with various aspects of merger and acquisition deals.

Electronic signatures (e-signatures), while not a new invention, have been a subject of renewed interest during the novel coronavirus pandemic. More than ever, contract parties are conducting business online, and some clients (and attorneys) may be working with e-signatures for the first time. Fortunately, contracts signed this way are valid in most situations in Oregon under applicable state and federal law.

Validity of e-signatures under federal and state law

In 2000, the United States enacted the Electronic Signatures in Global and National Commerce Act (E-SIGN Act). 15 U.S.C. § 7001-7031. The E-SIGN Act solidified the legal status of electronic signatures, providing that in "any transaction in or affecting interstate or foreign commerce," related signatures, contracts, and other records may not be denied legal effect, validity, or enforceability solely because the signature, contract, or record is in electronic form or an electronic signature or electronic record was used in formation of the contract or record. 15 U.S.C. § 7001(a).

At the state level, Oregon adopted the Uniform Electronic Transactions Act (UETA) in 2001. ORS ch. 84. Similar to the E-SIGN Act, UETA provides that signatures may not be denied legal effect or enforceability solely because they are in electronic form, and also provides that if a signature is required by law, an electronic signature satisfies the law's requirement. However, UETA applies solely to transactions where all involved parties have agreed to conduct the transaction by electronic means. ORS 84.013(2). To support the applicability of UETA to a contract, many agreements include a provision expressly stating that electronic signatures will have the same effect as manual signatures.

Accordingly, e-signatures have been available for contracting parties in Oregon to use for more than 20 years. While the pandemic has increased the utility of e-signatures and signature collection applications like DocuSign, the enforceability of e-signatures has not changed.

When are manual "wet-Ink" signatures required?

There are certain limited contexts where a manual signature is still required. Neither the E-SIGN Act nor UETA applies to wills, codicils, or testamentary trusts; and the E-SIGN Act similarly excludes family-law matters such as adoption and divorce. In addition, the E-SIGN Act does not supersede the Uniform Commercial Code (UCC), as adopted by any state, except UCC 1-107 (Captions), 1-206 (Presumptions), and Articles 2 (Sales) and 2A (Leases). In line with the E-SIGN Act, ORS 84.007(2) provides that UETA does not apply to transactions governed by the UCC, other than ORS Chapters 72 and 72A. The E-SIGN Act also excludes official court documents, certain notices of cancellation or termination, and documents accompanying hazardous or dangerous materials.

Neither the E-SIGN Act nor UETA requires a wet-ink signature on promissory notes. Because the UCC deems promissory notes negotiable instruments, there is legal significance to having possession of the original signed note, particularly when attempting to enforce the note. Both the E-SIGN Act and UETA address this issue by allowing e-signed notes to be categorized as "transferable records," which requires the creators of the note to establish a control system to maintain an authoritative copy of the note, create a system for tracking and marking transfers of the authoritative copy, and also track and label non-authoritative copies. Accordingly, parties may choose to collect manual signatures on notes to avoid the added administrative burden.

Additionally, though documents signed electronically may be legally valid, manual signatures may be required for certain recordable documents. This applies to recordable real estate documents in some jurisdictions through adoption of the Uniform Real Property Electronic Recording Act (URPERA).

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Electronic signatures

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However, Oregon has not yet adopted URPERA. Oregon does allow for recording of electronic images of certain instruments, if the person presenting the instrument certifies that the instrument or original from which the image was made contains original signatures. ORS 93.804.

Remote online notarization in Oregon

While e-signature laws haven't changed, Oregon's omnibus relief bill did affect remote notarization. HB 4212 established a pilot program allowing for notarial acts to be performed by a commissioned Oregon notary public using "communication technology," meaning electronic devices or processes that allow a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound. In order to perform a notarial act remotely, the notary must:

- Have received approval from the Oregon Secretary of State to perform Remote Online Notarization
- Have personal knowledge or satisfactory evidence of the identity of the remote individual through knowledge-based authentication, and using identification that meets the requirements of ORS 194.240
- Be reasonably able to confirm that a record before the notary is the same on which the remote individual signed or made a statement
- Be located in Oregon at the time of the notarial act (the signer, however, can be located within or outside Oregon)
- Create an audiovisual recording of the act

For internationally-located individuals, there are additional recordation requirements; however the identification requirements of ORS 194.240 remain the same.

Potential issues with electronic signatures

While the E-SIGN Act and UETA provide that the electronic nature of a signature alone does not impact validity, other challenges to e-signatures remain. If, for example, an e-signature is affixed on an entity's behalf by an individual who does not have signing authority, the entity could challenge the binding effect of the signature. While similar signature verification issues exist with manual signatures as well, it is important for contracting parties (and legal counsel) to confirm proper authority for an e-signature, which may be less apparent when conducting business remotely as opposed to in person.

Another potential issue is determining what constitutes an e-signature. The E-SIGN Act provides that an electronic signature can be a sound, symbol, or process, and must be both: (i) attached to or logically associated with a contract or record, and (ii) executed or adopted with intent to sign. Courts have reached differing conclusions, however, on whether an automatic e-mail signature block meets these requirements. See, e.g. *Khoury v. Tomlinson*, NO. 01-16-00006-CV, (Tex. App. Dec. 22, 2016). The same issue could be present where a contract is allegedly formed through text or messaging app exchanges.

The increase in use of e-signatures and electronic documents is a welcome removal of barriers to conducting business remotely, particularly in an environment where in-person contact is discouraged. However, legal counsel should be aware of potential challenges to the basic contract elements of offer, acceptance, and capacity arising in cases involving e-signatures, and consider appropriate contract provisions, disclaimers, or signature confirmation processes to preempt potential arguments unique to digital documents. ◆

This Article is the First in a Series

The miscellaneous contract provisions of common business, commercial, and real-estate agreements are often copied from earlier agreements. When disputes arise, these overlooked provisions can determine the fate of a transaction. If not closely examined in the context of every agreement, they can provide grounds for litigation or threats of litigation.

Beginning with this issue, *Oregon Business Lawyer* will provide a series of articles on essential "boilerplate" provisions, with an emphasis on reducing risk.

2021 Business Law Section Subcommittees

Co-Chair Emily Maass

Co-Chair Kara Tatman

Legislative

The subcommittee includes Executive Committee members James Hein, Genny Kiley, Brian Jolly, Jennifer Nicholls, Charmin Shiely, and Michael Walker.

In addition to the Section's involvement in the Oregon Laws Commission's review and update of the Oregon LLC Act, the Legislative Subcommittee works with the Bar's public affairs group to monitor proposed legislation that may affect Section members or their clients. The subcommittee also periodically considers whether to propose legislation, for example, to address issues Section members have identified in the current ORS Business Organizations statutory provisions.

If you are interested in serving on the Legislative Subcommittee, or have comments or suggestions on pending or possible business law-related legislation, please contact Emily or Kara.

Chair Jeff Tarr

Newsletter

Members or the subcommittee are Adam Akin, Jay Brody,Timothy Crippen, Stephanie Davdson, James Hein, David Malcolm, Wendy Beth Oliver, Scott Rennie, Meghan Williams, and Michael Walker.

The subcommittee meets monthly with a freelance editor to identify topics and potential authors. Members review articles for content and submit comments and questions to the editor for follow-up with the authors.

Those interested in joining the committee should contact Jeff Tarr.

Chair Joe Cerne

New Business Lawyers

The subcommittee includes Angie Burcham, Kristie Cromwell, Stephanie Davidson, Emily Dougherty, Mia Getlin, Will Goodling, Cody Gregg, Mick Harris, Kaci Hohmann, Justin Howe, Levi Johnston, Amanda Loupin-Bartlett, Mark McCarter, and Scott Rennie.

The subcommittee supports new business lawyers engaged in transactional business practice, through outreach efforts and (virtual) networking events. The subcommittee works with the three Oregon law schools to identify students who show outstanding potential to contribute to the Oregon business-law community. The subcommittee then recommends candidates for the Section's annual law-student scholarships.

Anyone interested in supporting or joining the subcommittee can reach out to Joe Cerne.

Continuing Legal Education

Chair Tyler Volm

The CLE subcommittee organizes the Section's annual fall CLE program and periodic single-topic seminars.
Those interested in participating in this subcommittee should contact Tyler Volm.

Outreach

Chair Brian Jolly

The Outreach subcommittee expands the network of the Section to professional communities in the Portland metropolitan area and statewide. The subcommittee also organizes the annual planning retreat for Executive Committee members. Those interested in participating in this subcommittee should contact Brian Jolly.

From the Executive Committee

The Business Law Section has joined many other OSB sections in support of the Lawyers' Campaign for Equal Justice. We received the following thank-you letter:

On behalf of CEJ, I want to thank you again for the Business Law Section's recent donation of $1000! Your generous support will have an incredible impact on our ability to support legal aid programs throughout the state. Given the unprecedented impact of the pandemic, our most vulnerable Oregonians have been left to defend for themselves on several fronts. With your financial contribution, we can help ensure those that need legal aid assistance are able to receive it. Your Section is helping to make a difference this year, and for that we say 'thank you'; please extend our gratitude to all of your members!

Best regards,
Lois M. Smith, Associate Director
Lawyers' Campaign for Equal Justice

Job Postings

Sussman Shank LLP

Sussman Shank LLP, a mid-sized, full-service law firm in Portland, has the following positions open.

Business Transaction Attorney

The firm has an immediate opening in its business practice group for an attorney with 6 to 15 years of experience to handle a broad range of business transactions (e.g., mergers and acquisitions, sales and purchases of real estate and business operations), real and personal property based financing, business formations, and general corporate work. IP, tax, securities, land use or environmental law experience a plus. The position requires strong academic credentials and excellent written and oral communication skills. An ideal candidate has the capacity for and shows dedication to business and practice development.

Employment Attorney

The firm has an immediate opening in its litigation practice group for an employment law attorney with 8+ years of experience.

Candidate must be able to provide advice and guidance to employers of all sizes in multiple industries with respect to :

- Employee discipline and termination
- The Family Medical Leave Act, Oregon Family Leave Act and Washington Paid Family and Medical Leave Act
- Federal and Oregon disability laws (ADA and Oregon equivalent)
- Oregon and Washington sick leave laws
- Employee handbooks, policies, and appropriate and effective employee documentation
- Harassment and discrimination investigations
- Wage and hour issues
- Employee classification (exempt/non-exempt, employee/contractor)
- Severance and Separation agreements
- Workers compensation discrimination
- Retaliation, whistleblowing, and wrongful termination
- Issues related to competition and solicitation
- Trade secret protection and confidentiality
- Work for hire and protection of Intellectual Property
- Executive compensation
- Employment agreements

The successful candidate should also have experience in all aspects of litigation and administrative charge work, including preparing position statements, evaluating claims, negotiating private settlements, handling mediation, taking depositions, engaging in motion practice, and preparing for and taking cases to arbitration and trial (with assistance from members of our litigation group).

Please address cover letters and resumes to our Chief Operating Officer, Steven T. Seguin. Visit Sussman Shank's website for information on the firm and its attorneys at www.sussmanshank.com.

Office of General Counsel Network

Commercial Contract Attorney

OGC Network provides general counsel services to organizations, and also helps them add capacity to existing in-house legal teams. We have developed an independent network of attorneys with expertise in most areas typically addressed by in-house counsel, and our model best suits attorneys who have both law firm and in-house experience and are looking for flexibility while still having the opportunity to do high-quality and interesting work for great clients.

We are currently seeking attorneys with expertise in commercial agreements and, in particular, technology-focused agreements, including consulting agreements, Software as a Service) (SaaS) agreements, hardware and software procurement, including reseller agreements, technology licensing, and data privacy and security.

Generally, we are looking for attorneys with at least 5–7 years of experience, preferably with a large firm and/or in-house. We seek individuals who have the ability to evaluate issues from both legal and business perspectives, with a practical, business-oriented approach to problem solving and who have strong interpersonal skills. Our attorneys work independently with clients, which requires high professional standards and sound judgment. Work is generally remote, but may involve on-site presence at a client's office (when safe conditions permit). Most of our current clients are located in Oregon or Washington and we have a preference for applicants who are licensed to practice in one or both jurisdictions.

If you are interested in learning more, please send a resume or reach out to Eva Kripalani or Elizabeth Large.

Bryant, Lovlien & Jarvis

Municipal Law Associate

Bend's oldest law firm is seeking an associate attorney with 3-5 years of experience in municipal law. Qualified candidates must have strong organizational skills, as well as the ability to work independently and as a team member. The ideal candidate will be a self-starter, have strong academic credentials, and outstanding writing and interpersonal skills. We offer competitive salary and benefits, and the opportunity to work on challenging projects in a collegial work environment.

Business/Estate Planning/Real Estate Associate

The firm is seeking an associate attorney with 1-5 years of experience to work in its thriving and sophisticated business, real estate, and estate planning practice. Qualified candidates must possess an attention to detail, will be top one-third (1/3) of his or her law school class, have an interest in business, real estate, and/or estate planning demonstrated through law school course work or relevant experience. We offer competitive salary and benefits, and the opportunity to work on challenging projects in a collegial work environment.

To apply for either position, please submit cover letter, resume, and transcript with class rank to Laura Toftdahl, Bryant, Lovlien & Jarvis, 591 SW Millview Way, Bend, OR 97702 or laura@bljlawyers.com.

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.