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AS FEDERAL AID FOR THE GAMING INDUSTRY LAGS IN THE US, GAMING PROPERTIES PREPARE FOR EVENTUAL RE-OPENING

by Jennifer J. Gaynor, Gregory R. Gemignani, Kate C. Lowenhar-Fisher, and Jeffrey A. Silver

Over the past several weeks, we have seen the gaming industry scramble to gain inclusion in relief under the hastily passed Coronavirus Aid, Relief, and Economic Security Act of 2020 (“CARES”), including the Paycheck Protection Program (“PPP”).

CARES was designed to assist businesses and furloughed employees in their efforts to tread water until the pandemic crisis has passed. Much has already been written about this welcome relief in the form of Small Business Administration (“SBA”) loans for businesses which qualify as a “small business concern.”

THE GAMING INDUSTRY GETS SHUT OUT

As the gaming industry (both private and tribal) quickly learned, most had been shut out from these loan benefits because the law and Interim Rules as written exclude millions of gaming employees from the safety net provided by PPP.

Why was this business-salvaging program not available to the gaming industry? That is a question currently being asked by the American Gaming Association (“AGA”), the Association of Gaming Machine Manufacturers (“AGEM”), the National Congress of American Indians and many other organizations, tribal authorities and individual gaming operators.

On April 8, 2020, Bill Miller, the President and CEO of the AGA, sent a letter to President Trump regarding this “unintentional exclusion” in which he requested assistance to address the Interim Final Rules adopted by the SBA on April 2, 2020 (the “Interim Rules”). He stated, “Specifically, these interim rules rely on antiquated, discriminatory policy that renders small gaming entities ineligible to receive critical loan assistance designed to help small businesses pay their employees.”

The rules referenced were found in 13 CFR Section 120.110 which describes the businesses eligible for PPP and specifically excluded those “deriving more than one-third of gross annual revenue from legal gaming activities.” This provision is contrary to Section 1102 of the CARES Act which added a new section 7a to the Small Business Act that allows any small business concern to be eligible for PPP loans so long as size or monetary requirements (not more

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than 500 employees or maximum tangible net worth less than \$15 million and average annual net income (after federal income taxes), of not more than \$5 million, calculated using the two years preceding the application) are met.

TREASURY DEPARTMENT CLARIFICATION OFFERS LITTLE HELP

As of the date of this release, the Treasury Department and SBA have offered a “clarification” for businesses that receive revenue from legal gaming that wish to be considered for a PPP loan:

A business that is otherwise eligible for a PPP loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.110(g) is met or the following two conditions are satisfied: (a) the business’s legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business’s total revenue in 2019.

This clarification of the Interim Rules did little to assist small casino operators, including most tribal operations, whose revenue is derived primarily from gaming. The political and emotional battle lines are drawn for the inclusion of small casinos in the PPP and while a favorable outcome is still possible, a disappointed Bill Miller stated “Despite promising conversations with the administration over the last two weeks, this updated guidance falls woefully short of fully addressing antiquated, discriminatory policies that have, to date, restricted small gaming companies from accessing critical loan support made available through the CARES Act.” His hope would be that gaming can make its case in a subsequent funding.

Although the funds for the initial tranche of SBA funding were quickly exhausted, hope is on the horizon. News sources have reported that an agreement on a new \$470 billion federal stimulus package, which would include \$310 billion more for the PPP, is imminent.

OTHER INTERIM OPTIONS FOR GAMING COMPANIES

In the interim, The Pandemic Unemployment Assistance (“PUA”) law, referenced in Section 2102 of CARES, generally allows states that enter into an agreement with the Secretary of Labor (the “Secretary”) to pay up to 39 weeks of benefits to individuals who are not eligible to receive or who have exhausted their regular

unemployment compensation benefits and can meet the eligibility requirements described below. The costs of this new federal benefit program are 100% federally funded, but require the State to enter into an agreement with the Secretary in order to receive the funding for this program.

In Section 2102 of CARES (potentially applicable to the gaming industry employees, including part-time workers), an individual who is not eligible for regular unemployment compensation or extended benefits under State or Federal pandemic emergency unemployment compensation under Section 2107 of CARES, including a person who has exhausted all rights to regular unemployment or extended benefits, may be eligible for PUA relief. Section 2107 is emergency funding which expands unemployment compensation benefits to provide an additional 13 weeks of benefits if the individual remains unemployed after 26 weeks at a weekly rate of \$600 for that 13-week period).

In order to be eligible for PUA, the employee must provide a certification under oath that he or she is otherwise available to work, but they are unemployed because they have contracted the virus, a family member has contracted the virus and they have voluntarily self-quarantined, they are caring for children who must remain at home because of school closures, or the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency. If an employee can demonstrate he or she is a “covered individual” under PUA, the employee would be eligible for assistance for up to 39 weeks due to unemployment, partial unemployment or inability to work caused by COVID-19 beginning on or after January 27, 2020 and ending on or before December 31, 2020.

In general, the weekly benefit shall be the amount authorized under the unemployment compensation laws of the State where the covered individual was employed (except that the amount may not be less than the minimum weekly benefit amount described in section 625.6 of title 20, Code of Federal Regulations <https://www.govinfo.gov/content/pkg/CFR-2012-title20-vol3/pdf/CFR-2012-title20-vol3-sec625-6.pdf>).

The Secretary shall provide these supplemental funds to the State for distribution to the affected employees. Employers of affected employees should advise the furloughed or terminated employees to first file for regular unemployment benefits and, if such benefits are denied or have been exhausted, the employee should seek coverage under PUA. Under the law, the State is required to provide the employee a prompt determination and



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notification of appeal processes in the event PUA coverage is not granted. The PUA can also apply to self-employed persons provided they can meet certain eligibility certification standards.

Individuals who meet the following criteria are not eligible for PUA:

- a. Individuals who have the ability to telework with pay. When addressing issues about the availability of paid telework, the State must determine whether the claimant has been offered the option of continuing to work for pay by teleworking. If so, and claimants were offered to continue to work the same number of hours, claimants are not eligible for PUA.
- b. Individuals receiving paid sick leave or other paid leave benefits. If claimants receive such leave for their customary work hours, they are not eligible for PUA. The State must treat any paid sick leave or paid leave received by a claimant in accordance with the income restrictions set out in PUA at 20 C.F.R. 625.13.

Finally, there are several additional programs that were a part of CARES which the authors can discuss with your individual business. They include Economic Injury Disaster Loans ("EIDL") which are also available through the SBA through December 31, 2020. These loans can provide paid sick leave to employees unable to work due to the effect of COVID-19 and/or to meet increased costs to obtain materials that would be unavailable through traditional supply chains and pay obligations that cannot be met due to revenue losses. For those requiring immediate relief, an emergency advance of up to \$10,000 may be available.

LOOKING TOWARDS THE RE-OPENING OF GAMING PROPERTIES

As the hard-hit gaming industry burns through their reserves and gaming employees continue to face workforce reductions and furloughs, all eyes are looking worriedly towards the future. Reports suggest that the impact of COVID-19 will continue to be felt for many months to come. Given this reality, even after properties are allowed to re-open, the gaming industry as we know it will never be the same.

Indeed, in addition to the Nevada Gaming Control Board and Gaming Commission, Nevada gaming properties are paying

increased attention to a regulatory body that will have a large say in what taverns and casinos will look like when they re-open-Nevada OSHA. Members of the Gaming Control Board have provided that the Board will be looking to OSHA for guidance on workplace rules for when casino operations resume in Nevada. It is expected that the Board rules regarding re-opening procedures will be published soon, and it is expected that, much like the closing guidance published by the Board, the published guidance will in large part look similar to prior memos regarding post remodeling closures, with the inclusion of or reference to OSHA-directed requirements for social distancing and sanitization at gaming properties.

A review of the Nevada OSHA protocols that have been issued for essential businesses that are continuing to operate during the pandemic provides some guidance on what those OSHA requirements may look like. For example, the current guidelines include that essential business shall:

- Establish effective social distancing protocols, which ensure that staff maintain a 6 foot personal separation from other staff during meetings, discussions, or other job tasks.
- Prohibit gatherings of 10 or more people.
- Promote frequent and thorough hand washing, including providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
- Provide face masks to service runners who deliver ordered materials to curbside pick-up locations, attend to drive through windows, or any other immediately exposing tasks.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment with Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus.
- Provide sanitation and cleaning supplies for addressing common surfaces in multiple user mobile equipment and multiple user tooling. This guideline is recommended based on the specifics of a business's services and procedures.
- Maintain 6 foot separation protocols for labor transportation services, such as buses, vans, etc.
- Conduct daily surveys of changes to staff/labor health conditions. The Nevada OSHA is emphasizing the need for business leadership to be working with and aware of the health and well-being of its staff.



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- Ensure that any identified first responders in the labor force are provided and use the needed Personal Protective Equipment (PPE) and equipment for protection from communicable or infections disease.
- Provide access to potable and sanitary water

Although these guidelines apply to businesses that are open during the height of the pandemic and will certainly be scaled back for re-opening after the virus has run past its peak, they offer a look into the sorts of practices that will be required when gaming properties come back online. This is especially true when these are paired with the GCB Restrictions on Operations during COVID-19 Outbreak, which were issued on March 16, 2020, just prior to the total closure of the state’s gaming properties. These restrictions included that:

- There may be no more than three chairs at each table game.
- Each gaming machine must be cleaned and sanitized at least once every two hours.
- Patrons may not serve themselves from buffets that remain open. Similarly, employees may not serve themselves in employee dining areas.
- The gaming floor and other public areas of a licensee’s property must operate under the latest social distancing guidance from Nevada’s medical advisory team.

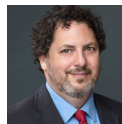
It is safe to say that the world-famous Las Vegas buffets and crowded casino floors will not be the same, at least not anytime soon. In the meantime, gaming properties are working hard to prepare for the new normal and to ensure they can get up and running as quickly as possible.

For further information, attorneys at Dickinson Wright can assist.

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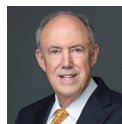
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