Borrowers Beware: Some CARES Act Loans Require a Union Neutrality Pledge

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The latest coronavirus stimulus legislation was signed into law on Friday, March 27, 2020. The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), provides more than $2 trillion in relief, making it the largest stimulus package in U.S. history. The CARES Act provides economic relief and stimulus in a number of ways including direct payments to most American adults, a waiver of penalties for withdrawal of up to $100,000 from employer-sponsored retirement funds, relief for student loan borrowers and more.

A central piece of the legislation is a broad, $500 billion lending program for states, municipalities and eligible businesses. These funds are allocated as follows: $4 billion for loans and guarantees for air cargo carriers; $17 billion in loans and loan guarantees for businesses critical to maintaining national security; $25 billion for the passenger air carrier industry; and the remaining $454 billion is for loans to states, municipalities, and qualifying businesses.

Within the $454 billion, the Treasury Secretary is directed to "endeavor" to create a program that provides liquidity to banks and lenders that make direct loans to businesses. The annualized interest rates of these loans may not exceed 2 percent. Mid-size employers, defined as those with 500-10,000 employees, may apply for these loans but should be aware they come with conditions for borrowers. For example, borrowers must make a "good-faith certification" that they will:

- Retain at least 90 percent of their workforce until September 30, 2020;
- Restore 90 percent of their workforce existing as of February 1, 2020 within four months of termination of the public health emergency caused by COVID-19;

- Refrain from offshoring or outsourcing jobs for two years after completing repayment of the loan; and
- Not pay dividends with respect to their common stock or repurchase their own stock.

Perhaps the most surprising condition of these loans is that borrowers must commit to not oppose union efforts to organize their workers. Specifically, employers must "make a good-faith certification that the recipient will remain neutral in any union organizing effort for the term of the loan." Loan terms can be up to five years under the program.

It is not entirely clear what "remain neutral" means. Some insight can be gained, however, from considering typical provisions in neutrality agreements unions frequently ask employers to sign. These agreements often include provisions such as:

- **Limitations on employer speech**. Employers are often prohibited from telling employees their perspective on unionization. As a result, employees end up only hearing one side of the story.
- **No Meetings**. Neutrality agreements typically prevent employers from holding mandatory meetings during employees' work day to discuss unionization, which further ensures that only one side of the story is told.
- **Access to Premises**. These provisions specify that, regardless of an employer's non-solicitation policies, union organizers may access the employer's premises in order to talk with employees about unionizing.
- **Card Check**. These provisions require voluntary recognition of the union if it presents signed union authorization cards from 50 percent of employees. Such provisions allow unions to bypass the certification processes of the NLRB, or state labor agencies such as Washington State's PERC. Card check is objectionable to most employers because it denies their employees the procedural fairness inherent in a secret ballot election.

The requirement in the new CARES Act for employers to "remain neutral" in the face of a union organizing campaign is in conflict with the principle expressed in Section 8(c) of the National Labor Relations Act (the "NLRA"), which generally allows employers to freely express their opinions regarding unionization. 29 U.S.C. §§ 151-169. Section 8(c) states:

The expressing of any views, argument, or opinion, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

The U.S. Supreme Court has stated that Section 8(c) of the NLRA "merely implements the First Amendment" by allowing employers to freely express non-coercive opinions regarding unionization. *NLRB v. Gissle Packing Co.*, 395 U.S. 575, 617 (1969). The Court went on to note

that, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union" so long as such expressions are non-coercive. *Id*. at 619 An employer may also "tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control," so long as such statements are not "threats of economic reprisal." *Id*. at 619.

Foster Garvey's Employment, Labor & Immigration attorneys will be following further adjudications of the new law, including the apparent conflict with the NLRA, and will provide additional insight as further guidance is offered.

Congress directed the U.S. Treasury Department to issue regulations to implement the new loan program by April 6, 2020. Foster Garvey attorneys will be paying close attention to these regulations and whether they define or clarify "remain neutral" in relation to union organizing campaigns. We will provide additional updates as more guidance is issued.

If you have any questions, please contact a member of Foster Garvey's Employment, Labor & Immigration team.