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Employment Law Note

March 2020 – "CARES Act Employer Loans" Edition

CARES Act Loans for Union and Non-Union Mid-Sized and Non-Profit Employers: Beware the Fine Print

By Matt Lynch, mlynch@sebrisbusto.com

As we shared with you in our March 28th Note ("*Congress Showers Employers with Loan Programs, Tax Credits, and Other Incentives to Retain Employees*"), new loan programs under the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") for mid-sized employers and non-profits come with significant strings attached for those employers wishing to participate in these new loan programs.

To recap, the CARES Act includes an authorization for the Treasury Department to provide up to $454 billion in economic stabilization assistance, including direct loans to mid-sized businesses and non-profits (defined as those with "between 500 and 10,000 employees") who require a loan to support their ongoing operations. The 854-page law imposes conditions on mid-sized and non-profit companies that participate in the program. Two of these conditions are worth noting for union and non-union employers. A third, though not specific to an employer's union status, impacts a core operational right of employers that is often a source of conflict with unions.

1. Requirement of Employer Neutrality During Union Organizing

The law requires loan recipients to remain neutral during any union organizing drive for the term of the loan. There is no explanation as to how such a requirement is related to the coronavirus emergency, but that can be said of many of the law's provisions. In addition, the United States Supreme Court has ruled that employers have a constitutional right to engage in speech related to union organizing, provided such employer speech does not contain threats. It is likely that the neutrality provisions of the CARES Act are unconstitutional, but it will take a lawsuit to generate a court decision invalidating this provision of the law.

2. Prohibition against "abrogating" a collective bargaining agreement

The law will not allow a loan recipient to "abrogate" a collective bargaining agreement for the term of the loan and for two years after repayment of the loan. It is unclear what this means, since most collective bargaining agreements can only be opened and terminated according to their terms. Employers considering bankruptcy and dissolution of their union contracts should take special note of this requirement, as should construction firms with 8(f) agreements that can end by unilateral employer action, and project labor agreements that end at the conclusion of construction projects. Consequently, mid-sized employers and non-profits should await further clarification from federal enforcement agencies on these

issues before securing loans under the new federal program.

3. Prohibition Against Outsourcing

Loan recipients—whether union or non-union—will not be allowed to subcontract work for the term of the loan and for the two years following repayment of the loan. For union employers, this requirement may conflict with labor contracts and with the National Labor Relations Act, so we will likely see further agency clarification and, perhaps, judicial review of this provision as well.

If you have any questions regarding these aspects of the CARES Act, you can contact Matt Lynch (mlynch@sebrisbusto.com) or Mara Vinnedge (mvinnedge@sebrisbusto.com).

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