Important Labor Law Implications Of Latest Federal COVID-19 Law

Insights
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Although the new Coronavirus Aid, Relief, and Economic Security Act (CARES ACT) contains important help for businesses, it also presents potentially significant labor issues for any mid-size company (500 to 10,000 employees) that receives direct loans under the Emergency Relief and Taxpayer protections portion of the Act. To receive a direct loan under the Act, a mid-size company must make a "good-faith certification" that it will comply with certain requirements listed in the CARES Act.

Among those certifications are two with significant labor implications. First, the company must certify that it will remain "neutral in any union organizing effort for the term of the loan." Second, a business must certify that it "will not abrogate existing collective bargaining agreements for the term of the loan [not to exceed 5 years] and 2 years after completing repayment of the loan."

Since regulations have yet to be promulgated, it is unclear the extent this legislation will impact covered employers' relationship with employees and unions. However, it is clear that the above requirements could have a significant impact on both.

"Neutral" To Organizing Efforts

The more troubling of the two required certifications is the requirement that an employer remain "neutral in any union organizing effort for the term of the loan" or else potentially jeopardize the loan. Wilma Liebman, who was the National Labor Relations Board's (NLRB's) Democratic chairwoman during the Obama administration, noted that the Act gives unions new targets for organizing drives and could "have an impact on a fair number of organizing campaigns."

Unions will almost certainly argue that the provision prohibits covered employers from taking any action whatsoever in response to a petition for representation filed by a union. Regardless of union arguments to the contrary, the term "neutral" in the context of organizing activity has traditionally been used to impose restrictions on employer conduct beyond those required by federal labor laws and regulations. Neutrality agreements typically vary depending on the terms reached by the employer and the union through bargaining or otherwise. A business agreeing to these new requirements could therefore limit the extent to which it may otherwise utilize its lawful "free speech" rights under these circumstances.

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For instance, remaining neutral might require an employer to refrain from providing facts about a union to employees, holding "captive audience" meetings addressing the risks of unionization, or taking other actions to fight against unionization. With that said, in many neutrality agreement situations, employers remain free to communicate with employees for purposes of explaining legal rights, the secret ballot process, collective bargaining, and the positive benefits enjoyed by employees without a union.

This neutrality requirement also conflicts with the Taft-Harley Act, which amended the National Labor Relations Act (NLRA). The Taft-Harley Act contains a "free speech clause," and balances an employer's right to free speech with employee rights to collectively address their terms and conditions of employment. Requiring an employer to remain "neutral" would presumably conflict with these provisions. How the NLRB (or ultimately the courts) address this conflict may significantly alter a covered employer's ability to respond to a union organizing campaign.

Non-union employers should always be looking for ways to demonstrate their commitment to a direct working relationship and the value that flows from that relationship. To accomplish this, they should regularly communicate with their workforce, proactively identify and resolve employee concerns, lawfully seek employee input, and genuinely demonstrate care and concern for their well-being.

Abrogation

Under the new loan requirement, a business must also certify that it "will not abrogate existing collective bargaining agreements for the term of the loan [not to exceed 5 years] and 2 years after completing repayment of the loan. The term "abrogate" is not defined in the CARES Act. Normally, the term is defined as: "to repeal or do away with; to evade a responsibility or duty." Applying that definition, the extent to which this certification restricts the collective bargaining relationship is not entirely clear. Presumably, by agreeing to this term, an employer certifies that it will not break a collective bargaining agreement (CBA).

Typically, both parties to a CBA may engage in midterm bargaining to request concessions or other changes. It is, however, unclear whether this practice will now be interpreted as "abrogating" a CBA. If applied literally, it could certainly be construed to preclude covered employers availing themselves of the opportunity to bargain for necessary CBA changes to keep them viable and competitive.

It is also unclear how this term will be interpreted if a CBA expires during the term of the loan. For example, an employer engaging in good faith bargaining over proposed changes to a renewed CBA could also be deemed to abrogate the loan by seeking those changes, let alone by unilaterally implementing the terms of last, best, and final offer once the parties have reached lawful impasse. While an employer's right to seek changes to a CBA and lawfully implement them at impasse should theoretically remain available undercurrent federal labor laws, the extent to which such lawful practices jeopardize a covered employer's covered loan status remain to be seen.

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Other Considerations

Many other aspects of this new law have yet to be resolved, and at this stage even the identity of the enforcing agency for these purposes remains unclear. Traditionally, the NLRB retains exclusive jurisdiction over such matters, with oversight from federal courts. The CARES Act, however, is regulated by the Treasury Department — an agency with practically no experience with interpreting labor law. At this point it is unclear if the Treasury Department will issue regulations regarding these requirements, but the ultimate arbiter of what constitutes "neutrality" and "abrogation" could significantly alter a covered employer's rights in these areas.

The scope of the remedy itself remains in question. The remedy for failure to comply with certifications is likely confined to rescission of the loan. However, it remains to be seen if unions could file unfair labor practice charges predicated on a violation of those certifications.

Conclusion

In sum, any mid-size business considering pursuit of a direct federal loan under the Emergency Relief and Taxpayer protections portion of the CARES Act needs to think about these issues now and how best to address them before accepting the loan. Before doing so, such employers are encouraged to consult labor counsel, and to have a firm contingency plan in place.

We will continue to monitor the situation and provide updates as new regulations and guidance is issued. In the meantime, be sure to subscribe to Fisher Phillips' Alert System for the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Labor Relations Practice Group. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus, our COVID-19 Guidance And FAQs For Unionized Employers, and our FP Resource Center For Employers, maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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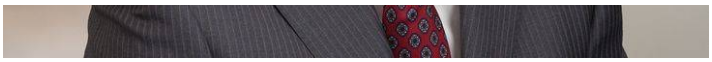

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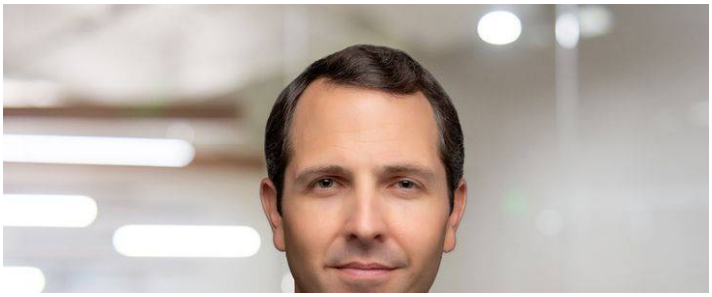

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