Unionized Covid-19 Loan Recipients Face Troubling Non-Abrogation Commitment

Insights
4.10.20

In an increasingly desperate business climate, thousands of businesses are expected to apply for emergency loans created by the Coronavirus Aid Relief and Economic Security Act (CARES Act) – but unionized employers may want to think twice before walking this path. Certain commitments necessary to secure these loans– including a commitment not to abrogate existing collective bargaining agreements – could impact your labor relations strategy well beyond the course of the COVID–19 emergency. Before applying, businesses are encouraged to read the fine print because the strings attached could have major ramifications. What do unionized employers need to know about this obligation?

There Are Always Strings Attached

Among other stimulus initiatives included in the Act, the Treasury Industry Stabilization Loan Program provides direct, low-interest loans to mid-sized businesses employing between 500 and 10,000 employees. These loans are obviously intended to offer immediate and substantial relief to employers faced with potentially massive business downturns resulting from COVID-19 "shelter in place" and other restrictions.

As a condition at certification, borrowers will be required to satisfy several key requirements. First, they need to preserve as many of their employees' jobs as possible by using loan money to pay for payroll, benefits, and other business necessities. Specifically, borrowers must commit to retain, or restore, 90% of all employees who were on their payrolls as of February 1, 2020.

While the primary thrust of this loan program is to get the economy up to speed as quickly as possible, Congress added other borrower commitments to the hastily fashioned legislation, several of which were lifted from the "wish list" of organized labor. Two are of particular significance to the labor law community. First, any company seeking these loan funds must certify that it will remain "neutral in any union organizing effort for the term of the loan." For a full discussion of this neutrality commitment, read our summary here.

For unionized employers, the second commitment in particular could seriously impact your future labor relations options and strategies. Buried on pages 523 and 524 of the massive statute is a troubling provision requiring borrowing employers to agree not to "abrogate existing collective bargaining agreement's" (CBAs) during the life of the loan – up to five years – and for an additional two years thereafter.

What Does "Abrogation" Mean?

It is important for unionized borrowers to fully understand what the non-abrogation obligation actually means. How might this limitation impact future rights in dealing with labor unions? After all, the word "abrogate" is not commonly used in collective bargaining or in discussions of employer and union rights under the National Labor Relations Act (NLRA).

In the absence of interpretive guidance providing clarifying definitions, one must first consult the common meaning of the word. Simply defined, "abrogate" means to "repeal or do away with" or to "evade a responsibility or duty." A broad reading of that term within the broader context of "existing collective agreements" suggests that it would prohibit loan recipients from repealing or otherwise doing away with their responsibilities under "existing" agreements.

Looking To The Bankruptcy Code For Guidance

Beyond its common definition, the term "abrogate" is often utilized in the context of bankruptcy proceedings. Indeed, use of this term may have been specifically intended to prevent employers from exercising rights currently enjoyed under the Bankruptcy Code.

Pursuant to existing bankruptcy law, businesses are generally free to reject or abrogate existing collective-bargaining agreements if they pursue bankruptcy for business reorganization purposes. Consequently, businesses seeking Chapter 11 relief typically turn to such relief as a measure of last resort for continuity purposes. But employers pursuing such relief must also comply with bankruptcy court mandates compelling them to attempt to bargain with incumbent unions over potential economic concessions before rejecting the CBA outright. Not every employer succeeds in that regard.

A Sword Rather Than A Shield?

Nevertheless, unions have long decried the use of any bankruptcy options for purposes of scuttling existing CBAs. Over the past several decades, organized labor has regularly pursued the introduction of legislation curtailing (or even eliminating) such measures. It is therefore reasonable to surmise that the primary intent of the no-abrogation commitment is to erode borrowers' rights before the bankruptcy courts. Cases from the National Labor Relations Board (NLRB) and elsewhere support such an interpretation.

If so, then this language goes a long way toward achieving that objective. Should a borrower move to "abrogate" an existing CBA pursuant to Chapter 11 proceedings during the loan period, the incumbent union could well raise the new CARES Act language as a sword in conjunction with a Motion in Opposition. If the court agrees, the employer may be forced to operate under a CBA that might have otherwise been set aside.

Labor Relations Implications Beyond Bankruptcy Proceedings

Although the intended target CBA appears to be employer bankruptcy rights, the scope of the no-abrogation language is far less certain with respect to other collective bargaining scenarios. It is certainly common for employers to pursue concessions as part of negotiations for renewed CBAs.

Depending on the extent of the COVID-19 crisis, businesses may require additional concessions when current CBAs expire. Will the prohibition against abrogating "existing CBAs" limit your ability to pursue those objectives (through "hard bargaining" and other lawful tactics)? At this stage, the answer remains unclear.

It can certainly be argued that the "no-abrogation" commitment should not impair existing employer rights under Section 8(d) of the NLRA for good faith concessions. While the right to reject CBA obligations in a bankruptcy setting contemplates unilateral action, collective bargaining generally entails a bilateral process. The good faith requirement, however, does not operate to preclude you from adhering to legitimate bargaining positions on proposed concessions.

Hard Bargaining vs. "Abrogation"

If you succeed in coaxing a reluctant union to agree on terms, then by definition you would not be unilaterally rejecting an "existing CBA." Although the NLRB is often the final arbiter, the concept of good faith is often in the eyes of the beholder. The "harder" the bargaining tactics, the closer the question.

As an example, if the parties reach a legal impasse in negotiations for a renewed CBA that has since expired, and the borrowing employer attempts to implement the terms of its last, best, and final offer, the union may attempt to raise the flag of unilateral CBA abrogation. The employer may counter by pointing to the absence of an "existing CBA."

Has the existing CBA actually been "abrogated" in its entirety under these circumstances, or does this simply constitute an example of lawful "hard bargaining?" By the same token, if a CBA has expired, can it be an "existing CBA" in the first place? The answers to these questions could alter the economic balance at the bargaining table for many borrowing employers going forward, but the CARES Act offers little if any guidance in its present form.

So Where Can We Turn For Answers?

Other than existing bankruptcy rights impacted by the no-abrogation prohibition, the full extent of the broader labor relations impact will likely be evaluated in the form of guidance from the Treasury Department that has yet to be issued, or through litigation before the NLRB and the courts. In the meantime, however, the potential threat to bargaining leverage for borrowing employers remains very real.

Unions are poised to exploit these threats and the surrounding uncertainty by pursuing relief from Treasury Department loan officials in the form alleged abrogation. Unions may also seize on the CARES Act language to press the NLRB for corresponding expansion of the concept of "bad faith" bargaining under these circumstances. Even if such efforts ultimately prove unsuccessful, the looming threat of loan cancellation alone – along with attendant interest or other penalties – could be sufficient leverage to shift the bargaining dynamics in the unions' favor.

Let The Borrower Beware

As the economic fallout from COVID-19 lingers, the prospect of bankruptcy relief could emerge as an increasingly attractive option for many mid-sized businesses. Those that are ineligible for Treasury Department sponsored loans may still access the Bankruptcy Code for relief of their CBA obligations

Unionized businesses contemplating the pursuit of additional relief through this particular loan program, however, may soon find themselves at the proverbial fork in the road. Some may ultimately choose the path of accepting loan proceeds and the corresponding restrictions on discharging their onerous CBA obligations in bankruptcy. Others may conclude that they are better off retaining their economic flexibility while pursuing other, less restrictive sources for business continuation capital.

Even for those unionized businesses that stop short of bankruptcy proceedings, the potential impediments on their strategic options at the bargaining table may send them in a different direction. At the very least, you should carefully weigh the financial benefits associated with this loan program against the potential pitfalls that come with accepting them.

Conclusion

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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