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Back to Basics: Managing Through COVID-19 with Traditional Labor Law | Part 5

This alert is the finale of our five-part series: "Back to Basics: Managing Through COVID-19 with Traditional Labor Law." For the full series, please click the PDF link on the left column.

Part 5: Issues Unique to Cares Act

Under the recently-enacted CARES Act, "mid-sized" employers (between 500 and 10,000 employees) can qualify for favorable loans. However, the loans come with some significant strings attached. For example, the employer must enter into a "good faith certification" agreeing to use the funds to retain at least 90 percent of its workforce at full compensation and benefits until September 30, 2020, and must restore its workforce to not less than 90% of its February 1, 2020, level and restore all compensation and benefits to its employees no later than four months after termination of the public health emergency. The employer must also refrain from outsourcing or offshoring jobs for the entire term of the loan plus two years after completing repayment of the loan.

Neutrality

As part of the "certificate of good faith", the employer must also agree that it will "remain neutral in any organizing effort for the term of the loan." The law does

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not define "neutrality" or give any guidance as to what activities may be engaged in by a targeted employer. Must the employer remain silent on the subject of unionization? Can the employer communicate with employees on the subject as long as the employer remains "neutral"? Can the employer distribute written or visual material on the subject? Can the employer provide factual, accurate information or answer employee questions on the possible impact of unionization on the employees' pay or benefits or job security? Can the employer communicate or campaign aggressively before an actual organizing drive is underway? Must the employer provide the union with employee personal contact information or access to the employees at the workplace? Can the employer hold group meetings or one-on-one discussions with employees about their rights?

The neutrality requirement certainly affects an employer's ability to communicate effectively with its employees on the important question of unionization, and it deprives the employees of valuable and necessary information to assist them in making their choice. For that reason, many believe that the neutrality requirement of the CARES Act may violate the First Amendment prohibition on laws that interfere with free speech.

Abrogation of Union Contracts

The CARES Act also requires that, as a condition for a favorable loan, the employer certify that it "will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan." As with the term "neutrality," the term "abrogate" is not defined in the Act, nor does the Act provide any guidance whatsoever as to the meaning and intent of the condition.

- Does this provision make it unlawful for an employer to violate the terms of an existing collective

bargaining agreement? If so, how is that different from an ordinary grievance or unfair labor practice allegation? Does the mere commission of a grievance act or unfair labor practice make the offending employer vulnerable to immediate repayment of the loan? Who will decide?

- Does this provision mean that the contract will remain a "bar" for the whole term of the loan plus two years to any decertification election or withdrawal of recognition even if to do so would deprive employees of their statutory right to remove the union as their representative or to change from one union to a different union?
- Does this provision mean that, when the contract expires and is being renegotiated, the employer cannot propose concessions or other less-favorable terms and conditions of employment than those in the expiring contract?
- Does this provision mean that, during bargaining, the employer cannot implement its proposals even if the parties reach a lawful impasse?
- Is the employer prohibited from seeking bankruptcy court approval to reject an onerous union contract?
- Is the employer prohibited from selling its business unless it requires the purchaser to assume the existing union contract?

While the CARES Act creates many desirable, even necessary, benefits for struggling companies, before agreeing to such a loan—indeed, before signing the required "certificate of good faith"—an employer should seek guidance to assure that it understands the terms and conditions attached to the loan, especially where so many of the conditions related to its workforce are steeped in uncertainty and vagueness.

Conclusion

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This summary of some of the implications of the COVID-19 pandemic is, by its nature, not meant to convey specific legal advice. Rather, it is meant as a brief attempt to highlight some of the most significant situations that may affect an employer's ability to make timely and meaningful decisions about the future of its business, especially in the context of its relationship with the union that represents its employees. It is meant to highlight the employer obligations to bargain with the union under normal circumstances while also underscoring the special obligations created by the COVID-19 pandemic and other extraordinary circumstances.

As issues created by the pandemic and by the specific provisions of the CARES Act further develop, we will attempt to update our thoughts and our guidance.

In the meantime, if you have any questions regarding labor and employment issues, please do not hesitate to contact Howard Bernstein, Gerald Golden, Jason Kim or your Neal Gerber Eisenberg attorney.

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