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Employment Question of the Day: April 13, 2020

Legal Update
04.13.2020

By Bridget R. Penick

Question

Does a loan under the CARES Act loan program limit an employer's right to oppose a union?

Answer

Yes. There are two conditions attached to a loan granted to a mid-sized business that require the business to give up certain rights under federal labor law. If the recipient of such a loan has between 500 and 10,000 employees, the recipient must make a good faith certification it will not 1) "abrogate existing collective bargaining agreements during the term of the loan and 2 years after completing repayment of the loan" and 2) it will "remain neutral in any union organizing effort for the term of the loan."

The part of the CARES Act that contains these union provisions is called the "Coronavirus Economic Stabilization Act of 2020." The program provides a total of up to $500 billion in loans, loan guarantees and other assistance to provide liquidity to businesses under economic duress because of the coronavirus. The union provisions are in a section dedicated to "Assistance for Mid-Sized Businesses." While the program contains many provisions favorable to business, including a two percent cap on the interest rate and no requirement to make principal or interest payments for at least six months, any business considering this program will have to weigh whether the cost of giving up its rights under the labor laws is worth the benefit of the loan terms.

Abrogate a Collective Bargaining Agreement

The CARES Act does not define the term "abrogate," so it is difficult to discern what it means in the context of the loan program. Even absent the loan program, an employer does not have the right to unilaterally abrogate, that is, repeal or do away with, an existing collective bargaining agreement (CBA). Any changes to an existing CBA must be bargained for. The risk is that an employer's request for concessions in an existing CBA could be construed as an effort to abrogate union rights or benefits.

Under this interpretation, an employer who promises not to abrogate a collective bargaining agreement gives up the right to bargain for better contract terms or to implement the terms of a last, best and final offer once the parties have reached lawful impasse.

An agreement not to abrogate a CBA may also limit an employer's rights in bankruptcy. The federal bankruptcy laws allow a debtor to reject certain contracts, including, in some circumstances, a CBA. The right to reject a CBA in bankruptcy can provide an employer needed leverage to persuade a union to negotiate concessions. In some cases, the terms of a CBA are a factor in the debtor's financial distress, and abrogating the agreement is essential to a reorganization. It is not clear the CARES Act overrides conflicting bankruptcy law, but the potential of giving up a recognized right in bankruptcy might be high price to pay for a government backed loan.

Remaining Neutral

Federal labor law protects an employer's right to oppose a union's organizing campaign. An employer is not allowed to say or do anything that might threaten employees who favor a union or coerce them into voting against it. But employers are permitted to communicate to employees their desire to remain union free, provide truthful information about employees' rights to vote against the union, and explain potential disadvantages of becoming a union member. An employer also has the right to tell employees how a union would change the relationship between employees and management. To remain neutral arguably means giving up those rights and allowing the union to run its campaign completely unopposed. Employees whose employer is neutral in a union campaign are, not surprisingly, more likely to vote in favor of the union.

Takeaways

In deciding whether to participate in the loan program of the Coronavirus Economic Stabilization Act of 2020, the costs of the union provisions should be carefully weighed along with the program benefits. Limiting the right to bargain for more favorable CBA provisions, not only while the loan is outstanding, but for two years after, could limit the long-term benefit of borrowing at favorable rates and repayment terms. Giving up the right to oppose a union organizing effort could have even longer-term consequences. Once a union organizes a workforce, it is very difficult to become union free in the future. An employer who participates in the loan program may have to deal with a union long after the loan is repaid.

It is uncertain whether the union provisions are enforceable. The government may not have the authority to compel an employer to give up basic rights under the National Labor Relations Act as a condition of participating in a loan program. The CARES Act program is regulated by the Treasury Department, which has no authority to interpret or administer the National Labor Relations Act, the law that governs collective bargaining. Undoubtedly there will be litigation over these provisions. In the

meantime, an employer receiving a loan will have to accept the risk it is giving up significant rights.

It is important to note that the CARES Act loan program to which these labor conditions attach is different than the Federal Reserve's Main Street Lending Program announced April 9. Although the Main Street Program is also authorized by the CARES Act, the Federal Reserve is developing the rules for the Main Street Program. At this time, it does not appear a loan under the Main Street Program will contain the same labor conditions as a direct loan under the CARES Act. Employers should consult with counsel before making the decision whether to participate in either program.

For more information, please contact your Fredrikson & Byron attorney.