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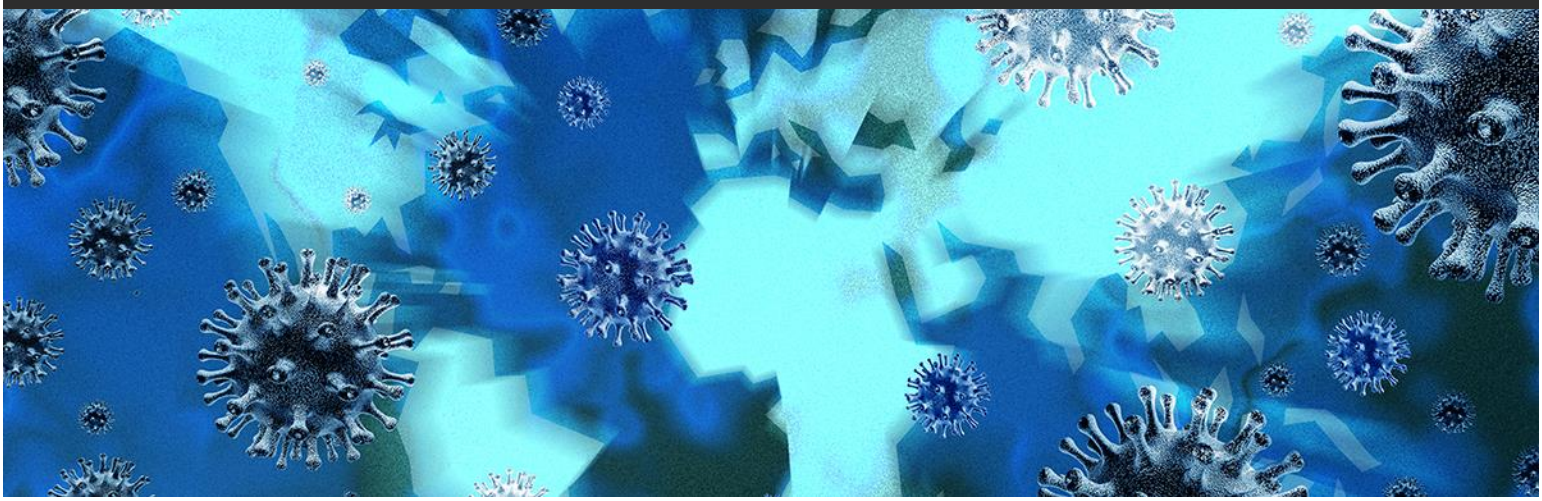
Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



March 27, 2020

Employers with 500-10,000 Employees: Some CARES' Federal Reserve Loans Will Require Committing to Labor Conditions

The newly enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act) stimulus legislation contains a number of provisions for loans to United States businesses. Under CARES, the Secretary of the Treasury is to "endeavor" [1] to implement a loan program to businesses employing between 500 and 10,000 employees on favorable terms – 2% interest and no payments for at least six months. If the Secretary's endeavors do lead to such implementation, employers considering applying for such loans should be aware of three requirements that will apply to businesses with unionized workforces and those with employee free choice concerns.[2]

First, under section 4003(c)(3)(D)(i)(VIII) of the CARES Act, the recipient must agree it "will not outsource or offshore jobs" for the term of the loan, plus two additional years after completing repayment. On the subject of maintaining jobs, subsection II requires the recipient to use the funds it receives "to retain at least 90 percent of the recipient's workforce, at full compensation and benefits, until September 30, 2020." And, subsection III provides the recipient must intend to restore 90 percent of its

[1] The CARES Act provides that the Treasury Secretary "shall endeavor to seek the implementation" of this program, meaning that 1) it is optional on the part of the Treasury Secretary to set up; and 2) businesses can elect whether to avail themselves of the program.
[2] The provisions of Section 4003(c)(2)(G) require maintaining certain employment levels as a necessary qualification for loans. Any employer seeking a loan through the CARES Act must ensure that its loan documentation meets these specific requirements.

workforce (and to restore compensation and benefits) that existed as of February 1, 2020, no later than four months after the termination of the public health emergency declared by the Secretary of Health and Human Services.

Second, under section 4003(c)(3)(D)(i)(IX) of the CARES Act, the recipient must agree it "will not abrogate existing collective bargaining agreements" for the term of the loan, plus an additional two years. (Section 4025, however, provides that a loan may not be conditioned on entering into a collective bargaining agreement).

Third, under section 4003(c)(3)(D)(i)(X), the recipient must agree to "remain neutral in any union organizing effort for the term of the loan."

Outsourcing generally refers to where and by what entity certain work will be performed.

"Neutrality" generally refers to the stance a company may take when a union seeks to organize its employees. Under Section 7 of the National Labor Relations Act (NLRA), employees have the right to join or not join a union, and under Section 8(c) of the NLRA, employers have free speech rights, even when an organizing drive is underway.

Beyond these general terms, the CARES Act, however, provides few specifics to guide businesses, and many questions will follow. For example, on outsourcing, does the term include the movement of production from one company-owned facility to another? Can portions of recipient businesses be sold?

"Neutrality" is often defined by a specific agreement with a particular labor organization. As to that issue: does the statute require that union organizers have access to company property, or that any union representational selection be by card check, as some union advocates urge and some neutrality agreements have provided? Or, will it mean that at some level of the company's organization, management may not speak against a particular union seeking to organize, but otherwise is free to respond to what a union may promise? Asked another way, under the CARES Act, may a neutral management educate employees, for example, about the process of collective bargaining? Does the neutrality language in the CARES Act require loan recipients to negotiate, compromise or forfeit those free speech rights as a condition of receipt of a qualifying loan?

There is no consensus or assurance as to what the term "abrogation of an existing collective bargaining agreement" (the CARES Act's third labor condition), means even in a non-COVID world.

This all brings up yet another issue: will the National Labor Relations Board (NLRB) be the body responsible for determining whether these particular loan covenants have been broken? Or will there be a judicial forum? And, if a judicial forum, will courts defer to the NLRB where the alleged conduct may also be an unfair labor practice?

For more information and updates on the developing COVID-19 situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019.

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