

Strings Attached: Accepting COVID-19 Financial Relief Could Limit Ability to Oppose Union Organizing

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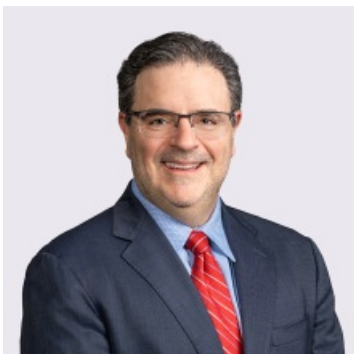
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Businesses that seek financial assistance under the Coronavirus Aid, Relief, and Economic Security (CARES) Act will be subject to several unique restrictions that could dramatically affect a company's future. While the pending legislation has the potential to provide unprecedented levels of financial relief to employers harmed by the coronavirus (COVID-19) pandemic, employers must consider the terms of that relief carefully before deciding to accept it.

The CARES Act, passed unanimously on March 25, 2020 by the U.S. Senate, provides more than two trillion dollars to states, hospitals, businesses, and individuals that have been affected by the COVID-19 pandemic. The pending legislation now moves to the House of Representatives, where the House plans to consider the legislation on March 27, 2020. The bill contains provisions that employers that intend to accept financial assistance under it should be wary of.

What's in the Legislation?

Under the Senate's version of the CARES Act, the federal government would provide \$454 billion in loans, loan guarantees, and other loan programs for eligible businesses, including nonprofit organizations. The Secretary of Treasury may create a loan program for mid-size companies, including non-profit organizations, that employ between 500 and 10,000 employees. Loans under this program would provide interest rates no greater than 2% and no payment due for the first six months of the loan.

Loans under this discretionary program would have stringent restrictions affecting labor relations. First, eligible businesses would have to remain neutral in any union organizing effort for the term of the loan. This could prevent eligible businesses from making any statements to employees about the risks of unionization that are normally protected under Section 8(c) of the National Labor Relations Act, including about the risks associated with collective bargaining and the possibilities of strikes. Employees who are unfamiliar with those topics would be more likely to favor union representation.

Second, an eligible business seeking a loan under this program must certify that it will not abrogate existing collective bargaining agreements or "outsource or offshore jobs" during the length of the loan and *two years after* the loan is repaid. These restrictions would affect a business's ability to subcontract work and would limit rights that are currently available to other companies with organized workplaces. They also could interfere with employees' ability to decertify a union as their representative.

For an eligible business to secure a loan, it must certify several conditions. An eligible business must certify that it will not re-purchase its own stock or the stock of a parent company for the duration of the loan term and for 12 months after the loan is repaid.

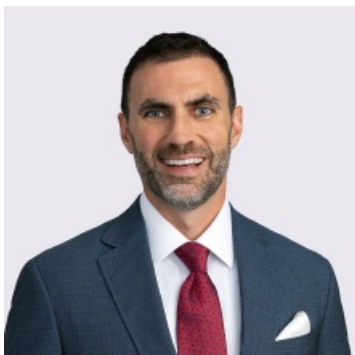
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Eligible businesses would not be able to issue any dividends to common stockholders for the same time period. Finally, no officer or employee of an eligible business whose compensation exceeded \$425,000 in 2019 would be permitted to receive more than their 2019 compensation in any 12-month period until one year *after* the loan is fully repaid. More stringent compensation limits apply to employees whose compensation exceeds \$3 million.

In addition, an eligible business also must certify that funds from the loan will be used to retain at least 90% of its workforce at *full compensation* until September 30, 2020. Eligible businesses must also restore its workforce to not less than 90% of the workforce that existed on February 1, 2020, and restore all compensation and benefits to the workers no later than four months after the Secretary of Health and Human Services terminates the ongoing public health emergency. These restrictions are designed to alleviate any of the immediate financial harm to employees that is connected to the COVID-19 pandemic.

It is not currently clear what penalties would apply for noncompliance; however, fraudulent misrepresentations on loan applications could subject borrowers to criminal liability and significant monetary penalties.

Implications

Companies are facing an unprecedented economic crisis. Therefore, when deciding whether to accept the financial support offered through loans under the CARES Act, employers should carefully consider the strings attached and seek legal advice on the impact the loans may have on their labor relations, among other considerations.

Please contact a Jackson Lewis attorney with any questions about this or other issues.