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Key CARES Act Mid-Sized Business Loan Programs Limit Executive Compensation, Protect Labor Organizing

Human Resources & Employment

A significant component of the sweeping \$2 trillion economic stimulus enacted on March 27, 2020, is a \$500 billion Exchange Stabilization Fund, whose intended beneficiaries include mid-sized businesses with less than 10,000 employees that have been impacted by the COVID-19 pandemic.

The Coronavirus Aid, Relief, and Economic Security Act (CARES) Act authorizes the U.S. Treasury Department and the Federal Reserve to create several relief programs using this fund, including a [mid-sized business loan program](#) and the [Main Street Lending Program](#) (MSLP), but the act also places several restrictions and requirements on businesses wanting to take advantage of these programs, including limits on executive compensation and protection of labor organizing.

We detail the various strings attached to these programs below, and we expect additional guidance to be issued in the coming days as further details about the programs are released.

Executive Compensation

Businesses seeking a loan or loan guarantee from either the MSLP or mid-sized business loan program must limit executive and employee compensation once the loan or loan guarantee starts and until one year after the loan or loan guarantee is no longer outstanding (the "Restriction Period").

The restrictions on compensation described below apply to mid-sized businesses with between 500 and 10,000 employees in any industry, as well as certain specialized industries including air carriers and contractors. (Note that these limits do not apply to those businesses participating in other CARES Act relief loan programs, such as the Paycheck Protection Program and the Economic Injury Disaster Loan program.)

The compensation restrictions include:

- No officer or employee of the business whose total compensation exceeded \$425,000 in calendar year 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020) may receive:
 - total compensation that exceeds such employee's 2019 calendar year compensation during any 12 consecutive months during the Restriction Period, *or*
 - severance pay or other benefits upon termination of employment that exceeds two times the employee's 2019 calendar year total compensation
- In the event an officer or employee of the business had total compensation that exceeded \$3 million in calendar year 2019, such officer or employee's compensation during any 12 consecutive months during the Restriction Period may not exceed:
 - \$3 million, *plus*
 - 50% of the amount by which such employee's total compensation for 2019 exceeded \$3 million

The CARES Act states “total compensation” includes salaries, bonuses, awards of stock and other financial benefits. What “other financial benefits” includes is unclear, and may be elaborated on in the forthcoming regulations.

Employers should consider the implications of the executive compensation limits *before* applying for a loan. For employers with existing employment or severance agreements in place, any conflicts that may exist between the existing agreements and compliance with the law should be addressed before participating in the program.

Labor Implications

In addition to the compensation limits, the CARES Act also requires businesses with between 500 and 10,000 employees receiving a loan under the MSLP or mid-sized business loan program to make a “good-faith certification” that it will comply with certain requirements listed in the CARES Act.

Two of those certifications may have a significant impact on labor law. First, the recipient must certify that it “will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan.” Second, a business must certify that it “will remain neutral in any union organizing effort for the term of the loan.”

As we await further guidance on the implications of these required certifications, it is clear these “good-faith certifications” could have a significant impact on these employers’ future relationships with unions and employees.

What is Abrogation?

Under the CARES Act loan restrictions, a business must certify that it “will not abrogate existing collective bargaining agreements [CBA] for the term of the loan [not to exceed 5 years] and 2 years after completing repayment of the loan.” As of now, the extent to which this certification will affect the collective bargaining process remains unclear. The CARES Act does not state whether midterm bargaining that parties to a CBA may engage in would be considered “abrogating” a CBA. Furthermore, it is unclear what this term may mean if a CBA expires during the term of a loan.

What is Neutrality?

Typically, neutrality agreements are entered into by an employer and a union, and provide that the employer would not oppose the union’s efforts to organize its employees. They can include such provisions as allowing the union to contact employees during work hours, allowing the union access to employee directories, and prohibiting the employer from saying anything negative about the union or unionization during an organizing drive.

Now, mid-sized businesses needing a loan under these two CARES Act programs are compelled to remain “neutral” for the entire term of the loan. This requirement would seem to directly conflict with the “free speech clause” of the Taft-Hartley Act, which amended the National Labor Relations Act, and provides that employers have the right to express their views and opinions about labor issues.

It remains to be seen if the regulations will provide any further guidance for employers who are required to remain “neutral.” The CARES Act is unclear on how a violation of the neutrality certification would play out – whether it would affect the loan and/or be considered an unfair labor practice. Clearly, though, requiring employers to remain neutral gives unions new potential targets for organizing drives.

As to the labor provisions, it also remains to be seen if the National Labor Relations Board, which traditionally has jurisdiction over such matters, or the Treasury Department, which has jurisdiction over the CARES Act, will be the enforcing agency.