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CONSIDERING A DIRECT LOAN UNDER THE CARES ACT? IMPORTANT CONDITIONS MAY APPLY REGARDING OUTSOURCING AND UNION NEUTRALITY

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act ("the Act"). The Act is intended to provide a multifaceted economic response to the COVID-19 pandemic.

Among the various other provisions in the Act, section 4003 of the Act specifically contains several Federal Reserve lending provisions for mid-size companies (employers that employ between 500 and 10,000 employees), including nonprofits. §4003(b)(4) of the Act authorizes the Secretary of the Treasury to create a loan program – for up to $454 billion (plus any funds remaining from other allocations[1]) for mid-size companies.

However, a company or non-profit that applies for a loan under this program must make a good faith certification, among other things, that:

- The recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment of the loan (§4003(C)(3)(D)(i)(VIII));
- The recipient will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan (§4003(C)(3)(D)(i)(IX)); and
- The recipient will remain neutral in any union organizing effort for the term of the loan (§4003(C)(3)(D)(i)(X)).

NEUTRALITY

Although the Act does not specifically define neutrality, it is not unusual for a neutrality agreement to contain provisions prohibiting management from negatively commenting on the union and its organizing efforts. This provision will likely prohibit a recipient from running a counter-campaign or educating its employees on some of the disadvantages of union representation during any union organizing effort for the term of the loan. This provision puts loan recipients in the crosshairs of union organizers and puts the recipient employer at a significant disadvantage if it is faced with a union organizing effort.

It remains to be seen whether a violation of the neutrality certification requirement would put the loan at risk and/or be considered an unfair labor practice that would be adjudicated by the National Labor Relations Board with all the attendant Board remedies. This may be clarified in the expected update from the Secretary of the Treasury.

PRACTICAL TAKEAWAYS

All employers who are considering the direct loans should consider the impact of the funds on their labor relations strategy. We have seen increased outsourcing of various functions in health care, from food services to medical record administration. The outsourcing provision in the Act could negatively affect a recipient's plans to outsource any functions during the term of the loan.

The neutrality provision is also an important consideration in health care. Labor unions have historically targeted health care and have been increasingly more outspoken during the COVID-19 public health emergency. The impact of COVID-19 on health care workers and the economy as a whole may result in increased union organizing efforts. Employers should consider these risks and the effect of the neutrality and outsourcing provisions when considering whether to apply for this loan program.

For now, it seems that hospitals with between 500 and 10,000 employees that take a direct loan under the forthcoming program described under §4003(C)(3)(D) of the Act would be making a significant commitment by accepting funds – one that may well last longer than the course of the pandemic itself.

- It is important to note that this requirement applies to just one type of loan program that is still in the works, and other loans may still be available.
- The Secretary of the Treasury is expected to publish more specific procedures for loan application and minimum requirements on or

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around April 6, 2020 – 10 days from the date the Act was passed (§4003(C)(i)(B)). This is expected to shed more light on the many areas of uncertainty surrounding the direct loans.

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[1] Under §4003(b)(1)-(3), Passenger air carriers, cargo air carriers and national security companies are specifically allocated an additional $46,000,000,000.

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