

So You Want Some of the Fed Money? The Potential Price for Mid-Sized Businesses: A Labor Union

Labor & Employment Law Update

By Beverly Alfon on March 27, 2020

The U.S. Senate unanimously passed the CARES Act, and it is up for vote TODAY before the U.S. House of Representatives, with a promise of swift passage. You need to pay attention. This is about more than emergency relief.

Look at page 524 of the bill, which would apply to any mid-sized business that takes a loan under this Act:

"Any eligible borrower applying for a direct loan under this program shall make a good-faith certification that—

(X) that the recipient will remain neutral in any union organizing effort for the term of the loan."

This means that if you employ between 500 and 10,000 employees and you take a loan under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), you would be *required to remain neutral when a union tries to organize your employees*. In other words, by taking this loan, you would agree to not communicate with your employees – at all – about your preference to stay non-union, any of the drawbacks of union representation, or even respond to any stretched truth that the union throws at your employees to sway them to support the union. Although there are still questions about what "remain neutral" means under the CARES Act and whether that could include card checks – at the very least – we know it would mean that employees who are being organized by a union will only hear one side of the story.

The expectation is that this language will lead to union pressure on employers to enter into neutrality agreements to memorialize certain terms, which often include "card check" provisions. When there is a card check, the union merely has to obtain signatures from a majority of employees in a company to become the exclusive bargaining representative for all workers. This is a significant concession to the labor unions because it takes away the employees' existing right to vote for or against the union, by secret ballot election conducted by the National Labor Relations Board (NLRB). Rather, a card check amounts to open

voting because a union representative simply gets to ask the employee for his/her signature. Opponents of the card check process argue that this can lead to unlawful interference with the employee's right to freely choose for or against union representation.

The inclusion of this neutrality language comes on the heels of a November 2019 decision from the General Counsel of the National Labor Relations Board (NLRB), in *Embassy Suites by Hilton, Seattle Downtown Pioneer Square*, 19-CA-227623, in which he shifted on the legality of neutrality agreements by finding that a neutrality agreement amounted to unlawful employer assistance to the union and unlawful acceptance of aid by the union. This was a significant departure from the current law which generally views these neutrality agreements as legal. This was viewed by management-side attorneys as a good basis to resist pressure from unions to enter into such agreements. This CARES Act provision appears to be a direct shot at that.

The bottom line is BEWARE. Read the fine print or this loan could get you.

As of publication, the CARES Act language is still subject to change. We will continue to monitor the bill's progress through the House and will update as necessary.

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