April 8, 2020

Loans for Mid-size Businesses Under the CARES Act
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ASSISTANCE (LOANS) FOR MID-SIZE BUSINESSES
UNDER THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT
(CARES ACT)
TITLE IV – ECONOMIC STABILIZATION AND ASSISTANCE
TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY
SUBTITLE A - CORONAVIRUS ECONOMIC STABILIZATION ACT OF 2020

HIGHLIGHTS

• Under Title IV of the CARES Act (signed into law on March 27, 2020), Congress appropriated $500 billion in U.S. Department of Treasury loans and loan guarantees to provide liquidity to eligible businesses, States and municipalities related to losses incurred as a result of COVID-19.
• The Act specifically directs the Secretary of Treasury to “endeavor” to implement a stimulus program through the Federal Reserve to provide financing to banks and other lending institutions that make direct loans to eligible mid-sized businesses between 500 and 10,000 employees.
  ✓ Note: Of the $500 billion, the remaining $46 billion is allocated to make loans and loan guarantees for businesses in aviation and “businesses critical to maintaining national security.”
• An “eligible business” is defined in Title IV of the Act as a “United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act.”

Basic Terms of Loans:

• Interest rate capped at 2 percent per annum.
• No loan forgiveness
• No principal or interest payments due for first 6 months after any such direct loan is made, however, Secretary of Treasury has discretion to extend period when first payment is due.
• No maximum loan amount or maximum maturity rate.

Good Faith Certification Required: To receive a loan, any eligible borrower must certify:

• As of the date of the application, uncertainty of economic conditions makes loan request necessary to support ongoing operations of applicant.
• Company will use loans to retain at least 90% of workforce, at full compensation and benefits, until September 30, 2020.
• Company intends to restore not less than 90% of workforce that existed as of February 1, 2020, and to restore all compensation and benefits no later than four months after the
termination of the COVID-19 public health emergency declared by the Secretary of Health of Human Services.

- Company is an entity or business that is domiciled in the U.S. with significant operations and employees located in the U.S.
- Company is not a debtor in a bankruptcy proceeding.
- Company was created or organized in the U.S. or under the laws of the U.S. with significant operations and majority of employees based in the U.S.
- Company will not pay dividends on its common stock, repurchase an equity security listed on the national securities exchange or any parent company of the recipient while the direct loan is outstanding, “except to the extent required under a contractual obligation that is in effect as of the date of the enactment of this Act”.
- Company will not outsource or offshore jobs for the term of the loan and until two years after the loan is repaid.
- Company will not “abrogate” existing collective bargaining agreements for the term of the loan and for a period of two years after paying the loan.
- Company will remain neutral in any union organizing effort during term of the loan.

Expressed Concerns About Union Related Conditions:

- **Agreement Not to Abrogate Existing Collective Bargaining Agreements**
  - The term “abrogate” is not defined in the Act.
  - Management attorneys are concerned that to date, there is no regulatory guidance as to what the term means, how it will be enforced, and how it would apply under existing provisions under the National Labor Relations Act.
  - Not clear how this condition relates to receiving much needed stimulus money to help businesses survive and retain employees.

- **Neutrality Mandate**
  - For the entire term of the Treasury loan, the employer must agree to remain neutral in any union organizing effort and cannot oppose unionization.
  - Similar concerns that the concept of “neutrality” is not defined or clarified in the statute and there is no guidance on how the neutrality obligations will be enforced.
  - Of extreme concern, expressed by management attorneys -- the neutrality condition significantly impacts an employer’s statutorily protected free speech rights under the National Labor Relations Act (NLRA), which allows employers to share facts and information about unions with their employees, address possible misinformation if necessary, and educate employees about the realities of being unionized. The neutrality condition, essentially requires employers to remain silent and prohibits them from sharing their points of view with their own employees.
  - Critics also believe that giving employees the opportunity to hear perspectives from both sides, and not just from the union, allows employees to make informed decisions on whether to unionize. This condition is one-sided and deprives employees all necessary information in a union drive.
✓ Worst case scenario, if employees are given misinformation during a union organizing effort and vote for unionization, this could have a long-term impact on the business and could be even permanent because the reality is that there are many restrictions imposed on decertification efforts by employees.

- **Overall**
  ✓ These conditions significantly affects “core” rights of employers and employees under the National Labor Relations Act. They present difficult choices for businesses who may have no choice but to agree to these conditions to get access to much needed funds to save jobs for their employees and to allow their businesses to survive.

**Other Considerations:**

- Secretary of Treasury should be releasing much needed guidance or regulations on how the program will be implemented, shortly.
- Expect Congressional oversight, including investigations into loans granted inappropriately and/or based on false claims.
- Department of Justice enforcement is also expected to address false representations made during the application process, due to the specificity of the certification requirements.