

# The CARES Act: What Could Taking Federal Assistance Mean for Your Business

Charles Birenbaum | [birenbaumc@gtlaw.com](mailto:birenbaumc@gtlaw.com) | 415.655.1310  
Justin F. Keith | [KeithJ@gtlaw.com](mailto:KeithJ@gtlaw.com) | 617.310.6230  
Tayanah Miller | [millerta@gtlaw.com](mailto:millerta@gtlaw.com) | 415.655.1277  
Jonathan L. Sulds | [suldsj@gtlaw.com](mailto:suldsj@gtlaw.com) | 212.801.6882

# Presenters



**Charles  
Birenbaum**  
*Shareholder  
San Francisco*



**Justin  
Keith**  
*Shareholder  
Boston*



**Tayanah  
Miller**  
*Associate  
San Francisco*



**Jonathan  
Sulds**  
*Shareholder  
New York*

# Agenda

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- Overview of CARES Act Stimulus Loans
  - Paycheck Protection Program
  - Coronavirus Economic Stabilization Act
- Eligibility Issues under PPP and CESA
- CESA Obligations
  - No Outsourcing/Offshoring
  - Non-abrogation of CBAs
  - Neutrality Requirements
  - Enforcement of Obligations

# Introduction

In a dynamic environment for COVID-19 economic assistance from the federal and state governments, it is becoming increasingly clear that the assistance comes with conditions that could impact work force relations and the feasibility of business.

- Certain loans are conditioned on neutrality in union organizing and agreement not to abrogate union labor agreements.
- Certain loans may require recalling a work force as it existed on February 1, 2020 regardless of business conditions when the recall occurs.
- Certification commitments required for loans if untrue could lead to civil and criminal proceedings in enforcement.
- In bankruptcy proceedings, it is unclear whether CARES Act requirements preempt the Bankruptcy Code.
- In union organizing drives, it is unclear whether the CARES Act requirements preempt the National Labor Relations Act and the primary jurisdiction of the National Labor Relations Board.

**Employers should plan carefully when seeking economic assistance.**



# Overview of the CARES Act Stimulus Loans

**Jonathan L. Sulds**  
*Shareholder, New York*

# Two New Loan Programs

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- Title I: Paycheck Protection Program (PPP)
  - For “small” businesses
- Title IV: Coronavirus Economic Stabilization Act (CESA)
  - For air carriers, air cargo, and national security related businesses, U.S. businesses, and states and municipalities

# Title I of CARES: Paycheck Protection Program (PPP)

- Provides loans for:
  - Payroll costs
  - Benefits
  - Salaries, commissions, or similar compensations
  - Interest of mortgage obligations
  - Rent
  - Utilities
  - Interest on other debts incurred before February 15, 2020
- Loans are eligible for forgiveness but only if 75% of the loan is spent on payroll costs

# Title IV of CARES: Coronavirus Economic Stabilization Act of 2020 (CESA)

- Creates a \$500,000,000,000 facility to allow the Treasury Secretary to provide subsidy amounts for loans, loan guarantees and other investments to provide liquidity to eligible businesses, states and municipalities related to losses incurred as a result of coronavirus – Section 4003(a)



# Title IV of CARES: Coronavirus Economic Stabilization Act of 2020 (CESA)

- Of the \$500 billion, \$46 billion is earmarked for air carriers, air cargo and businesses critical to maintaining national security
- \$454 billion is to make loans, loan guarantees and other investments in programs or facilities established by the Federal Reserve – 3 buckets potentially

# CESA General Provisions

- Treasury Secretary may make loans:
  - At a rate determined “based on the risk and the current average yield on outstanding marketable obligations of the United States of comparable maturity” – Section 4003(c)(1)(A)
  - Secretary to publish application procedures shortly – Section 4003(c)(1)(B)
  - No equity repurchase until 12 months after loan no longer outstanding – Section 4003(c)(3)(A)(ii)I

# CESA General Provisions

- No dividends – Section 4003(c)(3)(A)(ii)II
- Restrictions on compensation – Section 4003(c)(3)(A)(ii)
  - Section 4004(a)1 for employees over \$425k in comp in 2019
    - May not have raise
    - No severance or benefits greater 2x 2019 comp
    - If over \$3 million limit is \$3 million plus 50% of excess over 3 million – Section 4004(a)(2)

# CESA Assistance for Mid-Sized Businesses

- Secretary shall “endeavor” to seek implementation of facility for employers (including non profits) of between 500 and 10,000 employees (further details to come) – Section 4003(c)(3)(D)(i)
- 2% interest rate, 6 month payment moratorium (or longer if Secretary so determines)
  - Funds used to retain 90% workforce through 9/30/20, at full compensation and benefits (II)
  - Funds used to restore not less than 90% of 2/1/20 workforce and to restore all compensation and benefits no later than 4 months after emergency lifted (III)

# CESA Assistance for Mid-Sized Businesses

- Loans only to United States business (IV, VI) [created or organized, domiciled, significant operations and majority of employees in US]
- No dividends while loan outstanding (VII)
- No outsourcing or offshoring of jobs for duration of loan, plus two years (VIII)
- No abrogation of existing collective bargaining agreements for the term of loan plus two years (IX)
- Recipient “will remain neutral in any union organizing effort for the term of the loan” (X)

# Main Street Lending Program

- On April 9, the Fed announced a term sheet for the Main Street program, allocating \$75 billion of the \$500 billion to the Main Street New Loan Facility
- While the terms are still subject to public comment through April 16, here are some important aspects from the announced Term Sheet:
  - Businesses employing up to 10,000 employees, or with revenues less than \$2.5 billion will be eligible; unlike the “endeavor” loans described above, there is not a 500 employee threshold
  - Main Street loans will be available to businesses which have taken out PPP loans
  - Firms must commit to make “reasonable” efforts to maintain payroll and retain workers; compare the 90% indicators in the “endeavor” loans
  - No current indication that the labor terms (neutrality, no subcontracting, no abrogation of CBA’s) attached to the “endeavor” loans apply to these Main Street loans
  - U.S. businesses only
  - Borrower must follow compensation, stock repurchase and capital distribution restrictions from 4003(c)(3)(A)(ii)
  - Adjustable rate of SOFR plus 250-400 basis points, 4 year maturity, amortization of principal and interest deferred one year, minimum size is \$1 million, maximum size is lesser of \$25 million or an amount that when added to untapped credit does not exceed 4x EBITDA



# **Eligibility Issues**

**Tayanah Miller**  
*Associate, San Francisco*

# PPP eligibility

- Three paths to eligibility for “small” businesses:
  1. 500 or fewer employees
  2. For certain industries, a business with more than 500 employees is considered small under the SBA
    - The SBA has developed a list of industries that can be considered small under SBA regulations.
    - The size caps vary by industry (see 13 CFR § 121.201 for full listing organized by sector)
      - E.g., electric power distribution businesses may be small if they have 1000 employees or less
  3. Businesses in the Accommodation and Food Services Industry that employ no more than 500 employees per physical location
- **Note: some businesses are ineligible regardless of size**



# Some examples of small businesses > 500 employees

- Iron and Steel Mills and Ferroalloy Manufacturing (1500)
- Bituminous Coal Underground Mining (1500)
- Tobacco Manufacturing (1500)
- Metal Can Manufacturing (1500)
- Crude Petroleum Extraction (1250)
- Chocolate and Confectionery Manufacturing from Cacao Beans (1250)

# Title IV CESA eligibility

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- Should the Secretary “endeavor,” Title IV loans will be available to eligible businesses:
  1. Air carriers, air cargo, and national security related businesses
  2. Mid-sized U.S. businesses with between 500-10,000 employees that have not received adequate loan relief under the CARES Act

# Who is an employee under the PPP?

- The term employee under the PPP includes:
  - Full-time and part-time employees
  - Individuals employed through some “other basis” (e.g., staffing agency)
- The SBA looks at the totality of the circumstances to determine whether someone is an employee.
  - Developed 11 criteria, though criteria are not exhaustive
  - If one or more criteria exist, the individual may, but will not necessarily be an employee

# Who is an employee under CESA?

- But who is an employee under this section?
  1. Employee means employee under the NLRA; and
    - “The term “[employee](#)” shall include any [employee](#), and shall not be limited to the [employees](#) of a particular employer . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or [person](#) at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a [supervisor](#), (B) includes any individual employed by an employer
  2. Any employee subject to the Railway Labor Act

# Do employees of affiliated businesses count under the PPP?

- Yes. Affiliation rules from the SBA generally apply
  - Borrower is aggregated with its affiliates for purposes of determining eligibility for the PPP
  - Entities are affiliates of each other when one controls or has the power to control the other, through ownership, management, or other relationships or interactions between the parties.
  - Highly fact specific inquiry

# Do employees of affiliated businesses count under CESA?

- We don't know how or whether employees are aggregated under Title IV
  - There is no indication that the SBA affiliation rules will apply
  - Possible joint employer questions for eligibility



# **Outsourcing Issues, Non-abrogation of CBAs**

**Justin F. Keith**  
*Shareholder, Boston*

# Workforce Retention: Section 4003(c)(3)(D)(i)(VIII)

- Recipient must use the funds it receives “to retain at least 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020”
- Recipient must intend to restore 90 percent of its workforce (and to restore compensation and benefits) that existed as of February 1, 2020, no later than four months after the termination of the public health emergency declared by the Secretary of Health and Human Services



# Outsourcing/Offshoring: Section 4003(c)(3)(D)(i)(VIII)

- Recipient must agree it “will not outsource or offshore jobs” for the term of the loan, plus two additional years after completing repayment

# No Clear Guidance on Outsourcing Issues

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- “Outsourcing” generally refers to where and by what entity certain work will be performed
- Does the term include the movement of production from one company-owned facility to another?
- Can portions of recipient businesses be sold?

# Non-Abrogation of CBAs: Section 4003(c)(3)(D)(i)(IX)

- Recipient must agree it “will not abrogate existing collective bargaining agreements” for the term of the loan, plus an additional two years
  - Section 4025 provides that a loan may not be conditioned on entering into a collective bargaining agreement

# No Clear Guidance on the term “Abrogation”

- There is no consensus or assurance as to what the term “abrogation of an existing collective bargaining agreement” means
- Conflict with NLRA principles regarding majority status?



# Neutrality Clauses, CESA Enforcement

**Charles Birenbaum**  
*Shareholder, San Francisco*

# Neutrality: Section 4003(c)(3)(D)(i)(X)

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- Recipient must agree to “remain neutral in any union organizing effort for the term of the loan”
- “Neutrality” generally refers to the stance a company may take when a union seeks to organize its employees

# Neutrality: Section 4003(c)(3)(D)(i)(X)

- Under Section 7 of the National Labor Relations Act (NLRA), employees have the right to join or not join a union, and under Section 8(c) of the NLRA, employers have free speech rights, even when an organizing drive is underway

# Neutrality: Section 4003(c)(3)(D)(i)(X)

- Neutrality terms are often defined by a specific agreement with a particular labor organization
- Terms generally include:
  - Scope of unit
  - Access to employees
  - Limitations on certain types of speech or conduct
  - Representation procedures
  - No strike
  - Arbitration



# No Clear Guidance on Neutrality

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- Waiver of constitutional or statutory rights?
  - Does the neutrality language in the CARES Act require loan recipients to negotiate, compromise or forfeit free speech rights as a condition of receipt of a qualifying loan?
  - Under the CARES Act, may a neutral management educate employees, for example, about the process of collective bargaining?
  - Does neutrality require that any union representational selection be by card check as some union advocates urge?

# No Clear Guidance on Neutrality

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- Conflict with NLRB guidance?
  - Does neutrality require that union organizers have access to company property or employee contact information as some union advocates urge and some neutrality agreements have provided?

# Enforcement of CARES Obligations

1. **Pandemic Response Accountability Committee** – selected from among existing inspectors general, and charged with broad oversight and enforcement of covered funds across all programs; authorized to conduct independent investigations, with the power to hold public hearings and issue subpoenas to private entities and individuals; can also refer matters to the DOJ
2. **Special Inspector General for Pandemic Recovery** – established within Treasury Department, responsible for audits and investigations of loans, loan guarantees, and other investments; can refer matters to the DOJ for criminal or civil enforcement proceedings
3. **Congressional Oversight Commission** – five member commission selected by congressional leadership; will conduct oversight of the implementation of the stimulus package by the Treasury and the Federal Reserve

# Enforcement of CARES Obligations

- Who will decide whether labor-related loan covenants have been broken?
  - Will the three oversight bodies and/or courts decide?
  - Will the National Labor Relations Board (NLRB) have a role?
  - NLRB has primary jurisdiction – matters of national labor policy are decided in the first instance by the NLRB, not courts, including:
    - Whether a ULP has occurred, even when the ULP involves a contract clause that a court is enforcing under section 301(a)
    - representation disputes

# Upcoming GT Alert

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- Many of you have raised questions about [work stoppages](#) during the COVID-19 pandemic
  - Stay tuned for a GT Alert on this issue!



**Questions?**

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