ON THE LABOR FRONT—Abrogating free speech and labor contracts in the CARES Act

By Michael J. Soltis

What’s a two trillion-dollar government spending package without a little pork? In the 880-page Coronavirus Aid, Relief and Economic Security Act (CARES) Act, buried in the back half, are a couple of chops for the labor movement added by House Democrats. The Democratic party has a long history of currying labor’s favor and resources, especially during election season.

Abrogation. The chops for labor consist of two abrogations. The venerable Merriam-Webster defines “abrogate” as “to abolish by authoritative action: annul” and “to treat as nonexistent.” For mid-size businesses seeking a loan, the CARES Act abolishes, annuls and treats as nonexistent their right to free speech during a union organizing drive during the term of the loan. A second piece of pork bars an employer from abrogating an existing collective bargaining agreement even beyond the term of the loan. Let’s put this abrogation legislation in perspective.

Abrogation of free speech under the National Labor Relations Act

A mid-sized employer seeking a loan under the CARES Act must “make a good faith certification” it “will remain neutral in any union organizing effort for the term of the loan.”

The federal National Labor Relations Act (NLRA) regulates union organizing. Section 7 of the NLRA—the heart of the Act—gives employees the right “to form, join, or assist” a labor union and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” This CARES Act certification for a loan deals with the extent to which an employer can communicate to employees its opposition to a union.

The NLRA, as enacted in 1935, did not mention employer communications during an organizing drive. From 1935 until 1947, the National Labor Relations Board, the agency which enforces the NLRA, held that communications by an employer to employees opposing a union or favoring one over another were coercive and thus violated the NLRA. In 1947, an NLRA amendment added Section 8(c), which states: “The expressing of any views, argument, or opinion,” however disseminated, does not violate the NLRA, so long as the expression “contains no threat of reprisal or force or promise of benefit.”
Free debate. Section 8(c), the Supreme Court said, “merely implements the First Amendment.” Its enactment manifested “a congressional intent to encourage free debate on issues dividing labor and management.” This policy “favor[s] uninhibited, robust, and wide-open debate in labor disputes” and the “freewheeling use of the written and spoken word.”

The CARES Act certification requires an employer-borrower to certify in good faith it will “remain neutral in any union organizing effort for the term of the loan.” While the statute does not define “neutral,” Merriam-Webster defines it as “not engaged on either side,” meaning that an employer may not communicate to employees its opposition to a union. With a wave of the legislative wand, gone is that policy favoring “uninhibited, robust, and wide-open debate.” Poof! Gone is that “freewheeling use of the written and spoken word.” Poof! Gone is the NLRA’s First Amendment. Poof!

Neutrality agreements. Neutrality agreements have been around for decades. They are an example of what is sometimes called “top-down organizing.” With traditional organizing, a union seeks to obtain the right to represent a group of employees by gaining the support of a majority of them. The NLRB has a process for conducting secret ballot elections to give employees the ability to decide whether to be represented by a union. With “top-down” organizing, a union enlists the employer’s assistance to seek the support of the employer’s employees.

An employer’s commitment to not say or do anything to oppose the union’s organizing effort gives a significant advantage to a union. Think about a football game with only one team on the field. In a typical neutrality agreement, an employer would agree to give a union information about its employees, such as their contact information, job titles and dates of hire and perhaps allow union representatives onto its property to solicit support from employees. The CARES Act language—remain neutral—suggests an employer need not provide information or access but may not oppose the union’s organizing efforts.

Why would an employer agree to a neutrality clause? Each employer, of course, has its own reasons. Consider an employer with multiple locations, such as an institutional food service company. Employees at some locations may be represented by a union while at others, they are not. A union might make some very attractive proposals during negotiations at the unionized locations conditioned upon an employer’s agreement to a neutrality clause. Or, in a highly regulated industry, a union may offer to use its political clout to support an employer’s regulatory or legislative initiative if the employer agrees to remain silent while the union organizes its employees.

The latter was the situation in a case the Eleventh Circuit addressed in UNITE HERE, Local 355 v. Mulhall. The union had agreed to provide financial support for a gaming-related ballot initiative which would benefit a dog track owner. In exchange, the track owner agreed to provide the union assistance in organizing its employees, which included a commitment not to oppose the organizing. An employee of the track sued the employer and union, claiming that such an agreement violated Section 302 of the NLRA which makes it a crime for an employer
"to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to a labor union that represents or seeks to represent its employees.\(^4\)

The Eleventh Circuit held that organizing assistance “can be a ‘thing of value’ if demanded or given as payment” which could violate Section 302.\(^5\) Other circuits have held to the contrary.\(^6\) The Supreme Court had agreed to resolve the conflict but, after oral argument, the Court dismissed the writ of certiorari as “improvidently granted.”\(^7\)

Agreeing to remain neutral during an organizing drive—swallowing the labor pork—will cause varying degrees of indigestion to non-union employers wanting a loan. Each will need to weigh its financial need against the employee relations implications of the neutrality commitment. Where the financial interests prevail, it is reasonable to assume the employer’s neutrality commitment will inure to the labor movement’s benefit, which, of course, is the purpose of this piece of pork.

**“Abrogation” of labor contracts**

Mid-sized employers (500-10,000 employees) whose employees are already represented by a union and that seek a CARES Act loan will have their own piece of pork to digest. Another condition for obtaining a loan is that the recipient 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.”

Including this certification suggests an employer has some unilateral ability to abolish or annul a labor contract. Abrogation of a labor contract is not a term or concept mentioned in the NLRA. In teaching Labor Law to law school students, I have never used that phrase. What does it mean?

Start with the premise that the idea an employer can unilaterally abolish or annul a labor contract is anathema to 85 years of experience under the NLRA and a handful of Supreme Court decisions. The relevant general rules (note: exceptions apply) are that during the term of a labor contract, an employer may not make any unilateral changes in the agreement or in wages, hours or terms and conditions of employment. Following the contract’s expiration, if a successor agreement is not in place, an employer may not make unilateral changes unless it has bargained in good faith and the parties have reached impasse.

Given these bedrock principles, it takes extensive abrogation imagination to determine the meaning of that certification. I have identified three possibilities to consider.

**Abrogation through bankruptcy?**

Labor contracts get special treatment in bankruptcy. The Bankruptcy Code has a multi-step procedure a debtor-in-possession or trustee must follow to reject a labor contract. Even after following those steps, the court must find “the balance of the equities clearly favors rejection.” I doubt the drafters of this CARES Act certification had bankruptcy in mind when the Act prohibited abrogation of a labor contract. If that were the certification’s purpose, I suspect the
drafter would likely have used the bankruptcy term “rejection” rather than ‘abrogation’ and could easily have cited the special provisions for labor contracts in the Code.

**Abrogation through entrepreneurial decision-making?**

Under some circumstances, an employer may make an “entrepreneurial” decision that could affect the continued existence of a collective bargaining agreement. For example, if an employer were to merge its smaller unionized workforce into its larger non-unionized workforce, the merger might destroy that bargaining unit and the labor contract that covers it. Or, if the employer were to relocate the work done at the unionized location to another of its locations, the labor contract at the former site would no longer exist since there is no bargaining unit there.

These are obviously significant decisions and the impact on a labor contract of any of them depends on many factors, including the employer’s motivation for its action and the language of the labor contract.

It is possible that the certification was intended to address these situations but, if that is the case, the legislation raises more questions than it answers.

- What if an employer relocates 75 percent of its workforce, leaving the remaining 25 percent to be covered by the labor contract?
- What if the labor contract gives the employer the right to make the entrepreneurial decision and perhaps even provides for severance?
- What if a majority of employees during the period in the certification tell the employer they no longer want to be represented by the union? To continue to recognize a union not representing a majority violates the NLRA.
- If the contract expires, can the employer negotiate a new contract with different terms, perhaps even concessions?

If the abrogation certification was intended to address all of this, it is woefully lacking.

**Abrogation because it sounds good?**

A third possibility is that it was inserted in the law to show support for labor but does not have much or any substantive meaning. I raise this possibility mindful of the maxim that statutes shall not be construed to render any sentence, clause or phrase superfluous or meaningless.

In labor relations, however, that is not always the case. Decades ago, as a young associate carrying a senior partner’s bags to a labor negotiation, I learned the importance of being able to craft language that has no substantive meaning. The parties had been locked into a dispute about an issue. In a sidebar, the parties agreed how to resolve it, but both needed some face-saving language to claim victory. “We need some Moe language,” the union representative said to me.
Reading the puzzled look on my face, the representative told me Moe was union negotiator who was a master of crafting language devoid of substantive meaning but that satisfied everyone.

I never met Moe. I don’t know anything about him other than he was a union negotiator somewhere in the New York City area 40-plus years ago but numerous times throughout my career, I have invoked his spirit and crafted language with little or no substantive meaning that resolved a critical issue. Could it be that a legislative drafter was told to draft language that prohibits an employer from annulling or abolishing a labor contract even though, today, an employer cannot annul or abolish a labor contract?

Perhaps the drafters had other thoughts about the labor contract abrogation prohibition language. Perhaps those overseeing CARES Act administration will give some guidance or perhaps an enforcement action will interpret that certification. Then again, perhaps we will never know.

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As these two CARES Act certifications establish, even during a crisis, despite the platitudes about the greater good, politics lies at the heart of our system of government and if that means a little abrogation bacon, so be it.

**About the author:** Michael J. Soltis is an attorney, author, arbitrator, speaker and adjunct law professor of employment and labor law. He represented employers in employment and labor law matters for more than 35 years with a national labor and employment law firm. Visit his blog at www.pslatwork.com.

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5. *UNITE HERELocal 355 v. Mulhall*, 667 F.3d at 1215-16.