NLRB Reverses Its Stance on Determining Successor Liability for Refusal to Hire

Companies who have bought or are considering buying unionized workplaces should familiarize themselves with a significant decision affecting liability issues made last month by the National Labor Relations Board (NLRB).

The National Labor Relations Board reversed its stance on successor liability for refusal to hire predecessor employees when it unanimously overruled its 2006 decision in *Planned Building Services* on September 30, 2014. The decision significantly increases the potential damages that could be imposed on a successor employer who fails to hire employees of its predecessor. This includes companies that buy the assets (or stock) of an existing unionized operation.

Until *Pressroom Cleaners*, the law had been relatively clear. A company that buys another is considered a successor for labor (union) law purposes if they continue to operate with a majority of the workers. A successor is not necessarily bound by the prior company's collective bargaining agreement; the successor may reset wages and working conditions. However, the successor is required to negotiate with the union. A successor loses that option if it discriminatorily refuses to hire the seller's employees because of their union status; in that event, the successor must—with one exception—continue the prior terms and conditions until it either reaches a new agreement of its own or an impasse. That one exception was just foreclosed by the NLRB in *Pressroom Cleaners*.

In *Pressroom Cleaners*, the NLRB affirmed an administrative law judge's finding of successor liability for violation of Sections 8(a)(3) and 8(a)(5) of the National Labor Relations Act (NLRA), where the employer refused to hire several predecessor employees because of their union affiliation and unilaterally changed the terms and conditions of employment for the employees it did hire.

Prior to the NLRB's September ruling, under *Planned Building Services*, the exception to the foregoing rules had allowed a successor who was found to have discriminatorily refused to hire predecessor employees to limit its liability by proving that, even if it had hired the workers, (1) it still would have reached an impasse and not agreed to the union's contract provisions with the predecessor, and (2) the date on which the parties would have reached that impasse and implemented its final offer. In *Pressroom Cleaners*, the NLRB has now rejected that exception.

Planned Building Services had been premised on the rationale that the traditional approach of requiring an employer to comply with the predecessor's terms for more than a "reasonable bargaining period" was punitive, and that it is not impossible to determine what two parties would have theoretically agreed to or failed to agree to. But in *Pressroom Cleaners*, the NLRB determined that the rationale applied in *Planned Building Services* was flawed and inconsistent with its holdings in other refusal-to-bargain cases. The NLRB reasoned that the traditional approach is not punitive since in cases of unfair labor practices, lawful bargaining likely will not commence until after the NLRB issues an order and an employer should bear the burden of a delay that resulted from the employer's own conduct. Additionally, the NLRB found that the traditional approach does not violate Section 8(d) of the NLRA because it merely requires the parties to maintain the status quo until they negotiate in good faith and reach agreement or impasse. Now such an employer is liable for back pay at the predecessor's rate until an

agreement or impasse is reached. This could extend the back pay period to a multiyear period. The decision is likely to have the greatest potential impact on successor entities that hire new employees through an open hiring process, rather than giving preference to existing employees of the predecessor.

The NLRB's decision in *Pressroom Cleaners* is the latest example of the NLRB's increased focus on successor employer refusal-to-hire and refusal-to-bargain cases. Companies interested in buying unionized workplaces should consult with labor counsel. The decision whether to hire the seller's workforce has become all the more critical.

This document is intended to provide you with general information regarding successor liability. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions

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