NLRB Ups the Stakes for Successor Employers

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A recent National Labor Relations Board decision could significantly increase the damages that employees can recover against an employer that acquires a business but refuses to hire the employees of the predecessor. The decision applies to companies that acquire business through bidding as a replacement contractor or through a purchase and sale transaction.

In *Pressroom Cleaners*, issued September 30, 2014, the NLRB increased the back-pay period from a "reasonable period for bargaining" – usually a few months – to an open-ended obligation running from the date the business changed ownership through a final board decision and continuing thereafter until the successor satisfies its bargaining obligation, a period that could last several years. The ruling is limited to situations in which the new employer successor contractor is found to have selectively hired employees who used to work for the predecessor in order to avoid potential bargaining obligations.

While *Pressroom Cleaners* involved a situation where one contractor replaced another, the principles announced will apply to other types of transactions involving the sale or transfer of a business, as several of the pre-2006 cases relied on by the Board involved asset purchase transactions.

As a practical matter, the ruling greatly increases the potential exposure of acquirers who choose an open-hiring process that does not give preferences to those employed by the predecessor. An acquiring employer electing this path should be extremely careful to avoid creating any evidence that its hiring decisions were designed to avoid having a workforce that consists of a majority of the predecessor's employees or other union adherents.

The employer in *Pressroom Cleaners* was a cleaning service contractor that specialized in printing plants. It successfully bid to replace another contractor that had been providing services at a particular location and refused to hire any of the eight employees who had been working at the location, all of whom were in a union and working under a union contract. The NLRB held that the refusal to hire at least six of the eight employees was motivated by the employer's desire to avoid being deemed a successor to the exiting employer's bargaining obligation with the union.

The case first reaffirms the rule that a successor who engages in discriminatory hiring to avoid having a bargaining obligation waives its right to alter the initial terms and conditions of employment that will be offered to the predecessor's employees. Thus, while a typical successor may set its own initial terms without bargaining, one found to have unlawfully avoided hiring predecessor employees or union members is required to adhere to the terms and conditions that were in place with the predecessor until such time it negotiates changes to the terms to either an agreement with the union or reaches an impasse.

Second, the Board altered the manner in which back pay will be calculated in these cases. Since 2006, the Board had consistently held that the employees were entitled to back pay – measured by the difference between their old terms and those imposed by the successor – only for a "reasonable bargaining" period in which the parties would have been likely to reach agreement or get to impasse. These periods were usually found to be a matter of months.

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Under the new ruling, the offending successor is required to pay back pay calculated for the entire period from the acquisition date through the Board's decision and into the future until such time as it reaches a good faith impasse or agreement with the union. This can extend the back-pay period to a multi-year time frame. In the *Pressroom Cleaner* case, the time from the acquisition to the Board's decision was almost three years. In doing so, the Board reinstated pre-2006 precedent.

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