Companies Acquiring Unionized Businesses Face Increased Scrutiny by the NLRB

Companies acquiring unionized businesses are likely to face increased scrutiny from the National Labor Relations Board ("Board"). On May 9, 2014, NLRB General Counsel Richard F. Griffin, Jr., issued a memorandum instructing Board offices across the country to be on the lookout for appropriate cases in which the Board may sue buyers. General Counsel Griffin, previously general counsel for the International Union of Operating Engineers, explained, "I have a particular interest in seeking injunctive relief in appropriate cases involving a successor's refusal to bargain and, more importantly, successor refusal-to-hire cases."

A company that buys or otherwise acquires the operations of a unionized workplace can become a "successor" to the seller's union *relationship*. While it does not necessarily become bound by the seller's collective bargaining agreement (CBA), it may at least be bound to a relationship that requires it to bargain with the union for a CBA of its own.

Are all buyers "successors"? That is actually a more complex question, outside the scope of this client alert. In short, a buyer who acquires *stock* and continues the seller's operations causes no change to the selling company's employment relationships; therefore, the selling company's CBAs would remain in effect. A buyer who acquires *assets* may be a successor if it substantially continues the seller's operations. One indicator that the buyer substantially continues the seller's operations is if the buyer hires 50%+1 of the seller's workers. While that simple summary does not capture the technical nuances of the tests, it gives a general sense.

NLRB General Counsel Griffin's directive is intended to preserve the status quo, so that the union has a meaningful opportunity to bargain for a new CBA with the buyer.

The first category of cases that NLRB General Counsel Griffin warns Board staff to look for is, as he characterizes it, a refusal-to-bargain case. That is a situation where the successor simply ignores the union and refuses to bargain.

The second category, a refusal-to-hire case, is where the successor refuses to hire union supporters. This category is often quite contentious. Consider a buyer who acquires only assets. The buyer may wish to restructure all of the operations and, as part of that decision, decide to hire, instead of seller's workforce, workers with different skills or experience, perhaps even in a different location. Such a buyer is arguably not a successor but should consult with experienced labor counsel.

NLRB General Counsel Griffin's two categories are not exhaustive. The Board has long recognized other examples of successor violations, such as refusing to provide the union with cost, pay, and insurance information; insisting that a union get a petition filed for an election at the Board; announcing new pay rates without first giving the union notice and an opportunity to bargain over them; and shutting

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down operations without first giving the union notice and an opportunity to bargain over the effects of the shutdown.

In any of these scenarios, the Board may sue the successor, asking a court to issue an injunction under section 10(j) of the National Labor Relations Act, requiring the successor to negotiate with the union. Such an injunction would include an order requiring the successor to reverse any illegal acts, e.g., hire any workers wrongfully refused a job offer or re-hire any wrongfully discharged.

If you have questions, please contact Bill C. Berger, Chad Grell or Tiffany Updegraff in our **Employment Group**.

This document is intended to provide you with general information regarding the NLRB's stance on acquiring unionized businesses. 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 attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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