

Labor Board Limits Successorship Obligations After Discriminatory Hiring

by Grant S. Gibeau - Wednesday, April 10, 2019



The current National Labor Relations Board (NLRB) continues to reconsider longstanding legal positions regarding the balance of rights between employers and their workforces.

The most recent example of this can be found in the case of [Ridgewood Health Care Center, Inc.](#), which overruled two decades of precedent regarding successor employer bargaining obligations following discriminatory hiring practices.

The Successorship Doctrine in a Nutshell

Under certain circumstances, a firm purchasing a business with an existing unionized workforce may have an obligation to bargain with the incumbent union representing the seller's employees before setting those employee's initial terms and conditions of employment, if the buyer is a "perfectly clear successor." A buyer is a perfectly clear successor if the incumbent employees reasonably believe that the buyer will retain "all" or "substantially all" of a predecessor's unit employees without changing those employees' terms and conditions of employment.

If a buyer is not a perfectly clear successor, then the buyer is able to set the employees' initial terms and conditions of employment as it sees fit. However, the buyer may still have an

obligation to recognize the incumbent union if two factors are met: (1) if the buyer runs the operation in the same manner as the seller had, and 2) if the buyer hires enough of the seller's employees to comprise a majority of the employees in the new unit.

One caveat to this exists under the NLRB's 1996 decision of Galloway School Lines. In Galloway, the NLRB held that if a buyer discriminates in hiring any of the represented workers in an effort to avoid a resulting majority in the new workforce, then the buyer waives its right to set the initial terms and conditions of employment for its employees and remains bound by the existing collective bargaining agreement (CBA), effectivity becoming a perfectly clear successor.

The NLRB Eases The Remedy

In Ridgewood, the NLRB dealt with a situation where a hospital was purchased by a different company. Following the hiring process, the buyer claimed that a majority of the new hires were not previous employees, and therefore argued it was not obligated to recognize the incumbent union. The incumbent union brought an Unfair Labor Practice Charge alleging that the buyer had engaged in a discriminatory hiring scheme against the previously represented employees, and that the unit would have had a majority of employees of the predecessor employer, but-for the buyer's discriminatory hiring scheme.

The NLRB agreed with the Union that the buyer had discriminated against four prior employees in an effort to avoid having a majority of previously-represented workers in the new unit, and that the buyer had an obligation to recognize and bargain with the Union. However, in reaching its decision, the NLRB overruled the Galloway decision, thereby preventing the buyer from being considered a perfectly clear successor bound by the existing CBA. The NLRB reasoned that the Galloway decision goes too far and "effectively eliminates the otherwise customary . . . right to set initial employment terms" for a successor employer.

The NLRB went on to further state that the decision, which provides more flexibility to firms acquiring existing businesses, "will promote the survival of foundering businesses and preserve jobs." Thus, the buyer in this case was not obligated to adopt the CBA. Instead, they were ordered to hire the four employees they discriminated against, which then gave the union majority status requiring the buyer to recognize and negotiate with them.

Bottom Line

The overruling of Galloway provides more wiggle room for companies buying existing businesses since it is less likely that they will be deemed perfectly clear successors even if they are found to have discriminated against some of the seller's employees in the hiring process. Even so, businesses should remain cognizant of successorship issues to be sure that they do not put themselves into the position of having to live with a CBA that someone else negotiated.

