The NLRB's Successorship Doctrine, Perfectly Clear Successors, Executive Order 13495, and Worker Retention Laws: What the Trump Administration Has Inherited

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Introduction

Over the past six years, Obama appointees have controlled the National Labor Relations Board (NLRB or Board). During this period, the "Obama Board" issued many highly publicized, pro-labor decisions.[1] These decisions reversed or significantly revised longstanding precedent that survived prior changes in administrations and partisan Board composition.[2] President Obama and the Board also decided other, less noticed cases which nevertheless have far-reaching consequences for employers. One example concerns the NLRB's "successorship" and "perfectly clear" successor doctrines and their intersections with federal, state, and local laws, rules, and executive orders that limit a successor employer's discretion in hiring and setting new terms and conditions of employment.[3] Successorship issues arise, for

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1. *See, e.g.*, Specialty Healthcare & Rehab. Ctr., 357 N.L.R.B. 934, 944–46 (2011) (opening door to union organizing of "micro-units"); Browning-Ferris Indus., 362 N.L.R.B. No. 186, slip op. at 17–19 (Aug. 27, 2015) (changing standard for determining whether two companies are "joint employers"); Purple Communc'ns, Inc., 361 N.L.R.B. No. 126, slip op. at 14 (Dec. 11, 2014) (employees given presumptive right to use employer's e-mail system during non-working time to engage in union organizing and other activities protected by Section 7 of the National Labor Relations Act); Lincoln Lutheran of Racine, 362 N.L.R.B. No. 188, slip op. at 2 (Aug. 27, 2015) (employer's obligation to check off union dues continues after expiration of collective bargaining agreement).

2. *See* cases cited *supra* note 1. The Obama Board also charted new territory and effectively rejected other longstanding precedent by adopting its "quickie election" rules over the objection of Republican Board members. Representation-Case Procedures, 79 Fed. Reg. 240 (Dec. 15, 2014) (codified at 29 C.F.R. pts. 101, 102, 103 (2016)).

3. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 5 (Aug. 27, 2015).

example, if a corporation merges with, or purchases the assets of, an entity with a unionized work force, or when the government awards a new employer a contract previously performed by a unionized firm.[4]

Through a series of recent Obama Board decisions, President Obama's Executive Order 13495, and the application of state and local "worker retention" statutes, it is virtually impossible for a successor employer to avoid inheriting a predecessor's collective bargaining obligation.[5] In addition, the Board has further narrowed the circumstances in which a successor employer can lawfully set initial terms and conditions of employment for the predecessor's employees, which will remain in effect until new terms are reached through collective bargaining.[6] These developments are particularly significant for contractors bidding on federal service contracts previously performed by unionized contractors.

This Article addresses the shift in successorship law under the Obama administration, including several decisions issued by the Board in 2015 and 2016, and the related impact of E.O. 13495, which took effect in January 2013. A full discussion of E.O. 13495 is beyond the scope of this Article. In a nutshell, however, it (1) requires most contractors awarded federal service contracts over $150,000 to give qualified employees of the predecessor contractor, who otherwise would lose their jobs, a right of first refusal for employment with the successor contractor; and (2) prevents the successor contractor from hiring new employees to perform services under the contract until this right has been extended to the predecessor's employees.[7]

E.O. 13495 does not limit the terms on which a successor contractor may offer employment to the predecessor's employees, but the Service Contract Act (SCA) does.[8] Under SCA Section 4(c), a successor contractor to a covered federal contract may not pay a service employee less than the wages and fringe benefits that the employee would have received under the predecessor's contract.[9] This includes "accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations."[10]

To be clear, the SCA does not require a successor contractor to (1) recognize or bargain with the predecessor employees' union, (2) follow any non-wage or non-fringe benefit provisions of the predecessor's collective bargaining agreement, (3) provide the same fringe benefits as the

4. *See e.g.*, *id.*, slip op. at 1–2.

5. Exec. Order No. 13495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (2009); *see also* 41 U.S.C. § 6707(c) (2012).

6. *See, e.g.*, *GVS Props.*, 362 N.L.R.B., slip op. at 3–4.

7. *See* Exec. Order No. 13495, 74 Fed. Reg. 6103, 6105 (2009).

8. *Id.*; *see generally* 41 U.S.C. §§ 6701–6707 (2012).

9. 41 U.S.C. § 6707(c)(1).

10. *Id.*

predecessor, or (4) adopt the predecessor's benefit plans. It only prohibits a successor contractor from paying predecessor employees less than the dollar equivalent of the wages and fringe benefit package they received under the previous contract.[11] However, as discussed below, the interplay of the Obama Board's interpretation of the NLRB's successorship rules, and the limitations imposed by E.O. 13495 and the SCA, create unique challenges for federal service contractors.

Like President Obama's other labor and employment initiatives, the recent shift in successorship law is subject to reversal under President Trump's administration. However, it remains to be seen whether, and how quickly, President Trump or a Republican-controlled Board will change the law in this area. Meanwhile, the law developed under the Obama administration will remain intact and cannot be ignored when making and implementing decisions that implicate the NLRB's successorship rules.

Part I of this Article provides background on the Board's successorship rules. Part II.A discusses the impact of state and local worker retention statutes on the Board's application of its successorship doctrine. Part II.B addresses how E.O. 13495 and the SCA affect the successorship and "perfectly clear" successor analysis. Part II.C discusses several recent decisions that have made it more difficult for employers to avoid a "perfectly clear" successor finding. Part III anticipates how an NLRB with a majority of Republican-appointed members will impact successorship doctrine.

I. Background on NLRB's Successorship Rules

Under longstanding National Labor Relations Act (NLRA) precedent, if an employer is a "successor," it must recognize and bargain with any union that represented the predecessor's employees.[12] For this purpose, an employer is considered a "successor" if: (1) there is substantial continuity in the predecessor's and successor's business operations (e.g., products, services, plant, equipment, workforce, jobs, supervisors, working conditions, etc.), and (2) the predecessor's employees constitute a majority of the new employer's work force in a separate and appropriate bargaining unit.[13]

In *NLRB v. Burns International Security Services, Inc.*,[14] the Supreme Court held that a successor employer is not bound by the substantive terms of a collective bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and condi-

11. *Id.*

12. National Labor Relations Board, Basic Guide to the National Labor Relations Act 24 (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.

13. *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 28 (1987).

14. 406 U.S. 272 (1972).

tions of employment unilaterally.[15] The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident that the union will retain majority status in the new workforce until the successor has hired a full complement of employees.[16] The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."[17]

In *Spruce Up Corp.*,[18] the Board stated that the "perfectly clear" caveat was restricted to circumstances in which the "new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,"[19] or when the employer "has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[20] Although *Burns* and *Spruce Up* held that an employer must negotiate before fixing terms if it intends to retain *all* of the predecessor's employees, the Board has clarified that the relevant inquiry is whether the successor "[p]lanned to retain *a sufficient number* of predecessor employees to make it evident that the Union's majority status would continue" in the new workforce.[21]

Several recent Obama Board decisions have sharply limited the circumstances in which employers may lawfully avoid not only successorship status, but also a finding that they are "perfectly clear" successors that cannot unilaterally set initial terms and conditions of employment. One decision allowed a local worker-retention statute to trump successor employers' flexibility under federal labor law.[22] Other decisions address the impact of federal restrictions under E.O. 13495 and the SCA.[23] They also show how the Obama Board has expanded the circumstances in which an employer's hands will be tied by a "perfectly clear" successor finding.

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15. *Id.* at 273.
16. *Id.* at 294–95.
17. *Id.*
18. 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).
19. *Id.* at 195.
20. *Id.*
21. Galloway Sch. Lines, Inc., 321 N.L.R.B. 1422, 1426–27 (1996) (emphasis added); Spitzer Akron, Inc., 219 N.L.R.B. 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976); *see also* Adams & Assocs., Inc., 363 N.L.R.B. No. 193, slip op. at 4 (May 17, 2016); Hosp. Pavia Perea, 352 N.L.R.B. 418, 418 n.2 (2008).
22. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 2 (Aug. 27, 2015).
23. *See, e.g.*, Data Monitor Sys., Inc. 364 N.L.R.B. No. 4 (May 31, 2016).

II. Obama Board's Recent Successorship Decisions

A. *Impact of State and Local Worker Retention Statutes*

In *GVS Properties, LLC*,[24] an employer acquired several properties in New York City.[25] The prior owner had subcontracted the daily service, maintenance, repair, and upkeep of the properties to a unionized contractor with a collective bargaining agreement.[26] Under the New York City Displaced Building Service Workers Protection Act (DBSWPA),[27] the purchaser had to (1) retain its predecessor's employees for a ninety-day transition period; (2) recognize seniority when laying off employees not needed to provide services at the buildings; (3) offer a right of first refusal to any laid off employees if positions again became available during the transition period; and (4) not discharge any of the predecessor's employees, except for cause, during the transition period.[28] The DBSWPA also required the successor employer to provide written performance evaluations for each retained employee at the end of the ninety-day transition period and, if his or her employment had been satisfactory, to offer continued employment under the terms and conditions established by the successor employer or as required by law.[29]

When it purchased the properties, the new owner distributed a letter to the union-represented employees announcing it would self-

24. *GVS Props.*, 362 N.L.R.B. No. 194.
25. *Id.*, slip op. at 1–2.
26. *Id.*
27. N.Y.C. Admin. Code § 22-505 (2017).
28. *GVS Props.*, 362 N.L.R.B., slip op. at 2.
29. N.Y.C. Admin. Code § 22-505 (2017). In *California Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019 (Cal. 2011), the California Supreme Court held that the NLRA did not preempt the City of Los Angeles Grocery Worker Retention Ordinance (L.A. Ord. No. 177,231, adding ch. XVIII, L.A., Cal., Mun. Code § 181.00 *et seq.*). The Los Angeles Ordinance was very similar to the DBSWPA at issue in *GVS Properties*. Among other things, it required employers succeeding to ownership of grocery stores of 15,000 square feet or larger to hire the predecessor's employees for a ninety-day transition period and prohibited successors from discharging employees without cause during the transition period. *Id.* The California Supreme Court noted that the Los Angeles Ordinance was like those adopted by states and municipalities throughout the United States that regulate the ability of certain employers summarily to replace the workforce upon acquiring a new business. *California Grocers Ass'n*, 254 P.3d at 186. *See, e.g.*, Cal. Lab. Code §§ 1060–65 (2002) (janitors and building maintenance workers); Cal. Lab. Code §§ 2500–22 (2016) (grocery workers); Gardena, Cal., Mun. Code ch. 5.10 (2006) (grocery workers); S.F., Cal., Police Code art. 33D (2006) (grocery workers); Santa Monica, Cal., Mun. Code ch. 5.40 (2006) (grocery workers); Berkeley, Cal., Mun. Code ch. 13.25 (2006) (marina workers); Emeryville, Cal., Mun. Code ch. 32, art. I, § 5-32.1.1(b) (2008) (hotel workers); L.A., Cal., Mun. Code §§ 183.00 *et seq.* (2006) (hotel workers); Oakland, Cal., Mun. Code ch. 2.36 (2004) (hospitality workers); San Jose, Cal., Mun. Code §§ 25.11.700 *et seq.* (2008) (airport workers); N.Y.C. Admin. Code § 22-505 (2016) (building service workers); Phila., Pa., Mun. Code ch. 9-2300 (2000) (service contract workers); Providence, R.I., Code of Ordinances §§ 2-18.5, 14-16 (2009) (hospitality workers and building service workers, respectively); D.C. Official Code, §§ 32-101 *et seq.* (1994) (health care, food service, and janitorial workers).

manage the properties and the employees would no longer be employed by the previous contractor.[30] The letter also stated that (1) "if the employees wished to continue working at the properties, they should inform [the new owner's] manager of operations," (2) "all of the terms and conditions of employment" under their prior employer were "revoked and nullified in their entirety," (3) the new owner "was setting new terms and conditions of employment," and (4) the employees' continued "employment would be on a temporary and trial basis for 90 days, after which time [the new owner] would determine its permanent staffing needs."[31] The new owner also enclosed a memorandum describing the new terms and conditions of employment.[32] The announced wages, hours, and benefits significantly differed from those in the predecessor's collective bargaining agreement.[33]

The day after the purchase, the new owner hired seven of eight bargaining unit employees and permanently laid off the eighth.[34] Less than three weeks later, the union requested the new owner to recognize and bargain with it as the employees' exclusive representative.[35] The new owner refused.[36] It argued "the request was premature because it would not employ a substantial and representative complement of employees until after expiration of the 90-day transition period mandated by the DBSWPA, when it would determine whether the unit employees would be offered permanent employment."[37] After the ninety-day transition period, the new owner "discharged three of the unit employees and hired four new employees."[38] It refused to recognize or bargain with the union because former union-represented employees no longer comprised a majority of its workforce.[39]

The union's resulting unfair labor practice charge required the NLRB to decide the appropriate time to determine successorship status if a state or local worker-retention statute requires employers to retain the predecessor's employees for a set period of time.[40] Specifically, the issue was whether the successorship determination should be made when the new employer assumes control over the business and hires the predecessor's employees pursuant to the retention statute or after the end of the mandatory retention period.[41] The Board

30. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 2 (Aug. 27, 2015).
31. *Id.*
32. *Id.*
33. *Id.*, slip op. at 2, n.8.
34. *Id.*, slip op. at 2.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*, slip op. at 2–3.
41. *Id.*, slip op. at 3.

majority concluded that the appropriate time for determining successorship status was when the new employer "assumed control over the predecessor's business and hired the predecessor's employees," even though it was required to do so by a worker-retention statute.[42] Accordingly, it held that the new employer unlawfully refused to recognize and bargain with the union because it had the required "successor majority" at the appropriate time.[43]

The majority rejected the idea that the successorship determination could not be made until after the DBSWPA-mandated retention period had ended.[44] This notion was based, in part, on *Fall River Dyeing & Finishing Corp. v. NLRB*,[45] in which the Supreme Court emphasized the central role the successor's conscious and intentional decision-making played in finding successorship status under the NLRA:

> [T]o a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.[46]

Member Harry J. Johnson III noted in dissent that delaying the successorship determination until after the mandatory retention period ended and the employer achieved a stable and representative complement of employees of its choosing would best serve the careful balance struck by the Supreme Court in *Burns* and *Fall River*, without unduly burdening unions.[47]

The majority attempted to square its decision with Supreme Court precedent by finding the new owner "made the 'conscious' decision required by *Burns* and *Fall River* when it purchased the buildings and took over the predecessor's business with actual or constructive knowledge of the requirements of the DBSWPA."[48] The majority stated: "[W]e find that the [new owner's] decision to take over the business of the predecessor and assume responsibility for the management of the buildings was tantamount to a decision to retain the predecessor's employees, at least for the period required by the DBSWPA."[49] However, as Member Johnson observed: "The coercive nature of the regulation

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42. *Id.*
43. *Id.*, slip op. at 4.
44. *Id.*, slip op. at 3, 11 (position advanced by both new owner and dissenting Board member, Harry I. Johnson, III).
45. 482 U.S. 27 (1987).
46. *GVS Props., LLC*, 362 NLRB No. 194, slip op. at 8 (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40–41 (1987)).
47. *Id.*, slip op. at 10.
48. *Id.*, slip op. at 3.
49. *Id.*, slip op. at 3 n.13.

. . . necessarily negates the voluntariness upon which the successorship doctrine is based. Compliance with the DBSWPA is not a voluntary choice—if an employer does not obey its commands, it faces monetary penalties and other enforcement mechanisms."[50] Johnson also noted that by finding that "an employer makes a voluntary decision to hire its predecessor's employees when it decides to purchase a business that is subject to a local worker retention statute," the majority "erroneously conflat[ed] the decision to purchase a business with the decision to compose its work force."[51]

The majority also rejected Member Johnson's argument that its decision impermissibly gave state and local jurisdictions control over successor obligations under federal law, threatened federal preemption of state and local worker retention laws, and denied employer rights the U.S. Supreme Court had carefully articulated and protected in *Burns* and *Fall River*.[52] Member Johnson also suggested that the majority's decision could further curtail successor employer rights under the "perfectly clear" exception to the general rule that successors are free to set initial terms and conditions of employment.[53] As Johnson noted, "It is perfectly clear that employers governed by the DBSWPA and like statutes will have to retain all of their predecessor's employees."[54] Therefore, even if those statutes "do[] not mandate retention of employees under the same terms and conditions of employment they enjoyed with the predecessor, a successor will have no opportunity to exercise the *Burns* right to set new terms unless it does so prior to contracting to purchase the [predecessor's] business."[55]

The majority responded by noting that nothing in its decision implied, let alone held, "that all new employers subject to worker retention statutes are 'perfectly clear' successors," and that it was not obliterating the *Burns* right of successor employers to set their employees' initial terms.[56] The majority emphasized that under *Burns* and *Spruce Up*, an employer can escape application of the "perfectly clear" successor exception by, among other things, "clearly announc[ing] its intent to establish a new set of conditions prior to inviting former employees to accept employment."[57] That, according to the majority, was "precisely what happened here when the [new employer] simultaneously offered employment and announced new terms and conditions of employment."[58]

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50. *Id.*, slip op. at 8.
51. *Id.*, slip op. at 9.
52. *Id.*, slip op. at 10.
53. *Id.*, slip op. at 9.
54. *Id.*, slip op. at 10.
55. *Id.*
56. *Id.*, slip op. at 5.
57. *Id.*
58. *Id.*, slip op. at 6.

Interestingly, however, the "perfectly clear" successor issue was not directly presented to, or decided by, the Board in *GVS* because the union had not challenged the new employer's unilateral implementation of changed terms and conditions of employment.[59] Thus, *GVS*'s holding makes clear that employers that hire all or substantially all of a unionized predecessor's employees (even if only temporarily) under a state or local worker retention statute mandate may be unable to avoid a successorship finding creating an NLRA bargaining obligation.[60] Whether such employers also will be treated as "perfectly clear" successors, unable unilaterally to set the initial terms upon which employment will be offered, was left to future cases. However, given the direction in which the Obama Board has moved successorship law, employers succeeding to operations or contracts subject to state or local worker retention laws should proceed cautiously.

B. Impact of E.O. 13495 and the SCA

In *Data Monitor Systems, Inc.*,[61] a federal contractor was awarded a contract to supply transportation services at Wright Patterson Air Force Base in Fairborn, Ohio.[62] The new contractor replaced a unionized contractor subject to collective bargaining agreements covering its maintenance, transportation, supply, and personal property employees.[63] These agreements required the employer to consider seniority when making layoff and scheduling decisions.[64]

The new contractor won the federal contract on July 18, 2014.[65] The contract provided for a transition period from August 1 to 31, during which the new contractor was to become familiar with Base operations and interview and hire employees.[66] Performance under the contract was scheduled to start on September 1.[67]

During the contract transition period, the predecessor contractor informed its employees that it had lost the contract, the new contractor would take over the contract effective September 1, and employment applications were available for those wishing to work for the new contractor.[68] Employees also were told that the new contractor would conduct employment interviews on August 6, 7, and 8, and that they should complete their applications and sign up for a specific interview time on one of those days.[69]

59. *See id.*
60. *See id.*
61. 364 N.L.R.B. No. 4 (May 31, 2016).
62. *Id.*, slip op. at 1.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

The new contractor interviewed all of the predecessor's employees who signed-up for interviews[70] and told them that hiring decisions would be announced shortly thereafter.[71] When interviews were completed,[72] the new contractor told the predecessor employees' union that it would not hire the same number of employees as its predecessor.[73] The contractor stated it would hire the best applicants and would not use seniority as a basis for deciding whom to retain.[74] The new contractor ultimately offered employment to only sixty of approximately ninety predecessor employees.[75]

There was no dispute whether the new contractor was a NLRA successor required to recognize and bargain with the union.[76] There was a substantial continuity in the predecessor's and successor's business operations, and the predecessor's employees constituted a majority of the new contractor's workforce at the Base.[77] The parties disputed, however, whether the new contractor could unilaterally set the initial terms and conditions of employment for the predecessor employees.[78] In its unfair labor practice charge, the union asserted the new contractor had lost that right because it became a "perfectly clear" successor when it distributed employment applications to the predecessor employees without simultaneously announcing changes to existing terms and conditions of employment.[79] The charge also alleged that, by failing to use seniority when laying off and assigning hours of work to unit employees, the new contractor unlawfully changed terms and conditions of employment without bargaining.[80]

The NLRB's General Counsel argued that because all prior successors had distributed applications and invited employees to sign up for interviews without disrupting service delivery or employment, the employees perceived this as a routine process and thought their employment would continue uninterrupted with the new contractor.[81] The General Counsel also noted that the new contractor was subject to E.O. 13495, which required it to offer a right of first refusal of suitable employment to those predecessor employees whose employment would be terminated as a result of the award of the successor contract.[82] Thus, based on past experiences with various successor employers

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*, slip op. at 2.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

and E.O. 13495's obligation, the new contractor's invitation to the predecessor employees to submit applications essentially became a job offer.[83] According to the General Counsel, because the new contractor failed clearly to announce its intent to establish new conditions before extending "job offers," it was a "perfectly clear" successor.[84]

The Board disagreed and held that these facts did not make the new contractor a "perfectly clear" successor because the distribution of applications to the predecessor employees was not the equivalent of an offer of employment.[85] Furthermore, the new contractor had not "either actively or, by tacit inference" misled the predecessor employees into believing that they would be retained without changes in wages, hours, or terms and conditions of employment.[86]

The Board noted that, at the time the new contractor invited the predecessor employees to obtain applications and sign up for an interview, it "was in the preliminary stages of the hiring process."[87] It had not yet decided how many employees it needed under the contract or which predecessor employees it intended to hire.[88] The application documents themselves reflected that the new contractor had not yet made hiring decisions, emphasized the worker's status as "applicants," and did not in any way indicate that simply completing the application guaranteed employment with the new contractor.[89] Thus, the Board concluded that because the new contractor "did not, in any way, communicate or demonstrate an intent to retain the employees, [it] was under no obligation to make a simultaneous announcement of its intent to change terms and conditions of employment in order to avoid 'perfectly clear' successor status."[90]

The Board also found "that the obligations imposed by E.O. 13495 did not warrant a contrary result in the circumstances presented here."[91] Unlike the worker retention statute in *GVS Properties*, E.O. 13495 does not require the new contractor to retain any predecessor employees for any time period.[92] Instead, E.O. 13495 merely required the new contractor to offer predecessor employees the right of first refusal of suitable employment.[93] Moreover, it permitted the new contractor to hire fewer employees than the predecessor and generally

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83. *Id.*
84. *Id.*
85. *Id.*, slip op. at 3–4.
86. *Id.*, slip op. at 3 (citing NLRB v. Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975)).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*, slip op. at 4.

gave the new contractor authority to choose whom to hire.[94] Therefore, although E.O. 13495 effectively sealed the new contractor's fate as a successor, it did not automatically make it a "perfectly clear" successor.[95]

Data Monitor's facts showed that, at the time employment applications were distributed to the predecessor employees, the new contractor had not yet determined which employees would receive a right of first refusal.[96] "Nor did it know which employees, if any, would accept jobs once offers were made."[97] The Board thus concluded that the contractor's distribution of application packets and invitations to apply "cannot be viewed as the equivalent of affirmatively offering employees the right of first refusal."[98]

Data Monitor must be viewed in light of its rather unique facts. The new contractor's staffing plan called for the hiring of only two-thirds of the predecessor employees.[99] Because the new contractor did not need all or substantially all of the predecessor employees to service the contract, it legitimately used the application and interview process to assess employees' relative qualifications and identify employees to receive the right of first refusal required by E.O. 13495.[100] As such, it emphasized the individuals' status as "applicants" and avoided making any representations that would lead them to believe that completing applications was simply an administrative formality to ensure continued employment.[101]

This is substantially different from the typical scenario in which the new contractor will need to hire most, if not all, predecessor employees to meet its staffing requirements. In such a scenario, the new contractor knows, from the time the contract is awarded, it will offer a right of first refusal to all or substantially all of the predecessor employees. Thus, if a new contractor wants to avoid "perfectly clear" successor status under existing Board law, it must announce its intent to change terms and conditions of employment by no later than the time it affirmatively offers predecessor employees the right of first refusal required by E.O. 13495.[102] However, even that may be too late under new direction in which the Obama Board has moved the "perfectly clear" successor analysis.

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*, slip op. at 9.
100. *Id.*, slip op. at 9–10.
101. *Id.*
102. *Id.*, slip op. at 2.

C. Shift in Time for Determining Perfectly Clear Successor Status

Under *Burns* and *Spruce Up*, an employer's status as a perfectly clear successor generally is determined at the time it "invit[es] former employees to accept employment."[103] To avoid a "perfectly clear" successor finding, an employer typically must announce its intent to establish new employment conditions before or at the time it extends employment offers to predecessor employees.[104] However, in three 2016 cases—*Adams & Associates, Inc.*,[105] *Creative Vision Resources, LLC*,[106] and *Nexeo Solutions, LLC*[107]—the Board shifted the temporal focus to a potentially much earlier time: when the successor expresses an intent to retain the predecessor employees.[108]

In all three cases, the Board found that the employers' announcement of intent to change employment conditions was not timely.[109] That made them perfectly clear successors unable to set unilaterally the initial terms and conditions on which employment would be offered to predecessor employees.[110] *Adams & Associates* was unanimously decided by three Democratically appointed Board members. A Democratically appointed majority decided *Creative Vision* and *Nexeo Solutions*, eliciting dissents from the lone Republican appointee.[111]

In *Adams & Associates*, the administrative law judge (ALJ) found the employer was a NLRA successor, but not a "perfectly clear" successor.[112] The successor employer received a federal contract to provide residential, counseling, career preparation, career transition, recreation, and wellness services at a Job Corps Center in Sacramento, California.[113] The prior contractor had a collective bargaining agreement with the American Federation of Teachers.[114] In filling positions, the successor contractor was required to follow E.O. 13495 by offering a right of first refusal to the predecessor's qualified employees.[115]

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103. NLRB v. Spruce Up Corp., 209 N.L.R.B. 194, 195, *enforced*, 529 F.2d 516 (4th Cir. 1975).

104. *Id.*

105. 363 N.L.R.B. No. 193 (May 17, 2016).

106. 364 N.L.R.B. No. 91 (Aug. 26, 2016).

107. 364 N.L.R.B. No. 44 (July 18, 2016).

108. *Adams*, 363 N.L.R.B., slip op. at 2; *Creative Vision*, 364 N.L.R.B., slip op. at 3; *Nexeo*, 364 N.L.R.B., slip op. at 6.

109. *Adams*, 363 N.L.R.B., slip op. at 4–5; *Creative Vision*, 364 N.L.R.B., slip op. at 5; *Nexeo*, 364 N.L.R.B., slip op. at 6–7.

110. *Adams*, 363 N.L.R.B., slip op. at 5; *Creative Vision*, 364 N.L.R.B., slip op. at 7; *Nexeo*, 364 N.L.R.B., slip op. at 13.

111. *Adams*, 363 N.L.R.B., slip op. at 1; *Creative Vision*, 364 N.L.R.B., slip op. at 7 (Member Miscimarra, dissenting); *Nexeo*, 364 N.L.R.B., slip op. at 15 (Member Miscimarra, dissenting).

112. *Adams*, 363 N.L.R.B., slip op. at 1.

113. *Id.*

114. *Id.*

115. *Id.*, slip op. at 14.

Early in the transition process, the successor contractor informed the predecessor's employees it would offer a right of first refusal, with certain exceptions, to eligible and qualified employees who worked on the predecessor's contract during its last thirty days.[116] The successor contractor also informed the employees (1) it might reduce the size of the current workforce and, therefore, only a portion of the existing eligible workforce might receive employment offers; and (2) if the successor contractor believed an employee's job performance had been unsatisfactory, the employee would not receive an employment offer.[117]

The successor contractor gave qualified incumbents the right to apply for positions before outside applicants were considered.[118] The successor contractor interviewed incumbent applicants and offered positions to those determined to be qualified.[119] To accept employment, the employees needed to sign and return offer letters to the successor contractor before commencing work.[120] The offer letters: (1) specified the employees' wage rates, which were the same as those of the predecessor; (2) stated that employees would receive all benefits provided by the successor, as defined in its human resources policies; (3) set forth employees' schedules, which for some differed from their schedules with the predecessor; (4) stated that the successor reserved the right to adjust work schedules for business necessity or to meet program service needs; and (5) stated that employment would be "at-will," "there is no written or implied contract for continued employment," and the company "is free to terminate your employment at any time for any reason except as may be prohibited by law."[121]

Before commencing work, all successful applicants also were required to sign employment agreements.[122] The employment agreements provided, among other things, that (1) employment would be at-will, (2) employees would be subject to the successor's disciplinary policies and procedures, and (3) employees would be required to resolve employment-related disputes through mandatory arbitration.[123]

Hiring decisions were made throughout the contract transition period.[124] Decisions were based on various considerations, including completed interview evaluation forms, annotated employee lists containing the predecessor's recommendations, and instructions from the successor's corporate office.[125] When the successor contractor

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*, slip op. at 2.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*, slip op. at 14.
125. *Id.*

began operating the Job Corps Center, a majority of its employees had been bargaining unit employees of the predecessor.[126] The ALJ found the new contractor was a NLRA successor and was obligated to recognize and bargain with the employees' union representative.[127]

However, the ALJ rejected the General Counsel's argument that the new contractor was a "perfectly clear" successor that violated the NLRA by setting initial terms of employment without bargaining with the union.[128] According to the ALJ, the new contractor did not actively or tacitly indicate that all employees would be retained. Furthermore, although the new contractor had to comply with E.O. 13495, the regulatory framework applicable to the transition did not mandate that all predecessor employees be retained. E.O. 13495's right of first refusal did not mandate blanket offers to all employees. The applicable regulations permitted a successor to refuse to offer employment to incumbent employees when, for example, there was credible information of unsatisfactory job performance with the prior contractor.[129]

The ALJ also found that, even if the new contractor had evinced an intention to hire all incumbent applicants, it had clearly announced its intent to establish new conditions.[130] The ALJ noted that, prior to beginning operations, the new contractor had formulated its own operation plan and told employees there would be a reduction in staff.[131] In addition, the new contractor set forth in all hiring agreements wages, shifts, mandatory arbitration for employment disputes, at-will employment, a new disciplinary system, and new insurance.[132] Accordingly, the ALJ concluded: "Based on these facts, I find that [the new contractor] was not a 'perfectly clear' successor as envisioned in *Burns* and as limited by *Spruce Up*."[133] The ALJ also declined the General Counsel's invitation to reexamine *Spruce Up* in light of "the number and scale of corporate mergers and acquisitions in the 40 years since it was decided" and the assertion that "the majority holding in *Spruce Up* misconstrued *Burns* and has led to inconsistent results."[134] The ALJ noted, "It may be that this argument will be addressed by the Board but administrative law judges are bound by extant law."[135]

The Board did not take the opportunity to directly reexamine *Spruce Up*. Instead, it found that the ALJ improperly concluded that

126. *Id.*, slip op. at 15.
127. *Id.*, slip op. at 22.
128. *Id.*, slip op. at 21–22.
129. *Id.*
130. *Id.*, slip op. at 22.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

the new contractor was not "a 'perfectly clear' successor within the meaning of *Spruce Up* . . . ."[136] In discussing *Spruce Up*, however, the Board shifted the timing of the perfectly clear successor analyses from when the successor invites the employees to accept employment to when it expresses an intent to retain the predecessor's employees. Indeed, in *Adams & Associates*, the Board held that "to avoid 'perfectly clear' successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its *expression of intent to retain the predecessor's employees.*"[137]

Applying this standard, the Board concluded that the new contractor became a "perfectly clear" successor several weeks before it extended employment offers to any of the predecessor employees.[138] The Board focused on the new contractor's initial meeting with predecessor employees to announce the transition and inform them about the hiring process.[139] At this meeting, the new contractor's executive director stated that employees had been "doing a really good job," that the company "didn't want to rock the boat," and that it "wanted a smooth transition."[140] When the meeting opened for questions, an employee who identified herself as the union president asked about the available positions and what might prevent an incumbent employee from being hired.[141] The contractor's executive director responded that, "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job."[142] He also noted, however, that the company planned to reduce the total number of positions at the Center from twenty-five to fifteen and to create a new position to help meet student-staff ratios.[143] Employees at the meeting were shown copies of the job descriptions for available positions and told they could apply for up to two. They were given twenty-four hours to return completed applications.[144]

According to the Board, these statements clearly "expressed an intent to retain a sufficient number of incumbent [employees] to continue the Union's majority status in the [contractor's] new workforce."[145] Therefore, under the Board's interpretation of *Burns* and *Spruce Up*, to preserve its authority to set initial terms and conditions of employment unilaterally and avoid "perfectly clear" successor status, the new contractor was required clearly to announce its intent

136. *Id.*, slip op. at 1.
137. *Id.*, slip op. at 3–4 (emphasis added).
138. *Id.* slip op. at 4–5.
139. *Id.*, slip op. at 2.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*, slip op. at 4.

to establish new conditions at or before the meeting at which these statements were made.[146] The Board found the new contractor did not inform the employees that their jobs would involve new terms until several weeks later, when it distributed offer letters and employment agreements to successful applicants.[147] Therefore, the new contractor became a "perfectly clear" successor at the initial meeting with employees.[148]

The Board took the same approach three months later in *Creative Vision*,[149] this time over the dissent of Republican Board Member, Philip A. Miscimarra.[150] In *Creative Vision*, the Board majority overruled the ALJ's determination that a new employer was not a "perfectly clear" successor under *Spruce Up*.[151] The principal source of disagreement between the majority and the dissent was the appropriate time to assess the new employer's status as a perfectly clear successor.[152] As in *Adams & Associates*, the majority focused on the time when the new employer expressed intent to retain predecessor employees.[153] In contrast, Member Miscimarra, like the ALJ, focused on the time when the new employer invited predecessor employees to accept employment.[154] The different conclusion that each side reached was directly related to their choice of the appropriate time for assessing "perfectly clear" successorship status.

As Member Miscimarra explained, the new employer's hiring process began on or about May 19, 2011, but remained in a state of flux until June 2 when the employees accepted employment by beginning work.[155] "Thus, in determining whether the [new employer] fulfilled its obligation under *Spruce Up* to clearly announce to the [incumbent employees] its intention to set new terms and conditions of employment prior to or simultaneously with inviting them to accept employment, we must examine what the [new employer] communicated to the [incumbent employees] *on or before June 2*."[156] Based on the following evidence, he agreed with the ALJ that the new employer "provided timely notice to the [incumbent employees] of its intention to set new terms and conditions of employment."[157]

146. *Id.*
147. *Id.*
148. *Id.*
149. 364 N.L.R.B. No. 91 (Aug. 26, 2016).
150. *Id.*, slip op. at 9 (Member Miscimarra, dissenting) ("Applying the standard set forth in *Spruce Up* . . . I would find . . . that the facts establish that the [new employer] was not a perfectly clear successor.").
151. *Id.*, slip op. at 1.
152. *Id.*, slip op. at 10 (Member Miscimarra, dissenting).
153. *Id.*, slip op. at 6–7.
154. *Id.*, slip op. at 10–11.
155. *Id.*, slip op. at 10.
156. *Id.*
157. *Id.*

First, starting in May, the new employer distributed employment applications to predecessor workers with W-4 tax withholding forms attached.[158] The predecessor treated workers as independent contractors and, accordingly, did not withhold taxes from their pay.[159] The ALJ and Miscimarra found that by including tax forms, the new employer signaled a fundamental change in employees' terms and conditions of employment—namely, that if they accepted employment with the new employer, they would no longer work as independent contractors and instead become employees subject to tax withholding.[160] Furthermore, because the employees received and signed the applications and accompanying tax forms, they were put on notice of the different employment terms offered by the new employer.[161]

Second, prior to June 2, the new employer informed approximately thirty percent of the predecessor workers of changes to terms and conditions of employment, including the pay rate, and that the employer would deduct taxes and social security from employees' paychecks.[162]

Third, on June 2, before work started, one of the new employer's supervisors communicated to all of the workers the new terms and conditions of employment, which they were free to accept or refuse.[163] These new terms included a new pay rate, the deduction of federal and state taxes, and a number of new employment standards and safety rules. Some employees refused to work upon learning these terms.[164] A sufficient number remained, however, to staff the operations.[165] According to Miscimarra, once the supervisor announced the new terms and conditions of employment on June 2, "the 'perfectly clear' exception, already inapplicable by virtue of the distributed tax withholding forms, was rendered doubly inapplicable."[166]

Member Miscimarra also noted that successor employers must recognize and bargain with the union under two conditions: "(1) [T]he union demands recognition or bargaining, and (2) the successor is engaged in normal operations with 'a substantial and representative complement' of employees, a majority of whom were employed by the predecessor."[167] In *Creative Vision*, the union had not made a demand for recognition or bargaining until June 6. According to Miscimarra, this was "the earliest point in time when the [new employer] could be

158. *Id.*, slip op. at 1.
159. *Id.*, slip op. at 11.
160. *Id.*
161. *Id.*
162. *Id.*, slip op. at 2.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*, slip op. at 12 (Member Miscimarra, dissenting).
167. *Id.*

deemed a 'successor' for purposes of Section 8(a)(5)" and "independently preclude[d] a finding that the [new employer] was a 'perfectly clear' successor on or before June 2, when the [it] commenced operations after indicating . . . that there would be different employment terms."[168]

The Board majority viewed the law and facts differently. According to the majority, the ALJ and Member Miscimarra improperly "ignored Board decisions clarifying that, to preserve its authority to set initial terms and conditions of employment unilaterally, a successor must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees."[169] The majority added further:

> [A] subsequent announcement of new terms, even if made before formal offers of employment are extended or the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.[170]

According to the Board majority, the ALJ's own factual findings established that the new employer expressed intent to retain predecessor employees between mid-May and June 1.[171] The ALJ stated that, because the transition would be an abrupt shift, the new employer had to know in advance if it had enough employees.[172] In addition, the new employer made no effort to hire employees from other sources.[173] Furthermore, although the new employer asked the predecessor workers to complete employment applications and W-4 forms, it did not interview any applicants, examine qualifications, or check references.[174] Therefore, the ALJ had "no doubt" the new employer "intended to retain the [predecessor's workers] as its new work force and that 'filling out the applications and tax form was a formality.'"[175]

The majority disagreed with Member Miscimarra and the ALJ's assessment of the new employer's communications with the predecessor workers prior to June 2.[176] According to the majority, the inclusion of the W-4 forms with job applications, without explanation, let alone an express announcement that taxes would be withheld from the employees' pay, "was too ambiguous."[177] The majority thought it insufficient to make "clear [to] a reasonable employee in like circum-

168. *Id.*, slip op. at 12 (Member Miscimarra, dissenting).
169. *Id.*, slip op. at 3.
170. *Id.*
171. *Id.*, slip op. at 3–4.
172. *Id.*, slip op. at 4.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See id.*, slip op. at 4 n.12, 5.
177. *Id.*, slip op. at 4 n.12.

stances . . . that continued employment [was] conditioned on acceptance of materially different terms from those in place under the predecessor."[178] The majority also concluded that the other evidence on which Member Miscimarra and the ALJ relied showed that, prior to June 2, the successor discussed new employment terms with only a relatively small number of predecessor workers.[179] Furthermore, although the new employer's supervisor announced the new employment terms to all predecessor workers on June 2, that announcement "came too late to remove the [new employer] from the 'perfectly clear' exception" because it already expressed the intent to retain the predecessor workers.[180]

The majority also disagreed with Miscimarra's conclusion that an employer cannot become a "perfectly clear" successor before the union makes a bargaining demand.[181] The majority observed that the rule Miscimarra invoked was developed in a very different context.[182] In *Fall River Dyeing*,[183] the Supreme Court addressed when the bargaining obligation was triggered if there was a hiatus between the closing and reopening of an enterprise or a successor gradually expanded its workforce over a period of time.[184] According to the majority in *Creative Vision*, "nothing in the language or reasoning of *Fall River* supports the extension of these criteria to the 'perfectly clear' successor context."[185] Indeed, "application of these criteria would eviscerate the 'perfectly clear' exception, which is intended to promote bargaining *before* the successor hires the predecessor's employees and fixes initial terms, in circumstances where the successor intends to retain as its work force a majority of the predecessor's employees."[186]

In *Nexeo Solutions*,[187] the Board considered whether the purchaser of a distribution center's assets that operated the business in basically the same form, and retained all the predecessor's bargaining unit employees without a break in service, was a "perfectly clear" successor.[188] The same Board majority that decided *Creative Vision* disagreed with the ALJ's decision that the *Nexeo Solutions* purchaser was not a "perfectly clear" successor.[189] The majority concluded that the purchaser became a "perfectly clear" successor because it was

178. *Id.*
179. *See id.*, slip op. at 5.
180. *Id.*
181. *Id.*, slip op. at 6.
182. *Id.*
183. 482 U.S. 27 (1987).
184. *Id.* at 29–30; *see also* Creative Vision, 364 N.L.R.B. No. 91, slip op. at 7 (Aug. 26, 2016).
185. *Creative Vision*, 364 N.L.R.B., slip op. at 6–7.
186. *Id.*, slip op. at 7.
187. 364 N.L.R.B. No. 44 (July 18, 2016).
188. *Id.*, slip op. at 1.
189. *Id.*, slip op. at 14–15.

"abundantly clear from the outset that the [purchaser] planned to retain the unit employees."[190]

To support its conclusion, the Board majority noted that under a November 5, 2010 purchase agreement, the purchaser (1) committed to offer employment to all the predecessor employees; (2) agreed that the purchase would not cause any employee to be terminated; and (3) guaranteed that, for a period of eighteen (18) months after the closing date, the predecessor employees who accepted the purchaser's employment offer would receive pay and benefits no less favorable than those provided immediately prior to the closing date.[191] On November 7, 2010, the predecessor employer told its employees they "will transfer to the new business."[192] However, "[t]here was no mention at that time that the [purchaser] intended to establish a new set of conditions."[193]

Under the majority's interpretation of *Burns* and *Spruce Up*, the purchaser became a "perfectly clear" successor, with an obligation to bargain over initial terms, on November 7, 2010.[194] The majority further supported its conclusion by relying on a November 8 communication in which the predecessor employer (1) "reiterated the message that all or substantially all of the . . . employees would be retained"; and (2) noted that the terms of the purchase agreement required the purchaser "to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing[,] and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011."[195]

Because the Board majority concluded that the purchaser became a "perfectly clear" successor on November 7, it generally disregarded as *untimely* all of the subsequent communications between the purchaser and the predecessor employees from November 7 to March 31, 2011 (when the purchase of assets was completed) and April 1, 2011 (when the purchaser began operating the business).[196] These communications included a letter distributed during a February 16, 2011, meeting in which the purchaser informed the predecessor employees that (1) it would not assume any of the predecessor's collective bargaining agreements; (2) it had elected "not to adopt, as initial terms and conditions of employment, any of the provisions contained in any" of those agreements; (3) if the employees accepted the purchaser's offer of employment, they no longer would "participate in the multi-

190. *Id.*, slip op. at 7.
191. *See id.*, slip op. at 7–8.
192. *Id.*, slip op. at 7.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*, slip op. at 8–9.

employer pension plan" maintained by the predecessor employer; and (4) instead, the employees would be covered by the purchaser's 401(k) plan.[197] On February 17, 2011, the purchaser also mailed employment offer letters, which were accompanied by a description of the purchaser's health insurance, life insurance, and 401(k) plans.[198]

Member Miscimarra would have affirmed the ALJ's finding that the purchaser was not a "perfectly clear" successor and, accordingly, "acted lawfully when it announced different initial terms and conditions of employment in job-offer letters that [the purchaser] mailed to [the predecessor] employees on February 17, 2011."[199] In Miscimarra's view, the General Counsel failed to satisfy his burden under *Spruce Up*.[200] He found the General Counsel's evidence insufficient to establish either that the purchaser had "misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment," or that it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[201] To the contrary, according to Miscimarra, "the [purchaser] never invited [the predecessor's] employees to accept employment without clearly announcing its intent to set new employment terms."[202]

Miscimarra listed several factors to support his conclusion that the purchaser was not a "perfectly clear" successor.[203] The November 7 and November 8 communications relied on by the majority did not constitute invitations by the purchaser to accept employment under *Spruce Up* because they were made by the predecessor (i.e., the seller).[204] As Miscimarra observed: "*Spruce Up* requires an invitation *by the successor employer*, not a statement by some other party, such as the predecessor employer, about that party's own expectations."[205] Furthermore, Miscimarra concluded there was insufficient evidence to attribute the predecessor's statements to the purchaser based on agency principles.[206]

Member Miscimarra also disagreed with the majority's claim that the purchaser invited employees to accept employment without conveying its intent to establish new terms when it stated it "[was] not planning job reductions" in early January 2011.[207] Miscimarra noted

197. *Id.*, slip op. at 4.
198. *Id.*
199. *Id.*, slip op. at 15.
200. *Id.*, slip op. at 20–21.
201. *Id.*, slip op. at 21.
202. *Id.*
203. *Id.*, slip op. at 21–22.
204. *Id.*, slip op. at 21.
205. *Id.*
206. *Id.*
207. *Id.*, slip op. at 22.

that immediately after that statement, the purchaser told employees that "[w]e are working hard to flesh out final plans for our new company's compensation and benefits program" and that it "hoped to have final resolution of that package in the near future."[208] To Miscimarra, this statement itself "clearly informed [the predecessor] employees of [the purchaser's] 'intent to establish a new set of conditions,'" as required by *Spruce Up*.[209] Therefore, according to Miscimarra, the evidence failed to support the majority's finding that the predecessor's employees reasonably would have thought the purchaser intended to retain them on the predecessor's terms and conditions.[210]

Additionally, Member Miscimarra disagreed that the purchase agreement supported finding the purchaser was a "perfectly clear" successor.[211] Initially, Miscimarra noted that the purchase agreement left the purchaser free to implement benefits and benefit plans that differed from the predecessor's as long as they were "substantially comparable in the aggregate to those provided by [the predecessor]."[212] The purchase agreement allowed the purchaser to implement different initial terms and conditions, as it did when it substituted a 401(k) plan for a union-sponsored pension plan and altered health insurance benefits.[213] Therefore, as Miscimarra observed: "The possibility was real that some [of the predecessor's] employees would seek employment elsewhere rather than accepting a different mix of benefits (and the possibility of completely different working conditions after 18 months)."[214]

Finally, "and dispositively," according to Miscimarra, "it [was] undisputed that [the purchaser] did not furnish the Purchase Agreement to the Union or employees until March 2011, *after* it had clearly announced different initial terms and conditions in its February 17 offer letters to [the predecessor] employees."[215] Hence, "the Purchase Agreement itself cannot properly be viewed as an 'invit[ation] . . . to accept employment' within the meaning of *Spruce Up*."[216] To Miscimarra, the Board should have considered February 17—not November 7—as the date to determine if the purchaser was a "perfectly clear" successor. Because the purchaser announced different terms and conditions of employment by February 17, it was not a "perfectly clear" successor under *Spruce Up*.[217]

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208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

In *Adams & Associates*, *Creative Vision*, and *Nexeo Solutions*, the Board majority focused on the date the successor employer expressed intent to retain the predecessor's employees—not when it invited employees to accept employment—as the temporal trigger for a "perfectly clear" successor finding. Thus, under current law, to avoid "perfectly clear" successor status, a successor employer must clearly announce its intent to change the terms and conditions of employment long before the date it extends employment offers or rights of first refusal to predecessor employees. If a successor to a unionized contractor on a federal service contract knows from the outset that it will need all or substantially all of the predecessor's employees, is obligated by E.O. 13495 to offer a right of first refusal to the predecessor's employees, and is obligated by the SCA to offer those employees an aggregate wage and benefit package no less than the predecessor's, the successor should clearly announce its intent to change terms and conditions of employment at or near the time it is first awarded the federal contract.

The same preventive action is necessary for a successor employer that, as in *GVS Properties*, is required to hire predecessor employees under a state or local worker retention law. Under the rationale of the *GVS* majority, the "decision" to retain predecessor employees effectively is made when an employer chooses to purchase a business or operation with actual or constructive knowledge of the requirements of a state or local retention law. Therefore, despite the majority's efforts to assuage the dissent's concerns, it is not difficult to see how the Obama Board could find an employer that purchases a business or operation subject to a worker retention law automatically would become both a "successor" and a "perfectly clear" successor, unless the employer clearly announces its intent to change terms and conditions of employment in its first communication with employees. Indeed, the dissenting Board member in *GVS* asserted that under the majority's analysis, the successor would need to make the announcement "prior to contracting to purchase the [predecessor's] business."[218] If a successor delays the announcement until it offers employment or a right of first refusal to predecessor employees, it risks losing its ability unilaterally to set initial terms and condition of employment under *Burns*.

III. What the Future Holds

Only three of the five NLRB positions are currently filled.[219] As of April 2017, the Board consists of Member Mark G. Pearce, a Democratic appointee whose term expires on August 27, 2018; Member Lauren McFerran, a Democratic appointee whose term expires on Decem-

218. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 10 (Aug. 27, 2015).

219. *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board (last visited Mar. 7, 2017).

ber 16, 2019; and Acting Chairman Philip A. Miscimarra, a Republican appointee whose term expires on December 16, 2017.[220] Richard F. Griffin, Jr. currently serves as the NLRB's General Counsel[221] and is responsible for investigating and prosecuting unfair labor practice cases and for the general supervision of case processing in the NLRB field offices.[222] Mr. Griffin previously served as General Counsel for the International Union of Operating Engineers.[223] He was appointed by President Obama on November 4, 2013, for a four-year term.[224]

President Trump started his term with the opportunity to fill the two vacant Board positions. In June 2017, he nominated two Republican candidates—Marvin Kaplan and William Emanuel—to fill the vacant positions.[225] He will also have the opportunity to fill the General Counsel position in early November 2017. Appointments to these positions require Senate confirmation. However, given Republican control of the Senate, President Trump's appointments will likely be approved. Therefore, Republican appointees soon will comprise a majority of Board members.

Such a majority could end the Obama Board's approach to successorship issues. The views expressed by the dissenting Board members in *GVS Properties*, *Creative Vision*, and *Nexeo Solutions* could be adopted as the prevailing law by the new majority. This could cause the following effects:

- The Board would reverse *GVS Properties*. The determination of a successor employer's obligations under the NLRA would not be controlled by state and local worker retention laws. An employer's status as a "successor" would not be determined until after the mandated retention period.

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220. Mark Gaston Pearce, *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/mark-gaston-pearce (last visited Mar. 7, 2017); Lauren McFerran, *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/lauren-mcferran (last visited Mar. 7, 2017); Philip A. Miscimarra, *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/philip-miscimarra (last visited Mar. 7, 2017).

221. Richard F. Griffin, Jr., *Who We Are: The General Counsel*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/general-counsel/richard-f-griffin-jr (last visited Mar. 7, 2017).

222. *Who We Are: The General Counsel*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/general-counsel (last visited Mar. 7, 2017).

223. Griffin, *supra* note 221.

224. *Id.*

225. Mr. Kaplan currently is Chief Counsel at the Occupational Safety and Health Review Commission. He previously worked for the House Republicans on various education and oversight committees. Mr. Emanuel is a management-side labor attorney with the law firm of Littler Mendelson P.C. See Josh Eidelson, Chris Opfer, and Ben Penn, *Trump to Nominate Kaplan, Emanuel for Key Labor Board Spots*, BLOOMBERG BNA NEWS (May 11, 2017), https://www.bna.com/trump-nominate-kaplan-n73014450763/.

- The Board would return to a strict construction of the "perfectly clear" successor caveat to the *Burns* rule—that successor employers ordinarily are free to set initial terms and conditions of employment. The General Counsel would bear the burden of proving that facts warrant application of the caveat as clarified by *Spruce Up*; the Board would return the temporal focus of the "perfectly clear" determination to the time when the successor invites predecessor employees to accept employment; and the Board would adopt a more expansive view of the types of communications sufficient to constitute a clear announcement of changes in terms and conditions of employment.
- The Board would apply the "union demand" requirement in the successorship context. The successor's obligation to recognize and bargain with the union that represented the predecessor employees would not commence until the union demanded recognition or bargaining. It would not occur automatically, as a matter of law, when the employer becomes a statutory "successor" under *Burns*.

A new General Counsel appointed by President Trump will likely abandon efforts to have the Board reexamine *Spruce Up* and stop using an employer's compliance with mandates of E.O. 13495 and the SCA to contend the employer is a "perfectly clear" successor. In addition, President Trump could overturn E.O. 13495, thereby eliminating it altogether from the NLRB's successorship analysis.

Conclusion

President Obama and the Obama Board have fundamentally (yet relatively quietly) changed federal successorship law without expressly overruling a single NLRB precedent. Instead, the Board used a combination of (1) issuance of E.O. 13495; (2) a change in Board interpretation and application of longstanding NLRB law regarding successorship and "perfectly clear" successors; (3) the Board's willingness to permit state and local worker retention statutes to trump rights traditionally available to successor employers under federal labor law; (4) the Board's shift in the time when "perfectly clear" successor status is determined; and (5) the Board's narrow view of the types of communications sufficient to "clearly announce" the intention to change initial terms and conditions of employment and, thus, avoid a "perfectly clear" successor finding. Collectively, these changes made it more likely that a successor employer not only will inherit the predecessor's collective bargaining obligations, but also be unable to set the initial terms and conditions on which it will offer employment.

Like President Obama's other labor and employment initiatives, the recent shift in successorship law is subject to reversal by the Trump administration. It is important to remember, however, that successorship law—set forth in *GVS Properties*, *Adams & Associates*, *Creative Vision*, and *Nexeo Solutions*—does not change automatically with the arrival of the new administration, appointment of new Board members, or appointment of a new General Counsel. Because NLRB law is largely case-driven, the current law will remain in effect until new cases involving the key successorship issues work their way up to the reconstituted Board for decision. In the meantime, employers will continue to be subject to the restrictions imposed by the Obama Board's successorship decisions. Employers that fail to comply with those restrictions will do so at their peril.