Holland & Knight

Labor Law Series

The NLRB's Successorship Doctrine and "Perfectly Clear" Successors: What the Trump Administration Has Inherited

Part 1 of 3: Background on NLRB's Successorship Rules and Impact of Worker Retention Statutes

Kenneth A. Jenero
Partner
Labor, Employment & Benefits Practice Group [1]

Series Overview

Over the past six years, the National Labor Relations Board ("NLRB" or "Board") has been controlled by members appointed by President Obama. During this six-year period, the "Obama Board" (as it sometimes is called) issued many "pro-labor" or "anti-employer" decisions that reversed or significantly revised longstanding precedent that had survived prior changes in administrations and partisan Board composition. Some of the most notable and highly publicized decisions include *Specialty Healthcare & Rehabilitation Center* (2011), which opened the door to union organizing of "micro-units"; *Browning-Ferris Industries of California, Inc.* (2015), which changed the standard for determining whether two companies are "joint employers"; *Purple Communications, Inc.* (2014), which gave employees the presumptive right to use their employer's e-mail system during non-working time; and *Lincoln Lutheran of Racine* (2015), which held that an employer's obligation to check-off union dues continues after expiration of a collective bargaining agreement. The Obama Board also charted new territory and effectively rejected other longstanding precedent by adopting its "quickie election" rules, over the objection of the Republican members of the Board, in 2014.

While all of this was going on, the Obama Board also engaged in many less highly publicized actions, which nevertheless have far-reaching consequences for employers. One example involves the NLRB's "successorship" and "perfectly clear" successor doctrines, and their intersection with federal, state and local laws, rules and executive orders that limit a successor

---

[1] Holland & Knight's national Labor, Employment & Benefits Practice Group is a market leader in both employment litigation and counseling and traditional labor law for management. We are a diverse group of more than 60 practitioners with extensive experience in all areas of labor and employment law across a wide range of industries, including healthcare, construction, education, hospitality, transportation, energy, financial services, federal contracting, retail and manufacturing. We offer our clients a rare blend of boutique-type experience backed by the resources and support of a top-tier, full-service law firm. Our Labor Relations for Management team exclusively represents employers in all facets of the union-management relationship.

employer's discretion to make hiring decisions and set new terms and conditions of employment. These successorship issues may come into play, for example, when there is a corporate merger with, or an asset purchase of, an entity with a unionized work force, or when a new employer is awarded a government contract previously performed by a unionized contractor.

Through a number of recent Obama-Board decisions, President Obama's Executive Order 13495, *Nondisplacement of Qualified Workers Under Service Contracts* ("E.O. 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. In addition, the Board has continued to narrow the circumstances in which a successor employer lawfully can set the initial terms and conditions of employment upon which employment will be offered, and which will remain in effect until new terms are reached through the collective bargaining process. These developments are of particular significance to contractors bidding on federal service contracts previously performed by a unionized contractor.

This three-part *Labor Law Series* addresses the shift in successorship law under the Obama administration, including several decisions issued by the Obama Board in 2015 and 2016, and the related impact of E.O. 13495, which became effective in January 2013. A full discussion of E.O. 13495 is beyond the scope of this series. In a nutshell, however, it (1) requires most contractors awarded federal service contracts in excess of $150,000 to give qualified employees of the predecessor contractor, who otherwise would lose their jobs as a result of the change in contractor, a right of first refusal for employment with the successor contractor, and (2) prevents the successor contractor from hiring any new employees to perform services under the contract until this right of first refusal has been provided.

Although E.O. 13495 does not limit the terms on which the successor contractor may offer employment to the predecessor's employees, that is accomplished, in part, through the Service Contract Act ("SCA"). Under Section 4(c) of the SCA, a contractor who succeeds 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. This specifically 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 arms-length negotiations."

To be clear, the SCA does not require a successor contractor to (1) recognize or bargain with the union that represents the predecessor's employees, (2) follow any of the non-wage or non-fringe benefit provisions of the predecessor's collective bargaining agreement, (3) provide the same fringe benefits as the predecessor, or (4) adopt the predecessor's benefit plans. The successor contractor only is required to pay the dollar equivalent of the predecessor's wage and fringes, in total. However, as discussed in this series, 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 ongoing 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 Board comprised of a majority of his appointees will change the law in this area. In the meantime, the law developed under the Obama administration will remain intact and cannot be ignored when making and implementing decisions that could implicate the NLRB's successorship rules.

Background on NLRB's Successorship Rules

Pursuant to longstanding precedent under the National Labor Relations Act ("NLRA"), an employer who is a "successor" to an employer with a unionized workforce will have a duty to recognize and bargain with the union that represented the predecessor's employees. For this purpose, an employer generally will be a "successor" if the following two conditions are satisfied: (1) there is substantial continuity in the predecessor's and successor's business operations (*e.g.*, products, services, plant, equipment, work force, 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. *See Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

Under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), 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 conditions of employment unilaterally. In *Burns*, the Supreme Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. *Id*. at 295. 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." *Id*. at 294-295.

In *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), *enfd*. 529 F.2d 516 (4th Cir. 1975), the Board held that the *Burns* "perfectly clear" caveat should be 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, or at least to circumstances where the new employer ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." 209 NLRB at 195.

In subsequent cases, the Board has clarified that, although the Court in *Burns* and the Board in *Spruce Up* spoke in terms of a "plan[] to retain *all* of the employees in the unit" (emphasis added), 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 work force. *Galloway School Lines*, 321 NLRB 1422, 1426-1427 (1996); *Spitzer Akron, Inc*., 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977). *See also, Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 3 (2016); *Hospital Pavia Perea*, 352 NLRB 418, 418 fn. 2 (2008).

Several recent decisions of the Obama Board evidence its plan to sharply limit the circumstances in which employers lawfully may avoid not only successorship status, but also a finding that they are "perfectly clear" successors who cannot unilaterally set initial terms and conditions of employment. In one of the decisions (discussed below), the Board allowed a local worker retention statute to trump the flexibility otherwise available to successor employers under federal law. The other decisions (discussed in Parts 2 and 3 of this series) address the impact of restrictions imposed by the federal government under E.O. 13495 and the SCA. They also show

how the Obama Board has expanded the circumstances in which an employer's hands will be tied by a finding that it is a "perfectly clear" successor.

Obama-Board's Recent Successorship Decisions: Impact of State and Local Worker Retention Statutes

In *GVS Properties, LLC*, 362 NLRB No. 194 (2015), an employer acquired several real estate properties in New York City. The prior owner of the properties had subcontracted the daily service, maintenance, repair and upkeep of the properties to a unionized contractor with an extant collective bargaining agreement. Under the New York City Displaced Building Service Workers Protection Act ("DBSWPA"), the purchaser of the properties was required to (1) retain its predecessor's employees for a 90-day transition period, (2) recognize seniority when laying off employees who were not needed to provide services at the buildings, (3) offer a right of first refusal to any such laid off employees if positions again became available during the transition period, and (4) not discharge any of the predecessor's employees, other than for cause, during the transition period. The DBSWPA also required the successor employer to perform written performance evaluations for each of the retained employees at the end of the 90-day transition period and, if their employment was satisfactory during the transition period, to offer them continued employment under the terms and conditions established by the successor employer or as required by law.

At the time it purchased the properties, the new owner distributed a letter to the union-represented employees at the properties announcing that it would self-manage the properties and that the employees would no longer have jobs with the contractor who had employed them prior to the purchase. 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 the new owner would determine its permanent staffing needs. Enclosed with the letter was a memorandum describing the new terms and conditions of employment. Those terms and conditions, including wages, hours and benefits, were significantly different from those contained in the predecessor contractor's collective bargaining agreement.

The day after the purchase, the new owner hired seven of the eight bargaining unit employees and permanently laid off the eighth. Less than three weeks later, the union requested the new owner to recognize and bargain with it as the exclusive representative of the unit employees. The new owner refused. It took the position that 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. At the end of the 90-day transition period, the new owner discharged three of the unit employees and hired four new employees. It refused to recognize or bargain with the union because former union-represented employees did not comprise a majority of its then-current work force.

The issue presented to the NLRB by the union's unfair labor practice charge was the appropriate time to determine successorship status in cases in which a state or local worker

retention statute requires the employer to retain the predecessor's employees for a set period of time. 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 mandatory retention period has ended. A Board majority comprised of Obama appointees 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 pursuant to the terms of a worker retention statute. Accordingly, it held that the new employer unlawfully had refused to recognize and bargain with the union because it had the required "successor majority" at the appropriate time.

The majority rejected the argument of the new owner and the dissenting Republican Board member that the successorship determination could not be made until after the DBSWPA-mandated retention period had ended. This argument was based, in part, on the following language from *Fall River Dyeing and Finishing Corp.*, in which the Supreme Court emphasized the central role that 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. (Italics in original.)

482 U.S. at 40-41. The dissent in *GVS Properties* noted that delaying the successorship determination until after the mandatory retention period had run and the employer had 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.

The Obama-appointed majority attempted to square its decision with the applicable Supreme Court precedents by finding that the new owner had made the "conscious" and "intentional" 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." 362 NLRB at 3. As 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." *Id.* at n. 13.

However, as the dissenting Board member aptly observed: "The coercive nature of the regulation … 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." *Id.* at 8. The dissent also noted that by finding that an employer makes a voluntary decision to hire a predecessor's employees when it decides to purchase a business that is subject to a local worker retention statute, the majority erroneously had conflated the decision to purchase a business with the decision to compose its work force.

The majority also rejected the dissent's argument that its decision impermissibly gave state and local jurisdictions control over the determination of a successor's obligations under federal law, threatened the abnegation of state and local worker retention laws under the federal preemption doctrine, and denied employers subject to such laws rights which the U.S. Supreme Court had carefully articulated and protected in *Burns* and *Fall River*. The dissent also suggested that the majority's decision could lead to further curtailment of the rights of successor employers under the "perfectly clear" exception to the general rule that successors are free to set initial terms and conditions of employment. As the dissent noted: "It is perfectly clear that employers governed by the DBSWPA and like statutes will have to retain all of their predecessor's employees." 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." 362 NLRB at 10.

In response to the latter argument, the majority observed 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. 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." 362 NLRB at 5. That, according to the Board majority in *GVS*, was "precisely what happened here when the [new employer] simultaneously offered employment and announced new terms and conditions of employment." *Id* at 6.

Interestingly, however, the "perfectly clear" successor issue was not directly presented to, or decided by, the Board in *GVS Properties* because the union had not challenged the new employer's unilateral implementation of changed terms and conditions of employment. Thus, what we know from the majority's holding in *GVS* is that employers who hire all or substantially all of a unionized predecessor's employees (even if only temporarily) under the mandate of a state or local worker retention statute will not be not be able to avoid a successorship finding and related bargaining obligation under the NLRA. Whether such employers also will treated as "perfectly clear" successors, unable to unilaterally set the initial terms upon which employment will be offered, remains to be addressed in future cases in which the issue is squarely presented to the Board for decision.

Given the direction in which the Obama Board has moved successorship law – as explained further in Parts 2 and 3 of this series – employers succeeding to operations or contracts subject to state or local worker retention laws will need to proceed very cautiously. Of course, a change to a Republican-controlled NLRB under President Trump could bring this movement to an abrupt halt, including reversal of the Obama Board's decision in *GVS Properties*. However, as discussed in Part 3 of this series, nothing will happen automatically as a result of the change of administration or even a change in the composition of the Board. The Obama Board's successorship decisions will remain intact and represent the controlling law in this area, unless and until they are overturned by specific rulings in new cases, which could take months or years to work their way up to a reconstituted, Republican-controlled Board.

Kenneth A. Jenero is a partner in Holland & Knight's Labor, Employment & Benefits Practice Group, the leader of the Practice Group's Healthcare & Life Sciences Team, and a member of the Labor Relations for Management Team. Mr. Jenero is an experienced trial lawyer and business advisor, who has devoted his entire professional career to litigation and client counseling in all areas of labor and employment law, including union avoidance, collective bargaining, unfair labor practices, labor arbitration and union-management relations; employment discrimination, civil rights and affirmative action; wrongful discharge, retaliation and common law employment torts; trade secrets, non-compete agreements and other post-employment restrictive covenants; wage and hour law; and occupational safety and health.

Holland & Knight LLP
131 S. Dearborn Street, 30th Floor
Chicago, Illinois 60603
Tel: 312-715-5790
kenneth.jenero@hklaw.com