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NLRB Finds Obligation to Recognize Union Based On Purchaser's Compliance with NYC Worker Retention Law

In *GVS Properties, LLC*, 362 NLRB No. 194 (Aug. 27, 2015), the National Labor Relations Board ("NLRB or "Board") considered for the first time whether a purchaser becomes a successor employer under the National Labor Relations Act ("NLRA") with an obligation to recognize and bargain with an incumbent union when, in compliance with a local worker retention law, it hires the predecessor employer's employees for a limited transition period. In a 2-1 decision, the Board held that the appropriate time to determine the issue of successorship is when the new employer assumes control over the business and hires the predecessor's employees, even if such hiring is undertaken solely to comply with a worker retention statute and the employment is only temporary. The Board's decision, announced the same day as its controversial *Browning-Ferris* joint-employer decision (about which we wrote here), represents another favorable development for labor unions, as they will now be able to demand that employers subject to worker retention laws recognize and bargain with them, even in cases where, ultimately, none of the predecessor's employees will be retained.

In February 2012, GVS Properties, LLC ("GVS") purchased several buildings in New York City. Pursuant to New York City's Displaced Building Service Workers Protection Act ("DBSWPA"), GVS was required to retain the buildings' predecessor employees (a unit of maintenance employees represented by the International Association of Machinists and Aerospace Workers, AFL-CIO, District 15, Local Lodge 447 (the "Union")) for at least 90 days. Prior to taking control of the properties, GVS sent a letter to the employees advising them that, as their new employer, it had established new terms and conditions of their employment, which would apply on a temporary and trial basis for 90 days, after which time GVS would determine its permanent staffing needs. GVS also enclosed with the letter a memorandum detailing the employees' new terms and conditions of employment.

Several weeks later, the Union demanded in writing that GVS recognize and bargain with it as the exclusive collective bargaining representative of the employees. GVS refused. It claimed that the Union's request was premature since GVS would not

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employ a "substantial and representative complement" of the employees until after expiration of the 90-day transition period mandated by the DBSWPA. At the end of the 90-day transition period, GVS discharged three of the employees and hired four new employees. As a result, GVS's workforce consisted of four employees who had previously worked for the predecessor and four employees who had not. Because the predecessor's employees did not constitute a majority of the workforce, GVS continued to refuse the Union's demand for recognition. In response, the Union filed an unfair labor practice charge, alleging that GVS was a successor under the NLRA and, thus, obligated to recognize and bargain with the Union.

The Board majority held that GVS became a successor under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), when it assumed control over the predecessor's buildings and hired a majority of its workforce from among the former employer's employees. GVS argued that it could not be the successor employer under these circumstances since it did not make any "conscious" decision to hire the predecessor's employees, but rather was compelled to temporarily hire them under the DBSWPA. The Board majority rejected this argument, finding that GVS made the "conscious" choice to hire the predecessor's employees when it purchased buildings in New York City, since it was reasonably foreseeable that GVS would be subject to the requirements of the DBSWPA. The majority concluded that the NLRA's goal of maintaining industrial peace was best effectuated by considering GVS to be the successor at the time the employees were hired pursuant to the DBSWPA, as opposed to delaying the employees' bargaining rights and leaving the Union unsure of its status until the end of the 90-day transition period.

NLRB Member Johnson vigorously dissented. First, Member Johnson contended that the majority's reasoning that an employer voluntarily decides to hire its predecessor's employees erroneously conflates the decision to purchase a business with the decision to compose its workforce. Member Johnson explained that Supreme Court precedent mandates that NLRA successorship status may only arise when an employer voluntarily decides to retain the predecessor's employees. Because the worker retention statute is coercive legislation, he argued, it necessarily negates the voluntary conduct upon which successorship obligations must be based. As such, Member Johnson would not have found GVS to be a successor employer or to have any obligation to recognize or bargain with the Union. Instead, he contended that the only proper standard is to wait until after the statutorily mandated retention period had expired before applying the successorship doctrine. At that point, he noted, the Board could evaluate the voluntary decisions of the new employer, in accordance with Supreme Court precedent.

Member Johnson also argued that the Board's decision could have the unintended consequence of nullifying local worker retention statutes, as courts may now regard them as preempted by the NLRA. Previously, most courts examining this issue concluded that local retention statutes such as the DBSWPA were not preempted

under the NLRA, based on the assumption that the NLRB would never hold that successorship determinations arise prior to the end of a worker retention period. Given the NLRB's unexpected ruling in this case, these early court holdings will likely be re-evaluated, and the DBSWPA and other local worker retention statutes may be deemed preempted. Notably, the Board majority, in responding to these concerns, seemed to acknowledge that preemption could be an unintended consequence of its decision, but stated that this was not a sufficient enough reason to rule differently.

The Board majority's decision did not go as far as employers might have feared. The majority expressly denied that all purchaser employers subject to worker retention statutes are "perfectly clear" successors. A "perfectly clear" successor is one who is not permitted to set initial terms and conditions of employment but rather is bound by the predecessor's collective bargaining agreement. "We do not, as the dissent suggests, imply–much less hold–that all new employers subject to worker retention statutes are 'perfectly clear' successors, and we are not 'obliterating' the right of successor employers to set their employees' initial terms." Purchaser employers subject to worker retention statutes, however, can still be deemed "perfectly clear" successors if they fail to announce new terms and conditions of employment at the time they provide notice of their intention to retain a predecessor's employees. Because GVS timely set initial terms and conditions in this case, it was not deemed a "perfectly clear" successor.

On September 2, 2015, GVS filed a petition for review with the D.C. Circuit Court of Appeals seeking to have the Board majority's decision overturned. We will continue to monitor that appeal. Unless overturned, however, the Board's decision could have far-reaching impact. In addition to New York City, many other localities, including Philadelphia, Washington, D.C., Chicago, San Francisco, and Los Angeles, have enacted similar worker retention statutes. As such, prospective purchasers subject to these laws may have no choice but to recognize a predecessor employer's union, even in cases where few, if any, of the predecessor's employees will be employed by the purchaser after the transition period mandated by the retention statute expires.

If you have any questions about the issues discussed in this article, please contact Philip Repash or another attorney at the firm at (212) 758-7600.