Holland & Knight

Labor Law Series

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

Part 2 of 3: Impact of Executive Order 13495 and the Service Contract Act

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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 employer's discretion to make hiring decisions and set new terms and conditions of employment.

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[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.

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.

Obama-Board's Recent Successorship Decisions:
Impact of E.O. 13495 and the SCA

Part 1 of this series included an overview of successorship law as established by the U.S. Supreme Court in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and the NLRB in *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), *enfd*. 529 F.2d 516 (4th Cir. 1975). Under *Burns,* a statutory "successor" has a duty to recognize and bargain with the union that represented the predecessor's employees, but it ordinarily is not bound by the substantive terms of the predecessor's collective bargaining agreement and is free to set initial terms and conditions of employment unilaterally. The Court recognized an exception, however, where it is "perfectly clear" that the new employer plans to retain all (or a substantial majority) of the employees in the predecessor's bargaining unit. In such cases, "it will be appropriate to have [the successor] initially consult with the employees' bargaining representative before he fixes terms." *Id*. at 294-295.

In *Spruce-Up Corp.*, the Board limited the *Burns* "perfectly clear" exception 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 *Data Monitor Systems, Inc.*, 364 NLRB No. 4 (2016), the Obama Board addressed the application of the *Burns* and *Spruce Up* successorship rules in the context of a federal contractor that was awarded a contract to supply transportation services at Wright Patterson Air Force Base in Fairborn, Ohio. The new contractor was replacing a unionized contractor with collective bargaining agreements covering its maintenance, transportation, supply and personal property employees. These agreements required that seniority be used in deciding which employees to lay off and how to assign hours of work.

The new contractor won the federal contract on July 18, 2014. 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. Performance under the contract was scheduled to start on September 1.

During the contractual transition period, the predecessor contractor informed its employees that it had lost the contract, that the new contractor would be taking over the contract effective September 1, and that employment applications were available for those interested in working for the new contractor. Employees also were told that the new contractor would be conducting 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.

At the conclusion of each interview, the new contractor told the applicants that they would be informed shortly whether they would be offered employment. The new contractor interviewed all of the predecessor's employees who signed-up for an interview. When the interviews were completed, the union representing the predecessor's employees met with the new contractor. During this meeting, the new contractor told the union that it would not be hiring the same number of employees that the predecessor had employed at the Base. In response to the union's questions regarding the process that the new contractor would use to determine who to hire, the contractor stated that it would be hiring the best applicants and would not be using seniority in deciding which employees to retain. The new contractor ultimately offered employment to only 60 of approximately 90 of the predecessor's employees.

There was no dispute that the new contractor was a successor employer under the NLRA, which was required to recognize and bargain with the union as the representative of the unit employees. 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 work force at the Base. What was disputed, however, was whether the new contractor was free to unilaterally set the initial terms and conditions of employment on which employment would be offered to the predecessor's employees. In its unfair labor practice charge, the union argued (with the support of the NLRB's General Counsel) that the new contractor had lost that right because it became a "perfectly clear" successor when it distributed employment applications to the predecessor's bargaining unit employees without a simultaneous announcement of changes to the existing terms and conditions of employment. 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 with the union.

The NLRB's General Counsel argued that distributing applications and inviting employees to sign up for interviews was the same method that all prior successors had utilized, without disruption in service delivery or employment, and that employees understood the process to be routine and that their employment would continue uninterrupted with the new contractor. 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 employees of the predecessor whose employment would be terminated as a result of the award of the successor contract. Thus, in the context of the historical practices with various successor employers and the obligations imposed by E.O. 13495, the new contractor's invitation to the predecessor's employees to submit applications was essentially a job offer. According to the General Counsel, because the new contractor failed to clearly announce its intent to establish a new set of conditions prior to extending the "job offers," it was a "perfectly clear" successor.

The Board held that under the specific facts presented in the *Data Monitor* case, the new contractor did not become a "perfectly clear" successor because the distribution of applications to the predecessor's employees was not the equivalent of an invitation to accept employment, as argued by the General Counsel. Furthermore, the new contractor had not "either actively or, by tacit inference" misled the predecessor's employees into believing that they would be retained without changes in their wages, hours or terms of conditions of employment. *Spruce Up,* 209 NLRB at 195.

The Board noted that at the time the new contractor invited the predecessor's employees to obtain applications and sign up for an interview, it was in the preliminary stages of the hiring process. It had not yet decided how many employees it needed to meet its staffing requirements under the contract or which of the predecessor's employees it intended to hire. The documents in the application packets themselves reflected that the new contractor had not yet made hiring decisions, emphasized the individual's status as "applicants," and did not in any way indicate that simply completing the application was sufficient to guarantee employment with the new contractor. Thus, the Board concluded, 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." 364 NLRB at 3.

The Board also found, contrary to the General Counsel' argument, that the obligations imposed by E.O. 13495 did not warrant a contrary result "*in the circumstances presented here*." *Id*. (italics added). Unlike the worker retention statute at issue in *GVS Properties* (discussed in Part 1 of this series),[2] E.O. 13495 did not require the new contractor to retain any of the predecessor's employees for any period of time. Instead, E.O. 13495 merely required the new contractor to offer the predecessor's employees the right of first refusal of suitable employment. Moreover, it permitted the new contractor to hire fewer employees than the predecessor employed and generally gave the new contractor the authority to choose which employees to hire. Therefore, although E.O. 13495 effectively sealed the new contractor's fate as a successor, it did not automatically support a finding that it was a "perfectly clear" successor.

The facts in *Data Monitor* showed that at the time employment applications were distributed to the predecessor's employees, the new contractor had not yet determined which of the employees it was going to offer the right of first refusal. Nor did it know which employees, if any, would accept jobs once offers were made. According to the Board, under these facts, the new 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." 364 NLRB at 4.

At first blush, the *Data Monitor* decision may seem to be favorable to employers. However, it must be viewed in light of its somewhat unique facts. The new contractor's staffing plan called for the hiring of only two-thirds of the predecessor's employees (i.e., 60 out of 90). Because the new contractor did not need all or substantially all of the predecessor's employees to service the contract, it legitimately used the application and interview process to assess the employees' relative qualifications and identify the particular employees to which it wanted to extend the right of first of refusal required by E.O. 13495. As such, it emphasized the individual's status as "applicants" and avoided making any representations that would lead them to believe that completing the applications was simply an administrative formality that would ensure their continued employment.

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[2] In *GVS Properties LLC*, 362 NLRB No. 194 (2015), a Board majority comprised of Democratic Obama appointees held that the appropriate time for determining successorship status is when the new employer assumes control over the predecessor's business and hires the predecessor's employees, even when it is required to do so pursuant to the terms of a state or local worker retention law. The worker retention law at issue in *GVS* was a New York City statute that required purchasers of certain properties to retain their predecessor's employees for a 90-day transition period and prohibited the purchasers from discharging any of the predecessor's employees, other than for cause, during the transition period. The *GVS* decision effectively permits state and local statutes to trump the rights afforded to employers under longstanding federal successorship law. Under *GVS*, 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.

This is substantially different from what likely is the more typical scenario in which the new contractor will need to hire most, if not all, of the predecessor's employees to meet its staffing requirements under the contract. In such a scenario, the new contractor effectively knows, from the time the contract is awarded, that it will be offering a right of first refusal to all or substantially all of the predecessor's employees. As such, the Obama Board likely would be more receptive to the arguments made by the General Counsel in *Data Monitor*. If the new contractor wants to avoid "perfectly clear" successor status under existing Board law, including *Data Monitor*, it presumably would need to announce its intent to change terms and conditions of employment by no later than the time when it affirmatively offers the predecessor's employees the right of first refusal required by E.O. 13495. However, as noted in Part 3 of this series, even that may not be soon enough given the direction in which the Obama Board has moved the "perfectly clear" successor analysis in several decisions following *Data Monitor*.

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