

# Holland & Knight

## Labor Law Series

### **The NLRB’s Successorship Doctrine and “Perfectly Clear” Successors: What the Trump Administration Has Inherited**

#### **Part 3 of 3: Shift in Time for Determining “Perfectly Clear” Successor Status And What the Future Holds**

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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. These successorship issues may come into play, for example, when there is a corporate merger

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<sup>1</sup> 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.

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: Shift in Time for Determining “Perfectly Clear” Successor Status**

As discussed in Part 1 of this series, under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) and *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), an employer’s status as a “perfectly clear” successor generally is determined as of the time it “invit[es] former employees to accept employment.” *Spruce Up*, 209 NLRB at 195. To avoid a “perfectly clear” successor finding, an employer typically must announce its intent to establish a new set of employment conditions prior to or at the time it extends offers of employment to the predecessor’s employees. However, in three cases decided in 2016 – *Adams & Associates, Inc.*, 363 NLRB No. 193 (May 17, 2016), *Creative Vision Resources, LLC*, 364 NLRB No. 91 (August 26, 2016), and *Nexeo Solutions, LLC*, 364 NLRB No. 44 (July 18, 2016) – the Obama Board shifted the temporal focus of the “perfectly clear” determination from the time when the successor invites employees to accept employment, to a potentially much earlier time, namely, when the successor expresses an intent to retain the predecessor’s employees.

In all three cases, the Board found, contrary to the ALJ, that the employers had failed to announce their intention to change employment conditions in a timely manner. As such, they were “perfectly clear” successors who could not unilaterally set the initial terms and conditions on which employment would be offered to the predecessor’s employees. *Adams* was a unanimous decision by a panel comprised of three Democratic Board members. *Creative Vision* and *Nexeo Solutions* were majority decisions, which elicited strong dissents from the lone Republican Board member.

In *Adams & Associates*, the ALJ found that the employer was a successor under the NLRA, but was not a “perfectly clear” successor. The successor employer in *Adams* was awarded a federal contract to provide residential, counseling, career preparation, career transition, recreation, and wellness services at a Job Corps Center located in Sacramento, California. The prior contractor had a collective bargaining agreement with the American Federation of Teachers. 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.

Early in the transition process, the successor contractor informed the predecessor’s employees that it would offer a right of first refusal to “those **eligible and qualified** employees” who had worked on the predecessor’s contract during the last thirty days of the contract, with certain exceptions. 363 NLRB at 14 (emphasis in original). The communication also noted that (1) the successor contractor might reduce the size of the current workforce and, therefore, only a portion of the existing eligible workforce might receive employment offers, and (2) where the successor contractor had reason to believe that an employee’s job performance while working on the contract was unsuitable, the employee would not be entitled to an offer of employment.

The successor contractor first interviewed qualified incumbent employees of the predecessor contractor. These qualified incumbents were given the right to apply for positions before outside applicants were considered. The successor contractor interviewed the incumbent employees who applied for positions and provided offer letters to those who were determined to be qualified. To accept employment, the employees needed to sign the offer letters and return them to the successor contractor prior to commencing work for the contractor. The offer letters:

- Specified the employees' wage rates, which were the same as those paid by the predecessor employer;
- stated that the employees were eligible for all of the benefits provided by the successor contractor, as defined in its Human Resources Policies;
- set forth the employees' schedules, which for some was different from their schedule with the predecessor employer;
- stated that the successor contractor reserved the right to adjust work schedules as a business necessity and/or to meet program service needs; and
- stated that employment would be "at-will and there is no written or implied contract for continued employment ... [and that the company] is free to terminate your employment at any time for any reason except as may be prohibited by law."

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

Hiring decisions were made on an ongoing basis throughout the contract transition period. The decisions to hire were based on a combination of various considerations, including completed interview evaluation forms, annotated employee lists containing the predecessor employer's recommendations, and instructions from the successor contractor's corporate office. As a result of this hiring process, at the time the successor contractor began operating the Job Corps Center, a majority of its employee complement were former bargaining unit employees of the predecessor employer. As such, the ALJ found that the new contractor was a successor under the NLRA and was obligated to recognize and bargain with the employees' union representative.

However, the ALJ rejected the General Counsel's argument that the new contractor was a "perfectly clear" successor who violated the NLRA by setting initial terms of employment without bargaining with the union. According to the ALJ, the new contractor did not actively or tacitly indicate that all employees would be retained. Furthermore, although the new contractor was obligated to comply with E.O. 134945, the regulatory framework applicable to the transition from one contractor to the next did not mandate that all incumbent employees of the predecessor be retained by the successor. The right of first refusal required by E.O. 13495 did not constitute a mandated blanket offer to all employees. The applicable regulations permitted a successor contractor to refuse to offer employment to incumbent employees when, for example, there was credible information that the employee had not performed suitably for the prior contractor. 363 NLRB at 21-22.

The ALJ also found that even if the new contractor had evinced an intention to hire all of the incumbent applicants, it had clearly announced its intent to establish new conditions. 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. In addition, in its hiring agreements, which

were presented to each employee at the time of hire, the new contractor set forth wages, shifts, a mandatory arbitration agreement to resolve employment disputes, at will employment, a new disciplinary system, and new insurance. 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*.” *Id.* at 22. 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 assertion that “the majority holding in *Spruce Up* misconstrued *Burns* and has led to inconsistent results.” *Id.* As the ALJ noted, “[i]t may be that this argument will be addressed by the Board but administrative law judges are bound by extant law.” *Id.*

The Board in *Adams & Associates* did not take the opportunity to directly reexamine *Spruce Up*. Instead, it found that the ALJ improperly had concluded that the new contractor was not “a ‘perfectly clear’ successor within the meaning of *Spruce Up* ...” *Id.* at 1. In discussing the meaning of *Spruce Up*, however, the Board shifted the focus of the temporal analysis from the time when the successor contractor invited the employees to accept employment, to the time when it expressed an intent to retain the predecessor’s employees. Indeed, in *Adams*, the Board specifically 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*.” *Id.* at 3-4 (italics added).

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’s employees. The Board focused its attention on the initial meeting that the new contractor held with the predecessor’s employees to announce the transition and inform them about the hiring process. At this meeting, the new contractor’s Executive Director stated that the 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.” *Id.* at 2. When the meeting was opened for questions, an employee who identified herself as the union president, asked about the availability of positions and what might prevent an incumbent employee from being hired. The contractor’s Executive Director responded that, “aside from disciplinary issues, he was 99 percent sure that [they] would all have a job.” *Id.* He also noted, however, that the company planned to reduce the total number of positions at the Center from 25 to 15 and to create a new position to help meet student-staff ratios. 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 24 hours to return completed applications.

According to the Board, the Executive Director’s above-quoted statements – *i.e.*, that the predecessor’s employees had been “doing a really good job,” that the company “didn’t want to rock the boat” and “wanted a smooth transition,” and that “aside from disciplinary issues, he was 99 percent sure that [they] would all have a job” – clearly “expressed an intent to retain a sufficient number of incumbent [employees] to continue the Union’s majority status in the [new contractor’s] workforce.” *Id.* at 4. Therefore, under the Board’s interpretation of *Burns* and *Spruce Up*, in order to preserve its authority to set initial terms and conditions of employment unilaterally and avoid “perfectly clear” successor status, the new contractor was required to clearly announce its intent to establish a new set of conditions on or before the date of the meeting at which these statements were made. The Board found that the new contractor did not inform the employees that employment would be on new terms until several weeks later, when it distributed offer letters and

employment agreements to the successful applicants. Therefore, the new contractor became a “perfectly clear” successor as of the date of the initial meeting with the employees.

The Board took the same approach three months later in *Creative Vision* – this time over the strong dissent of the lone Republican Board member. In *Creative Vision*, the Board majority overruled the ALJ’s determination, with which the dissenting Board member agreed, that the new employer was not a “perfectly clear” successor under *Spruce Up*. The principal source of disagreement between the ALJ and dissenting Board member, on the one hand, and the Board majority, on the other hand, was the appropriate time to assess the new employer’s status as a perfectly clear successor. As in *Adams & Associates*, the Board majority in *Creative Vision* again focused on the time when the new employer expressed an intent to retain the predecessor’s employees. In contrast, the ALJ and dissenting Board member focused on the time when the new employer invited the predecessor’s employees to accept employment. The different conclusion that each side reached was directly related to their choice of the appropriate time for assessing “perfectly clear” successorship status.

As the dissenting Board member explained, the new employer’s hiring process began on or about May 19, 2011, but remained in a state of flux right up to the moment on June 2 when the employees accepted employment by beginning work. “Thus, in determining whether the [new employer] fulfilled its obligation under *Spruce Up* to clearly announce to the [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 [employees] *on or before June 2.*” 364 NLRB at 10 (italics in original). Based on the following evidence, the dissenting Board member agreed with the ALJ that the new employer “provided timely notice to the [employees] of its intention to set new terms and conditions of employment.” *Id.*

First, starting in May, the new employer distributed employment applications to the predecessor’s workers with W-4 tax withholding forms attached. To the ALJ and the dissenting Board member, inclusion of the tax forms was compelling evidence of the new employer’s intention to set new terms and conditions of employment different from the predecessor’s. The predecessor had treated the workers as independent contractors and, accordingly, did not withhold taxes from their pay. Thus, the tax forms signaled a fundamental change in the employees’ terms and conditions of employment – namely, that if they accepted employment with the new employer, they would cease being independent contractors paid by the day with no taxes withheld and would become employees from whose paychecks taxes would be withheld. Furthermore, because the employees received and signed the applications and accompanying withholding forms, it reasonably followed that they were on notice that the new employer was offering employment on new and different terms.

Second, prior to June 2, the new employer informed approximately thirty percent (30%) of the predecessor’s workers of certain changes in their terms and conditions of employment, including that the new employer would pay \$11 per hour with overtime and would deduct taxes and social security from the employees’ paychecks.

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. These new terms included the \$11 per hour pay rate, the deduction of

federal and state taxes, and a number of new employment standards and safety rules. Some of the employees refused to work upon learning of the new terms. A sufficient number remained, however, to staff the operations. According to the dissenting Board member, with the announcement of 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.” 3674 NLRB at 12.

The dissenting Board member also noted that it is well established in successorship cases that the successor employer’s obligation to recognize and bargain with the union commences only if and when two conditions are met: (1) the 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. The record in *Creative Vision* showed that the union did not make a demand for recognition or bargaining until June 6. According to the dissenting Board member, because “June 6 [was] the earliest point in time when the [new employer] could be deemed a ‘successor’ for purposes of Section 8(a)(5),” this “independently preclude[d] a finding that the [new employer] was a ‘perfectly clear’ successor on or before June 2, when the [new employer] commenced operations after indicating ... that there would be different employment terms.” *Id.*

The Board majority in *Creative Vision* had a different view of the law and the facts. According to the majority, the ALJ (and the dissenting Board member) 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.” 364 NLRB at 3. In addition, “[t]he Board has consistently held ... that 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.” *Id.*

According to the Board majority, the ALJ’s own factual findings established that the new employer expressed an intent to retain the predecessor’s employees between mid-May and June 1. Because the transition from the old employer to the new employer would be an abrupt shift, the new employer had to be sure that it had enough employees lined up to staff all of its needs in advance. The new employer made no efforts to hire employees from other sources. Furthermore, although the new employer asked the predecessor’s workers to complete employment applications and W-4 forms, it did not interview any of the applicants, examine their qualifications, or check their references. Therefore, there was “no doubt” that 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.’” 364 NLRB at 4.

The majority disagreed with the dissenting Board member and ALJ’s assessment of the new employer’s communications with the predecessor’s workers prior to June 2. According to the majority, the inclusion of the W-4 forms with the job applications, without explanation, let alone an express announcement that taxes would be withheld from the employees’ pay, “was too ambiguous.” *Id.* It was insufficient to make “clear [to] a reasonable employee in like circumstances ... that continued employment [was] conditioned on acceptance of materially different terms from those in place under the predecessor.” *Id.* The majority also concluded that the other evidence

relied on by the dissenting Board member and ALJ showed that, prior to June 2, the new employer had discussed the new employment terms with only a relatively small number of the predecessor's workers. Furthermore, although the new employer's supervisor announced the changed employment terms to all of the predecessor's workers on June 2, that announcement "came too late to remove the [new employer] from the 'perfectly clear' exception" because it already had expressed the intent to retain the predecessor's workers. *Id.* at 5.

The majority also disagreed with the dissenting Board member's additional basis for concluding that the new contractor was not a "perfectly clear" successor as of June 2 – namely, that the union had not yet made a bargaining demand. The majority observed that the rule invoked by the dissenting Board member was developed in a very different context. Specifically, in *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court addressed the question when the bargaining obligation was triggered in circumstances where there was a hiatus between the closing and reopening of an enterprise and/or a successor gradually builds up its work force over a period of time. According to the majority, nothing in the language or reasoning of *Fall River* supported the extension of these criteria to the "perfectly clear" successor context. 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." 364 NLRB at 6-7 (italics in original).

In *Nexeo Solutions*, the Board was confronted with the question of whether a company that purchased the assets of a distribution center, began operating the business in basically unchanged form, and retained all of the predecessor's bargaining unit employees without a break in service was a "perfectly clear" successor under *Burns* and *Spruce Up*. The same Board majority that decided *Creative Vision* disagreed with the ALJ's decision that the purchaser in *Nexeo Solutions* was not a "perfectly clear" successor. Contrary to the ALJ and the dissenting Republican Board member, the majority concluded that the purchaser became a "perfectly clear" successor because the facts made it "abundantly clear from the outset that the [purchaser] planned to retain the unit employees." 364 NLRB No. 44 at 7.

As support for its conclusion, the Board majority noted that under the terms of the November 5, 2010 purchase agreement, the purchaser (1) committed itself to offer employment to all of the predecessor's employees, (2) agreed that the purchase would not result in the severance of employment of any employee, and (3) guaranteed that for a period of eighteen (18) months after the closing date, the predecessor's employees who accepted an employment offer with the purchaser would receive base salary or wages no less favorable than those provided immediately prior to the closing date, as well as other employee benefits, variable pay, incentive and bonus opportunities under plans that were substantially comparable in the aggregate to those provided by the predecessor employer. Then, on November 7, 2010, the predecessor employer communicated to its employees that they "will transfer to the new business." *Id.* There was no mention, at that time, that the purchaser intended to establish a new set of conditions. The purchaser's November 7 communication to the predecessor's employees was silent regarding terms and conditions of employment.

Therefore, under the majority's interpretation of the *Burns* caveat, as clarified in *Spruce Up*, the purchaser became a "perfectly clear" successor, with an obligation to bargain over initial terms, as of November 7, 2010. According to the majority, although not necessary to its finding,

its conclusion that the purchaser was a “perfectly clear” successor was further supported by a November 8, 2010 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.” *Id.*

Because the Board majority concluded that the purchaser became a “perfectly clear” successor on November 7, 2010, it generally disregarded – as *untimely* – all of the subsequent communications between the purchaser and the predecessor’s employees during the period from November 7<sup>th</sup> to March 31, 2011 (when the purchase of assets was completed) and April 1, 2011 (when the purchaser began operating the business). These communications included a February 16, 2011 letter in which the purchaser informed the predecessor’s 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-employer pension plan maintained by the predecessor employer, and (4) instead, the employees would be covered by the purchaser’s 401(k) plan. The communications also included employment offer letters, dated February 17, 2011, which were accompanied by a description of the purchaser’s health insurance, life insurance and 401(k) plans.

The dissenting Board member 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’s] employees on February 17, 2011.” 364 NLRB at 15. In the view of the dissenting Board member, the General Counsel failed to satisfy his burden of proving that the purchaser was a “perfectly clear” successor under the standard set forth in *Spruce Up*. The evidence presented by the General Counsel was insufficient to establish either that the purchaser had “misled employees into believing that 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.” 364 NLRB at 21. To the contrary, “the [purchaser] never invited [the predecessor’s] employees to accept employment without clearly announcing its intent to set new employment terms.” *Id.*

The dissenting Board member listed several factors in support of his conclusion that the purchaser was not a “perfectly clear” successor. First, 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). As the dissenting Board member 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.” 364 NLRB at 21 (*italics in original*). Furthermore, unlike the majority, the dissenting Board member concluded that there was insufficient evidence to attribute the predecessor’s statements to the purchaser on the basis of actual authority, apparent authority or ratification.

Second, the dissenting Board member disagreed with the majority’s claim that in early January 2011, the purchaser invited employees to accept employment without conveying its intent

to establish new terms. The majority relied on a statement to employees by the purchaser that it “[was] not planning job reductions.” 364 NLRB at 22. However, as the dissenting Board member noted, immediately after making that statement, the purchaser told the 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 future. To the dissenting Board member, this statement itself “clearly informed [the predecessor’s] employees of [the purchaser’s] ‘intent to establish a new set of conditions’” as required by *Spruce Up*. *Id.* Therefore, according to the dissent, the evidence failed to support the majority’s finding that the predecessor’s employees reasonably would have thought that the purchaser intended to retain them on the same terms and conditions they were working under with the predecessor.

Third, the dissenting Board member disagreed that the purchase agreement supported a finding that the purchaser was a “perfectly clear” successor. Initially, the dissenting Board member noted that the purchase agreement left the purchaser free to implement benefits and benefit plans that differed from the predecessor’s so long as they were “substantially comparable in the aggregate to those provided by [the predecessor].” 364 NLRB at 22. The purchase agreement clearly allowed for 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, consistent with the terms of the purchase agreement. Therefore, as the dissent 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).” *Id.*

Finally, “and dispositively,” according to the dissenting Board member, “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’s] employees.” *Id.* (italics in original). Hence, “the Purchase Agreement itself cannot properly be viewed as an ‘invit[ation] ... to accept employment’ within the meaning of *Spruce Up*.” *Id.* To the dissenting Board member, February 17 – not November 7 – was the operative date for determining the purchaser’s status as a “perfectly clear” successor. Therefore, because the purchaser had announced different terms and conditions of employment by February 17, it was not a “perfectly clear” successor under *Spruce Up*.

In *Adams & Associates*, *Creative Vision*, and *Nexeo Solutions*, the Obama Board focused on the date when the successor employer expresses an intent to retain the predecessor’s employees – not on the time when it actually invites those employees to accept employment – as the temporal trigger for a “perfectly clear” successor finding. With this new focus, to avoid “perfectly clear” successor status, a successor employer may need to clearly announce its intent to change the terms and conditions of employment long before the date when it extends an employment offer or right of first refusal to the predecessor’s employees. Where 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 to staff the operation, 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 that is no less than the predecessor’s, the successor may need to clearly announce its intent to change terms and conditions of employment at or near the time it is first awarded the federal contract in order to avoid “perfectly clear” successor status.

The same potentially is true for a successor employer who, as in *GVS Properties* (discussed in Part 1 of this series), is required to hire the predecessor's employees under a state or local worker retention law.<sup>2</sup> Under the rationale adopted by the majority in *GVS*, the "decision" to retain the predecessor's 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 concerns expressed by the dissent in *GVS*,<sup>3</sup> it is not difficult to see how, under the Obama Board's decisions, an employer who 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 the predecessor's 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." 362 NLRB at 10. Delaying the announcement until on or before the date on which the successor offers employment or a right of first refusal to the predecessor's employees could prove fatal to its ability to unilaterally set the initial terms and condition of employment under *Burns*.

### **What the Future Holds**

Only three of the five positions on the NLRB currently are filled. The Board members are Chairman, Mark G. Pearce, a Democrat whose term expires on August 27, 2018; Member Lauren McFerran, a Democrat whose term expires on December 16, 2019; and Member Philip A. Miscimarra, a Republican whose term expires on December 16, 2017. The current General Counsel of the NLRB is Richard F. Griffin, Jr. The General Counsel is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases. Mr. Griffin previously served as General Counsel for the International Union of Operating Engineers. He was appointed to the position of General Counsel of the NLRB by President Obama for a term that expires on October 28, 2017.

President Trump starts his term with the opportunity to fill the two vacant Board positions immediately. He also will have the opportunity to fill the important position of General Counsel in late October 2017. Appointments to these positions require Senate confirmation. However, given Republican control of the Senate, President Trump's appointments almost certainly will be approved. Therefore, the Republicans soon will comprise a majority of the Board's members.

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<sup>2</sup> 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 able to avoid a successorship finding and related bargaining obligation under the NLRA.

<sup>3</sup> See discussion of *GVS Properties* in Part 1 of this series.

A Republican majority could mean an end to 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 a new Republican majority. If that were to happen, we could see the following:

- Reversal of *GVS Properties*: State and local worker retention laws would not control over the determination of a successor employer’s obligations under the NLRA. An employer’s status as a “successor” would not be determined until after the mandated retention period.
- 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 unilaterally: The General Counsel would be held to the burden of proving that the facts warrant application of the caveat as set forth and delimited in *Spruce Up*; the Board would return the temporal focus of the “perfectly clear” determination to the time when the successor invites the predecessor’s employees to accept employment; and the Board would take a more expansive view of the types of communications that are sufficient to satisfy the requirement that the successor “clearly announce” changes in terms and conditions of employment.
- Application of the “union demand” requirement in the successorship context: The successor’s obligation to recognize and bargain with the union that represented the predecessor’s employees would not commence until the union demands recognition or bargaining. It would not occur automatically, as a matter of law, when the employer becomes a statutory “successor” under *Burns*.

With a change in the majority of the Board and the appointment of a more employer-friendly General Counsel, it also is likely that the General Counsel will abandon efforts to have the Board reexamine *Spruce Up* and stop using an employer’s compliance with the mandates of E.O. 13495 or the SCA to support an argument that the employer is a “perfectly clear” successor.<sup>4</sup> In addition, President Trump could overturn E.O. 13495, thereby eliminating it altogether from the NLRB’s successorship analysis.

It is important to remember, however, that successorship law – as set forth in the Obama Board’s decisions in *GVS Properties*, *Adams & Associates*, *Creative Vision*, and *Nexeo Solutions* – will not be nullified automatically by a change in the administration, the composition of the NLRB or the identity of the 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 a Republican-controlled Board for decision. In the meantime, employers will continue to be subject to the restrictions imposed by the Obama Board’s successorship decisions. Employers who fail to comply with those restrictions will do so at their own peril.

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<sup>4</sup> See discussion of *Data Monitor Systems, Inc.*, 364 NLRB No. 4 (2016) in Part 2 of this series.



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