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Buyer Beware – NLRB Decision Creates New Risks For Purchasers Of Union Operations

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The NLRB's Successorship Rules For some time, the NLRB's general counsel has wanted to alter the National Labor Relations Act (NLRA) successorship doctrine in favor of unions. A recent NLRB decision on the "perfectly clear successor" exception has shed some light on the obligation for a purchaser to bargain with a union – and on its purchase agreement language and communication with employees. The NLRA's successorship doctrine sets the rules for when an asset purchaser becomes obligated to recognize and bargain with a union representing the seller's employees. The general rule is that an asset purchaser that continues the seller's business in a substantially unchanged form and whose new hourly workforce is made up of a majority of the seller's prior represented employees is obligated to bargain with the union that represented those employees. Another part of the general rules on successorship, when communicated correctly, allows an asset purchaser to set its own initial terms and conditions of employment first and then bargain with the union starting from those initial terms. When this option is implemented correctly, the purchaser avoids being immediately saddled by the terms and conditions of the seller's existing Collective Bargaining Agreement (CBA). A caveat is worth noting: these general rules also assume that the purchaser has not agreed to assume the CBA as part of any asset purchase agreement. There is an exception to the general rules known as the NLRB's "perfectly clear successor" doctrine. When applicable the "perfectly clear successor" doctrine takes away an asset purchaser's ability to set initial terms and conditions of employment. Losing the right to set initial terms and conditions of course creates a significant issue of bargaining leverage for the purchaser should it have to recognize and bargain with the seller's union. Therefore, avoiding "perfectly clean successor" status often is a priority for companies purchasing a business that has union represented employees and a reason the NLRB has been proposing to expand the "perfectly clear" exception. **The NLRB's New 'Perfectly Clear' Successor Case** The "perfectly clear successor" test came in *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016), in which a two-member majority of the NLRB created additional risks for asset purchasers trying to avoid "perfectly clear" successor status. First, the NLRB clarified that: ". . . the bargaining obligation attaches when a successor [asset purchaser] expresses an intent to retain the predecessor's employees without making it clear that employment will be an acceptance of new terms.

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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.”

While these statements generally reflect prior law, what is shocking about the *Nexeo Solutions* decision is how the NLRB Majority applied these rules and the doctrine. In *Nexeo*, the NLRB majority relied in part on the language from the asset purchase agreement itself (a document the union did not even have prior to the time the NLRB found *Nexeo* became a “perfectly clear” successor). Specifically, the NLRB majority found that language in the purchase agreement that employment would be offered to the seller’s employees (notwithstanding that the union nor the employees knew nothing of this language), along with language binding the purchaser to “provide to each transferred employee, base salary and wages no less favorable than those provided prior to closing[,] and other employee benefits that are substantially comparable in the aggregate . . .” helped support finding that the purchaser, *Nexeo*, was a “perfectly clear” successor. What is somewhat astounding about the NLRB’s reliance on these pieces of evidence is that because neither the union nor the employees knew of this language at the time the NLRB determined *Nexeo* became a perfectly clear successor, it is quite impossible that either the union or employees could have been misled that their terms and conditions would not change. This is significant because in the NLRB’s Spruce Up decision, 209 NLRB 194 (1974), the NLRB previously stated that the “perfectly clear” exception “should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they all would be retained without a 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.” In the *Nexeo* case, when the purchaser actually offered employment, it did announce new terms and conditions, but the *Nexeo* NLRB majority was willing to find that the language in the asset purchase agreement which stated that wages and benefits would be “no less favorable” and/or “comparable in the aggregate” were insufficient to allow a change because they were not specific enough about any changes. Such language is common in asset purchase agreements, and notwithstanding the NLRB’s view, a purchaser would generally believe such language should preserve its ability to make some changes. Given that purchase agreements are negotiated often in a vacuum, and sometimes long before actual offers of employment are made, it is troubling that the NLRB latched onto this language. Moreover, such language often is used by purchasers to preserve a very important right, especially in the areas of health and pension benefits, where a purchaser may find it almost impossible to “mirror” the seller’s plans and will therefore invariably have to make a change. These real life circumstances, however, seem lost on the NLRB majority. The result: employers purchasing union businesses must be even more careful when drafting and considering the possible results of purchase agreement language, but also when considering all other communications to a seller’s employees or their union that could be interpreted to either promise continued employment or the retention of current terms and conditions of employment.
Bottom Line When purchasing a business with union represented employees there are many possible pitfalls. Purchase agreement language,

communications to employees and their union, and overall labor law goals are critical to consider. And, as the *Nexeo* case clearly establishes, if a purchaser does not: “buyer beware.”