Buying a Business With a Unionized Workforce? Heed These Important Legal Considerations

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If you're thinking of buying a business or taking over a services contract from a contractor with a unionized workforce, you'll want to know whether your new workforce also will be unionized. You'll also want to know, perhaps even more critically, whether you will be able to establish your own terms and conditions of employment without having to bargain with the union or be bound by an existing labor contract. Most new business owners and operators want the ability to start afresh and set their own employment terms (e.g., wages, benefits, etc.).

The Basics

Determining whether your new workforce will be unionized is fairly standard. If you buy the corporate equity of the existing business (for example, a stock purchase) you step into the shoes of the existing business. Your workforce will be represented by the same union and you will be bound by the existing labor contract. If, on the other hand, you buy some of the assets of the existing business or are awarded a new services contract, the answer depends on whether you significantly modify operations and whether you employ a majority (i.e., 50.1%) of the pre-existing workforce. And, by the way, you cannot refuse to hire members of the pre-existing workforce just to avoid having a new workforce with more than 50% of the pre-existing workforce.

Determining whether you can unilaterally set new employment terms is a bit trickier and one where many a new acquirer or service provider has foundered on the shoals. To simplify things: if your workforce will be union represented under the general test discussed above, you can set initial terms unless you have conveyed to the existing workforce that you intend to offer jobs to "substantially" every incumbent (i.e., much more than 50.1%) and do not mention that you intend to change employment terms. The rationale is based loosely on the concept that the pre-existing workforce should know what it's getting into before deciding whether to accept employment with the new employer.

Impact of Recent NLRB Decision

What happens, however, if the new employer illegally refuses to hire some members of the pre-existing workforce because of their union-represented status? Should the law penalize the new employer by requiring it to adopt the existing terms of employment or should the remedy be limited to recognizing the union and paying backpay to the discriminatees?

The NLRB now holds "well it depends." *Ridgewood Health Care Center, Inc.*, 367 N.L.R.B. No. 110 (Apr. 2, 2019). The decision in *Ridgewood Health Care Center* is a departure from prior case law and was met with a vigorous dissent.

In *Ridgewood Health Care Center,* the new employer ultimately hired a total of 101 employees in the bargaining unit, 49 of whom came from the pre-existing workforce. Because the new workforce had less than 50.1% of the old workforce, the new employer refused to recognize the union and accordingly set its own terms of employment. Oops. The labor board found that the new employer illegally refused to hire four incumbent employees because of their union status, and therefore 53 of the new group of employees would have come from the pre-existing workforce. Because 53 would have constituted more than 50.1% of the new workforce, the new employer illegally failed to recognize the union.

As for the pre-existing labor contract – which is really the big financial question in these situations – the NLRB concluded that, because there was no evidence of illegality other than to the four employees, it could not be assumed that the new employer intended to hire substantially all of the pre-existing workforce. Without that assumption, the employer remained free to set initial terms of employment. The penalty for the illegal refusal to hire was limited to paying damages just to those four employees and recognizing the union.

The NLRB reminded employers, however, that if it is unclear how many existing employees were illegally denied employment (for example, in circumstances where the new employer made certain illegal statements toward the entire pre-existing workforce), then the new employer would forfeit its right to set initial employment terms.

Takeaways

Given the financial margin and CapEx that companies stake on getting new business, labor law successorship is absolutely not a Do-It-Yourself area of the law. Getting expert advice is paramount, for even minor facts. How an announcement is phrased, a stray remark said during an interview, employee provisions in an asset purchase agreement or services contract – can all fundamentally affect the answer to the two key questions: (1) Will we be unionized? and (2) Can we set initial terms of employment? The answers to these questions are even more challenging because federal labor law evolves and typically depends upon which political party is in the White House. Case in point: the decision announced in *Ridgewood Health Care Center*, a departure from prior case law, was met with a vigorous dissent likely to be adopted when the next Democratic President appoints a NLRB majority.

For more information, contact:

Jay Sabin, Esq., Member, Labor and Employment Practice, at jsabin@bracheichler.com or 917.596.8987

Authors

The following attorneys contributed to this insight.

Jay Sabin

Member
Labor and Employment, Cannabis Industry

917.596.8987 · 973.618.5907 Fax

jsabin@bracheichler.com