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Displaced Building Service Workers Protection Act Development: Federal Judge Holds That Any Successorship Analysis Must Be Performed After the Statutory Employee Retention Period

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Employers taking over unionized work covered by a statute mandating temporary retention of the existing workers may have assumed that they automatically have to recognize the existing union. In New York City, and possibly in other jurisdictions with similar laws, this assumption may no longer be correct.

In 2002, Mayor Bloomberg signed the New York City Displaced Building Service Workers Protection Act ("DBSWPA") into law. The DBSWPA requires successor building owners, managers, and contractors to offer employment to the pre-existing employees for a 90-day period. During this time, employees only can be terminated for cause or if the successor employer "determines that fewer building service employees are required to perform building services." N.Y.C. Admin. Code § 22-505.[1] Chicago, Philadelphia, San Francisco, Los Angeles, and Washington D.C. have all enacted similar laws that require the retention of employees for a set period of time. These laws attempt to dovetail with the successorship analysis utilized under the National Labor Relations Act ("NLRA" or the "Act") whereby an asset purchaser that is a "successor" employer generally must assume the seller's obligation to recognize and bargain with the union representing the seller's employees. A "successor" under the NLRA is defined as an entity that takes over a preexisting operation from one employer and continues substantially the same business where a majority of the workforce going forward consists of employees of the former entity. Typically, where an asset purchaser is continuing the business of the seller, the hiring of a majority of the seller's employees would cause an asset purchaser to be deemed a successor required to bargain with the existing union representing the employees.

The validity of these laws essentially mandating that certain asset purchasers become successors under the NLRA have come under attack before. A similar Providence, Rhode Island statute was challenged in the First Circuit, where the circuit court affirmed a district court's finding that an employer cannot be held to be a successor under the NLRA as a result of mere compliance with a statutory displaced workers statute. *See Rhode Island Hospitality Association v. City of Providence*, 775 F.Supp.2d 416 (D.R.I. 2011), *aff'd* , 667 F.3d 17 (1st Cir. 2011) (holding that since the NLRA's successorship analysis is based on the conscious decision of the new employer to retain workers, the disputed displaced workers statute mandate of transitional employment did not interfere with, and therefore was not preempted by, the NLRA, so long as successorship was not based on the period of statutorily required retention).

Most recently, in *Paulsen v. GVS Properties, LLC*, 1:12-cv-04845 (E.D.N.Y. Nov. 13, 2012) the United States District Court for the Eastern District of New York similarly evaluated the effect that the DBSWPA has on the NLRA's successorship analysis. As detailed below, the Court ruled that a building purchaser has the same right to determine its workforce as any other purchaser of assets – albeit, pursuant to the DBSWPA, the building purchaser has to wait 90 days to do so.

Background

In *Paulsen*, GVS purchased certain New York City properties, in which eight building service workers represented by the International Association of Machinists and Aerospace Workers, AFL-CIO, District 15, Local Lodge 447 ("Union") were employed. Upon taking control of the buildings and pursuant to the DBSWPA, GVS immediately hired seven of the eight employees of the predecessor – with the eighth employee being terminated based on GVS's determination that it needed only seven employees to perform the building services work. At the beginning of the 90-day period, GVS wrote a letter to the seven unit employees stating that after the 90-day period expired, any employee seeking to continue working for GVS had to reapply, and that, effective immediately, GVS revoked the prior terms and conditions of employment. The letter also clearly stated that after the 90-day period GVS did not intend to hire all of the seven employees and all the employees would be subject to termination "with or without cause."

Approximately three weeks into the 90-day period, the Union made a written demand that GVS recognize and bargain with it as the exclusive collective bargaining representative of the seven employees. GVS rejected the request because it had not yet established its full complement of employees. GVS explained that the time to determine whether it had a bargaining obligation would be at the conclusion of the 90-day period.

At the conclusion of the 90-day period, GVS hired its full complement of workers which "consisted for four employees who previously worked for [the predecessor] and four new employees who had not." As the former union-represented employees were not a majority of its workforce, GVS continued to refuse the Union's demand for recognition. The Union filed an unfair labor practice charge, alleging that GVS was a successor under the NLRA and obligated to recognize and bargain with the Union. Pursuant to the charge, the National Labor Relations Board, Region 29, filed an action seeking injunctive relief under Section 10(j) of the Act, requiring GVS to recognize and bargain with the Union as a successor.

The Decision

The key issue was whether GVS, by retaining a clear majority of the seller's employees pursuant to the DBSWPA's 90-day transition period, was a successor under the NLRA and thus obligated to recognize and bargain with the Union. The Court held that it was not. It noted that the DBSWPA "deprived [GVS] of the ability to make a voluntary decision to hire its predecessor's employees for a period of 90 days." The Court continued, "[b]y limiting an employer's ability to discharge employees solely to cases of cause or redundancy, the Displaced Workers Act deprives the employer of making the voluntary decision that requires in order to deem an employer to be a successor." Studying the text of the DBSWPA, the Court found that the DBSWPA "contemplates that the new employer can only decide whether to hire any of its predecessor's employees at the end of the 90-day period." Therefore, it held that a successorshipanalysis can not be done until after the statutorily mandated 90-day transition period.

The Court found that GVS made clear from the beginning of the employees' employment "that it did not intend to hire a majority of its employees from its predecessor's workforce" and it did not continue the then-existing terms and conditions of employment. Moreover, when it was able to *voluntarily* hire a full complement of workers, it did not employ more than 50% of those formerly-represented. After analyzing the facts under the NLRA's successorship analysis, the Court held that GVS was not a successor under the Act based on its involuntary retention of the seller's employees during the 90-day period; and that, therefore, GVS had no obligation to recognize the Union. Accordingly, the Court denied the Regional Director's petition for a preliminary injunction.

Implications for Employers

The NLRB may or may not appeal this decision to the U.S. Court of Appeals for the Second Circuit. If it does not appeal, or if it does appeal but the court of appeals upholds the district court, then under this decision the purchaser of a building with a unionized workforce does not have any obligation to recognize or bargain with the union based on the statutorily required hiring for the first 90 days under Second Circuit precedent.

Pursuant to *Paulsen*, an employer may, at the outset of the 90-day period, discontinue the existing terms and conditions of employment, inform the employees that they may be terminated with or without cause at the end of the 90-day period, and require all employees to submit applications for employment at the conclusion of the 90-day period. Moreover, at the conclusion of the 90-day period, a purchaser who retains less than half of the seller's workforce will not be obligated to recognize and bargain with the employees' former union.

All employers, however, are cautioned that any discrimination against the seller's workforce on the basis of union affiliation could constitute an unfair labor practice. It would be unlawful for a buyer to refuse to hire certain employees based on their union affiliation, in order to avoid the obligation to recognize their union. Further, it should be noted that the decision of whether a buyer's workforce consists of a majority of the seller's represented employees, will be made at the time the buyer has hired a "representative complement" of employees, not when it has hired its full complement of employees. As a practical matter, this means that the "representative complement" will likely be that group of employees the buyer hires immediately following the end of the 90-day period.

Contractors also benefit from this decision as the DBSWPA requirements apply to any employer taking over building services at buildings covered by the statute. Like purchasers, contractors must comply with the DBSWPA but, pursuant to this decision, are free to establish their own workforce after the 90-day transition period. The advice discussed above with respect to purchasers, therefore, applies equally to contractors.

Finally, as many cities have enacted displaced worker statutes in the real estate and other industries similar to those addressed in *Paulsen* and *Rhode Island Hospitality Association*, employers taking over unionized work covered by displaced worker statutes should not automatically assume that they will be considered successors under the NLRA obligated to continue a collective bargaining relationship with the existing union. Instead, employers throughout the country are advised to carefully consider their options prior to taking over covered work and plan accordingly.

[1] The DBSWPA contains an "opt-out provision" that completely exempts successor employers who are party to, or willing to become party to, a collective bargaining agreement that contains provisions regarding the discharge or layoff of the building employees.

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