

NLRB Changes Rule on Successors Bargaining Obligations

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A National Labor Relations Board decision this week may help more businesses avoid "perfectly clear successor" liability after they take over operations of another company.

In a 3-1 decision, the NLRB held that while the new owner of a nursing facility had to bargain with an existing union, it was not a "perfectly clear successor" and, therefore, was not bound by the existing collective bargaining agreement, despite the union's continuing majority status and evidence of clear anti-union animus.

The decision, *Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc.*, overrules NLRB precedent and establishes that the "perfectly clear successor" doctrine is limited to cases in which the successor retains (or would have retained, absent discriminatory animus) "all" or "substantially all" of the predecessor's unit employees.

By way of background, a buyer that continues its predecessor's unionized business in substantially unchanged form and hires employees of the predecessor as a majority of its workforce is a "successor employer" and has an obligation to bargain with the union. However, pursuant to U.S. Supreme Court precedent, successor employers are free to set initial terms of employment unilaterally unless they express an intent to retain or rehire all of the employees in the unit.

In its 1979 *Love's Barbeque Restaurant No. 62* decision, the NLRB ruled that an employer's hiring discrimination against "all" or "substantially all" of a predecessor's unit employees also makes the employer tantamount to a "perfectly clear" successor, since the employer *would* have rehired these employees but for discriminatory animus. A 1996 case, *Galloway School Lines*, extended this rule further, to "mean that a duty to bargain over initial terms can arise in cases where, although the employer's plan is to retain a fewer number of predecessor employees, it is still evident that the union's majority status will continue." The NLRB explicitly overruled *Galloway School Lines* this week, finding that it impermissibly extended *Love's Barbeque* and "went far beyond the limits of the narrow perfectly clear successor."

In the *Ridgewood* case, the successor employer had initially told employees that it intended to hire 99.9% of them, keeping their employment conditions the same and agreeing to bargain with the union. Then, the owner switched course, telling employees she did not think the union necessary and going so far as to threaten to close the facility if the employees unionized. Ultimately, the new employer rehired 49 former unit employees and 52 new employees and then refused to recognize the union. An administrative law judge found-and the NLRB agreed-that the employer would have hired four additional former employees but for anti-union animus and, since that would have made the former employees a majority of the workforce, the employer was a "successor employer" who had bargaining obligations. However, since it was apparent that the employer would not have hired all or substantially all former employees regarding of any discriminatory

intent, it was not a "perfectly clear successor."

Despite its pro-employer bent, the *Ridgewood* case also exemplifies the problems that can occur if buyers are not clear about their intent in communications with the predecessor company and its employees. If a new employer does not intend to hire all or substantially all of the predecessor's employees or otherwise intends to change business operations, this message should be conveyed as early as possible and often, so there is no confusion over successor bargaining obligations. If you have questions about the NLRB precedent or how it could affect a business acquisition, please [reach out to me](#) or any member of the [Barley Snyder Employment Practice Group](#).

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