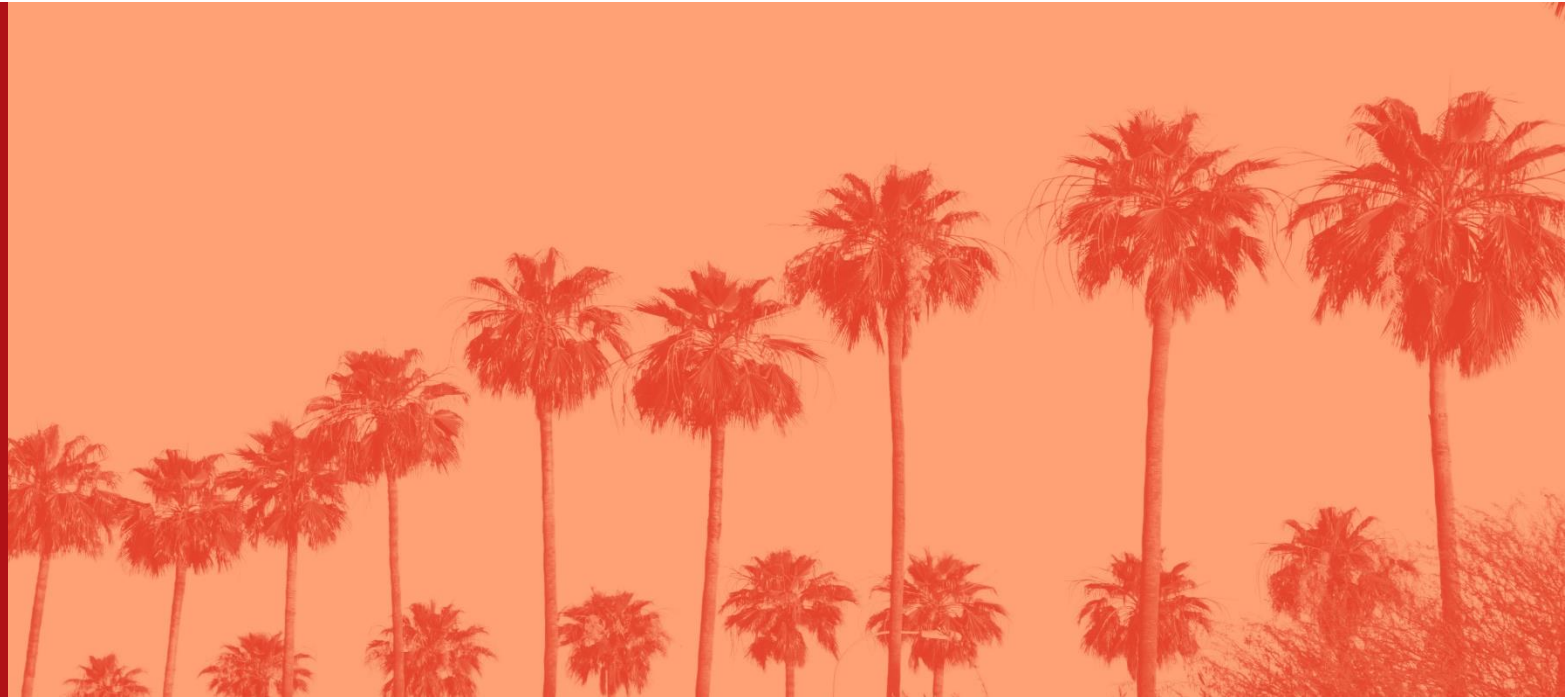


LOOKING AHEAD

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ACQUIRING A UNIONIZED ENTITY – Practical, Legal and Business Considerations

Breakout Agenda

- > Structural Considerations
- > Regulatory Framework
- > Potential Changes on the Horizon
- > Cultural Implications
- > Managing the Labor Relations Impact
- > Framing the Buy-Sell Agreement
- > Closing Thoughts
- > Q&A

Approach Acquisition Targets Strategically

- > Cultural suitability
- > Comprehensive valuation
- > Risk assessment
- > Strategy integration from start to finish
- > Unifying behind core business objectives
- > “Don’t buy any problems you’d prefer to avoid”

Common Scenario

- > Potential acquisition is presented to legal
- > Your organization is predominantly union-free
- > Initial reports suggest that portions of seller's operations are unionized
- > Pressure is mounting to move forward with the transaction regardless
- > Deal is not yet fully structured, but consummation timetable is aggressive
- > Questions are coming in from multiple directions
- > Where do you go from here?

The State of Unions Today

- > Membership is down from 34% compared to its peak
- > Total union membership down to 10.5%
- > It's down to 6.4% in the private sector (33.9% in public sector)
- > Figures are lower in many states
- > Only 2,000 elections last year vs. 8,000 30 years ago
- > Massive withdrawal liability looming for many unionized entities

Why the Decline?

- > Loss of traditional manufacturing jobs
- > Erosion of political clout
- > Failure to understand changing demographics
- > Increased role of government in the workplace
- > Reluctance to join any organization
- > Preventive action by employers
- > Individual rights explosion
- > Employers treating employees better
- > Increased preventive action
- > Complacency

Forms of Unionized “Acquisition”

- > Asset Purchase (Seller's liabilities may stay with the seller)
- > Successful Bid or Assumption of Service Contract/Obligation
- > Stock Purchase (Successor doctrine inapplicable)
- > Merger (Successor doctrine generally inapplicable)

What are we Succeeding to?

- > Liability for seller's unlawful misconduct?
- > Duty to remedy that misconduct?
- > Duty to bargain with the incumbent union?
- > Duty to assume the seller's contract with that union?
- > According to the NLRB – neither buyer's intent nor the documents control.

Thorough Due Diligence

- > Employee census/compensation data
- > CBA language/Side agreements and MOUs
- > Multi-employer pension plans/withdrawal liability
- > SUB agreements
- > Medical plans
- > Policies and procedures
- > Past and pending litigation /charges /asserted claims
- > Strike/grievance/organizing/bargaining history
- > Published arbitration and legal decisions
- > Government contracts
- > Layoffs
- > Accrued paid leave/contingent liability

CBA Analysis – Devil is in the Details

- > Recognition clause
- > Successorship language
- > Subcontracting restrictions
- > Closing/severance/notice/transfer provisions
- > Work preservation
- > Economic terms
- > Grievance/arbitration
- > No-strike
- > Seniority
- > Expiration/evergreen

What About Successor Language in the CBA?

- > Predecessor CBA may contain a “successor clause”
- > Different clauses impose different obligations (active vs. passive)
- > Most provisions at least require notice of CBA to successor
- > Privity of contract remains between Union and predecessor
- > Generally deemed non-binding on successor regardless of terms

What About Successor Language in the CBA?

- > Active language may bind the predecessor to open-ended liability
- > Indemnification language can then be implicated
- > Injunctive relief may also be available to block the sale
- > Impact on purchase valuation
- > Post-sale contingencies

Clearing the Slate

- > Seller generally remains bound by CBA post-sale
- > Grievance/arbitration machinery may remain available
- > No-strike remains in effect through date of transfer
- > Predecessor's obligations (effects/impact vs. decisional)
- > Availability of information requests
- > Phase-out/Closing agreements
- > Severance arrangements
- > OW/BPA issues
- > Lingering buyer obligations?
- > Maintain communications with seller throughout process

Common Union Pressure Tactics

- > Information Requests
- > Mass grievances
- > ULP charges
- > Mass picketing/Leafleting
- > Salting
- > Corporate campaigns
- > Appeals to local government officials and civic reps
- > International pressure

Elements of the NLRA's "Successor Doctrine"

- > A unionized "predecessor" (with or without existing CBA)
- > Hires a majority of predecessor's bargaining unit employees
- > Attachment of good faith bargaining (but not CBA assumption) obligation
- > Assuming there is a substantial continuation of seller's operations

Substantial Continuity in Business Enterprise

- > Is the workforce the same or substantially the same?
- > Is there substantial continuity of the business operation?
- > Is the work being performed at the same location?
- > Do the jobs exist under similar working conditions?
- > Does the new employer utilize same supervisors/machinery/equipment?
- > Does it manufacture same products or offer same services?
- > Was there substantial hiatus (e.g., two years) prior to commencement?

Timetable for Evaluating Successor Status

- > Upon hiring a “substantial and representative complement” of workforce
 - > Have job classifications been substantially filled?
 - > Is operation at substantially normal production?
 - > How long before a substantially larger workforce will be required?
 - > What is likelihood of need for significantly larger workforce?
- > Any bargaining obligation thereafter attaches upon Union demand
- > All such demands are deemed to be continuing in nature

Refusal to Hire Exposure Under NLRA

- > The NLRA establishes various “Unfair Labor Practices”
- > Section 8(a)(3) prohibits discrimination on basis of “union animus”
- > Legitimate non-discriminatory reasons constitute a viable defense
- > Prevailing/Avoiding such claims sets union-free groundwork
- > Incumbent (or any other) union may still stage organizing attempt
- > Employers tend to be at most vulnerable during transition periods
- > Consider messaging associated with hiring, orientation, training, etc.
- > Premium on workplace communication (upward and downward)

The “*Spruce-Up*” Right to Set Initial Terms

- > A “successor” may generally set initial employment terms and conditions
- > It then has obligation to collectively bargain (up or down) from there
- > If not exercised, opportunity closes upon becoming “perfectly clear successor”
- > Manifesting clear intent to hire majority without communicating new terms
- > Incumbent union must first impose bargaining demand (except in Circuits 2/5)
 - > Successor must then accept predecessor’s terms (but not CBA) in full
 - > Obligation to continue bargaining in good faith for new terms
 - > Union may therefore demand increases to those terms
 - > The NLRA does not compel either side to agree to bargaining demands
- > Transitional operations pending outcome of bargaining

Preserving Right to Set Initial Terms

- > At very first opportunity and before any other employee communication:
 - > Make clear that you will not be adopting the CBA
 - > Declare intent to set new and different terms and conditions
 - > Make clear that employment will only be offered on those new terms
 - > Disabuse any notion that existing policies and practices will remain in place
 - > Disclaim any authority of predecessor to represent otherwise

Preserving Right to Set Initial Terms (continued)

- > Courts are imposing this duty **before** assumption of operations
- > Legal duty to maintain status quo once initial terms are established
- > Duty to bargain with incumbent union over ongoing employment issues
- > A single supervisor/agent of buyer could jeopardize right to set initial terms

Keeping Managers and Supervisors in Line

- > Prohibit responses to any employee/third party inquiries
- > Prior to closing, all inquiries should be directed back to seller
- > Post-closing, direct them to appropriate personnel for coordinated response
- > Avoid any suggestion that union enjoys representative status
- > Such status can only be ascertained once buyer fully assumes operations
- > Never suggest that seller's prior terms will continue

Recent NLRB “Perfectly Clear Successor” Cases

- > *GVS Properties, LLC*, 362 NLRB No. 194 (2015) – Buyer deemed successor even though it had no choice in whom to hire
- > *Nexeo Solutions LLC*, 364 NLRB No. 44 (2016) – Successorship imposed after buyer failed to repudiate seller promises that employees would be hired on same terms
- > *Creative Visions Resources LLC*, 364 NLRB No. 91 (2016) – Successorship imposed after buyer failed to reveal its true intention to set initial terms
- > GC Memo 18-02 (2017) – Directs submission of successor cases to Advice for review
- > *First Student, Inc.*, 366 NLRB No. 13 (2018) – In dissent, Member Kaplan called for relaxation of *Spruce-Up* standard
- > *Walden Security*, 366 NLRB No. 44 (2018) – Two Republican Board members (Kaplan and Emanuel) signal desire for review of timetable for setting initial terms

Other Unique Issues

- > Hiatus
- > Bankruptcy
- > Different unions on each side of transaction
- > Responsibility for remedying predecessor ULPs
- > “Alter-ego” status:
 - > Common ownership, and
 - > Same or substantially identical business purpose, operations, etc.
- > Successorship status under other statutes (ERISA/WARN/FMLA/USERRA)

Bargaining for an Initial CBA

- > NLRA imposes a “good faith” requirement
- > Law does not compel either side to agree
- > No timetable imposed on pace of negotiations
- > Parties need only confer at reasonable times and places
- > Successor decertification bar:
 - > 6 months if CBA is assumed
 - > 12 months if new terms established

Bargaining for an Initial CBA (continued)

- > Restrictions on unilateral/unplanned/discretionary changes
- > Buyer may be able to “pre-negotiate” some CBA terms before closing:
 - > Must avoid perfectly clear successor status
 - > Must also take care to avoid Section 8(a)(2) liability

Potential Operational Impediments

- > Hiring
- > Promotions
- > Disciplinary Actions
- > Layoffs
- > Operational Efficiency
- > Dove-tailing vs. end-tailing

Cultural Implications

- > Tension with direct dealing
- > Risk of sending “mixed signals” to other locations
- > Skill set necessary to manage in unionized environment
- > Premium on seniority over merit
- > Impediments to operational efficiency
- > Complexities of accretion with existing workforce
- > Dual-culture/organizational schism concerns
- > Other “hidden costs” (time expended in negotiations, arbitrations, etc.)

Cultural Implications

- > Impact on team atmosphere
- > “Us versus them” mentality
- > Disruption in communication scheme
- > Risk of concerted work stoppages/slow-downs
- > Unique roles of shop stewards and third party reps
- > Inconsistency/variability in representation approaches
- > Freedoms sacrificed by employees themselves

Challenges are not Insurmountable

- > Unionized entities can be managed
- > Goals can be achieved through aggressive bargaining strategies
- > Rigid work rules can be administered
- > Managing a unionized workforce draws upon different skills
- > CBAs should be viewed as documents of limitation
- > Paths remain to decertification depending on priorities

To Retain Maximum Flexibility...

- > Include seller's CBA in schedule enumerating "excluded assets"
- > Include claims arising under CBA (and NLRA) among "retained liabilities"
- > Secure warranty that seller will not:
 - > Enter into or modify CBA
 - > Make representations concerning buyer's hiring plans
 - > Modify terms any employment offers extended by buyer
- > Secure warranty that seller will:
 - > Make performance, attendance and disciplinary records available
 - > Cause supervisory employees to rate employees through established criteria
 - > Arrange pre-closing consultation with incumbent union on request

Closing Thoughts

- > Understand your organizational goals *before* the deal comes in
- > Push for input and coordination throughout the process
- > Make sure your business and labor relations objectives are aligned
- > Establish and implement a plan for achieving those objectives
- > Communicate that plan to all high-level participants
- > Assign roles and accountabilities while safeguarding the privilege
- > Once adopted, stick with the plan regardless of obstacles
- > Develop contingency strategies
- > Be willing to walk away if objectives prove unfeasible

FINAL QUESTIONS



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FOR JOINING US

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