ACQUIRING A UNIONIZED ENTITY: *THE PRACTICAL, LEGAL, AND BUSINESS CONSIDERATIONS*

STEVE BERNSTEIN (TAMPA)
FISHER PHILLIPS LLP

I. Introduction

Acquiring a unionized entity can have substantial business implications for your organization. After all, labor unions are businesses themselves, and they have their own complex agendas within the context of a sales transaction. The stakes can be enormous, and the structure of a particular deal can often mean the difference between operating a unionized acquisition – and one that is union-free.

The stakes are often greatest for those buyers that are unaccustomed to operating in a unionized environment. A management team that knows no other reality will often take for granted its right to deal directly with the workforce. A culture premised on cooperation and teamwork can be rocked by traditional notions of conflict and confrontation that often accompany third party representation.

Adding to these challenges are a myriad of complex laws and regulations governing the doctrine of "successorship," administered by an agency that, until recently, has demonstrated a pronounced predisposition toward the interests of organized labor. Even the slightest tweak in terms of communication and timing can have enormous ramifications for those buyers who are committed to charting their own course on the labor relations front.

Fortunately, there is a path to attaining your goals in this arena – whether they consist of shedding the seller's contractual obligations to negotiating a collective bargaining agreement that fits your organizational needs, or avoiding the prospect of third party representation altogether. Those strategic options form the nucleus of this paper, and to effectively grasp them one must start with a fundamental understanding of the various acquisition structures and the legal implications associated with each of them. As will soon become apparent, the asset purchase model offers far and away the greatest degree of flexibility in this area.

II. A Word About Unions

Even in the absence of an incumbent labor union, in-house counsel have traditionally played a significant role in the evaluation of strategic acquisition targets. Operating in that capacity, an effective counsel can bring their expertise to bear on a number of crucial aspects of the potential deal, ranging from risk assessment, to valuation, to composing the buy-sell agreement itself. While some may also bring a level of sophistication and experience when it comes approaching the concept of unionization, others have little expertise in that area.

Perhaps that's because in recent decades, union membership in the private sector has been in the throes of a pronounced downward spiral. Indeed, those figures have declined from approximately 35 percent to less than 7 percent over the past 75 years alone. While various theories have been advanced in an attempt to explain this phenomenon, some factors come up more than others.

For example, there is a general consensus that the shift in our economy from heavy manufacturing to service-based industries has played a significant role. So, too, has the trend toward increased workplace regulation (supplanting the perceived need for third party representation), a change in the demographic composition of the workplace itself, and a failure on the part of organized labor to craft a message that resonates with those workers. Beyond that is an overriding sense that within an increasingly global marketplace, the business community has essentially been compelled to improve its treatment of the American worker in order to effectively compete for human resources.

For nearly a century now, the process giving rise to third party representation in the private sector has been administered and regulated by the National Labor Relations Board (NLRB). In recent years, the agency has implemented changes to its regulations (such as its

recently enacted "quickie election" rule) for purposes of stemming the tide of union decline. Thus far, however, it seems that these changes have only had a modest impact.

Consequently, the general trend in the U.S. remains a negative one for organized labor, and over time it stands to reason that the population of unionized acquisition targets will decline along with it. Nonetheless, unions continue to wield their influence and make their presence felt in a variety of contexts. It seems that organized labor has recommitted itself to reversing decades of membership decline, and consequently its leaders are particularly sensitized to any business transactions that potentially impact the job security and working conditions of those who comprise their primary source of dues revenue.

By the same token, incumbent unions are often heavily invested in the collective bargaining process, which culminates with the negotiation of a contract (or CBA) encompassing all significant employment terms and conditions. Many CBAs also tie the contracting business to multi-employer defined benefit pension plans that – to the extent they are underfunded – carry significant withdrawal liability. Triggering such liability can ultimately become a "bet-the-business" proposition for many organizations – thereby upping the economic ante when it comes to the prospect of assuming the obligations of a unionized seller.

III. A Successor For What Purpose?

The term "successor" is used in a multitude of contexts within the employment law arena alone. Consequently, regulatory agencies such as the Equal Employment Opportunity Commission (EEOC) and U.S. Department of Labor (USDOL) apply their own unique standards for assessing a buyer's liability for (and duty to remedy) the seller's alleged wrongs, ranging from Title VII violations to those of the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA) or the Occupational Safety and Health Act (OSH Act.) The Employee Retirement

Income Security Act (ERISA) imposes yet another standard for evaluating a buyer's obligations to assume liabilities associated with the seller's mass or partial withdrawal from a multi-employer pension plan.

Likewise, the NLRB has adopted its own analysis for purposes of evaluating the obligations of a buyer with respect to a seller's unionized operations – and ultimately with respect to dealing with the incumbent union itself. A successorship determination under this standard has significant business implications for the buyer. At a minimum, a successor determination extends "authorized representative" status to the incumbent union, and imposes a legal obligation on the buyer to bargain with it over an initial CBA covering all bargaining unit personnel. Under certain circumstances, such status may actually attach a corresponding obligation to assume the seller's CBA outright – without any additional bargaining whatsoever.

Neither a buyer's intentions, nor the language that makes its way into a buy sell agreement, are controlling factors in this regard. Rather, the NLRB looks first to the actions of the buyer and its supervisors and agents during the critical period surrounding consummation of the deal and assumption of operations.

Consequently, the remainder of this paper will focus upon the unique successorship test applied by the NLRB, along with the practical and business implications that flow from application of that test. As set forth directly below, any discussion of the NLRB's standard for determining successorship status must begin by evaluating the structure of the acquisition itself.

IV. Structuring The Acquisition

While acquisitions may take on a variety of forms, they generally fall into one of three broad categories: (1) asset purchase; (2) stock purchase; and (3) merger. Unionized operations may also be "acquired" by way of prevailing in a bid to assume a competitor's service contract or

related business relationship. For purposes of the NLRB's successorship test, however, such arrangements are generally deemed to be analogous to an asset purchase. As set forth below, any buyer intent upon maximizing flexibility when it comes to averting a unionized seller's contractual obligations will likely structure the acquisition as an asset purchase.

A. Asset Purchase

From an employment (and certainly labor) law perspective, this structure maximizes seller flexibility to the extent it allows for certain contractual, employment and related legal obligations to remain with the seller. As an example, the seller's workforce is generally not "sold" along with other assets, but instead it is separated and may then be hired anew by the buyer. Consequently, this arrangement potentially offers unique advantages when it comes to acquiring a unionized entity.

Put simply, the NLRB's successor test is crafted for application to asset purchases alone. Under limited circumstances addressed in more detail below, it may lead to acquisition of a unionized operation without the restrictive trappings (including CBA assumption or even a bargaining relationship) that necessarily flow from stock purchases and certain mergers.

B. Stock Purchase/Merger

Unlike the asset purchase, a stock purchase (along with most conventional mergers) contemplates assumption of the seller's (or the merged/disappearing firm's) contractual, labor and related liabilities in full, on the theory that there is no effective change in the employment relationship. Within the context of a unionized acquisition, those liabilities include not only the incumbent bargaining relationship, but all direct byproducts of that relationship (including the CBA itself).

In essence, the buyer (or surviving merger partner) under these circumstances "stands in the seller's shoes" for all practical business purposes, effective with consummation of the transaction. While this arrangement may have other inherent advantages extending beyond the scope of this paper, flexibility when it comes to averting the liabilities and obligations flowing from the seller's unionized status is not one of them. To the contrary, the stock purchaser (or surviving merger partner) remains obligated to recognize an incumbent labor union, and to assume the terms of any CBA in place at the time of the transaction.

V. Due Diligence Factors

Once an appropriate structure is matched with the buyer's objectives, the real work begins in the form of thorough due diligence. An intensive audit is imperative to ensure that your organization is acquiring value – without the unwanted problems that may come with it. An educated buyer may not get everything it wants, but a prudent one will be better positioned to avoid the risks that can turn a lucrative deal into a costly one. Along the way, it will become important to identify strategic counterparts who can expedite the flow of information, while exhibiting the decorum needed to win their trust and cooperation.

An exhaustive field of inquiries may exceed the scope of this paper, but some of the more crucial data points revolve around the following categories:

A. Employee Census Data

1. Active Workforce
2. Employees on Leave/Layoff Status
3. HRIS Information
4. DOH, Salary and EEO Data
5. Personnel Files

6. Performance, Attendance and Disciplinary Records

7. Workplace Accident/Safety Records

8. Work Authorization Records

9. Supervisory/Departmental Files

B. Litigation/Regulatory Compliance History

1. Court Decisions and Agency Determinations

2. Pending or Threatened Lawsuits, Complaints, Claims and Charges

3. Decisions Involving Arbitration, Mediation and other ADR Mechanisms

4. Administrative Agency Findings and Determinations

5. Pending Awards of Injunctive Relief

6. Negotiated Settlements and Consent Decrees

C. Collective Bargaining Agreements And Related Union Documentation

I. Side Letters

2. Letters and Memoranda of Understanding

3. Local Agreements

4. Established Work Rules

5. Notes on Recent Bargaining History

6. Grievance/Labor Arbitration Awards and Settlements

D. Pension Obligations

I. Joint multiemployer Pension Obligations

2. Underfunding/Withdrawal Liability Issues

E. Workplace Policies, Practices, Procedures, And Training

I. Employee Handbook(s)

2. Procedure Manuals

3. Supervisory Policies and Procedures

4. Separate Provisions Governing Employee Transfer/Severance Rights

5. Employment Contracts

6. Procedural Manuals Governing Drug Testing, FMLA Leave, Etc.

7. Orientation, Training and Professional Development Records

F. Medical And Accrued Benefits

1. Accrued Vacation

2. Paid Time Off and other Accrued Paid Leave

3. Medical Claims Trends

4. Insurance Plans, Benefit Levels, Costs and Participation Rates

5. Retiree Insurance benefits and anticipated cost

G. Severance Agreements And Related Sources Of Contingent Liability

I. Golden Parachutes

2. Negotiated Severance Plans

3. SUB Plans and Status

H. Government And Other External Contracts

I. Municipal, State and Federal Contracts

2. Outstanding Vendor Agreements and Obligations

VI. CBA Analysis

Any exhaustive due diligence process calls for thorough review and analysis of all collective bargaining and "side" agreements in effect (along with any proposals that remain the subject of pending negotiations). The economic package will likely be of paramount importance, particularly

to the extent that the buyer is contemplating adoption of similar terms upon commencement of operations, or down the road as part of a separate collective bargaining agreement. Other aspects of the CBA may fly under the radar, but could ultimately have a more profound impact on the buyer's obligations in the short term. The following provisions are particularly significant in that regard.

A. Recognition/Scope Of Bargaining Unit

All such provisions (typically appearing at the outset of the CBA) should be carefully reviewed for language describing the scope of the existing bargaining unit(s). Particular scrutiny should be applied to language extending jurisdiction to geographic locations beyond the operation in question, or to classifications presumed to fall outside of CBA coverage, so as to guard against the possibility of inadvertent "accretions" to existing locations.

B. Successorship Clause

Language should be carefully reviewed for any provisions imposing an "active duty" on the seller to bind the buyer to the terms of the existing CBA, and/or compelling the seller to take affirmative steps to mandate CBA assumption under penalty of resulting damages (that could flow back to the buyer in the form of an indemnification provision). Note that such provisions may not be explicitly labelled as "successorship" articles and will occasionally appear within other "miscellaneous" sections of the CBA.

C. Closing/Notice Provisions

CBAs will often impose independent notice provisions on the seller, upon acquiring knowledge of an impending sale (or even plans for contemplating the same). To the extent that such provisions are violated, labor arbitrators are often empowered with broad-based remedial

authority that could ultimately be applied to undo the transaction itself. Other provisions may trigger severance payment obligations beyond those otherwise specified within the CBA.

D. Subcontracting Restrictions

Depending on the scope of the acquisition, some transactions may amount to a covert attempt at subcontracting bargaining unit away from a unionized operation that otherwise remains viable (or at least gives off the appearance of doing so). Under such circumstances, language restricting employer subcontracting may give rise to grievances under the arbitration apparatus of the CBA, many of which could go undetected in the absence of thorough due diligence. Even without such language, the NLRB will generally impose a duty on the seller to bargain over the decision (and effects of that decision) to subcontract unionized work, unless the Union has clearly and unmistakably waived its right to engage in such bargaining.

E. Work Preservation

CBAs will often impose restrictions on assignment of "bargaining unit work" to non-unit personnel, including supervisors or third party employees. Even in the absence of express provisions to that effect, labor arbitrators may imply such rights into the CBA. The vast majority of arms' length acquisitions will typically moot the application of such language. As set forth above with respect to subcontracting restrictions, however, work preservation language can occasionally come into play, and for that reason alone it is important to evaluate the scope and application of such language within a seller's CBA.

F. Term Of Agreement

As part of the due diligence process, the buyer should ascertain the precise term of the CBA and any looming expiration dates, along with "evergreen" provisions that have the effect of rolling the term over on a year-to-year or other specified basis. Acquisitions that occur

coextensively with CBA expiration may have other implications, and could conceivably "muddy the waters" with respect to a buyer's obligations, absent clear communication (and preferably "closing negotiations") between the existing parties.

VII. The Seller's Obligations – and the Union's Objectives

At the very least, a unionized seller operates under a common law duty under the National Labor Relations Act (NLRA) to give sufficient advance notice to the incumbent union to allow it to engage in "meaningful" bargaining over the effects (or impact) of the sale on bargaining unit personnel. Upon subsequently receiving a demand for such bargaining, the seller undertakes a corollary obligation to sit down with the union for purposes of entering good faith negotiations over a host of requested extra-contractual benefits, ranging from severance pay, to displacement services, to transfer preference within other seller operations.

In rare circumstances, the seller may also undertake an obligation to bargain over the decision itself. Such circumstances, however, are generally limited to situations in which the transaction is deemed tantamount to an act of subcontracting, and/or a "relocation" to one or more operating companies maintained by the seller.

In many cases, the parties will attempt to memorialize the outcome of such bargaining through a "closure" agreement that supplants the CBA as the penultimate document establishing their remaining rights and obligations. Such documents are generally deemed optimal from the buyer's perspective, to the extent that they serve to extinguish any prior rights (and relationships) that fail to make their way into the closure agreement, and ideally waive the incumbent union's right to pursue additional grievances and unfair labor practice charges. As with conventional bargaining, the seller is under no obligation to acquiesce to a single union demand, but instead must meet at reasonable times and places in good faith.

From the union's perspective, the overriding objective is to press for benefits that will ameliorate any adverse effects of the transaction on bargaining unit personnel. That being said, the union will also be invested in maintaining its status as bargaining representative through the acquisition date if at all possible.

In conjunction with the effects bargaining process, the union will often utilize the information request process to secure data needed to formulate specific demands, including (when available) extensive financial data. At the outset, the union may focus on securing employment opportunities for its members, and on "dove-tailing" seniority within a broader post-transaction bargaining unit. In addition to job preservation, the union will typically press for concrete benefits flowing to employees as a result of the transaction, including those most commonly associated with effects bargaining from the seller's perspective as set forth above.

VII. Evaluating The Buyer's Objectives Against The NLRA's Successor Doctrine

At the outset of this paper, we explained that within the context of a unionized acquisition, the asset purchase affords the greatest degree of flexibility from the buyer's perspective. That's because unlike stock transactions, asset purchases qualify for application of the NLRA's unique administrative framework for assessing a buyer's obligations in this arena – otherwise referred to as the "successor doctrine." As set forth below, "successor" employers will generally not be required to assume an existing CBA, but may operate under a lesser duty to recognize and bargain with the incumbent union for a new one.

A. Substantial Business Continuity

The successor doctrine rests on the notion that substantial continuity in the seller's unionized operations leads to an inference that a majority of incumbent employees are likely to maintain a desire for continued union representation thereafter – and that a mere change in

ownership is unlikely to alter those sentiments. Out of this notion comes the proposition that an asset purchaser should "succeed" to the seller's unionized obligations if it continues to operate the same business in the same location, with substantially the same workforce.

The following factors are typically considered in evaluating whether there is a substantial continuity in the business enterprise: (1) Is the workforce the same or substantially the same? (2) Is there substantial continuity of the business operation? (3) Is the work itself being performed at the same facility? (4) Are the jobs performed under similar working conditions? (5) Does the buyer use the same supervisors, machinery, equipment and production methods? (6) Does the buyer manufacture the same products or sell the same services?

On rare occasions, a buyer's operations are not found to be a substantial continuation of the seller's business – in which case it need not recognize and bargain with the union, even though a majority of its employees were employed by the seller. To qualify for this exception, however, the buyer should be prepared to demonstrate a substantial hiatus (two years, for example) between suspension of the seller's operations and commencement by the purchaser. Beyond that, there should also be a showing that the methods of operation differ significantly. For example, a buyer wishing to invoke this exception should show that the product is different, and that no more than a minority of its customers were holdovers from the seller.

B. Timetable For Evaluating Successor Status

On the heels of the transaction, the buyer's workforce will likely be fluid rather than fixed. Under these circumstances, the NLRB will not confine the evaluation of majority status to the precise time at which the assets are acquired. To establish workforce continuity, the NLRB instead looks to whether the buyer has: (1) hired a "substantial and representative complement" of employees; (2) the majority of whom previously worked for the seller.

Consequently, the timetable for calculating majority status can have significant implications. The NLRB has held that it may be appropriate to delay a successorship determination where the buyer expects, with reasonable certainty, to substantially increase its employee compliment within a short period of time. Once a substantial and representative compliment is reached, however, a buyer may assume a bargaining obligation even though additional employees could later be hired.

Generally speaking, the following factors are relevant to determining whether and when a substantial and representative complement of employees have been hired: (1) whether the job classifications are substantially occupied; (2) whether the operation is at normal production; (3) the actual size of the workforce compliment on the normal production date; (4) the time elapsed before a larger workforce is needed; and, (5) the anticipated likelihood of workforce expansion. Any bargaining demand made by the incumbent union before the buyer hires a substantial and representative workforce complement is deemed to be continuing in nature, until such time as the buyer has achieved such status.

C. Refusal To Hire Exposure Under The NLRA

The NLRA's successor doctrine has developed under a body of common law principles stretching back decades. Because the terms of a buy-sell agreement generally bind only the parties to that agreement, they typically will not alter the outcome of the successor analysis. Consequently, the Supreme Court has opined that, if "the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation remains."[1]

[1] *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 46 n. 12 (1987).

In the absence of any express contractual obligations to the contrary, a bona fide asset purchaser may nonetheless select its own workforce – free from any obligation to hire the seller's employees. In exercising this freedom, however, a buyer may not discriminatorily refuse to hire the seller's employees based upon union status, membership or activity.

Consequently, avoiding the seller's qualified employees for purposes of avoiding the prospect of union recognition (or related union considerations) constitutes a violation of Section 8(a)(3) of the NLRA.[2] Under such circumstances, the NLRB is empowered to issue broad-based remedial relief, ranging from reinstatement with back pay to injunctive action.

D. The Right to Set Initial Terms

The bargaining obligation attaches once holdover employees constitute a majority of the successor's workforce. As the Supreme Court has made clear, however, a successor is not automatically bound by the substantive terms of a predecessor's CBA, and instead remains free to unilaterally establish initial employment terms.[3] The NLRB has since recognized a buyer's "*Spruce-Up*"[4] rights to establish initial employment terms and conditions (in the form of wages, benefits and working conditions) for all employees prior to (or contemporaneously with) closure of the transaction.

To preserve these rights, it is incumbent on the buyer to make clear at the outset that employment will only be offered on new terms – or at the very least, that such terms will differ from those of the seller. Ideally, these communications should take place before the buyer assumes operations. As the NLRB tends to impute supervisory actions to the employer, even an

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[2] *American Press*, 280 NLRB 937 (1988).
[3] *N.L.R.B. v. Burns Security Service*, 406 U.S. 272 (1972).
[4] *Spruce Up Corp.*, 209 NLRB 194 (1974).

isolated statement to the contrary (for example, implying that the buyer will continue to apply the seller's employment terms) can operate as a waiver of the right to set initial terms.

So long as employees recognize that they are going to be offered employment only under changed terms, however, the buyer may unilaterally continue to set those terms until the majority of its workforce is comprised of the predecessor's employees, at which point unilateral changes become impermissible. If the union subsequently fails to make a timely request to bargain, however, the buyer may proceed with implementation of new terms (unless the union can show that such a request would have been futile).

E. The NLRB's "Perfectly Clear Successor" Standard

An asset purchaser's obligations with respect to the incumbent union will generally turn upon whether it becomes a "perfectly clear" successor – i.e., when it has become perfectly clear that the buyer intends to retain a majority of the seller's employees. From that point forward, a buyer that has effectively established initial terms as set forth above is duty bound to maintain them through the duration of negotiations for a new CBA. A perfectly clear successor may be compelled to bargain with the incumbent union even before it has hired a substantial compliment of employees. In other words, a buyer's legal window of opportunity for establishing initial terms closes upon assuming perfectly clear successor status – at which point it will be obligated to bargain over ongoing changes to those terms.

Such status may be triggered through any number of actions (or inactions) imputed to the asset purchaser. Of course, one obvious trigger point would be communications (to applicants, employees, or the union itself) suggesting that the buyer has simply chosen to adopt the seller's CBA in full. From that point on, the buyer would be bound to all terms set forth therein through contract expiration.

Any number of other factors may trigger perfectly clear successor status, including: (1) retention of a majority of the seller's bargaining unit employees; (2) deploying those employees to perform the same or similar job duties; (3) manufacturing the same or similar products; and (4) utilizing the same vendors and customers. While a prudent buyer may choose to approach the incumbent union before assuming clear successor status, in the process it must be careful to avoid implicitly recognizing the union – and should expressly disclaim any intent to do so.

In its 1974 *Spruce Up* decision, the NLRB noted that a buyer that has yet to commence operations may announce new employment terms before or simultaneously with its corresponding invitation to the seller's workers to submit their job applications. The agency reasoned that within that window, it cannot be said that the buyer plans to retain the seller's employees, who remain free to reject employment opportunities on the new terms. A buyer jumping through that window is not deemed to be a "perfectly clear" successor, and therefore averts a duty to bargain over implementation of its initial terms and conditions.

NLRB doctrine, however, has a tendency to shift with the ideology of the governing administration, and those shifts are now impacting the legal landscape in this area. Under the Obama administration, the agency issued a series of controversial decisions (four in 2016 alone) signaling a movement toward broader interpretation of the "perfectly clear successor" standard (narrowing the window of opportunity for buyers seeking to preserve their *Spruce Up* rights).

In *Nexeo Solutions*, LLC,[5] the NLRB looked beyond the buyer's actions to language in the purchase agreement itself, through which it agreed to offer employment to all of the seller's employees. The seller (and not the buyer) subsequently conveyed to those employees that they would be "transferred" to the new business. According to the NLRB, these two factors (the

[5] 364 NLRB No. 44 (2016).

latter of which was at least arguably outside the buyer's control) combined to make it perfectly clear from the outset that the buyer intended to retain all of the seller's employees – thereby precluding it from establishing initial terms.

In *Adams & Associates*,[6] the NLRB imposed perfectly clear successor status on a buyer for leading the seller's employees to believe that they would be hired – without simultaneously communicating that prospective employment would be conditioned upon their acceptance of new terms and conditions. Later that same year, the agency issued its decision in *Creative Vision Resources*,[7] finding that the buyer became a perfectly clear successor upon distributing approximately fifty employment applications that failed to articulate plans to impose new employment terms (despite the fact that approximately 20 other applications made those intentions perfectly clear). In *Data Monitor Systems, Inc.*,[8] however, the NLRB declined to impose perfectly clear successor status on a buyer that had distributed employment applications to the seller's employees underscoring their status as applicants who were not guaranteed employment merely by completing them.

More recently, a majority of NLRB members appointed by the Trump administration have demonstrated an interest in revisiting the perfectly clear successor standard. Signs of this shift began to emerge in member Kaplan's dissent to a then Democratic majority finding of perfectly clear successor status this past year in *First Student Inc.*[9] In that dissent, member Kaplan noted that the Respondent had actually given notice of its intent to set initial terms over a month before it had extended employment offers to incumbent employees.

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[6] 363 NLRB No. 93 (2016).
[7] 364 NLRB No. 91 (2016).
[8] 364 NLRB No. 4 (2016).
[9] 366 NLRB No. 13 (2018).

Member Kaplan proceeded to suggest that the Obama-era decisions discussed above were not "correctly decided," to the extent that they erroneously attached perfectly clear successor status immediately upon expressing "*an intent* to retain the predecessor's employees without making it clear that employment will be conditioned on the acceptance of new terms."[10] Member Kaplan reasoned that, "The 'expresses an intent' standard cannot be reconciled with principles set forth in *Burns, Fall River Dyeing*, and their progeny."[11]

Just one month later, in a footnote to the agency's decision in *Walden Security, Inc.*,[12] two Republican appointees (members Kaplan and Emanuel) took the opportunity to differ with the agency's prior interpretations in connection with the same Obama-era precedent. Consequently, those decisions would seem to be ripe for reversal now that the agency has reached a majority compliment of three Republican members.

While the law in this area remains volatile, there are a few steps that asset purchasers can take to steer clear of any inadvertent waiver of *Spruce Up* rights. First, declare an intent to set new terms and conditions as soon as reasonably possible, and ideally before (or at least simultaneously with) the extension of any job offers. Second, make clear that any employment offer will incorporate those new terms, and that they must be accepted in order to qualify for employment. Third, if possible, avoid undertaking any commitments within the purchase agreement that even suggest a contrary intention. Fourth, train the supervisory start-up team to avoid even the slightest suggestion that existing terms and conditions (or even "substantially equivalent" or "comparable" ones) will be honored going forward. Lastly, publicly disavow any

[10] Id. at slip op. 7 (emphasis in original).
[11] Id. (Citations omitted).
[12] 366 NLRB No. 44 (2018), fn 4.

known representations (be they from the seller or from the buyer's supervisors or agents) inferring that the purchaser will continue existing employment terms as soon as possible.

VIII. Bargaining For An Initial CBA

Although an exhaustive overview of the collective bargaining process is beyond the scope of this paper, there are few fundamental points to keep in mind in the event that a buyer is called upon to recognize and negotiate with an incumbent labor union. At the outset, it's worth noting that although Section 8(d) of the NLRA requires parties to the collective bargaining process to bargain in good faith, it does not compel them to agree to a proposal or make a concession. By the same token, there is no minimum (or maximum) timetable on the negotiating process, although the NLRA does impose a "successor bar" of 12 months before employees may petition to "decertify" the union where the employer has exercised its right to set initial terms (and six months where it has adopted the predecessor's terms).[13]

Among other things, this good faith requirement calls upon the parties to meet at reasonable times and intervals for purposes of exchanging proposals and compromising on counter-proposals that manifest a sincere desire to find common ground. The NLRB traditionally draws a distinction between "hard bargaining," which is generally permissible, and "surface bargaining," which is deemed to be in bad faith. Adopting a "take-it-or-leave-it" approach generally falls into the latter category.

Throughout the process, the employer is barred from unilaterally implementing material changes to the "status quo," or to those items that are otherwise deemed to be mandatory subjects of bargaining. Rather, the employer must bargain with the union over such changes prior to implementation. "Mandatory subjects" include wages, hours, benefits, and other items that

[13] *UGL-Unicco Service Co.*, 357 NLRB 801 (2011).

vitally effect the terms and conditions of employment. This obligation continues until such time as negotiations reach a legal "impasse" (or deadlock), at which point the employer may be free to unilaterally implement changes consistent with the terms of its last, best and final offer.

To further its objectives at the bargaining table, the NLRA also confers upon unions the right to impose requests for information that are relevant to the negotiating process. Throughout the bargaining process, however, the employer is barred from bypassing the union for purposes of negotiating directly (or indirectly) with bargaining unit employees.

IX. Practical And Cultural Implications Of Operating A Unionized Acquisition

As set forth above, negotiations for an initial CBA can be effectively managed with a sufficient amount of amount of advance planning, effective counsel and commitment to an overall strategy designed to achieve the buyer's overall business objectives. It can be a mistake, however, to focus on that aspect of the process to the exclusion of the cultural considerations that come with acquiring a unionized operation.

For organizations that are accustomed to managing a unionized workforce, the adjustment may be relatively seamless. For others, however, the transition can be challenging. To begin with, the supervisory skills needed to effectively manage a unionized workforce can differ substantially from those required to manage a conventional workplace. After all, managing to the letter of a CBA, through a third-party representative and a shop steward charged with policing contract compliance, is a far cry from dealing directly with subordinate employees.

Beyond that, unions are typically invested in emphasizing seniority over merit, and rigidly focusing on defined job duties over cross-training and versatility. The upshot for many is an environment that makes it harder to promote top talent – and more difficult to deal with underperformers. Unionized workplaces are often characterized by an increased level of conflict

with management that may work at cross-purposes with an environment of cooperation, efficiency, accountability, flexibility and teamwork. Indeed, the American labor relations model is premised on an adversarial relationship from the onset of collective bargaining through administration of the resulting CBA.

A unionized workplace may also be plagued with the lost productivity, inefficiencies and other "hidden costs" associated with grievance meetings, arbitration hearings, etc. Along the way, the exercise of day-to-day decision making can be severely hampered. Of course, there also remains the risk of strikes, slow-downs, work stoppages and other economic actions staged during negotiations or upon contract expiration.

These cultural obstacles are formidable enough in a vacuum. When juxtaposed against a non-union workforce across other aspects of the organization (or within the facility itself), however, they can present even greater challenges. To the extent that the organization is otherwise committed to maintaining a direct working relationship with its employees, there remains the risk of sending "mixed signals" to such workers, while potentially exposing the organization to a third party with local contacts in close proximity to other locations.

X. Structuring Buy-Sell Agreements To Maximize Flexibility

While the NLRA's successorship test is largely fact-sensitive, certain elements can be incorporated into the purchase agreement for purposes of reducing the prospect of such a finding. To retain maximum flexibility when it comes to avoiding the obligations of a unionized asset seller, the buyer may want to explore a number of elements, including:

(1) excluding the seller's CBA from any enumeration of "acquired assets;"

(2) including the seller's CBA in any enumeration of "excluded assets;" and

(3) including all claims arising under the seller's CBA (along with any NLRA violations) among the seller's "retained liabilities."

By the same token, the seller should ideally warrant that it:

(1) will not enter into or modify any CBA;

(2) is not in violation of any CBA (or the NLRA);

(3) has made (and will make) no representations to employees or the union concerning the buyer's hiring or CBA assumption plans, or with respect to the terms of any potential offers;

(4) will, upon the buyer's request, make specified due diligence data available; and,

(5) will, at the buyer's request, arrange a pre-closing consultation with the union.

In the event that the seller presses for a commitment regarding its unionized workforce, the following language is generally deemed to be relatively innocuous: "Buyer shall abide by any applicable federal labor laws regarding the terms and conditions of employment of any formerly unionized employees of the seller who may be bargaining unit members, as to which Buyer becomes subject to a collective bargaining obligation."