Sellers Beware: NLRB Expands Employer Requirements to Provide Sales Agreement to Union

Insights
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In a recent decision, the National Labor Relations Board gave unions greater access to sales agreements under the employer's duty to provide relevant information so as to meaningfully engage in effects bargaining. The August 23 decision in *Crozer-Keystone Health System* offers lessons to those employers involved in corporate transactions where unionized employees are affected, and also to those employers dealing with union information requests.

Dispute Over Purchase Information Leads to Stalemate With Union

At the end of 2015, Crozer-Keystone Health System entered into an Asset Purchase Agreement (APA) with Prospect Medical Holdings Inc. In January 2016, Crozer sent a letter informing employees of the sale, stating that "under the APA," many things related to their employment would not change. That list included that Prospect would offer union employees employment at terms the purchaser would set, that Prospect would recognize the several unions representing Crozer's employees, and that Prospect would assume Crozer's outstanding pension liability resulting in payment to pension beneficiaries.

Shortly thereafter, the union requested the complete APA and all schedules and attachments from Crozer to prepare for effects bargaining. Crozer responded that it could not provide the entire APA and related material because they were confidential and proprietary, covered by a confidentiality agreement with Prospect, and not relevant for effects bargaining. However, it indicated it was opening to considering alternative requests.

Subsequently, the union offered to bargain over the confidentiality of the APA. Crozer offered, in response, to produce only portions of the APA. The union rejected Crozer's offer, arguing that it could not rely on Crozer's determination of what was relevant, and would need to see the entire document to determine relevancy. Neither Crozer nor the union budged, and, as a result, Crozer produced nothing to the union.

First Round of Litigation Goes to Union

In first round of litigation, the Board affirmed an ALJ's decision that Crozer violated the National Labor Relations Act by failing to provide the relevant portions of the APA to the union. According to the ALJ, the sales agreement, like the APA, is not presumptively relevant but noted that certain

the ALJ, the sales agreement, like the APA, is not presumptively relevant but noted that certain information within sales agreements would be presumptively relevant in certain scenarios, such as for effects bargaining.

Moreover, the ALJ criticized Crozer for withholding the entire APA while the parties negotiated over what Crozer should provide and under what confidentiality protections. Crozer was instead required to produce the portions it deemed relevant, identify the portions it was not producing, and explain why the withheld portions were being withheld. The union's intransigence in insisting on the entire APA was no defense. Lastly, the Board criticized Crozer for withholding the APA on confidentiality grounds but not explaining further or offering any accommodations, such as through redactions or a confidentiality agreement. The Board further emphasized that Crozer's confidentiality agreement with Prospect was a creature of contract and would not override Crozer's statutory obligations to produce information to the Union.

Although the Board unequivocally held that the entire APA, schedules, and attachments were not relevant – only portions – the Board still ordered Crozer to produce the entire APA to the union.

Federal Appeals Court Upholds the Board's Reasoning – But Rejects the Remedy

Crozer appealed to the Third Circuit Court of Appeals, which agreed with the Board and also found that portions of the APA were relevant. Crozer had argued that there should be no presumption of relevance afforded the APA and that the union did not meet its burden to advise Crozer of the factual basis for its request. But the Third Circuit rejected this argument, reasoning that Crozer's January 2016 letter referencing the APA's effect on terms and conditions of employment and the parties' agreement that the APA contained at least some relevant information made the Union's basis for requesting the APA – to prepare for effects bargaining – readily apparent from the circumstances.

Interestingly, however, this second round of litigation was not a sweeping victory for the union. The Third Circuit held that the Board's remedy in ordering the entire APA produced was overbroad and punitive given that the Board held that the entire APA was not relevant. The Third Circuit remanded the case to the Board to determine which schedules of the APA are relevant and should be produced.

Most Recent Decision Sees Board Analyze Relevancy and Set Standards

In the most recent round of litigation, the Board on remand analyzed the APA's schedules and held that the following were presumptively relevant:

- Schedules regarding whether certain obligations, like pension and other fund contributions in the CBA, were prepaid.
- Schedules related to WARN Act compliance, which would list employees who were laid off.
- Schedules regarding Crozer's contracts, which would contain information regarding collective bargaining agreements.

- Schedules regarding hospital departments to be closed.
- Schedules regarding wages, benefits, bonuses, and fund obligations.

Additionally, the Board held that the following schedules of the APA were not presumptively relevant but that the Union established they dealt with employees' terms and conditions of employment:

- Schedules related to real property relevant to reveal Crozer's plans for expanding different lines of the business or for potentially moving departments. The Board noted that the January 2016 letter assured employees that critical lines of business would stay in place or be expanded.
- Schedules related to government or third-party grants relevant to whether union employees were working under a grant.
- Schedules related to the corporate structure of Crozer relevant to whether bargaining unit work would stay within the sold entity.
- Schedules related to the disclosure of litigation, limited to those portions dealing with employment litigation involving bargaining unit employees.

Lastly, the Board held that schedules related to general financial information, intellectual property, and wages and benefits for executive employees were neither presumptively relevant nor established as relevant by the union. Therefore, the Board concluded these did not have to be produced by the employer.

Takeaways for Employers

The thorough analysis by the Board – twice – and the Third Circuit allows for several takeaways for employers. First, in the specific context of a corporate transaction, sellers should keep in mind the following:

- A sales agreement may not be presumptively relevant in its entirety, but certain information within the sales agreement may overcome this presumption if a union plans on engaging in effects bargaining.
- Any public statements regarding the sale's effects on employees could be held against the seller.
- Agreements with the buyer regarding confidentiality will not likely override a seller's obligation to produce information to a union.

Second, employers responding to general information requests should keep in mind the following principles articulated in these cases:

- If there is a dispute over the scope of production, the employer should produce relevant information while the parties work toward an accommodation which is not presumptively relevant.

- If an employer is withholding requested information, it should explain what is being withheld and why.
- Employers asserting confidentiality should offer accommodative bargaining with the union to allow for production while accommodating the employer's confidentiality interests.

Conclusion

What's clear is that employers should consult competent labor counsel in handling corporate transactions where unionized employees are affected and when dealing with union information requests to ensure they comply with their obligations.

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight system to receive the most up-to-date information. If you have questions on how these developments may impact your organization and workforce, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

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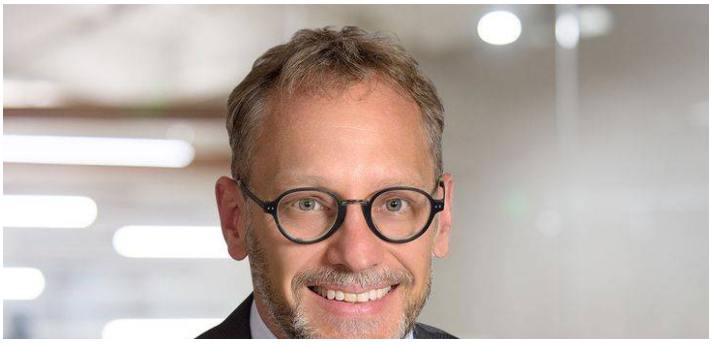

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