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D.C. CIRCUIT FREES EMPLOYERS FROM AUTOMATIC "SUCCESSOR BAR" TO UNION DECERTIFICATION AND SIGNALS FUTURE CHALLENGES TO NLRB ACTION

Insights
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D.C. Circuit Frees Employers From Automatic "Successor Bar" to Union Decertification and Signals Future Challenges to NLRB Action

A federal appeals court just struck down an NLRB rule that automatically locked employers into bargaining with a union after they acquired a unionized company, even when that union no longer had majority support among the workers. But the D.C. Circuit Court of Appeals' July 21 decision in *Hospital Menonita de Guayama, Inc. v. NLRB* did much more than kill the National Labor Relations Board's "successor bar" doctrine. It also signaled the way employers might challenge Board precedent well beyond this context after the Supreme Court's landmark *Loper Bright* decision. Rather than simply applying the SCOTUS decision to invalidate a Board policy, the court articulated a framework for distinguishing between permissible Board policymaking and impermissible Board lawmaking. What can we expect in the future, and what should employers do to prepare?

The D.C. Circuit's Decision Killing the "Successor Bar" Doctrine

The NLRB's successor bar doctrine generally requires an employer that acquires a unionized business to recognize and bargain with the incumbent union for a reasonable period – typically six months to one year – before the employer, employees, or a rival union can challenge the incumbent union's majority status. The doctrine creates an irrebuttable presumption that the incumbent union retains

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The NLRB adopted the successor bar doctrine in 2011 as a “policy choice” to ostensibly promote stability in newly established bargaining relationships following an ownership change.

In this case, Hospital Menonita de Guayama in Puerto Rico acquired another hospital in 2017 and, within the successor bar’s protected window, withdrew recognition from the union representing the acquired hospital’s employees. This prompted the NLRB to find the hospital had committed unfair labor practices.

The D.C. Circuit agreed with the Board and initially upheld the successor bar doctrine, deferring to the NLRB’s “reasonable” policymaking choices under the old *Chevron* standard.

Landmark SCOTUS Decision Leads to a New Outcome

Hospital Menonita petitioned the Supreme Court to hear its case. While the petition was pending, the Supreme Court issued the groundbreaking *Loper Bright* decision overturning the *Chevron* doctrine and telling federal courts that they don’t have to defer to federal agencies on questions of law. On the basis of this decision, the Supreme Court agreed with Hospital Menonita, vacated the D.C. Circuit’s prior opinion, and sent the case back for further reconsideration.

On remand, the D.C. Circuit overturned its prior decision and rejected the successor bar. Judge Neomi Rao concluded that the successor bar conflicts with the structure of the National Labor Relations Act (NLRA) because it nullifies both employees’ core statutory right to challenge a union’s representative status ***and*** employers’ core statutory right to refuse to bargain with a union that lacks majority support.

Broader Significance: Defining the Limits of Board Policymaking

The most critical aspect of *Hospital Menonita* is not its holding on the successor bar alone, but its explanation of what *Loper Bright* means (and does not mean) for federal labor law.

The majority carefully rejected two competing extremes.

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First, it rejected the proposition that courts should continue to uphold Board doctrine simply because it reflects a "reasonable" labor policy judgment. The court explained that *Loper Bright* requires courts to determine the NLRA's "single, best meaning" and to police the "outer statutory boundaries" of agency authority. Courts have an "independent obligation" to interpret statutes and not defer to an agency's interpretation, which means agencies receive no deference on questions of law.

Second, the majority rejected the suggestion that *Loper Bright* eliminated the Board's policymaking authority altogether. Instead, the opinion distinguishes between two separate questions:

- Has Congress delegated policymaking authority to the Board?
- Has Congress authorized the Board to adopt a particular policy?

The majority answered the first question in the affirmative, at least at a general level, explaining that Congress entrusted the Board with substantial responsibility to administer the NLRA and resolve labor-relations questions.

The second question, however, is for the courts. According to the majority, in light of *Loper Bright*'s requirement that courts – not agencies – determine the scope of the authority Congress delegated, the Board remains free to make policy within those statutory boundaries but cannot expand those boundaries by adopting policy preferences untethered from the Act itself.

This distinction may prove to be the opinion's most significant legacy when it comes to future cases.

Doctrines That May Receive Renewed Scrutiny

The reasoning described above should soon invite challenges to other Board-created doctrines that delay or restrict employees' ability to exercise Section 7 rights beyond limitations expressly established by Congress. The most notable examples include the voluntary-recognition and contract bar doctrines, which preclude challenges to majority status for a certain period in order to allow meaningful bargaining to occur.

In contrast, the certification-year bar – which precludes challenges to majority status for one year following union certification – is not likely to be a successful target given that Congress expressly created the bar. Similarly, many other Board doctrines (including those involving employer work rules, bargaining obligations, and the joint employer standard) raise different statutory questions and often involve interpretation of broad statutory language that Congress expressly delegated the Board to administer.

Practical Takeaways for Employers

For employers, *Hospital Menonita* underscores the need to evaluate Board doctrine not only as a matter of labor policy, but also by reference to the statutory authority Congress actually delegated.

- **Employers negotiating M&A deals involving unionized targets should revisit their bargaining posture.** Successor employers are no longer locked by default into continuing to recognize an incumbent union that objectively lacks employee majority support. If there's a good-faith basis to question majority support, you can now raise that question sooner rather than having to wait for up to a year.

- **Employers involved in acquisitions, organizing campaigns, or labor litigation should anticipate making more text-focused challenges to Board-created rules.** This is particularly true for those rules that restrict employee choice or impose obligations not clearly grounded in the NLRA's text.

- **In-house counsel and HR leaders should keep a running list of Board doctrines affecting their workforce that rest on policy rationale rather than express statutory text.** *Hospital Menonita* signals that "the Board has always done it this way" is no longer a safe assumption, and doctrines without a clear textual hook in the NLRA may not survive the next challenge.

Conclusion

We will continue to monitor developments and provide updates as developments occur. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group or Government Relations Team.

