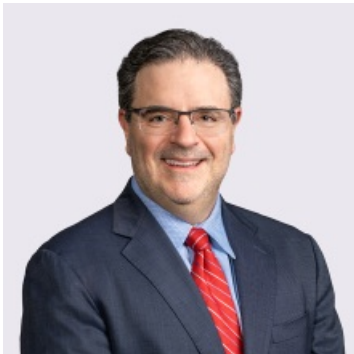


Labor Board: Successor Required to Bargain With Union Over Unilateral Layoffs

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More than five years and a pandemic later, the National Labor Relations Board (NLRB) has clarified a successor employer's union bargaining obligations regarding layoffs under the National Labor Relations Act. *[Tramont Manufacturing, LLC](#)*, 369 NLRB No. 136 (July 27, 2020).

The NLRB held that a successor employer may lawfully take any action "reasonably encompassed" by the initial terms and conditions established prior to bargaining with an incumbent union, but a successor employer's right to conduct layoffs does not absolve it from having to bargain over the effects of the layoffs. *Tramont Manufacturing* began with an unfair labor practice charge that was filed on July 8, 2015.

In light of the COVID-19 pandemic, which has spurred furloughs, layoffs, mergers, and acquisitions within the construction industry, the NLRB's *Tramont* provides an important reminder regarding a successor employer's obligations to bargain over the effects of decisions, including layoff decisions, even absent any obligation to bargain over the decision itself.

Successors Precedent: *Burns*

The NLRB's successorship doctrine stems from the U.S. Supreme Court's decision in *NLRB v. Burns Int'l Sec. Serv.*, 406 U.S. 272 (1972). Following *Burns*, an employer must bargain with a predecessor union if there is a "substantial continuity of identity in the business enterprise," and a majority of the new employer's workforce consists of the predecessor's employees.

While *Burns* successors are required to recognize and bargain with an incumbent labor organization, successors are not typically obligated to honor the specific collective bargaining agreement negotiated and entered into by the predecessor. A successor may establish initial terms and conditions of employment, unless it has expressly or implicitly agreed to honor the collective bargaining agreement.

Tramont Decision

The NLRB issued a supplemental decision in *Tramont*, clarifying the legal standard that applies in evaluating the lawfulness of a successor employer's unilateral action after setting the initial terms of employment, but before any collective bargaining agreements have been negotiated.

The employer in *Tramont* was indisputably a successor, having taken over the predecessor's operations and hired a majority of the predecessor's employees. The successor employer then implemented the initial terms and conditions of employment by distributing a handbook, which contained a provision setting forth the procedures the successor would follow in the event layoffs were required.

Before a collective bargaining agreement with the union was negotiated, the successor

unilaterally implemented a round of layoffs without notice to the union. The union requested bargaining over the layoffs decision, and its effects, but the employer refused, citing its handbook provision regarding layoffs.

Following multiple appeals and remands, the NLRB ultimately rejected the use of either a “contract coverage” standard or a “clear and unmistakable waiver” standard in determining whether the employer’s conduct was lawful, since the unilateral imposition of initial terms and conditions of employment cannot constitute a “contract” with, or “waiver” by, a union.

Instead, the NLRB held that an employer may take any action “reasonably encompassed by unilaterally implemented initial terms and conditions of employment” without providing advance notice to and bargaining with an incumbent union.

However, and critical to the employer in *Tramont*, the NLRB ruled that the right to take action “reasonably encompassed” by lawfully imposed initial terms and conditions of employment does not excuse an employer’s obligation to bargain over the *effects* of such actions.

Because the employer refused to bargain over the effects of its decision to implement layoffs, the NLRB found the employer’s conduct in *Tramont* violated the Act.

Implications

In light of *Tramont*, successor employers that wish to establish the initial terms and conditions of their employees’ employment should be clear to spell out with specificity the types of decisions they may make. When such decisions are made, an employer should be mindful of their obligations to bargain over the effects of such decisions, upon request.

Jackson Lewis attorneys are available to assist employers in complying with their bargaining obligations.

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