

CLIENT ALERT

The NLRB Overrules Prior Decisions to Reinstate "Recognition Bar" Protection for Unions Voluntarily Recognized and "Successor Bar" Protection for Incumbent Unions

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In two cases decided August 26, 2011, the National Labor Relations Board ("NLRB" or the "Board") re-established the "Recognition Bar" doctrine and the "Successor Bar" doctrine requiring "a reasonable period of bargaining" by an employer that has voluntarily recognized a union, *Lamons Gasket Co.*, 357 NLRB No. 72, and a successor employer that is obligated to recognize the predecessor's incumbent union. *UGL-UNICCO Service Co.*, 357 NLRB No. 68. The minimum "reasonable period of bargaining" that is required in both contexts is six months, and the maximum twelve months, after the parties' first bargaining session, depending on the consideration of five factors. Also in both contexts, during this "reasonable period of bargaining" the union's status as the representative of the employees cannot be challenged, either through an NLRB petition for an election filed by employees, by the employer, or by a rival union. Likewise, during this period, the employer may not unilaterally withdraw recognition from the union based on a claim that the union has lost majority support among the employees.

Regarding the "Recognition Bar" doctrine re-established in the *Lamons* decision, there was a complete reversal of precedent, eliminating both (i) the employees' right to contest the employer's voluntary recognition of the union within 45 days of notice of the recognition and (ii) the employer's right to withdraw recognition of the union at any time prior to a collective bargaining agreement ("CBA") being reached upon a showing that the union did not enjoy majority status among the bargaining unit. Conversely regarding the "Successor Bar" doctrine re-established in the *ULG-UNICCO* case, critical areas of law remain unchanged. In this regard, the employer who purchases the assets of a predecessor employer will usually not even be the legal successor if less than a majority of its workforce is comprised of the predecessor's union employees, provided the employer does not refuse to hire the predecessor's employees because of their union affiliation or on some such discriminatory basis. Even when the employer is the legal successor, the employer is under no obligation to accept the predecessor's CBA. Rather, the successor employer is required only to bargain with the predecessor's union in good faith "for a reasonable period of time." In fact, the successor employer is not even obligated to maintain the *status quo*. It is entitled in certain circumstances to set the employees' initial wages, benefits and all other terms and conditions of employment, even if different than the predecessor's.

In *Lamons Gasket Co.*, the NLRB reinstated its previous rule barring an election petition for a reasonable period of time after an employer's voluntary recognition of a union based on evidence of support by a majority of employees. Once voluntary recognition has been granted to a majority union, it becomes the exclusive collective bargaining representative of the employees. Quoting a 1944 U.S. Supreme Court decision, the NLRB invoked the principle that "[a] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period of time in which it can be given a fair chance to succeed." Withdrawal or renegeing from recognition of the union after voluntary recognition before a reasonable time for bargaining has elapsed violates the employer's bargaining obligation under the National Labor Relations Act ("NLRA"). The decision overrules the NLRB's 2007 decision in *Dana Corp.*, 351 NLRB 434 (2007). *Dana Corp.* allowed a 45-day window period following voluntary recognition during which employees could file a decertification petition supported by a 30 percent showing of interest, and required employers to post official Board notices informing employees of this right in order to commence that

45-day period. The NLRB concluded, in *Lamons Gasket Co.*, that the immediate challenge permitted under *Dana Corp.* was unnecessary, compromised the neutrality of the NLRB, and undermined the purposes of the NLRA.

In order to determine the “reasonable period of bargaining” during which the “Recognition Bar” will apply, the NLRB will utilize a “multifactor analysis.” This analysis requires consideration of “(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties’ bargaining process; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.” The burden of proof to show that further bargaining is required lies with the NLRB’s General Counsel. The NLRB will apply this new rule retroactively in all pending cases, unless an election has been conducted and the ballots opened and counted.

In *UGL-UNICCO Service Co.*, the NLRB restored the previously applicable “Successor Bar” doctrine. Under the “Successor Bar,” a union’s representative status may not be challenged for a reasonable period of time after a successor employer, following a corporate merger, acquisition or similar transaction, “acts in accordance with its legal obligation to recognize an incumbent representative of its employees.” Where the contract bar principle is inapplicable, either because the successor employer has not adopted the CBA or because an agreement between the union and successor does not constitute a bar, “the union is entitled to a period of bargaining,” assuming a majority of the predecessor’s organized employees have been hired. In issuing this decision, the NLRB overruled its 2002 decision in *MV Transportation*, 337 NLRB 770 (2002), which created an opportunity for a challenge to the representative status of the union’s status, by 30 percent of bargaining unit employees or a rival union, immediately after the employer’s sale or merger. The NLRB will apply the “Successor Bar” retroactively in representation proceedings. The question of whether that bar will be applied retroactively in unfair labor practice proceedings was not presented to the NLRB, and in its view “may raise distinct issues.”

The NLRB also held, in *UGL-UNICCO Service Co.*, that the “reasonable period of bargaining” during which the “Successor Bar” would apply ranges from six months to one year in the case of voluntary recognition. For a successorship, the protection extends for six months from the first bargaining meeting if the new employer “expressly adopts existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes.” The burden of proof that a reasonable period of time has not elapsed after six months is on the NLRB’s General Counsel. A different period applies where the successor recognizes the union but “unilaterally announces and establishes new terms and conditions of employment” before the hiring of employees. There, the “Successor Bar” will extend from six to twelve months after the first bargaining meeting, based on consideration of the same five above-mentioned factors applicable to “Recognition Bars” under *Lamons Gasket Co.* The burden of proof to establish that the “Successor Bar” has not elapsed is placed on the party seeking to invoke that bar.

The NLRB also modified, in *UGL-UNICCO Service Co.*, the contract bar doctrine as applied in the successorship context. The maximum contract bar period precluding election petitions filed by employees or rival unions is now two years, instead of three years, “where (1) a first contract is reached by the successor employer and the incumbent union within the reasonable period of bargaining during which the successor bar applied, and (2) there was no open period permitting the filing of a petition during the final year of the predecessor employer’s bargaining relationship with the union”

The dissenting member of the Board, Brian Hayes, rejected the majority’s reasoning in *Lamons Gasket Co.* and *UGL-UNICCO Service Co.* He viewed these reinstated bars to employees’ determination of their representational status as reflecting “a purely

ideological choice, lacking any real empirical support and uninformed by agency expertise.” In the view of Member Hayes, these holdings “are not entitled to deference and should be put to strict scrutiny upon judicial review.”

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