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News & Types: Employment, Labor & Benefits Update

Mergers & Acquisitions – Union Due Diligence

9/11/2013

Practices: Employment, Labor & Benefits

[Editor's Note: Mr. Kaplan was a prosecuting attorney and hearing officer at the National Labor Relations Board prior to joining Masuda Funai.]

A manufacturing client purchased a company whose employees were represented by a union and wanted to ensure that all of the employees continued working for the company. In another case, a real estate developer purchased a building where the janitors, elevator operators and HVAC employees were unionized, but the developer wanted to outsource those jobs and eliminate the unions. In both cases, the purchasing companies were facing liability for back wages to employees and other penalties under the federal National Labor Relations Act, if they did not comply with the laws. In addition, the sellers were also liable and had to comply with both contract and statutory laws. If the sellers did not comply with the law, the purchasing companies may have become successor employers with successor liability to the employees.

A company usually has a "management right" to sell a business. However, there are important exceptions, especially when the company has the intent to end the union's representation of the employees. Even if the seller has the statutory right not to bargain about the <u>decision</u> to sell, the company has the obligation to give notice of the sale to the union and also give the union an opportunity to bargain about the <u>effects</u> of the sale. In addition, if requested by the union, the seller may have an obligation to give the union information and documents about the sale. These statutory rights may be altered by a union contract. The seller may have a contractual obligation to negotiate with the union. The contract may also set forth obligations to give notice and release information.

Purchasers have to determine their goals. Purchasers could acquire a company (a) without any obligation to a union; (b) with an obligation to bargain with the union but provide different wages, benefits and working conditions; or (c) with unchanged wages, benefits and working conditions and a continuing relationship with a union. Each of these goals requires different actions by the purchasers before and during the acquisition of a unionized company.

A purchaser's liability to the union and employees depends whether the purchaser is a "perfectly clear" or "not a perfectly clear" successor to the unionized company. The smoothest transition occurs when the purchaser adopts the union contract. It is perfectly clear that the purchaser is the successor. In addition, it is perfectly clear when the purchaser retains a majority of the employees; workers perform the same or similar job duties; manufactures the same or similar products; and has the same or similar vendors and customers. However, the purchaser may not be a perfectly clear successor if the company, prior to the closing, sets new wages, benefits and working conditions, and interviews but does not hire a majority of the seller's employees. A purchaser may not conduct interviews with intent not to hire a majority of the seller's employees. In this situation, the purchaser may not have the legal obligation to recognize and bargain with the union and to comply with the seller's contract with the union. In either case, the purchaser needs to perform due diligence to determine if a legal obligation to recognize and bargain with a union exists and if a contract exists. Most importantly, the purchaser has to take those actions in compliance with the rules set forth in numerous cases decided by the National Labor Relations Board addressing when obligations continue and do not continue. As with other due diligence, companies protect themselves from liability the earlier they engage and seek the advice of counsel.