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## BLOGS

Archives; Labor & Unions

# Alphabet Soup: The NLRB Weighs in on M & A

Employers by now are likely accustomed to hearing about the National Labor Relations Board (NLRB) and its efforts to firmly insert itself into both union and non-union workplaces. For the past few years, the NLRB has issued countless decisions invalidating what have otherwise been deemed routine and sensible employment policies, such as requiring confidentiality of internal investigations, clarifying at-will employment, and prohibiting workplace bullying. Recently, however, the NLRB issued a decision involving corporate mergers and acquisitions that will impact companies C-suite initiatives, and not just their human resources department.

When acquiring an entity with a unionized workforce, companies must always determine whether they are also acquiring the union contract currently in place, or merely just an obligation to bargain with the union over a new contract. Under established law, when an acquisition of a unionized entity occurs, a purchaser only becomes bound by the sellers collective bargaining agreement if it is perfectly clear that the purchaser plans to retain most or all of the sellers bargaining unit employees, and the employees reasonably believe their terms and conditions of employment will remain unchanged. If the purchaser announces an intent to establish new terms and conditions of employment before hiring the sellers employees, the purchaser is free to set these initial terms until a new collective bargaining agreement is agreed upon with the union.

In *Nexeo Solutions, LLC*, 364 NLRB No. 44 (July 18, 2016), the NLRB found that the employer lost its right to set initial terms and conditions of employment for the unionized employees of an acquired company. However, this finding represented a radical departure from board law because it was largely based on statements and representations made to the employees by the *seller*, not the purchaser. In justifying its decision, the board relied on an email from the seller's president to the employees stating, "[W]e anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business." The board also relied on another employee communication that read, "Under the terms of the agreement, for at least 18 months following closing, the newly independent company is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011."

The board's reliance on these communications completely disregarded the purchasers later statements, which made it clear that any continued employment would be subject to different terms and conditions. The board held that the seller's statements to the employees may be imputed to the purchaser, which is a radical departure from the board's previous requirement that a purchaser would only be bound by the sellers collective bargaining agreement if it evinced an intention to retain all unionized employees with the same terms and conditions of employment.

Given this new ruling, employers involved in mergers and acquisitions with a unionized workforce will need to carefully monitor all messaging to affected employees. This may require a detailed provision in the purchasing agreement or other relevant side agreements. Unfortunately, due to the NLRB's ruling, companies will have to engage in a difficult



balancing act in order to achieve a smooth sale while tempering employee concerns about their terms and conditions of employment going forward under the new entity.