ALP: If we purchase the assets and continue the business of a unionized company, do we have to recognize the union and assume an existing labor agreement?

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Not automatically. It depends (a) whether New Co. is a "successor" of Old Co., and (b) what pre-purchase communications were made regarding the existing labor agreement and terms of employment with New Co. (Assume the purchased company is called "Old Co." Assume that after the purchase, the company is called "New Co.").

Is New Co. a "Successor" of Old Co.? The first critical question is whether New Co. is a "successor" of Old Co. under the National Labor Relations Act. If not, then New Co. generally has no obligation to recognize Old Co.'s union or labor agreement. If it is, however, then New Co. will have an obligation to recognize Old Co.'s union upon request.

New Co. will be deemed a "successor" of Old Co. if: (1) a majority of New Co.'s employees in the applicable bargaining unit were former Old Co. employees; and (2) there is a "substantial continuity" of business from Old Co. to New Co.

The first question is not whether a majority of Old Co. employees were hired by New Co. It is whether a majority of New Co.'s employees in the applicable bargaining unit are former Old Co. employees. If they are, and if there is a "substantial continuity" of business from Old Co. to New Co., then New Co. will be a successor with certain obligations to recognize and bargain with Old Co.'s union.

Note, New Co. generally has no legal obligation to hire any particular Old Co. employee. New Co. can decline to hire Old Co. employees for legitimate business purposes and can require Old Co. employees to compete with outside applicants for positions. New Co. cannot, however, refuse to hire Old Co. employees simply

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because the employees were in a union or to avoid being a successor.

The second question to determine successor status is whether there is a "substantial continuity" of business from Old Co. to New Co. This determination is made on a case-by-case basis. The purpose of this inquiry is to determine if there has been a substantial change in the business that would have a probable effect on employee attitudes regarding union representation. Broadly, the following questions are asked: (1) is the business of New Co. the same as Old Co.; (2) are the employees of New Co. doing the same jobs, in the same working conditions, and under the same supervisors as at Old Co., and (3) does New Co. have the same production process, same products, and same customer base as Old Co.?

If New Co. is deemed a successor of Old Co., then if the union makes a request for recognition, New Co. must recognize and bargain with the union regarding the applicable bargaining unit.

If New Co. is a "Successor" to Old Co., must it assume an existing labor agreement?

Generally, no. While as a successor of Old Co., New Co. must recognize the union; it need not automatically assume an existing labor agreement. Successor companies are free to set initial terms and conditions of employment that are different from those contained in Old Co.'s labor agreement. After those terms are set, however, if re-quested by the union, New Co. must engage in collective bargaining with the union over new terms and conditions (i.e. as compared to those unilaterally established by New Co.).

To preserve the ability to set initial terms of employment, New Co. must avoid misleading Old Co. employees into believing that they all will be hired or that prior working conditions will remain the same. When communicating to Old Co.'s work force regarding the potential of working for New Co., New Co. must clearly state that Old Co. employees are not guaranteed a job simply because they worked for Old Co., that New Co. will not assume Old Co.'s labor agreement, and that the terms and conditions of employment at New Co. will be new and different. New Co. should not tell Old Co.

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employees they all will be hired, and in fact, it is advisable that they not all be hired.

This article provides only a brief overview of the basic issues involved in the purchase of a unionized company. Many other issues exist which should be considered. For example, it is permissible, in the right circumstances, for a purchaser to have discussions with a union before the purchase to see if acceptable terms can be reached that make the deal worthwhile. This is a delicate process that if done incorrectly can easily lead to illegal agreements and unwanted obligations. Also, labor agreements and purchase agreements may create obligations which must be analyzed. We suggest advice of counsel be sought when purchasing a unionized company.

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