



AGC Labor and Employment Law Council's

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Benefit Fund Reactions to Double-Breasting

Thomas Vasiljevich

Ogletree, Deakins, Nash, Smoak & Stewart P.C.

thomas.vasiljevich@odnss.com

312-558-1224

ABOUT THE SPEAKER

Tom Vasiljevich is a shareholder in the Chicago office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., concentrating in employee benefits law. His practice encompasses all aspects of employee benefits and executive compensation. He serves as employee benefits counsel to a variety of publicly and privately owned employers and single and multi-employer pension, defined contribution and welfare funds and employer associations. Mr. Vasiljevich received his undergraduate degree in Economics from the University of Wisconsin at Madison, his law degree from DePaul University College of Law and an LL.M. in Taxation from IIT-Chicago Kent College of Law.

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Introduction

YOU ARE DOUBLE-BREASTED!!

Congrats!

NOW WHAT?

Roadmap

Double-Breasted Structure

Investigation of Double-Breasted Status

ERISA Claims

Audit Issues

Damages

Defenses/Settlement

Enforcement

Withdrawal Liability

Double-Breasted Structure

Single Employer

- Single bargaining unit
- Intent not a factor
- No automatic application of obligations of CBA

Single Employer

Deemed a single bargaining unit

- 4-factor (+) test (totality of circumstances):

1. Interrelation of operations
2. Common management
3. Centralized control of labor relations
4. Common owners

+ Common office facilities/equipment, family connections



Single Employer (cont'd)

Key factor: operational integration

- Centralized control of labor relations

'Single employer' determination is not enough to bind all separate companies to the CBA of any one of the companies

- Must also show companies represent appropriate employee bargaining unit

Typically entities (union and non-union) concurrently perform same function

Double-Breasted Structure

Alter Ego

- Continuance of union entity
- Need to establish intent to avoid union obligations
- Automatic application of CBA

Alter Ego

Similar factual inquiry as single employer analysis and examination of totality of circumstances

Key additional factor: intent to evade obligations under the NLRA

- Disguised continuance or attempt to avoid obligations through technical operations change or sham transactions



Alter Ego (cont'd)

Typical situation involves new legal entity that replaces union predecessor

Determination of 'alter ego' status

- Defeats attempts to avoid CBA obligations
- Means automatically responsible for legal and contractual obligations of other company

Single Employer v. Alter Ego

Automatic application of the CBA?

Single employer: *MAYBE*

- Requires a finding of a single bargaining unit

Alter ego: *YES*

Investigation of Double-Breasted Status

Sources of Information

- Union
- Corporate Records
- Employees
- Routine Payroll Audit

Types of ERISA Claims

1. Contributions due

- All work performed by the non-union company was “covered work” under the CBA for which benefit contributions are due
- Contribution obligation dates back to whenever that single employer/alter ego status commenced
 - could be *ab initio*



Contribution Obligation

Breach of CBA

- Failure to pay contributions on covered work

Jurisdiction Issues

- Where was covered work performed
 - Does CBA limit territorial jurisdiction?
 - Does CBA create outside area jurisdiction?
 - What about National agreements?

Types of ERISA Claims (cont'd)

2. Withdrawal Liability

- Non-union company had an obligation to contribute under the CBA
- Withdrawal liability based on contributions the company was **obligated** to make—regardless of whether **actually** made



Audits by Benefit Funds

Source of Authority to Audit

- Collective Bargaining Agreement
- Benefit Fund Trust Agreements
- Collection Procedures



Scope of Audit

- Documents
- Time Period

Audit Authority

Sample CBA Language:

“The books and records of the Employer shall be made available at all reasonable times for inspection and audit by the accountants or other representatives of the Funds including, without limitation, all payroll related forms and sheets, checks, ledgers,...”

AND

“The books and records of any affiliate, subsidiary, alter ego, joint venture, successor, or related company of the Employer shall also be made available...”

Forensic Audit

Typical audit request list includes:

- General ledgers
- Payroll journals/registers
- Bank statements
- Invoices and waivers of liens for subcontractors
- Tax returns
- Tax returns
- Time cards
- Vendor listings
- Forms W-2s, W-3s
- Contribution reports to funds
- Individual earnings records

Audits by Benefit Funds

Benefit Funds have a right to audit employer

- Usually unproductive to challenge right to audit
- Trustees have fiduciary duty to recover assets
- Can sue in federal court to enforce this right
 - Fund can collect attorneys' fees if successful (vice versa unlikely)
- Double-breasted structure may make companies more likely target for audit

Dealing with an Audit

The auditor is **not** a neutral fact finder

Do not ignore the request

Request confidentiality agreement

Make challenges in writing

Records, records, records

- Be able to produce the documentation needed to support a challenge



Audit – Damages

Contributions

Audit Fees

Liquidated damages

- Up to 20% of delinquent contribution (ERISA §502(g)(2)(C)(ii))

Interest

Other

- Wages, possibly attorneys' fees if litigated

Audit – Damages (cont'd)

Personal Liability

- Are Contributions Plan Assets?
 - Trust Agreement
 - Pierce the Corporate Veil

Criminal Liability

Defenses to Fund Challenge

Comply with Double-Breasted rules

- Maintain separate structure on paper and in operation

Exercise caution in responding to Fund request for information, especially regarding structure



Settlement Arguments

Agree to make non-union entity a union entity prospectively only

- Avoid fees (liquidated damages, interest) for allegedly delinquent contributions
- Allows for proper business planning going forward



Settlement Arguments (cont'd)

Argue any payment is a windfall to the Benefit Funds



- Employees of non-union company have no coverage or vested benefits under the Benefit Funds for past work performed
- Fund receiving payment when not expected to provide benefits for the individuals who worked those hours

Enforcement



ERISA § § 502, 515

- Fund's right to collect delinquent contributions

Taft-Hartley § 301 Arbitration

- Violate CBA – Streamlined Procedure?

Arbitration of Withdrawal Liability Disputes

Withdrawal Liability Issues

Controlled group rules

- Joint liability for all “trades or business” under “common control”
- Timing of determination of controlled group

Ceco Concrete Construction LLC v. Board of Trustees of the Centennial State Carpenters Pension Trust, 821 F.3d 1250 (10th Cir. 2016)

Conflict with Double-Breasted Ownership Structure

What is a Complete Withdrawal

Complete withdrawal (ERISA §4203)

- Permanently cease to have an obligation to contribute; or
- Permanently cease all covered operations under the plan.

What is a Partial Withdrawal

Partial withdrawal (ERISA §4205):

- 70% decline in CBUs (e.g., hours) in each of 3 consecutive years when compared to high average (i.e., 2 years of highest CBUs in the preceding 5 years); OR
- Company has permanent cessation of obligation to contribute for 1 or more—but fewer than all—CBAs requiring contributions; OR
- Company has permanent cessation of obligation to contribute with respect to work performed at 1 or more—but fewer than all—its facilities.

Some Withdrawal Exceptions

Sale of assets (ERISA §4204)

Free look rule (ERISA §4210)

Situation-specific statutory exemptions

- Change in business form (ERISA §4218)
- New union/new plan (ERISA §4235)

Fund Trustees apply for and adopt exemption

Withdrawal Timing

Sometimes can strategize to minimize withdrawal liability

- Especially when double-breasted structure creates additional withdrawal liability risk

But, company cannot always control (or even anticipate) timing of withdrawal

- Decertification by the union
- Loss of government contract



Construction Industry Exemption

ERISA §4203(b) – No **complete** withdrawal if:

- Construction industry employer;
- Construction industry plan; and
- Company ceases to have obligation to contribute and does not continue to perform (or resume) performance of covered work in the jurisdiction of the CBA within 5 years after the date the obligation to contribution ceased (“5-year Rule”).

5-Year Rule

Controlled group cannot perform covered work in the jurisdiction of the CBA for 5-years from date of complete withdrawal

- Beware application of controlled group rules an timing of controlled group determination(Ceco)
- If single employer/alter ego status, must close non-union business before or concurrently with the union business

Construction Industry Exemption (cont'd)

Partial withdrawals (ERISA §4208(d)):

“Only if company’s obligation to contribute is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the CBA of the type for which contributions are required.”

- No partial so long as company contributes for 100% of total covered work in the jurisdiction of the CBA
- BUT issue of non-union company performing covered work

Takeaways

Double-breasting structure creates higher risk for:

- Audit of non-union company
- Claim for delinquent contributions
- Claim for withdrawal liability for the non-union company
- Failure to meet the requirements of construction industry exemption due to non-union company activity

Questions?

Thomas Vasiljevich

Ogletree Deakins

312-558-1224

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