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State and Other Developments Impacting Double Breasting

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State and Other Developments Impacting Double Breasting

by Robert R. Roginson

I. INTRODUCTION

Contractors considering creating a double-breasted entity or already operating one must be aware of state and other developments which may impact a double-breasted operation. These developments include, among other things, the risk of criminal liability for individual shareholders and officers and the increasing risk that liability may be imposed on a parent company, or non-union subsidiary, for the union obligations of its union-signatory subsidiaries.

II. POTENTIAL CRIMINAL LIABILITY

While rare, there are examples of shareholder and officers indicted for criminal charges arising out of their operation of double-breasted companies. The charges chiefly focus on fraudulent representation and theft charges, including Mail Fraud (18 U.S.C. § 1341), Theft or embezzlement from Employee Benefit Plan (18 U.S.C. § 1027), and False ERISA Statements (18 U.S.C. § 664). Charges sought also included criminal forfeiture of real and personal property traceable to the commission of the alleged offenses under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

USA v. Alonso, et al. In 2013, following charges brought by the federal Department of Justice in Massachusetts, Juan J. Alonso and his business, Aguila Construction Company, were convicted and sentenced for theft or embezzlement from benefit plans subject to the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), making false statements in documents submitted to benefit plans subject to ERISA, and making false statements to the United States Department of Transportation (DOT). Alonso was sentenced to 13 months incarceration, 36 months supervised release, and the company received 5 years probation. Both Alonso and his company were ordered to pay $782,824 in restitution and forfeit $752,520.

In 2000, Alonso, on behalf of Aguila Construction had agreed to be bound by collective bargaining agreements with, among other unions, Laborers International Union of North America Local 39 (Local 39). Between 2008 and 2011, Alonso operated Aguila Construction Company, Inc. and Alonso Construction, Inc. from the same location in Fitchburg, Massachusetts. The companies performed the same type of work, used the same equipment, and used the same laborers and office staff. Alonso was found to have defrauded the benefit funds by running part of the Aguila Construction payroll through his non-union company, Alonso Construction, thereby underreporting the hours actually worked by Local 39 union members. Alonso also defrauded the funds by paying Aguila Construction laborers in cash, in order to avoid making hourly payments to the benefit funds. Over the four-year period, Alonso failed to pay the benefits fund by approximately $805,338.

Alonso has performed several publicly-funded projects, including 12 projects funded by the US DOT pursuant to the American Recovery and Reinvestment Act of 2009 (ARRA). As part of the scheme, a portion of this contract work was conducted by Alonso Construction rather than Aguila Construction, the signatory to the contracts. In particular, between June 2009 and May 2010, Aguila Construction was subcontracted to perform construction work on an ARRA-funded construction project on Route 2 in Harvard and Littleton. In connection with this project, Aguila Construction completed and sent to the Massachusetts Department of Transportation certified payroll records falsely stating the identity of employees, the number of hours worked and the wages paid.

USA v. Thomson, et al. In 2016, the DOJ in Massachusetts brought criminal charges against Christopher Thompson and Kimberly Thompson, for 18 counts of mail fraud, one count of benefit fund embezzlement, and 18 counts of filing false documents with an ERISA fund. The DOJ also charged the two corporate entities used by the Thompsons, AQE, Inc., a union entity, and Air Quality Experts, Inc., a non-union entity.

According the indictment, the Thompsons employed members of Laborers International Union of North America. The Thompsons allegedly paid members of the Laborers for jobs which required union participation from the AQE, Inc. payroll. When the jobs did not require a union signatory company, the Thompsons paid the union members from the Air Quality Experts, Inc. payroll. In these instances, the union members did not receive union rates, and benefits were not paid by the Thompsons to the MLBF which provides medical and pension benefits to 8,000 laborers and their families in Massachusetts. The Thompsons allegedly sent "remittance reports" to the MLBF which failed to report thousands of hours worked by members of Local 1421. By significantly under reporting the hours worked by union members, the Thompsons failed to pay over $2 million to the MLBF.

The defendants moved to dismiss the indictment, arguing, in part that only AQE's hours had to be reported to the MLBF because Air Quality and AQE were part of a lawful "double-breasted" operation. In a decision reported at *United States v. Thompson*, 207 F.Supp.3d 106 (D.Mass 2016), the court denied the motion to dismiss and held that the indictment properly alleges violations of the mail fraud, theft, embezzlement and false statement statutes. Of particular significance, the court dismissed the defendants' argument that they should not be held criminally liable (or face civil liability) because the non-union shop, Air Quality, was created before AQE, the union shop, and case law requires the alleged alter ego entity be created to avoid labor obligations. The court, however, found the order of creation not determinative for purposes of alter ego liability and concluded the indictments stated the criminal offenses with sufficient adequacy.

Ultimately, the federal prosecutors agreed to dismiss fraud and embezzlement charges against two owners of a construction company. The company, however, was convicted and ordered to pay $500,000 in restitution. In sum, the potential criminal indictments of individual shareholders and officers certainly increases the risk of failing to operate a lawful dual shop operation.

III. CALIFORNIA'S SKILLED AND TRAINED WORKFORCE STATUTES

California Senate Bill 54 ("SB 54"), which is codified at California Health & Safety Code section 25536.7, became effective on January 1, 2014. It requires oil refiners in California to use a "skilled and trained workforce" when contracting for certain construction work at their refineries and to pay its contractors wages which are no less than the applicable prevailing wages adopted by the State for public work projects.SB 54 was sponsored by the California State Building Construction and Trades Council ("SBCTC").

SB 54 defines "a skilled and trained workforce" as workers who are either registered apprentices or skilled journeypersons. In order for a contractor to be able to offer a "skilled and trained workforce," the contractor's employees must, with limited possible exceptions, be enrolled in or graduates of one of the apprenticeship programs that have been approved by the California Department of Apprenticeship Standards (DAS) or approved for federal purposes under federal apprenticeship regulations. SB 54 further requires a periodic increase of percentage of journeypersons who are graduates of such state or federal apprenticeship programs. The current percentage of journeymen who must be graduates is 60%. Because the vast majority of the non-union construction companies employ workers who are not graduates of a state or federal apprenticeship program, such non-union contractors are, for practical terms, prevented from working on the refinery projects.

Beginning in 2017, the SBCTC was increasingly successful in compelling many of the refineries operating in California to adopt a project labor agreement covering all the refinery construction and maintenance work. The PLAs require that all contractors performing work covered by the PLA to become bound to the underlying master labor agreement with the individual craft unions performing the work. Of significance, SB 54 contains a specific provision providing that if a union cannot dispatch a worker to the contractor, which meets the conditions of being a skilled journeyman, the contractor is relieved of the obligation to hire such a skilled journeyman and may hire an employee from any source. This provision has the perverse effect of allowing a union contractor to avoid the obligation under SB 54 to employ only a skilled apprentices and journeyman so long as the union is unable to dispatch such a qualified worker.

Since nearly all the contractors qualified to perform the construction and maintenance work in the refineries were non-union, or were signatory to non-building trade craft unions only, many contractors were compelled to consider becoming signatory to one or more of the building trades unions or establishing a union entity.

IV. JOINT EMPLOYMENT: CORPORATE PARENTS RESPONSIBLE FOR EMPLOYMENT VIOLATIONS BY WHOLLY-OWNED, CONTROLLED SUBSIDIARIES

The doctrines of "single employer liability" and "joint employer liability" are legal mechanisms by which a parent company or franchisor ("Parent Company") may be held liable for the federal employment law violations of subsidiaries or franchisees ("Subsidiary") because the two companies are so operationally interconnected that they both qualify as an individual's

"employer." Application of the doctrines can also arise from common ownership of two separate entities by a single entity, such as a holding company. If either doctrine applies, a reviewing court can hold the two companies jointly and severally liable to the complaining plaintiff, allowing the plaintiff to recover up to 100 percent of the damages from either company.

A. Affirmative Steps A Company Should Take To Avoid Single Or Joint Employer Liability.

A Parent company can and should take several practical steps to structure and operate its relationship with a Subsidiary to avoid the future imposition of single or joint employer liability. Specifically, a Parent should:

- Eliminate or minimize commonality among officers and directors serving roles at both the Parent and a Subsidiary.

- Maintain separate financial statements for each entity.

- Include affirmative statements in materials provided to a Subsidiary clearly setting forth that it has no control over employment matters including personnel decisions, direction of the workforce or terms and conditions of employment.

- Make any Subsidiary solely responsible for training its own workforce. The Parent should keep its own training programs at parent level. If the Parent develops training programs applicable to any of its subsidiaries, any Subsidiary should tailor these programs to its own needs and make it optional for the Subsidiary.

- Include an indemnity provision in an agreement with each Subsidiary explicitly setting forth that the Subsidiary assumes all responsibilities with respect to employment liabilities.

- Exercise only broad and general "control" over the day-to-day operations of a Subsidiary, or the policies and practices in place at that company.

- If the Parent provides office space, equipment, or supplies to a Subsidiary, memorialize the same in written agreements and sell, lease, or loan the space/equipment at fair market rates. Similarly, any loans from the Parent to a Subsidiary should be memorialized in writing and should be supported with adequate security and be subject to market interest rates.

- If any employees of a Subsidiary are transferred to the Parent or transferred to another subsidiary, the move should be characterized and documented as a "termination" and a "new hire," as opposed to a "transfer."

- If the Parent houses certain functions, such as HR, characterize the resource as "available" rather than "mandatory" and permit the Subsidiary to exercise as much discretion as possible over such matters with generalized oversight from the Parent

only. Require the Subsidiary to enter into administrative services agreements with the Parent for use of these services for which a Subsidiary will pay fair market value.

- Represent to the public and in all publications (e.g., on the Internet, public advertising, tax disclosures, and business cards) that the Parent and the Subsidiary are separate.

- Maintain independent vendor agreements for the Parent and each Subsidiary and ensure that each assume their own bills/operating costs.

- If the Parent provides a benefit plan to the Subsidiary, allow the Subsidiary to formally adopt the plan on a voluntary basis.

- Ensure that each Subsidiary maintains an independent payroll account separate from that used by the Parent.

B. Practices A Company Should Avoid To Help Ensure That Single Or Joint Employer Liability Will Not Attach.

Parent companies should avoid the following activities to limit the risk of exposure to single or joint employer liability:

- Exercising control over the day-to-day operations of a Subsidiary.

- Sharing employee handbooks. A Subsidiary should develop its own employee handbooks. Although the handbooks can mention the Parent and its relationship to the Subsidiary, a disclaimer should clearly indicate that the Parent does not exercise control over the employees or the terms and conditions of their employment.

- Participating in the Subsidiary ' s screening or approving employees for hire, implementing discipline, making schedules, setting wages, or otherwise affecting the terms and conditions of their employment.

- Including the Parent's name and/or logo on the Subsidiary's marketing materials, employee pay stubs, or other publications.

- Requiring that senior employees of a Subsidiary report to persons employed by the Parent regarding granular matters. Generalized reporting on broad topics such as corporate health, profit and loss, and business strategy, however, is usually acceptable.

- "Sharing" employees between a Subsidiary and the Parent.

Sharing office space with a Subsidiary. If this practice is unavoidable, use different address information (for instance, different suite numbers) and independent telephone numbers.

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