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Taft-Hartley Report

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Amendment Removing Trustees Was Not A Breach of Fiduciary Duties

A recent decision by the U.S. District Court for the Central District of Illinois held that four trustees of the Construction Industry Welfare Fund of Central Illinois (CIWF) did not breach their fiduciary duties when they adopted an amendment that ultimately resulted in two union trustees being replaced.[1]

The CIWF is a multi-unit employee benefit fund comprised of three employer appointed trustees and three union appointed trustees. The Plaintiffs, Jack Peterson and Donald Nelson, were appointed by Carpenters' Local 44 and Carpenters' Local 347 to serve as two of the union trustees. They each made statements to the other trustees that their unions were considering leaving the CIWF and they were petitioning other unions to withdraw from the CIWF. In response, the other trustees approved an amendment that removed the carpenters unions from the list of unions eligible to appoint the union trustees. The amendment's language did not explicitly remove any trustees, but rather it granted the authority to appoint a union trustee to two other CIWF unions – the Bricklayers, Local No. 8-Chapter 17 and the International Brotherhood of Painters, Local No. 363. Subsequently, the Plaintiffs were replaced by two new individuals nominated by the Bricklayers and the Painters.

The court held that the amendment was permitted under the language of the trust agreement, which stated a trustee could be removed from office at any time by a resolution adopted at a regular or special meeting of the trustees. The court also agreed that the trust agreement provided that a trustee could serve "until their successors shall be selected and duly qualified." Accordingly, the court upheld the Plaintiffs' removal and confirmed the appointment of the two new trustees from the Bricklayers and the Painters.

[1] *Peterson v. Petry*, No. 06-2072, 2007 WL 973861 (C.D. Ill. Oct. 10, 2007).

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Government Agencies Agree to Work Together

As part of its enforcement program under the Labor-Management Reporting and Disclosure Act (LMRDA), the Office of Labor Management Standards (OLMS) has entered into an agreement with the Department of Labor's Employee Benefits Security Administration (EBSA). The Memorandum of Understanding is aimed at promoting communication among senior management and sharing information between the two agencies.

Under the agreement, EBSA will provide OLMS information from Form 5500 that requires employee benefit plans to disclose information about their financial condition, investments and operations. OLMS agreed to provide EBSA with information from the LM-10 and LM-30 forms. The LM-10 form requires employers to disclose certain financial dealings with their employees, unions, union agents, and labor relation consultants. The LM-30 form requires union officers or employers to disclose certain interests and dealings related to an employer whose employees their union represents or are actively seeking to represent.

Under this agreement, the DOL will have the ability to cross-reference the information provided in the Form 5500 and the LM-10 and LM-30. Sharing the data collected from each of the forms will allow DOL to electronically identify the Plan fiduciaries that receive something of monetary value with greater simplicity and efficiency.

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Update on Controversial E-Verify Program and No-Match Rule

E-Verify

The Department of Homeland Security (DHS) has implemented a program called E-Verify to assist employers in verifying that their new hires are authorized to work in the United States. The program allows employers to use an automated Internet-based system to run employment authorization checks against DHS and Social Security Administration databases. The employers use information collected from employment records and compare it against the SSA and DHS records. The program issues a response to the query within a day and if it cannot give a quick response, the program lists the search as "tentative non-confirmation." DHS will either investigate the matter or the employee can challenge the non-confirmation.

In response to this program, the State of Illinois passed a law stating that until DHS can conduct the investigations in a timely manner, it would be illegal for any Illinois business to participate in the program. DHS immediately filed suit asking the court to declare the Illinois law illegal. In December 2007, Illinois Attorney General Lisa Madigan agreed to not enforce the law until the lawsuit against Illinois was resolved. We will keep you informed of any future developments regarding the DHS lawsuit and the status of the Illinois law.

No-Match Rule

The Social Security Administration sends "no-match" letters to workers and certain employers when the workers' names and Social Security numbers do not match. DHS has issued a new rule that would use these letters as evidence that an employer has "constructive knowledge" that its workers are undocumented, unless the employer and the employee follow certain steps to resolve the discrepancy.

In response to the new DHS rule, the AFL-CIO, along with other labor, civil rights, and business groups filed a lawsuit arguing that the DHS rule violates workers' rights, imposes burdensome obligations on employers and causes discrimination against workers who are perceived to be immigrants.

On October 10, 2007, a federal judge in *AFL-CIO v. Chertoff*[1] agreed to temporarily stop the implementation of this regulation. The federal judge granted the Plaintiffs' preliminary injunction and blocked the SSA from sending the "no-match" letters to employers. Accordingly, the SSA cannot send out the "no-match" letters until the court has conducted a full trial on the merits of the case. We will keep you informed of the outcome of this case.

[1] *AFL-CIO v. Chertoff*, No. 3:07-cv-04472-CRB, 2007 WL 2972952 (N.D. Cal. Oct. 10, 2007), *granted preliminary injunction.*

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Employee's Termination Did Not Trigger COBRA Coverage

Most employers believe that they are required to offer employees the option to purchase COBRA health coverage when their coverage with the employer is terminated. However, in *Jordan v. Tyson Foods*[1] *Inc.*, the Sixth Circuit upheld the decision of the Plan Administrator to not offer COBRA to a terminated employee after he failed to make premium payments while on medical leave.

In this case, the employee took a medical leave of absence while working for IBP, Inc., a South Dakota-based meat packing company. Under the IBP health plan, an employee's contributions were deducted from his paychecks. However, when the employee took his leave, the contributions were not deducted from his short-term disability checks. As a result, the employee was not paying his contributions to the health plan. Shortly after he took his leave, IBP, Inc. was acquired by Tyson Foods Inc. The Tyson plan provided that any employee whose premium payments were in arrears was not eligible to enroll in the new plan. Tyson learned of the employee's deficient payments, terminated his coverage and did not offer him COBRA coverage.

The employee argued that he was entitled to notice of COBRA coverage when he was terminated. However, Tyson contended that since the employee was not entitled to health care coverage when he was terminated, notice was not required.

The court agreed with Tyson stating that the employee was not covered by Tyson's health coverage at the time he was terminated because he had not paid his contributions. Further, the court held that the employee had constructive notice that he had a duty to make those contributions while he was on his leave through the IBP summary plan description. Therefore, the employee's termination was not the cause of him losing his health care coverage and COBRA coverage was not available. Additionally, the court struck down the employee's argument that he was entitled to COBRA coverage under the Family and Medical Leave Act (FMLA) noting that the FMLA does not require employers to continue coverage to employees who fail to pay their premiums while on leave.

This decision serves to illustrate the fact that there are several ways a participant can lose their eligibility for benefits and not have the right to purchase COBRA coverage.

[1] *Jordan v. Tyson Foods Inc.*, No. 06-6601, 2007 WL 4455435 (6fh Cir. Dec. 19, 2007).

Be Aware: Alter Ego, Successor Liability

What do you do when a signatory employer closes its doors in an attempt to evade its contractual obligations and re-emerges as a new employer performing the same type of bargaining unit work? In this situation, the following questions typically arise: 1) Can the new employer be held liable for the debts of the signatory employer? and 2) Is the new employer bound to the terms of the Collective Bargaining Agreement (CBA)?

In the Taft-Hartley Fund context, alter ego and successor liability are two related doctrines that operate to impose liability on related employers. Proving alter ego or successor liability requires a detailed factual analysis comparing the business entities.

The goal is to prevent a corporate business from limiting its responsibilities to the Funds by splintering its business.[1] This includes situations in which the employer may be operating as a double breasted or dual union/non-union shop. The Union and the Funds should be aware of the following factors to identify the existence of such relationships: common ownership, common operations, common workforce, common tools, similar business purpose and the specific intent to evade obligations under the CBA. The more factors that are present, the greater the likelihood a non-signatory employer may be found liable for the debts of the signatory employer.

Successor liability typically arises when a non-signatory employer begins operating shortly after the signatory employer ceases to operate. In order to hold the non-signatory employer liable for the debts and contractual obligations of the signatory, there must be a substantial continuation of the predecessor business.[2] Factors used to identify substantial continuity of operations include: common employees, common business purpose, common ownership, common customers, common business name and the specific intent to evade obligations under the CBA.

To identify possible alter ego and successor relationships, the Funds should encourage all payroll auditors to track 1099's as well as W-2's and consult with Fund Counsel early on whenever such a relationship is suspected.

[1] *See Central States Southeast and Southwest Areas Pension Fund v. Sloan,* 902 F.2d 593, 596 (7th Cir. 1990).
[2] *See Howard Johnson Co. v. Detroit Local Joint Executive Board,* 94 S.Ct. 2236 (1974).

Union Official Convicted for Displaying Inflatable Rat

A recent New Jersey court's decision serves as a reminder to check with your local public officials to determine whether your planned NLRA protected activity will be in violation of any local ordinance.

On April 5, 2005, a senior International Brotherhood of Electrical Workers, Local 269 official was issued a ticket and convicted for displaying an inflatable rat outside of a New Jersey company.[1] The IBEW was handbilling in front of Gold's Gym where they had inflated a ten foot tall rat outside the building. After Gold's Gym complained, the police informed the senior IBEW official that the inflatable rat must be removed because it violated a local ordinance that prohibited various types of signs that were displayed for the purpose of attracting the attention of motorists and pedestrians. The official initially complied with the police officer's orders; however the official re-inflated the rat shortly after the police officer left the premises. The police officer returned and issued the IBEW official a ticket.

The IBEW official was found guilty of violating the ordinance and was fined. His conviction was upheld by the appellate court and he ultimately appealed to the Supreme Court of New Jersey to challenge the constitutionality of the ordinance. The Court upheld the conviction and determined that the ordinance is constitutional and does not interfere with the Union's freedom of speech or its right to engage in National Labor Relations protected activities.

At trial, the union official argued that the use of an inflatable rat in connection with handbilling was a protected activity under the NLRA. The Court held that although handbilling and displaying signs may be a protected activity under the NLRA, that activity may still violate local laws and therefore it could be subject to sanctions. The local government is able to establish laws that place valid time, place and manner restrictions on activities. This particular ordinance restricted the display of inflatable signs and it applied to all parties, including IBEW protesters and the general public. The Court stated that IBEW's message was not curtailed by not allowing the rat because they were still handbilling and could engage in conversations with passersby.

It is important to note that although the NLRA allows union employees and officials to engage in certain protected activities, those activities remain subject to facially neutral local laws and regulations.

[1] *State of New Jersey v. DeAngelo*, 396 N.J. Super. 23 (N.J. Super. Ct. App. Div. 2007).

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Proposed DOL Regulation Requires Fee Disclosures

The Department of Labor has proposed a regulation requiring service providers to disclose to fiduciaries of ERISA plans information regarding fees, compensation and conflicts of interest.[1] The service providers affected by the proposed regulation include: providers of banking, consulting, custodial, insurance, investment advisory or management, recordkeeping, securities brokerage and third party administration services. The regulation also applies to some service providers who receive indirect compensation including providers of accounting, actuarial, appraisal, auditing, legal or valuation services.

The terms of the contract between the plan and any of these providers must include information regarding all compensation the provider will receive, both from the plan and indirectly from any party other than the plan or plan sponsor. In addition to general compensation and fees, the service providers must disclose indirect compensation such as gifts, finder's fees, awards, trips for employees, placement fees, research, commissions and other things with a monetary value.

Failure to comply with this regulation would result in the arrangement or contract being a prohibited transaction under ERISA and a violation of the fiduciary's responsibilities. However, DOL proposed a separate regulation that would give a fiduciary an exemption if the service provider fails to disclose the required information without the fiduciary being aware of it.[2] Under this regulation, as soon as the fiduciary learns that the provider failed to disclose the required information, he must request the information. If the information is not provided, the fiduciary must notify DOL of the provider's non-compliance. At that time, the fiduciary can evaluate whether to terminate or continue its contract with the service provider.

These proposed regulations may be effective later this year. If approved, all contracts and arrangements with service providers will have to be reviewed to determine whether the providers are in compliance with the regulations.

[1] 72 Fed. Reg. 70988 (proposed Dec. 14, 2007).
[2] 72 Fed. Reg. 70893 (proposed Dec. 13, 2007).

We encourage you to contact JOHNSON & KROL, LLC if you have any questions regarding the stories contained within this newsletter.

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