JOHNSON & KROL, LLC.

Taft-Hartley Report

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FROM THE EDITOR—DENNIS JOHNSON

As the Managing Member of Johnson & Krol, LLC, I have the pleasure of introducing the first edition of the Taft-Hartley Report. In this and future issues we will endeavor to keep our friends and clients up to speed on the latest legal trends and developments. Our goal is to cut through the confusion and provide clear and concise reports of the legislation, regulations, and court decisions that affect the Taft-Hartley world. I hope that over the coming years this newsletter becomes one of your favorite sources of legal news.

Breach of Fiduciary Duty: Personal Liability of Corporate Officers

What do you do when a contractor organized as a corporation or limited liability company (LLC) owes unpaid contributions, but goes out of business and does not have sufficient assets to pay the delinquency? The question is then often whether the Funds have any recourse against the owners of the defunct company.

Generally speaking, officers/owners of corporations and LLC's are not personally liable for corporate debts. Until recently, the only way for a Taft-Hartley fund to impose personal liability against a corporate officer was to 1) obtain a signed personal guarantee or 2) prove up a piercing the corporate veil case. However, a recent line of federal court decisions have found corporate officers personally liable for unpaid contributions under a breach of ERISA fiduciary duty theory.

In order to impose liability under a breach of ERISA fiduciary duty theory, the court must first find the existence of a fiduciary duty on the part of the officer. Under ERISA, a person is a fiduciary if he or she exercises any discretionary authority or discretionary control respecting management or disposition of plan assets. While some courts have limited liability under this theory to contractual obligations, other courts have expanded liability under the theory.

Although the Seventh Circuit Court of Appeals has not yet ruled on whether a corporate officer can be held personally liable for unpaid contributions under a breach of ERISA fiduciary duty theory, the district courts in Illinois and Indiana have limited liability to situations where the corporate officer has knowingly undertaken a fiduciary duty through a contractual undertaking or has disregarded the corporate form so as to allow the fund to pierce the corporate veil.[1] These courts require that the Trust Agreements classify contributions as plan assets, regardless of whether or not they have been paid.[2] In addition, the agreements would need to clearly designate that the corporate officer is undertaking a fiduciary duty to submit contributions. While the Seventh Circuit has limited the ERISA fiduciary duty standard, other courts have expanded upon it.

The Sixth Circuit Court of Appeals has developed a functional test to determine the fiduciary status of corporate officers under ERISA.[3] Under the test, the court will analyze the extent of discretion an officer has in the management of plan assets.[4] These courts generally consider unpaid contributions to be plan assets. Therefore, the fiduciary duty is breached, and personal liability may be imposed, the moment the Employer fails to submit the contributions to the funds and instead diverts the proceeds for other uses. This represents the most expansive view of the ERISA fiduciary duty standard.

Personal liability creates another avenue from which to collect delinquent contributions and places additional pressure on the owners and officers of signatory contractors to pay contributions in a timely manner. These recent cases significantly expand the ability of Taft-Hartley Boards to reach past the corporate shield to collect delinquent contributions. However, in order to take advantage of these cases, most funds would need to amend their Trust Agreements.

[1] *National Roofing, Industry Pension Fund v. W.R. Kelso, Inc. et al.*, 2005 U.S. Dist. LEXIS 11057 (N.D. Ind. 2005)
[2] *Chicago District Council of Carpenters Pension Fund, et al., v. Abel Angulo, et al.*, 150 F.Supp.2d 976 (N.D. Ill. 2001)
[3] *William Briscoe, et al. v. Allan H. Fine, et al.*, 444 F.3d 478 (6th Cir. 2006)
[4] *Id.* at 488.

INSIDE THIS ISSUE:

DOL Issues Important Changes to Form LM-30

On July 2, 2007, the Department of Labor (DOL) published a final rule revising Form LM-30. The new rule includes two important changes of which you should be aware.

The first pertains to reporting requirements for payments made from trusts to union officials acting as trustees. Originally, the DOL had stated that it would not file enforcement actions seeking LM-30 and LM-10 reports of these payments, pending the completion of the LM-30 rulemaking process.

However, the final rules make clear that payments by a trust must be treated the same as any other payment made by an employer to a union official. This means that, if a union official attends an educational conference and he or she is reimbursed for travel and other expenses associated with conference attendance, the trust must file an LM-10 reporting the expense, and the union official must report the receipt of payment on an LM-30.

There is an important exception for union officers who are "bona fide employees" of the Trust Funds. These employees are exempt from LM-30's reporting requirements, as are their employers from filing an LM-10.

The second important change to the rules pertains to the "de minimis" exception for gifts under \$250. The revised LM-30 formally adopts the \$250 amount, and in addition, provides that hospitality gifts (such as coffee or modest lunches) valued at \$20 or less do not need to be included when calculating whether the \$250 has been met. A filer may not, however, use the exception to hide a series of payments or gifts that were purposely set at \$20 or less to avoid reaching the threshold.

In terms of format, the revised LM-30 form is quite different than the previous version. While the previous form displayed reportable information in a three section format, the new format includes three schedules, and it organizes the reportable matters by tables instead of narrative boxes. Fortunately, the new form also includes far more detailed and helpful instructions.

The Final Rule is effective for fiscal years beginning August 16, 2007 and thereafter.

Proposed Regulations Provide Safe-Harbor for Plan's Choice of Default Investment

It is no secret that a large percentage of participants in self-directed defined contribution plans do not actually "direct" the investment of their accounts. As a result, trustees must place the assets in the plan's default investment option. Prior to the enactment of the Pension Protection Act of 2006 (PPA), trustees were exposed to some liability as fiduciaries related to their choice of a default investment.

Under the PPA, trustees may now attain relief from fiduciary liability by investing participant assets in what are known as a "qualified default investment alternatives" (QDIAs). The Department of Labor (DOL) has issued proposed regulations regarding QDIAs. Final regulations are expected to be released sometime in 2007, and will become effective 60 days after publication in the Federal Register.

The proposed regulations outline three types of QDIAs: (1) life-cycle or targeted-retirement-date funds; (2) balanced funds; or (3) professionally managed accounts.

Perhaps the most exciting option is the life-cycle or targeted-retirement-date funds. By focusing on the participant's age, target retirement date, or life expectancy, these funds eliminate the hassle of adjusting a portfolio's asset allocation over time. These funds adjust over time as the investor's retirement date approaches.

All trustees of self-directed defined contribution plans should consider adopting a QDIA as the plan's default investment option. By investing in a QDIA, trustees may be able to increase participant retirement savings while reducing their legal exposure. Still, QDIAs are not completely without risk. While the PPA provides significant protection, plan fiduciaries are still liable for the prudent selection and monitoring of QDIAs.

House Committee Approves New Mental Health Parity Bill

On July 18, 2007, the House Committee on Education and Labor approved the Paul Wellstone Mental Health and Addiction Equity Act of 2007. If enacted, the majority of group health plans will be required to make significant changes in how mental health and addictive disorders are covered.

You may recall that the Mental Health Parity Act of 1996 made it unlawful for health plans to set annual and lifetime dollar insurance limits for mental health care – except where the same dollar limits were also applied to medical and surgical care. Most Plans still found ways to control mental health coverage using other methods, such as lower co-payment percentages. The driving force behind the proposed amendment is to close these loopholes.

Like the 1996 Act, the amended version does not mandate group health plans to provide mental health or substance-related condition coverage. However, to the extent such coverage is provided, there must be complete parity in coinsurance, co-payments, deductibles, hospital day and visit limits, and maximum out-of-pocket caps.

The bill is headed to the Full House. No date has been set for a vote.

Supreme Court Clarifies Test for Determining Illegal v. Legal Political Speech

Election season is upon us. For corporations and labor unions, this means that special care must be taken to abide by the laws that limit the use of general funds for political speech.

Prior to the Bipartisan Campaign Reform Act of 2002 (BCRA), corporations and labor unions were free to use independent expenditures to engage in political speech, so long as the speech did not expressly advocate for the election or defeat of a particular candidate. The BCRA cut back on this ability significantly, making it a federal crime for corporations and unions to broadcast any communication naming a federal candidate for elected office within 30 days of a federal primary election or within 60 days of a federal general election.

In 2003, the Supreme Court upheld the constitutionality of the Act, but left open the possibility that it may be unconstitutional to forbid "genuine issue ads" - ads which convey information and educate, rather than advocate for the defeat or election of a particular candidate. In *FEC v. Wisconsin Right to Life*,[1] the Court set forth the test for determining which advertisements constitute illegal campaign speech, and which are protected as genuine issue ads.

At issue in this case were three radio advertisements financed by the Wisconsin Right to Life (WRTL). A transcript of one of the ads reads as follows:

> PASTOR: And who gives this woman to be married to this man?
>
> BRIDES FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up…
>
> (VOICE-OVER): Sometimes it's just not fair to delay an important decision. But in Washington it's happening.
>
> A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.
>
> It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org
>
> Paid for by the Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

WRTL planned on running the ads throughout August 2004, which included the 30 day period prior to the Wisconsin primary election. Believing that it possessed a right to broadcast these ads, WRTL filed suit against the FEC seeking a declaration that it could run the ads during this period.

In deciding this case, the Court set forth what is now the definitive test for determining whether an advertisement violates the BCRA. Under the test, an ad is the equivalent of express advocacy (and therefore illegal) if there can be no reasonable interpretation other than as an appeal to vote for or against a specific candidate. In formulating this test, the Court rejected an approach that would focus on the intent of the speaker; thus, factors such as the background and context in which the ad was run are not relevant.

Applying the new test to WRTL's advertisements, the Court held that the ads were not illegal under the BCRA. In supporting this conclusion, the Court noted that the ads do not mention a particular election, candidacy, or political party, nor do they take a position on a particular candidate's character, qualifications, or fitness for office. The Court stated that "one would not even know from the ads whether Senator Feingold supported or opposed filibusters."

This decision has been met with resistance both within the Court (three Justices dissented) and outside of it. But despite the division and controversy, the test announced is still the law of the land. The bottom line is that this opinion can be used to expand the use of "genuine issue ads."

[1] 2007 WL 1804336 (2007)

Federal Appeals Court Upholds "Interest Arbitration" Clause, Imposing New CBA on Parties

When disputes over the terms of an existing collective bargaining agreement reach an impasse, arbitration can provide a valuable tool for resolving the dispute. But when the parties are unable to agree on a successor agreement, they are generally left with two options: either strike, or force a lockout. To avoid such drastic measures, some collective bargaining agreements include "interest arbitration" clauses. These clauses allow an arbitrator to create a contract when the parties are unable to agree on the terms.

In the recent case of *Sheet Metal Workers' International Association Local 15 v. Law Fabrication, LLC*,[1] the Eleventh Circuit Court of Appeals confirmed the enforceability of interest arbitration clauses – even after the CBA has expired. The clause at issue in *Sheet Metal Workers'* was a standard interest arbitration clause, which provided that when negotiations about a new CBA deadlock, the dispute must be referred to the National Joint Adjustment Board for arbitration. Only if the arbitration panel fails to reach a unanimous decision would the Union have the option to strike.

In upholding the arbitration panel's unanimous decision, the court was careful to note that an arbitration clause is not enforceable when the contract itself is a product of interest arbitration. This means that only one agreement may be created by an arbitrator – after that, a new agreement must be entered into by the parties. Arbitrators do not have the ability to impose new agreements on the parties indefinitely.

The fact that the courts will enforce interest arbitration clauses in collective bargaining agreement that force the referral of disputes over the terms of a successor collective bargaining agreements to Arbitration instead of the streets is something unions and employers should at least consider.

[1] 2007 WL 1821022 (11th Cir. 2007)

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Comply with Sarbanes-Oxley, and Avoid Criminal Prosecution

In the wake of Enron and numerous other highly publicized corporate scandals, Congress passed the Sarbanes-Oxley Act of 2002 ("SOX"). While much of SOX pertains only to publicly held corporations, several provisions apply to all organizations – including labor unions and Taft-Hartley trust funds. Most important among the provisions is the addition of a new federal criminal offense for knowingly altering or destroying documents to prevent their use in a federal investigation.

As a practical matter, companies must destroy unnecessary and outdated documents on a regular basis. In implementing SOX, the Securities and Exchange Commission issued regulations regarding how long certain documents must be retained. Although the regulations do not apply specifically to unions and trust funds, implementing a document retention policy consistent with SOX will help any organization avoid criminal prosecution.

Under the regulations, "financial and audit" records must be retained for seven years, including workpapers, memoranda, correspondence, communications, electronic records, and any other document that is created, sent, or received in connection with an audit or review. However, if an official investigation is underway or even anticipated to begin, all document purging should be suspended.

Given the current legal climate, it would be prudent for all organizations to add an additional layer of legal protection by revising their existing document retention policies to comply with SOX.

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

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