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COURT ORDERS EMPLOYER TO JAIL UNLESS HE COMPLIES WITH UNION FRINGE BENEFIT FUND AUDIT REQUEST

Insights
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Employers are far behind the eight ball when union fringe benefit funds come knocking to audit or collect claimed delinquent contributions – and a recent decision from an Oregon federal judge means that employers could face jail time if they don't follow the law. A suite of Iron Workers fringe benefit funds persuaded the judge to order jail for the President and CEO of an employer that refused to submit to an audit. The December 1 decision in *Regional Local Unions Nos. 846 v. LSRI, LLC,* saw Judge Marco A. Hernandez bring the hammer down after the employer ignored several court orders requiring it to produce its books and records. Based on the court's power to sanction for civil contempt, the judge ruled that incarceration was a proper remedy in the case, giving the President and CEO the option of complying with the required audit or go to jail. What can your company learn from this startling decision (to avoid jailtime yourself)?

Funds Have Broad Powers – and Clout

The U.S. Supreme Court long ago affirmed union fringe benefit funds' right to audit and access all employer records reasonably necessary to determine if proper amounts were contributed. Moreover, fringe funds are incentivized by law to take aggressive positions and sue. That's because ERISA ***requires*** employers to pay not only the judgment amount but also interest, liquidated damages (usually 20% of the judgment), and reasonable attorneys' fees and costs (which normally include audit costs and other costs of collection) if a fund receives a ruling in its favor.

Related People

Robert C. Christenson
Partner

404.240.4256

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To make matters worse, employer defenses in delinquency cases are severely limited. They must be based on outright fraud or the plain terms of a written collective bargaining agreement in order to succeed. And of course, many fringe funds have millions of dollars to back aggressive litigation programs, far in excess of the amounts many employers can expend to defend.

Things are Getting Personal

In recent years, fringe funds have begun asserting that executives and officers are personally and individually liable for delinquent contributions owed by their employers. This is based on an argument from the funds that contribution amounts owed to them are “plan assets.” According to the funds and several courts, this means that executives who fail to authorize payment of these “plan assets” are “fiduciaries” to the funds who have breached their fiduciary duty to use plan assets for the exclusive benefit of plan participants.

While jail is not a normal result in audit and delinquency cases, employers need to carefully navigate these claims to ensure that you know your rights and don’t make strategic mistakes that add to your liabilities (or lead to a prison sentence).

Some of the Biggest Mistakes You Can Make

Often, employers set themselves up for failure long before an audit is demanded, or an alleged delinquency incurred. Here are some of the most common mistakes we’ve seen that have led to damaging outcomes for employers:

- **Signing “Side” Agreements.** Too often employers sign letters of understanding or side-agreements with fringe funds that give away the few rights they enjoy. In many cases, employers have no idea that “standard” collective bargaining language provided to them for signature by unions or union funds contains substantive provisions which conflict with and supersede protections they thought they had or may have negotiated into their collective bargaining agreements.

- **Reaching Other Agreements.** Employer “participation” or “subscription” agreements routinely demanded by union funds invariably contain provisions through which the employer agrees to a broad range of penalties in

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connection with delinquencies, and also agrees to whatever collection or other rules the trustees may impose in the future.

- **Confusing Parties Involved.** Further, employers often confuse the local unions which negotiate the contracts with the union funds, which are separate legal entities not bound by written or oral promises the union may have made. It is not uncommon for an employer and union to execute a "standard" collective bargaining or joinder agreement requiring broad classes of employees to participate in a union benefit plan, and then sign off on a side letter of understanding limiting participation. Unfortunately, in most cases, a side-letter between the union and employer expressing the intent of the bargaining parties is no defense to a delinquency claim brought by a benefit plan based on the terms of the standard CBA.

Conclusion

Union fringe benefit funds are often touted in bargaining as easy ways for employers to provide benefits without having the cost and burden of plan administration or ensuring that plans comply with the web of federal laws that make plan sponsorship a headache. In reality, however, employers need to tread carefully before and after going down the union plan path and remain vigilant to the series of traps and pitfalls which potentially await.

Employers with questions about this situation or how to avoid critical concerns should contact their Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Benefits and Tax Practice Group or Labor Relations Practice Group. We will monitor this situation and provide updates as necessary, so make sure you are signed up for the Fisher Phillips Insight service to ensure you get the latest news directly to your inbox.

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