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SUCCESSOR WITHDRAWAL LIABILITY IN ASSET SALES: 5 TIPS FOR EMPLOYERS BEFORE BUYING THE ASSETS OF A UNIONIZED COMPANY

Insights
Nov 18, 2024

When a New York waste operator took over a waste hauling and recycling contract for Westchester County last year, the successful acquisition of a multimillion-dollar business opportunity turned into a pension liability nightmare. The new contractor was soon blindsided by a $7.5 million withdrawal liability demand – filed by a Teamster pension fund to which the waste hauler had likely never contributed – and became a defendant in collection litigation in federal court. The culprit? Successor withdrawal liability – a judge-made obligation that appears nowhere in ERISA but has become another collection tool for multiemployer pension funds across the country. What can employers and potential asset buyers learn from this? We'll explain it all and give you five tips for avoiding successor withdrawal liability exposure.

What Happened?

The New York waste hauler likely thought it had done everything right. When it took over the county contract, it allegedly purchased substantially all of the operating assets of the prior contractor, hired substantially all of its Teamster employees, and assumed its existing collective bargaining agreement – including the prior contractor's obligation to contribute to the Teamster Pension Fund going forward.

But when the prior contractor paid only a fraction of its assessed withdrawal liability, the fund turned to the new contractor for the balance. It asserted that when the new contractor hired the prior contractor's employees, purchased its assets, and assumed the collective bargaining

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Robert C. Christenson
Partner

404.240.4256

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agreement, the new contractor "had notice that the permanent cessation of [the prior contractor's] operations would result in [the prior contractor] owing withdrawal liability to the Fund." If proven, these allegations render the new contractor a "successor" to the old contractor and liable for the old contractor's withdrawal liability. Last week the contractor settled the matter on undisclosed terms in return for dismissal of the litigation.

Successor Withdrawal Liability in Asset Acquisitions

Few, if any, buyers agree to assume a seller's withdrawal liability in an asset sale transaction. But a buyer can be treated as a "successor" if it sufficiently continues the seller's business operations and therefore be on the hook, anyway. These cases often come down to whether the alleged successor had "notice" of the prior employer's withdrawal liability. Unfortunately for successor employers, courts across the country have made it easy to find "notice" and assess successor withdrawal liability.

For example, the 9th Circuit has held that actual notice is not necessary, and that an employer can confer liability if it *should* have known about the exposure. In the 7th Circuit, simply knowing that the prior employer contributed to a multiemployer pension plan can be enough to put the successor on notice that there might be withdrawal liability and satisfy the successorship notice requirement.

Other Types of Successor Liability

Withdrawal liability is only the tip of the successorship iceberg. If the seller is delinquent in contributions to a multiemployer fund, a fund can claim these delinquencies against a successor. Or, if the successor later withdraws from a fund, the fund may assert that contributions made by the prior employer should be considered in determining the new employer's withdrawal liability. And a successor employer can be liable for a predecessor employer's labor law violations or even wage and hour, discrimination, or other exposures beyond the pension plan context. Note, though, that the test for successorship can vary among different legal contexts.

5 Tips to Avoid Successor Withdrawal Liability in Asset Acquisitions of Unionized Companies

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So what should an employer do before buying the assets of a unionized employer and taking over its business? Keep these five tips in mind.

1. **Be aware of the successorship trap.** Even in an asset purchase transaction, you could become responsible as a "successor" for the seller's withdrawal liability. To avoid successor withdrawal liability, don't hire the target company's employees, and don't assume the existing collective bargaining agreement or agree to continue the seller's contributions to a multiemployer pension fund. But keep in mind that the National Labor Relations Board applies its own successorship standard when determining whether an asset buyer is obligated to bargain with an incumbent union – so work with counsel to navigate the different types of successorship traps.

2. **Do your due diligence.** Work with counsel to identify and thoroughly review any multiemployer pension plan obligations the seller has had within the past six years and any pending or potential withdrawal liability related to those plans. The mere presence of any multiemployer pension plan obligations should immediately set off alarm bells, and you must take the time to determine the magnitude and source of any withdrawal liability exposure.

3. **Address withdrawal liability in the sale agreement.** Work with counsel to determine the best way to protect your company through the negotiated terms in the asset purchase agreement. For example, you might require the seller to maintain an escrow account or other arrangement to pay off any potential withdrawal liability to ensure you have no successor exposure.

4. **Work with the pension fund.** If necessary and possible, **strike a deal with the pension fund *before* finalizing the transaction**, to make sure that obligations and exposures are clear. Often, if an employer agrees to retain the seller's employees and continue contributions to the pension fund, the fund will forgo successor withdrawal liability if asked in advance. In these cases, the funds are more interested in continued contributions than withdrawal liability.

5. **Work with the contracting entity (as applicable)**. Additionally, when the transaction involves a contractor taking over an existing contract, the new contractor can

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seek indemnification from the contracting entity to protect the contractor from the prior contractor's withdrawal liability or other exposures.

Conclusion

Withdrawal liability is like a jungle patrol deep in enemy territory. An employer can walk into an ambush at any time. The key for potential buyers is to keep successorship in mind before entering into a purchase transaction with a unionized employer. An employer may think it is doing the right thing by hiring a predecessor's employees or acceding to its collective bargaining agreements, but doing so could inadvertently expose the buyer to enormous liability. Certainly, that was the fate of the waste-hauling employer in Westchester County.

If you have questions about successor withdrawal liability, reach out to your Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Benefits and Tax Practice Group. We will continue to provide tips, guidance, and updates on employee benefits and other workplace law topics, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox.

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