Asset Purchaser Also Bought FLSA Liability

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A decision from the 7th Circuit U.S. Court of Appeals (with jurisdiction over Illinois, Indiana, and Wisconsin) offers an important reminder to employers about the potential for successor liability under the federal Fair Labor Standards Act.

In *Teed v. Thomas & Betts Power Solutions LLC*, a company that acquired another business's assets at a receiver's auction was held to be responsible for paying a $500,000 settlement reached in an FLSA lawsuit between the predecessor business and its employees. The acquiring company knew about the FLSA lawsuit prior to the asset acquisition and specifically disclaimed liability for the lawsuit as a condition of the asset-transfer agreement.

Contractually Disclaiming Liability Was Not Enough
The court first said that a multi-factor federal analysis trumps state law in FLSA cases involving possible successor liability. It also saw the "default rule" as being that a predecessor's FLSA liability should normally be imposed upon the successor, unless there are good reasons not to do this.

And in what is perhaps one of the most-instructive aspects of the decision for other employers, the court ruled that an explicit contractual disclaimer of the FLSA liability was *not* a good enough reason standing alone to avoid the default rule. The court concluded among other things that, if an acquiring employer could contractually disclaim liability in this fashion, the "statutory goals" of the FLSA would be frustrated, and "a violator of the Act could escape liability or at least make relief much more difficult to obtain." The court also rejected a variety of other arguments to the effect that finding successor liability would be inequitable or economically unwise.

Due-Diligence Prior to Acquiring Assets
This case demonstrates that employers should carefully analyze any potential FLSA successor liability in evaluating whether and upon what terms to acquire another company. While the decision might at first appear to *discourage* due-diligence on this score – the court referred to the acquirer's knowledge of the pending FLSA lawsuit as favoring successor liability – this would not be the wisest approach. For one thing, the opinion addressed some circumstances under which a court might decide *not* to impose successor liability even if the acquirer had such knowledge.

The more prudent course would instead seem to be to determine early on whether potential FLSA liability exists, and then to consider the prospects for successor liability under the specific facts presented, what might be done to decrease the chances that successor liability would be found, and

whether the acquisition might be structured in such a way as to provide a financial cushion if successor liability *is* imposed. The employer can then give these matters informed consideration in evaluating the overall risks and benefits of proceeding with the transaction.

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