CLEARY,
JOSEM &
TRIGIANI LLP

215-735-9099 | 800-559-7676

September 2015

BENEFITS ALERT: Withdrawal Liability

A recent decision of the U.S. Court of Appeals for the 9th Circuit in *Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering, Inc.* __ F.3d __ (9th Cir. 2015) makes it easier for multiemployer pension plans (particularly those in the construction industry) to assess withdrawal liability on successor employers who do not contribute to the plan. Based on this ruling, a plan may be able to assess withdrawal liability on a successor (even one who effectively takes over a contributing employer's business without actually purchasing it) if it derives business from a significant portion of the contributing employer's customer base.

Facts

After Resilient Floor Covering, a construction industry employer contributing to a multiemployer pension plan, went out of business, one of its sales representatives started his own company (Michael's Floor Covering). This sales representative bought 30% of Resilient's assets, used the same space, phone number, similar branding as Resilient, and 5 of his 8 employees were from Resilient. While he did not take over Resilient's customer contracts, he used his own contacts as a sales rep to sign up Resilient's customers as his own. Unlike Resilient, Michael's did not participate in the multiemployer pension plan.

Withdrawal Liability

Withdrawal liability is triggered when an employer either ceases to have an obligation to contribute to a plan or permanently ceases operations. In the construction industry, however, the liability is triggered only if an employer engages in operations in the union's jurisdiction for which no contributions are due to the pension fund within 5 years after either event.

Successor Employer - Generally

In order to avoid assuming the liabilities of a business it is purchasing, buyers often structure sales so that they buy only the assets of the seller. (In contrast, a buyer who purchases the legal interests of a business, *e.g.,* its stock, purchases both the assets owned by the business and assumes its liabilities.) However, in certain situations, even in an asset sale, if a buyer substantially continues the seller's business, it will be considered a successor employer to the seller, and assume its liabilities. Previous court cases have ruled that successor employers can be liable for a seller's delinquent contributions to a multiemployer plan. With this case, those liabilities extend to withdrawal liability as well.

Successor Employer - Construction Industry

In deciding that Michael's was a successor to Resilient, the court recognized that in the construction industry if an employer goes out of, or sells its, business, the remaining employers will pick up work (and the out of work employees) for ongoing (and future) projects. As such, there is no harm to the plan, because unlike the withdrawal of an employer in another industry, the employee base for a construction industry multiemployer plan is likely to remain stable even as employers withdraw.

If, however, a new a non-union employer were to pick up some of that work, the plan would be harmed. In the construction industry, whether that work is picked up or not depends on the whether the new employer works for the prior employer's customers. The court recognized that a new employer is more likely to pick up the prior employer's customer base if it has the same location, offers the same services, and has insider knowledge of (and uses that knowledge to pursue) the prior employer's customer base. In that situation, as evidenced in the case, even if there is no sale of the business from one employer to the other, the new employer can be considered a successor.

Conclusion

Because Michael's did not contribute to the multiemployer pension plan, operated non-union operations within the 5 year window, and was Resilient's successor, it was responsible for withdrawal liability. This case highlights the need for business agents to remain vigilant in tracking the corporate identity of the employers in their union's jurisdiction.

The materials provided in this communication are for informational purposes only. This communication is not intended to provide advice, create an attorney-client relationship or render a legal opinion. This communication does not necessarily reflect the opinion of Cleary, Josem & Trigiani LLP or any of its individual attorneys. Clients, of course please call any of the Cleary, Josem & Trigiani LLP attorneys if you have questions about the items reported on here.

---

325 Chestnut St, Ste 200 | Philadelphia, PA 19106
Copyright 2014 Cleary, Josem & Trigiani LLP