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Multiemployer Withdrawal Liability Can Extend Beyond the Withdrawing Employer

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December 12, 2024

A recent case from the United States Court of Appeals for the Sixth Circuit, *Local No. 499, Board of Trustees of Shopmen's Pension Plan v. Art Iron, Inc., et al*., 177 F. 4th 923 (6th Cir. 2024), clarifies a significant legal principle, owners of businesses that are obligated to contribute to multiemployer pension plans (MEP) must know when considering withdrawing from an MEP. A business is generally obligated to contribute to an MEP as a result of being a party to a collective bargaining agreement that requires such contributions.

Background and Analysis

The Employee Retirement Income Security Act of 1974, as amended (ERISA), governs aspects of the administration of retirement plans, including MEPs. The Multiemployer Pension Plan Amendments Act of 1980, as amended (MPPAA), which is a part of ERISA, is intended to protect participants in MEPs by requiring employers that withdraw from MEPs to pay their share of "unfunded vested benefits" to the MEP if it is underfunded when the employer withdraws. This is called withdrawal liability.

Under 29 U.S.C. § 1301(b)(1), all "trades or businesses" under "common control" with an employer who has withdrawn from an MEP are jointly and severally liable for the employer's withdrawal liability. Section 1301(b)(1) does not define "trade or business." While the statute references some Internal Revenue Service regulations, those regulations address what it means to be under "common control." In these circumstances, some courts look to the United States Supreme Court's decision in *Comm'r v. Groetzinger*, 480 U.S. 23 (1987) for guidance as to what constitutes a "trade or business". In *Groetzinger*, the Supreme Court held that a taxpayer's gambling activities could constitute a "trade or business," which would enable the taxpayer to deduct gambling losses as business expenses, if: (i) the primary purpose of the activity was to generate income or profit; and (ii) the activity was continuous and regular. In *Art Iron, Inc.*, the Sixth Circuit joined a growing list of federal circuit courts, the Second, Seventh, and D.C. Circuits, finding that the *Groetzinger* test should be used to determine whether an activity constitutes a "trade or business" for withdrawal liability purposes under 29 U.S.C. § 1301(b)(1).

In *Art Iron*, Robert Schlatter, the employer's only shareholder, officer, and director, operated a separate consulting business that performed work for Art Iron at the time Art Iron withdrew from the MEP. His wife, Mary, made and sold jewelry as a sole proprietorship. The MEP argued that Robert and Mary were both personally liable for over $1,000,000 in withdrawal liability because both of them operated separate "trades or businesses" that were under common control at the time of Art Iron's withdrawal from the MEP. The district court, finding that the couple's tax returns admitted that these activities constituted the operation of sole proprietorships, agreed with the MEP, but chose not to apply the *Groetzinger* test because it interpreted another decision of the Sixth Circuit, *Pension Benefit Guar. Corp. v. Findlay Indus., Inc.*, 902 F.3d 597 (6th Cir. 2018), to reject that standard because it "would not serve ERISA's purposes."

On appeal, Mr. Schlatter did not contest the district court's finding that his consulting business was under "common control" with Art Iron; he did, however, argue that the district court misapplied the more stark standard of *Findlay*, should have followed *Groetzinger* when determining whether he operated a "trade or

business" under Section 1301(b)(1), and erred in concluding his director's fees were income. Mrs. Schlatter also challenged the district court's determination that her jewelry business was a "trade or business" under *Findlay* and argued it would not be under *Groetzinger*.

The Sixth Circuit agreed that *Groetzinger* should apply. The Court limited *Findlay* to circumstances where the employer withdrawing from an MEP leases property from a commonly owned entity and reasoned that in all other circumstances, whether an activity constitutes a "trade or business" under Section 1301(b)(1) should be evaluated under the *Groetzinger* test. Applying *Groetzinger*, the Sixth Circuit affirmed the district court's ruling against Mr. Schlatter and reversed the ruling against his wife. The court ruled that Mr. Schlatter's consulting business was continuous and regular because he received consulting fees for "several consecutive years" up to and through the year of withdrawal. On the other hand, the court reasoned that Mrs. Schlatter's jewelry sales were not sufficiently continuous, nor regular, because she did not have sales in the year of withdrawal from the MEP.

Takeaway

It is important to remember that the employer – the entity itself – may not be the only party to be found liable for withdrawal liability when withdrawing from an MEP. As noted in *Art Iron*, withdrawal liability amounts can be significant, and we also know that the reality of withdrawal liability, in general, has even caused companies to end talks of acquiring another company with potential MEP withdrawal liability under MPPAA. *Groetzinger* makes it clear that under certain circumstances, the employer's owners, their spouses, and affiliated companies may also be subject to withdrawal liability. Whether withdrawal liability may attach is a very fact-intensive analysis that involves a full exploration of the employer's operations, ownership structure, its affiliated or related entities, and other ERISA statutes and laws, including the ones applicable to the jurisdiction in which the MEP is operated and where the employer, its affiliates, and owners are located. Employers should keep in mind that what appear to be unrelated businesses owned by the spouses of company owners can be deemed to be "trades or businesses" under common control and as a result be responsible for the payment of withdrawal liability.

If you have questions or concerns regarding this alert, please reach out to Cameron S. Hill Sr., William E. Robinson, or any member of Baker Donelson's Labor & Employment Group.