



RESEARCH MEMO

District Court Addresses Issue of Employer Withdrawal Liability For Construction Industry Employers and Relation of Subcontracting Clauses in CBA

A recent Oregon District Court case addressed whether a contributing employer (Employer) to a construction industry multiemployer defined benefit pension plan could avoid employer withdrawal liability (EWL) by subcontracting out the "covered" work it performed before withdrawal to non-union employers. The arbitrator ruled for the Employer and the pension plan appealed to the District Court. The case is *Oregon-Washington Carpenters-Employers Pension Trust Fund v. BQC Construction, Inc. Hardware Service*, --- F.Supp.2d ---, 2007 WL 1231638 (D.Or. 2007)(No. CV 06-1379-HU).

On appeal from the arbitration, the Oregon District Court overturned most of the [arbitrator's decision](#). The District Court held that the Employer owed withdrawal liability because it subcontracted out work to non-union employers for which the Employer had been required to make pension fund contributions under collective bargaining agreements (CBAs). The Employer had switched to the non-union subcontractors after laying-off its union employees.

The CBAs at issue all contained subcontracting clauses requiring the Employer to ensure that any subcontractor it used to perform covered work signed or were otherwise bound by the CBAs. The CBAs made the Employer responsible for any amounts, including pension payments that were not paid by such subcontractors.

The Oregon District Court stated that:

"An employer that has made contributions on behalf of employees in the building and construction industry, who ceases making those contributions, but continues performing the same work through subcontractors who do not make contributions, is subject to withdrawal liability."

The District Court further stated that under the CBAs the Employer:

"....could have avoided withdrawal liability by subcontracting to a union employer who would make contributions to the Plan...."

The Oregon District Court case provides an opportunity for a refresher on employer withdrawal liability for construction industry employers and the importance of subcontracting clauses.

A Closer Look at the Oregon District Court Case

In this case, the Plan was a multiemployer pension plan covering employees in the *building and construction industry*. The Employer was engaged primarily in the manufacture and sale of wood products, including custom store fixture showcases and displays, some of which required installation. Before withdrawing, the Employer performed such installation work through its in-house "installation" employees or subcontracted installation to other companies. The Employer's installation employees were members of the United Brotherhood of Carpenters and Joiners of America (the UBOC).

Until withdrawing, the Employer was subject to three labor agreements (referred to collectively as the "UBOC agreements") requiring it to contribute to the Plan for the covered work performed by its installation employees. The UBOC agreements also contained subcontracting clauses governing the Employer's use of subcontractors. Those clauses required that if the Employer used a subcontractor to perform installation work, the Employer had to *ensure that the subcontractor was a signatory to a UBOC Agreement or was otherwise bound to the requirements of the agreements*. The three agreements made the Employer responsible for any amounts, including pension payments, that were *not* paid by subcontractors.

At some point in time, the Employer decided to *shut down its installation department and laid-off all of its installation employees, terminated the UBOC agreements* and withdrew union recognition. As a result, the Employer had no further obligation to contribute to the Plan, as of the date of withdrawal. Immediately afterwards, the Employer subcontracted out its installation work to non-union companies. The Employer did not arrange for these installation subcontractors to make Plan contributions on behalf of their installation employees.

The Plan timely demanded payment from the Employer of \$98,569.40 in withdrawal liability. The Employer disputed that the use of subcontractors meant it had continued to "perform work within the jurisdiction of the UBOC agreements" that had previously covered its installation employees. Arbitration ensued.

In assessing withdrawal liability against the withdrawing Employer, the Trustees were acting in accordance with their fiduciary duty to do so. Courts have unanimously held that Trustees have a fiduciary duty under *ERISA* to determine the amount of the employer's withdrawal liability, notify the employer and collect it.

Arbitration and Then Off to District Court

The arbitrator found for the Employer, deciding it owed no EWL, despite the fact that all of the UBOC agreements imposed responsibility on the Employer for ensuring payments to the Plan were made by subcontractors performing work for the Employer. The Plan appealed to the District Court to overturn the arbitration by filing a complaint in District Court seeking to overturn the arbitrator's decision. Copies of the important case documents are available by "[clicking here](#)".

The District Court first laid out the legal background of employer withdrawal liability statute, the *Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)*, noting that the *MPPAA* imposes withdrawal liability on employers that completely or partially withdraw from a multiemployer pension plan and stop making contributions to that plan. The Court noted that the *purpose of withdrawal liability is to ensure that an employer withdrawing from a plan pays the its fair share of unfunded liabilities that would otherwise fall on the remaining contributing employers*. In general, the amount of an employer's withdrawal liability is its share of unfunded vested benefits.

The Court noted the Employer contributed to the Plan only for its in-house installation employees, which work was considered "*building and construction industry*" work. The *MPPAA* contains a special withdrawal liability exception for employers that contribute to pension plans for workers performing *building and construction industry work*. Withdrawing employers covered by the building and construction employees exception only owe withdrawal liability if they:

- continue to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
- resume such work within five years after the date on which the obligation to contribute ceased.

The District Court explained that the rationale for excepting employers of building and construction industry employees from withdrawal liability unless they continue to do covered work is because the construction industry as a whole does not necessarily shrink when a contributing contractor leaves the industry; covered employees are often dispatched to another contributing contractor. Thus, the withdrawal of a signatory employer from a plan does not reduce the contribution base if the employer leaves the construction industry and other signatory employers take up the slack.

The District Court noted that the withdrawal of an employer from a plan does decrease the base if the employer stays in the industry but goes non-union and ceases making payments to a plan. Hence, the *MPPAA* makes withdrawal liability depend on whether the employer is continuing to do "covered work."

In determining that the withdrawing Employer herein owed withdrawal liability, the Oregon District Court was guided by the landmark case of *H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California*, 663 F.Supp. 1016 (N.D.Cal.1987), *aff'd*, 859 F.2d 808 (9th Cir. 1988), *cert. denied*, 490 U.S. 1036, 109 S.Ct. 1934 (1989).

In *Elliott*, the withdrawing employer was a housing contractor who was signatory to the labor which required it to contribute to the pension fund on behalf of its workers until the labor agreement expired. However, before the expiration date, Elliott began subcontracting its carpentry work out and ceased making contributions to the Fund. The subcontracting provisions of the CBA Elliott had signed required

employers to subcontract only to contractors willing to comply with the provisions of the CBA. The CBA further required that when a subcontractor was delinquent in making payments to the trust fund, the signatory employer was required to make those payments. After Elliott withdrew, litigation followed.

The *Elliott* district court held that by subcontracting out its carpentry work, Elliott nevertheless continued to "perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required." Consequently, the district court held Elliott was subject to withdrawal liability.

On appeal, the Ninth Circuit court affirmed the district court, stating in part:

"We are in full agreement with the district court when it concluded that regardless of whether the carpentry tools were wielded by Elliott's employees or a subcontractor's employees, Elliott continued to do work of the type for which contributions were previously required." *Accord*, PBGC, Op.Ltr. 85-5

The Oregon District Court Vacates the Arbitrator's Decision

The Oregon District Court found several errors in the arbitrator's decision. Among other things, the Court held that the arbitrator erred in concluding the Employer did not owe EWL. The Court stated that an employer that has made contributions on behalf of employees in the building and construction industry, who ceases making those contributions, but continues performing the same work through subcontractors who do not make contributions is subject to withdrawal liability because another signatory employer has not "taken up the slack" created by the Employer's withdrawal from the Plan. The Employer's termination of the UBOC agreements and withdrawal of union recognition meant that vested benefits for its installation employees were left unfunded. Hence, it was proper for the Employer to be subject to withdrawal liability.

The District Court also concluded the arbitrator erred in deciding that the Employer could only have avoided withdrawal liability by going out of the manufacturing business. The District Court observed that the Employer could have avoided withdrawal liability by subcontracting to a union employer who would make contributions to the Plan, as required by the CBA, thereby allowing such employers to "take up the slack" created by the withdrawing Employer.

The District Court concluded its opinion by vacating most of the arbitrator's decision and finding the withdrawing Employer liable in the amount of \$98,569.40.

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