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LABOR RELATIONS

Expert Analysis

Successor Liability in Labor And Employment Cases

Companies purchasing the assets of another business should be mindful they may become responsible for the seller's employment liabilities under a successor liability theory, irrespective of an exclusion of such liabilities under the purchase agreement. This month's column examines recent cases addressing successor employer liability under several federal employment statutes, including the Fair Labor Standards Act (FLSA), the Employee Retirement Income and Security Act (ERISA) and the Family and Medical Leave Act (FMLA).

Applicable Tests

When corporate ownership is transferred in a stock sale or merger, the successor corporation is generally liable for the acts of its predecessor. On the other hand, under most state laws and traditional common law, a company that purchases the assets of another company is generally not liable for the seller's liabilities unless the purchaser expressly or impliedly assumed the predecessor's liability, the transaction amounted to a de facto merger, the purchasing corporation is a mere continuation of the seller or the asset transfer was for the fraudulent purpose of escaping liability for unpaid debts. *Golden State Bottling v. NLRB*, 414 US 168, 182 n5 (1973).

However, in the federal labor and employment law context, courts have held that a company that purchases another company's assets may be liable as a successor employer if there is substantial continuity between the entities. See *Golden State Bottling*, 414 US at 185 (finding such successor liability theory in National Labor Relations Act (NLRA) case justified by avoidance of labor strife, prevention of deterrent effect on exercise of NLRA Section 7 rights and protection for victimized employees); *EEOC v. MacMillan Bloedel Containers,* 503 F2d 1086, 1094 (6th Cir 1974)

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(finding considerations "justifying a successor doctrine to remedy unfair labor practices are applicable equally to remedy unfair employment practices in violation of Title VII").

Courts have held that a company that purchases another company's assets may be liable as a successor employer if there is substantial continuity between the entities.

Courts applying the substantial continuity test typically look to the factors enunciated by the U.S. Court of Appeals for the Sixth Circuit in the seminal *MacMillan* case. Those nine factors include (1) whether the successor company had prior notice of the charge or pending lawsuit; (2) the ability of the predecessor to provide relief; (3) whether there has been substantial continuity of business operations; (4) whether the new employer uses the same facilities; (5) whether the new employer uses the same or substantially the same work force; (6) whether the new employer uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery, equipment, and methods of production; and (9) whether the new employer produces the same product. Although *MacMillan* was a Title VII case, that nine-part test, or a similar version of it, has been relied upon by courts subsequently considering successorship issues under other federal labor and employment laws.

FLSA

In *Teed v. Thomas & Betts Power Solutions*, 711 F3d 763 (7th Cir 2013), the U.S. Court of Appeals for the Seventh Circuit recently affirmed the imposition of successor liability on an asset purchaser for the seller's presale FLSA violations, even despite contract language expressly disclaiming that liability.

In *Teed*, employees of JT Packard sued Packard and its parent S.R. Bray for unpaid overtime violations under the FLSA. Several months later, Bray defaulted on a loan that Packard had guaranteed. Bray then assigned its assets, including its stock in Packard (its principal asset) to an affiliate of the bank it had defaulted against. The assets were placed in a receivership under Wisconsin law and auctioned off.

Thomas & Betts Power Solutions acquired Packard's assets in the auction for approximately $22 million and continued to operate Packard, keeping the same facility and offering employment to many of the same employees. In the asset transfer agreement, Thomas & Betts expressly disclaimed all liabilities and included a specific condition that it would not assume any liabilities Packard might incur in the pending FLSA litigation. However, the district court allowed the employees in the FLSA suit to substitute Thomas & Betts for Bray and Packard under a successor liability theory. Thomas & Betts appealed.

The Seventh Circuit affirmed the imposition of successor liability on Thomas & Betts. The court first noted that under the law of most states, including Wisconsin, Thomas & Betts would not be liable because it had not expressly or implicitly assumed the FLSA liabilities. The court held the state standard does not apply, however, because "when liability is based on a violation of a federal statute relating to labor relations or employment, a federal common law standard of successor liability applies that is more favorable to plaintiffs." The court stated a federal standard applicable to federal labor and employment

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statutes is necessary because such statutes are intended to foster labor peace and protect workers' rights, and these goals would be thwarted if the employer could extinguish liability via a corporate sale. The Seventh Circuit concluded this reasoning extends to suits to enforce the FLSA.

The court noted the federal standard of successor liability usually requires consideration of several factors (similar to the *MacMillan* factors) that were weighed by the district court. However, it went further in this case and held "successor liability is appropriate in suits to enforce federal labor or employment laws—even when the successor disclaimed liability when it acquired the assets in question—unless there are good reasons to withhold such liability." In this particular case, the court found there was no good reason to withhold successor liability, such as a lack of notice of the FLSA claim to the purchaser.

In *Battino v. Cornelia Fifth Avenue*, 861 FSupp2d 392 (SDNY 2012), the District Court for the Southern District of New York concluded the broader substantial continuity test for successor liability (as opposed to the traditional common law test) is appropriate in cases brought under the FLSA. Similar to the agreement in *Teed*, the asset purchase agreement in *Battino* excluded liabilities incurred in connection with the conduct of the business prior to closing and also included a covenant that liabilities relating to employment of employees prior to closing shall be the sole responsibility of seller. Yet the *Battino* court used these contractual provisions against the defendant (the successor employer's owner). Specifically, the court stated it was unable to conclude as a matter law that defendant cannot be liable for FLSA claims as a successor because of a lack of notice of such claims (one of the factors articulated in *MacMillan*) because defendant was aware of potential liabilities to unpaid employees and attempted to negotiate the asset purchase agreement accordingly.

Nevertheless, *Teed* and *Battino* should be contrasted with cases in the District Court for the Eastern District of New York which have held the traditional common law successor liability test should apply in FLSA cases. See, e.g., *Ramirez v. H.J.S. Car Wash*, No CV-11-2664, 2013 WL 1437600 (EDNY April 9, 2013) (holding asset purchaser was not liable as successor for employees' unpaid minimum and overtime wages that accrued prior to purchase date where bill of sale stated purchaser was not assuming seller's liabilities, employees' claims were not made until two years after the sale and, although there was continuity in personnel, overall management of the business changed completely).

ERISA

In *Einhorn v. M.L. Ruberton Construction*, 632 F3d 89 (3d Cir 2011), the U.S. Court of Appeals for the Third Circuit held an asset purchaser may be liable for the acquired company's delinquent ERISA fund contributions where the purchaser had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the entities.

In *Einhorn*, the acquired company, Statewide Hi-Way Safety Inc., was required under two collective bargaining agreements to make contributions to a multiemployer pension trust fund and a multiemployer health and welfare fund. Prior to the asset sale, Statewide was delinquent in making required contributions to the funds in an amount close to $600,000. The purchaser, M.I. Ruberton Construction Company, had knowledge of the delinquent contributions at the time of the asset sale.

After the purchase, Ruberton hired over half of Statewide's employees, assumed several of its projects and began making contributions to the funds. Einhorn, the administrator of the funds, brought suit under ERISA against Ruberton to recover Statewide's unpaid contributions to the funds. Applying the traditional common law rule, the district court found Ruberton was not a "mere continuation" of Statewide and granted Ruberton's motion for summary judgment. Einhorn appealed.

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The Third Circuit found the district court had applied the wrong successor liability standard. The court pointed to the Seventh Circuit's ruling in *Upholsterers' Int'l Union Pension v. Artistic Furniture of Pontiac*, 920 F2d 1323 (7th Cir 1990), which held an asset purchaser may be liable for the seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer was aware of the liability before the sale and there was "continuity of operations" between the entities.

The Third Circuit also explained that federal courts, beginning with *Golden State Bottling*, have developed a federal common law successorship doctrine imposing liability upon successors beyond the confines of the common law rule when necessary to protect important employment policies. Emphasizing the policy goal underlying ERISA—the protection of plan participants and their beneficiaries—the Third Circuit found the federal policies underlying ERISA "'are no less important, and no less compel the imposition of successor liability than do the policies animating the NLRA, Title VII,' or the other statutes to which the doctrine has been extended." Thus, the court remanded the case to the district court to apply the *Golden State* successorship doctrine.

FMLA

Under the FMLA, not only is an "employer" responsible for compliance with the statute, but a "successor in interest of an employer" may be responsible as well. The meaning of "successor in interest" is important because an employee who has worked for an employer for less than 12 months may be eligible for FMLA protection if that employer is considered a successor in interest to the employee's former employer and the employee's combined length of service for both employers is 12 months or more. A Department of Labor regulation at 29 CFR §825.107 enumerates eight factors to be considered—essentially the same as the *MacMillan* factors, not including the notice factor.

In *Sullivan v. Dollar Tree Stores*, 623 F3d 770 (9th Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit held plaintiff was not immediately entitled to FMLA benefits from her new employer because it was not a successor in interest of her former employer. Dollar Tree purchased Factory 2-U's leasehold on its Pasco, Wash., store after Factory 2-U filed for bankruptcy, and plaintiff, who had been working at Factory 2-U as store manager for over a year, was hired by Dollar Tree as an assistant store manager. Plaintiff subsequently requested FMLA leave, but because she had not been working for Dollar Tree for at least 12 months, Dollar Tree approved only some of her requested leave.

In assessing whether Dollar Tree was a successor in interest of Factory 2-U under the FMLA, the Ninth Circuit considered the eight-factor test in the Labor Department regulation. The court found that while Dollar Tree was operating a similar business out of the same location, Dollar Tree did not purchase any other assets from Factory 2-U besides the lease on the building, and Dollar Tree spent weeks renovating the store to meet its own design specifications. The court also noted Factory 2-U's employees were required to apply for jobs with Dollar Tree if they wanted to work for Dollar Tree; Dollar Tree only hired the plaintiff and one other employee of Factory 2-U; Dollar Tree trained employees in its own methods; and Dollar Tree employed a new store manager.

Conclusion

Given the potential for successor employer liability in the context of asset sales, asset purchasers should perform due diligence, assess risk accordingly and stay apprised of legal developments in this area.