Legal Update Article

Third Circuit Joins Sister Circuits in 'Employer' Definition under Multiemployer Pension Plan Amendments Act

By Robert R. Perry

April 14, 2022

Meet the Authors

Robert R. Perry
Principal
212-545-4000
Robert.Perry@jacksonlewis.com

Related Services

Employee Benefits

Turning an "American Dream Project" into a nightmare for a New Jersey contractor, the U.S. Court of Appeals for the Third Circuit has held that, under ERISA's multiemployer pension plan provisions (the Multiemployer Pension Plan Amendments Act of 1974 or MPPAA), a MPPAA employer includes any entity that is obligated to contribute to a plan as either a direct employer or in the interest of one. *J. Supor & Son Trucking v. Trucking Employees of North Jersey Pension Fund*, No. 20-3286, 2022 U.S. App. LEXIS 9070 (Apr. 5, 2022). Adopting this consensus definition of other circuit courts, the court upheld a potential withdrawal liability award in an amount *more than double* the amount the contractor earned for seven-plus years' work on the related project.

Under the MPPAA, an *employer* who withdraws from a plan is liable for withdrawal liability. Surprisingly, however, the statute does not define this crucial term.

Background

The facts of *J. Supor* are not unusual. The construction contractor bid on and was awarded a job on New Jersey's American Dream Project, described as "one of the largest retail developments in America." The company agreed to be bound by the terms of a project labor agreement (PLA), which required the company to contribute to a multiemployer pension plan (Fund) subject to MPPAA. The company contributed to the Fund from 2007 to 2015, until the project stalled, and the company's work ended. A notice and demand for withdrawal liability in excess of $700,000 followed soon after.

District Court Holds Company is a MPPAA Employer

Following their receipt of the Fund's demand for withdrawal liability, the company filed suit asserting the Fund's demand failed because the union had promised the company immunity from withdrawal liability. In response, the Fund moved for summary judgment, citing MPPAA's mandatory arbitration provision. *See ERISA § 4221(a)(1)* ("Any dispute between an *employer* and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [the withdrawal liability provisions] shall be resolved through arbitration."). The company denied it was a MPPAA employer and, therefore, it was not subject to the arbitration mandate.

The District Court held a MPPAA employer includes any entity that is obligated to contribute to a plan "either as a direct employer or in the interest of an employer of the plan's participants." *J. Supor & Son Trucking & Rigging Co. v. Trucking Emps. of N. Jersey Welfare Fund*, 2020 WL 5988240 (D. NJ 2020), *citing Korea Shipping Corp. v. N.Y. Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Tr. Fund*, 880 F.2d 1531 (2d Cir. 1989). This is the definition adopted by every other circuit court to have considered the issue.

Third Circuit Adopts Consensus View

The Third Circuit had little difficulty finding the company was an employer.

The company urged the Third Circuit to adopt a dictionary definition of "employer," which would hinge on whether the entity was the common law employer. This definition would exclude any entity that was not the common law employer of bargaining unit employees or that indirectly employed such individuals. (The court noted the record was unclear as to whether the company had employed the drivers directly or through subcontractors.)

The court found at the outset that this definition would "cripple" MPPAA's withdrawal liability regime, since a statute that penalized only direct employers could easily be evaded by hiring union labor indirectly through third parties. The Third Circuit further found that this definition would make the withdrawal liability determination turn on fact-sensitive "minutiae" such as whether the entity directly hires workers as independent contractors or indirectly hires them as employees but through subcontractors.

In contrast, employer status under the *Korea Shipping* consensus definition hinges on the obligation to make contributions, not on whether the entity was the common law employer of bargaining unit employees. The Third Circuit found the use of this definition provides consistency and avoids the "thickets" inherent in the common law definition favored by the company. Finding the *Korea Shipping* definition "plausible, protective of the statutory scheme, and supported by three decades of consensus," the Third Circuit held a MPPAA employer is "any person obligated to contribute to a plan either as a direct employer or in the interest of one." Because the company clearly was a MPPAA employer under that definition, it must resolve the withdrawal liability dispute with the Fund in arbitration.

What of Union's Promised Waiver of Withdrawal Liability?

The company had claimed the union had promised immunity from future withdrawal liability when it signed the PLA. The Third Circuit found this alleged promise, even if true, did not excuse the employer from the arbitration mandate. The court concluded "arbitrability does not hinge on liability." The court further alluded to MPPAA's "evade or avoid" provision (ERISA § 4212(c)), noting an employer cannot contract out of withdrawal liability.

Finally, the company claimed that it was deceived into signing the PLA by the union's promise of a withdrawal liability hall pass. The Third Circuit found that, at best, these fraudulent inducement allegations rendered the PLA voidable. Noting the company had never tried to void the PLA, but rather contributed to the Fund during its work on the project, the court held the impact of any alleged oral agreement was also subject to arbitration.

Takeaways

This case brightly illustrates the potential pitfalls awaiting an employer who signs any labor agreement. The company worked on the American Dream Project for seven-plus years. The result, however, was more a nightmare; the company remains embroiled in ongoing litigation for withdrawal liability in an amount that is *"more than twice what [the company] earned on the project."* The case further demonstrates the hurdles an employer must jump through when presented with a demand for withdrawal liability, specifically the requirement that all related disputes be arbitrated.

If you have any questions, please contact the author or the Jackson Lewis attorney with whom you regularly work.