American Bar Association
Section on Labor and Employment Law
Employee Benefits Committee

2019 Midwinter Meeting
February 6-9, 2019
Nashville, Tennessee

REPORT OF SUBCOMMITTEE ON
JOINTLY-ADMINISTERED PLANS

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ISSUES UNIQUE TO JOINTLY ADMINISTERED PLANS

I. Legislation and Regulation of Jointly Administered Plans

B. ERISA Regulation of Jointly Administered Plan

A final regulation\(^1\) broadens the criteria under ERISA Section 3(5)\(^2\) for determining when employers may join together in an employer group or association treated as the “employer” sponsor of a single multiple-employer plan. The regulation modifies the definition of “employer” by: 1) creating a more flexible “commonality of interest” test and 2) permitting working owners of a business to elect to act as employers for purposes of sponsoring and association health plan as well as employees. The stated goal of the proposed regulation is to expand access to affordable health coverage by removing undue restrictions.

A proposed regulation\(^3\) restores the test for “joint employer” status that the NLRB had relaxed in its 2015 *Browning-Ferris*\(^4\) decision, establishing that an employer may be considered a joint employer of a separate employer’s employees only if: 1) the two employers share or codetermine the employees’ essential terms and conditions of employment and 2) the employer possesses and actually exercises substantial direct and immediate control over the essential terms and conditions of employment of another employer’s employees in a manner that is not limited and routine. The stated goal of the proposed regulation is to foster predictability and consistency regarding determinations of joint-employer status, thereby promoting labor-management stability. Two weeks before the extended deadline for the comment period on the proposed rule, the D.C. Circuit Court of Appeals issued a decision\(^5\) upholding *Browning-Ferris*, finding that the NLRB properly found that the joint employer test included consideration of both an employer’s reserved right to control and its indirect control over employees’ terms and conditions of employment. However, the D.C. Circuit also found that remand was warranted, as the NLRB failed to confine its inquiry to indirect control over the essential terms and conditions of employment.

Congress passed the Federal Register Printing Savings Act of 2017, which delayed the implementation of the excise tax on high cost employer-sponsored health coverage under the Patient Protection and Affordable Care Act until 2022.

II. Substantive Requirements of Section 302(c)(5) of the Taft-Hartley Act

C. Written Agreement

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1 29 CFR 2510  
2 29 U.S.C. 1002(5)  
3 29 CFR Chapter I  
4 BFI Newby Island Recyclery, 362 NLRB No. 186 (2015)  
In New York Hotel & Motel Trades Council v. Chelsea Grand LLC,\(^6\) a defendant employer sought to vacate an arbitration award on the grounds that, \textit{inter alia}, payment of awarded unpaid contributions to employee benefit funds would violate Section 302(c)(5) of the Taft-Hartley Act\(^7\) due to the lack of a written agreement between the parties governing benefit contributions. In so arguing, defendant employer relied on \textit{International Longshoremen’s Association v Seatrain Lines, Inc.},\(^8\) in which the Second Circuit noted that “contributions to union welfare funds which have been made pursuant to . . . an arbitration award, and might therefore be thought to fall within the exceptions of Section 302(c)(2) are to be scrutinized under the standards set out in Section 302(c)(5).” However, the court declined to vacate the arbitration award on that basis, as defendant employer failed to make this Section 302 argument before the arbitrator, even though it was well aware that the arbitrator was contemplating awarding unpaid contributions to the employee benefit funds. The court reasoned that “even assuming that the rule enunciated in \textit{Seatrain} was well-defined, explicit, and clearly applicable to the case,” the employer defendant’s failure to raise its argument at arbitration prevented it from later showing that the arbitrator acted with a manifest disregard of the law sufficient to vacate the arbitrator’s award under New York law.

In \textit{Furwa v. Operating Eng’rs Local 324 Health Care Plan},\(^9\) plaintiff participants sought a preliminary injunction to force defendant health care fund to accept and credit healthcare contributions from their employers. Plaintiffs’ employers contributed to the defendant health care plan under 8(f) agreements\(^10\) between Operating Engineers Local 324 and the Michigan Infrastructure and Transportation Authority, a trade group whose members employ Local 324 members to work on Michigan’s roads. Upon expiration of all of Local 324’s 8(f) agreements, with MITA, and various individual employers, the union informed the defendant health care plan that it would not pursue a successor agreement with MITA, but would instead be seeking to negotiate with each member-employer individually. The union took the position that the trustees of defendant health care plan could not accept and credit contributions from any MITA employer under the expired MITA agreement. MITA employers continued to make contributions under the expired 8(f) agreement, and the organization advised the defendant health care plan that it should continue to accept contributions from all employers on behalf of all participating employees. The trustees of the plan ultimately determined that accepting contributions under the expired MITA agreement would violate Section 302(c)(5) of the Taft-Hartley Act, reasoning that because the agreement had expired and the union had no interest in a successor agreement, there was no written agreement between the union and employer. In granting the plaintiffs’ request for a preliminary injunction, the court cited to \textit{Alaska Trowel Trades Pension Fund v. Lopshire}\(^11\) and the plain language of Taft-Hartley for the proposition that the written agreement requirement serves only to make plain the detailed basis for employer contributions, and that the statute “requires only a written agreement, not a writing plus an agreement by all parties to continue to be bound by the writing.” In the court’s view, a repudiated 8(f) agreement would likely satisfy

\(^{6}\) 2018 WL 4284046 (S.D.N.Y. Sep. 6, 2018)
\(^{7}\) 29 U.S.C. §186(c)(5)
\(^{8}\) 326 F.2d 916 (2d Cir. 1964)
\(^{10}\) The NLRA does not require an employer to continue to bargain in good faith with a union after the expiration of an 8(f) agreement.
\(^{11}\) 103 F.3d 881 (9th Cir. 1996)
Taft-Hartley’s written agreement requirement, despite the union’s disavowal of the bargaining relationship.

In *Acosta v. Ameriguard Sec. Servs.*,\(^\text{12}\) the Secretary of Labor filed suit against defendant, a contributing employer to several Taft-Hartley welfare and pension plans, alleging that defendant breached its fiduciary duty under Section 409 of ERISA\(^\text{13}\) by failing to be involved in the establishment of the plans, for not appointing a trustee to administer the funds and for not participating in plan administration. Plaintiff’s suit was based on the theory that defendant was an ERISA fiduciary because the “written agreement” requirement of Section 302(c)(5) of the Taft-Hartley Act obligated the defendant to play a role in the establishment and administration of the plans. Plaintiff claimed that the defendant’s failure to do so constituted a breach of its fiduciary obligations. The court granted the defendant’s cross-motion for summary judgment, finding no support for the plaintiff’s theory that defendant was a fiduciary under ERISA.

III. Criminal Liability Under Section 302 of the Taft-Hartley Act

In *Ohlendorf v. United Food Commer. Workers Int’l Union, Local 876*,\(^\text{14}\) plaintiff employees filed a class action against defendant union seeking damages and injunctive relief, claiming it violated the Labor Management Relations Act by imposing conditions on their ability to revoke their dues authorizations in violation of Sections 302(b) of the Taft-Hartley Act, which makes it a crime for a labor union to willfully accept money from an employer. The Sixth Circuit affirmed the district court’s decision to dismiss the complaint as a matter of law, based upon its determination that Section 302(e) of the Taft-Hartley Act creates jurisdiction for the federal courts to restrain violations of Section 302 at the request of the Attorney General, but does not create an express or implied private right of action for individuals to sue for money damages.

In *Swanigan v. FCA US, LLC*,\(^\text{15}\) plaintiff employees filed a hybrid class action under Section 301 of the Taft-Hartley Act against defendants, their union and employer, alleging that the defendant employer breached its collective bargaining agreement and the defendant union violated its duty of fair representation by conspiring to provide payments to union officers to obtain concessions in bargaining and that this collusion impacted the sale to the employer of equity interests held by a union benefit trust fund. In granting defendants’ motion to dismiss, the court determined, *inter alia*, that the plaintiffs were attempting to bring a disguised Section 302 claim for bribery and collusion under Section 301 of the Taft-Hartley Act. Relying on the Sixth Circuit’s decision in *Ohlendorf*, the district court held that Section 302 of the does not create a private right of action.

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\(^{12}\) 2018 WL 4158349 (Md. Aug. 30, 2018)

\(^{13}\) 29 U.S.C. § 1109

\(^{14}\) 883 F.3d 636 (6th Cir. 2018)

IV. Actions to Enforce the Contribution Obligation

B. Judicial Enforcement of the Contribution Obligation

1. Subject Matter Jurisdiction

a. Who May Bring Collection Actions

The district court entered judgment for plaintiff fund against defendant employer, noting that employer’s argument that plaintiff fund could not pursue the action until the union participated in an arbitration with defendant employer held “no water,” where dispute was between fund and employer, and fund possessed an independent statutory right to enforce contribution obligation under ERISA.16

2. Contract Validity Defenses

b. Excepted Defenses: Contract Void Ab Initio or Illegal

The district court denied the plaintiff fund’s motion to dismiss where the defendant employer’s allegations, including that the employer executed a single signature page and was misled as to the nature of the actual agreement, were sufficient to state a counterclaim for fraud in the execution.17

4. Contract Interpretation Issues

The district court granted summary judgment to defendant employer finding that the employer had no obligation to contribute for employees who had opted out of the fund’s coverage even outside of the fund’s open enrollment period where the opt out language of the collective bargaining agreement did not conflict with the Trust Agreement, and even if it did, the CBA controlled and there was no evidence that the employer was bound by the Trust Agreement.18

5. Scope of Contribution Obligation

b. What Work Is Taken Into Account

On an employer’s motion in limine to exclude plaintiff fund’s exhibit purporting to show contributions allegedly owed on vacation hours, the district court found that defendant employer was not obligated to make fund contributions on vacation time where the employees’ vacation would have vested after the CBAs had terminated.19

The district court found evidence that defendant employer deducted union dues as probative that the work performed by employees was covered employment subject to the collective bargaining agreement for purposes of fund contributions and that the plaintiff fund’s audit and supporting documentation created a presumption that defendant employer did not make required contributions.20

d. Proof of Amount Owed

The district court, in awarding summary judgment to plaintiff fund, found a spreadsheet summarizing on a month-by-month basis amounts due to be competent and admissible evidence, when undergirded by a witness affidavit, in support of the amount of contributions owed by the defendant employer, especially where the employer had failed to produce contrary evidence.21

10. Right to Jury Trial

The district court denied plaintiff fund’s request to strike defendant’s demand for a jury trial, because although the action involved mixed claims for legal and equitable relief, neither party had produced Supreme Court or Eighth Circuit authority determinative as to whether claims for delinquent contributions may be tried by jury.22

C. Payroll Audits

2. Scope of Audit

The district court denied summary judgment to plaintiff fund, in part, because it was not reasonable for fund auditor to assume that every expense for which an employer will not or cannot provide more information means that the expense was paid out to a subcontractor whose labor falls within the collective bargaining agreement.23

D. Remedies Available Upon a Finding of Delinquency

3. Injunctive Relief

The district court denied plaintiff funds’ request for permanent injunctive relief, where no evidence of irreparable harm that cannot be adequately addressed by money damages, in particular where the funds had not sought an audit of the defendant employer’s records.24

E. Individual Liability, Piercing the Corporate Veil, and Liability of Others

2. Liability of Affiliated Company as Alter Ego

The Eighth Circuit reversed the district court’s finding of employer liability for unpaid contributions under an alter ego theory where the plaintiff fund did not raise an alter ego theory in its complaint.25

4. Liability of Affiliated Company as Successor

The district court granted leave to amend to defendant employer’s alleged successor in order to allow it to file a crossclaim touching the ultimate issue of its liability for delinquent contributions to plaintiff funds.26

The district court denied parties’ cross-motions for summary judgment, where intervenor fund, as third-party beneficiary, sought to hold the federal government liable for delinquent contributions alleging that the United States had stepped into the shoes of the employer, where the United States had seized ownership of predecessor employer, because there were disputes of material fact and deep disagreement as to the government’s involvement in the operation of employer.27

V. Funding Rules for Multiemployer Plans

D. Special Rules for Critical and Declining Status Plans

1. Limitations on Suspending Benefits

* * * The IRS has received a number of applications for suspensions of benefits, and has published the applications and supporting materials on its website for public review.28 As of January 2019, 25 different plans had submitted a total of 34 applications for suspension of benefits, of which 12 were withdrawn, 5 denied, 10 approved, and 7 still in review.29

VI. Multiemployer Pension Plan Amendments Act—Plan Termination Insurance

A. Guarantees for Insolvent Multiemployer Plans

29 Id. (accessed January 15, 2019, last updated October 3, 2018).
As discussed in the Main Volume, the MPRA\textsuperscript{30} increased PBGC premiums payable by multiemployer plans and indexed them to national wage growth.\textsuperscript{31} The 2019 rate is $29 per participant.\textsuperscript{32}

The MPRA also required the PBGC to issue a report analyzing whether these premium increases would be sufficient to ensure that PBGC meets its guarantee obligations for multiemployer plans through 2025 and 2035, and if not, to recommend a schedule of additional premium increases.\textsuperscript{33} The PBGC issued its report on June 17, 2016. The report concluded that, based on current premium levels, PBGC’s multiemployer program would become insolvent by 2025.\textsuperscript{34} Similarly, in its Projections Report for fiscal year 2017, issued on May 31, 2018, the PBGC found:

This year’s projections for PBGC’s Multiemployer Program show a very high likelihood of insolvency during FY 2025 and near certainty of insolvency by the end of FY 2026.\textsuperscript{35}

Congress sought to address PBGC’s funding shortfall, as well as the broader crisis of multiemployer plan solvency, in the Bipartisan Budget Act of 2018.\textsuperscript{36} That statute established the Joint Select Committee on Solvency of Multiemployer Plans, made up of members of the House of Representatives and Senate, to make recommendations and propose legislative language to carry out those recommendations.\textsuperscript{37} The committee missed its deadline of November 30, 2018, but its co-chairs pledged to continue working on the issue.\textsuperscript{38} In the meantime, Representative Richard Neal, chairman of the House Ways and Means Committee, has introduced legislation that would create a new agency, called the Pension Rehabilitation Administration, to issue loans to multiemployer plans in critical and declining status and to some insolvent plans currently receiving assistance from the PBGC.\textsuperscript{39}

E. Mergers and Transfers

On September 14, 2018, the PBGC issued final regulations updating existing rules on multiemployer plan mergers and transfers.\textsuperscript{40} The regulations became effective on October 15,
2018,\textsuperscript{41} and reorganize existing rules to distinguish between regulations applicable to all mergers and transfers and regulations specifically applicable to facilitated mergers, including those involving financial assistance.\textsuperscript{42}

1. **Mergers and Transfers Between Multiemployer Plans**

In its final rule, the PBGC abandoned changes it initially proposed that would have broadened the definition of a “significantly affected plan” that must undergo exacting solvency testing to satisfy the requirement that a merger or transfer not reasonably be expected to result in the suspension of benefits.\textsuperscript{43} Under the PBGC’s original proposal, all plans in endangered or critical status would have been considered “significantly affected plans.”\textsuperscript{44} The PBGC also abandoned its proposal to prescribe more rigorous solvency testing for both significantly affected and non-significantly affected plans.\textsuperscript{45} The PBGC noted, however, that it “may eventually re-propose changes to provisions in the existing regulation interpreting the solvency requirement[].”\textsuperscript{46}

The regulations now provide different deadlines by which a notice of a proposed merger or transfer must be filed with the PBGC, depending on the type of merger or transfer: 270 days in advance for a facilitated merger, 120 days in advance for a transfer or a non-facilitated merger for which a compliance determination is requested, and 45 days for a merger in which a compliance determination is not requested.\textsuperscript{47} The information required to be contained in the filing remains generally the same as under the prior regulations.\textsuperscript{48} The PBGC continues to require additional information when a compliance determination is requested.\textsuperscript{49}

2. **PBGC Facilitation of Mergers Between Multiemployer Plans**

Section 121 of the MPRA authorizes the PBGC to take action to promote and “facilitate” mergers of multiemployer plans after determining that the merger “is in the interests of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.”\textsuperscript{50} As noted above, on September 14, 2018, the PBGC issued final regulations updating existing rules on multiemployer plan mergers and transfers.\textsuperscript{51} These rules implement the MPRA’s authorization of “facilitated mergers.”\textsuperscript{52}

\textsuperscript{41} Id.
\textsuperscript{42} Id. at 46644.
\textsuperscript{43} Id. at 46644-46645.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 46645.
\textsuperscript{47} 29 C.F.R. § 4231.8(a).
\textsuperscript{48} 29 C.F.R. § 4231.9.
\textsuperscript{49} 29 C.F.R. § 4231.10.
\textsuperscript{50} MPRA § 121(a), adding ERISA § 4231(e)(1), 29 U.S.C. § 1411(e)(1).
\textsuperscript{52} 29 C.F.R. §§ 4231.12-4231.18.
Specifically, the regulations set forth detailed procedures and filing requirements governing requests for facilitated mergers, including requests for financial assistance. The regulations also establish the manner in which PBGC will respond to requests for facilitated mergers and authorize PBGC’s continuing jurisdiction over merged plans receiving financial assistance. However, the PBGC did not specify the factors it will use to assess requests for facilitated mergers, stating that it “will review each request … on a case-by-case basis in accordance with the statutory criteria in section 4231(e) of ERISA.”

4. **Partition of Multiemployer Plans**

Section 122 of the MPRA extensively modified the rules regarding partitions of multiemployer plans.

The PBGC issued interim final regulations on June 19, 2015, and final regulations on December 23, 2015, setting forth in detail procedural rules for filing applications for partition and for providing the required notice to interested parties. The regulations specify how to file an application for partition, what information must be included in the application, and details of the process of review, notice, and ultimate determination of the partition application as well as the content of the partition order. The regulations also provide for special rules when a plan sponsor applies concurrently to the PBGC for partition and to the Treasury Department for suspension of benefits under section 305(e)(9) of ERISA. The regulations include model notices that plan sponsors may provide to interested parties when applying for partition, with or without concurrent application for suspension of benefits. Finally, the regulations authorize PBGC’s continuing jurisdiction over partitioned plans.

### VII. **Coal Industry Retiree Health Benefit Act of 1992**

#### B. Legal Challenges to the Coal Act

2. **Other Legal Challenges**

A district court dismissed the UMWA 1992 Benefit Plan’s (1992 Plan) lawsuit against a signatory operator on the basis that it did not have subject-matter jurisdiction. The 1992 Plan alleged that the signatory operator was not providing the required benefits under the signatory

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53 29 C.F.R. §§ 4231.12-4231.16.
54 29 C.F.R. § 4231.17.
55 29 C.F.R. § 4231.18.
59 29 C.F.R. § 4233.3.
60 29 C.F.R. §§ 4233.4-4233.9.
63 29 C.F.R. § 4233.11; 29 C.F.R. Part 4233, Appendix A.
operator’s benefit plan pursuant to section 9711 of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act).

A district court granted summary judgment to the 1992 Plan to require a “related person” to an entity no longer in business to satisfy the security requirements of section 9712(d) of the Coal Act.65

An appellate court upheld the district court’s ruling that benefits provided pursuant to the Coal Act are subject to section 1114 of the Bankruptcy Code.66 The circuit court held that Coal Act premiums were not taxes for jurisdiction under the Anti-Injunction Act, section 1114 of the Bankruptcy Code applied to Coal Act benefits and that section 1114 also applied to liquidating reorganizations.

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