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Revisiting "Double-Breasting" ... Again

By: Jill Tobia Sorger, Esq.

Introduction:

Over the past several years, this column has often examined the legality of "double-breasting" or operating separate union and non-union entities. Following a string of legal cases in the 1980s, "double-breasted" or "dual shop" operations became an acceptable and legal way of doing business in the construction industry. From an employer's perspective, one major advantage of "double-breasting" is the ability to satisfy customer preferences for either union or non-union labor depending on the demands of a particular job. Accordingly, over the years, many construction industry contractors have established successful double-breasted operations. While organized labor has always outwardly opposed even the concept of lawful "double-breasting" for obvious reasons, it has in many cases knowingly allowed said dual operations to co-exist and accepted the same since doing so arguably allows the contractor to remain competitive in both union and non-union spheres; thereby ensuring the overall viability of the contractor. However, as this column has also addressed in recent

years, the failure to keep these entities entirely "separate" and distinct from each other within the meaning of the law has led to employer liability for such unfair labor practices as desiring to evade its collective bargaining obligations and unlawful diversion of unit work.

Now, with the downturn in the economy, Union Funds have recently become particularly aggressive in seeking to audit contractors and to assess and collect alleged deficiencies. As part of this assertive effort, Union auditors have begun to increasingly include, in most cases without justification or explanation, the work performed by a "non-union" double-breasted entity in the alleged audit deficiency of the "union" double breasted entity. In growing numbers, the Union auditors have begun to claim that "bargaining unit" or "covered" work is being impermissibly performed by the "non-union" entity. The audit deficiency is therefore tremendously inflated, as the non-union entity has often been allowed to operate for many years. As a result, the Unions and their Fringe Benefit Funds are filing an increasing amount of arbitrations and/or court proceedings seeking enormous monetary judgments against "double-breasted" contractors. In addition to the time and expense of such legal proceedings, the steadfast position of organized labor with respect to the contractor's liability in double-breasting scenarios is a cause of great concern; thereby necessitating that contractors currently operating, or contemplating operating, "double-breasted" revisit the structure of the operations carefully.

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A Change of Heart:

Despite the frequent acquiescence of organized labor for many years to a "double-breasted" arrangement, union representatives often have a change of heart when an audit of the "non-union" entity reveals a significant amount of alleged lost work opportunities and corresponding fringe benefit shortfalls. Suddenly, years of harmonious co-existence are erased by allegations that the contractor has "intermingled" and "integrated" the operations of the union an d non-union entities, thus giving rise to findings of single employer or alter ego status. Developing case law from only a handful of decisions (which one can only speculate is due to the fact that such litigation is costly and time consuming) demonstrate that the union generally has the upper hand, with only a few courts recognizing union "acquiescence" or "acknowledgment" as a viable defense when there exists some evidence of integration of operations.

The biggest problem facing a double-breasted contractor is based on the case law determining that liability can arise even if there is/was no intent to evade one's collective bargaining agreement with the union by forming the non-union company. The "single employer" test currently employed in assessing the legality of "double-breasted" operations examines several factors including common ownership, common management, interrelation of operations and common control of labor relations. Although no one factor is conclusive, common control of labor relations appears to be the key to said analysis. Unfortunately, contractors seeking efficiency of operations often will centralize control of labor relations; thereby unintentionally creating a link between the "double-breasted" entities.

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Where such an interrelationship exists, said fact may lead to a "single employer" finding even when the non-union company was established *prior* to the union company.

Advice For Contractors:

Even if a Union has acquiesced to "double-breasted" operations for many years, contractors must be careful not to intermingle or integrate these entities. The more the line is blurred between the two entities, the greater the likelihood that liability will be found to exist by the courts even in light of a Union's acceptance of the arrangement. Unless the Union's acceptance of the non-union entity is in writing, every contractor in this situation is at risk. While there are defenses available to the contractor, the time and expense of such litigation makes being proactive a high priority. Accordingly, as audits are being conducted with more frequency, it is recommended that labor counsel be consulted to evaluate, scrutinize and structure or restructure the ownership and operation of such "double-breasted" entities.

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