

No Asset Sale Exception to Withdrawal Liability Applies Where Purchaser Can Reduce Employee Hours Post-Acquisition

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The Second Circuit Court of Appeals affirmed a district court holding that a seller was not exempt from withdrawal liability under the Multiemployer Pension Plan Amendments Act because the purchaser of the seller's assets was not obligated to contribute substantially the same number of contribution base units to the pension fund post-sale as seller had contributed pre-sale. In this case, the "contribution base units" were hours of employee pay. The asset purchase agreement stated that purchaser could lay off employees or take other actions which could reduce the number of contribution base units purchaser was obligated to contribute to the plan. The court found that, before the sale, seller had a year-to-year ongoing ERISA obligation to maintain a threshold level of hours of employee pay. If seller had reduced its contribution base units by 70 percent, or partially ceased its contributions in a given year, it would have been subject to partial withdrawal liability. The court stated that, although purchaser had an obligation to contribute to the plan at the same rate as seller did before the sale, purchaser did not have an obligation to maintain substantially the same number of hours of pay. Therefore, the sale did not qualify the seller for the exemption from withdrawal liability. *HOP Energy, LLC v. Local 553 Pension Fund*, No. 10-3889-cv (2nd Cir. May 3, 2012).