

# CONSTRUCTIVE NOTICE SUFFICIENT FOR IMPOSITION OF WITHDRAWAL LIABILITY ON SUCCESSOR EMPLOYER IN PURCHASE OF ASSETS

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Employee Benefits

In several earlier cases, courts have held that withdrawal liability may be imposed on a purchaser of assets when the purchaser is treated as a successor employer and had notice of a withdrawal liability. For example, in an asset purchase transaction if, as part of the due diligence process, the purchaser of the assets became aware of the withdrawal liability and if the purchaser is treated as a successor, the purchaser would be liable for the withdrawal liability if it is not paid by the selling entity. The purchaser would be treated as a successor if there was sufficient continuity in operations without interruption or substantial change.

In a recent case, the court held that actual notice of the potential withdrawal liability was not required. In this case, a private equity firm bought a hotel in Hawaii where the seller of the assets was party to a collective bargaining agreement that provided for participation in a multiemployer pension fund. Just before the transaction was completed, the seller stopped contributing to the plan and seller withdrew from the plan on the date of sale. The plan sent a notice of withdrawal liability to the purchaser. The purchaser contested liability in this situation claiming that it lacked a formal notice of the withdrawal liability. The Ninth Circuit Court of Appeals held that constructive notice was sufficient to impose liability because the purchasers were deemed to have notice of the facts that “when using reasonable care or diligence should have” been discovered. The Court held that this would not impose strict liability on the purchasers of assets; liability would be imposed only if the buyer, using reasonable care in the diligence process, should have discovered the withdrawal liability and if it was “fair” to impose the liability. As this case demonstrates, multiemployer plans continue to be aggressive in pursuing withdrawal liability against parties who did not directly contribute to plan and the courts have been willing to impose liability. *Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, 9th Cir., 2018.