

Portland Bar, Restaurant Liable for Unpaid Wages due Predecessor's Employees, Oregon High Court Holds

Date: 2.3.2014

An employer that acquired the assets of a defunct bar and restaurant and continued to operate a restaurant on the same premises was liable for unpaid wages owed to the defunct restaurant's former employees, the Oregon Supreme Court has ruled. *Blachana LLC v. Bureau of Labor and Industries*, No. S060789 (Ore. Jan. 16, 2014).

Reversing the Oregon Court of Appeals, the Court found that the Bureau of Labor and Industries (BOLI) did not err in deciding the employer was a successor for state wage liability purposes because it conducted "essentially the same business as conducted by the predecessor," even though it did not employ any of the predecessor's employees.

Background

In 2005, Dustin Drago, President of NW Sportsbar, began operating a bar and restaurant in Portland, Oregon, under the name of the "Portsmouth Club" and "Anchor Grill." Drago hired four employees. By 2006, however, Drago had ceased paying his employees and closed the business. Janet Penner, the landlord of the premises where NW Sportsbar operated, acquired all of NW Sportsbar's assets, business name, goodwill, and personal property.

Penner registered Blachana, LLC, and eventually began operating a bar and restaurant under the names "Penner's Portsmouth Club" and "Portsmouth Pizza and Pub" in the same space and using the same equipment and vendors as NW Sportsbar had used. Blachana did not employ any of the same employees as NW Sportsbar.

In the meantime, NW Sportsbar's former employees filed a claim for unpaid wages with BOLI. BOLI paid the claims through the Wage Security Fund then sought to recover those amounts from Blachana, as a "successor to the business" of NW Sportsbar. After a hearing, the administrative law judge determined that Blachana was liable as a successor for the unpaid wages and penalties because it operated "essentially the same business" as NW Sportsbar. Blachana appealed, and the Oregon Court of Appeals reversed. BOLI appealed.

Applicable Law

Under Oregon law, when an employee has filed a claim for unpaid wages and BOLI has determined the employer is incapable of paying the wage claim, the Commissioner will pay the claim out of the Wage Security Fund. Or. Rev. Stat. §§ 652.414(1), (2). The Commissioner then may sue to recover the unpaid wages and penalties from the "employer or other persons or property liable." Or. Rev. Stat. § 652.414(3).

"Employer" is defined as "any person who . . . engages personal services of one or more employees and includes any successor to the business of any employer . . ." The term "successor to the business" is not defined by statute; however, BOLI has interpreted the term to mean that the new employer carries on "essentially the same business" as the former employer. *In re Anita's Flowers & Boutique*, 6 BOLI 258, 267-68 (1987). In determining whether the new employer carries on "essentially the same business," BOLI examines several factors, including: "the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; [whether] the same or substantially the same workforce employed; [whether] the same product is

manufactured or the same service is offered; and [whether] the same machinery, equipment, or methods of production are used.” Not every factor is required.

Successor

Blachana argued that BOLI’s interpretation of “successor to the business” was outside of the legislature’s intended meaning. Blachana contended that the succeeding entity must have agreed to assume the predecessor’s obligations under law other than under the wage statute. The Supreme Court disagreed.

According to the Court, the statute did not define “employer” to include those who succeed to the obligations of a prior employer; rather, it referred to the “business” of the prior employer. The Court found that the statute’s language indicated the Legislature’s intent “to include a broad class of successors — all those who continue to operate the same establishment or engage in the same enterprise.” The Court also found BOLI’s interpretation of the statute, imposing successor liability on those entities engaged in “essentially the same business” as the prior employer, was consistent with the Legislature’s intent.

The Court also ruled that BOLI correctly applied its standard to the facts of the case. First, Blachana used a similar name for its business at NW Sportsbar. The two businesses were located in the same premises and used much of the same equipment. The two businesses operated a bar and restaurant. Further, only 47 days passed between the time NW Sportsbar closed and Blachana opened. Although Blachana employed different workers, the facts, as a whole, the Court said, demonstrated that Blachana was a “successor to the business” that had been operated by NW Sportsbar. Accordingly, the Court reversed the judgment of the Court of Appeals and affirmed BOLI’s order.

Given this new ruling and the expansive interpretation of the term “successor,” all individuals or entities contemplating the purchase or lease of business assets, or taking over the operation of an existing business should consider whether their new business may be deemed a “successor” for purposes of the Wage Security Fund administered by BOLI. With planning, a business may be able to minimize the potential for successor liability in structuring the transaction, or alternatively, identify the potential risk and cost associated with such a finding.

Many other state and federal employment laws, including the Oregon Family Leave Act, the federal Family Medical Leave Act, the federal Fair Labor Standards Act, and the federal National Labor Relations Act, also use the concept of “successor” liability to create obligations. Each law may apply its own criteria. These laws also pose a threat of potential liability for unsuspecting employers. Thus, whether a new business may be a “successor” is an important issue that should be thoroughly explored before any transaction is closed.

Please contact Sarah J. Ryan, at Sarah.Ryan@jacksonlewis.com, April L. Upchurch, at April.Upchurch@jacksonlewis.com, in our Portland office, (503) 229-0404, or the Jackson Lewis attorney with whom you regularly work if you have any questions.

© 2014, Jackson Lewis P.C. This Update is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. Reproduction in whole or in part is prohibited without the express written consent of Jackson Lewis.

This Update may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.

Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.

practices

Management and Employee Training

jackson lewis p.c. © 2014