

CLIENT BULLETIN

Criminal Charges Filed Against Contributing Employer for Mail Fraud Based On Filing False Remittance Information

In an unusual development, a civil action by several ERISA-governed multiemployer fringe benefit funds ([Massachusetts Laborers Benefits Funds](#)) against two companies for unpaid fringe benefit contributions apparently triggered a CRIMINAL action by the Department of Justice (DOJ) against the companies' owners and the companies (Air Quality Experts, Inc. and AQE, Inc.) for mail fraud and other criminal violations based upon the use of the U.S. Mail to file false contribution remittances.

The civil suit was filed November 19, 2015 and the criminal indictment was filed a mere 61 days later on January 19, 2016. We are unsure of the chain of events that triggered the criminal lawsuit, but contributing employers who attempt to game the system should be extra wary.

The civil lawsuit alleged that the two companies were alter-egos of one another as they shared the same corporate officers, were both in the business of asbestos removal services, operated out of the same address, stored their trucks, equipment and supplies at the same place, used the same clerical staff and supervisors, and used the laborer employees interchangeably between the two companies. The defendants argued the two companies comprised a lawful "double-breasted operation." The parties filed a joint motion to stay the civil proceedings due to the pending criminal case. That motion was granted on August 1, 2016.

The criminal indictment alleged that the defendants' use of the U.S. mail for filing false remittance reports violated U.S. laws against [mail fraud](#), [theft or embezzlement from an employee benefit plan](#), [false ERISA statements](#) and [aiding and abetting](#). The DOJ sought the remedy of [civil](#) and [criminal forfeiture](#).

The defendants filed a motion to dismiss the criminal charges which was denied by the district court. The district court explained that a "double-breasted operation" is a business comprised of both union and non-union companies in which the non-union company bids on contracts that do not require a union contractor and the

union company bids on union contracts. The court noted that such double-breasted arrangements are “neither uncommon nor inherently unlawful.”

However, the DOJ alleged that under the defendants’ fraudulent scheme, the union and non-union companies were not actually two separate companies but rather a single company with the same location, workforce, equipment and management. In sum, the DOJ alleges that Air Quality and AQE were actually a single business in which Air Quality was bound by the CBAs that AQE signed, but that the defendants fraudulently misrepresented that their business was a lawful double-breasted operation with two separate companies, one subject to the CBAs and the other not.

Thus, the DOJ was seeking criminal liability based on an “alter-ego” theory. The use of alter-ego theory to show “common control” in civil suits to collect outstanding fringe benefit contributions or withdrawal liability is not new. However, the criminal court noted that it was unaware of any criminal cases using alter-ego liability in this manner and neither party cited such a case to the court.

In denying the defendants motion to dismiss the criminal indictment, the court noted that when grading an indictment’s sufficiency, it looks to see whether the document sketches out the elements of the crime and the nature of the charge so that the defendant can prepare a defense and plead double jeopardy in any future prosecution for the same offense. The indictment did so. The defendant’s motion to dismiss was accordingly denied.

We will watch this case for future developments.

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Court Documents

Civil Case – McAnarney v. Air Quality, Inc. and AQE, Inc., Cause Number 1:15-cv-13891, District Court of Massachusetts

- [Complaint](#)
- [Joint Motion To Stay](#)
- [Docket Sheet](#)

Criminal Case – United States v. Christopher Thompson, Kimberly Thompson, Air Quality, Inc. and AQE, Inc., Cause Number 1:16-cr-10014, District Court of Massachusetts

- [Indictment](#)
- [Court’s Opinion Denying Motion to Dismiss](#)
- [Docket Sheet](#)

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