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# First Circuit Rules Private Equity Fund is "Trade or Business" for Purposes of ERISA Withdrawal Liability

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In the first court of appeals decision on this issue, the First Circuit recently ruled that a private equity fund may be a "trade or business" for purposes of ERISA's multiemployer plan withdrawal liability provisions. *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 2013 WL 3814984 (July 24, 2013), reh'g denied, Aug. 23, 2013.

Under ERISA, an employer that withdraws from a multiemployer pension plan is liable for a share of the plan's unfunded vested benefits, if any. The entities subject to this liability are the employer that contributed to the pension plan, as well as any other "trades or businesses" under "common control" with the withdrawing employer (generally, "common control" requires an ownership interest of at least 80 percent). The Court found that one of two private equity funds was a "trade or business" for this purpose because, "through layers of fund-related entities," it was not merely a passive investor, but "sufficiently operated, managed, and was advantaged by its relationship with its portfolio company. . . ." The Court remanded to the district court the decisions whether the other private equity fund met the trade or business standard, and whether the private equity funds were under "common control" with the portfolio company. We comment on this important decision in the attached memo.