

What are the pitfalls of 'double-breasting' to win nonunion contracts?

Q. We are a construction contractor. We work union, but increasingly find ourselves losing bids because we can't compete with nonunion companies in certain industry segments. Can we just set up a separate operation to bid the nonunion work? I've heard that such "double-breasting" is common practice.

A. Double-breasting is common in the construction industry and can be a useful business model—if handled correctly. Unfortunately, when handled incorrectly, it's also a very common way to run into very expensive trouble with labor unions and multiemployer fringe benefit funds.

The danger in double-breasting is that the union and nonunion operations might be challenged and found to be one and the same employer. If the employer has not set things up to successfully withstand such challenge from a union or fringe benefit fund, the nonunion operation may be subject to all the terms of the union contract, including the obligations the union employer has to the fringe funds.

To succeed in double-breasting, two businesses must be set up with as much separation as practicable on four key factors:

1. ownership and/or financial control;
2. management;
3. interrelation of operations; and
4. control of labor relations.

Creating the requisite separation will involve significant added operating costs, which must be measured against the value of becoming free to compete on a nonunion basis.

Successful double-breasting takes extensive measures and ongoing practical application. It is not an exact science. Upon challenge, each case turns on its facts. No element is solely determinative. To increase your chances of double-breasting success, seek the assistance of a competent labor attorney.