

## ERISA Prohibited Transactions & Fiduciary Duties

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 NECA National  
 2023 Labor Relations Conference  
 March 21, 2023

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## Federal Laws – It's Not Just ERISA

- All Multiemployer Plans (e.g., Pension, Annuity, Health & Apprenticeship)
- Taft-Hartley Act
- Internal Revenue Code Governing Tax Exempt Organizations
- Employee Retirement Income Security Act

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## ERISA Overview

<ul style="list-style-type: none"> <li>▪ Prudence – reasonable expert (know what you don't know)</li> <li>▪ Sole &amp; Exclusive Benefit</li> <li>▪ Administration expenses reasonable &amp; necessary</li> <li>▪ Diversification</li> <li>▪ Compliance with plan documents</li> </ul>	<ul style="list-style-type: none"> <li>▪ <u>Prohibited Transactions</u></li> <li>▪ 406(a) – Almost everything is “prohibited”</li> <li>▪ Many exceptions</li> <li>▪ Service provider &amp; fiduciary compensation</li> <li>▪ Related party transactions</li> <li>▪ Self-dealing</li> <li>▪ Acting as Adverse Party</li> <li>▪ Anti-kick back rule</li> </ul>
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**Generally - Who Is a Fiduciary?**

Section 3(21)(A) of ERISA states that "a person is a fiduciary with respect to a plan to the extent (i) he *exercises any discretionary authority or discretionary control* respecting *management of such plan* or exercises any authority or control respecting *management or disposition of its assets*, (ii) he *renders investment advice for a fee* or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any *discretionary responsibility in the administration of such plan*."

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**Consequences of ERISA Fiduciary Breach**

Section 409(a) of ERISA.

- Personally liable for losses to plan
- Pay any profits earned
- Equitable or remedial relief, including removal

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**Consequences of ERISA Fiduciary Breach**

- Civil penalty under Section 502(l) equal to 20% of amount recovered
- Liability for breach by a co-fiduciary
  - Participate in or conceal breach
  - Failure to comply with own responsibilities led to breach by another
  - Failure to correct
- Unwind Prohibited Transaction & Penalty under Section 502(l) on party in interest equal to 5% of amount involved or 100% of amount involved if not corrected
- IRC Prohibited "Disqualified" Transaction Excise Taxes

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**“Thou Shalt Nots”**

- Section 406(a) per se prohibited transactions



**Plan Assets** **Party in Interest**

- Section 406(b) conflict of interest transactions



**Plan Assets** **Fiduciary**

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**406(a) Per Se Prohibited Transactions –Fiduciary Causes**

- Sale, exchange, or lease of property
- Lending of money or extension of credit
- Furnishing of goods, services or facilities
- Transfer of plan assets to a party in interest
- Use by or for the benefit of a party in interest of any plan assets
- Acquisition by plan of any employer securities or employer real property

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**Generally - Parties In Interest**

- Fiduciary, counsel or employee
- Service providers
- Employer Associations
- Contributing employers
- Unions which represent covered employees
- Owners, officers, shareholders, partners, joint venturers, relatives or employees of the above
- *Rule of Thumb: Assume that everyone is a Party In Interest and look for an exemption*

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### 406(b) – Prohibited Conflict of Interest Transactions

- **Self Dealing**
  - Example – Cannot use plan assets to buy a boat
- **Acting on Behalf of Adverse Party**
  - Example – A management trustee cannot negotiate the sale of office equipment on behalf of the plan and the NECA Chapter that appointed him
- **Kickbacks**
  - Example – A trustee cannot receive season football tickets as a gift from the plan’s counsel

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### Exemptions

- Statutory Exemptions
- Class Exemptions
- Individual Exemptions
- Regulatory & Sub-Regulatory Guidance

Plan Assets

Party in Interest

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Summary of Common Multiemployer Plan ERISA Prohibited Transaction Exemptions for Unions, Employers & Employer Associations			
	Union	Employer	Employer Assoc.
Plan Provides Services to Party in Interest**	PTCE 76-1/77-10***	PTCE 76-1/77-10***	PTCE 76-1/77-10***
Plan Leases Office Space to Party in Interest**	PTCE 76-1/77-10**	PTCE 76-1/77-10***	PTCE 76-1/77-10***
Plan Leases Real Estate to Party in Interest**	NO	NO	NO
Plan Sells Real Estate to Party in Interest**	NO	NO	NO
Plan Sells/Leases Goods to Party in Interest**	PTCE 76-1/77-10**	PTCE 76-1/77-10***	PTCE 76-1/77-10***

\*\* Statutory Exemption ERISA §408(b)(7) relief may also be available for non-fiduciary service providers.

\*\*\*DOL maintains there is no relief from the prohibition of ERISA §408(b)(1) Self-Dealing conflicts of interest.

12

Summary of Common Multiemployer Plan ERISA Prohibited Transaction Exemptions for Unions, Employers & Employer Associations			
	Union	Employer	Employer Assoc.
Party in Interest Provides Services to Plan**	§408(b)(2)*	§408(b)(2)*	§408(b)(2)*
Party in Interest Leases Office Space to Plan**	§408(b)(2)*	§408(b)(2)*	§408(b)(2)*
Party in Interest Leases Real Estate to Plan**	PTCE 78-6* JATC	PTCE 78-6* JATC	NO
Party in Interest Sells Real Estate to Plan**	NO	NO	NO
Party in Interest Sells/Leases Goods to Plan**	NO	PTCE 78-6* JATC	NO

\* DOL maintains there is no relief from the prohibitions of ERISA §406(b)(1) Self-Dealing & §406(b)(2) Acting-on-Behalf-of-an-Adverse-Party conflicts of interest.  
 \*\* Statutory Exemption ERISA §408(b)(7) relief may also be available for non-fiduciary service providers.

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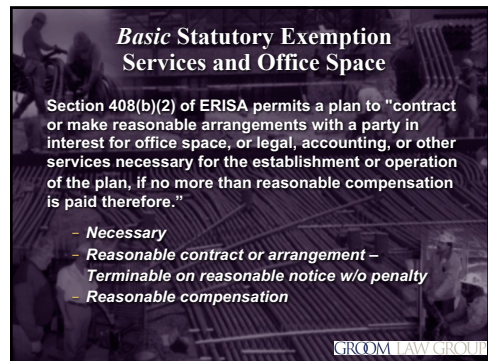
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### Basic Statutory Exemption Services and Office Space

Section 408(b)(2) of ERISA permits a plan to "contract or make reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefore."

- Necessary
- Reasonable contract or arrangement –
- Terminable on reasonable notice w/o penalty
- Reasonable compensation

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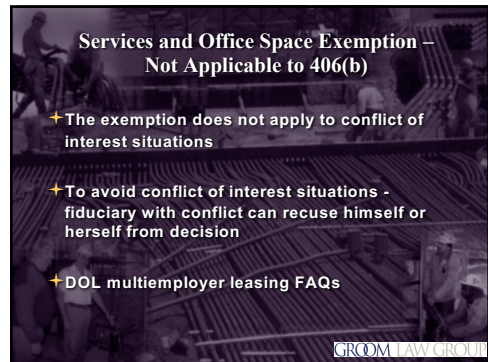
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### Services and Office Space Exemption – Not Applicable to 406(b)

- ✦ The exemption does not apply to conflict of interest situations
- ✦ To avoid conflict of interest situations - fiduciary with conflict can recuse himself or herself from decision
- ✦ DOL multiemployer leasing FAQs

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### Common Multiemployer Plan Prohibited Transaction Class Exemptions

- PTCE 76-1 – Multiemployer Plans (BISSTY)
- PTCE 77-10 – Multiemployer Plans (Conflict of Interest – Only Adverse Parties / Two Hats)
- PTCE 78-6 – Apprenticeship & Training
- PTCE 84-14 - QPAM

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### Individual Exemptions?

The DOL is authorized to grant individual exemptions upon application if such exemption is:

- Administratively feasible
- In the interests of the plan and its participants and beneficiaries, and
- Protective of the rights of participants and beneficiaries

Recent proposed regulation - DOL is significantly narrowing its individual exemption program

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17

#### Summary of Common Multiemployer Plan ERISA Prohibited Transaction Exemptions for Unions, Employers & Employer Associations

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\*\* Statutory Exemption ERISA §408(b)(7) relief may also be available for non-fiduciary service providers.  
\*\*\*DOL maintains there is no relief from the prohibition of ERISA §408(b)(3) Self-Dealing conflicts of interest.

18

Summary of Common Multiemployer Plan ERISA Prohibited Transaction Exemptions for Unions, Employers & Employer Associations			
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### Questions & Answers

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