

Trust and Trustee Issues

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Overview

- Basics of the ERISA & Taft-Hartley Act
- Trust Governance Issues
- Common Prohibited Transactions
- Plan Funding Issues
- Withdrawal Liability

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Overview

- Delinquencies
- What Do I Do If My Plan Is Noticed for Investigation?
- Some DOL ERISA Investigation Issues
- Attorney-Client Privilege – Individual Representation
- Fiduciary Insurance
- Indemnification

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Basics

ERISA - Breaches of Fiduciary Duty

- Prudence
 - reasonable expert? (know what you don't know)
- Sole & Exclusive Benefit Rule
- Administration expenses
 - Reasonable & necessary
- Diversification
- Prohibited Transactions
 - 406(a) – Almost everything is “prohibited”
 - Many exceptions
 - Service provider & fiduciary compensation
 - Related party transactions
 - Self-dealing
 - Acting as Adverse Party
 - Anti-kick back rule

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Basics

ERISA - Breaches of Fiduciary Duty

Named Fiduciaries & Plan Administrators

- Trustees of employee benefit plans are fiduciaries

Responsibility for Administration or Discretion

- Third Party Administrators?
- Plan Staff?
- Committees for Multiple Plans?

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Basics

ERISA - Breaches of Fiduciary Duty

- Co-fiduciary liability
- Non-fiduciary liability – knowing participation in a breach

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Criminal Authority Taft-Hartley Act Basics

- Taft-Hartley Act
 - Strict payment prohibition
 - Anti-bribery prohibition
 - Exceptions form the rule (but *Demisay* leaves administration to ERISA)
 - Trust Agreement
 - Written method of contributions
 - Annual Audit
 - Equal Representation

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Trust Governance Issues

- Recusals
- Quorum
- Deadlocks
- CBA vs. Trust Agreement
- Minutes

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406(a) Per Se Prohibited Transactions

- 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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General Parties In Interest

- Fiduciary, counsel, or employee
- Service providers
- Covered employers
- Unions which represent covered employees
- Owners, officers, shareholders, partners, joint venturers, relatives or employees of the above

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Multiemployer Plan Parties In Interest

- Trustees
- Committee Members
- Executive Director
- Employees
- Attorneys
- Other Service Providers
- Contributing Employer
- Employer Associations
- Local Union
- Employees and Family Members of the Above

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406(b) Conflict of Interest Transactions

- Self Dealing
 - Example – Cannot use 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 free season football tickets from the plan's counsel

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Exemptions

- Statutory Exemptions
- Class Exemptions
- Individual Exemptions



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Statutory Exemption for 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 therefor.”

- Necessary
- Reasonable contract or arrangement – Terminable on short notice w/o penalty
- Reasonable Compensation

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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
 - Pay no more than direct expenses.
 - Fiduciary with conflict can recuse himself or herself from decision

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Summary of Exemptions

	<u>Union</u>	<u>Employer</u>	<u>Employer Assoc</u>
Party in Interest Provides Services to JATC	§ 408(b)(2)*	§ 408(b)(2)*	§ 408(b)(2)*
Party in Interest Leases Office Space to JATC	§ 408(b)(2)*	§ 408(b)(2)*	§ 408(b)(2)*
Party in Interest Leases Real Estate to JATC	PTCE 78-6*	PTCE 78-6*	NO
Party in Interest Sells Real Estate to JATC	NO	NO	NO
Party in Interest Sells/Leases Goods to JATC	NO	PTCE 78-6*	NO

*no relief from prohibition of section 406(b)(2) conflicts of interest

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Summary of Exemptions

	<u>Union</u>	<u>Employer</u>	<u>Employer Assoc</u>
JATC Provides Services to Party in Interest	PTCE 76-1/77-10	PTCE 76-1/77-10	PTCE 76-1/77-10
JATC Leases Office Space to Party in Interest	PTCE 76-1/77-10	PTCE 76-1/77-10	PTCE 76-1/77-10
JATC Leases Real Estate to Party in Interest	NO	NO	NO
JATC Sells Real Estate to Party in Interest	NO	NO	NO
JATC Sells/Leases Goods to Party in Interest	PTCE 76-1/77-10	PTCE 76-1/77-10	PTCE 76-1/77-10

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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, its participants, and beneficiaries, and
- Protective of the rights of participants and beneficiaries

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Plan Funding Issues

- Rehabilitation Plans
- Updates
- All reasonable measures
- MPRA applications
- Merger or asset transfers
- Managed Mass Withdrawals

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Multiemployer Pension Plan Withdrawal Liability Policies

- General Types of Withdrawals (But Construction Plan Exception):
 - Complete - Obligation to contribute ends in full
 - Partial - Contributions continue for at least one CBA or facility but end for at least one other CBA or facility (and, very generally, the underlying operations for that CBA or facility continue, perhaps elsewhere)
 - 70% decline in contributions over period of time
 - Mass Withdrawal - Can trigger withdrawal liability even for an employer who did not withdraw
 - Potential increased liability since amortization period caps are lifted, and
 - Last man standing and claw back issues.

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Multiemployer Pension Plan Withdrawal Liability Policies

- Events with Potential Withdrawal Implications:
 - Asset and stock sales,
 - Asset and stock purchases,
 - Negotiating out of a multiemployer pension plan at the bargaining table,
 - A loss of union representation (either through decertification or disclaimer of interest),
 - The termination of the CBA (that is, the expiration of CBA with no renewal),
 - Declining contributions (as a result of business contraction, reductions in force, or something else),
 - Site closure,
 - Workforce consolidation leading to loss of union representation,
 - Mechanization and subcontracting, and
 - The multiemployer pension plan's rejection of an employer's participation as actuarially unsound or in anticipation of an employer restructuring or bankruptcy.

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Transactional Traps for the Unwary

- Substitution of Employer
 - Employer is replaced as service provider
 - May trigger withdrawal liability.
- An "avoid or evade" transaction might not be a sale
 - Third Circuit: Employer negotiated out of plan in year before scheduled facility closing, knowing liability would be higher next year – this was an "avoid or evade" transaction.
- Successor Liability
 - In four (so far) Circuits, a labor-law successor may be liable for predecessor's unpaid withdrawal liability, and
 - May apply even to purchases out of bankruptcy.

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Multiemployer Plan Delinquency Audit Policies

- Scope: Generally, audit may reach files and records for all employees (including those not covered by the CBA) if legitimately required to verify employee status as covered or non-covered.
- Scope of audit may extend to general ledger and other books and records if needed to achieve legitimate audit purpose of fund.
- Most multiemployer plan trust documents require employer to pay for the cost of the audit and penalties if a deficiency is found.
 - Penalties and costs add up. A culture of compliance minimizes the risk of penalties and costs. Audits with adjustments may result in additional audits or expanded scope.

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What Do I Do When I Get a Document Request from DOL?

- Call your lawyer (I don't care if its expensive, call anyway)
- Identify your insurance policies that may provide coverage
 - D&O Policy with ERISA Fiduciary Endorsement
 - Pension Fiduciary Policy that may name multiple plans as insureds
 - Union Leadership Policy
- Draft a claim letter to your insurers
- Establish a claim date as soon as possible and invoke the insurer's obligation to pay for defense costs
- Check for "Gap Coverage" – Pre-Claims Investigations

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What Do I Do When I Get a Document Request from DOL?

- Establish a single point of contact with DOL (preferably your attorney)
- Keep a separate copy of all the documents DOL reviews
- Keep a separate copy of all the documents DOL copies
- Designate a place for the investigator to work if on premises
- Counsel should be present during Investigator formal and informal interviews
- Consider whether to request subpoenas
- The investigator will be friendly but is there to do a job
- Speak only when spoken to and only answer the question asked

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Issues that Have Come Up During DOL Investigations

- Meals for trustees and employees or their families
- Travel expenses for trustees and employees
- Alcohol expenses
- Graduation/Skills Event /Class Registration Fair/Office expenses
 - Who is attending? Family members? Union Officers? Dignitaries?
 - Plaques/Watches/Jackets

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Issues that Have Come Up During DOL Investigations

- Fidelity bonding
- Personal vehicle use
- Form 5500 filings
- Building purchase and/or leasehold improvements.
 - Market value?
 - Updated lease arrangements

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Issues that Have Come Up During DOL Investigations

- Fiduciary status of plan employees / Training Directors & co-fiduciary duty
- Trustee and staff entertainment (e.g., golf, duck tours & in-town meals)
- Insurance – Property, Car & D&O/Discrimination
- Lawsuit Settlements
- Advertisements (e.g., clothing and events)
- Gifts from service providers

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Issues that Have Come Up During DOL Investigations

- Gifts to charities, trustees, employees, participants or family (e.g., funeral flowers, attendance at events, or charitable events)
- Transactions between plan, employers, or union
- Allocation of plan expenses between plans
- Investment losses or failure to diversify
- Late Fees and interest on receivables

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Attorney-Client Privilege

- Generally protects communications between client & attorney
- Fiduciary exception?
- Individual representation of Trustee?
- Attorney Work Product?
- Internal plan reviews?

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Fiduciary Insurance

- “Claims Made” Policies – Notice
- Carriers, Comparisons – The “Gap Problem”
- Claims Administration
- Choice of Counsel & Settlement
- How Much Coverage Is Enough?
- Who Pays When?
- Waiver of Recourse

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Indemnification by the Trust

- The Gap Problem & Advancement of Fees
- Maximum Extent Permitted By Law?
- Disfavored by DOL?
- Conflict of Interest?
- Trust Provision – Ahead of Time by Plan Sponsor Action (Trust Does Not Pay for Amendment)

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