

TRUSTEE EXPENSES

TRAVEL AND RELATED EXPENSE ISSUES

The following is a collection of Frequently Asked Questions Relating to ERISA Trustee Travel and Expense Issues that should prove helpful in formulating a comprehensive expense policy.

1. **May a plan reimburse any personal expenses incurred while the trustee or employee is traveling? NO**

A plan **may not** reimburse any personal expenses. Personal expenses include all items that would be paid for by the trustee or employee personally while at home. Personal items do not involve the administration of the plan. We have been advised by our colleagues or have found cases, Voluntary Compliance Letters or Press Releases showing that the DOL has challenged plan reimbursements to fiduciaries for movies, health club fees, massages, spa fees, medications, magazines, newspapers, gift shop purchases, entertainment, cigars, alcohol, bottled water, toiletries or similar items or services and, of course, any expenses for spouses, family or guests. According to the DOL, the difference, if any, between a hotel's single occupancy rate and a double occupancy rate is a personal expense. Dry cleaning and laundry services are also generally personal expenses.

2. **May a plan reimburse any business expenses that are not plan related but are incurred while the trustee or employee is traveling? NO**

The DOL's position is a plan **should not reimburse** any business expenses that are not plan-related, such as phone calls or faxes for union or employer business. Such expenses do not involve the administration of the plan because they are not incurred in the performance of the person's duties for the plan; rather, they are incurred because the individual continues to conduct other business while traveling. Such expenses have been challenged in several cases but, in others, the DOL did not address the question of phone calls.

A modest amount for phone calls is unlikely to be challenged by DOL. If phone expenses are high, a fiduciary should be prepared to document the plan business for which the phone calls were made. The DOL has examined phone calls on hotel bills and required the fiduciary to annotate each phone call to document that it was plan business. In view of the high phone expenses that may be incurred using a hotel phone, our suggestion is to use cell phones or telephone calling cards whenever possible.

3. May a plan reimburse any recreational expenses while a trustee or plan employee is traveling on plan related business? NO

Recreational expenses are personal expenses. A plan **may not reimburse** recreational expenses of any kind, including but not limited to golf, tennis, concerts, plays, shows, theme park admissions, museum fees, in-room movies, movies in a theatre, or movies on a plane. Recreation does not involve the administration of the plan even if plan business is discussed during the recreational activity. In addition, a trustee or plan employee may not be reimbursed for recreational expenses he or she has paid for anyone else such as a union official or employer representative. Based on several court cases, a plan service provider may not pay for the recreational activities of plan fiduciaries. These were found to involve party-in-interest transactions which are prohibited under ERISA.

**4. In general, whose meeting expenses may be reimbursed by a plan on?
Trustee and Plan Employees Only**

A. Service Providers

Does contract include expense reimbursement? If not, can't pay.

A plan may reimburse expenses for those trustees and plan employees whose attendance is reasonably required at the meeting. Service provider expenses for attendance at a meeting may be reimbursed if such reimbursement is part of the contract with the service provider. Agreeing to reimbursement of expenses for a service provider must be justified on the basis of reasonableness; that is, it must be shown that such a contract provision was reasonable in view of the practices in the industry, and the fees charged are reasonable in relation to the services provided.

If the attendance of a trustee, plan employee, or service provider is not reasonably required for an entire meeting, he or she may only be reimbursed for expenses associated with the portion of the meeting for which his or her attendance is reasonably required. For example, if someone stays at a hotel for an entire multi-day meeting and only participates in the meeting for part of a single day, the plan should not reimburse that person's hotel and other expenses for the entire meeting.

5. **May a plan pay or reimburse expenses associated with spouses, family members, or friends? NO, NEVER.**

Under no circumstances may a plan pay or reimburse expenses for spouses, family members, friends or colleagues who accompany a trustee or plan employee on plan business. This includes, but is not limited to, the cost of meals paid for by a plan or a service provider, airfare, and incremental increases in lodging costs. Such expenses do not involve the administration of the plan

A plan should not advance expenses for these individuals even if they are to be reimbursed later as this may be construed as a loan by the plan to a party-in-interest. Such a loan would be a prohibited transaction in violation of ERISA §§406(a)(1)(B) and 406(b)(1) and (3).

We were advised that, in one case, the DOL disallowed the cost of meals for spouses of attendees at a recognition dinner held in conjunction with an apprenticeship and training fund contest. We were also advised that the DOL disallowed the expenses associated with the attendance of service providers and union representatives at a plan's Christmas party (however, the DOL did not challenge the party itself).

Service providers should not pay expenses for spouses, family members, friends or colleagues of a fiduciary, or any other personal expense of a fiduciary. Such payments have been found to be a violation of ERISA §406(b)(3). In DOL investigations, the fiduciaries who have received personal expenses from a service provider have been required to reimburse such amounts with interest. Some court cases have also found a violation when service providers pay such expenses.

Recent Voluntary Compliance Letters make it clear that it is the Department's position that a fiduciary's receipt of a personal expense from a service provider was imprudent under ERISA. The DOL takes the position that the receipt of a personal expense from a service provider constitutes self-dealing violations of ERISA and violates the anti-kickback rule, ERISA §§406(b)(2) & (3), whether or not the fiduciary realizes the expense is personal.

The Department also stated its opinion that to solicit or allow the service provider to repay the plan on behalf of the fiduciary would constitute additional self-dealing violations of ERISA.

6. May a plan pay or reimburse expenses for anyone else not associated with the plan? NO.

A plan **may not reimburse** a trustee or plan employee for expenses paid by them for anyone not associated with the plan. This includes, but is not limited to, union officials and employer representatives. If the expenses would not be reimbursed if the other person sought reimbursement directly from the plan, a trustee or plan employee may not be reimbursed by the plan for paying those expenses.

A common practice at conferences is for one trustee to pay for a meal for a trustee of another plan and, in exchange, the trustee of the other plan later pays for a meal for the first trustee. Neither trustee may be reimbursed for the meal expense of the trustee of the other plan. The DOL has specifically addressed this in investigations. These are not expenses of the plan of the paying trustee.

7. May a trustee or plan employee receive reimbursement for travel expenses for days other than the days attending a meeting? NO UNLESS A SAVINGS TO THE PLAN

The DOL has challenged and disallowed trustee expenses in some cases involving multi-day meetings because trustees or plan employees may only receive reimbursements for days during which they are actually in attendance at a meeting and, when appropriate, the day before and the day after the meeting as needed for travel. The DOL position is that if a conference ends early enough in a day that the trustee or employee would be reasonably able to return home that same day, expenses for the next day should not be reimbursed. This would generally only apply to a conference or a meeting for which the ending time was known when the travel arrangements were made. It may be difficult to arrange to return the same day if a meeting unexpectedly ends early. Meetings should not be arranged to stretch out over a longer time period than reasonably necessary to conduct the business of the meeting.

If a meeting or conference starts late enough in a day that the trustee or employee would reasonably be able to arrive that same day in time to attend the meeting, expenses for the previous day should not be reimbursed.

However, if the trustee or plan employee can provide specific documentation that the total expenses of extra days would be less than the expenses for the time period discussed above, the trustee or plan employee may be reimbursed for the extra days that produce the savings. Otherwise, extra days involve personal expenses since the extra time and expenses were not “properly and actually incurred” by the fiduciary in the performance of his duties for the plan.

8. Where may plan meetings be held?

If those attending a plan meeting travel from different parts of the country, there is no specific meeting site that must always be favored. However, in selecting sites, plan fiduciaries must be mindful of the relative costs of various locations. The trustees do not have to select the least expensive locations, but a comparison of the costs of a proposed meeting site with the costs of a meeting at the plan office should be considered. The selection of a resort area in high season at an expensive site could be called into question as not reasonable. Similarly, the meetings should not be held at an unreasonably expensive hotel nor should meals be at the most expensive restaurants. Meetings should not be held outside of the country if to do so would incur expenses in excess of meeting at a reasonable location within the U.S. However, meeting outside of the country or at any location is not per se improper. Whether an expense is reasonable must be considered under all the facts and circumstances. DOL Reg. §2550.408c-2(b)(1).

9. May a trustee or plan employee receive reimbursement for first class or non-discounted airfares or train fares?

In general, a trustee or plan employee does not have to find the lowest airfare or train fare. In the first place, it can be extremely difficult to determine the lowest fare due to various sales, special rates and internet fares. A plan trustee or employee may not be able to make the reservation far in advance because other obligations around the time of the travel are not yet known. In addition, deeply discounted fares may be available only at inconvenient times, and it would not be reasonable to require trustees to travel at those times. Non-discounted coach fares should also not be taken if under the circumstances a discounted fare is reasonably available. It is often less expensive to book a restricted fare and pay a \$100 change fee than to fly on an unrestricted fare. Therefore, if a restricted fare is booked, the change fee can generally be reimbursed.

The plan should reimburse only the actual fare for the trustee or employee to the extent the fare is reasonable under the circumstances. A plan cannot reimburse the amount it would have cost to purchase a ticket if the trustee or employee travels on a free ticket since that amount is not actually incurred as required by ERISA §408(c)(2).

Unless there are unusual circumstances which must be documented, we believe DOL would not consider first-class airfare to be reasonable. Although many believe DOL would approve first-class airfare for travel in excess of a certain time such as three or four hours, we found nothing affirmative to indicate that this is true. In fact, we found no instance in which the DOL affirmatively approved first-class airfare. For instance, in a Voluntary Compliance Letter the DOL required the plan to amend its expense policy to eliminate first-class airfare. We have been advised that DOL has not challenged first-class airfare in some investigations where there was a good reason such as the large size of the person traveling and/or the long distance involved.

10. May a trustee or plan employee receive reimbursement for cab fare or the cost of a rental car?

In general, a plan may reimburse the expenses of a rental car, but only to the extent a car is reasonably needed for travel. For example, if the meeting or conference is held at a hotel adjacent to the airport, a car would not be needed. If the cost of taxis would be less expensive, a rental car should not be used unless several people attending the meeting can share the car, the cost of the car would be less expensive than multiple taxis fares, and this fact is documented. However, we were advised of one investigation in which the DOL disallowed the expenses of the rental vehicle where the trustee rented a larger vehicle and transported several other trustees.

11. May a plan pay or reimburse transportation expenses in the vicinity of the plan?

In general, trustees and plan employees may be reimbursed for mileage (for the use of a personal vehicle) and parking incurred while on plan business, including mileage to and from the site of a meeting in the home city or area or cab fare if there is some reason that the individual cannot drive. **However, if the mileage involves a person's regular commute, mileage and parking should not be reimbursed. Car rentals in an individual's home city would almost always be inappropriate.** Service providers may be reimbursed transportation expenses in the plan's home city if their contracts with the plan provide for such reimbursements.

12. May a plan pay for, or reimburse the expense of, alcoholic beverages? NO

In general, a plan may not pay for or reimburse a trustee or plan employee for the expense of alcoholic beverages. However, under the facts and circumstances approach, if a trustee or plan employee has a glass of reasonably priced wine or other alcoholic beverage with dinner, DOL may not challenge the expense. However, bar bills were disallowed in several investigations and were challenged in one suit filed by DOL.

13. May a plan pay or reimburse the cost of trustee or plan employee meals while the trustee or plan employee is traveling on plan business?

A plan may pay the reasonable cost of the meals of trustees and plan employees while traveling on plan business. The plan may pay for the meals of service providers if the contract with the service provider includes reimbursement for meal expenses and the expenses are reasonable. A meal expense might not be considered reasonable if it was incurred after the fiduciary or plan employee has completed his or her performance of duties for the plan. For example, absent special circumstances, the plan could not reimburse for the expenses associated with a dinner after a meeting ended when the individual lived in the area or after a traveler had returned to his or her home city.

14. May a plan pay for the cost of meals for a trustee, plan employee or service provider in the vicinity of the plan?

A plan **may not pay** the expenses of meals that do not involve any plan business. For example, it may be acceptable to hold a meeting at a restaurant if plan business is transacted during the meal (see example below) but in two separate cases the DOL found that it was not acceptable for the plan to pay for a meal after the meeting was over. The plan may also pay for reasonably priced lunches that are brought into the meeting if the meeting continues through lunch. Local meals for service providers should only be paid for by the plan if the attendance of the service provider is required during the part of the meeting that is held during the meal.

15. May a plan pay or reimburse the expenses of trustee or plan employee lodging while the trustee or plan employee is traveling out of town on plan business?

A plan may pay the reasonable expenses of lodging for trustees and plan employees while traveling out of town on plan business. The plan may pay for the lodging of service providers if the contract with the service provider includes reimbursement for lodging. **The rate should not exceed a comfortable and safe but not extravagant hotel** reasonably convenient to the location of the meeting or conference. We are aware of instances in which DOL investigators challenged hotel expenses arguing that the hotel rate paid by the trustees should not exceed the rate at which government employees could be reimbursed under government per diem guidelines, but we are not aware of any instances in which the DOL successfully pursued reimbursement for the excess amounts, perhaps because of the facts and circumstances of individual cases.

16. May a plan pay for the expenses of lodging for trustees or plan employees who live in the area where a meeting or conference is held? NO

Absent unusual circumstances, a plan **may not pay** for the lodging of trustees, plan employees, or service providers who live near the location of a meeting or conference. In a Voluntary Compliance Letter, the DOL determined that it was not proper for the plan or a service provider to pay the expenses of a fiduciary to stay at a hotel in the city during a conference when the fiduciary lived approximately an hour from the meeting location but had not presented evidence that the meeting started unusually early or ended unusually late or that there were other circumstances requiring the stay in the hotel.

17. May a plan pay for the attendance by the trustees or plan employees at any events sponsored by the union, an employer, or other organization? NO

A plan may not reimburse expenses connected to the attendance of a plan fiduciary or employee at union or employer events, or at any other event (except for educational conferences), at which no plan business is transacted. Plan fiduciaries, employees or service providers may attend union and employer meetings to perform educational functions, provided the costs and materials associated with such attendance are reasonable and provided the plan does not pay or reimburse the union or employer for any of their expenses associated with the meeting. Documentation of the plan-related reason for attendance would help in an investigation.

18. May a plan pay the expenses for trustees, plan employees and service providers to attend educational conferences?

A plan may reimburse the expenses for trustees and plan employees to attend educational conferences addressing topics that are associated with their duties for the plan. Offers to attend a conference, meeting, or other event at the expense of a service provider should be refused unless the expenses of attendance could be reimbursed by the plan itself, i.e., the expenses must be reasonable and not constitute a personal expense. Even if the plan could pay the costs of the conference, we know of instances in which the payment by the service provider was questioned by DOL.

A plan may not pay the expenses of the general professional education of its service providers. The DOL has required service providers to reimburse the plan for expenses paid by a plan for general education. However, we believe that a plan could pay the expenses of a service provider to attend a conference if the plan directed the provider to attend the conference to gain specific knowledge or information for the plan. The determination by the plan that the provider should attend the conference and the expected benefit to the plan and its participants should be documented. Expenses would be paid in accordance with the service provider's contract.

We were advised that, in one investigation, the DOL disallowed late registration fees for attending an educational conference.

19. May a service provider pay expenses of a trustee or plan employee?

Court cases have held that a service provider cannot pay for personal expenses such as extra days at hotels, meals for spouses, or entertainment and recreation (including but not limited to golf or tickets for games, massages, shows and sporting events). Also, trustees and plan employees should not accept gifts from a service provider. Trustees and plan employees should not accept items such as reduced or waived banking fees, personal investment advice, use of a condo or vacation property, or free fares and vacations. Payments by a service provider of personal expenses are prohibited transactions. ERISA §406(b)(3).

20. How should expenses claimed for reimbursement be documented? CAREFULLY!

A plan should have a written expense policy adopted by the trustees. In investigations, the DOL looks to the adopted expense policy to determine if the plan may pay or reimburse certain expenses. The policy may also be used to state the rationale for the plan's payment of certain categories of expenses. The policy should address many of the issues discussed.

All expenses should be individually itemized by date. The location and purpose of each expense should also be documented. Generally, there should be a written receipt for all expenses for which a receipt can reasonably be obtained. This is an item frequently addressed in a plan's expense policy and the policy must be followed. In a Voluntary Compliance Letter, DOL found that **"generic" receipts and credit card billings alone are insufficient**. The expenses must be itemized on the receipt.

It is very common for plan expense policies to provide that receipts are not required for reimbursement of expenses under \$25. This is based on an old IRS rule and is for purposes of documenting deductions. The DOL does not necessarily follow this rule. DOL requires documentation of all expenses. However, in our experience in DOL investigations, DOL will accept documented expenses without receipts for amounts under \$25 if the documentation appears believable. An expense without a receipt must be documented in the expense reimbursement request with information indicating the date, nature, purpose and location of the expense and who was present.

In connection with the documentation for payment of airfare, it is important to keep in mind that airline flights can be changed until the date and time of departure. Each change can generate a different ticket and related receipt. The fares for each ticket can differ significantly. The airlines do not require passengers to return tickets. Therefore, we have been advised that some plans have a policy of requiring trustees and plan employees to submit both the ticket and the boarding passes as documentation for air travel. These documents will substantiate that the ticket claimed as air travel was actually used, as a common ticket number is printed on each.

Finally, see Treas. Regs. §§1.274-5, 5A and 5T concerning substantiation requirements for tax purposes. These regulations do not control the substantiation of expenses for purposes of the fiduciary requirements of ERISA but may be useful in formulating documentation policies.

21. May a plan provide expense advances or per diems?

We are using the term “per diem” to refer to an amount paid to a plan fiduciary or employee by the plan that the plan fiduciary need not account for or reimburse. We are using the term “expense advance” to refer to amounts to be used only for expenses that the plan may properly pay. The expenses for which the advance was used must be documented as soon as possible after the meeting and the excess, if any, must be refunded to the plan.

The rules concerning per diems and advances may be summarized as follows:

1. A plan fiduciary who does not receive full-time pay from certain parties-in-interest as discussed may receive either a per diem or an expense advance or both. A plan fiduciary who does receive full-time pay from certain parties-in-interest as discussed may not receive a per diem but may receive an expense advance. A per diem is compensation which must meet a reasonableness standard and must be approved by the trustees. A per diem need not be accounted for and any unused portion need not be reimbursed to a plan.
2. An expense advance must be used only for the types of expenses that a plan can pay and that are reasonable in amount. A fiduciary who receives an expense advance must promptly account for the expenses to which the advance was applied and must reimburse any unused portion of the advance to the plan.
3. A per diem is compensation which must meet a reasonableness standard and must be approved by the trustees. A per diem need not be accounted for and any unused portion need not be reimbursed to a plan.
4. An expense advance must be used only for the types of expenses that a plan can pay and that are reasonable in amount. A fiduciary who receives an expense advance must promptly account for the expenses to which the advance was applied and must reimburse any unused portion of the advance to the plan.

CONCLUSION

All plans must have a written expense policy and proper documentation to comply with Department of Labor procedures.