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Trustee and Plan Expense Issues
Questions and Answers

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Introduction

During the many years in which we have advised clients on fiduciary matters, it has become apparent that questions related to appropriate trustee and plan expenses sometimes cause confusion for plan fiduciaries and their advisors. In part, this problem is due to the lack of definitive or comprehensive guidance from the U.S. Department of Labor (DOL), the Federal agency that is charged with administering and enforcing the fiduciary rules under the Employee Retirement Income Security Act of 1974 (ERISA). But perhaps more importantly, even if the agency were inclined to issue definitive guidance on these issues, it would be difficult to do so because ERISA's definition of a fiduciary is a functional in nature: it's not what your title is but what you actually do that makes you a fiduciary. In addition, the application of ERISA's fiduciary principles is based on the individual facts and circumstances of each situation, including the extent to which decisions regarding trustee and plan expenses have been documented by plan fiduciaries. This makes definitive, generally applicable guidance extremely hard to fashion.

Nevertheless, we believe it may be useful for plan fiduciaries and their advisors to have access to information collected from a variety of sources that illustrates the range of legal authority, guidance, and opinions that have been expressed, including in some circumstances, by the DOL regarding trustee and plan expenses. We caution readers of this paper that the compilation of information presented here does not constitute definitive guidance as to what the law is regarding these questions. Trustees and plan administrators are best advised to consult with their own legal counsel as questions arise on plan expenses, as the individual facts and circumstances, including documentation and policies in place, may well impact the outcome of any investigation. Also, the authorities cited here are intended to illustrate the issues being discussed and are not exhaustive. Particularly in the matter of case law, there are simply too many cases to review. We have noted a few of the better-known cases but you should review authority in the applicable jurisdiction. There are several excellent collections of case authority including Employee Benefits Law*, compiled by the ABA Section of Labor and Employment Law.*

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[1] I gratefully acknowledge the contributions of many colleagues who have provided their ideas, experiences, and input that are reflected in this paper, including my O'Donoghue colleagues Ellen O. Boardman, Michael A. Powers and Ginger LaChapelle. I also wish to acknowledge the contributions of my former law partner, John L. Bohman, who co-authored the early versions of this paper. I gratefully acknowledge the contributions of my friend and colleague, Phyllis Borzi, who reviewed various versions of this paper while employed at O'Donoghue and since leaving government. Phyllis is not only a great writer, as a former English teacher, but asks challenging questions. In addition, I wish to acknowledge the substantial contribution of Melissa Rettig, an O'Donoghue summer associate who gamely helped us find and analyze obscure cases and DOL guidance. Her understanding of the material was tremendously helpful. Finally, thanks to current and former representatives of the U.S. Department of Labor with whom I and my colleagues have had informal conversations on many occasions over the years. However, the opinions expressed in this paper are mine alone and I take full responsibility for them. I do not wish to imply that those who have contributed to this paper either agree or disagree with the views expressed herein.

General Observations

This paper represents our understanding of the law and positions taken by DOL formally in guidance and less formally in investigations and complaints filed concerning trustee and plan expense issues. The information has been collected from DOL guidance[2] including Advisory Opinions, Field Assistance Bulletins, Frequently Asked Questions, Information Letters, publications and DOL Press Releases concerning lawsuits and settlements. Occasionally, we have also included the experiences of our professional colleagues in DOL investigations, modified to protect the identities of those involved. If older guidance has been modified by later DOL guidance or court decision, we include the current position. Where case law has been cited, it is intended to illustrate the point and is not intended to be exhaustive but a starting point for further research.

While most of the issues we discuss in this paper apply equally to multiemployer and single employer plans, our experiences are primarily with multiemployer plans. In addition, some guidance applies differently to multiemployer plans as we will identify. The structure of multiemployer plans, most of which are jointly administered trusts as required by the Taft Hartley Act, impacts the issues discussed here. For example, in the case of a multiemployer plan, the functions of "plan sponsor,"[3] "named fiduciary,"[4] and "administrator"[5] are typically concentrated in the joint labor-management board of trustees. Trustees of a multiemployer plan are fiduciaries.[6] Other individuals and entities related to a

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[2] *See* the DOL Employee Benefits Security Administration (EBSA) website for information concerning the various types of guidance issued by DOL. ERISA Procedure 76-1 describes the procedure for issuing and effect of Advisory Opinions and Information Letters. *See Filing Requests for ERISA Advisory Opinions: ERISA Procedure 76-1*, U.S. DOL, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos (last visited July 22, 2024). An **Information Letter** calls attention to a well-established interpretation or principle of the Act, without applying it to a specific factual situation. It is informational only and is not binding on the Department with respect to any particular factual situation. *See Information Letters*, U.S. DOL, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters (last visited July 22, 2024). An **Advisory Opinion (or AO)** is an opinion of the Department that applies one or more sections of ERISA, regulations, interpretive bulletins, or exemptions to a specific factual situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion. *See Advisory Opinions*, U.S. DOL, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions (last visited July 22, 2024). **Field Assistance Bulletins (or FABs)** are written by the Office of Regulations and Interpretations to the Director of Enforcement and Regional Directors to provide guidance in response to questions that have arisen in field operations. FABs may also include transition enforcement relief that permits employers, plan officials, service providers and others time to respond to new laws or regulations. *See Field Assistance Bulletins*, U.S. DOL, https://www.dol.gov/agencies/whd/field-assistance-bulletins (last visited July 22, 2024). For **Interpretive Bulletins**, *see* Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 29 C.F.R. §§ 2509.75-2–2509.2022-01 (2024), *available at* https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XXV/subchapter-A/part-2509. Interpretive Bulletins are updated to reflect changes made by regulation.

[3] ERISA § 3(16)(B).

[4] ERISA § 402(a).

[5] ERISA § 3(16)(A).

[6] ERISA §§ 3(21), 403.

plan may also be fiduciaries such as one or more of the plan's administrative staff, investment managers and consultants and entities that appoint trustees. Although we tend to use the term "trustee," unless specifically indicated otherwise, the rules discussed apply to all fiduciaries. It is very important to determine which individuals and entities related to a plan are fiduciaries to properly apply the rules discussed (*see* Q&A 7).

You should keep the following observations in mind as you review this paper:

- When the DOL comes to visit your plan, it is conducting an investigation. It is seeking to detect and correct violations of the law. DOL representatives have emphasized this point. In a case it considers appropriate, DOL will file a civil action to remedy violations.

- Whether or not the DOL brings an enforcement action or demands correction concerning a particular issue will depend on the specific facts and circumstances of the alleged violation and the overall state of the plan's compliance with fiduciary and other requirements of the law. For example, if the practices of a plan and its fiduciaries and the documentation are substantially in accord with the principles discussed herein, DOL might not question minor issues. However, if the overall practices of a plan show evidence of frequent and/or significant personal benefit to plan fiduciaries or employees, such as payment or reimbursement for expensive hotels, meals, and entertainment, the DOL is far more likely to challenge even small items that might otherwise be overlooked. Note that in its enforcement capacity, the DOL has the authority to pursue even the smallest violations. As a technical matter, there is no special rule under ERISA for fiduciary violations involving *de minimis* amounts, although as a practical matter, the DOL may choose not to pursue them.

- The fact that a particular practice may not have been challenged during an investigation of another plan does not establish that the practice is approved by DOL. By the same token, the fact that a practice was challenged does not mean that this will be the DOL position in all cases or even that a court would find the practice unlawful. We have found significant differences in the DOL positions from case to case, region to region and between the field offices and the DOL National Office. We are also aware of DOL challenges to expenses and expense-related practices that we do not believe would be sustained in court.

- If it determines there is a violation, DOL may require a fiduciary to reimburse the plan whether or not the plan's legal counsel or another plan professional has provided an opinion that the expense is reimbursable by the plan or reasonable in amount. Trustees are generally not protected by relying on such advice.

- Participants are likely to become aware of DOL allegations of self-dealing and inappropriate expenditures of plan assets. For example, the DOL usually issues a press release when it files a lawsuit or enters into a settlement.

- If suit is filed for breach of fiduciary duty, the plan itself may not be able to pay defense costs on behalf of fiduciaries. If the plan cannot pay these defense costs and fiduciary insurance does not cover all such costs (e.g., if there is a deductible as part of fiduciary coverage), the trustee or plan employee will have to pay for such non-covered amounts personally. In addition, any amounts determined by the court to be owed back to the plan must either come from fiduciary insurance or the personal assets of the trustee or the plan employee whom the court has found liable.

- In some circumstances, one plan fiduciary may be liable for the breaches committed by another plan fiduciary. In addition, some courts have found that fiduciary liability under ERISA is joint and several liability, which means that each trustee found to have breached his or her fiduciary duty is liable for the entire loss to the plan. If some of the breaching fiduciaries are not financially able to pay their portion, the other fiduciaries will be required to make the plan whole.

- It is probable, but not certain, that fiduciary insurance would cover at least some defense costs and would reimburse the plan for at least some losses, but fiduciary insurance should not be relied upon as a safety net for knowing violations. One should also keep in mind that the DOL could (and often does) seek to remove a trustee or plan employee involved in these matters.

- The DOL generally will not settle claims for expense payments that it considers improper under the law (e.g., personal expenses) without full reimbursement to the plan. The DOL will typically also seek to require the trustee or plan employee who has received the benefit of improper expense payments to pay interest on amounts paid back to the plan, as well as the 20% penalty under ERISA § 502(l)A. Depending on the policy, fiduciary insurance may not cover these additional penalties and assessments. The trustee or plan employee may also be required to reimburse the plan for any amounts impermissibly paid by a service provider to, or on behalf of, the trustee or plan employee even though the amounts were paid by the service provider and not directly with plan assets.

- Keep in mind that some expenses that are not reimbursable as a rule may be reimbursable under the specific facts and circumstances involved. DOL makes this point repeatedly in opinions. It is the fiduciary's responsibility to document the specific circumstances under which the fiduciary determines that an expense that might otherwise be viewed as personal or excessive is reimbursable. A well-crafted plan expense policy and documentation that the policy was followed are important parts of this process.

- An expense must not only be of a type that is permissible under the law, but the amount must also be reasonable under the circumstances involved. For example, a hotel room would be a permissible expense for a trustee traveling on plan business, but if the amount of the hotel room was excessive, the excess would not be a reimbursable expense.

- The payment of plan assets for expenses to, or on behalf of, a trustee, or other plan fiduciary or plan employee that are not legitimate plan expenses or are not reasonable is a prohibited transaction under ERISA.

- DOL has pointed out that many plan expense violations can be corrected under the Department's Voluntary Fiduciary Correction Program. Information about this program is available on the DOL website at *Voluntary Fiduciary Correction Program*, U.S. DOL, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/voluntary-fiduciary-correction-program (last visited July 22, 2024). Although a plan must follow the procedure to gain the full range of protection offered by the program, some plans may choose to do the correction without filing. Self-correction of a violation may be looked upon favorably by DOL even without filing. It may also have the ameliorative effect of limiting the amount that may be owed by a fiduciary.

General Plan Expense Rules

1. For what purposes may plans assets be expended?

Plan assets may be expended only to pay benefits to participants and beneficiaries and to defray the reasonable expenses of administering the plan.[7] In making determinations concerning plan expenses a fiduciary must discharge his or her duties "solely in the interest of the participants and beneficiaries."[8] This is the first question that a DOL investigator usually addresses, so you need to be prepared to show how each questioned expense benefits participants and beneficiaries or is a proper administrative expense. If an expense is permissible under this test, the amount must also be reasonable as discussed below.

As will be discussed below, plan assets may not be expended for a "settlor" expense (*see* Q&A 3). Plan assets may not be expended to benefit a party-in-interest, absent a prohibited transaction exemption. This would prohibit a variety of expenditures including (1) the personal expenses of a fiduciary or plan employee, or (2) expenditures pursuant to a service sharing arrangement that does not satisfy one of the applicable prohibited transaction exemptions. Also prohibited are expenditures for gifts or items of value of a personal nature to trustees, other plan fiduciaries, plan employees and service providers. However, the plan may compensate a trustee, other fiduciary, service provider or plan employee within the restrictions of ERISA § 408 (*see* Q&As 5–7). Remember that a party-in-interest to a plan includes trustees, plan employees, service providers, sponsoring unions, participating employers and employer associations as well as a related plan that provides services to the plan.[9]

2. What is a reasonable expense of plan administration?

Plan assets may not be used to pay expenses unless the amount is reasonable and the expenditure is necessary for the administration of the plan. ***The reasonableness standard applies to <u>all</u> plan administrative expenditures.*** When the plan determines the compensation package for a plan fiduciary or plan staff, hires a service provider or buys equipment or a building or leases space, this standard applies.

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[7] ERISA § 404(a)(1)(A).
[8] ERISA § 404(a)(1).
[9] ERISA § 3(14).

Reasonableness is determined by the circumstances and is based on what a fiduciary "familiar with such matters" would prudently expend in like circumstances for the sole and exclusive interest of participants and beneficiaries.[10] This statutory requirement that fiduciary conduct must be evaluated with reference to the conduct of a person "familiar with such matters", may require the use of experts to advise the decisionmakers if the fiduciary decisionmakers lack the necessary expertise.[11] Although hiring a qualified, unbiased expert may be evidence that a decision-making process was prudent, hiring an unqualified adviser may itself be an improper expense[12] or contribute to a finding that the decision-making was imprudent. However, the prudence standard regarding an expense decision may not necessarily be satisfied if plan fiduciaries hire an expert unless they also prudently select the expert, including thoroughly investigating the expert's qualifications, provide full and accurate information to the expert and make efforts to understand the expert's advice to determine that the advice may be relied upon under the circumstances.[13]

Since ERISA § 404(a)(1)(B) requires that prudence must be determined in the "conduct of an enterprise of a like character and with like aims," the standards applicable to ordinary business expenditures generally do not apply since the assets of the plan are held by fiduciaries in trust for the participants and beneficiaries and are not used in the conduct of a business for profit. For example, in *Dole v. Formica*,[14] the court found that the plan administrator was paid an excessive salary when compared to similar plans.

Therefore, before plan assets may be used to pay an expense, the expense must be <u>both</u> necessary for the administration of the plan and reasonable in amount. An expense may be reasonable in amount but not necessary for the administration of the plan, (e.g., settlor expenses, union or employer expenses, personal expenses of a trustee or plan employee), in which case plan assets cannot be used for the expense. Or an expense may be a proper administrative expense of the plan but not reasonable in amount, in which case plan assets may not be used for the portion of the expense that is excessive.

DOL investigations often involve issues concerning the fees paid to service providers. *See* Q&A 14 concerning service provider compensation issues.

Plan administrative expenses must be approved by plan trustees and not by the plan administrator. Such approval involves the exercise of "trustee responsibilities," which means the responsibility provided in the plan's trust to manage or control the assets of the plan. ERISA § 405(c) provides that "trustee responsibilities" may only be delegated to a trustee or, in the case of investment responsibilities, an investment manager. In Advisory Opinion 81-21A, the DOL concluded that the trustees of a joint apprenticeship fund may not transfer plan assets for the joint apprentice committee to use to fund the operations of the plan since the committee did not include any trustees.

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10 ERISA §§ 404(a)(1)(A)–(a)(1)(B).

11 *Donovan v Walton*, 609 F. Supp. 1221 (S.D. Fla. 1985).

12 *Donovan v Mazzola*, 716 F.2d 1226 (9th Cir. 1983).

13 *See* discussion of failure of fiduciaries to evaluate and understand expert report after passage of time in *Donovan v Cunningham*, 716 F.2d 1455 (5th Cir. 1983). *See* Employee Benefits Law, Ch. 10, IV., B.2. Reliance on Experts.

14 No. C87-2955, 1991 WL 317040, at *5, 14 EBC 1367 (N.D. Ohio Sept. 30, 1991).

We believe that trustees may exercise this control by establishing a policy, formula or budget that is implemented by the plan office. Policies involving trustee compensation and the issues discussed in this paper should be adopted by the trustees who must determine and document the benefit to the plan. The issue involving trustee approval of actions involving plan assets was raised by the DOL in an investigation of which we are aware. DOL challenged the allocation of collected contributions among related plans by the administrator. However, the DOL yielded when presented with the written allocation policy adopted by the trustees and implemented by the administrator. In another investigation of which we are aware, the DOL inquired in detail whether the administrator or trustees approved certain expenses.

The importance of trustee review and involvement in compensation and expense decisions cannot be overstated. Two courts have held that if the trustees are not aware of the details of an expense, then the expense is unreasonable. In *LaScala v. Scrufari*,[15] the court found that the administrator's compensation was unreasonable because the trustees approved the administrator's "present rate of pay" without knowing what the rate of pay actually was. The trustees also did not approve periodic raises that the administrator gave to himself. In *Weisler v. Metal Polishers Union & Metal Production & Novelty Workers Union 8A-281A*,[16] the court found that an administrator's compensation was unreasonable because the trustees were unaware the administrator was simultaneously receiving a union salary. Although these cases deal with administrator compensation, the holdings apply to other expense and compensation decisions made by the trusts. If the trustees are not aware of the expense, they have not engaged in an appropriate process to evaluate it. However, the failure of process would not necessarily make the expense itself unreasonable if a subsequent evaluation documented that it was appropriate. In such a case, the trustees may breach their duty for the initial failure of process but no damages result.

3. May the Plan pay expenses for settlor functions?

Plan assets may not be expended in connection with a function performed in a settlor capacity. DOL Field Assistance Bulletin 2002-2 states its views on this complex issue and provides helpful guidance for multiemployer plans. The history of the settlor issue as it relates to multiemployer plans and the impact of DOL's position has not been resolved by the courts.[17] But DOL guidance in the FAB is helpful. It concludes that where relevant plan documents provide that multiemployer plan trustees act as fiduciaries when carrying out functions that would otherwise be settlor in nature, those actions would be subject to fiduciary standards and plan assets could be used to pay for them. If plan documents do not include such a provision, actions that would otherwise be settlor in nature are not

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[15] 479 F.3d 213, 217 (2d Cir. 2007).

[16] 533 F. Supp. 209, 217 (S.D.N.Y. 1982).

[17] *See generally Cement & Concrete Workers Dist. Council Pension Fund v. Ulico Casualty Co.*, 387 F. Supp. 2d 175 (E.D.N.Y. 2005), *aff'd*, 199 Fed. Appx. 26 (2d Cir. 2006), which did not discuss the FAB even though it was decided after the FAB was issued. In this case, fiduciary insurance coverage for a challenge to a plan amendment was denied because the amendment was discretionary and therefore settlor in nature. The court found that no claim for breach of fiduciary duty covered by the policy had been stated. As policies have evolved after the FAB, they may include riders for settlor activity. The unresolved question is whether the courts will recognize the DOL construct to allow otherwise settlor expenses of multiemployer plans to be treated as plan expenses.

subject to scrutiny under fiduciary standards, but plan assets cannot be used to pay expenses related to such acts.[18]

The prior guidance and court cases are useful to identify what constitutes "settlor" functions. These include discretionary plan amendments,[19] amendment to a rehabilitation plan,[20] and plan termination.[21] DOL issued guidance prior to FAB 2002-2 that may be useful to identify expenses as settlor (not payable from plan assets) or administrative and payable from plan assets.[22] There are additional cases under which it is not clear what standard is being used to evaluate the conduct of the trustees. There are circumstances in which it would be advantageous for multiemployer plan trustees not to be subject to scrutiny under a fiduciary standard for actions that are typically settlor in nature. However, if trustees wish to avoid the application of fiduciary requirements, expenses related to such acts, but not the subsequent administrative implementation, cannot be paid from plan assets. So, for example, legal and actuarial costs in connection with a proposed discretionary plan amendment could not be paid from plan assets unless plan documents reflect that such action is subject to a fiduciary standard.

4. What types of expenses are neither settlor expenses nor related to plan administration?

Several years ago, DOL asked during investigations whether plans had expended plan assets to "influence public policy" in connection with the Social Security debate. In May 2005, for example, DOL sent a letter to the AFL-CIO expressing its view that ERISA violations would occur if plan fiduciaries expended plan assets to inform participants about the public debate on Social Security or hire or fire plan service providers based upon the service providers' opinions on Social Security reform.

The DOL has issued Advisory Opinions addressing the expenditure of plan assets for issues involving public policy. In Advisory Opinion 2007-07A addressed to the US Chamber of Commerce, DOL expressed its view that expending plan assets "to further policy or political issues through proxy

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[18] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2002-2, PLAN AMENDMENTS MADE BY MULTIEMPLOYER PLAN TRUSTEES 3 (Nov. 4, 2002).

[19] *See generally Walling v. Brady*, 125 F.3d 114 (3d Cir. 1997); *Gard v. Blankenburg*, 33 Fed. Appx. 772, 27 EBC 1776 (6th Cir. 2002); *Milwaukee Area Joint Apprenticeship Training Comm. for the Electrical Industry v. Howell*, 67 F.3d 1333, 19 EBC 2041 (7th Cir. 1995); *Hartline v. Sheet Metal Workers Nat'l Pension Fund*, 134 F. Supp. 2d 1 (D.D.C. 2000), *aff'd*, 286 F.3d 598 (D.C. Cir. 2002) (per curiam); *Janese v. Fay*, 692 F.3d 221, 54 EBC 1369 (2d Cir. 2012); *DiMarco v. Mich. Conference of Teamsters Welfare Fund*, 861 F. Supp. 599 (S.D. Mich. 1994); *Boucher v. Williams*, 13 F. Supp. 2d 84 (D. Me. 1998); *Fisher v Secchitano*, No. 3:18-cv-1639-JR (D. OR, July 9, 2019). *See also* the following cases involving single employer plans but which were relied upon by many of the previously cited decisions: *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999).

[20] *Ely v Bd. of Trs. of the Pace Industry Union-Mgmt. Pension Fund*, Case No. 3:18-cv-00315-CWD, 2019 WL 438338 (D. Idaho Feb. 4, 2019).

[21] U.S. Dep't of Lab., Emp. Benefits Welfare Admin., Information Letter to John E. Erlenborn (Mar. 13, 1986).

[22] U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Kirk Maldonado (Mar. 2, 1987) ; U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-03A (Jan. 23, 1997); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2001-01A (Jan. 18, 2001); *see Guidance on Settlor v. Plan Expenses*, U.S. DOL, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/settlor-expense-guidance (last visited July 23, 2024).

resolutions that have no connection to enhancing the value of the plan's investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of section 404(a)(1)(A) and (B)." In Advisory Opinion 2008-05A, also addressed to the US Chamber of Commerce, DOL stated its view that plans may not expend assets to promote union organizing campaigns and union goals in collective bargaining negotiations.[23] Interpretive Bulletins 94-1 and 94-2 addressing Economically Targeted Investments and Exercise of Shareholder Rights, respectively, were later revised consistent with these Advisory Opinions.[24]

These Interpretive Bulletins (IBs) were modified several times until regulations were issued in 2020, reevaluated and issued again in 2022.[25] The Preamble of the 2022 Regulation traces the history of DOL guidance on the issues in the IBs and emphasizes that two longstanding principles have not changed. First, there is "the core principle that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan. Second, the fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to those shares, such as the right to vote proxies."[26] The Preamble states that the 2022 Final Rule amends the existing regulation to "make it clear that a fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis and that such factors may include the economic effects of climate

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23 "The Department believes the use, or threat of use, of pension plan assets or plan management to achieve a particular collective bargaining objective is activity that subordinates the interests of participants and beneficiaries in their retirement income to unrelated objectives. Although union representation of plan participants and benefit related provisions of collective bargaining agreements may in some sense affect a plan, the fiduciaries may not, consistent with ERISA, increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote or oppose union organizing goals or collective bargaining objectives. In addition, expenditures of plan assets to urge union representation of employees in the collective bargaining process or to promote a particular collective bargaining demand may constitute a prohibited transfer of plan assets for the benefit of a party-in-interest, under section 406(a)(1)(D) and potentially an act of self-dealing under section 406(b)(1)." U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2008-05A (June 27, 2008).

24 *See* 29 C.F.R. § 2509.94-1 and § 2509-94-2, subsequently modified.

25 *See* U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Interpretive Bulletin 2008-01, INTERPRETIVE BULLETIN RELATING TO INVESTING IN ECONOMICALLY TARGETED INVESTMENTS (Oct. 17, 2008); U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Interpretive Bulletin 2008-02, INTERPRETIVE BULLETIN RELATING TO EXERCISE OF SHAREHOLDER RIGHTS (Oct. 17, 2008); ; U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Interpretive Bulletin 2015-01, INTERPRETIVE BULLETIN RELATING TO THE FIDUCIARY STANDARD UNDER ERISA IN CONSIDERING ECONOMICALLY TARGETED INVESTMENTS (Oct. 26, 2015); U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Interpretive Bulletin 2016-01, INTERPRETIVE BULLETIN RELATING TO THE EXERCISE OF SHAREHOLDER RIGHTS AND WRITTEN STATEMENTS OF INVESTMENT POLICY, INCLUDING PROXY VOTING POLICIES OR GUIDELINES (Dec. 29, 2016) ; U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2018-1, INTERPRETIVE BULLETINS 2016-01 AND 2015-01 (Apr. 23, 2018) ; Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Nov. 13, 2020); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658 (Dec. 16, 2020); Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022).

26 87 Fed. Reg. 73822, 73827 3d column.

change and other environmental, social, or governance factors on the particular investment or investment course of action." [27]

Therefore, it appears that factors relevant to a risk return analysis may be taken into account with respect to investments or exercise of shareholder rights, even if such factors could be considered to relate to public policy, but DOL's position is that a plan may not expend plan assets to further policy or political issues that have no connection to enhancing the value of the plan's investment.

Compensation and Fee Issues

5. May a plan pay compensation, fees, and expenses to a "party-in-interest?"

ERISA § 406(a) prohibits a plan fiduciary from transferring any plan assets to, use by, or use for the benefit of a party-in-interest.[28] Absent an exemption from this prohibition, a plan could not pay its service providers, employees, or fiduciaries, including reimbursement of expenses.[29]

"Party-in-interest" includes any plan fiduciary (e.g., administrator, trustee), a service provider to the plan, counsel to or employee of the plan, an employer whose employees are covered by the plan, a union any of whose members are covered by the plan, and relatives of these.[30] Related plans are not parties in interest with respect to each other merely because they are maintained under the same collective bargaining agreement, or by the same plan sponsor or have trustees or fiduciaries in common. A plan may be a party-in-interest with respect to another plan if it has a relationship to that other plan as defined in ERISA § 3(14), for example, if one plan provides services to another plan.[31]

ERISA § 408(b)(2) provides an exemption from the prohibitions of ERISA § 406(a), thus allowing a plan to pay compensation, fees, and/or expenses to a party-in-interest, if a plan contracts or makes 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. The DOL has issued regulations[32] that provide additional details.

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[27] *Id.*
[28] ERISA § 406(a)(1)(D).
[29] ERISA § 406(a)(1) prohibits a fiduciary from engaging in one of the prohibited transactions without an exemption if the fiduciary "knows or should have known" that the transaction constituted a direct or indirect transaction of the type listed. As is the case with all fiduciary acts, the fiduciary will be evaluated by the prudence standard to determine if the fiduciary should have known the nature of the transaction or that a party-in-interest was involved. *See* discussion in EMPLOYEE BENEFITS LAW, 4th Ed, Ch. 10, VIII.
[30] ERISA § 3(14).
[31] U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 93-15A (May 18, 1993); Preamble to Prohibited Transaction Exemption 76-1: Class Exemptions from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans are Involved, 41 Fed. Reg. 12740, 12745 (Mar. 26, 1976).
[32] 29 C.F.R. § 2550.408b-2.

ERISA § 408(c) and related regulations[33] define what constitutes reasonable compensation for purposes of § 408(b)(2).[34] *See* more detailed discussion in Q&A 6 below.

The regulations are clear that ERISA § 408(b)(2) does not provide an exemption for conflicts of interest described in ERISA § 406(b). The regulations state that these are separate transactions not covered by the ERISA § 408(b)(2) exemption. *See* Q&A 8 for a more detailed discussion of 406(b) conflicts. In any compensation decision, it is important to identify and avoid any conflict of interest under ERISA § 406(b). Such a conflict might arise in any hiring or compensation decision by the trustees or in the case of an investment arrangement in which one fiduciary has decision making authority over asset allocation or hiring of other investment professionals. *See* Q&A 8 below.

ERISA § 408(b)(17) also provides an exemption from the transactions described in ERISA § 406(a)(1)(A), (B), and (D) between the plan and a party-in-interest other than a fiduciary who has discretionary authority with respect to the plan assets involved in the transaction.

See DOL Frequently Asked Questions on Multiemployer Plan Leasing Arrangements for examples regarding the exemptions provided by ERISA §§ 408(b)(2) and 408(b)(17), including examples of ERISA § 406(b) conflicts.[35]

6. May a fiduciary (including a trustee) receive compensation and/or expenses from the plan?

A plan fiduciary, including a plan trustee, may receive reasonable compensation from a plan for services rendered to the plan as well as reimbursement for reasonable direct expenses properly and actually incurred in the performance of his or her duties with the plan and not otherwise reimbursed.[36] However, a fiduciary who is already receiving full-time pay from an employer, employer association, or a union whose members participate in the plan, may only receive reimbursement for reasonable direct expenses properly and actually incurred in the performance of his duties with the plan and not otherwise reimbursed.[37]

A plan fiduciary who is <u>not</u> already receiving full-time pay from a union, employer or employer association may be paid reasonable compensation for services to the plan. For such a fiduciary, the plan may pay the compensation <u>and</u> reimburse expenses. The compensation could be used by the fiduciary for any purpose, including paying expenses that the plan could not reimburse.

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33 *Id.*

34 29 C.F.R. § 2550.408c-2(a) states "Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) refers to the payment of reasonable compensation by a plan to a party-in-interest for services rendered to the plan. Section 408(c)(2) of the Act and 29 C.F.R. §§ 2550.408c-2(b)(1) – 2550.408c-(b)(4) clarify what constitutes reasonable compensation for such services.

35 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., FAQS ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS (2011), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/multiemployer-plan-leasing-arrangements.pdf.

36 ERISA § 408(c)(2); 29 C.F.R. § 2550.408(c)-2(b)(2).

37 ERISA § 408(c)(2); 29 C.F.R. § 2550.408(c)-2(b)(2).

Whether or not a fiduciary is receiving full-time pay from a union, employer or employer association is not always easy to determine. There are no regulations defining "full-time pay" for this purpose and DOL has stated that this must be determined based on all the facts and circumstances. DOL has issued an Information Letter that states its view that "an employee who is compensated on an hourly basis and who suffers a loss of pay by reason of his absence from work while performing duties as a fiduciary does not receive full-time pay within the meaning of section 408(b)(2)." However, the Information Letter also expressed the view that "in most cases, an individual who is paid a salary for services for an employer [or the union] would be receiving full-time pay."[38]

In *Gilliam v. Edwards*,[39] the court addressed the full-time pay requirement when it found that Edwards' business-agent salary entitlement from the union was substantial enough to qualify as full-time pay for purposes of the fiduciary rationale of the rule. Citing legislative history, the court stated that ERISA focuses not on the hours devoted to the second job, but on the amount of payment received to prevent double payment from a party-in-interest, and thus avoid the conflicts dual allegiances may spark. A weekly salary of even $250 [in 1980] was sufficient to create an impermissible interest tension.

Many Advisory Opinions and Information Letters have addressed fiduciary compensation.[40] Although most of these were issued in the 1970s through 1990s, the position of the DOL has remained

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38 U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to George E. Clark, Jr. (June 4, 1993).

39 492 F. Supp. 1255, 2 EBC 2475, 2483 (D.N.J. 1980) (citing S. REP. No. 383, 93d Cong., 2d Sess. 3, *reprinted in* U.S.C.C.A.A.N. 4890, 4983).

40 U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 76-03 (Mar. 17, 1976) (hourly paid trustee may be compensated for hours not paid while serving as trustee); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 76-57 (May 6, 1976) (compensation of trustees); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 78-28A (Dec. 5, 1978) (whether union and employer trustees receive full time compensation); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 85-19A (May 6, 1985); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 79-42A (July 5, 1979) (shared salary of plan fiduciary); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 79-59A (Aug. 27, 1979) (full time compensation); . U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 83-07A (Jan. 24, 1983) (full time compensation); U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 83-20A (Apr. 27, 1983) (direct expenses); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 86-01A (Jan. 2, 1986) (direct expenses); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 88-03A (direct expenses); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 88-13A (Aug. 29, 1988) (whether a full time employee of an employer that no longer contributes may be compensated); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 89-09A (June 13, 1989) (direct expenses, what records must be maintained to document); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 93-06A (Mar. 11, 1993) (direct expenses, what records must be maintained to document); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-19A (Aug. 28, 1997) (direct expenses); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2001-10A (Dec. 14, 2001) (any profit in fees exceeds direct expenses); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to A. M. Kunis and Co. (July 13, 1979); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Andrea B. Wapner (Aug. 23, 1979); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Bernard S. Goldfarb (Aug. 9, 1984) (direct expenses); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Herbert New (Dec.12, 1984) (compensation of trustees); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Joyce A. Mader (July 8, 1988) (stolen expense

consistent. Recent cases filed by DOL are also consistent with this guidance.[41] In addition, many of the Information Letters and Advisory Opinions address common fact patterns related to multiemployer plans and are useful to review to understand the DOL analysis.

Both DOL guidance and case law is based on the ERISA § 408(c) regulations clarifying what constitutes "reasonable compensation" for purposes of the exemption in ERISA § 408(b)(2).[42] Although ERISA § 408(c)(2) is limited by its terms to compensation of fiduciaries, the regulations are not so limited.[43] The application of the regulations to parties in interest that are not fiduciaries is reinforced by the statement at the end of paragraph (b)(2)[44] that the restrictions of that one paragraph (i.e., full time pay, limitation to reimbursement of direct expenses) are limited to fiduciaries.

The ERISA § 408(c)(2) provides that a fiduciary may receive from a plan "reasonable compensation for services rendered" and "reimbursement of expenses properly and actually incurred in the performance of his duties with the plan." The specificity of the statute would preclude, for example, reimbursement for an expense not related to the performance of the fiduciaries' duties with the plan making the reimbursement nor an expense properly or actually incurred. An exception to the general rule discussed previously precludes compensation to a fiduciary who already receives full-time pay from an employer, association of employers, or employee organization. The regulations limit reimbursement to a fiduciary for "direct" expenses properly and actually incurred and not otherwise reimbursed.[45]

An expense is not a "direct expense" to the extent it would have been incurred even if the services to the plan had not been provided or if it represents an allocable portion of overhead costs.[46] Many of the DOL Advisory Opinions and Information Letters cited in note 40, above, address what constitute

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advance was not reimbursement for expenses and if not repaid would be compensation to fiduciary paid full time); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Terry Oneal (Feb. 1, 1991) (determining compensation to a trustee for services); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Rosemary Collyer (Sept. 11, 1991) (determining compensation for an administrator paid part time by union and part time by fund); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Jeffrey M. Lesser (Jan. 7, 1992) (determining compensation to a trustee for services); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to Lant A. Johnson(May 7, 1992) (determining compensation to a trustee for services); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to George E. Clark, Jr. (June 4, 1993) (determining compensation to a trustee for services, hourly paid trustee).

[41] *Acosta v. City Nat'l Corp.*, 922 F.3d 880 (9th Cir. 2019) (finding that City National received more than reasonable compensation for administering its own plan. Includes detailed discussion regarding what constitutes direct expenses and the importance of detailed recordkeeping, which City National did not do); *Perez v. Philp,* Civil Action File No. 7:14-cv-06238-CS (S.D.N.Y. 2014).

[42] 29 C.F.R. § 2550.408c-2(a).

[43] *See* 29 C.F.R. §§ 2550.408c-2(a), (b)(1), (b)(4) (which refers to plan employees in addition to fiduciaries), and (b)(5).

[44] 29 C.F.R. § 2550.408c-2(b)(2), "The restrictions of this paragraph (b)(2) do not apply to a party-in-interest who is not a fiduciary."

[45] 29 C.F.R. § 2550.408c-2(b)(2).

[46] 29 C.F.R. § 2550.408c-2(b)(3).

"direct expenses" in the circumstances discussed. *See also Acosta v. City Nat'l Corp.*, 922 F.3d 880 (9th Cir. 2019).

An Information Letter[47] explains that because ERISA § 406 prohibits both direct and indirect transactions of the kind described therein, a fiduciary to whom the limitation in ERISA § 408(c)(2) applies (i.e., no compensation if fiduciary is paid full time as stated) could not assign his rights to compensation for services rendered to a plan to a third party, such as an employer. A claim based on this was included in a complaint filed by DOL in 2014. In that case, the board of trustees voted to hire the sponsoring union to provide administrative services. At least some of the services were provided by the full-time business manager and trustee. The union, which was also a fiduciary, was reimbursed for expenses that were not "direct expenses" because the salary of the full-time union officer would have been paid whether or not the union provided services to the plans.[48]

Under the regulations, "reasonable compensation" may also include an expense advance to a plan fiduciary or employee from the plan to "cover direct expenses to be properly and actually incurred by such person in the performance of such person's duties with the plan…." The amount of the advance must be reasonable with respect to the amount of direct expenses the fiduciary or employee is likely to incur in the immediate future. The fiduciary or employee must account to the plan at the end of the period covered by the advance for the expenses properly and actually incurred.[49] If the plan prefers to provide an advance for which no accounting is required, such an advance may only be provided to an individual who can lawfully be compensated by the plan. Therefore, any fiduciary who is already paid full time by an employer, employer association, or union must account to the plan for any expense advance.[50] *See* Q&A 33 for further discussion.

In an Advisory Opinion[51], DOL considered the adoption of a trust amendment authorizing reimbursement of legal fees for trustees in the event of any legal action that may arise from their fiduciary duties. DOL stated its view that the reimbursement of a plan fiduciary's legal fees would be permissible in some circumstances but that the sweeping trust provision for reimbursement of legal fees could result in payments by a plan that would be inconsistent with and prohibited by ERISA. Specifically, such a broad provision might violate ERISA § 410(a). *See* Q&A 16. In addition, DOL expressed the view that a reimbursement of legal fees to a plan fiduciary who was found to have breached his duties to the plan would not be a reasonable expense of administering the plan. Accordingly, ERISA § 408(c)(2) which permits reimbursements of fiduciary expenses properly and actually incurred in the performance of plan duties would not apply and a reimbursement would constitute a prohibited transaction.

47 U.S. Dep't of Lab., Pension and Benefits Welfare Admin., Information Letter to Andrea B. Wapner (Aug. 23, 1979).
48 Complaint, *Perez v. Philp,* Civil Action File No. 14-cv-6238(CS) (SDNY 2014).
49 29 C.F.R. § 2550.408c-2(b)(4).
50 U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 80-58A (Oct. 9, 1980).
51 U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 78-29A (Dec. 5, 1978).

7. To whom do the restrictions on compensation/expenses in ERISA § 408(c) apply? – Trustees and other fiduciaries

A full treatment of which persons and entities are fiduciaries in various circumstances is beyond the scope of this paper. However, this section will briefly review some of the basics for purposes of applying ERISA § 408(c) and to assist in avoiding conflicts as discussed below. *See* Q&A 8.

Individuals or entities that fulfill certain roles are always fiduciaries: trustees,[52] named fiduciaries,[53]investment managers,[54] and administrators designated in the plan.[55] In addition, an individual or entity is a functional fiduciary[56] to the extent he or she:

(i) exercises discretionary authority or discretionary control in the management of the plan or exercises any authority or control in the management or disposition of plan assets; or
(ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to plan assets or has any authority or responsibility to do so; or
(iii) has any discretionary authority or responsibility in the administration of the plan.

A series of Q&As in 29 C.F.R. § 2509 explores many issues related to identification of fiduciaries. It is important to determine the fiduciary status of individuals and entities with whom the plan transacts business, including potential service providers.[57] As will be discussed in Q&A 16, whether a potential service provider or party to a transaction is a fiduciary will affect compensation and other terms of the arrangement.

It is also important to remember that parties that have the discretion and authority to appoint a trustee are considered to be fiduciaries.[58] By virtue of this authority, a union, employer or employer association

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52 ERISA §§ 3(14)(A), 403(a); 29 C.F.R. § 2509.75-8, D-3.
53 ERISA § 402(a); 29 C.F.R. § 2509.75-5, FR-2.
54 ERISA § 3(38).
55 ERISA § 3(14)(A); 29 C.F.R. § 2509.75-8, D-3.
56 ERISA § 3(21)(A).
57 29 C.F.R. § 2509.75-5, D-1 (professional advisors typically not fiduciaries unless they exercise fiduciary functions);29 C.F.R. §§ 2509.75-8, D-2 (persons who are generally not fiduciaries), D-3 (discussion of functional fiduciaries), D-4 (fiduciary status of those who appoint trustees and other fiduciaries), D-5 (union not a fiduciary unless it performs functions of fiduciary in ERISA § 3(21)(A)), FR-16 (extent of fiduciary liability), FR-17 (obligation of fiduciary who appoints trustees to monitor their performance).
58 H.R. Rep. No. 1280, 93d Cong., 2d Sess., Reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5103 (ERISA defines fiduciary as any person who exercises any discretionary authority and includes persons who select plan fiduciaries); 29 C.F.R. § 2509.75-8, D-4, FR-17; *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984) (selection of plan fiduciaries by corporate directors); *Batchelor v. Oak Hill Med. Grp.*, 870 F.2d 1446 (9th Cir. 1989) (employer is a fiduciary where it is vested with discretionary authority to appoint trustees and is responsible for periodic monitoring); *Licensed Div. Dist. No. 1 MEBA/NMU, AFL-CIO v. Defries*, 943 F.2d 474 (4th Cir 1991) (union was a fiduciary to the extent it had authority to appoint any trustees); *Whitfield v. Tomasso*, 682 F. Supp. 1287 (E.D.N.Y. 1988) (union which had the authority to appoint and remove trustees was a fiduciary); *Martin v. Harline*, 15 EB Cases 1138, No. 87-NC-115J, 1992 U.S. Dist. LEXIS 8778 (D. Utah Mar. 31, 1992) (fiduciary breach by board of directors for appointing unqualified trustee and failing to monitor performance of trustee); *Chao v. Constable*, No. CIVA 04-1002, 2006 WL 3759749, 40 EBC 1061 (W.D. Pa. Dec. 19, 2006); *Int'l Bhd. of*

would be a fiduciary to the extent of this authority. DOL guidance addressed the obligation of an appointing fiduciary to monitor performance of trustees.[59]

8. When should trustees or other fiduciaries recuse themselves during hiring and compensation decisions?

As previously discussed, regulations provide that ERISA § 408(b)(2) does not provide an exemption for conflicts of interest described in ERISA § 406(b). The regulations state that these ERISA § 406(b) conflicts are separate transactions not covered by the ERISA § 408(b)(2) exemption. The regulations do not state that the existence of a conflict described in ERISA § 406(b) renders the ERISA § 408(b)(2) exemption unavailable for a related ERISA § 406(a) transaction.[60] For example, if a plan fiduciary that voted to hire a service provider was conflicted, and if the contract with the service provider including compensation was a reasonable arrangement, the plan's transactions with the service provider would be subject to the ERISA § 408(b)(2) exemption but the conflicted plan fiduciary would not be protected. However, the existence of widespread conflicts can raise questions about the reasonableness of the entire transaction.

The conflicts are described in ERISA §§ 406(b)(1), (2), and (3). There are no regulations. To avoid conflicts, it is important to have a basic understanding of situations in which such conflicts may arise. Complex transactions will require more careful examination and research since there are many court decisions and the results are determined by the specific facts of each transaction.

The DOL Frequently Asked Questions (FAQs) on Multiemployer Plan Leasing Arrangements include examples of ERISA § 406(b) conflicts and when recusal may avoid such conflicts.[61] Although these FAQs are focused on leasing arrangements, the exemptions, conflicts, and conflict avoidance by recusal also applies to other transactions.

ERISA § 406(b) includes broad prohibitions on the conduct of plan fiduciaries designed to prevent certain transactions with a high potential for abuse. These have been described by courts as *per se*

Electrical Workers, L. 90 v. Nat'l Electrical Contractors Ass'n, Inc., Civil Action No. 3:06cv2 (SRU), 2008 WL 918481, 44 EBC 166 (D. Conn. Mar. 31, 2008) (union sued employer association for fiduciary breach for failure to appoint and monitor trustees); Complaint, *Perez v. Philp,* Civil Action File No. 14-cv-6238(CS)(S.D.N.Y. 2014) (complaint alleging union was fiduciary).

[59] 29 C.F.R. § 2509.75-8, FR-17.

[60] 29 C.F.R. § 2550.408b-2(e); U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2021-03, TEMPORARY ENFORCEMENT POLICY REGARDING GROUP HEALTH PLAN SERVICE PROVIDER DISCLOSURES UNDER ERISA SECTION 408(B)(2)(B) n.2 (Dec. 30, 2021), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-03; U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 82-26A (June 9, 1982) ; U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 83-44A (Aug. 24, 1983); U.S. Dep't of Lab., Pension and Benefits Welfare Admin., Information Letter to Richard E. Dolan (Dec. 17, 1990).

[61] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., FAQS ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS (2011), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/multiemployer-plan-leasing-arrangements.pdf. .

prohibitions without regard to the merits of the transaction.[62] *See Cutaiar v. Marshall*,[63] a leading case that involved a transaction between related multiemployer plans.

The acts prohibited by ERISA § 406(b) are not always obvious. This subsection states flatly that "a fiduciary with respect to a plan shall not---" in contrast to the prohibitions of ERISA § 406(a) which provides that a fiduciary may not engage in the listed transactions unless provided in ERISA § 408 by exemption.

a. ***ERISA § 406(b)(1)***

ERISA § 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan "in his own interest or for his own account." Clearly, this prohibits a fiduciary from being involved in determining his or her own compensation[64] or a benefit to herself or himself[65] But the prohibition is broader than that. This is explained very well in 29 C.F.R. § 2550.408b-2(e):

> The prohibitions of section 408(b) supplement the other prohibitions of section 406(a) of the Act [ERISA] by imposing on parties in interest who are fiduciaries a duty of undivided loyalty to the plans for which they act. These prohibitions are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interests of the plans for which they act. In such cases, the fiduciaries have interests in the transactions which may affect the exercise of their best judgment as fiduciaries. Thus, a fiduciary may not use the authority, control, or responsibility which makes such person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service. Nor may a fiduciary use such authority, control, or responsibility to cause a plan to enter into a transaction involving plan assets whereby such fiduciary (or a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) will receive consideration from a third party in connection with such transaction. A person in which a fiduciary has an interest which may affect the exercise of the fiduciary's best judgment as a fiduciary includes, for example, a person who is a party in interest by reason of a relationship to such fiduciary described in section 3(14)(E), (F), (G), (H), or (I).

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[62] *M & R Inv. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982), *aff'g* 484 F. Supp. 1041 (D. Nev. 1980); *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

[63] 590 F.2d 523, 529, 530 (3d Cir. 1979).

[64] *Gilliam v. Edwards*, 492 F. Supp. 1255 (D.N.J. 1980) (fiduciary approved payment for his services); *Donovan v. Daugherty*, 550 F. Supp. 390 (S.D. Ala. 1982) (fiduciaries approved payment for services and benefit for which they were not eligible); *Weisler v. Metal Polishers Union*, 533 F. Supp. 209, 3 EBC 2339 (S.D.N.Y. 1982) (fiduciary participated in decision to pay himself); *Patelco Credit Union v. Sahni,* 262 F.3d 897 (9th Cir. 2001) (fiduciary approved his own compensation).

[65] *Lowen v. Tower Asset Mgmt.*, 829 F.2d 1209 (2d Cir. 1987) (fiduciaries invest plan assets in companies in which they are substantial owners); *Marshall v. Carroll*, 2 EBC 2491 (N.D. Cal. 1980) (fiduciary approved plan investment in insurance contracts and banks from which he received personal benefit).

As discussed previously in Q&A 5, persons described in Section 3(14)(E), (F), (G), (H), or (I) include persons having interests in an employer or union or an entity with specified ownership interests by a plan fiduciary, a plan service provider, a participating employer, participating union or relative of a fiduciary, service provider, employer or union official. Therefore, fiduciaries who are union officers or employees should not participate in the consideration of hiring the union to perform services for the plan. Employer appointed fiduciaries should not participate in a decision to settle a delinquency claim with the fiduciary's company. *See The DOL Frequently Asked Questions (FAQs) on Multiemployer Plan Leasing Arrangements*, Q&A-1 and 3.[66]

The regulation also includes several good examples. Example 7 illustrates how fiduciaries may avoid engaging in a prohibited transaction in connection with decisions involving their own compensation arrangements. In this example, one trustee of a plan is president of a bank and the bank proposes to provide services to the plan. The example states that this trustee physically absents himself from all consideration of the proposal and does not otherwise exercise any of the authority, control or responsibility which makes him a fiduciary to cause the plan to retain the bank's services. The other trustees of the plan consider the matter and decide to retain the bank. The example concludes that the bank president/trustee has not violated Section 406(b)(1) of ERISA. It also states that the other trustees have not violated Section 406(b)(1) merely because the president of the bank is a trustee of the plan. This fact alone does not cause the other trustees to have an interest in the transaction which might affect the exercise of their best judgment as fiduciaries.

Recusal to avoid an ERISA § 406(b)(1) violation is also discussed in the *DOL Frequently Asked Questions on Multiemployer Plan Leasing Arrangements*[67] and several Advisory Opinions and Information Letters.[68]

b. ERISA § 406(b)(2)

This second of the conflict provisions prohibits a fiduciary in an individual or other capacity from acting in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. The Third Circuit has required plans to be represented "by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction."[69]

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66 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., FAQS ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS (2011), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/multiemployer-plan-leasing-arrangements.pdf.

67 *Id.*; *see also* complaint in *Perez v. Philp,* Civil Action File No. 14-cv-6238(CS)(S.D.N.Y. 2014), which alleges violations of ERISA §§ 406(b)(1) and 406(b)(2).

68 U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 79-72A (Oct. 10, 1979) (involving ERISA § 406(b)(1) and (b)(2)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 91-37A (Oct. 16, 1991) (involving ERISA § 406(b)(1) and (b)(2)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 92-08A (Feb. 20, 1992) (involving ERISA § 406(b)(1) and (b)(2)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2005-04A (Mar. 25, 2005) (involving ERISA § 406(b)(1) and (b)(2)); U.S. Dep't of Lab., Pension and Benefits Welfare Admin, Information Letter to George E. Clark, Jr.(June 4, 1993).

69 *Cutaiar v. Marshall,* 590 F.2d 523, 530 (3d Cir. 1979).

This case involved a loan between related multiemployer plans with the same trustees but not identical participants and beneficiaries. Other courts have followed this case involving loans.[70] Other cases determined that the boards or groups acting on both sides of a transaction need not be identical for an individual fiduciary to violate ERISA § 406(b)(2). ERISA § 406(b)(2) creates a duty against self-dealing for each individual fiduciary.[71] Some courts have not found violations of ERISA § 406(b)(2) where a trustee also has a role with a contributing employer to the plan or an employer association in which capacity the trustee might take actions as a bargaining representative even though such actions might be adverse to the plan. These decisions are based on ERISA § 408(c)(3) which expressly states that a trustee may serve as a fiduciary in addition to being an officer, employee, agent or other representative of a party-in-interest including employers and union. The courts that have considered such situations have determined that the trustee must be free to act on behalf of the party-in-interest except in direct transactions with the plan.[72]

Courts have made clear that merely holding a position and even advocating for a view does not violate ERISA § 406(b)(2).[73] The mere potential for an ERISA § 406(b)(2) violation does not give rise to a violation nor is seeking an exemption under ERISA § 408(b) evidence of disloyalty under ERISA § 406(b).[74]

For multiemployer plans, Prohibited Transaction Class Exemption 77-10 provides that shared service transactions exempted by Prohibited Transaction Class Exemption 76-1 are not subject to ERISA § 406(b)(2).[75]

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70 *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983); *Davidson v. Cook*, 567 F. Supp. 225 (E.D. Va. 1983), *aff'd mem.*, 734 F.2d 10 (4th Cir. 1984), *cert. denied*, 469 U.S. 899 (1984).

71 *See Reich v. Compton,* 57 F.3d 270, 287-90 (3d Cir. 1995); *Davidson v. Cook*, 567 F. Supp. 225, 237 (E.D. Va. 1983), *aff'd mem.*, 734 F.2d 10 (4th Cir. 1984), *cert. denied*, 469 U.S. 899 (1984); *Iron Workers Local #272 v. Bowen,* 624 F 2d 1255, 1261 (5th Cir. 1980).

72 *Evans v. Bexley*, 750 F.2d 1498 (11th Cir. 1985) (trustee may represent employer in negotiations with union concerning plan); *Jordan v. Sundt*, 6 EBC 1382 (W.D. Wash. 1985) (employer trustee who promotes non-union operations among contributing employers does not violate ERISA because he acts in employer and not fiduciary capacity); *Curren v. Freitag,* 432 F. Supp. 668, 672–73 (S.D. Ill. 1977) (employer trustee who advises employers how to resist plan collection efforts does not violate section 406(b)(2) because he acts in employer and not fiduciary capacity); *see also NLRB v. Amax Coal Co*., 2 EBC 1489 (1981).

73 *See Herman v. Painting Industry Insurance Fund*, 2 EBC 2438 (S.D.N.Y. 1981) (Employer trustee did not violate ERISA § 406(b)(2) by representing his company before the board concerning the assessment of liquidated damages because he recused himself from participating in the decision as a trustee).

74 *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 835 (N.D. Cal. 2005) ("No case of which the court is aware has held that ERISA fiduciaries breach their duty of loyalty simply for "placing themselves in a position" where they might act disloyally…."); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-8337-CIV.-JORDAN, 2007 WL 2263892, at *45 (S.D. Fla. Aug. 7, 2007), as amended (Aug. 10, 2007) ("Nor can a breach of loyalty be presumed from the mere fact that Prudential needed § 408(b) exemptions in order to avoid engaging in prohibited transactions with the Plan. Simply because Prudential followed such a practice--the very result Congress intended to approve by enacting the § 408(b) exemptions--does not give rise to an inference of disloyalty, especially where these practices are universal among plans of the financial services industry.").

75 Prohibited Transaction Exemption 77-10: Class Exemption from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans Are Involved Pursuant to Application Filed by National Coordinating Committee for Multiemployer Plans, 42 Fed. Reg. 33918 (July 1, 1977); Prohibited Transaction Exemption 76-1: Class Exemptions from Prohibitions Respecting Certain Transactions

c. *ERISA § 406(b)(3)*

ERISA § 406(b)(3) provides that a fiduciary with respect to a plan shall not "receive any consideration for his personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." In one of the earliest cases addressing this provision, the court held that ERISA § 406(b)(3) is violated when a fiduciary receives gratuities from any party dealing with the plan and that no showing of harm to the plan was required. The court acknowledged that the provision standing alone was not unambiguous but that a contrary interpretation would render the other provisions in ERISA § 406(b) superfluous and was inconsistent with the common law rule that requires no showing of a *quid pro quo*.[76]

In *Lowen v. Tower Asset Management*,[77] the court found ERISA § 406(b)(3) violations when an investment manager for a Masters, Mates and Pilots plan received commissions, finders fees and securities from certain companies in which in which they invested plan assets that performed poorly. The court discussed the "in connection" requirement of ERISA § 406(b)(3) in detail, including the legislative history and difference from the common law. The court then determined that a fiduciary charged with a violation of ERISA § 406(b)(3) must either: prove by a preponderance of evidence that the transaction in question fell within an exemption or prove by clear and convincing evidence that the compensation it received was for services other than a transaction involving the assets of the plan.[78]

DOL has issued several Advisory Opinions and Information Letters involving ERISA § 406(b)(3). These primarily address insurance or investment transactions in which a fiduciary could benefit from transactions entered into on behalf of a plan.[79]

ERISA § 406(b)(3) issues may also arise in connection with gifts and gratuities from service providers to plan fiduciaries, particularly those fiduciaries who select and monitor the service providers. *See* Q&A 37 below for a discussion of this issue.

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in Which Multiemployer and Multiple Employer Plans are Involved, 41 Fed. Reg. 12740 (Mar. 26, 1976); U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., FAQS ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS (2011), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/multiemployer-plan-leasing-arrangements.pdf.

76 *Brink v DaLesio*, 496 F. Supp. 1350, 1367 (D. Md. 1980).

77 829 F.2d 1209 (2d Cir. 1987).

78 *Id.* at 1214-16.

79 *See, e.g,* U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 93-24A (Sept. 13, 1993) (income to discretionary trustee on float); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-15A (May 22, 1997) (receipt of 12b-1 fees); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-16A (May 22, 1997) (12b-1 fees to nonfiduciary recordkeeper did not violate 406(b)(3)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-19A (Aug. 28, 1997) (direct expenses); U.S. Dep't of Lab., Emp. Benefits Sec. Admin, Information Letter to Judith A. McCormick (August 11, 1994) (DOL response to article criticizing Adv. Op. 93-24A). Search DOL EBSA Website Advisory Opinions for 406(b)(3).

Entities can be ERISA fiduciaries and can violate ERISA § 406(b)(3) even though the statutory language says, "for his personal account."[80] An entity that is a fiduciary does not violate ERISA § 406(b)(3) when it is paid reasonable compensation for the services that make it a fiduciary. This provision is often described as prohibiting a fiduciary from use the authority control, or responsibility which makes the person a fiduciary to cause a plan to pay an additional fee to that fiduciary (or to a person in which that fiduciary has an interest which may affect the exercise of the fiduciary's best judgement as a fiduciary) to provide a service.[81]

d. ERISA § 406(b), in general

The prohibitions in ERISA § 406(b) are closely related and address common issues. Violations of more than one of these provisions are often alleged in connection with one transaction. Scenarios include fiduciary service providers who might affect their own compensation (e.g., investment consultant fee tied to return which could affect allocation of assets to benefit himself); service provider who takes fees not permitted by contract and becomes a fiduciary by exercising such discretionary control over plan assets; plan fiduciaries with responsibility to select and monitor service providers who receive gifts and gratuities from service providers hoping to be hired or retained.)

It is also important to bear in mind that avoiding a prohibited transaction under ERISA § 406 does not necessarily protect a fiduciary from a challenge to the prudence of the transaction and liability under ERISA § 404.[82]

9. What are the rules concerning compensation to plan staff?

The reasonableness standard discussed previously applies to compensation issues for plan staff. It is important to remember that the compensation package for a plan employee includes more than just the salary paid. For some positions, particularly where the plan seeks to attract and retain a highly qualified individual, the compensation package may include other benefits such as a car, non-qualified retirement arrangements, bonuses, severance arrangements, and travel arrangements. So long as the package is documented and reasonable, the individual components of the package should be permissible.

If properly documented and reasonable in amount, amenities such as modest holiday gatherings and coffee and refreshments in the office should be acceptable. A pleasant working environment is important for employee retention, which is in the plan's interests.

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[80] *See, e.g., Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1213 (2d Cir. 1987) (finding Tower Asset Mgmt. liable for breaches as an ERISA fiduciary under ERISA § 406(b)(3)); *Hamilton v. Carell*, 243 F.3d 992, 998 (6th Cir. 2001) ("ERISA also defines a "person" to include a corporation").

[81] U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 82-31A (July 14, 1982) (finding that the mere receipt by Advisers of investment management fees with respect to PEGT would not violate Section 406(b)(3) of ERISA).

[82] *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 971 (1986); U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to William Lindsay (Feb. 23, 2005) (trustee who returned contribution to his political campaign from TPAs bidding on plan business and recused himself from participating in selection decision avoided a violation of ERISA §§ 406(b)(1)-406(b)(2)).

For any plan employee who is a fiduciary, the restrictions discussed in Q&A 7 above apply.

10. May a plan give gifts or donations to plan staff (or to anyone else)?

We are aware of several investigations in which the DOL has disallowed gifts, including: flowers sent to a trustee or a trustee's spouse upon the illness or death of the trustee or spouse; flowers to a plan employee upon the death of a family member; flowers to a terminally ill plan employee; flowers to a retiring service provider; flowers to a seriously ill service provider.

In a Voluntary Compliance Letter, DOL stated its position that such expenditures were non-exempt prohibited transactions for which clear guidance is provided in ERISA § 3(14)(A) & (B) and Sections 404 and 406(a)(1)(C) & (D). DOL reiterated that a fiduciary must discharge his duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses. In the DOL's view in that investigation, these kinds of expenses did not satisfy those requirements. In another case, the DOL agreed not to require reimbursement from the trustees for flowers sent to a plan employee in sympathy for her dying mother and flowers to a terminally ill employee if the plan agreed not to send flowers in the future in similar cases.

Some years ago, it appeared that in the case of such kindnesses to plan employees, various regional offices took different positions and there appeared to be no firm position at the National Office. Sending flowers on occasions such as those described above to plan staff are important for staff morale which affects productivity and employee retention. Trustees could reasonably determine and document the determination that such actions benefit participants. A different standard, however, would apply to gifts to plan staff than would apply to gifts to plan service providers or others who were not plan employees. Moreover, if such items were included in a collective bargaining agreement covering plan staff, they would be part of the bargained-for compensation package (for example, a holiday bonus or food certificate).

In *Dole v. Formica*,[83] the court found that the trustees violated their fiduciary duties by making various gifts and donations. "It is no defense that the trustees believed that these gifts and donations benefited the plans by creating good will, showing appreciation or encouraging employers to make the required contributions. These expenses are not made in the sole interest of the participants for the exclusive purpose of providing benefits and defraying costs." There is no information about the nature or amount of the gifts and donations involved.

Based on the input we have received from various sources, it appears that DOL might permit flowers or similar expressions of sympathy or joy for plan employees based upon a <u>documented</u> trustee determination of benefit to the plan and its participants. However, we have not found affirmative evidence that DOL has approved flowers, plaques or other items for births, deaths, or retirements for non-employees including trustees and service providers or donations to charities or other events.[84]

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83 14 EBC 1397, 1410 (N.D. Ohio 1991).

84 *See* the following cases that involve compensation or amenities to plan employees. Most of these involved compensation to or malfeasance by the director or administrator who, although a plan employee, is also typically

The DOL addressed donations to charities in FAB 2012-01 stating "we cannot think of a situation where the expenditure of plan assets on donations to favored charities or other causes would be permissible." [85] If such a situation does arise, the plan fiduciaries must document why the donation benefits the plan and/or its participants and beneficiaries and that the amount is reasonable when compared to alternative means of accomplishing the same objective.

Similarly, a gift or payment to a party-in-interest or someone not associated with the plan would either be a prohibited transaction for which an exemption would be required, as discussed above, or not a reasonable expense of plan administration.

11. May a plan provide a holiday party, picnic, luncheons, or refreshments for plan employees or participants?

This issue has caused a great deal of controversy and we have been advised that DOL has raised it in several investigations across the country. While a plan may provide its employees with reasonable compensation and benefits, some plans have been challenged when the plan pays for a holiday party or other entertainment for its staff. In some cases, DOL has also challenged plans' payment for other extras that are often provided to employees in a workplace for morale, such as coffee, bagels or donuts, staff luncheons or retirement parties.

In response to an inquiry, a DOL investigator rejected a proposal by the plan trustees to adopt a policy allocating an amount per employee per year as part of the employees' compensation package to cover incidental employee expenses including Christmas parties, retirements, birthdays, donuts, bagels, flowers and similar items. The Trustees had concluded that such minimal amenities were necessary to maintain the morale and productivity of plan employees and that maintaining a satisfied and productive workforce directly benefited participants and beneficiaries. In response, the DOL investigator reiterated the position that providing Holiday parties, birthday cakes, retirement parties, donuts, bagels, flowers and similar items to a party in interest (plan employees) violates ERISA §§ 404(a)(1)(A),(B) and (D) and 406(a)(1)(D). The DOL investigator asserted that there are no statutory or class exemptions allowing prohibited transactions. We understand that subsequently the DOL advised that the plan could provide a more modest holiday party for its staff based upon a trustee determination of the benefit to the plan and its participants; however, the DOL would not approve the original budget proposal.

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a fiduciary: *LaScala v. Scrufari*, 96 F. Supp.2d 233 (W.D.N.Y. 2000) (plan manager); *Patelco Credit Union v. Sahni,* 262 F.3d 897 (9th Cir. 2001) (fiduciary, who set his own compensation and collects the amount from plan assets, violated ERISA §406(b)(1)); *Chao v. Constable*, No. 04-1002, 40 EBC 1061 (W.D. Pa. Dec. 19, 2006) (plan administrative employee). *See also US Department of Labor Issues Statement Following Sentencing of Northeast Carpenters Benefit Funds' Former Plan Administrator*, U.S. DEP'T OF LAB. (Nov. 16, 2022), https://www.dol.gov/newsroom/releases/ebsa/ebsa20221116.

[85] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2012-01, CITING APPRENTICESHIP AND TRAINING PLANS FOR USING PLAN ASSETS FOR GRADUATION CEREMONIES AND PROGRAM MARKETING 4 (Apr. 2, 2012).

In another investigation, we were advised the DOL investigator originally disallowed the entire cost of a holiday party. Counsel to the plan argued with the investigator based on the positions described below and ultimately, the DOL only required reimbursement for service providers who attended the party, but not for plan employees. In yet another investigation, the DOL initially challenged a holiday party and occasional pizza for plan staff but finally allowed these expenses.

It is unclear to us whether the position taken by some DOL investigators with respect to these issues reflects the view of the DOL National Office. However, we believe that such expenses in reasonable amounts can be justified as part of plan employees' compensation packages. In addition, such expenses benefit participants and beneficiaries since they improve plan employee morale, productivity and particularly employee retention. Section 408(b)(2) of ERISA provides a statutory exemption from the prohibitions of ERISA § 406(a) for contracting or making reasonable arrangements with a party-in-interest for services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid for such services. Employee compensation is clearly covered by this exemption or a plan would be unable to pay salaries or provide benefits to its own employees. The additional compensation in the form of minimal amenities is no different than salaries; it is part of the total compensation package. In addition, many plans with their own staff compete with third party administrators for employees. The plan's compensation package must be competitive with the total compensation package offered by third party administrators and those packages generally include such minimal amenities.

Given the position of some DOL investigators, a plan should be very cautious concerning such expenses for plan employees. To provide some protection, the trustees of a plan (not the administrator) must make the determination that such expenses benefit participants and beneficiaries and the basis for the decision must be documented. In addition, the amount of the expense incurred should be modest or it will invite DOL challenge. A plan should not pay for retirement parties for trustees. Because the plan may not pay for such expenses, we do not believe that a service provider could pay for them either.

12. May a Plan pay severance or bonuses to retiring or terminated staff?

One practice that does attract attention is the payment of severance or retirement bonuses. DOL has challenged such payments unless agreed to prior to the individual's termination or retirement as an inducement at that time to attract an employee or to keep the individual employed. In Advisory Opinion 81-83A, the DOL found that a payment made to the plan's executive director as part of his severance package was unreasonable since it did not constitute compensation under ERISA §408. Similarly, in Advisory Opinion 89-08A, the DOL found that a special benefit paid to a training director upon his retirement was unreasonable. The apprentice director had received a salary for his years of service to the plan. When he announced his retirement, the trustees decided to give him additional compensation in the form of a retirement benefit. In finding that the retirement benefit was unreasonable, the DOL found that the benefit constituted inappropriate compensation for services rendered in the past and was in addition to the salary package originally agreed upon in the employment relationship. Because the additional benefit was not part of the director's expectation of compensation for his services rendered to the plan, it was unreasonable compensation under ERISA § 408.[86]

13. May a plan pay any expenses in connection with a retirement or testimonial dinner?

The rules concerning post-retirement benefits for plan employees discussed in Q&A 12 above apply to a retirement or testimonial dinner for a plan employee. Unless such a benefit was specified in the employment agreement (or the collective bargaining agreement for bargained staff), it would not be considered reasonable compensation under the guidance discussed.

Plan assets may not be used to sponsor or contribute to a retirement or testimonial dinner for a plan trustee unless the trustee may lawfully be compensated (*See* Q&A 7) and the amount expended from plan assets is both necessary and appropriate.

A plan could pay for at least a portion of the meal expense for plan employees and/or trustees to attend a retirement dinner if the plan would otherwise have paid for the meal (for example, if the retirement dinner is held in conjunction with an appropriate out of town meeting or educational conference). Even in such a case, the amount that a plan can pay is limited to a reasonable meal expense under the circumstances. *See* Q&A 31. As discussed, the expenses of spouses cannot be paid from plan assets. *See* Q&A 22.

Service Providers

14. What are the plan fiduciaries' responsibilities concerning service provider contracts and arrangements including compensation and fees?

As discussed in Q&A 5 above, ERISA § 408(b)(2) provides an exemption from the prohibitions of ERISA § 406(a) if a plan contracts or makes reasonable arrangements with a party-in-interest, including a plan fiduciary, for office space or services necessary for the establishment or operation of the plan if no more than reasonable compensation is paid for the space or services. Such services could include services as a plan administrator or trustee or service provider. The previous Q&As 5-7 focused on compensation to fiduciaries including fiduciary service providers and restrictions that apply in the case of compensation to certain fiduciaries. This Q&A will focus on all types of service providers and include leases.

To take advantage of the exemption in ERISA § 408(b)(2), plan fiduciaries making the contract or arrangement must determine that the office space or service:

[86] U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 81-52A (June 15, 1981) (payment of death benefit to widow of former plan employee not required by the plan or an employment agreement with the employee is a violation); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 81-83A (Nov. 30, 1981) (payments proposed for terminated employee were not compensation for services rendered for purposes of ERISA § 408(c)(2)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Information Letter to Douglas O. Kant (June 24, 1983) (transfer of automobile to retiring fund director was not a prohibited transaction but may be fiduciary violation).

- Is necessary for the establishment or operation of the plan;
- Is furnished under a contract or arrangement that is reasonable; and
- No more than reasonable compensation is paid for the office space or service[87]

A service is "necessary for the establishment or operation of the plan" if the service is appropriate and helpful to the plan in carrying out the purposes for which the plan is established or maintained.[88] Fiduciaries seeking a lease or services should determine if the lease or service fulfills these requirements and the basis for this determination should be documented.

Fiduciaries must also determine that the contract or arrangement for the lease or services is reasonable. This involves more than the amount of compensation. It involves disclosures of service provider financial arrangements that relate to compensation but also involves other contract terms.[89]

a. Pension plan disclosures required for a reasonable contract or arrangement[90]

This paper will not review the details of these required disclosures, but we note here that no contract or arrangement for services between a covered plan and a covered service provider, nor any extension or renewal of such a contract is reasonable within the meaning of ERISA § 408(b)(2) unless the requirements in 29 C.F.R. § 2550.408b-2(c)(1) are satisfied. The covered plans subject to these requirements are generally qualified pension plans. Covered service providers are those that enter into a contract or arrangement with a covered plan and reasonably expect $1,000 or more in direct or indirect compensation from providing services to the covered plan. The services and service providers that require disclosure are broad. These include services as a fiduciary or registered investment advisor, recordkeeping or brokerage services. A catchall provision includes most other service providers to a pension plan if indirect compensation is involved.[91] Indirect compensation is compensation received by the service provider from any source other than the covered plan.[92]

The regulations require detailed disclosures regarding compensation arrangements including both direct and indirect compensation. Failure of a covered service provider to make the required disclosures would prevent the contract or arrangement from satisfying ERISA § 408(b)(2). Revised disclosures are required within a relatively short time after a change to any of the information disclosed. The regulations require notice to DOL if a covered service provider fails to disclose.[93] Plan fiduciaries are protected from violating the prohibited transaction provisions if the service provider failed to disclose, the plan fiduciary did not know of the failure and upon learning of the failure, requested disclosure and notifies DOL if disclosure is not timely made.[94]

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87 29 C.F.R. § 2550.408b-2(a).
88 29 C.F.R. § 2550.408b-2(b).
89 29 C.F.R. § 2550.408b-2(c).
90 29 C.F.R. § 2550.408b-2(c)(1).
91 29 C.F.R. §§ 2550.408b-2(c)(1)(iii)(A)-(C).
92 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(2).
93 29 C.F.R. §§ 2550.408b-2(c)(1)(v)-(vi).
94 29 C.F.R. § 2550.408b-2(c)(1)(ix).

b. Health Plan Disclosures required for a reasonable contract or arrangement[95]

The Consolidated Appropriations Act, 2021 (CAA) (in Section 202 of Title II of Division BB) amended ERISA § 408(b)(2) to require disclosures like those applicable to pension plans. Certain service providers to group health plans are required to disclose specified information to a plan fiduciary about the direct and indirect compensation that the service provider expects to receive in connection with its services to the plan. These disclosure requirements in ERISA § 408(b)(2)(B) apply to persons who provide "brokerage services" or "consulting" to ERISA-covered group health plans who reasonably expect to receive $1,000 or more in direct or indirect compensation in connection with providing those services.[96] The statute provides that no new contract or arrangement for services between a covered plan and a covered service provider, and no extension or renewal of such a contract or arrangement, is reasonable under ERISA § 408(b)(2) unless the disclosure requirements are satisfied.[97]

The disclosure requirements in the statute are like the disclosure requirements for pension plans in the regulations. Pending issuance of regulations, DOL has issued guidance in Field Assistance Bulletin 2021-03.

c. Conditions required for a reasonable contract or arrangement that apply to all plans.

The regulations have long included a provision that limits the length, termination and other conditions of a reasonable contract or arrangement.[98] A reasonable contract or arrangement must permit termination of the contract or arrangement by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from being locked into an arrangement that has become disadvantageous to the plan. The regulations provide, however, that a long-term lease that may be terminated prior to its expiration without penalty to the plan on reasonably short notice under the circumstances is not generally an unreasonable arrangement simply because it is long term. The regulation also specifically provides that a provision in a contract or arrangement which reasonably compensates the service provider or lessor for loss for early termination is not a penalty. The regulation provides examples:

- A minimal fee in a service contract applied to provide recoupment of reasonable start-up costs is not a penalty.
- A provision in a lease for a termination fee that covers reasonably foreseeable expenses related to a vacancy and reletting of the office space upon early termination of a lease is not a penalty.

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95 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2021-03, TEMPORARY ENFORCEMENT POLICY REGARDING GROUP HEALTH PLAN SERVICE PROVIDER DISCLOSURES UNDER ERISA SECTION 408(B)(2)(B) (Dec. 30, 2021), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-03.

96 ERISA § 408(b)(2)(B)(ii)(II)(bb).

97 ERISA § 408(b)(2)(B)(i).

98 29 C.F.R. § § 2550.408b-2(c)(3).

However, such a provision does not reasonably compensate for loss if it provides for payment in excess of the actual loss or if it does not require mitigation of damages.

Other DOL Guidance has addressed what "termination on reasonably short notice under the circumstances" means in similar circumstances. The following was included in the Preamble to Prohibited Transaction Class Exemption 76-1:[99]

> Questions were also raised in the letters of comment regarding the conditions of the exemption requiring that the plan be permitted to terminate the relationship for provision of office space or administrative services on reasonably short notice under the circumstances and without penalty. This condition is designed to preclude plans from being locked into arrangements which may become disadvantageous to such plans. However, this condition should not be deemed to prevent a multiple employer plan from, for example, entering into a long–term lease for the provision of office space to a participating employee organization, participating employer, or participating employer association, or to another plan, if such lease provides that the plan has the option to terminate such lease on reasonably short notice under the circumstances, notwithstanding the termination date set forth in the lease. Among the circumstances that would be considered in determining whether there is a reasonably short notice period for the termination of such a lease is the length of the notice period as compared to the length of the lease. For example, a one-year notice period would not be considered unreasonable for terminating a 20-year lease.

The third requirement is that the amount that a plan pays a party-in-interest for services or office space must be reasonable compensation.[100] This regulation refers to the ERISA § 408(c)(2) regulation for what constitutes reasonable compensation.[101] *See* Q&A 7 above.

See Q&A 15 and 16 below for further discussion of service provider compensation and other issues that affect a contract or arrangement in connection with selection of service providers.

It is also worth emphasizing that the exemption from the prohibited transaction provisions for a reasonable contract or arrangement in ERISA § 408(b)(2) exempts the payment of reasonable compensation, including expenses, by a plan to plan fiduciaries and other parties-in-interest for services (or office space) provided but not for acts of self-dealing, including compensation or expenses, that would be prohibited by ERISA §§ 406(b)(1), (2), or (3). *See* discussion above in Q&A 8. Accordingly, plan fiduciaries should avoid circumstances in service provider contracts that could give rise to an ERISA § 406(b) conflict. For example, several Advisory Opinions have discussed

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99 Prohibited Transaction Exemption 76-1: Class Exemptions from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans are Involved, 41 Fed. Reg. 12740, 12745 (Mar. 26, 1976).

100 29 C.F.R. § 2550.408b-2(d).

101 29 C.F.R § 2550.408c-2.

circumstances in which a fiduciary service provider can either affect its own compensation by its recommendations or recommends that it be hired to provide an additional service.[102]

15. What responsibilities do plan fiduciaries including trustees have with respect to selection and monitoring of service providers?

a. In General

Plan fiduciaries' responsibilities include the prudent selection and monitoring of service providers. The selection and monitoring activities include determining reasonable compensation and contract terms for service providers both when the service provider is initially retained and on an ongoing basis. The DOL has issued piecemeal guidance on selection and monitoring of service providers. Selection and monitoring activities are often spoken of separately since one occurs at the time a service provider is hired and the other takes place after the initial hiring. But the responsibilities are generally the same although monitoring may take into account actual experience involving the performance of the provider. The relevant questions are: what information must be considered, and what is the process?

In early guidance, DOL addressed the ongoing responsibilities of a plan fiduciary to review other fiduciaries the plan fiduciary has appointed or hired. The performance review should be done "at reasonable intervals" and in a manner reasonably expected to determine that the performance of the fiduciary being reviewed has been in compliance with the terms of the plan, statutory requirements and that the performance satisfies the needs of the plan. The guidance states specifically that no single procedure to accomplish this review will be appropriate in all cases and that the procedure will vary with the nature of the plan and other facts and circumstances.[103]

Subsequently, DOL has addressed issues regarding selection and monitoring of service providers in several Information Letters, Advisory Opinions, and Field Assistance Bulletins. These sources are consistent regarding what is required for selection and monitoring even if guidance is directed at a particular type of service provider. The core requirements are that in selecting a service provider, the responsible plan fiduciary must "engage in an objective process designed to elicit information

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102 U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 82-26A (June 9, 1982) (multiple services by fiduciary); U.S. Dep't of Lab., Lab.-Mgmt. Serv.'s Admin., Advisory Opinion 84-03A (Jan. 4, 1984) (multiple services by fiduciary-406(b)(1)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 84-04A (Jan. 4, 1984) (multiple services by fiduciary-406(b)(1)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 89-25A (Sept. 27, 1989) (fiduciary's decision to retain an affiliated service provider whose fees are not paid by plan assets does not violate 406(b)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 86-20A (Aug. 29, 1986) (incentive fees-- 406(b)(1) and 406(b)(2)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 86-21A (Aug. 29, 1986) (incentive fees-406(b)(1) and 406(b)(2)); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 89-31A (Oct. 11, 1989) (performance-based fees--406(b)); U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Advisory Opinion 99-16A (Dec. 9, 1999) (performance based fees – 406(b)(1) and 406(b)(2)). The Eighth Circuit in *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002), *cert. denied sub nom. Harley v. 3M Co.*, 537 U.S. 1106 (2003), disagreed expressly with the DOL's regulations, holding that a fiduciary may set his or her own compensation so long as that compensation is reasonable.

103 29 C.F.R. § 2509.75-8, FR-17.

necessary to assess the qualifications of the service provider," the quality of the work product or services offered, contractual provisions and the reasonableness of the fees charged in light of the services provided.[104] In one Advisory Opinion, DOL took the position that a plan fiduciary's failure to take quality of services into account in the selection process constituted a breach of the fiduciary's duty under ERISA when the selection involves the disposition of plan assets.[105]

DOL has provided little detailed information about the selection process itself except that it should be an "objective process" and "designed to avoid self-dealing, conflicts of interest or other improper influence." Not surprisingly DOL has noted that what constitutes an appropriate method of selecting a service provider will depend upon the particular facts and circumstances. Soliciting bids from service providers at the outset is a means by which the fiduciary can obtain the necessary information relevant to the decision-making process but DOL has never stated that this is the only means to obtain this information.[106]

DOL guidance also addresses a fiduciary's obligation to monitor service providers. The guidance provides that whether a process such as used in the initial selection "is appropriate in subsequent years may depend, among other things, upon the fiduciary's knowledge of the service provider's work product, the cost and quality of services previously provided by the service provider, the fiduciary's knowledge of prevailing rates for the services, as well as the cost to the plan of conducting a particular selection process." However, regardless of the method used to select or monitor services providers, the fiduciary must be able to demonstrate compliance with ERISA's fiduciary standards.[107]

DOL has also noted that because several factors will "necessarily be considered by a fiduciary when selecting a service provider, a fiduciary need not necessarily select the lowest bidder when soliciting bids, although the compensation paid to the service provider by the plan must be reasonable in light of the services provided. The fiduciary should not consider one factor, such as the lowest fee bid for services, to the exclusion of any other factor, such as the quality of the work product. Rather, the decision regarding which service provider to select should be based on an assessment of all the relevant factors, including both the quality and cost of the services."[108]

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104 U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Theodore Konshak (Dec. 1, 1997); U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Diana Orantes Ceresi (Feb. 19, 1998); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2002-08A (Aug. 20, 2002); U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2002-03, DISCLOSURE AND OTHER OBLIGATIONS RELATING TO "FLOAT" (2002).

105 U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Diana Orantes Ceresi (Feb. 19, 1998).

106 U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Theodore Konshak (Dec. 1, 1997).

107 U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Theodore Konshak (Dec. 1, 1997); U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Diana Orantes Ceresi (Feb. 19, 1998).

108 U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Theodore Konshak (Dec. 1, 1997); U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Diana Orantes Ceresi (Feb. 19, 1998).

Except as provided in ERISA §408(b)(2), plan fiduciaries also have an obligation not to cause a plan to engage in certain transactions under ERISA § 406(a), including a direct or indirect furnishing of goods, services or facilities between the plan and a party-in-interest.[109] *See* Q&A 5 previously discussed.

For a fiduciary to evaluate the reasonableness of compensation, in addition to the information generated by the objective selection or monitoring process, the fiduciary must evaluate compensation received by the provider from other sources, including payments from third parties, in connection with the services provided to the plan. A plan fiduciary must then periodically monitor compliance by service providers with the terms of the agreement entered into and the reasonableness of compensation under the agreement in order to ensure continuation of the agreement meets the requirements of ERISA §§ 404(a)(1), 406 and 408(b)(2).[110] This is particularly important when the compensation may vary or increase as the plan assets increase.

The obligation to review compensation arrangements on an ongoing basis is not limited to retainer arrangements and is not limited to just the fee rate. It applies to all aspects of the service provider compensation package including expense reimbursements and limitations of liability provisions. If the service provider is compensated by the hour, the service provider's recommendations with respect to work to be performed by the service provider should be monitored. However, there is little guidance beyond general principles concerning the method of monitoring the performance of service providers particularly those service providers such as the actuary, accountant, lawyer, etc. where performance cannot be measured against a numerical benchmark.

Both DOL enforcement and private litigation continue to focus on the monitoring responsibilities of plan fiduciaries. In two investigations of which we have been advised, DOL found the plan trustees had breached their fiduciary duties by failing to regularly monitor service providers. Although in both cases, the trustees were directed to perform regular monitoring activities.

In *Acosta v. Chimes District of Columbia, Inc.*,[111] DOL sued Chimes alleging, *inter alia,* failure to properly select a service provider. The Court reviewed the process used by the trustees and their reasons for doing so and ruled against the DOL. Although the trustees did not engage in a formal bid process, the court determined that they engaged in an adequate investigative process before deciding to replace a service provider. This case is worth reading as it shows DOL's viewpoint and the rejection of that viewpoint by the court on these facts. The court analyzed the unique facts and circumstances of the Chimes Plan in detail and found that the DOL's fee expert had not understood these complexities or taken them into account. *But see* DOL complaint in *Hugler v DeWalt*,[112] which alleged payment of

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[109] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2002-03, DISCLOSURE AND OTHER OBLIGATIONS RELATING TO "FLOAT" (2002).

[110] *See* Field Assistance Bulletin 2002-03, *supra* note 105, regarding factors for fiduciaries to consider in evaluating and arrangement for float to be credited to account of provider; U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-15A (May 22, 1997); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 97-16A (May 22, 1997); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2005-10A (May 11, 2005).

[111] No. RDB-15-3315 (D. Md. Feb. 26, 2019).

[112] Complaint, No. 2:17-cv-00082-TOR (E.D. Wash. 2017).

excessive provider fees as well as conflicts by plan fiduciaries. A consent judgment was entered in 2017.[113]

The numerous cases that have been filed and continue to be filed involving the duty to monitor investments including fees for investment options in participant-directed plans state the law regarding the duty to monitor but differ on whether that duty was breached in the case involved.[114]

b. Audit Quality

The DOL views a plan's independent auditor as critical to protect the participants and beneficiaries and the plan itself. However, when DOL reviewed the work of auditors there was significant concern about audit quality. In its 2015 study[115] DOL Office of Chief Accountant (OCA) reviewed Forms 5500 and attached audits. The OCA review determined that 39% of all 5500 form/audits filed had major deficiencies. A follow up study was conducted in 2023[116], this study determined that 30% of the audits contained major deficiencies.

These studies are useful because they describe the types of auditors most likely to submit audits with major deficiencies. This information, at a minimum, is useful to help trustees assess their auditor or to hire a new auditor.

c. Selection and Monitoring of Annuity Providers

DOL FAB 2015-02 reviews the principles concerning selection and monitoring of service providers in the context of an annuity provider.[117]

d. ERISA § 411 Compliance

ERISA § 411 prohibits persons who have committed certain enumerated crimes from serving in various capacities in relation to an employee benefit plan. Some of the prohibited positions could be as employees to service providers. We are aware that some plans request certifications from service providers that they comply with ERISA § 411 but this is not required. A person is, however, prohibited from knowingly hiring, retaining or employing someone in violation of ERISA § 411. Therefore, if

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113 Judgment, *Hugler v. DeWalt*, No. 2:17-cv-00082-TOR (E.D. Wash. 2017).

114 *Tibble v. Edison Int'l*, 575 U.S. 523 (2015); *Hughes v. Nw. Univ.*, 537 U.S. 1106 (2022); *Hecker v. Deere & Co.* , 556 F.3d 575, 586 (7th Cir. 2009) ("nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.")

115 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., ASSESSING THE QUALITY OF EMPLOYEE BENEFIT PLAN AUDITS (2015), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/assessing-the-quality-of-employee-benefit-plan-audits-report.pdf.

116 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., AUDIT QUALITY STUDY (2023), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/november-2023-audit-quality-study.pdf.

117 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2015-02, SELECTION AND MONITORING UNDER THE ANNUITY SELECTION SAFE HARBOR REGULATION FOR DEFINED CONTRIBUTION PLANS (2015).

plan fiduciaries become aware that someone providing services to the plan has been convicted of a crime, including another trustee, counsel should review this provision to determine if any action is required. The crimes which disqualify a person from serving a plan are broad and not specifically related to employee benefit plans (e.g., arson, murder, rape, substance violations, kidnapping, perjury and more).

16. Are limitation of liability or indemnification clauses in service provider agreements permitted?

The definition, and limitations on duration and termination of a "reasonable contract or arrangement" were previously discussed in Q&A 14. DOL Advisory Opinion 2002-08A addresses other terms and conditions that service providers often seek to include in contracts and arrangements. Specifically, this Advisory Opinion responded to a question from a plan concerning whether the limitation of liability and indemnification provisions that a prospective service provider sought to include in the contract with the plan were permitted by ERISA.

> The Department does not believe that, in and of themselves, most limitation of liability and indemnification provisions in a service provider contract are either *per se* imprudent under ERISA section 404(a)(1)(B) or *per se* unreasonable under ERISA section 408(b)(2). The Department believes, however, that provisions that purport to apply to fraud or willful misconduct by the service provider are void as against public policy and that it would not be prudent or reasonable to agree to such provisions. Other limitations of liability and indemnification provisions, applying to negligence and unintentional malpractice, may be consistent with sections 404(a)(1) and 408(b)(2) of ERISA when considered in connection with the reasonableness of the arrangement as a whole and the potential risks to participants and beneficiaries. At a minimum, compliance with these standards would require that a fiduciary assess the plan's ability to obtain comparable services at comparable costs either from service providers without having to agree to such provisions, or from service providers who have provisions that provide greater protection to the plan.

Notably, this Advisory Opinion referred to indemnification provisions that apply to negligence and unintentional malpractice since the service provider was not a fiduciary.

ERISA § 410 also prohibits fiduciaries from entering into any agreements containing exculpatory provisions seeking to relieve them in any way from ERISA's fiduciary obligations. Courts considering ERISA § 410(a) have concluded that Congress intended to specify the standard of conduct for ERISA fiduciaries and did not want fiduciaries to modify that standard through exculpation or indemnity agreements.[118] Liability insurance, is however, permitted under ERISA § 410. The Department of Labor has issued an interpretative bulletin and other guidance setting forth the Department's understanding of ERISA § 410.[119] Indemnification provisions that leave the fiduciary fully responsible

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118 *See Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1460 (9th Cir. 1995); *IT Corp. v. General American Life Ins.. Co*, 107 F.3d 1415 (9th Cir. 1997).

119 29 C.F.R. § 2509.75.4; U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 77-66/67A (Sept. 9, 1977); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 84-02A

and liable but provide that another party will satisfy any liability incurred by the fiduciary in the same manner as insurance are permitted. The DOL interprets ERISA § 410(a) as voiding any arrangement for indemnification of a fiduciary by an employee benefit plan.

Although ERISA § 410 prohibits the indemnification and exculpation of a fiduciary by a plan, it permits the indemnification of the fiduciary by an employer or by an employee organization whose members are covered by the plan.

A plan can provide for the advancing of funds to a Trustee to enable him to defend against a claim that he breached fiduciary duties. In DOL Advisory Opinion 77-66/67 A, the Department of Labor addressed whether an indemnification provision in an investment management contract violated ERISA. The indemnification agreement at issue in Advisory Opinion 77-66/67A stated:

> Expenses incurred in defending a civil or criminal action, suit or proceeding, if requested by such person, shall be paid by the Trustees in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by such person to repay such amount plus reasonable interest in the event that in the final judgment of a court of competent jurisdiction such person is found to have breached this Agreement or any duties or responsibilities undertaken pursuant to this Agreement, and proof satisfactory to the Trustees that such person is financially capable of repaying such amount in the event it is found liable for the amount alleged as damages in the action.

In Advisory Opinion 77-66/67A, the Department of Labor concluded that this agreement requiring the advancement of legal fees and other defense costs in the event of a fiduciary breach claim would not violate ERISA § 410(a), provided that certain additional safeguards were met. Specifically, the plan was required to obtain a written opinion by independent legal counsel determining that "based on a review of the relevant facts, the acts of the fiduciary in question do not constitute a breach of a fiduciary obligation by such fiduciary." Thus, it is arguably not considered a violation of ERISA § 410(a) if a plan agrees to cover all reasonable costs incurred by fiduciaries in connection with the defense of actual or threatened litigation, including attorneys' fees, provided there is no finding of a breach of fiduciary duty.[120]

The 2024 amendment to the QPAM Class Exemption 84-14 requires contracts with QPAMs "to agree to indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a QPAM losing eligibility for the exemption due to a Criminal Conviction or Prohibited Misconduct. Damages may include losses and related costs arising from unwinding

(Jan. 4, 1984); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 95-15A (June 26, 1995); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 93-16A (May 18, 1993); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 93-18A (May 28, 1993); U.S. Dep't of Lab., Pension and Welfare Benefits Admin., Advisory Opinion 2003-08A (June 26, 2003).

[120] *See Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009), in which the Court upheld a preliminary injunction that prevented a plan from advancing defense costs to fiduciary defendants where plaintiffs demonstrated they were likely to succeed in establishing that defendants had breached their fiduciary duties.

transactions with third parties, transitioning Plan assets to an alternative asset manager, and exposure to excise taxes under Code section 4975."[121]

Allocation of Expenses among Related Plans or between a Plan and a Party-in-Interest

17. How should expenses be allocated among related plans and related organizations?

There are several statutory and class exemptions from the ERISA § 406(a) prohibited transactions that permit an employee benefit plan to engage in certain transactions with a contributing employer, union or another employee benefit plan. The types of transactions covered include leases or services from a union or employer (party-in-interest) to a plan; leases or services from a plan to a union or employer (party-in-interest) and shared services. The requirements and limitations depend on the identity of the parties, whether any of the parties are fiduciaries, the nature of the transaction and which party provides the services or office space to the other. The DOL *FAQs on Multiemployer Leasing Arrangements* does a good job of explaining the various exemptions available to multiemployer plans and what they each cover.[122] A summary chart is attached in the resource section.

Some of these exemptions are very broad but this section addresses their application to transactions from plan to union/employer/other plan or from union/employer/other plan to plan or shared arrangements in which the expenses for office space or administrative services are allocated among related plans or a plan and a party-in-interest. The answer to the question above depends on which exemption applies and which parties are involved. The following describes the various exemptions available.

a. ERISA § 408(b)(2)

This exemption has been discussed previously. This section will compare it to other available exemptions. This exemption covers, *inter alia,* leasing office space and providing administrative services **to a plan from a party-in-interest** including a union, employer, or employer association. When analyzing a potential transaction, look carefully at the definitions of party-in-interest in ERISA § 3(14). For example, an "employee organization" is one if any of its members are covered by the plan. Therefore, a national union would also be a party-in-interest with respect to a local union plan even though it does not appoint trustees or engage in collective bargaining with respect to the plan. Similarly, entities that have ownership interests in a contributing employer may be parties-in-interest.

There is no exemption for conflicts in ERISA § 406(b), so the applicable trustees may be required to recuse themselves from participation in a decision whether to retain the union or employer to provide office space or services or from a decision to obtain services from a company owned by a relative of the trustee.

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121 89 Fed. Reg. 23090, 23134 (Apr. 3, 2024).

122 FAQS ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS, *supra* note 32.

The office space or services must be provided under a reasonable contract or arrangement[123] and compensation must be reasonable.[124] Only **office space** may be leased. This exemption does not apply to classroom space or warehouse storage. The plan must be able to terminate the arrangement on reasonably short notice under the circumstances without penalty.[125]

b. ERISA § 408(b)(17)

This exemption from transactions in ERISA § 406(a)(1)(A), (B), and (D) permits, *inter alia*, leases between a plan and a service provider (other than a fiduciary with respect to the assets involved in the transaction) including a service provider that is another multiemployer plan. The exemption requires that the plan may receive no less, nor pay no more, than adequate consideration, in connection with the transaction. The space that may be leased is not limited to office space. The plan may lease to or lease from the service provider. There is no exemption for conflicts in ERISA § 406(b).

c. Prohibited Transaction Class Exemptions (PTCE) 76-1 and 77-10

PTCE 77-10 complements PTCE 76-1, Section C, but there are differences between the two. PTCE 76-1 provides exemptions for transactions in ERISA § 406(a)(1)(A)-(D) but no exemption in PTCE 76-1 for ERISA § 406(b) conflicts. PTCE 77-10 provides an exemption **only** for ERISA § 406(b)(2) conflicts. Both exemptions apply only to **office space.**

PTCE 76-1 states that the **sharing** of office space or services **jointly secured** with a party-in-interest and with costs allocated *pro rata* is not a prohibited transaction and no exemption is required.[126] The PTCE applies where a multiemployer plan independently secures for its own use office space or administrative services, and furnishes part of the office space or administrative services to a participating employee organization, employer, or employer association, or to another multiemployer plan which is a party-in-interest. As will be discussed later in this section, PTCE 77-10 expanded the exemption to cover sharing of space or services jointly secured as well as the transaction described in PTCE 76-1 so that the relief from ERISA § 406(b)(2) provided in PTCE 77-10 would be available for such arrangements.[127]

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123 29 C.F.R. § 2550.408b-2(c).

124 29 C.F.R. § 2550.408c-2.

125 29 C.F.R. § 2550.408b-2(c)(3).

126 "In some instances, a multiple employer plan will secure office space and administrative services jointly with a participating employee organization, employer, or employer association, or with another multiple employer plan which is a party-in-interest or disqualified person with respect to the plan, and will share the costs of securing such office space or administrative services on a pro rata basis with respect to each party's use of such space or services. Such joint use of office space or administrative services does not constitute a prohibited transaction under either section 406(a) of the Act or section 4975(c)(1)(A) through (D) of the Code." Prohibited Transaction Exemption 76-1: Class Exemptions from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans are Involved, 41 Fed. Reg. 12740 § C (Mar. 26, 1976).

127 Prohibited Transaction Exemption 77-10: Class Exemption from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans Are Involved Pursuant to Application Filed by National Coordinating Committee for Multiemployer Plans, 42 Fed. Reg. 33918 (July 1, 1977).

PTCE 76-1 permits a multiemployer plan to lease office space, provide administrative services and sell or lease goods to a participating employee organization, participating employer, or participating employer association, or to another multiple employer plan which is a party--in interest for reasonable compensation. Reasonable compensation need not include a profit but must be sufficient to reimburse the plan for its costs.[128] Any plan involved in the transaction must be able to terminate the arrangement on reasonably short notice under the circumstances.

The plan that provides the services, leases the office space or sells or leases the goods must maintain records for a period of six years from the date of termination of the arrangement as are necessary to demonstrate compliance with the exemption.

PCTE 77-10 states that it is intended to complement PTCE 76-1 and was issued at the request of certain organizations to make PTCE 76-1 more workable. PTCE 77-10 only provides an exemption from ERISA § 406(b)(2) in the context of transactions covered by PTCE 76-1 and also in the context of shared space and services transactions that PTCE 76-1 explained did not require an exemption. These were included only in PTCE 77-10 so that the ERISA § 406(b)(2) exemption would apply.

The exemption from ERISA § 406(b) conflicts was provided in recognition that plan trustees might also act for an employer or union in a transaction covered by PTCE 76-1. PTCE 77-10 noted that in response to a comment it had been broadened to permit related plans, which are not necessarily parties in interest with respect to one another, to share office space, goods and administrative services on a *pro–rata* basis. Even if plans that share space or services are not parties in interest with respect to one another (and therefore no exemption is required to share space or services), common trustees may face a problem under ERISA § 406(b)(2) because the trustees, in determining the allocation of costs, will be representing parties with adverse interests.

Records must be maintained for a period of six years from the date of termination of the arrangement as are necessary to demonstrate compliance with the exemption.

In sum, each PTCE only provides exemption from specified prohibited transactions:

- PTCE 76-1 only applies to ERISA § 406(a) transactions.
- PTCE 77-10 only applies to ERISA § 406(b)(2) transactions.
- Neither PTCE 76-1 or 77-10 apply to ERISA §§ 406(b)(1) or 406(b)(3) transactions.

Therefore, an agreement or arrangement may need to meet the requirements of more than one exemption. PTCEs do not provide an exemption from ERISA § 404 fiduciary duties.

d. PTCE 78-6

PTCE 78-6 provides exemption for specified transactions between multiemployer apprentice or training funds and either a contributing employer or a union representing participating employees.

[128] Prohibited Transaction Exemption 76-1: Class Exemptions from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans are Involved, 41 Fed. Reg. 12740 § C(I)(a) (Mar. 26, 1976)

This exemption was intended to permit **purchase or leasing of space other than office space** for training purposes. An apprenticeship or training plan can use one of the other available exemptions to lease office space.

Specifically, PTCE 78-6 applies to the following transactions:

(a) The purchase of personal property by an apprentice or training plan from an employer who makes contributions to the plan or a wholly owned subsidiary of such an employer;

(b) The leasing of personal property by an apprentice or training plan from a contributing employer or a wholly owned subsidiary of such an employer;

(c) The lease of real property other than office space from a contributing employer or a wholly owned subsidiary of such an employer, from a union any of whose members' work results in contributions being made to the apprenticeship or training plan; and

(d) The leasing of personal property incidental to the leasing of real property by an apprenticeship or training plan from a union any of whose members' work results in contributions being made to the apprenticeship or training plan.

No other transactions are covered by this exemption. It does not apply to any other transaction described in ERISA § 406(a) nor to any conflicts under ERISA § 406(b).

The transaction must be on terms at least as favorable to the plan as an arm's length transaction with an unrelated party would be. The transaction must be appropriate and helpful in carrying out the purposes for which the plan is established and maintained. The plan must maintain records for 6 years from the termination of any covered transaction to document that the conditions of the exemption have been met.

In short, Plans should determine which exemption(s) applies to their space and services arrangement and draft agreements appropriately.

e. ***Pro Rata*** **Allocation of Expenses**

As described above, the compensation and other requirements vary. Although DOL investigations have focused in the past on *pro rata* allocation of expenses, that standard only applies to shared arrangements (where two or more parties obtain space or services jointly). It is not required where one plan provides space or services to another **unless one or more trustees must act for both parties in the transaction**. It has been my experience, however, that agreements with properly documented, regularly updated *pro rata* allocations are viewed favorably by DOL investigators.

This issue has often been a focus of the DOL in its investigations. DOL is looking for allocations that are skewed to benefit smaller plans or organizations where common trustees may have engaged in a conflict. If trustees serve more than one plan and participate in a decision to allocate expenses among the plans they serve on a basis other than *pro rata*, such trustees will be conflicted under ERISA § 406(b)(2) and will not be protected by an exemption. However, if trustees are not identical and conflicted trustees do not participate in the allocation decision, the fee paid to the plan providing the space or services need not be precisely *pro rata* but must reimburse the plan for its costs as required by PTCE 76-1.

Cases concerning expense allocations demonstrate the legal issues that might arise. In *Dole v. Formica*,[129] the DOL challenged the amount of rent paid by the union for space rented from the fund. The court found that the trustees' failure to review the rental terms and to charge rent for the actual footage occupied by the Union and to apportion the utilities to the Union was unreasonable. In *Enright v. N.Y.C. Dist. Council of Carpenters Welfare Fund*,[130] the trustees found that the plan had provided services to the union without compensation. Because the requirements of PTCE 76-1 were not satisfied, this arrangement was a *per se* prohibited transaction.

DOL has issued guidance concerning the allocation of plan expenses to participants in defined contribution plans. *See* Field Assistance Bulletin 2003-3, entitled Allocation of Expenses in a Defined Contribution Plan.[131]

Travel, Meeting, Conference and Entertainment Related Expense Issues

The following brief review of issues previously discussed will help to frame the Q&As in this section. As discussed in Q&A 1, plan assets may be expended only to pay benefits to participants and beneficiaries and to defray the reasonable expenses of administering the plan. In making determinations concerning plan expenses a fiduciary must discharge his or her duties "solely in the interest of participants and beneficiaries."

Plan assets may not be used to pay expenses unless the amount is **both** reasonable and the expenditure is necessary for the administration of the plan. An expense may be reasonable in amount but not necessary for the administration of the plan or an expense may be a proper administrative expense of the plan but not reasonable in amount, in which case plan assets may not be used for the portion of the expense that is excessive. *See* Q&A 2.

Reasonableness is determined by the circumstances and is based on what a fiduciary, familiar with such matters, would prudently expend in like circumstances for the sole and exclusive interest of participants and beneficiaries in the conduct of an enterprise of like character and with like aims.

Plan assets may not be expended to benefit a party-in-interest, absent a prohibited transaction exemption.

A plan fiduciary (including a plan trustee) may receive reasonable compensation from a plan for services rendered to the plan as well as reimbursement for reasonable direct expenses properly and actually incurred in the performance of his or her duties with the plan and not otherwise reimbursed.[132]

However, a fiduciary who is already receiving full-time pay from an employer, employer association or from a union whose members participate in the plan, may only receive reimbursement for

[129] 14 EBC 1397, 1409 (N.D. Ohio 1991).
[130] No. 12 Civ. 4181 (JPO), 2013 WL 3481358 (S.D.N.Y. July 10, 2013).
[131] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2003-03, ALLOCATION OF EXPENSES IN A DEFINED CONTRIBUTION PLAN (2003), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2003-03.
[132] ERISA § 404(a)(1).

reasonable direct expenses properly and actually incurred in the performance of his duties with the plan and not otherwise reimbursed.[133] *See* Q&A 6.

ERISA § 408(c)(2) provides that a fiduciary may receive from a plan "reasonable compensation for services rendered" and "reimbursement of expenses properly and actually incurred in the performance of his duties with the plan." The specificity of the statute would preclude, for example, reimbursement for an expense not related to the performance of the fiduciaries' duties with the plan. An expense is not a "direct expense" to the extent it would have been incurred even if the services to the plan had not been provided or if it represents an allocable portion of overhead costs. *See* Q&A 6. *See* Q&A 7 which discusses to whom the restrictions on compensation in ERISA § 408(c) apply.

The answers to the questions in this section follow from these general rules. In addition, DOL Field Assistance Bulletins 2012-01 and 2014-02 issued regarding aspects of apprentice and training plans, also address travel and related expenses relevant to all ERISA covered plans. These will be discussed below both concerning the unique circumstances of apprenticeship and training plans that affect what expenses are appropriate but also with respect to the general views of DOL regarding travel, meal and related expenses expressed therein.

Finally, in several investigations of which we are aware, many of the expenses were challenged by DOL because they were inconsistent with the plan's travel and expense policy, because receipts and documentation were inadequate or nonexistent, or because the process of submitting expenses for reimbursement and obtaining trustee approval was flawed. A well-crafted expense policy should address many of the issues discussed below. If the policy flatly prohibits an expense, it cannot be reimbursed without amending the policy. A well-crafted policy should leave room for flexibility in unusual circumstances. DOL does require documentation of expenses and such documentation must be produced in an investigation so expenses should not be reimbursed without a receipt unless the expense is a minor one for which a receipt is typically not available (e.g., a subway). If the policy requires expenses to be submitted by a specified date, then expenses cannot be reimbursed if submitted after that date so the policy should build in flexibility.

18. May a plan reimburse any personal expenses incurred while a plan fiduciary including a trustee or plan employee is traveling?

A plan may not reimburse any personal expenses whether or not the individual is traveling. Personal expenses include all items that would be paid for by the plan fiduciary or employee personally while at home. Personal items do not involve the administration of the plan or the performance of the individual's duties to the plan. We are aware 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, toiletries or similar items or services and, of course, any expenses for spouses, family, or guests. According to the DOL, permissible plan expenses would

[133] ERISA § 408(c)(2); Compensation for Services, 29 C.F.R. §§ 2550.408(c)-2(b)(2).

not include costs to upgrade hotel rooms[134]. Dry cleaning and laundry services are also generally personal expenses.

19. May a plan reimburse any business expenses that are not plan-related but are incurred while the trustee or employee is traveling?

We understand the DOL's position to be that a plan should not reimburse any business expenses that are not plan-related, such as expenses incurred 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 individual's duties <u>for</u> the plan; rather, they are incurred because the individual continues to conduct other business while traveling.

20. May a plan reimburse any recreational expenses while a plan fiduciary, including 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 whether or not a plan fiduciary, including a trustee, or a plan employee is traveling on plan related business, 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 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 that are prohibited under ERISA.

In a 2008 investigation, DOL challenged golf fees at a conference included in the registration fees paid by the plan. In a more recent investigation of which we are aware, DOL disallowed all expenses (e.g., hotel, airfare, meals, etc.) of trustees to attend a conference offered by a plan service provider because, based on the investigation, DOL concluded that the purpose of the conference was not educational but entertainment and relationship building. DOL noted the relatively small amount of time spent in educational sessions versus entertainment and that similar subjects were reported to the trustees at each quarterly meeting.

21. In general, whose meeting expenses may be reimbursed by a plan?

A plan may reimburse expenses for those plan fiduciaries, including 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 is a contract issue and subject to a reasonableness standard; that is, it must be shown that such a contract provision was reasonable in view of the practices in the industry, and the total fees charged are reasonable in relation to the services provided. *See* Q&A 14 concerning service provider compensation and fees.

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[134] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 3 (2014).

If the attendance of a plan fiduciary, including 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. In FAB 2014-02, DOL stated that permissible plan expenses included reasonable cost of meals while traveling on plan business but not meals for days not associated with necessary plan travel.[135]

22. May a plan pay or reimburse expenses associated with spouses, family members, or friends?

Under no circumstances may a plan pay or reimburse expenses for spouses, family members, friends or colleagues who accompany a plan fiduciary, including 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 and guests do not provide services to the plan.

A plan should not advance expenses for any individual who does not provide services to the plan even if the expenses 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. *See* Q&A 37 and particularly *Brink v. DaLesio*[136] and *Secretary of Labor v. Carell.*[137]

Recent Voluntary Compliance Letters reveal the Department's position that a fiduciary's receipt of a personal expense from a service provider is imprudent under ERISA. This was true in one case even where the fiduciary had understood the expense to be a legitimate educational expense, but the DOL

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135 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 3 (2014).
136 496 F. Supp. 1350 (D. Md. 1980).
137 17 EBC 1159 (M.D. Tenn. 1993).

found it to be personal under the circumstances. DOL takes the position that the receipt of a personal expense from a service provider constitutes a self-dealing violation of ERISA and violates the anti-kickback rule, ERISA §§ 406(b)(2) and (3), whether or not the fiduciary realizes the expense is personal.

In one case, clarification was requested from the Department as to whether the plan could seek recovery from the service provider rather than from the fiduciary who unwittingly received the deemed personal expense from the service provider. The Department stated its position that since the fiduciary received the questioned expense (which the Department characterized as a "kickback"), he was responsible for the repayment to the plan. 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.

See Q&A 37 for further information concerning payment of expenses by service providers.

23. May a plan reimburse a trustee who has paid expenses for another trustee?

We understand that the DOL has challenged a plan fiduciary who paid for and was reimbursed for meals of other fiduciaries of the <u>same</u> plan attending a meeting or conference. Apparently, the basis for this position is that the paying trustee did not incur the expenses of the other trustee in the performance of the first trustee's duties. This would mean that trustees of the same plan eating together would be required to get separate checks at restaurants, which is not always possible. We believe this is largely a concern about documentation and that this practice is unlikely to be questioned if the receipt clearly shows the number of entrees and the individuals at the meal are contemporaneously documented so that it is clear that the expenses were for meals for individuals for whom the plan could appropriately pay expenses.

See FAB 2014-02 regarding whose expenses may be paid by the plan.[138]

24. May a trustee or plan employee receive reimbursement for travel expenses for days other than the days attending a meeting?

The DOL has challenged the expenses of plan fiduciaries, including trustees, and plan employees because such individuals received reimbursements for travel for a time period that exceeded what was required for the meeting or conference. Plan fiduciaries or plan employees may only receive reimbursements for days during which they are actually in attendance at a meeting or conference, and when appropriate, reasonable time before and after the meeting or conference as needed for travel. Meetings should not be arranged to stretch out over a longer time period than reasonably necessary to conduct the business of the meeting. FAB 2014-02 stated "Permissible plan expenses would not include, for example, the costs associated with the personal itinerary of such [individuals] such as hotel,

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138 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 1 (2014).

meals or travel accommodation for days not associated with necessary travel to or from the [meeting or conference] or during the [meeting or conference itself]…."[139]

We are aware of an investigation in which DOL questioned the expenses of trustees for travel to educational conferences for days that exceeded the conference on the basis that such expenses were not properly incurred, not necessary to or reasonable for a plan's administration and, accordingly, would not meet criteria necessary for the exemption under ERISA § 408(c)(2). Therefore, when the fiduciaries requested reimbursement of such expenses and caused the plan to pay such expenses, the fiduciaries caused the Plan to engage in transactions that they knew or should have known were in violation of ERISA §§ 406(a)(l)(D), 406(b)(l) and (2).

This, of course, begs the question of what is a reasonable period of travel to and from a meeting. Clearly, expenses for personal travel cannot be reimbursed. However, what is a reasonable period of time for travel will vary by the facts and circumstances including the airline schedule from the meeting or conference to the home of the plan fiduciary or employee, when the meeting or conference ends (not always easy to determine), the weather, the travel time/distance from the location of the meeting or conference to the airport in order to make an available flight. While the beginning time of a meeting or conference may be easy to determine the ending time may not be. It may not be possible to get a return flight if a meeting ends early. When reimbursement is requested, a plan fiduciary should document any factors that caused travel to extend longer than might be expected. The plan expense policy should include some flexibility for unforeseen travel delays (e.g., weather delays) and not rigidly limit reimbursement to a specified period.

25. 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).

If those who will be seeking reimbursement of expenses from a plan are located within a single region or city, the meeting should be held in that region or city, unless there is some reason to benefit participants and beneficiaries that the meeting must be held elsewhere and this reason is documented by the plan fiduciaries. In one investigation, DOL took the position that it was imprudent to hold trustees' meetings in connection with IFEBP meetings since this required the plan to pay for the travel expenses of plan professionals who would not have been required to travel at plan expense if the

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[139] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 3 (2014).

meetings were held at the plan office. The DOL concluded that these expenses were not reasonable and necessary expenses of plan administration and were imprudent and excessive. The payment of these expenses were prohibited transfers of plan assets to or on behalf of fiduciaries in violation of ERISA § 406(b)(1), or prohibited transfers of plan assets to parties in interest in violation of ERISA § 406(a)(1)(D). However, this conclusion might have been different if plan professionals also traveled at plan expense for meetings at the plan office.

26. May a plan fiduciary, including 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, 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 change fee than to fly on an unrestricted fare. Therefore, if a restricted fare is booked, the change fee can generally be reimbursed. This should be set out in the plan's expense policy.

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).

DOL's position on first class airfare does not seem to be a *per se* prohibition. DOL has challenged first class airfare in investigations. We are aware of DOL investigations in which first class airfare for flights longer than a certain number of hours was not questioned because it was provided for in the plan's travel expense policy. But comments in FAB 2014-02 seem to imply that airfare other than coach would be a personal expense.[140]

If the plan's reimbursement policy allows for first class airfare, documentation of the circumstances under which first class travel would be permitted and the reasons why the approving fiduciary determines it to be appropriate would be helpful in a DOL investigation.

27. 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

[140] "Permissible plan expenses would not include, for example, . . . costs to upgrade travel tickets or hotel rooms (e.g., from coach to business class)." U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 4 (2014).

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. The DOL has also challenged car rentals in which a spouse or other non-trustee was listed as a secondary driver.

We were advised of one investigation in which the DOL disallowed a portion of the cost of the rental car finding that mileage in excess of the mileage to and from the airport was personal.

A trustee or plan employee does not have to secure the lowest priced rental car. However, the DOL has taken the position that a plan may not reimburse for the use of a rental car for days in excess of the days for which expenses can be reimbursed or for the fees incurred when additional drivers are added to the rental contract.

Cab fare to and from the airport is permissible. However, in one case an expensive cab fare to a restaurant far from the hotel was found not to be reasonable when there were many restaurants to choose from within a reasonable distance from the hotel.

FAB 2014-02 mentions that permissible expenses include costs attendant to travel including transportation from the airport to the hotel or competition or meeting site, airport parking and shuttle fees.[141]

28. 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. 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.

In some circumstances, a car is part of the compensation package of a plan employee. If this is the case, the terms of the arrangement must be documented and must be approved by the trustees. If the package also includes such items as gas, repairs and a rental car while repairs are ongoing, these terms must be documented. Depending whether a car is provided under an "accountable" or "nonaccountable" arrangement for tax purposes determines whether automobile related expenses are considered part of the individual's compensation package or an expense that must be documented when the car is used for plan business, If the car allowance program is written and administered as a nonaccountable plan as that term is used in IRS Publication 463, the recipient is not required to return any unused portion of the allowance and the entire allowance is treated as income to the recipients and included on their W-2. Such items will be considered part of the overall compensation package of a plan employee which must be reasonable. *See* Q&A 9 concerning compensation terms for plan

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141 U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 3 (2014).

staff. Plan policies should specify whether any car allowance for a plan employee is "accountable" or "nonaccountable" and the car allowance should be taxed appropriately.

29. May a plan pay for, or reimburse the expense of, alcoholic beverages?

In our experience, DOL has not objected to a plan paying a reasonable quantity of reasonably priced wine or other alcoholic beverage with dinner. However, expect DOL to challenge bar bills even if they cover beverages consumed only by trustees.

30. May a plan pay or reimburse the cost of plan fiduciary, including a 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. 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 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.

In FAB 2014-02, DOL stated that permissible plan expenses included reasonable cost of meals while traveling on plan business but not meals for days not associated with necessary plan travel.

31. May a plan pay for the cost of meals for a plan fiduciary, including 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 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. *See* discussion at Q&A 21.

We were advised of one investigation in which the DOL found that the practice of the plan's co-chairs and administrator having lunch once a month to review the upcoming agenda and other issues that arose between meetings was improper. The DOL stated that since all were local, the meetings could be held in the plan office and not at a meal time. The DOL ultimately yielded to the argument that the co-chairs had other jobs and this was one of the most convenient times to meet. The costs of the lunches were also extremely modest.

32. May a plan pay or reimburse the expenses of lodging for a plan fiduciary, including a trustee, or plan employee while the individual 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 that of a comfortable and safe but not extravagant hotel reasonably convenient to the location of the meeting or conference.

DOL has taken the position that staying in a hotel designated as the "best" hotel accommodations at the IFEBP Conference rather than the "standard" hotel accommodations was prohibited by the plan. This was based on the wording of the plan's expense policy that provided for reimbursement of the prevailing rates for the conference. Attention to the wording of the expense policy might have avoided this issue.

FAB 2014-02 states that reasonable expenses for hotel accommodations is a permissible expense but also states that costs to upgrade hotel rooms is a personal expense.[142] *See* Q&A 24 for a discussion of the time period for which expenses, including hotel expenses may be reimbursed.

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

See previous discussion at Q&A 6. In this section, we use the term "per diem" to refer to an amount paid to a plan fiduciary or employee by the plan that the plan fiduciary or employee need not account for or reimburse. We use 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 after the meeting and the excess, if any, must be refunded to the plan.

As the DOL makes clear in Advisory Opinion 80-58A addressing this issue, whether or not a "per diem" can be paid to a plan fiduciary is determined by whether the plan can compensate the fiduciary as discussed in Q&A 6.

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

- A plan fiduciary who **does not** **receive full-time pay** from a union, employer or employer association as discussed in Q&A 6 may receive either a per diem or an expense advance or both.
- A plan fiduciary who **does** **receive full-time pay** from a union, employer, or employer association discussed in Q&A 6 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.
- 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.

34. May a plan pay for the expenses of lodging for a plan fiduciary, including a trustee, or a plan employee who lives in the area where a meeting or conference is held?

[142] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS 3 (2014).

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 one 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.

If there are circumstances requiring an individual to stay in the meeting hotel even though they live in the vicinity, this should be documented in advance by a request to the trustees. For example, heavy traffic, construction along the route, an early start to the meeting or the individual's responsibilities for meeting set up and arrangements might be reasons for the individual to stay in the meeting hotel.

35. May a plan pay for the attendance by a plan fiduciary, including a trustee, or a plan employee at any events sponsored by the union, an employer, or other organization?

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, such as providing information about the plan, 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 expenses associated with the meeting. Documentation of the plan-related reason for attendance would help in an investigation.

36. May a plan pay the expenses for a plan fiduciary, including a trustee, a plan employee or a plan service provider 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. For example, a pension fund trustee typically could not attend a conference devoted specifically to health fund issues; a health fund claims specialist typically could not attend a conference devoted specifically to pension fund issues. Absent some connection to the attendee's duties with the plan these would not constitute expenses incurred in the performance of the individual's duties with the plan.[143]

Offers to attend a conference, meeting, or other event at the expense of a service provider should generally be refused unless the expenses of attendance could be reimbursed by the plan itself, i.e., the expenses must be reasonable and necessary and not constitute a personal expense. DOL's Fiduciary Investigations Manual provides[144] that investigations may disclose possible fiduciary violations involving a plan fiduciary's acceptance, from a service provider of items such as meals, gifts, entertainment, or expenses associated with educational conferences. This section also states the

143 ERISA § 408(c)(2).

144 U.S. DEP'T OF LAB., FIDUCIARY INVESTIGATIONS PROGRAM (2019), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual.

circumstances under which an investigator should not treat the receipt of such items as a violation of ERISA § 406(b)(3).

We were advised that in one investigation DOL disallowed late registration fees for attending an educational conference. In another investigation, DOL looked at the course schedule of a conference and called into question the conference attendance certificate of trustees who submitted receipts for expenses incurred away from the conference during times when they were supposed to be attending the conference sessions.

37. May a service provider pay expenses of a plan fiduciary, including a trustee, or plan employee?

ERISA § 406(b)(3) provides that a fiduciary with respect to a plan shall not "receive any consideration for his personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." *See* discussion, court cases and examples in Q&A 8, ERISA § 406(b)(3).

Several cases address situations in which payments were made by service providers of gifts and gratuities or a "thing of value" to plan fiduciaries that were held to be illegal under ERISA. Although, in most cases, the circumstances were egregious, the cases also addressed relatively small items of entertainment.[145] Three cases, *Brink v. DaLesio*, *Secretary of Labor v. Carell*, and *Lowen v. Tower Asset Management, Inc.* are worthy of discussion.[146]

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[145] *Lowen v. Tower Asset Mgmt.*, 829 F.2d 1209 (2d Cir. 1987), *aff'g* 653 F. Supp. 1542 (S.D.N.Y. 1987) (commissions and fees in exchange for investing plans assets); *Brink v. DaLesio*, 496 F. Supp. 1350 (D. Md. 1980), 667 F.2d 420 (4th Cir. 1981); *Donovan v. Tricario*, 1984 U.S. Dist. Lexis 17516, 5 E.B.C. 2057 (S.D. Fla. 1984) (trustees received use of a boat and $5,000 per month to use their influence to make certain that payor got plan business); *Stuart Park Assoc.'s Ltd. P'ship v. Ameritech Pension Tr.*, 846 F. Supp. 701 (N.D. Ill. 1994) (payment for each investment that consultant recommended for investment of plan assets by party in which investments were made); *Whitfield v. Tomasso*, 682 F. Supp. 1287 (E.D.N.Y. 1988) (down payment and mortgage loan for home, lodging and airfare for a trip to the Virgin Islands as a quid pro quo for investment by plan fiduciary in uninsured CDs); *Martin v. Nat'l Bank of Alaska*, 828 F. Supp 1427 (D. Alaska 1992) (origination fees received by the fiduciary bank were "in connection with" loans involving plan assets and violated ERISA § 406(b)(3)); *Sec'y of Lab. v. Carell*, 17 EBC 1159 (M. D. Tenn. 1993)(gratuities to trustees and spouses included but were not limited to: airfare, lodging, meals, refreshments, entertainment and hotel expenses to attend Trustee meetings in Florida and Hawaii); *Damasco & Assoc.'s 401(k) Profit Sharing Plan v. The Mfr.'s Life Ins. Co.*, No. C 9902135 CRB, 1999 WL 672322 (N.D. Cal. Aug. 20, 1999) (payment from insurance company to consultant that recommended plan invest in company for every month the plan was invested); *Patelco Credit Union v. Sahni*, 262 F.3d 897 (9th Cir. 2001) (violation of § 406(b)(3) where insurance broker received commissions from insurance companies with whom he placed welfare plan's coverage); *Chao v. Linder*, 421 F. Supp. 2d 1129, 1135-36 (N.D. Ill. 2006) (transactions described in § 406(b)(3) are prohibited per se and that no harm to the plan must be shown to establish the violation). *See Ossey v. Marolda*, 1999 U.S. Dist. Lexis 14293 (N.D. Ill, 1999) (stated in dicta that ERISA fiduciaries should not be held liable for accepting a token gift from a service provider but found that the gift alleged in the case at issue was not a token gift).

[146] *Brink v. DaLesio,* 496 F. Supp. 1350 (D.Md. 1980) *aff'd in relevant part, rev'd on other grounds*, 667 F.2d 420 (4th Cir.1981); *Sec'y of Lab. v. Carell*, 17 EBC 1159, (M. D. Tenn. 1993); *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 8 EBC 2457 (2d Cir. 1987).

In *Brink*, the court discussed the meaning of ERISA § 406(b)(3) at length and commented that "an examination of the legislative history indicates that it was designed to prevent kickbacks." Noting that the controversy in the case before it centered around the issue of whether the plaintiffs needed show that there was a *quid pro quo* for the gratuities or that harm to the union or the funds resulted, the court concluded that the plaintiffs need not show that the receipt of gratuities actually influenced the defendant's discharge of his fiduciary duties or that any harm to the funds resulted from the transaction and that ERISA §406(b)(3) is violated when a fiduciary receives gratuities from any party dealing with the fund .[147]

In *Secretary of Labor v. Carell*, the court found that the trustees of the plans breached their fiduciary duties by accepting payment of airfare, lodging, meals, refreshments, entertainment and hotel expenses from a provider of administrative services. The payments covered trustees' expenses as well as the expenses of their spouses. The court rejected the argument that there was no violation because the amounts involved were insubstantial. Citing *Brink*, the *Carell* court held that the finding of an ERISA §406(b)(3) violation does not require proof of actual harm to the plan resulting from the prohibited transaction.

In *Lowen v. Tower Asset Management, Inc.*, the court found that a fiduciary charged with a violation of ERISA § 406(b)(3) must either prove by a preponderance of the evidence that the transaction in question fell within an exemption or must prove by clear or convincing evidence that compensation it received was for services other than a transaction involving the assets of a plan. The court commented that any doubt about a causal connection between payments to a fiduciary and the investment or expenditure of plan assets should be resolved against the fiduciary.

Since ERISA §406(b)(3) prohibits a plan fiduciary from receiving any consideration for his own personal account from any person dealing with the plan, we believe that a service provider may pay the expenses of a trustee or plan employee if it would be permissible for the plan to pay those expenses directly. If the plan could pay the expenses (i.e., they are the types of expenses that the plan may lawfully pay or reimburse and are reasonable in amount), they are not personal expenses. However, we have not found affirmative support for this position either in DOL opinions or court cases. We have been advised that the DOL does not necessarily agree with this position.

However, DOL's Fiduciary Investigations Manual provides its investigators some guidelines in connection with enforcement of ERISA § 406(b)(3). The text (with our added italics) reads:

> **11. Fiduciary Violations Involving Gifts and Gratuities**. Investigations may disclose possible fiduciary violations involving a plan fiduciary's acceptance, from a party dealing with the plan, of consideration such as meals, gifts, entertainment, or expenses associated with educational conferences. In such cases, the Investigator/Auditor should determine whether the facts support an allegation that the receipt of gifts, gratuities, or other consideration were for the fiduciary's personal account and received in connection with a transaction or transactions involving the

[147] *Brink v. DaLesio*, 496 F. Supp. 1350 (D.Md. 1980) *aff'd in relevant part, rev'd on other grounds*, 667 F.2d 420 (4th Cir.1981).

assets of the plan as required for a violation of ERISA section 406(b)(3). *The Investigator/Auditor should also determine whether the fiduciary or the plan maintained a reasonable written policy or plan provision governing the receipt of items or services from parties dealing with the plan and whether the fiduciary adhered to that policy.*

Further, for enforcement purposes only, the Investigator/Auditor generally should adhere to the following guidelines:

(1) The Investigator/Auditor should treat as insubstantial, and not as an apparent violation of ERISA section 406(b)(3), the receipt by a fiduciary (including his or her relatives) of the following items or services from any one individual or entity (including any employee, affiliate, or other related party). These items will be treated as insubstantial, if their aggregate annual value is less than $250 *and their receipt does not violate any plan policy or provision*: (a) gifts, gratuities, meals, entertainment, or other consideration (other than cash or cash equivalents) and (b) reimbursement of expenses associated with educational conferences.

(2) The Investigator/Auditor should not treat the reimbursement to a plan of expenses associated with a plan representative's attendance at an educational conference as a violation of ERISA section 406(b)(3) under the following conditions. *A plan fiduciary must have reasonably determined, in advance and without regard to whether such expenses will be reimbursed, that: (a) the plan's payment of educational expenses in the first instance was prudent, (b) the expenses were consistent with a written plan policy or provision designed to prevent abuse, (c) the conference had a reasonable relationship to the duties of the attending plan representative, and (d) the expenses for attendance were reasonable in light of the benefits afforded to the plan by such attendance and unlikely to compromise the plan representative's ability to carry out his or her duties faithfully in accordance with ERISA. The fiduciary's determination should be in writing.*[148]

Please note in (1) that the investigator may not disregard expenses if their receipt violates a plan policy or provision. Therefore, if a plan's expense or conflict of interest policy provides that a fiduciary may not accept any item of a personal nature from a service provider, the DOL investigator would, in theory, be required to pursue even small amounts. In the opening paragraph, the investigator is directed to obtain copies of such policies.

Item (2) shows that the DOL is focused on the payment of expenses to or on behalf of a fiduciary from a service provider for educational conferences for plan fiduciaries -- and whether that is an improper gift or gratuity. The criteria listed are evidence of the DOL's concern that payment of such expenses may make it difficult for a plan fiduciary to properly carry out his/her duties under ERISA with regard to a service provider that has paid the expenses of the fiduciary. Therefore, the DOL requires that the above findings be made in writing before the expenses are paid. This, of course, makes it obvious if the fiduciary changes the reasons and rationales for the trip/expense at a later date. These criteria also provide a good guide for documenting other situations in which a provider pays an expense that the plan could pay.

[148] U.S. DEP'T OF LAB., FIDUCIARY INVESTIGATIONS PROGRAM (2019), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual.

38. Does DOL have special rules for expenses of Apprentice & Training Funds?

In 2012 and 2014, DOL issued two Field Assistance Bulletins addressing certain apprentice and training fund expenses.[149] In FAB 2012-2, DOL addressed "payments for meals, gifts, entertainment, or other expenses associated with graduation ceremonies" and "payments to market, advertise or promote the apprenticeship or training program," advising that such expenses should be assessed on a "case-by-case basis."[150] "In every instance," DOL opined, apprenticeship and training plan fiduciaries must be able to justify plan expenses as appropriate means of carrying out the plan's mission of training workers.[151] Given the particular characteristics and aims of these training programs, DOL concluded that:

> we would not treat the plan's payment of expenses associated with a modest graduation ceremony attended by graduating apprentices, family, plan officials, and other persons connected with the program or industry outreach, including light refreshments, as an impermissible use of plan assets provided: (a) the amount of the expense is modest in relationship to the plan's assets; (b) the expenses were approved in accordance with internal accounting, recordkeeping, and administrative controls designed to prevent inappropriate, excessive, or abusive expenditures of plan assets; and (c) the expenses were for costs of the ceremony. For example, we generally would not view a graduation dinner for all attendees, valet parking, or payments for travel or hotel accommodations for graduating apprentices or guests as permissible plan asset expenses. On the other hand, a modest graduation ceremony offering light refreshments with diplomas or certificates for apprentices and token awards/gifts for non-apprentices (e.g., plan instructors or persons that supported the program) would be permissible.[152]

As for marketing expenses, DOL expressed its view that:

> certain outreach expenses related to the program can be paid for by the apprenticeship and training plans consistent with ERISA's fiduciary requirements. Here again, the expenses must be for marketing or promotion of the apprenticeship or training program itself (e.g., not for industry advancement or for sponsoring employers or employee organizations) and the amount of the expense must be consistent with the fiduciaries' obligation to be prudent and economical in the use of plan assets. For example, t-shirts provided to apprentices bearing the logo of the apprenticeship or training program may be appropriate plan expenses if the expense is modest and the t-shirts are not purchased from parties in interest in prohibited transactions.

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[149] U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2012-01, LAB., CITING APPRENTICESHIP AND TRAINING PLANS FOR USING PLAN ASSETS FOR GRADUATION CEREMONIES AND PROGRAM MARKETING (2012); U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., Field Assistance Bulletin 2014-02, SUPPLEMENTAL FAQS ON APPRENTICESHIP AND TRAINING PLAN EXPENSES – SKILLS COMPETITIONS (2014).

[150] Field Assistance Bulletin 2012-1, supra note 154, at 2.

[151] Field Assistance Bulletin 2012-1, *supra* note 154, at 3.

[152] Field Assistance Bulletin 2012-01, *supra* note 154, at 4.

> Conversely, tickets to sporting and other entertainment events for apprentices, plan officials, trustees, and contributing employers would generally be unreasonable plan expenses. Finally, we cannot think of a situation where the expenditure of plan assets on donations to favored charities or other causes would be permissible. In every instance, the fiduciary must thoughtfully ensure that the plan's assets are being efficiently used to promote the plan's training mission.[153]

DOL issued a supplemental FAB in 2014 addressing expenses paid by apprenticeship and training programs for skills contests. In this FAB, DOL recognized that "[c]ompetitions can promote the plan's legitimate goals both by directly providing training benefits to plan participants and by helping plan fiduciaries assess the effectiveness of their plan's training programs." *Id.* at Q & A 1. As such, "plans may treat the necessary costs of a plan's engagement in competitions as costs of administering the plan." *Id.* To that end, a plan may pay reasonable expenses for participants such as: transportation to and from the competition, registration fees, accommodations and meals, if necessitated by out-of-town travel, lost wages, and reasonable prizes; reasonable travel expenses of individuals other than apprentices if they play a "necessary role in the conduct of a competition (e.g., setting up the contest site or serving as judges)." Payment of expenses for plan trustees and other plan officials to attend and observe the competition are also permissible." *Id.* Reasonable expenses associated with organizing and managing the contest are also permissible. *Id.* at Q&A 2. The FAB also provides detailed guidance on per diems and reimbursement to employers for payment of apprentice lost time wages. *Id.* at Q &A 3 and 4.

Note that statements by DOL in the FABs on general expense principles and travel expenses not unique to apprentice and training programs (e.g., payment for meals, travel, and accommodations) are consistent with positions taken by DOL in investigations.

Reporting and Disclosure; Documenting Expenses

39. What are reporting and disclosure requirements that apply to expenses?

A detailed review of the reporting and disclosure requirements that apply to expenses is beyond the scope of this paper but this section will briefly review some of those requirements.

a. **ERISA § 408(b)(2)**

The disclosures required to satisfy the requirements for a "reasonable contract or arrangement" for purposes of ERISA § 408(b)(2) were discussed in Q&A 14. Some of the information required to be disclosed is similar to the information required for reporting purposes. However, in the case of ERISA § 408(b)(2), the disclosures are required to be made by specified service providers to plan fiduciaries. The compensation information is then available to plan fiduciaries to help them evaluate the reasonableness of the contract or arrangement.

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[153] Field Assistance Bulletin 2012-01, *supra* note 154, at 4.

In the case of the other requirements discussed in this section compensation, including expenses, must be reported by the plan as a part of annual filings.

b . Schedule C, Service Provider Information

The Schedule C instructions provide that Schedule C must be filed by a "large pension or welfare benefit plan...to report certain information concerning service providers." A plan must complete Part I of Schedule C to "report persons who rendered services to or who had transactions with the plan...during the reporting year **if the person received, directly or indirectly, $5,000 or more** in reportable compensation in connection with services rendered or their position with the plan..., except:

1. Employees of the plan whose only compensation in relation to the plan was less than $25,000 for the plan year;
2. Employees of the plan sponsor or other business entity where the plan sponsor or other business entity is reported on the Schedule C as a service provider, provided the employee did not separately receive reportable direct or indirect compensation in relation to the plan;
3. Persons whose only compensation in relation to the plan consists of insurance fees and commissions listed in a Schedule A filed for the plan; and
4. Payments made directly by the plan sponsor that are not reimbursed by the plan. In the case of a multiemployer or multiple-employer plan, where the "plan sponsor" would be the joint board of trustees for the plan, payments by contributing employers, directly or through an employer association, or by participating employee organizations, should be treated the same as payments by a plan sponsor.[154]

The Schedule C instructions include a list of persons who are considered "service providers" to a plan for purposes of Schedule C reporting. This list expressly includes plan employees, named fiduciaries and individual trustees. Accordingly, unless an exception listed above applies, a trustee's or plan employee's direct and/or indirect compensation in connection with services rendered to or their position with a plan must be reported on Schedule C.

Reportable compensation is defined as any money or thing of value, such as gifts, awards, or trips received directly or indirectly from the plan. The Schedule C instructions provide that service providers need not report non-monetary compensation of insubstantial value (such as gifts or meals of insubstantial value). An insubstantial gift or gratity must be valued at less than $50, and the aggregate value of gifts from one source in a calendar year must be less than $100, but gifts with a value of less than $10 do not need to be counted toward the $100 limit. *See* Schedule C instructions for more information and FAQs about the Schedule C for details.[155] The instructions state that these thresholds

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[154] U.S. DEP'T OF LAB., INSTRUCTIONS FOR 2023 FORM 5500 (SCHEDULE C) 27 (2023).

[155] U.S. DEP'T OF LAB., INSTRUCTIONS FOR 2023 FORM 5500(SCHEDULE C)28 (2023); U.S. DEP'T OF LAB., FREQUENTLY ASKED QUESTIONS ABOUT THE 2009 FORM 5500 SCHEDULE C(2008), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/2009-form-5500-schedule-c.pdf; U.S. DEP'T OF LAB., SUPPLEMENTAL FREQUENTLY ASKED QUESTIONS ABOUT THE 2009 SCHEDULE C(2010), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/supplemental-2009-schedule-c.pdf.

are for purposes of Schedule C reporting only. Filers are strongly cautioned that gifts and gratuities of any amount paid to or received by plan fiduciaries may violate ERISA and give rise to civil liabilities and criminal penalties.

Several of the FAQs relate directly to identifying and reporting trustee expenses including amounts received from service providers to the plan. Portions of the responses to several relevant FAQs are reproduced below, but both sets of FAQs should be read in full as well as the current Schedule C instructions.

i. Frequently Asked Questions about the 2009 Form 5500 Schedule C, July, 2008. (FAQs About The 2009 Form 5500 Schedule C (dol.gov))

FAQ 33: Payments for meals, hotel, transportation costs, tickets to a sporting or entertainment event, and other individual expenses, waiver of a conference registration fee is reportable indirect compensation.

ii. Supplemental Frequently Asked Questions about the 2009 Schedule C, October, 2010 (Microsoft Word - supplementalscheduleC.doc (dol.gov))

Supplemental FAQ 2: In the Department's view, ordinary promotional gifts, such as a coffee mug, calendar, greeting cards, plaques, certificates, trophies and similar items of insubstantial value that display a company logo of the person or entity providing the promotional gift have a value of less than $10 for purposes of Schedule C reporting and are not reportable indirect compensation. On the other hand, this FAQ would not cover a gift that clearly has a value in excess of $10, such as a $400 golf club or an expensive luxury pen, for example, merely because it was embossed with a company logo.

Supplemental FAQ 3: It is the view of the Department that a reasonable reading of the Schedule C instructions supports the conclusion that the value of meals, entertainment, and other gifts (other than cash or cash equivalents) is not reportable compensation for purposes of the Schedule C if neither the amount of the gift nor eligibility to receive the gift is based, in whole or in part, on the recipient's position with one or more ERISA plans, or the amount or value of services provided to or business conducted with one or more ERISA plans.

Supplemental FAQ 4: Paying for or reimbursing plan personnel for travel, meals, and lodging expenses associated with the plan representative's attendance at an educational conference generally constitutes reportable Schedule C compensation because it is provided due to the person's position with the plan. Waiver of any conference registration fee would also be reportable indirect compensation. The cost of the meals, travel, lodging, and waived conference registration fee must be included in the calculation of Schedule C reportable compensation for the recipients. The Department has decided that it will not require such educational conference expenses to be reported on Schedule C if a plan fiduciary other than the plan representative attending the conference reasonably determined, in advance and without regard to whether such conference expenses will be reimbursed, that (a) the plan's payment of educational expenses in the first instance would be prudent, (b) the payment or reimbursement of the expenses would be consistent with a written plan policy or provision designed to prevent abuse, (c) the conference had a reasonable relationship to the duties of the attending plan representative, and (d) the expenses for attendance were reasonable in light of the benefits afforded to the plan by such attendance and unlikely to compromise the plan representative's ability to carry out his or her duties in accordance with ERISA. The fiduciary's determination must be in writing. This guidance is for purposes of Schedule C reporting only. Filers are strongly cautioned that gifts and gratuities of any amount paid to or received by plan fiduciaries may violate ERISA and give rise to civil liabilities and criminal penalties.[156]

Supplemental FAQ 28: The instructions provide that reportable "direct compensation" includes "[p]ayments made directly by the plan for services rendered to the plan or because of a person's position with the plan . . . " Plan trustees render fiduciary services to the plan. The Schedule C instructions contain a specific service code for "individual trustee" services. The Department expects that disbursements to a plan trustee for transportation, hotels, meals, and similar expenses incurred by the plan trustee for goods and services or other things of value furnished to him or her while engaged in official plan business and paid or reimbursed by the plan are reportable compensation for purposes of the Schedule C. In addition, cash gifts and personal expenses paid by the plan to or for the plan trustee, whether paid directly through prepayment or use of credit cards or other credit arrangement, and non-cash gifts are reportable compensation for purposes of the Schedule C.

Supplemental FAQ 29: For the reasons stated in FAQ 28 above, reimbursement for expenses where the total compensation received by the employee is $25,000 or more must be reported on Schedule C. The Schedule C instructions contain a specific service code for "plan employee" services. With regard to reporting plan employees' salaries, total salaries (before taxes and other deductions) paid to employees should be used to determine whether an employee has received less than $25,000 during the plan year.

Schedule C instructions provide that where reportable compensation is received by a person in connection with several plans, any reasonable method of allocating the compensation among the plans may be used provided that the allocation method is disclosed to the plan administrator. In calculating the $5,000 threshold for purposes of determining whether a person must be identified in Part I (of Schedule C), include the amount of compensation received by the person that is attributable to the plan filing the Form 5500, not the aggregate amount received in connection with all the plans.[157]

For purposes of Schedule C, reporting payments to "service providers", including trustees, by the Plan sponsor that are not reimbursed by the Plan are not required to be reported. In the case of a multiemployer plan, the board of trustees is the plan sponsor. In an Information Letter, the Department took the position that in the context of multiemployer plans "plan sponsor" for purposes of Schedule C reporting, does *not* mean the plan's joint board of trustees:

> For purposes of the Schedule C reporting requirements, payments of [plan expenses] by . . . employers, directly or through an employer association, or by participating employee organizations, should be treated the same as payments by a plan sponsor.

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156 This response is consistent with the Fiduciary Investigations Program, Section 11, discussed in Q&A 37.
157 U.S. DEP'T OF LAB., INSTRUCTIONS FOR FORM 5500 (SCHEDULE C) 29 (2023).

> Thus, payments to plan service providers [*e.g.,* trustees] that are not reimbursed by the plans and that are made by contributing employers, directly or through an employer association, or by an employee organization that serves as a collective bargaining representative of employees covered by the plan, are not required to be included in the information reported on the Schedule C. [158]

iii. Information about trustees or plan employees that a plan must report on Schedule C

Part I of the Schedule C must be completed to report persons who rendered services to or who had transactions with the plan (including individual plan trustees) during the reporting year if the person received, directly or indirectly, $5,000 or more in reportable compensation in connection with services rendered or their position with the plan. As discussed above, "compensation" for this purpose includes expenses reimbursed by the plan filing the Schedule C.

Indirect compensation must also be taken into account to determine if the $5,000 reporting threshold is met. Indirect compensation, for this purpose, means anything of value, except things of *de minimis* value described later, received from sources other than directly from the plan or plan sponsor if the compensation was received in connection with services rendered to the plan during the plan year or the person's position with the plan. The amount of indirect compensation must be reported separately.

The Schedule C Instructions and of the DOL Supplemental FAQ About the Form 5500 Schedule C No. 3 indicate that indirect compensation may include meals, entertainment, or other non-monetary gifts. Notably, a report may exclude non-monetary compensation of insubstantial value.

A plan must maintain records of expense reimbursements, but each trustee or plan employee affected by the reporting must maintain records of the value of indirect compensation received from sources other than directly from the plan or a union, employer or employer association as applicable. Meals and entertainment received from plan service providers are examples of indirect compensation that must be reported.

Each year in preparation for filing the Schedule C, each plan or the plan's accountant will send a request to each service provider, including each trustee, requesting disclosure of whether the service provider/trustee received any indirect compensation and if so, the amount. The Plan is required to report on Schedule C any service providers/trustees who fail to respond to the request for information. Any service provider, including a trustee, who fails to provide the requested information must be reported on Schedule C.

c. LM-30/LM-10 Filing Requirements

DOL Form LM-30 and LM-10 filing requirements are beyond the scope of this paper. Note, however, that service providers to an ERISA trust fund must file LM-10 reports showing payments of anything of value over $250 to a union officer or employee, among others who may include trustees. LM-10

[158] U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Information Letter to Charles V. Stewart (July 12, 2010).

Information is available on the DOL website, Office of Labor Management Standards.[159] A number of FAQs address service provider payments to and entertainment of trustees. *See* FAQs 8, 15, 22, 23, 35, 40, 41, 46, 47, 50, 51, 55, 57, 60, 61, 64 and 73.[160] LM-30 information is also available on the DOL website, Office of Labor Management Standards.[161] There are no FAQs for Form LM-30 but the instructions to the Form include useful information. In particular, the exclusions from reporting for "insubstantial payments and gifts" and "widely attended gatherings" address situations that may affect trustees.[162] The exception for "insubstantial payments and gifts" is the same as LM-10, FAQ 50 and the exception for "widely attended gatherings" is substantially the same as LM-10 FAQ 61.

40. How should expenses claimed for reimbursement be documented?

Each plan should have a written expense policy adopted by the trustees. In investigations, the DOL looks to the adopted expense policy as well as the law and DOL guidance 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 in this paper. **Once the policy is adopted, it must be followed.** DOL may require a plan fiduciary to repay an expense that violates the plan's expense policy even if that expense does not otherwise violate the law or DOL guidance.

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 one Voluntary Compliance Letter, DOL found that "generic" receipts and credit card billings alone are insufficient. The expenses must be itemized on the receipt.

We are aware that DOL has required detailed information for group meals paid directly by the plan or paid for by one trustee eating with a group of trustees. Specifically, DOL requested the names of those who had been present at each group meal and whether they were a plan fiduciary, service provider or plan employee.

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159 U.S. DEP'T OF LAB., INSTRUCTIONS FOR FORM LM-10 EMPLOYER REPORT (2023), https://www.dol.gov/sites/dolgov/files/OLMS/regs/compliance/GPEA_Forms/instructions/lm-10_instructions.pdf. lm-10_instructions.pdf (dol.gov)

160 U.S. DEP'T OF LAB., FORM LM-10 - EMPLOYER REPORTS FREQUENTLY ASKED QUESTIONS (2021), https://www.dol.gov/agencies/olms/reports/forms/lm-10/faq. FORM LM-10 - Employer Reports Frequently Asked Questions | U.S. Department of Labor (dol.gov)

161 U.S. DEP'T OF LAB., LABOR ORGANIZATION OFFICER AND EMPLOYEE REPORTING (2023), https://www.dol.gov/agencies/olms/compliance-assistance/labor-organization-officer-employee-reporting. Labor Organization Officer and Employee Reporting | U.S. Department of Labor (dol.gov).

162 U.S. DEP'T OF LAB., LABOR ORGANIZATION OFFICER AND EMPLOYEE REPORTING (2023), https://www.dol.gov/agencies/olms/compliance-assistance/labor-organization-officer-employee-reporting. Labor Organization Officer and Employee Reporting | U.S. Department of Labor (dol.gov).

162 U.S. DEP'T OF LAB., INSTRUCTIONS FOR FORM LM-30 LABOR ORGANIZATION OFFICER AND EMPLOYEE REPORT 4 (2022), https://www.dol.gov/sites/dolgov/files/OLMS/regs/compliance/e_LM30/LM30_FormInstructions.pdf. Microsoft Word - LM-30_Instructions__10-24-11__(dol.gov).

Some plan expense policies provide that receipts are not required for reimbursement of expenses under some specified amount. This is based on an old IRS rule for purposes of documenting deductions.[163] 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 insubstantial amounts under 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.[164]

We recommend that trustees not adopt an expense policy permitting reimbursement without receipts for amounts greater than a specified amount (e.g., $25). This encourages minimal documentation and raises the likelihood that expenses will be challenged by DOL in an investigation.

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, 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. Reg. §§ 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.

Consequences and Penalties

41. What liability can result from violations associated with plan expenses?

As has been discussed throughout this paper, numerous violations of fiduciary duties may result that are related to expense issue. Compensation paid to a plan fiduciary, including a trustee, a plan employee or a service provider may not be necessary and appropriate for carrying out the purposes of the plan or might not be provided under a reasonable contract or arrangement or might not be reasonable in amount. Plan fiduciaries might inadvertently cause the plan to pay settlor expenses. Service provider arrangements might be approved without adequate review or conflicts by approving fiduciaries might be involved. Fiduciaries might fail to adequately monitor the performance of service providers or other fiduciaries they appoint. In any of these situations, losses to the plan may result for which fiduciaries may be liable.

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[163] A search revealed that the IRS amount for deductions without a receipt varied by the type of expense, some of which were less than $25.

[164] *See Whitfield v. Tomasso*, 682 F. Supp. 1287 (E.D.N.Y. 1988)(trustees breached their fiduciary duty not only by incurring unlawful expenses but also by failing to monitor and keep adequate records of administrative expenses); *Dole v. Formica*, 14 EBC 1397, 1407 (N.D. Ohio 1991) ("without some objective and contemporaneously recorded information, the Trustees could not evaluate the reasonableness of the compensation paid for the services received.").

ERISA § 409 provides that a plan fiduciary, including a trustee, who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by ERISA shall be personally liable to restore to the plan any losses resulting from the breach. The breaching fiduciary must also restore to the plan any profits made through use of plan assets by the fiduciary. The breaching fiduciary is also subject to such other equitable or remedial relief as a court may determine is appropriate, including removal of the fiduciary. A plan fiduciary may purchase fiduciary insurance but depending on the amount awarded a plan, insurance may not be adequate.

Plan fiduciaries should also bear in mind that they could be held liable for the breach of another plan fiduciary. ERISA § 405(a) states that a plan fiduciary is liable for a breach of fiduciary duty of another plan fiduciary if he or she knowingly participates in or knowingly conceals an act or omission of the other fiduciary while knowing the act or omission is a breach.[165] A co-fiduciary may also be liable for the breach of another fiduciary if he or she enables the breach by failing to act prudently in the administration of the plan.[166] Finally, a co-fiduciary may be liable for the breach of another fiduciary if he or she has knowledge of the breach unless he or she makes reasonable efforts under the circumstances to remedy the breach.[167]

A discussion of the case law concerning co-fiduciary liability is beyond the scope of this paper. There is a good discussion of the case law in Employee Benefits Cases, 4th Ed., Ch. 10. VI. Duty to Protect Against Violations by Other Fiduciaries. Generally, courts have required that knowledge for purposes of ERISA § 405(a)(1) and (3) must be "actual knowledge." Courts have held that a co-fiduciary cannot avoid liability under ERISA § 405(a)(3) "by simply doing nothing."[168] Resignation alone by plan fiduciaries seeking to prevent imprudent action by co-fiduciaries is not sufficient to avoid liability. Such fiduciaries must take all reasonable and legal steps to prevent the action including notifying the DOL, seeking an injunction in Federal court or publicizing the vote[169] ERISA § 405(a)(2) does not require actual knowledge by a co-fiduciary to be liable for the breach of another. Courts have found liability based on the failure to monitor.[170] Amounts due from a breaching fiduciary or a co-fiduciary are paid to the plan under ERISA § 409.

ERISA § 502(l) provides for a civil penalty of 20% of the amount recovered from a fiduciary for a breach of ERISA Part 4 Fiduciary Responsibility. A non-fiduciary who knowingly participated in the fiduciary breach is also subject to the 20% penalty.[171] The ERISA § 502(l) penalty is paid to DOL.

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165 ERISA § 405(a)(1).
166 ERISA § 405(a)(2).
167 ERISA § 405(a)(3).
168 *Free v. Briody*, 732 F.2d 1331, 1336 (7th Cir. 1984).
169 29 C.F.R. § 2509.75-5, FR-10.
170 *Free v. Briody*, 732 F.2d 1331, 1336 (7th Cir. 1984); *Chao v. Constable*, Civil Action No. 04-1002, 40 EBC 1061 (W.D. Pa. Dec. 16, 2006) (declining to cite specifically to ERISA § 405(a) as the basis for liability but relying on duty to monitor and stop malfeasance of breaching fiduciary. Trustees notified DOL of administrator's breaches but took no further action.)
171 *See* discussion in Employee Benefits Law, 4th Ed., Ch. 10, VII. H. Liability of Non fiduciaries for Fiduciary Misconduct.

If the breach is a prohibited transaction involving a plan subject to Internal Revenue Code (Code) § 4975 (e.g., a qualified pension plan), there is also an excise tax on the "disqualified person" (generally the same as the party-in-interest) involved in the transaction. The initial tax is 15% of the amount involved[172] for each year in the taxable period.[173] If the prohibited transaction is not corrected within the taxable period the excise tax is increased to 100% of the amount involved.[174]

42. Are there potential criminal violations associated with plan expenses?

In limited circumstances, the receipt of gifts and gratuities may also constitute a criminal violation under 18 U.S.C. § 1954. This is unlikely and the most recent case concerning gifts and gratuities was 20 years ago. This section will review the elements of the law for information.

This statute makes it a crime for individuals in "covered plan positions" (including a long list of positions that include non-fiduciaries and plan professional advisors) to use their relationship to the plan to *receive* or *solicit* any "fee, kickback, commission, gift, loan, money, or thing of value" from anyone with the intent to influence with respect to any action or decision relating to a plan. No *quid pro quo* is required. A "thing of value" may be tangible or intangible and need not be provided to the plan official. Anyone directly or indirectly *giving* or *offering* such fees, kickbacks, etc. to those in a "covered plan position" will violate the statute if the giving or offering was predicated on the covered person's *status* with respect to the plan, or where there is an *intent to influence* the covered person's decisions and actions with regard to the plan. Payments for, or acceptance of, *bona fide* salary, compensation, or reimbursement for services actually rendered will not violate the statute.

Those in "covered plan positions" may violate the statute even if they do not have actual control or influence over plan decisions. Conversely, individuals not in "covered plan positions" will violate Section 1954 if they do exercise control or influence over plan actions or decisions. Such control may be exercised directly or indirectly.

Several cases involving Taft-Hartley plans were decided from the 1980s through 2004[175] but there appear to be no cases since *U.S. v Kirkland.*

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172 I.R.C. § 4975(f)(4).

173 I.R.C. § 4975(f)(2).

174 I.R.C. § 4975(b).

175 *See U.S. v. Friedland*, 660 F.2d 919, 922–24, 926–27 (3d Cir. 1981) (affirming convictions of general counsels to Taft Hartley pension fund who offered loans from the fund to a social acquaintance in exchange for kickbacks received "because of [their] status, which gave them at least ostensible power to exercise influence"); *U.S. v. Romano*, 684 F.2d 1057, 1060, 1062–63 n.2 (2d Cir. 1982) (affirming conviction of pension fund trustee for receiving TV sets valued at $10,000 from bank with which he opened fund accounts were more than a "de minimis business or social gratuity" contemplated as a statutory exception in § 1954's pre-ERISA legislative history); *U.S. v. Soures*, 736 F.2d 87, 88–90 (3d Cir. 1984) (affirming conviction of union president for soliciting $500 from a contractor with which the union had a collective bargaining agreement in exchange for defendant's agreement not to reimpose a construction project lien relating partly to money owed the benefit fund); *U.S. v. Schwartz*, 785 F.2d 673, 675–76, 679–81 (9th Cir. 1986) (reversing and remanding trial court order dismissing § 1954 counts against defendant-trustees of benefit plans, who agreed to bid and award administration to insurance executives whom they enlisted to persuade the union's international president to approve a merger of their locals; the phrase "thing of value" is not limited to "tangible things with ascertainable money value");

In *U.S. v. Kirkland,* the court reached a conclusion concerning the application of 18 U.S.C. § 1954 that was different from earlier cases. The earlier cases specifically rejected the need to prove a *quid pro quo.* To obtain a conviction, the government had only to show that the person who received the gratuity was in the real or apparent position to influence a plan's action. The court in the *Kirkland* case took a different position based on the decision of the U.S. Supreme Court in *U.S. v. Sun-Diamond Growers of California,* 526 U.S. 398 (1999), a case involving gifts and gratuities to a public official. In the *Sun-Diamond* case, the Supreme Court held that a clear linkage must be shown between the gifts given and the action taken.

The court in *Kirkland* found that the government must prove that a substantial factor in the service provider's motivation to give a thing of value was the trustee's specific past or anticipated actions or decisions. It is not enough that the service provider is motivated merely by a trustee's general capacity to decide matters that affect the service provider's business interests or if the service provider sought merely to build a reservoir of goodwill. Nevertheless, the court found the service provider guilty on 12 counts where the government's case met the standard of proof. Interestingly, the court did not find the trustee guilty of illegally accepting gratuities. The evidence was not sufficient for a criminal conviction but did establish a breach of fiduciary duty.

Given the *Kirkland* court's reliance on the *Sun Diamond* case, it appears that criminal indictment under 18 U.S.C. § 1954 would require evidence of the clear linkage described in *Sun Diamond.* Since typical gifts and gratuities are common business development activities, that linkage is not likely to exist.

Conclusion

A plan's practices with respect to the expense issues discussed in this paper are generally reviewed by the DOL in the course of an investigation. It is important to understand the DOL's positions on these issues to prepare appropriate plan policies, procedures and processes with respect to expenses including documentation. As has been discussed, expense issues include compensation of plan staff and service providers, avoiding conflicts in decision making, properly selecting and monitoring service providers and requesting and approving expense reimbursements.

Although we have tried to collect the available information regarding the DOL positions on expenses, this paper should not be read as providing definitive guidance about what the law and DOL guidance is and what the DOL will do in a particular investigation or case. As previously explained in the introduction, the facts and circumstances applicable to each expense or fiduciary decision will significantly affect the assessment of whether or not the expense is proper under ERISA.

U.S. v. Robilotto, 828 F.2d 940, 944, 946–47 (2d. Cir. 1987) (affirming RICO convictions of union president who deposited certificates from plans with a bank in order to receive personal loans because as the union's business agent, he undisputedly exercised influence over the plans); *U.S. v. Rosenthal*, 9 F.3d 1016, 1017–20, 1023–24 (2d Cir. 1993) (affirming defendant investment banker's conviction for offering a gratuity to a pension fund manager with whose firm the bank did business); *U.S. v. Kirkland*, 330 F. Supp. 2d 1151 (D. Or. 2004).

In addition, we have found significant differences in the way in which DOL has treated certain issues. Certainly most of this is due to the underlying circumstances but to some extent it is also due to differences among individual investigators, different regional offices of DOL and differences between the field offices and DOL National Office.

Finally, where case law affects these issues, we have provided leading cases as a beginning point for research. There are other cases (and, in some areas, many other cases). To the extent that case law varies in jurisdictions, it may affect how these issues are resolved based on the facts of each situation.

In consultation with their legal advisors, fiduciaries should use the information presented here along with other available information to evaluate their own practices, determine if they have any potential exposure and implement changes if deemed necessary. Our experience shows that simple changes concerning documentation of individual decisions and plan policies may make an enormous difference in the length, tone and ultimately the outcome of an investigation.

Resources

Exemptions for Sharing/Leasing Office Space, Administrative Services, Goods

Abbreviations:
MEP – multiemployer plan
PII – party-in-interest
ATP – apprentice or training plan
PT – prohibited transaction
PCTE – prohibited transaction class exemption
AO – Advisory Opinion

	PTCE 76-1/77-10	**ERISA § 408(b)(2)**	**ERISA § 408(b)(17**	**PTCE 78-6**
FROM what party is space leased or services obtained?	MEP	PII (incl union, employer)	Service provider to MEP (incl another MEP)	Contributing employer or union.
TO whom is space, services or goods provided?	PII (incl MEP, union, employer, employer assn) PTCE 76-1 states jointly securing office space/services and sharing *pro rata* is not a PT requiring exemption 77-10 – provides for sharing space, services, goods *pro rata* based on each party's use of space, services, goods.	MEP	MEP or service provider. Transaction can go either direction.	ATP
What transactions under ERISA § 406 are exempt?	76-1 applies to 406(a)(1)(A)-(D) No exemption for 406(b) conflicts. 77-10-provides exemption ONLY for 406(b)(2) but NOT for 406(a), 406(b)(1) or (b)(3). 77-10 allows trustees of related plans to act on both sides of a transaction.	406(a)(1)(A)-(D) Incidental goods only AO 83-45A. No exemption for 406(b) conflicts.	406(a)(1)(A), (B) and (D) only. No exemption for 406(b) conflicts.	406(a)(1)(A), (C) and (D). Purchase or lease of personal property from employer; lease of space (other than office space) from employer or union; lease of personal property incidental to lease of space from union. No exemption for 406(b) conflicts.
What can be paid?	Reasonable compensation to plan providing space,	Space or services must be provided under reasonable	Plan pays no more or receives no less than "adequate	Terms at least as favorable to the plan as arm's length transaction.

	service or goods; need not include a profit but must reimburse plan for its costs. 77-10: Where plans joint secure space, services or goods costs must be allocated *pro rata* to avoid 406(b)(2) if trustees serve more than one plan.	contract or arrangement. *See* 29 CFR § 2550.408b-2(c). Compensation must be reasonable. *See* 29 CFR §§ 2550-408b-2(d) and 2550.408c-2.	consideration' as defined in ERISA § 408(b)(17)(B)(ii)—fair market value as determined in good faith by fiduciary.	
What can be provided or shared under arrangement?	**Office space**, goods, administrative services. 77-10 – shared *pro rata* with respect to each parties' use.	**Office space**, administrative services, incidental goods. 408(b)(2) also exempts sale or exchange of property, lending of money, extension of credit, transfer to or for use by PII of plan assets, furnishing goods, facilities and services.	**Space not limited to office space** 408(b)(17) also exempts sale or exchange of property, lending of money, extension of credit, transfer to or for the use by the PII of plan assets.	Personal property; **space other than office space**.
Does exemption permits leasing classroom space?	No	No	Yes	Yes
Termination of arrangement	MEP must be able to terminate on reasonably short notice without penalty.	MEP must be able to terminate on reasonably short notice without penalty.	None specified.	None specified.
Recordkeeping requirements	Six years from termination of arrangement.	None specified. Parties must be able to document compliance.	None specified. Parties must be able to document compliance.	Six years from termination of arrangement.

Sources:
PTCE 76-1
PTCE 77-10
PTCE 78-6
ERISA § 408(b)(2)
29 C.F.R. § 2550.408b-2.
ERISA § 408(b)(17
FAQS ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS, *supra* note __.

Information on DOL Website:

ERISA Fiduciary Advisor: **What should a fiduciary consider regarding fees in deciding on service providers and plan investments?** elaws - ERISA Fiduciary Advisor (dol.gov)

Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan. tips-for-selecting-and-monitoring-service-providers.pdf (dol.gov)

Selecting and Monitoring Pension Consultants – Tips for Plan Fiduciaries. selecting-and-monitoring-pension-consultants.pdf (dol.gov).

Tips for Hiring a Service Provider with Strong Cybersecurity Practices. Tips For Hiring a Service Provider With Strong Cybersecurity Practices (dol.gov)

Meeting Your Fiduciary Responsibilities. Meeting Your Fiduciary Responsibilities (dol.gov)

Apprenticeship and Training Plans. Apprenticeship and Training Plans | U.S. Department of Labor (dol.gov).

Understanding Retirement Plan Fees and Expenses. Understanding Retirement Plan Fees and Expenses (dol.gov).

Selecting an Auditor for Your Employee Benefit Plan. Selecting an Auditor for Your Employee Benefit Plan (dol.gov).

Field Assistance Bulletin No. 2008-04 Guidance Regarding ERISA Fidelity Bonding Requirements. Field Assistance Bulletin No. 2008-04 | U.S. Department of Labor (dol.gov)

Articles:

"May a Fiduciary Accept Gifts and Gratuities from Service Providers?", Charles B. Wolf and Patrick W. Spangler, Vedder, Price, Kaufman & Kammholz, P.C., Chicago, IL, Benefits Practice Center, 2007. c143ac33c668435f8f262a5abdf81267_document.pdf (vedderprice.com)