

Examining Multiemployer Plan Expense Sharing: Rules, Issues and Challenges

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Before we begin--introduction to updated “Expenses” paper

- Last updated in 2009.
- Included in materials but too detailed for this presentation
- Thanks to those who worked on this project.
- In the future contact Mike or Ginger to contribute information or ask questions.

Why Expense Sharing?

- Most multiemployer plans benefit from expense sharing in some form.
- But the requirements can be confusing.
 - When is an exemption required?
 - Which exemption applies?
 - Can steps be taken to simplify a transaction?
 - What types of actions should be avoided?

In the next hour we will address these questions.

Basics

- Most expense sharing (i.e., space, services, goods) involves a transaction with a “party-in-interest” (PII).
- ERISA § 406(a) broadly prohibits plan fiduciaries from causing plan to enter into certain transactions with a PII, if they know, or should know, that the action directly or indirectly involves a transaction described therein.
- Several exemptions permit some or all of the transactions prohibited (PT) by ERISA § 406(a) under circumstances specified in each exemption.
- BUT with one exception, expense sharing exemptions do not apply to conflicts in ERISA § 406(b).

Checklist for Plans

- Will plan be transacting with a PII?
- Is transaction a PT described in ERISA § 406(a)?
- Is an exemption (PTE) from the PT available?
 - Requirements of each PTE and which is best suited to the transaction?
- Have ERISA § 406(b) conflicts been avoided in consideration/approval by fiduciaries?
- Have ERISA § 408(c) issues been addressed?

Parties-in-Interest

ERISA § § 3(14) and 3(15)

Who or What is a PII?

- A detailed and complicated definition.
- Generally, a PII can be an individual or entity.
- For this presentation we'll discuss PII's typically involved in expense sharing with MEPs but be aware of the detailed definition.
- Also refer to related definitions.

Party-in-Interest – ERISA § 3(14) (A)

- Any fiduciary
 - Including but not limited to any—administrator, officer, trustee or custodian.
 - Review authority re which entities may be a fiduciary (e.g., party that appoints fiduciary is a fiduciary including union, employer and employer association).
 - See authority Expenses paper FN 57-58.
- Counsel
- Employee of plan.

Party-in-Interest – ERISA § 3(14) (B)-(D)

- A service provider to the plan.
 - Including another plan.
- An employer any of whose employees are covered by the plan.
- An employee organization any of whose members are covered by the plan.
 - Definition includes regional and national unions that might not be directly involved in the plan.

Party-in-Interest – ERISA § 3(14) (E), (G), (H), (I)

- These describe ownership interests but could include such entities as—
 - A related company partially owned by one of the persons or entities previously described,
 - An officer or director of an entity previously described.
- It is important to understand if any PII has an ownership interest as described, in a company with which a plan might transact -- avoid conflicts and comply with PTEs.

Party-in-Interest – ERISA § 3(14) (F), § 3(15)

- A PII includes a “relative” as defined in ERISA 3(15).
 - But only a relative of an individual described in 3(14) (A), (B), (C) or (E).
- A relative is a—spouse, ancestor, lineal descendant or spouse of lineal descendant.
 - So in laws are not PIIs.
 - But a great grandson of a service provider is a PII.

Is the transaction a Prohibited Transaction?

ERISA § 406(a)

Prohibited Transactions - ERISA § 406(a)

- Unless provided in an exemption, plan fiduciaries may not cause plan to engage in transactions with PII's if they know/should know, that action is a direct or indirect--
 - Sale, exchange, lease of property between plan & PII
 - Lending money, extending credit between plan & PII
 - Furnishing goods, services, facilities between plan & PII
 - Transfer plan asset to, or use by or for benefit of PII
 - Acquisition/holding by plan of any employer security/real property in violation of ERISA § 407

Prohibited Transactions - ERISA § 406(a)

- ERISA § 406(a) includes common expense sharing transactions .
- Transactions with a PII--plan(s) must comply with an applicable PTE.
 - A plan is PII to another plan as defined in ERISA § 3(14) (e.g., as service provider); not because of common trustees or the same CBA.
 - PTCE 76-1 Preamble states jointly secured space or services shared pro rata is not PT.

Prohibited Transactions - ERISA § 406(b)

- **ERISA § 406** states a fiduciary may not--
 - deal with plan assets in his own interest or for his own account (i.e., self-dealing) (§ 406(b)(1))
 - act in individual or any other capacity in any transaction involving plan, on behalf of party whose interests are adverse to interests of plan or its participants or beneficiaries.(§ 406(b)(2))
 - receive any consideration for personal account from any party dealing with plan in connection with transaction involving plan assets. (§ 406(b)(3))

ERISA § 406(b) – Conflict of Interest

- § 406(b) conflicts generally not covered by expense sharing PTEs even if related § 406(a) transaction is covered.
- *Per se* prohibitions without regard to merits of transaction. *Cutaiar v. Marshall* (3rd Cir. 1979).
- Avoiding a PT does not guarantee prudence and transaction may be challenged under ERISA § 404
 - § 406(b) conflicts may increase prudence concerns.

ERISA § 406(b)(1) – Self-dealing

- Prohibits fiduciary from benefitting himself but prohibition is broader than that.
- See 29 C.F.R. § 2550.408b-2(e) -- fiduciary may not cause a plan to enter into a transaction whereby 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 benefit.
 - E.g., authorities find violation if fiduciary acts in transaction involving his/her employer.

ERISA § 406(b)(2) – Adverse Interests

- Prohibits fiduciary in individual or other capacity from acting in any transaction involving plan on behalf of party (or representing party) whose interests are adverse to interests of plan or interests of its participants or beneficiaries.
 - Other party to a contract/arrangement with plan is adverse; fiduciary cannot act for other party.
 - Leading MEP case is *Cutaiar v. Marshall*, (3d Cir. 1979).
 - PTCE 77-10 exempts certain 406(b)(2) acts.

ERISA § 406(b)(3) – Personal Benefit from Third Party

- ERISA § 406(b)(3) prohibits a fiduciary from receiving any consideration for their personal account from any party dealing with plan in connection with transaction involving plan assets.
- Less likely to impact expense sharing arrangements but be aware of prohibition.

Avoiding ERISA § 406(b) Conflicts

- Conflicts may be avoided by recusal.
 - See 29 CFR 2550.408b-2(f), Example 7; DOL FAQs ON MULTIEMPLOYER PLAN LEASING ARRANGEMENTS (2011); Information Letter to William Lindsay (Feb. 23, 2005).
 - Conflicts may also be avoided structurally—
 - One or more trustees who serve only one plan;
 - Trust provision for designated alternate in event of conflict or provision for hiring independent fiduciary

Prohibited Transaction Exemptions (PTEs) for Multiemployer Plan (MEP) Expense Sharing

ERISA § 408(b) (2)

ERISA § 408(b) (17)

PTCE 76-1, 77-10, 78-6

Expense Sharing PTEs

- Several PTEs permit MEP to obtain space/goods/services from or provide space/goods/services to a union/employer/employer association or another MEP.
- Each PTE has different requirements and applies to different transactions. Attention to detail is very important.
- DOL FAQs on Multiemployer Leasing Arrangements (2011) explain various exemptions and what each covers.

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

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

	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.

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

	PTCE 76-1/77-10	ERISA § 408(b)(2)	ERISA § 408(b)(17)	PTCE 78-6
<p>TO whom is space, services or goods provided?</p>	<p>PII (incl MEP, union, employer, employer assn)</p> <p>PTCE 76-1 states jointly securing office space /services and sharing <i>pro rata</i> is not PT requiring exemption</p>	<p>MEP</p>	<p>MEP or service provider.</p> <p>Transaction can go either direction.</p>	<p>ATP</p>

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

	PTCE 76-1/77-10	ERISA § 408(b)(2)	ERISA § 408(b)(17)	PTCE 78-6
What transactions under ERISA § 406 are exempt?	<p>76-1 applies to 406(a)(1)(A)-(D) No exemption for 406(b) conflicts.</p> <p>77-10--exemption ONLY for 406(b)(2); NOT for 406(a), 406(b)(1) or (b)(3). Trustees of related plans may act on both sides of a transaction.</p>	<p>406(a)(1)(A)-(D) Incidental goods only AO 83-45A.</p> <p>No exemption for 406(b) conflicts.</p>	<p>406(a)(1)(A), (B) and (D) only.</p> <p>No exemption for 406(b) conflicts.</p>	<p>406(a)(1)(A), (C) & (D). (Purchase/lease of pers prop from empr; lease space (other than office space) from empr or union; lease of pers prop incidental to lease of space from union. No exemption for 406(b) conflicts.</p>

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

	PTCE 76-1/77-10	ERISA § 408(b)(2)	ERISA § 408(b)(17)	PTCE 78-6
What can be paid?	<p>Reasonable compensation to plan providing space/service/goods; need not include profit but must reimburse plan for its costs.</p> <p>77-10: If plans jointly secure space/services/goods costs must be allocated <i>pro rata</i> to avoid 406(b)(2) if trustees serve more than one plan.</p>	<p>Space/services must be provided under reasonable contract or arrangement. <i>See</i> 29 CFR § 2550.408b-2(c).</p> <p>Compensation must be reasonable. <i>See</i> 29 CFR §§ 2550-408b-2(d) and 2550.408c-2.</p>	<p>Plan pays no more or receives no less than “adequate consideration” as defined in ERISA § 408(b)(17)(B)(ii) —fair market value as determined in good faith by fiduciary.</p>	<p>Terms at least as favorable to the plan as arms length transaction.</p>

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

	PTCE 76-1/77-10	ERISA § 408(b)(2)	ERISA § 408(b)(17)	PTCE 78-6
What can be provided /shared under arrangement?	Office space, goods, administrative services.	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.

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

	PTCE 76-1/77-10	ERISA § 408(b)(2)	ERISA § 408(b)(17)	PTCE 78-6
Does exemption permit 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

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

	PTCE 76-1/77-10	ERISA § 408(b)(2)	ERISA § 408(b)(17)	PTCE 78-6
Record keeping 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.

Expense Sharing – PTCE 76-1 and 77-10

- PTCE 77-10 complements PTCE 76-1, Section C but there are differences between them.
- PTCE 76-1 provides exemption for ERISA § 406(a)(1)(A)-(D) but not for ERISA § 406(b) conflicts.
- PTCE 77-10 provides exemption **only** for ERISA § 406(b)(2) conflicts.

Expense Sharing – PTCE 76-1 and 77-10

- PTCE 76-1 states **sharing** office space/services **jointly secured** with PII with costs allocated *pro rata* is not PT and no exemption is required.
- PTCE 76-1 exempts when MEP secures space/services and furnishes portion to union, employer, employer association or another MEP which is PII.
- PTCE 77-10 expanded 76-1 exemption to provide relief from 406(b)(2) both for sharing space/services jointly secured + transactions exempted by PTCE 76-1 when trustee acts on both sides of transaction.

Other Issues to Consider When Preparing an Expense Sharing Arrangement

ERISA § 408(c)(2)

Fiduciary status of service provider

Pro rata allocation

Payment to a fiduciary -- ERISA § 408(c)

- Union or employer may be a fiduciary to MEP. See authorities in Expenses paper at FN 58.
- Expense sharing could violate 406(b).
- But no 406(b) violation if fiduciary provides services with only reimbursement of “direct expenses”.
 - See 29 CFR 2550.408b-2(e)(3) and 2550.408c-2(b)(3); authorities in Expenses paper at FN 40.
 - Direct expenses do not include overhead or expenses that would not have been incurred if services to plan not provided.

Payment for services by a fiduciary -- ERISA § 408(c)

- A fiduciary who is receiving full-time pay from union, employer, employer association may only receive reimbursement of direct expenses. See Expenses paper FN 36.
- Such fiduciary cannot assign right to compensation to employer. DOL Info Ltr Andrea B. Wapner (Aug. 23, 1979).
 - Therefore, employer or union could not be compensated for services provided by employee who is a trustee except for direct expenses.

PTCE 76-1 and 77-10 – Pro Rata Allocation

- Not required unless a trustee acts on both sides of transaction or for adverse party.
 - Even if not required might be appropriate administratively.
- Must still comply with compensation requirements of applicable PTE.

Conclusion

Checklist review
Questions

Checklist for Plans -- Review

- Will plan be transacting with a PII?
- Is the transaction a PT in ERISA § 406(a)?
- Is an exemption (PTE) from the PT available?
 - Requirements of each PTE and which is best suited to the transaction?
- Have ERISA § 406(b) conflicts been avoided in consideration/approval by fiduciaries?
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