



FINISHING CONTRACTORS ASSOCIATION TRUSTEE UPDATE

THE LATEST ON TRUSTEE GIFTS, GRATUITIES AND EXPENSES

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As many trustees are aware, the number one item that the U.S. Department of Labor, or DOL, looks at when it conducts an audit of an employee benefit plan, is the subject of trustee expenses, gifts and gratuities.

Very recently, the Employee Benefits Security Administration, EBSA, which is the agency of the DOL that is charged with correcting violations of federal law regarding employee benefit plans through administrative, civil, and criminal enforcement efforts, amended its employee handbook dealing with fiduciary investigations to further address the topic of trustee expenses, gifts and gratuities.

This modification to the DOL Enforcement Manual that deals with trustee expenses and gifts and gratuities is contained in Section 12 of the manual and reads:

“12. 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 assets of the plan as required for a violation of ERISA §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 § 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) as long as 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 § 406(b)(3) if a plan fiduciary 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.

Note that although the heading of the section mentions only gifts and gratuities, the content actually deals with trustee expenses, as well as gifts and gratuities.

TRUSTEE EXPENSES

Trustees who are full-time employees of sponsoring unions, sponsoring employer associations, or contributing employers may not receive any compensation from the fund for serving as a trustee **except** for the reimbursement of reasonable expenses actually incurred by the trustee.

In order for an expense to be reimbursable, all three of the following conditions have to be present:

- The expense must be reasonable.
- The expense must be actually incurred.
- The expense must be for the benefit of the plan and the participants of the plan.

A closer look at the newly added provisions to the enforcement manual can be quite helpful in educating trustees regarding this very important subject. The following is an analysis of some of the statements contained in the enforcement manual with respect to expenses.

1. Statement: *Investigations may disclose possible fiduciary violations involving a plan’s fiduciary acceptance, from a party dealing with the plan, of consideration such as meals, gifts, entertainment **or expenses** associated with educational conferences.* (emphasis supplied).

Here EBSA is focusing on the many educational conferences that are put on each year by professional educational organizations for trustees of employee benefit plans. The International Foundation of Employee Benefits Plans is one such organization, but by no means the only one that puts on trustee educational programs.

This statement is referring to two specific issues in conjunction with educational conferences:

- Expenses paid by the fund on behalf of the trustee and/or expenses reimbursed to the trustee.
- Expenses paid by “parties dealing with the plan.”

The term “party dealing with the plan” refers to vendors and service providers who by definition are “parties in interest” with respect to a plan. According to ERISA § 406(b)(3) it is illegal for a trustee to receive any consideration for his own personal account from **any party dealing with such plan** in connection with a transaction involving the assets of the plan.

The first question is: Who are these parties in interest?

They are vendors and service providers to the plan such as plan auditors, plan attorneys, plan consultants, plan investment managers, the plan’s bank, the plan’s administrator and any other entity or person that provides services or facilities to the plan.

An example of an expense paid for by a vendor would be a meal provided to a trustee. Payment of such an expense by a service provider is considered a payment made from plan assets, because the service provider has received fees from the plan and is deemed to be using these fees to pay the expenses. This does not mean however that any expense on behalf of a trustee paid by a service vendor is a violation of ERISA § 406(b)(3). Any expense that may properly be paid for by a plan out of plan assets may under certain circumstances be paid for by the service provider to the plan. For example, the trustees attend a day long trustees meeting and a working lunch is provided. This is a proper trust fund expense which could also be paid for by a service provider.

With respect to expenses paid either by the trust fund, or paid by the trustees and then reimbursed to the trustee by the trust fund, the rules have been well established. The first



and most important thing with respect to trustee expenses is that the trust fund should have a written comprehensive expense reimbursement policy. That policy should address such things as:

- Lodging.
- Airfare.
- Automobile rental.
- Meals.
- Reimbursement of wages.

The policy should make it clear that personal expenses are not to be reimbursed. Examples of personal expenses are:

- Telephone calls.
- Laundry.
- In room movies.
- Hotel mini bar.
- Shoe shines.
- Newspapers, books and magazines.
- Health club.
- Spousal expenses.

The policy should also address expense advances, receipts that are required to be supplied and the timing for submission of receipts and reconciling the advances the expenditures.

A well drafted expense reimbursement policy can be very helpful during a DOL audit. A poorly drafted policy or no policy at all, will cause nothing but headaches.

Trust funds should also have a written policy addressing attendance at educational conferences. The policy should include the types and numbers of conferences that can be attended, the eligibility of a trustee to attend the conference and should refer to the expense reimbursement policy that will govern all expenses in connection with the educational conference.

These two policies will address the concerns raised in paragraph 2, items (a) through (d) of Section 12 of the

enforcement manual.

2. Statement: *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.*

This statement reflects the importance of a trust fund having a policy regarding the receipt of these expenses by service providers. Sometimes this policy will be referred to as a “conflicts of interest” policy, or perhaps, an “ethics” policy. For those funds that are required to file IRS Form 990 returns each year, the Form 990 asks the question as to whether or not the Fund had adopted a conflicts of interest policy.

The guidance for such a policy is contained in the prohibited transactions sections of ERISA. Although these are already statutorily imposed upon the trust fund, a written policy can remind the trustees of what their obligations are. Keep in mind that if such a policy is adopted, it becomes a “plan document” and the fiduciary responsibility provisions of ERISA require that trustees adhere to all plan documents.

TRUSTEE GIFTS AND GRATUITIES

The same potential prohibited transaction issues that are present with the payment of Trustee expenses are also present when trustees receive gifts and gratuities.

The prohibition described above in ERISA 406(b)(3) means that it is illegal for a trustee to receive from a vendor or service provider such things as golf games, sports outings, trips or gifts. Just as expenses paid by a service provider on behalf of a trustee are deemed to be paid from plan assets, so too are gifts and gratuities deemed to be paid from plan assets.

3. Statement: *The Investigator/Auditor should treat as insubstantial, and not as an apparent violation of ERISA § 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) as long as their aggregate annual value is less than \$250 and their receipt does not violate any plan policy or provision: (a) gifts, gratuities, meals, entertainment, ...*

It is possible to read the statement in paragraph 1 of Section 12 as establishing a \$250 threshold for receiving gifts and

gratuities. In other words, anything above that amount is prohibited, anything below that is ok. In fact, there is no dollar threshold contained in ERISA 406(b)(3) for receipt of a gift or gratuity. In March of 2007, Virginia Smith, Director of Enforcement for the Department of Labor, gave a speech at an Investment Advisor Association Conference. During the speech, she said the following:

EBSA will be scrutinizing the 'illegal receipt of gifts and gratuities.'

Plan fiduciaries she said, “needs to be very, very careful under ERISA about accepting any gifts or gratuities from a service provider, **even items of modest value.**”

The revision in the enforcement manual appears to say that gifts and gratuities below \$250.00 are not material and the investigator/auditor should ignore them. In other words this \$250.00 threshold may be looked at as a “safe harbor.”

However, there is another federal statute that also impacts this issue. 18 U.S.C. § 1954 makes it a crime for a trustee to receive anything of value with the intent to be influenced from any person giving or proposing to provide services to the Plan. There is no threshold dollar amount for this criminal statute to be applicable. Receipt of a television has been sufficient to result in a conviction for a violation of this statute. Clearly, a trustee should never accept anything that would impact his/her decision regarding the trust that they are a trustee of. Also, the enforcement manual revisions, if they are read as a safe harbor, that safe harbor only exist if the trust fund has a written policy regarding receipt of expenses, gifts and/or gratuities.

After reviewing the revised enforcement manual and recognizing the potential danger in accepting gifts and gratuities, the best course of action is for the fund and the board of trustees to adopt a policy that they will receive no gifts or gratuities from service providers.

The Finishing Contractors Association wants the *Trustee Update* articles to serve its members. Your feedback or topic suggestions are welcomed by contacting William Ecklund at wecklund@felhaber.com or (800) 989-6321 or Amelia Townsend at atownsend@finishingcontractors.org or (703) 448-9001.



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