

**National Finishing Contractors Association
Trustee Conference Call**

April 27, 2011 – 2:00 P.M. Eastern Daylight Time

DELINQUENT CONTRIBUTIONS

I. Introduction

A. Fiduciary Duties - ERISA § 404

1) Statutory Language: ERISA § 404 sets forth the duties required of fiduciaries of employee benefit plans. Specifically, ... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims:

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA].

B. Personal Liability for Breach of Fiduciary Duties

If a fiduciary does breach a fiduciary duty, the law provides that the individual breaching the duty shall be personally liable:

1) To make good any losses to the plan resulting from the breach

- 2) To restore to the plan any profits which have been made through the use of assets of the plan by the fiduciary
- 3) And may be removed as a trustee
- 4) Are subject to such other equitable relief as the court may determine.

C. Prohibited Transactions - ERISA § 406

In addition to breaches of fiduciary duties, fiduciaries are prohibited from engaging in certain transactions known as “prohibited transactions.” Engaging in these transactions would also be a breach of fiduciary duty as well as a prohibited transaction subjecting the fiduciary not only to the remedies described above, but also to excise taxes. Prohibited transactions can be basically broken down into two categories:

- Transactions between the plan and a party in interest and
- Transactions between the plan and a fiduciary

1) Party in Interest

The “party in interest” definition is quite elaborate, and includes, any fiduciary (including, but not limited to, administrator, officer, trustee, or custodian of a plan, legal counsel to the plan, employee of the plan, a person providing services to the plan, any employer whose employees are covered by the plan, an employee organization whose members are covered by the plan, and certain other identified individuals such as relatives, trusts officers, directors, etc.

2) Transactions between a Plan and a Party in Interest, ERISA §406(a)

A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –

- sale or exchange, or leasing, of any property between the plan and a party in interest;
- lending of money or other extension of credit between the plan and a party in interest;
- furnishing of goods, services, or facilities between the plan and a party in interest;

II. Delinquency Collections

- 1) Failure to pursue delinquent contributions can be a prohibited transaction. The Department of Labor has issued a class exemption entitled Prohibited Transaction Exemption 76-1 (PTE 76-1), which addresses many of the standard transactions a Fund will find itself involved in. In PTE 76-1, the DOL stated:

Plans which do not establish and implement collection procedures which are reasonable, diligent and systematic may be found to be engaging in prohibited transactions under Sections 406 and 407(a) of the Act and Section 4975(c)(1) of the Code in failing to collect delinquent contributions.

Under the class exemption, there can be an arrangement to delay the receipt of a Plan contribution provided:

- The Plan has made an effort to collect the contribution.
- The terms of the extension are set forth in writing and are reasonable.
- The arrangement to extend the collection time is for the exclusive purpose of facilitating the collection of the contribution.

The Plan can accept less than the entire amount of the contribution provided:

- The Plan has made reasonable, diligent and systematic efforts to collect the contribution; and
- The terms of the Agreement are set forth in writing and under the circumstances based upon the likelihood of collecting the contribution or the expense that would be incurred if the Plan continued to attempt to collect the contribution.

A Plan can forego collecting any part of the contribution if:

- The Plan has made a reasonable, diligent and systematic effort to collect the contribution; and
- The determination to abandon the collection efforts is set forth in writing and is reasonable and appropriate based upon the likelihood of collecting the contribution or the expenses that would be incurred if the Plan continued to attempt to collect the contribution.

2) Delinquency Collections — Who Pursues?

What happens when the trustees disagree as to whether or not to start a collection action? Who has standing to sue? When the trustees cannot agree upon when to initiate suit, neither side has the authority to initiate suit unilaterally. Instead, the arbitration process provided for in the trust agreement (as opposed to the collective bargaining agreement, if any) must be utilized. *Alfarone v. Bernie Wolff Construction Corp.*, 788 F.2d 76 (2nd Cir. 1986).

3) Delinquency Collection by the Union

The union can institute suit under the collective bargaining agreement for failure of the employer to comply with the agreement; however, it may not be wise for the union to do so under most circumstances.

- a) The union may not be able to collect interest, liquidated damages and attorneys' fees.
- b) Arbitration process of collective bargaining agreements may have to be implemented prior to suit, thus delaying the whole process.
- c) The union may not be in the best position to have all the facts and figures with respect to the unpaid contributions.

4) Delinquency Collection by the Trustees

- a) Despite arbitration provisions required by the collective bargaining agreement, trust funds do have a right to initiate their own independent collection actions against delinquent employers without first resorting to the arbitration proceedings under the labor agreement. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 104 S.Ct. 1844 (1984).
- b) The National Labor Relations Board, rather than a federal court, must review and determine a trust fund's claim to recover employer contributions after the expiration of a collective bargaining agreement, but before a bargaining impasse. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 9 EBC 1457 (1998).

III. Practical Tips for Trustees

- 1) Under certain circumstances, may want to recommend to the union that the labor force be “pulled”.
- 2) Adopt rules and regulations cutting off benefits if contributions are not received.
 - (a) There are legal limitations on cutting off pension benefits for defined benefit plans.
 - (b) For health plans, require that participants pay the cost of coverage after one month delinquency.
- 3) Require bonds or cash escrow of new employers or previously delinquent employers.
- 4) Adopt a “habitually delinquent” policy requiring immediate legal action if an employer is delinquent.
- 5) Publicize delinquencies.
- 6) Amend trust agreement to facilitate imposing personal liability for delinquent contributions on those individuals who fail to remit the contributions to the Fund. (In other words, if an employer is having financial issues, the Fund would like the individuals working in the employer’s office that pay bills to pay the trust fund contributions first).

IV. Trustees Responsibility

- 1) Provide delinquency report at every trustees meeting.
- 2) Make sure written delinquency policy is up-to-date and followed by fund counsel and auditor.
- 3) Adopt written employer contribution audit policy.