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COLLECTING CONTRIBUTIONS: WHOSE RESPONSIBILITY IS IT ANYWAY?

by
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The Department of Labor (the "DOL") regulates the timely collection and forwarding of both participant and employer contributions to ERISA-covered plans. Its investigations have revealed parties attempting to relieve plan trustees of those responsibilities without clearly and carefully allocating them elsewhere. In response, the DOL provided Field Assistance Bulletin 2008-01 (the "Bulletin") to clarify various fiduciaries' (including trustees') obligations with respect to contribution collections. This newsletter will briefly describe the context of the Bulletin before summarizing the DOL's views expressed therein.

Context: Plan Assets and Associated Fiduciary Duties

The DOL is concerned with both participant contributions and employer contributions being forwarded to a plan on a timely basis. Participant contributions receive more attention from commentators, particularly in light of recently proposed DOL regulations. Those contributions become "plan assets" in the employer's hands on the earliest date the amount withheld from wages or paid to the employer can reasonably be segregated from the employer's general assets. With respect to an employee pension benefit plan, this date can be *no later than* the 15th business day of the month following the month in which participant contribution amounts were withheld from the employee's paychecks or paid to the employer. Importantly, that 15th-business-day deadline is not a safe harbor, but merely an outer limit on the "reasonably segregated" standard. (Recently proposed DOL regulations would provide a 7th-business-day safe harbor for plans covering fewer than 100 participants on the first day of the plan year, and the DOL is considering whether to develop safe harbor rules for larger plans.) If the participant contributions have become plan assets while in the employer's hands, they are delinquent. And ERISA and the DOL become concerned.

Although employ<u>er</u> contributions do not receive the same degree of attention, they may raise the same level of plan asset concerns. Employer contributions are delinquent when they have become due and owing to the plan under plan-governing documents but not yet been transmitted to the plan. Many courts would hold that the contributions have become plan assets at that point. The DOL characterizes the plan assets in a slightly different manner, but with similar practical effect. The DOL's position is that the employer contributions do not become plan assets until contributed to the plan, but that the plan's *claim* against the employer for the delinquent contributions is a plan asset.

Potential fiduciary and prohibited transaction liabilities arise when employers retain delinquent participant contributions or a plan has not timely received employer contributions. The DOL's investigations have revealed agreements purporting to relieve trustees of the fiduciary responsibility to collect, monitor, and forward both types of those contributions. That prompted the DOL to issue the Bulletin, which clearly addresses various fiduciaries' responsibilities, as well as the permissibility and implications of relieving certain trustees of contribution collection responsibilities.

Trustee Responsibility

The analysis must begin with the presumption that the collection responsibility rests with the trustee (subject to exceptions discussed in the next paragraph). Under common law, trustees bear fundamental duties to preserve and maintain trust assets, and to enforce valid claims held by the trust. In addition, a trustee is always a fiduciary under ERISA as a result of – and to the extent of – its authority and control over plan assets. It must discharge its fiduciary duties, including the collection of contributions, prudently and solely in the plan participants and beneficiaries' interests. ERISA allows named fiduciaries to appoint multiple trustees and to allocate trustee responsibilities among trustees, but does not otherwise allow trust documents to simply excuse trustees from their duties under ERISA.

ERISA provides two exceptions to the general requirement that exclusive authority and discretion to manage and control plan assets be vested in one or more plan trustees. First, a plan may expressly provide that the trustee is subject to the direction of a named fiduciary who is not a trustee (that is, a "directed trustee" relationship). Second, the authority to manage, acquire, or dispose of plan assets may be delegated to one or more investment managers. The DOL cautions that parties must be clear and careful to ensure the documents support the reliance upon either of these exceptions. Where the plan and trust documents are ambiguous, the DOL reasons that the ambiguity should be resolved in favor of trustee responsibility (rather than a manner that relieves trustees and investment managers from responsibility).

In sum, authority over a plan's claim for delinquent contributions must be assigned to one of the following: (1) a plan trustee with discretionary authority over plan assets; (2) a directed trustee; or (3) an investment manager.

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Named Fiduciary Responsibility

So, since employers or other named fiduciaries are not among the three fiduciaries discussed above, does an employer or named fiduciary really need to be concerned with these issues? Well, yes. A named fiduciary responsible for appointing trustees does not simply get off the hook. A named fiduciary must, instead, ensure that the obligation to collect contributions is appropriately assigned in one of the manners listed above. We mentioned earlier that the DOL has discovered trust agreements that would relieve plan trustees of any responsibility to monitor and collect delinquent contributions. The DOL allows such an approach, but also requires the *named fiduciary* to ensure that another trustee or investment manager has the responsibility. If not, the fiduciary with authority to hire the trustees <u>may be liable for plan losses</u> due to a failure to collect contributions. Accordingly, this potential exposure should motivate employers and other named fiduciaries to ensure the plan and trust documents' terms allocate contribution collection responsibilities as discussed in the Bulletin.

More for Trustees

After describing named fiduciaries' responsibilities and acknowledging that a discretionary trustee could shed its contribution collection responsibilities, the DOL explicitly emphasized that the ball could find its way back into any trustee's court. Even if the trust agreement's terms relieve a particular trustee from the responsibility to monitor and collect contributions, that trustee (including a

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directed trustee) nonetheless would have an obligation to take appropriate steps to remedy a situation in which the trustee knows no party has assumed collection responsibility or that delinquent contributions are going uncollected. The trustee would be so liable whether it participates knowingly in another fiduciary's breach or enables another fiduciary's breach without taking reasonable efforts to remedy the breach. The plan and trust documents cannot absolve a fiduciary from co-fiduciary liability for failing to take steps to remedy a known breach of another fiduciary.

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Action Steps for Named Fiduciaries and Trustees

The Bulletin should eliminate any fiduciary's inclination to avoid discussing contribution collection responsibility for fear that it might find itself saddled with the responsibility. Though some fiduciaries may have a practical interest in not having the responsibility, they ought to have a greater interest in ensuring that *someone* clearly does. Named fiduciaries should review plan documents and trust agreements to ensure they unambiguously allocate contribution collection responsibilities. It is similarly in trustees' best interests to do the same, particularly in light of the Bulletin's presumption of trustee responsibility in the event of ambiguity. A DOL representative (unofficially) recommended at a May 2008 American Bar Association Tax Section presentation that parties respond to the Bulletin by amending plan and trust documents to clarify the duties of the plan sponsor, discretionary trustees, directed trustees, and investment managers. And even a trustee that has been relieved of contribution collection responsibilities should be mindful of others' failure to fulfill their obligations and be prepared to take steps to remedy that failure. Depending upon the circumstances, those steps could involve advising the named fiduciary of the breach, reporting the breach to other fiduciaries, taking direct actions to collect contributions, seeking a plan or trust document amendment to properly allocate responsibility, or seeking a court order to perform that allocation.

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