

Revised Eighth Edition

# Trustee Handbook

A Guide to Labor-Management  
Employee Benefit Plans

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**Editor and Contributor**

Where applicable, International Foundation staff has updated content to reflect recent laws, regulations and statistics for this Revised Eighth Edition of Trustee Handbook. Any inaccuracies in the updates are not the fault of the authors.

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## Chapter 25

# Apprenticeship and Training Funds

*Richard T. Kennedy and Levi K. Logan*

Apprenticeship and training funds (referred to as *apprenticeship funds* or *funds* throughout this chapter) have a long history of providing skilled workers for a number of industries. These funds are employee welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and are typically exempt from federal income taxation under the Internal Revenue Code (IRC). As a result, the funds are subject to many of the same laws and requirements that apply to other multiemployer welfare plans. Because of their training and education function, it is important to know that these funds are subject to additional laws and requirements.

Apprenticeship funds seem to be largely ignored in the benefit literature. This chapter helps remedy this—discussing how these funds are similar to other benefit plans and highlighting some unique characteristics, laws and regulations.

## What Laws and Regulations Apply to Apprenticeship and Training Funds?

### *The Taft-Hartley Act*

The Taft-Hartley Act of 1947 applies to all multiemployer benefit trust funds including apprenticeship and training funds. The act prohibits payments from an employer to a union or employee representative. Violations can result in criminal penalties. There is an exception, however, for contributions to employee benefit trust funds—which include apprenticeship and other training funds. To be covered by the exception, there must be:

- A written agreement with the employer that sets forth the detailed basis on which such payments are made to the trust fund
- Equal representation by employers and employees in the administration of the fund
- Procedures to resolve deadlocks in fund administration between the employer and employee groups
- Provisions for annual audits of the fund.

### *ERISA*

ERISA is a key statute protecting the interests of employee benefit plan participants and establishes requirements for plan administration. Apprenticeship and training funds, like other plans covered by ERISA, must be established and maintained pursuant to a written plan document. All fund assets must be held in trust, which requires a trust agreement. Plan trustees are named in the plan document or trust agreement or appointed by a named fiduciary. An explanation of the operation of plans under ERISA is in Chapter 4.

### *Federal and State Tax Laws*

The IRC governs the federal income tax treatment of plan contributions, trust income, instructor compensation and other apprenticeship fund payments.

Like other multiemployer benefit plans, apprenticeship funds can qualify for tax-exempt status under the IRC. The trust income of tax-exempt funds is not subject to federal income tax. Funds that are exempt from federal income tax may also qualify for exemption from a number of state and local taxes, such as income, sales and

property taxes. For apprenticeship funds, the tax savings can offset the costs of training and education programs. Tax laws must be reviewed on a case-by-case basis—A fund accountant can help determine what state and local taxes apply.

Apprenticeship funds can qualify for federal income tax exemption as a 501(c)(3) charitable and educational organization, a 501(c)(5) labor organization or a 501(c)(9) voluntary employees' beneficiary association. These refer to sections in the IRC. Most, if not all, apprenticeship funds are tax-exempt organizations. To establish tax-exempt status, an application is filed with the Internal Revenue Service (IRS).

As an interesting side note, IRS maintains an online search tool referred to as Exempt Organizations Select Check at [www.irs.gov/app/pub-78](http://www.irs.gov/app/pub-78) which can be used to search for 501(c)(3) organizations. Even though an apprenticeship fund's tax exemption is actually evidenced by an exemption letter issued by IRS, this online search tool can be used to determine or confirm the 501(c)(3) tax-exempt status of an apprenticeship fund.

### ***National Apprenticeship Act***

The National Apprenticeship Act authorizes the U.S. Department of Labor (DOL) to (1) encourage the establishment of apprenticeship programs (2) issue regulations and standards that safeguard the welfare of apprentices and (3) cooperate with states in the formulation and promotion of apprenticeship standards.

DOL has issued regulations found at 29 CFR Part 29 and Part 30. Part 29 covers the registration of apprenticeship programs, including the required "standards of apprenticeship" and "apprenticeship agreements." Part 30 covers antidiscrimination and equal opportunity requirements that apply to apprenticeship programs.

Most apprenticeship programs register with the DOL Office of Apprenticeship, Employment and Training Administration or a state apprenticeship agency authorized by DOL. Registration requires compliance with the standards established by DOL. Programs must also be reviewed and approved by DOL or the state agency with which the program is registering. The registration agency can provide guidance and assistance on the requirements for registration and the registration process detailed in 29 CFR Part 29.

DOL regulations require registration agencies to evaluate the performance of a registered apprenticeship program. Program elements considered include quality assurance assessments, equal employment opportunity compliance reviews and completion rates. DOL regulations also identify factors for both voluntary and involuntary deregistration

of an apprenticeship program and provide for hearings and appeals of an involuntary termination.

### **Laws Prohibiting Discrimination in Employment or Training**

Although not addressed here, many state and local laws prohibit discrimination in employment or training. These laws often coincide with federal antidiscrimination laws—some provide more protections to workers and trainees than federal law. Trustees need to be aware of all of the anti-discrimination laws applicable to apprenticeship and training programs and keep abreast of changes.

**The Equal Pay Act of 1963 (EPA)**—an amendment to the Fair Labor Standards Act—requires employers to pay the same wage to men and women who perform jobs that require substantially the same skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. Pay differences are permitted when based on seniority, merit, quantity or quality of work, or factors other than gender.

**The Age Discrimination in Employment Act of 1967 (ADEA)** protects certain applicants and employees 40 years of age and older from discrimination based on age in hiring, promotion, discharge, compensation, all within the terms, conditions and privileges of employment. ADEA also prohibits harassment because of an individual's age. This federal law treats the apprenticeship fund as an employer if the fund employs 20 or more persons. If a fund has fewer than 20 employees, a fund may still be subject to state or local laws prohibiting age discrimination in employment. Most state and local age discrimination laws apply to employers with far fewer employees. For example, the threshold in Pennsylvania for age discrimination protection is four employees. For most apprenticeship programs, ADEA also applies to the selection, discipline and training of apprentices.

**Title VII of the Civil Rights Act of 1964**, as amended, makes it unlawful for an employer to discriminate against any individual on the basis of race, color, religion, sex or national origin. Title VII also prohibits racial, religious, ethnic or sexual harassment in the workplace. If a fund has 15 or more employees, Title VII applies to fund hiring, discipline and termination of employees. If the fund has fewer employees, most states and many local governments have similar prohibitions against employee discrimination and harassment that may apply. For most apprenticeship programs, Title VII also prohibits discrimination in the selection, discipline and training of apprentices.

**Title I of the Americans with Disabilities Act of 1990 (ADA)** prohibits discrimination against qualified disabled individuals with respect to application procedures, job training and other conditions of employment. Persons are considered disabled if they have a physical or mental impairment (or a record of impairment) that substantially limits one or more of their major life activities. Major life activities include hearing, sight, learning, speaking, walking, breathing, and the operation of a major bodily function. A “qualified” individual is an individual who, with or without reasonable accommodations for the disability, can perform the essential functions of a job.

Reasonable accommodations must be made for individuals who have a disability or a record of a disability. An employer is required to work with disabled employees to determine what accommodations can be made to enable the employees to perform their work. There is also protection under the ADA for individuals who are “regarded as disabled” because of an actual or perceived physical/mental impairment that is not transitory or minor.

ADA applies to an apprenticeship fund as an employer if the fund employs 15 or more employees. In most cases, ADA also applies to the selection and treatment of apprentices. Many state and local laws also prohibit discrimination based upon disability.

The ADA’s impact can extend beyond employment and training. ADA might also be applicable to a building owned or operated by a fund. **Title III of ADA** requires accessibility to buildings where people are employed or trained.

### *DOL Regulations*

In addition to the above statutes, DOL has issued equal employment opportunity regulations that apply to the recruitment and selection of apprentices and to all conditions of training during the apprenticeship.

### *Other Statutes*

There are other employment-related laws that can apply to a fund. For example, the **Family and Medical Leave Act (FMLA)** (applicable if an apprenticeship fund has 50 or more employees) provides employees with the right to take an unpaid leave of absence for specified family-related reasons. Another is the **Uniformed Services Employment and Reemployment Rights Act (USERRA)** that provides eligible apprentices and employees returning from qualified military service with federal reemployment rights and prohibits discrimination based on military service or obligations.

Apprenticeship funds must be aware of and comply with these obligations. Legal counsel or other professional advisors can offer advice and additional information.

### **What Are the Standards of Apprenticeship?**

To qualify for approval and registration by a registration agency, an apprenticeship program must have written standards that cover the terms and conditions for the recruitment, selection, employment and training of apprentices. The provisions required for these *standards of apprenticeship* are covered in detail in DOL regulations at 29 CFR Part 29. Among the provisions that must be addressed in the standards are:

- The training and employment of the apprentice in a skilled occupation
- The terms of the apprenticeship, which can be measured by on-the-job learning, the attainment of skill competency, or both
- The supervised work experience and on-the-job training that the apprentice will receive
- The instruction in technical subjects related to the occupation that will be provided, with an annual minimum of 144 hours recommended
- A progressively increasing schedule of wages consistent with the skills acquired
- A periodic review of apprentice performance on the job and in the classroom
- The minimum qualifications for apprenticeship
- Compliance with the nondiscrimination and equal opportunity requirements of 29 CFR Part 30, including an equal opportunity pledge and adoption of an affirmative action plan
- The requirement for a written apprenticeship agreement and the registration of the apprenticeship agreement
- The registration of the apprenticeship program.

In addition to DOL and state agencies, advice and assistance on the preparation and administration of standards of apprenticeship may be available from the international union or a national apprenticeship and training program.

### **What Is an Apprenticeship Agreement?**

DOL regulations also require an *apprenticeship agreement*. Generally, this is a written agreement between the program sponsor and the apprentice. The agreement sets forth the terms and conditions for the employment and training of the apprentice. The apprenticeship agreement is registered

with the registration agency as evidence of the apprentice's participation in the apprenticeship program.

DOL regulations specify the contents of the agreement. In addition to incorporating the standards of apprenticeship, the agreement must (among other things):

- Identify the apprentice and the apprenticeship program
- List the occupation in which the apprentice is to be trained
- Specify the term of the apprenticeship program
- State the graduated scale of wages to be paid
- Include statements on the required cancellation provisions
- Provide contact information for the party designated to receive and resolve complaints.

Apprenticeship agreements are prepared in conjunction with the standards of apprenticeship. DOL, state agencies, the international union or a national apprenticeship and training program can provide advice and assistance on preparation.

## Who Manages Apprenticeship and Training Programs?

### *Joint Apprenticeship and Training Committee*

A Joint Apprenticeship and Training Committee (JATC) is typically the sponsor of an apprenticeship and training program. The JATC is responsible for the administration and operation of the program under the National Apprenticeship Act.

A JATC is not necessarily the ERISA plan administrator and/or board of trustees, but it can be. Often, this is determined by the size of the fund. For a fund covering a single registered program, a board of trustees appointed in accordance with the Taft-Hartley Act can serve as the JATC, the ERISA plan administrator and ERISA trustees. For a larger fund covering a number of registered apprenticeship programs, each program may have its own JATC while the overall operation of the fund and the investment of the assets is administered and managed by a different (or smaller) board or committee.

### *Apprenticeship Training Coordinator*

Many apprenticeship funds have a *training coordinator* (or *manager*). The coordinator most often is a fund employee responsible for carrying out the daily administration and operation of the program within the guidelines of the fund's standards of apprenticeship and the JATC.

The coordinator may also serve in any or all of these roles:

- Member of the JATC
- ERISA plan administrator
- ERISA trustee.

Fulfilling these additional functions does not seem to be a typical practice. If done, it should be carefully structured and reviewed for compliance with the ERISA prohibited transaction provisions.

Whether a coordinator has fiduciary responsibilities under ERISA depends upon the discretion and authority given to the coordinator. Most funds treat an apprenticeship coordinator as a fiduciary.

## Are There Any Regulations Concerning Program Instructors?

Instructors typically are employees of an apprenticeship fund, but not always. Instructors are sometimes hired as "independent contractors." Without going into detail, an employee relationship exists for federal employment and tax law purposes when an employer has the right to direct and control a worker with respect to not only what a worker does, but also how the worker does the work. It is very important that instructors be properly classified. An apprenticeship fund has very different duties, responsibilities and obligations to employees and independent contractors, and it could incur significant liability if instructors are misclassified.

Perhaps stating the obvious, an apprenticeship fund should hire instructors with the necessary expertise, background and skills to be an effective teacher. In this regard, DOL regulations establish two specific requirements for an apprenticeship instructor:

1. The instructor must either meet state department of education requirements for a vocational-technical instructor or be a subject matter expert. A *subject matter expert* is an individual who is recognized within an industry as having expertise in a specific occupation. This would include journeymen with the necessary expertise.
2. The instructor must have training in teaching techniques and adult learning styles. This training can occur before or after the instructor has started teaching; it can be provided by the fund or by an accredited institution of higher learning.

## What Policies Are Needed to Comply With Laws That Prohibit Discrimination?

The laws prohibiting discrimination in employment and training have a major impact on the operation of appren-

ticeship and training programs. Besides the operational impact, the remedies and penalties for a violation can be significant. The remedies for violating Title VII of the Civil Rights Act or Title I of ADA include back pay; front pay in lieu of reinstatement; damages for loss of benefits; compensatory damages including damages for emotional distress, pain and suffering; as well as punitive damages. The remedies for a violation of ADEA include back pay, front pay in lieu of reinstatement and damages for loss of benefits. Damages can be doubled when there is a willful violation of ADEA.

Trustees need to be aware of the basic application of these laws to employees and apprentices. Two key issues to consider are an antiharassment policy and the equal employment opportunity standards for apprenticeship and training.

### *Antiharassment Policy*

Title VII prohibits racial, religious, ethnic or sexual harassment. *Harassment* for this purpose is verbal or physical conduct for the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. The Equal Employment Opportunity Commission (EEOC) administers Title VII.

EEOC regulations define the term *harassment* broadly to include epithets, slurs, negative stereotyping, threatening or hostile acts, and written or graphic material that denigrates or shows hostility to a person in a protected class or the protected class itself. The standard for determining harassment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive.

Harassment also includes unwelcome sexual advances or requests for sexual favors and other verbal or physical conduct—where acceptance or rejection of the conduct is the basis for a favorable or unfavorable action toward an employee or apprentice. A fund may be liable for the conduct of its employees or apprentices if the fund (1) knew or should have known about conduct that occurs at an apprentice function and (2) fails to take action to stop the conduct.

To minimize liability, every fund should have a written policy against harassment that is clearly and regularly communicated to employees and apprentices. An antiharassment policy should provide procedures by which harassment victims can (1) make their complaints known and (2) have their complaints promptly and confidentially investigated. The policy should provide an opportunity for a person to make a complaint to the apprenticeship coor-

dinator or to a union- or employer-appointed trustee. A policy that allows a complaint to be filed with a number of persons may avoid circumstances where a person is reluctant to bring a complaint involving the person with whom the complaint is to be filed. The policy should also provide for an investigation and action that stops the harassment. Trustees often rely on professionals to draft and implement an antiharassment policy and to assist with claims.

### *Equal Employment Opportunity Standards for Apprenticeship and Training*

DOL regulations set forth the general equal employment opportunity requirements for apprenticeship and training programs.<sup>1</sup> These regulations prohibit discrimination based on race, color, religion, national origin, sex, sexual orientation (including gender identity), pregnancy, age (i.e., over age 40), genetic information or disability in the recruitment, selection, employment and training of apprentices. The regulations also require uniform application of rules and regulations to all conditions of training during the apprenticeship and that the apprenticeship fund take affirmative action to provide equal opportunity in apprenticeships.

Notably, the regulations require an apprenticeship program (with five or more apprentices) to adopt a written affirmative action plan. Affirmative action plans must include the process by which the apprenticeship program reaches out to qualified women and minority applicants in targeted groups and individuals with disabilities.

To ensure apprenticeship funds are recruiting members from the protected classes, funds are required to develop lists of recruiting resources that must be updated annually. These resources must also be notified at least 30 days prior to any apprenticeship openings so potential candidates can be notified and referred.

Review of an affirmative action plan must be conducted in conjunction with a workforce analysis every three years to ensure current recruitment efforts are consistent with DOL regulations. The analysis examines apprentice composition based on race, sex, ethnicity and disability. If the utilization rate for women or any racial or ethnic groups is found to be less than reasonably expected given the availability of such individuals for apprenticeships, the fund is required to establish utilization goals to boost the participation of these groups. Newly registered apprenticeship programs are required to conduct an initial workforce utilization analysis within two years of their program registration date.

An apprenticeship program is required to maintain records that include the affirmative action plan, a summary of each applicant's qualifications, and the basis for selecting

or rejecting each applicant. DOL has the authority to conduct affirmative action compliance reviews (as well as general compliance reviews) and to investigate complaints filed by an apprentice or applicant for apprenticeship. DOL also has the power to impose sanctions on a program for not operating in accordance with the equal employment opportunity requirements. These sanctions include instituting proceedings to deregister the apprenticeship program.

DOL regulations allow a fund's affirmative action program to use any method when selecting apprentices provided the method meets the following requirements:

1. Comply with UGESP at 41 CFR part 60-3
2. Be uniformly and consistently applied to all applicants and apprentices
3. Comply with qualification standards of ADA
4. Be facially neutral in terms of protected groups.

There is detailed guidance in the regulations on the application of each of these requirements.

In addition, DOL regulations require the designation of an individual with appropriate authority to be responsible for overseeing the development and implementation of an apprenticeship fund's affirmative action program. This individual will most likely be the apprenticeship coor-

dinator. The person is responsible for monitoring registered apprenticeship activity to ensure compliance with the affirmative action program, maintaining records and preparing reports required by the regulatory agency.

### *Selection Procedures*

A fund's standards of apprenticeship generally establish the time frame for notifying the public it is accepting applicants. These time frames should be followed.

If applicants are required to take a written test, the test and test scores must be directly related to performance on the job and in the apprenticeship program. This requirement is also true for tests administered by state employment agencies. If an aptitude test is used, consider hiring a consultant to assist in the preparation of the test. A consultant can validate the test, certify the test is not discriminatory, and substantiate there is a relationship between test scores and the ability of applicants to succeed with training in class and on the job.

Oral interviews cannot be used to determine admission into an eligibility pool. However, once a group has been determined to be eligible based upon the application and/or an aptitude test, oral interviews are permissible. During the interview, take care not to ask for any information that cannot be requested on an application. The interviews should not request information concerning the applicant's race, sex, religion, age, national origin, sexual orientation, genetic information or disability. Interviewers should be consistent in the information they seek from each applicant. One way to accomplish this is to develop a written set of questions before the interview and to use the same questions for each applicant. This helps maintain the objectivity of the interviews and helps provide evidence that all individuals interviewed were treated equally.

One danger of an oral interview is that an applicant may voluntarily disclose information that interviewers are not allowed to request. For example, an applicant may begin to discuss a workers' compensation case in which he or she is involved. If this happens, interviewers should advise the applicant the information is not relevant and will not be considered in the selection process. This type of information should not be considered during the decision-making process, nor should followup questions ever be asked.

The fund should establish weights for factors such as work experience, test scores and interview responses. An applicant who has not been selected may challenge the decision with DOL, EEOC, a state agency or in another forum. If emphasis is on objective factors such as work experience

#### **Regulatory Update**

On November 6, 2015, DOL proposed regulations that would update 29 CFR part 30 covering equal employment opportunity in apprenticeship funds. The proposed regulations update the groups covered by antidiscrimination rules and provide new procedures to monitor apprenticeship funds' affirmative action obligations.

The proposed regulations add gender identity, genetic information, disability, age (40 and older) and sexual orientation to the list of protected classes. All of the new classes are currently covered by other federal laws prohibiting discrimination so most of the changes to current apprenticeship standards and affirmative action policies regarding protected classes should be minimal.

The method of selecting apprentices has also been updated in the proposed regulations. The new requirements are meant to simplify the selection procedure. Funds will be able to select any method they want, including direct entry.



and test scores, it is easier to respond to a legal challenge. If more weight is given to the interview process, which tends to be more subjective, it is more difficult to have a challenge dismissed. This is especially true if the applicant's objective scores are higher than the objective scores of individuals who were selected.

The effect of ADA (Title I) on the selection process is especially significant. Disability-related inquiries should not be included on an application or in an interview. Such inquiries include questions whether an applicant:

- Has a disease
- Was sick in the previous year
- Has been injured or treated for alcohol or mental health problems
- Is currently taking prescription drugs.

ADA does not allow an apprenticeship program to require a physical examination or completion of a medical questionnaire prior to applicant selection. A physical exam after a person has been conditionally selected for the apprenticeship program, however, is permitted. A conditional offer may be revoked if the condition discovered is job related and is consistent with business necessity.

Drug testing is not a medical examination under ADA. A current user of illegal drugs is not a qualified disabled individual. An increasing number of states have legalized the use of medical marijuana; the application of state law and its interaction with ADA should be carefully reviewed if an applicant tests positive for medical marijuana use.

ADA requires examination results be kept confidential and in a separate file from the applicant's regular file. Information obtained from post-offer physicals or other medical information that comes to the attention of the program is also confidential and should be accessible only to persons who have an absolute need to know the information.

Regular review of apprenticeship program application and selection procedures helps ensure the process continues to be relevant and legal.

### **What Are the 501(c)(3) Tax Exemption Provisions?**

To qualify for federal income tax exemption as a 501(c)(3) educational organization, an apprenticeship fund must satisfy an organizational test and an operational test. Well-run apprenticeship funds should have little difficulty in satisfying these and other basic 501(c)(3) exemption requirements:

- The organizational test requires that the exempt purpose be properly described in the operating documents.

- The operational test generally requires that an apprenticeship fund engage primarily in activities that further its exempt educational purposes.
- No part of the net earnings of the trust fund may inure to the benefit of any private shareholder or individual; the tax exemption can be jeopardized if the fund serves a private interest, rather than a public interest.
- An apprenticeship fund may not engage in any political campaign activity whatsoever and may engage only in "insubstantial" legislative activities unless it makes a special election to be subject to specified limitations on lobbying expenditures.

As a "private school," an apprenticeship fund must satisfy all of the following additional exemption requirements:

- The operating documents (or a resolution) must include a statement of the program's racially nondiscriminatory policy.
- A notice of the nondiscriminatory policy must be included in brochures and written advertising and may need to be publicized in local newspapers.
- The fund must be operated in a racially nondiscriminatory manner, including with respect to any scholarships or loans.
- Compliance must be certified annually (Schedule E, Form 990 or 990-EZ).
- Proper and specific records must be maintained.

### **Are ERISA Reporting and Disclosure Requirements the Same as for Other Benefit Plans?**

DOL regulations waive ERISA (Title I, Part 1) reporting and disclosure requirements for an apprenticeship fund providing only apprenticeship and training benefits, if the fund does all of the following:

- Files a one-time notice with DOL
- Takes reasonable steps to disclose information in the notice to employees of contributing employers who may be eligible for any of the fund's training or education programs
- Makes the notice available to employees upon request.

If this exemption does not apply, an apprenticeship fund is subject to ERISA's reporting and disclosure requirements—most notably the requirement to file the Annual Return/Report of Employee Benefit Plan (Form 5500). DOL can assess a penalty of up to \$2,063 per day (adjusted annually) against a plan administrator for a failure to file the form in a timely fashion when it is required.

IRS requires most 501(c)(3) organizations (and other tax-exempt organizations) to file a Form 990, Return of Organization Exempt from Income Tax (or if eligible, a Form 990-EZ, Short Form, Return of Organization Exempt from Income Tax). Financial penalties can also be assessed for failing to file the Form 990. Failure to file a Form 990 for three consecutive years will result in the loss of tax-exempt status.

## How Are the Unique Facility and Equipment Needs of Apprenticeship and Training Programs Addressed in ERISA?

Unlike other ERISA welfare plans, apprenticeship funds own or lease training facilities, equipment and/or materials used to train apprentices and journeymen. This distinguishes apprenticeship funds from other ERISA welfare plans. More importantly, this often means apprenticeship funds enter into more transactions with unions or contributing employers that require a heightened review of potential prohibited transaction issues. For example, it is not unusual for an apprenticeship fund to lease a union-owned training facility or to purchase supplies from a contributing employer working in the same industry. Both of these would be a party in interest prohibited transaction if ERISA or DOL did not provide an exemption.

A key ERISA statutory exemption permits plans to pay a party in interest, including a fiduciary, for office space or for services and incidental goods if these three criteria are met:

1. The office space or service is necessary for the establishment or operation of the plan.
2. The office space or service is furnished under a reasonable contract or arrangement.
3. No more than reasonable compensation is paid.

This exemption applies to the party in interest prohibited transaction provisions, but not to the self-dealing/conflict of interest prohibited transaction provisions. For a fuller explanation of prohibited transactions, see Chapter 4.

DOL has issued three important prohibited transaction class exemptions of particular interest to multiemployer benefit plans and apprenticeship and training programs.

1. PTE 76-1 permits multiemployer plans to do the following with an employer, employer association, union or another multiemployer plan that is a party in interest:
  - a. Lease office space to each
  - b. Provide administrative services to each
  - c. Sell or lease goods to each.

This exemption applies to the party in interest prohibited transaction provisions, but not to the self-dealing/conflict of interest prohibited transaction provisions.

2. PTE 77-10 complements PTE 76-1 by enabling a multiemployer plan to do the following with an employer, employer association, union or another multiemployer plan that is a party in interest:
  - a. Share office space, administrative services and goods
  - b. Lease office space
  - c. Provide administrative services
  - d. Sell or lease goods.

This exemption applies to the conflict of interest (but not self-dealing) prohibited transaction provisions.

3. PTE 78-6 permits an apprenticeship plan to
  - a. Purchase personal property from a contributing employer
  - b. Lease personal property or real property (other than office space) from a contributing employer
  - c. Lease real property (other than office space) and incidental personal property from a union.

This exemption applies to the party in interest prohibited transaction provisions, but not to the self-dealing/conflict of interest prohibited transaction provisions.

It is essential to consider carefully the circumstances when relying on an exemption from the prohibited transaction provisions.

These statutory and class exemptions typically provide the relief necessary for the operation of apprenticeship and training programs, but not always. For example, an apprenticeship fund purchase (or sale) of a training center from (or to) the (bargaining party) union is a party in interest prohibited transaction not covered by the foregoing exemptions—or any other statutory or class exemption. This is true even though the fund's leasing of a training center from the same union would be exempt under PTE 78-6.

As another example, a loan to an apprenticeship fund by another fund with common trustees would be a conflict of interest prohibited transaction for which there is no exemption.

It cannot be emphasized enough that all transactions with a party in interest or where a fiduciary may be operating under a conflict of interest should be carefully reviewed.

As a final example, under DOL's position that a trustee who is a member or officer of a union has an interest that

may affect a trustee's judgment as a fiduciary in a transaction with the union, any participation by a trustee in a fund transaction with the union would be a self-dealing prohibited transaction for which there is no exemption.

### **What Insurance Does an Apprenticeship and Training Fund Need?**

Like other ERISA plans, an apprenticeship fund must purchase ERISA fidelity bond coverage and should purchase fiduciary liability coverage to protect its plan assets. Recently, many ERISA plans have also purchased cyberliability insurance to cover the costs and liability for a data breach.

With respect to fiduciary insurance, it is important not to overlook the waiver-of-recourse endorsement. ERISA requires that an insurer have a right of *recourse* (recovery) against a breaching fiduciary when plan assets are used to purchase fiduciary insurance. Insurers waive this right of recourse or recovery under a *waiver-of-recourse endorsement*. Obtain this endorsement to protect the personal assets of fiduciaries. A minimum insurance premium is charged for the endorsement. The premium cannot be paid with plan assets. The fiduciary or the respective appointing bargaining party typically pays for it. Details concerning fidelity bond coverage and fiduciary coverage are provided in Chapters 11 and 12.

Because apprenticeship funds own or lease training facilities, equipment and materials, the insurance needs of an apprenticeship fund are far more complicated than those

of most other benefit plans. In addition to the more obvious types of insurance such as fire, theft, casualty, marine, general liability and workers' compensation, trustees may also want to consider employee practice liability insurance depending upon the number of employees, business disruption insurance and educational liability insurance.

Trustees should engage a knowledgeable insurance broker to assist them in determining fund insurance needs and to assist in obtaining the lowest possible premium. Failure to consider the insurance needs of an apprenticeship fund and to protect plan assets could be a breach of fiduciary duty.

### **Conclusion**

Service as a trustee of an apprenticeship fund may initially seem to be a daunting task, with many things to know and many responsibilities. It has been the authors' experience that the vast majority of trustees approach their responsibilities seriously and with the goal of providing the best training and education possible for apprentices and journeymen. This approach, along with a reliance on experienced trustees and knowledgeable advisors as needed, will enable all trustees to perform properly their important role in the operation of apprenticeship funds.

### **Endnotes**

1. 29 CFR Part 30.
2. *Ibid.*