Trustees of multiemployer benefit plans need to understand the why, when and how of collecting contributions.

by | Kent G. Cprek
Multiemployer Plan Collections—
A Refresher and Guide

Collections remain the basic foundation of funding for multiemployer benefit plans—both pension and welfare. The duties of trustees in this area are regulated by several hundred years of developed case law on trusts. The Employee Retirement Income Security Act (ERISA) largely adopted the common law of trusts as the basis of its provisions on collection duties but added new rules on prohibited transactions, fiduciary duty and pension withdrawal liability that mandate active collection efforts more forcefully than prior law.

ERISA Prohibition on Credit

The ERISA rules implement the congressional direction to apply the existing case law on trusts, subject to changes arising from “the special nature and purposes of employee benefit plans intended to be effectuated by” ERISA.1 ERISA strengthens the common law with an essentially absolute mandate to collect money due an ERISA plan.

ERISA Section 403(c)(1) has a general rule that the assets of an ERISA plan shall never be used to benefit an employer. The prohibited transaction rule in ERISA Section 406(a)(1)(B) further provides that:

A fiduciary with respect to a plan shall not cause the plan to engage in . . . a direct or indirect . . . lending of money or other extension of credit between the plan and a party in interest.

The term party in interest includes any employer with any employees covered by a plan under ERISA Section 3(14)(C).

Any failure to pay a debt to the plan in full and on time is potentially a prohibited “extension of credit” under this rule.2

Fiduciary Duty to Collect

ERISA enforces active collections programs through statutory fiduciary obligations. In addition to collection of contractual contributions, ERISA Section 4202 requires that the trustees of a multiemployer defined benefit plan must assess and collect withdrawal liability on a complete or partial withdrawal from the plan.

The foundation of the fiduciary collection rules is the common law requirement that a trustee is under a duty to take affirmative and reasonable steps to secure control of the trust property and to keep control of it.3 ERISA Section 404(a)(1)(B) requires more with its prudent expert rule:

A fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence and diligence under the 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.

The rule means that the trustee of a small fund will be expected to display the knowledge of a competent small-business-person. The trustees of larger funds may need collection practices matching those of a comparable bank or business.

If the trustees do not personally have the required knowledge and skill, they can and likely must hire experts with...
these abilities. A trustee's best efforts alone are not legally sufficient to satisfy ERISA. Good intentions similarly are no shelter, for "a pure heart and an empty head are not enough" to fulfill fiduciary obligations.

The fiduciary obligation cannot be changed or waived by the employer or union in a trust document or collective bargaining agreement. ERISA Section 404(a)(1)(D) provides that "[a] fiduciary shall discharge his duties . . . in accordance with the documents . . . governing the plan [but only] insofar as such documents and instruments are consistent with the provisions of ERISA." ERISA Section 410 provides that any agreement that purports to relieve a fiduciary from ERISA duties is void as against public policy.

**Personal Liability**

A fiduciary who fails to live up to ERISA's requirements is personally liable for any losses to the plan resulting from a breach under Section 409 of ERISA. A fiduciary cannot avoid liability simply by avoiding direct participation in a fiduciary breach. Under ERISA Section 405, a fiduciary can be liable for direct participation in a breach, concealment of a breach, failure to make reasonable efforts to remedy a breach once he or she acquires knowledge of it, or even for allowing a breach to happen by failing to exercise his or her supervisory duties as a trustee. Every fiduciary thus has a nondelegable obligation to monitor the work of other fiduciaries and service providers and correct errors.

**PTE 76-1**

Congress allowed the federal Department of Labor (DOL) to modify the absolute prohibition on credit to employers in Section 408(a) of ERISA. DOL quickly issued Class Prohibited Transaction Exemption (PTE) 76-1, which forgives a lack of collection of contributions due the plan if:

- The plan has made reasonable, diligent and systematic efforts that are appropriate under the circumstances to collect the contributions or any part thereof.
- The determination that contributions are not collectible is set forth in writing.
- The determination that contributions are not collectible is reasonable and appropriate based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the plan continued to attempt to collect such contribution or any part thereof.

ERISA Section 422 has been interpreted to provide similar rules for withdrawal liability. While PTE 76-1 does not legally bar a claim of fiduciary breach, it offers a road map for proper performance of fiduciary duty that is likely to be practical defense to any such claim.

**Reasonable Efforts**

DOL has not defined reasonable efforts, but the term implies that the effort will vary with circumstances. The "reasonable" test in the third element of the DOL formula suggests that the focus is on cost-effective measures that weigh a number of factors, such as:

- The amount at stake (for the case and similar cases)
- The merits and risks of the case, factually and legally
- The costs of litigation and collection
- The assets of the responsible parties.

The point is to balance costs against prospective recovery in terms of effort as well as any eventual resolution of a collection matter. While litigation is an inexact science, a rough expected value (based on the amount at stake times the probability of success on the merits and collection) or, more commonly, a range of possible outcomes is a common approach to settlement. The same approach can also be used to budget for collection efforts and litigation.
Diligence on Claims

*Diligent* means “to be concerned, eager to carry out a responsible act, untiring” in a legal dictionary.9 For collections, diligence has two basic facets:

1. A plan should investigate and pursue all potential claims and assets.
2. A plan should gear audit and collections activity to the time limits on claims.

A plan needs to remember that there are many possible avenues to recovery beyond a simple lawsuit against a delinquent employer that may have little or no money. Among these are:

- **Wage laws.** Many states have wage payment, prevailing wage and related laws that impose personal liability on owners for unpaid wages that are not preempted by ERISA.10 These are useful for collection of employee contribution deductions as well as wages, although state laws apparently are preempted as to pretax employer fringe benefit contribution claims.11

- **Plan assets and trust claims.** In addition to claims for employee contributions, a number of courts have allowed a plan to designate contribution amounts as a form of trust from the day they are earned. An individual who then diverts such assets to other purposes can be personally liable to the plan as a defaulting fiduciary (much like Social Security “trust fund” tax claims).

- **Defective corporations.** The law recognizes a variety of claims that cut back on the ability of a corporation to shield its owners or affiliates from liability for corporate debt. An encyclopedia of claims is beyond the scope of this article, but a plan should verify that a corporation actually was formed and is in good standing, as a lapsed or defective corporation may create personal liability on the part of its owners or officers. A failure to follow the procedures required of corporations may also allow a creditor to “pierce the corporate veil” and seek recovery from the owners of the business. If there are related businesses, diligence will often require a look at possible alter ego or “joint employer” claims.

- **Insolvency limits.** A creditor may also be able to follow and recover assets that left the corporate umbrella of a financially troubled employer. The possible claims again are numerous but include, among others, both state and federal bankruptcy claims for fraudulent conveyances, involuntary bankruptcy to stop and recover asset transfers, and corporate dividend and distribution restrictions.

- **Control group liability.** The law has long recognized the joint and several liability of affiliated businesses under common control for withdrawal liability.12 The same rules now may apply to pension contributions during endangered or critical status that are required by the minimum funding rules of ERISA.13

- **Construction remedies.** The construction industry has a number of unique remedies, from performance bonds to statutory or contractual trust fund claims and mechanic’s liens laws.

A plan should make sure that its staff and professional team are able to investigate and pursue the whole gamut of possible claims, especially on larger claims where litigation cost is less of a factor.

A plan should diligently pursue assets as well as claims. Many delinquencies are simply the result of current cash-flow problems that may eventually be corrected. A settlement may provide such security, but it can also be obtained without the debtor’s cooperation.

- **Judgment liens.** The most basic asset device is to register a judgment in any location in which a judgment debtor may have real estate. A registered judgment acts as a lien on real estate with proper filing (and revival) in most states.14

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• **Levy.** Judgments can also lead to levies on other property, such as accounts receivable and bank accounts. Delays in payment are a fact of commercial life, particularly in the construction industry, and collection efforts should include steps to obtain a lien of future payments.

Plan procedures to keep copies of checks or records of bank account numbers are an invaluable aid to collection. However, both federal and state court rules also generally allow assets depositions and other discovery to identify assets and attach them under state procedures. The Internet has added many resources to help identify and track assets with very limited expense.

**Timeliness**

The other face of diligence is timeliness. A plan’s collection practices should be designed to identify and claim amounts due the plan within the time limits set by law.

State limitations periods still apply to contractual contribution claims (and fraudulent conveyances, wage payment claims, etc.) under current case law. The courts generally apply the limitations period for the state in which the courts sit, which vary immensely. If the state period is too short to allow a cost-effective audit cycle of employers, the parties may be able to set a longer limitations period in the collective bargaining agreement.

Plan assets and trust claims should have a uniform three-to-six-year limit under ERISA Section 413. There is much to commend use of the same limitations period for contractual contribution claims, by a contractual provision or perhaps new case law. For a plan in multiple states, this may be the only practical option for a standard audit cycle.

Withdrawal liability has uniform federal time limits. It must be assessed “as soon as practicable” and collection of payments must be sought within a six-year limitations period after demand under Sections 4219 and 4301 of ERISA.

The time limits for claims can be extraordinarily short and present operational challenges.

In the construction industry, performance bonds quite commonly have contractual limitations periods on claims that are very short and not more than 90 days after work is completed and may also limit the time to sue. The same is often true of statutory trust fund and mechanic’s lien claims. These rules place an emphasis on preplanning in the collections department to get copies of bonds and keep them up to date and to develop systems to estimate delinquencies quickly.

The bankruptcy courts are the other perennial source of quick deadlines. In a Chapter 7 liquidation case, proofs of claim must be filed within 90 days after the first date set for the creditors meeting under Bankruptcy Rule 3002(c). In a Chapter 11 reorganization case, the bar date is set by the court under Bankruptcy Rule 3003(c) and may be well under 90 days, especially in “prepackaged” bankruptcy cases. There is a separate 60-day limit on complaints to avoid discharge of a debt due to fraud, *defalcation* (misappropriation of funds held by a trustee or other fiduciary, which can include loss of employee contributions or plan assets claims) and similar misconduct. The practical response is to develop procedures to estimate claims (reasonably, but on the high side) for a timely claim and then refine the claim later; in bankruptcy, timeliness is far more important than accuracy.

**Systematic Efforts**

The final item on the DOL list is systematic efforts. A legal dictionary definition characterizes a *systematic approach* as “methodical, repeatable and able to be learned by a step-by-step procedure.”

The ERISA mantra here is “procedure, procedure, procedure.” The case law establishes that an ERISA fiduciary’s duty is fulfilled if he or she employs appropriate methods to investigate on a careful and impartial basis, even if hindsight

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proves him or her wrong.\textsuperscript{18} On the other hand, haphazard efforts, even if successful, can still be actionable as “luck or good fortune is no substitute for a trustee’s duty of inquiry,” especially if the plan could have done better with another course of action.\textsuperscript{19}

The core of any systematic collection protocol is contribution audits. These generally are recommended (at least) for accrual basis statements and audit opinion that ERISA plans must have.\textsuperscript{20} A standard audit program should be organized for unbiased and statistically valid sampling and review all employers within a limitations period time cycle if feasible. The statistical routine should be enhanced by targeted efforts based on employee or other knowledge of a payment problem.

The same rules apply to withdrawal liability for pension plans. While withdrawal liability is relatively new to many plans and is disliked by many, a statutory obligation to assess and collect it remains on the books. A plan’s efforts to collect withdrawal liability are now tracked publicly on Form 5500, Schedule R, which requires disclosure of the number of employers that withdrew during the preceding plan year and the aggregate amount of withdrawal liability assessed against such withdrawn employers. Form 5500 is a sworn statement under penalty of perjury, and care should be taken to assure that the plan has adequate withdrawal liability procedures and accurately answers the questions on the form.

As noted, a fiduciary’s conduct and systems to collect must be unbiased to satisfy ERISA standards. PTE 76-1 does not provide any shelter from the prohibition on conflicts of interest in ERISA Section 406(b)(2) and related prohibitions on use of plan assets to benefit an employer or union. A trustee must serve only one master—the plan—in acting as a fiduciary and should remove himself or herself from any involvement or influence over plan decisions when that is not possible.

The final requirement of PTE 76-1 that a decision be reasonable in fact assures that no amount of “going through the motions” will shield trustees from liability for amounts that go uncollected by reason of gross negligence or improper motivation.

\section*{Conclusion}

The ground rules of ERISA are harsh in terms and nominally mandate collection of all amounts due a plan with no exceptions. Congress recognized that the absolute prohibition was not realistic and allowed administrative exemptions from the prohibited transaction rules. The rules crafted by DOL create a more flexible framework and road map for prudent fiduciary collection practices, which should be observed to avoid liability under the stricter statutory rule.

\section*{Endnotes}


4. See, e.g., \textit{Whitfield v. Tomasso}, 682 ESupp. 1287, 1301 (E.D.N.Y. 1988) (liability imposed for losses on unsecured loans to an insurance company; “none of the trustees was familiar with . . . [such] investment[s]. . . . They consulted no one expert in the field of investing in insurance companies.”).

5. Donovan \textit{v. Cunningham}, 716 F.2d 1455, 1467 (5th Cir. 1983).


15. See generally, Limitations of actions applicable to action by trustees of employee benefit plan to enforce delinquent employer contributions under ERISA, 90 A.L.R. Fed. 374.


