

## Legal Alert: DOL Addresses Fiduciary Responsibility to Collect Delinquent Plan Contributions

February 25, 2008

In Field Assistance Bulletin 2008-01 (February 1, 2008), the DOL articulated for its Office of Enforcement a theory of fiduciary responsibility under ERISA for collection of delinquent contributions to retirement and welfare plans. Click [here](#) for a copy. The failure by employers to remit participant contributions, employer contributions or both to the plan when due is a recurring problem to which DOL devotes meaningful resources; its Participant Contribution national enforcement project remains active and effective, it pursues delinquent employer contributions under its general civil enforcement program, and these efforts can result in criminal referrals to the Department of Justice for prosecution. In support of those efforts, FAB 2008-01 develops, under the statutory structure of ERISA, a theory of responsibility to collect contributions where the plan trustee is neither actively pursuing missing contributions nor clearly has a duty to so under the plan and trust documents.

With specific reference to directed trustee arrangements, FAB 2008-01 posits a hierarchy of fiduciary responsibility, statutorily imposed under ERISA, to collect delinquent contributions. The FAB argues first that the trustee of an ERISA plan generally has a duty to collect contributions. That duty implicates the fiduciary standards of ERISA – in determining what collection action to take, a fiduciary should weigh the value of the missing contributions against the likelihood of a successful recovery, the employer’s solvency, and the expense of collection – and can result in an ERISA prohibited transaction if any failure to systematically and reasonably pursue delinquent contributions is the result of an express or implied arrangement or understanding between the fiduciary and the employer. Pursuant to the provisions of ERISA permitting the allocation of trustee responsibilities, the FAB recognizes that a named fiduciary may direct a trustee as to this responsibility or may appoint an investment manager to take on this duty. To the extent that the trustee is a directed trustee, with specifically limited responsibilities under the plan or trust documents, the FAB takes the view that:

- The named or functional fiduciary authorized to appoint the trustee must ensure that the obligation to collect delinquent contributions is properly allocated. The FAB argues that any ambiguities in the plan and trust documents should generally be interpreted, in light of the statutory scheme and taking into account the parties’ actions, to allocate this responsibility rather than to relieve all trustees and investment managers from this duty; and

- If no trustee or investment manager has the obligation to collect contributions, the named or functional fiduciary may be liable for plan losses due to missing contributions, for failure to specifically allocate that responsibility.

FAB 2008-01 also takes the position that, if any particular trustee is not responsible for monitoring and collecting contributions, that trustee (including a directed trustee) nonetheless has a statutory responsibility under ERISA to take appropriate steps to remedy delinquent contributions where the trustee knows that no other party has assumed that responsibility, i.e., that there is a breach of fiduciary responsibility as articulated in the FAB. Those appropriate steps might include advising the named fiduciary or DOL of the breach, reporting the breach to other plan fiduciaries, taking actions to enforce the contribution on behalf of the plan, seeking an amendment of the governing plan or trust document, or seeking a court order mandating a proper allocation of fiduciary responsibility for contributions.

The enforcement positions articulated in FAB 2008-01 merit consideration in structuring and drafting ERISA plan documents, trust documents, and investment manager agreements. The FAB in particular focuses attention on directed trustee arrangements that relieve the trustee of responsibility to monitor and collect contributions, where the other governing documents are silent or ambiguous as to the allocation of that responsibility.



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