



FIELD ASSISTANCE BULLETIN No. 2012-01

DATE: APRIL 2, 2012

MEMORANDUM FOR: MABEL CAPOLOGO, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: CITING APPRENTICESHIP AND TRAINING PLANS FOR USING PLAN ASSETS
FOR GRADUATION CEREMONIES AND PROGRAM MARKETING

In the course of EBSA's investigations of some apprenticeship and training plans, questions have arisen about the use of plan assets to pay for graduation ceremonies and for advertising expenses. The Regional Offices have asked whether the use of plan assets for such purposes violates ERISA's exclusive purpose and fiduciary duty requirements. The following guidance is intended to promote consistency among the Regional Offices in their enforcement positions on these issues.

The term "employee welfare benefit plan" is defined in section 3(1) of Title I of ERISA to include:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions). (Emphasis added.)

Not all employment-based job training and apprenticeship programs, however, are ERISA plans. In order to clarify the definition of an employee welfare benefit plan, the Department issued 29 CFR § 2510.3-1 to describe certain arrangements that do not constitute "employee welfare benefit plans" within the meaning of section 3(1) of ERISA. Among other provisions, § 2510.3-1 provides that the following are not ERISA plans: scholarship programs paid from an employer's general assets, training provided on the job with the general assets of the employer, and industry advancement programs that have no employee participants and do not provide benefits to employees or their dependents, regardless of whether the program serves as a conduit

through which funds or other assets are channeled to employee benefit plans covered under ERISA.

Although the unique purposes of apprenticeship and training plans may result in differences in the structure and operations of such plans compared to other ERISA plans, the plan fiduciaries are still subject to and must abide by the general fiduciary standards in Part 4 of ERISA. Employee benefit plans, including apprenticeship and training plans, must be established and maintained pursuant to a written instrument, which provides for one or more named fiduciaries who jointly or severally have authority to control and manage the operation and administration of the plan. ERISA § 402(a)(1). Subject to certain exceptions, the assets of an employee benefit plan must be held in trust by one or more trustees. ERISA § 403. Furthermore, the trustees and other plan fiduciaries must discharge their duties solely in the interests of the plan's participants and beneficiaries, and for the exclusive purpose of providing apprenticeship or training benefits to participants and defraying reasonable expenses of administering the plan. ERISA § 404(a)(1)(A). Those duties must be performed with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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. ERISA § 404(a)(1)(B). The fiduciaries must diversify 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. ERISA § 404(a)(1)(C). The fiduciaries must act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA. ERISA § 404(a)(1)(D). The fiduciaries may not engage in non-exempt prohibited transactions with parties in interest nor may they use the apprenticeship or training plan's assets in their own interest or for their own account. ERISA § 406(a) and (b).

A fiduciary may also be held liable for a breach of fiduciary duty as a co-fiduciary if (1) he or she participates knowingly in, or knowingly undertakes to conceal, an act or omission of another fiduciary knowing such act or omission is a breach; (2) he or she by failing to fulfill his or her fiduciary responsibilities allows another fiduciary to commit a breach, or (3) if he or she has knowledge of a breach by another fiduciary and fails to take reasonable steps to remedy the breach. ERISA § 405(a).

Some types of apprenticeship and training plan payments have been questioned by EBSA Regional Offices as part of recent routine investigations because the payments do not qualify as payments for plan training benefits and are not typical plan administrative expenses. The payments commonly fall into the categories of (1) payments for meals, gifts, entertainment, or other expenses associated with graduation ceremonies and (2) payments to market, advertise or promote the apprenticeship or training program. Although expenses for graduation ceremonies or, except in rare circumstances, commercial marketing of the plan would not be appropriate expenditures of plan assets for an ERISA pension plan or for other welfare benefit plans, we cannot unconditionally classify all such payments as per se impermissible in light of the special characteristics and aims of apprenticeship and training plans. Rather, in addressing such expenses on a case-by-case basis, investigators should recognize the unique characteristics of apprenticeship and training plans, while being guided by ERISA's exclusive purpose rule.

In the context of apprenticeship and training plans, the exclusive purpose rule and the duty to manage plan assets prudently require plan fiduciaries to ensure the reasonableness of plan expenses in light of the educational objectives of the apprenticeship or training program. In every instance, apprenticeship and training plan fiduciaries must be able to justify plan expenses as appropriate means of carrying out the plan's mission of training workers. When fiduciaries expend plan assets without reasonably determining that the expenditures are likely to promote legitimate plan objectives, they breach their core fiduciary obligations under ERISA and are personally liable for the resulting loss of plan assets.¹

ERISA-covered apprenticeship and training programs typically involve multi-year training in a program registered with the U.S. Department of Labor, Office of Apprenticeship, or a recognized State Apprenticeship Agency, that combine on-the-job training and formal instruction to teach workers the practical and theoretical aspects of a skilled occupation.² Registered apprenticeship and training programs serve an important role in stimulating and assisting industries in developing the skilled workers needed to compete in a global economy.

Like many other educational enterprises, apprenticeship and training programs often award graduates certificates of completion, and in some cases, hours of college credit. The graduation ceremonies are often open to family members, plan officials, school instructors and administrators. Industry executives, civic leaders and others are sometimes invited. A graduation ceremony that serves to congratulate graduates on their achievements and encourage them on their future endeavors may support the training objectives of the plan by establishing an incentive and goal for participants to successfully complete the program.

¹ The Department's 408(b)(2) regulation defines the term "necessary service" for purposes of determining whether plan payments to service providers fall within the scope of the 408(b)(2) exemption from ERISA's prohibited transaction rules under ERISA § 406(a). Although the regulation is specifically aimed at service providers and compliance with ERISA's prohibited transaction rules, rather than the fiduciary duties of prudence and loyalty, it nevertheless provides helpful guidance on the propriety of plan expenditures. The regulation defines a necessary service as follows:

A service is necessary for the establishment or operation of a plan within the meaning of section 408(b)(2) of the Act and § 2550.408b-2(a)(1) if the service is appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained. A person providing such a service to a plan (or a person who is a party in interest solely by reason of a relationship to such a service provider described in section 3(14) (F), (G), (H), or (I) of the Act) may furnish goods which are necessary for the establishment or operation of the plan in the course of, and incidental to, the furnishing of such service to the plan.

Similarly, in the case of an apprenticeship training plan, expenses should be "appropriate and helpful" in carrying out the training purposes for which the plan is established or maintained.

² The Office of Apprenticeship is part of the Department's Employment and Training Administration (ETA). EBSA Regional Offices with questions about federal and state regulation of registered apprenticeship plans should be encouraged to consult with their counterparts in ETA's Regional Offices. One of ETA's roles is to safeguard the welfare of apprentices, ensure equality of access to apprenticeship programs, and provide integrated employment and training information to sponsors and the local employment and training community. The regulations at 29 CFR Part 29 outline labor standards, policies and procedures for the registration, cancellation and deregistration of apprenticeship programs, apprenticeship agreements, and the administration of the National Apprenticeship System. Also, 29 CFR Part 30 sets forth policies and procedures to promote equality of opportunity in apprenticeship programs registered with the U.S. Department of Labor and in State apprenticeship programs registered with recognized State Apprenticeship Agencies. The DOL's Wage and Hour Division enforces the Davis-Bacon and Related Acts (DBRA) and sets the wage rates for apprentices on Davis-Bacon projects.

Similarly, since the purpose of the apprenticeship or training program is to enroll and train eligible individuals, like many other educational enterprises, apprenticeship and training programs often have outreach programs to increase awareness of the program and encourage participation by eligible individuals. Certification requirements for apprenticeship and training programs may include outreach and recruitment efforts, such as (a) distributing information about the nature of programs, program admission requirements, current apprenticeship or training opportunities, sources of applications for the program, (b) publishing advertisements in newspapers circulated in the general areas in which the program operates, (c) participating in workshops conducted by employment service agencies, school districts, and community-based organizations, and (d) cooperating with local school districts and vocational education systems to increase awareness of the program. *See, e.g.*, 29 CFR Part 30. In fact, some apprenticeship or training programs, such as painting and sheet metal fabrication programs, may use construction and maintenance of signs, displays, and billboards regarding the program as part of their training operations.

Thus, in light of these characteristics of apprenticeship and training plans, we would not treat the plan's payment of expenses associated with a modest graduation ceremony attended by graduating apprentices, family, plan officials, and other persons connected with the program or industry outreach, including light refreshments, as an impermissible use of plan assets provided: (a) the amount of the expense is modest in relationship to the plan's assets; (b) the expenses were approved in accordance with internal accounting, recordkeeping, and administrative controls designed to prevent inappropriate, excessive, or abusive expenditures of plan assets; and (c) the expenses were for costs of the ceremony. For example, we generally would not view a graduation dinner for all attendees, valet parking, or payments for travel or hotel accommodations for graduating apprentices or guests as permissible plan asset expenses. On the other hand, a modest graduation ceremony offering light refreshments with diplomas or certificates for apprentices and token awards/gifts for non-apprentices (e.g., plan instructors or persons that supported the program) would be permissible.

Similarly, we believe that certain outreach expenses related to the program can be paid for by the apprenticeship and training plans consistent with ERISA's fiduciary requirements. Here again, the expenses must be for marketing or promotion of the apprenticeship or training program itself (e.g., not for industry advancement or for sponsoring employers or employee organizations) and the amount of the expense must be consistent with the fiduciaries' obligation to be prudent and economical in the use of plan assets. For example, t-shirts provided to apprentices bearing the logo of the apprenticeship or training program may be appropriate plan expenses if the expense is modest and the t-shirts are not purchased from parties in interest in prohibited transactions. Conversely, tickets to sporting and other entertainment events for apprentices, plan officials, trustees, and contributing employers would generally be unreasonable plan expenses. Finally, we cannot think of a situation where the expenditure of plan assets on donations to favored charities or other causes would be permissible. In every instance, the fiduciary must thoughtfully ensure that the plan's assets are being efficiently used to promote the plan's training mission.

We understand apprenticeship and training plans established as a tax-exempt entity under the Internal Revenue Code have argued that any expense that would be permissible under its tax exemption should be permissible under ERISA. We do not agree that the rules governing

expenditures by tax-exempt entities supplant ERISA's fiduciary requirements for ERISA covered plans. Thus, the fact that a non-ERISA tax-exempt education institution may pay for a particular expense or may pay a particular amount for a graduation ceremony, for example, would not itself justify a fiduciary paying for the same expense or paying the same amount for an apprenticeship training plan graduation expense. Rather, as noted above, investigators should address such expenses on a case-by-case basis taking into account the unique benefit characteristics of apprenticeship and training plans but be guided by ERISA's exclusive purpose fiduciary rule. That is, investigators should evaluate whether specific goods or services are reasonable expenses of administering an apprenticeship or training plan that provide benefits in the form of on-the-job and classroom instruction plus materials to apprentices. For example, modest meals provided by the plan for attendees at instruction programs, in some cases, may be reasonable expenses closely associated with providing training benefits under the plan.

Regional Office experience also suggests that potential violations may be more prevalent in apprenticeship and training plans that lack written expense policies and internal controls. These abuses include lack of oversight of plan vehicles, equipment, and other inventory; unreasonable instructor salaries and bonuses; employee meal stipends that are excessive or not reasonably related to the provision or promotion of the plan's training program; and payments for staff holiday parties, flowers, and donations to charitable, non-profit organizations, scholarship and memorial funds. Moreover, ERISA plan fiduciaries, as a matter of general prudence, should establish and implement adequate internal accounting, recordkeeping, and administrative controls designed to prevent inappropriate, excessive, or abusive expenditures of plan assets.³ The Department's Office of Labor Management Standards has published a list of some internal controls that may be useful for apprenticeship and training plans to consider at www.dol.gov/olms/regs/compliance/internal.htm. As in any other case, investigators should consider citing fiduciaries with a section 404(a)(1)(D) violation if they fail to follow a plan's written expense policy. Regional Offices should also require the plan to establish written plan expense policies and implement appropriate internal controls when violations are identified as part of the correction process.

When investigating apprenticeship plans, EBSA investigators should also be alert to other prohibited transactions involving use of plan assets for the benefit of parties in interest. See, for example, EBSA's "FAQs on Multiemployer Plan Leasing Arrangements," which provide guidance for fiduciaries of multiemployer plans regarding prohibited transaction violations that may arise in leasing or service provider arrangements (available on EBSA's website at www.dol.gov/ebsa/faqs/faq-leasingarrangements.html). Similarly, investigators should be mindful of the Department's enforcement policy with respect to fiduciaries' receipt of gifts and

³ In the case of apprenticeship and training plans that are required to file a Form 5500 with an annual audit report from an independent qualified public accountant, we would expect the auditor to send the plan administrator an internal control letter identifying any material weaknesses and significant deficiencies in the plan's internal controls. See American Institute of Certified Public Accountants (AICPA) Statement on Auditing Standards (SAS) No. 114, *The Auditor's Communication With Those Charged With Governance*, AU sec. 380 and SAS No. 115, *Communicating Internal Control Related Matters in an Audit*, AU sec. 325. We would also expect the plan administrator to address any identified problems and respond to any recommendations from auditors as how to improve the weakness or deficiency. See generally 29 CFR § 2520.104-22 (conditions for limited exemption from reporting and disclosure requirements for certain apprenticeship and training plans).

gratuities from parties dealing with the plan, as reflected in chapter 48, paragraph 12, of EBSA's enforcement manual (available on EBSA's website at www.dol.gov/ebsa/oemmanual/cha48.html).

EBSA has also on occasion uncovered criminal abuse of apprenticeship and training plans by plan fiduciaries and others who provide services to the plans, including bookkeepers and record keepers. Plans are particularly vulnerable to criminal abuse where the oversight of plan assets is weak. In many instances, it is employees of the apprenticeship or training plans or the plans' service providers who use their authority over plan payments to steal from the plans. In other cases, EBSA investigations have revealed that plan fiduciaries embezzled plan assets for their personal benefit. Whenever EBSA detects such fraud and abuse, the matter should be referred to the Department of Justice for possible criminal prosecution.