EUCLID SPECIALTY MANAGERS, LLC
Labor Affinity and Commercial Programs

THE EUCLID PERSPECTIVE

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The DOL's New Guidance on JATC Plan Expenses – The Modesty Policy

In 2011, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) increased enforcement of apprenticeship and training plans. Dozens of open investigations have caused considerable confusion as to what expenses are appropriate in these plans, particularly as investigators have appeared to act capriciously with inconsistent standards across the country. The key question is whether plan assets can be used for payments (1) for meals, gifts, entertainment, or other expenses associated with graduation ceremonies and (2) to market, advertise or promote the apprenticeship or training program. On April 2, 2012, the DOL issued the first Field Assistance Bulletin of the year (FAB No. 2012-01) to provide guidance and promote consistency among EBSA regional offices in their enforcement issues. The DOL defines a policy of permitting only "modest" expenses that can be justified under the educational purpose of the plan.

The Bulletin begins by underscoring that apprenticeship and training programs that qualify as employee welfare benefit plans are covered by ERISA. Accordingly, even though these programs have unique structure and operations, the plan fiduciaries are still subject to and must abide by the fiduciary standards in ERISA. The key fiduciary responsibility relevant to plan expenses is the "exclusive purpose" rule: trustees and other plan fiduciaries must discharge their duties solely in the interests of 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.

No Bright Line Rule

Next, the DOL does not declare that graduation or advertising expenses are "per se" or categorically impermissible under ERISA. Instead, the DOL instructs EBSA investigators to review expenses "on a case-by-case basis" under ERISA's exclusive purpose rule, recognizing the unique characteristics of apprenticeship and training plans. The test is whether plan fiduciaries have ensured the reasonableness of plan expenses in light of the educational objectives of the apprenticeship or training program. The DOL places the burden on plan fiduciaries "to justify plan expenses as appropriate means of carrying out the plan's mission of training workers." Before incurring any plan expenditure, plan trustees must reasonably determine that the expenditures are likely to promote legitimate plan objectives. Under the guidance in the Bulletin, plan fiduciaries must be able to prove that plan expenditures constituted a "necessary service" or were otherwise "appropriate and helpful" in carrying out training purposes.

"Modest" Graduation Ceremonies: Dinners are Out/Light Refreshments Acceptable

The DOL does not forbid expenses for graduation ceremonies paid by a plan, because the ceremonies can serve legitimate purposes. The Bulletin states that a graduation ceremony designed 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. But the guidance provides **three limiting factors**. **First**, the ceremony must be "modest," meaning that any expense must reasonably relate to the plan's assets. **Second**, the expense must be approved in accordance with plan controls designed to prevent inappropriate expenditures. **Third**, the expenses must be restricted to the costs of the ceremony – even a graduation dinner will be considered improper. The Bulletin makes clear that EBSA will generally find impermissible as plan expenses any dinner for all graduation attendees, valet parking, or travel and/or hotel accommodations for graduating apprentices or guests. By contrast, the DOL states that a "modest graduation ceremony" offering light refreshments with diplomas or certificates for apprentices and "token" awards/gifts for plan instructors would be permissible.

Advertising Expenses: T-shirts Acceptable/Sporting Events and Charitable Donations Out

The Bulletin states that certain outreach expenses related to the program can be paid for by the apprenticeship and training plans consistent with ERISA's fiduciary requirements, as long as the expenses are for marketing or promotion of the program and not for industry advancement or for the benefit of sponsoring employers or the union. The DOL suggests that t-shirts with logos and modest meals provided by the plan for attendees at instruction programs may be appropriate expenses, but tickets to sporting events or charitable donations would not be permissible. The Bulletin describes that "[i]n every instance, the fiduciary must thoughtfully ensure that the plan's assets are being efficiently used to promote the plan's training mission."

The Euclid Perspective

The DOL continues to place the burden on trustees to manage plan expenses and has not issued a safe harbor to avoid potential liability. The DOL's new modesty policy reveals its skepticism of many expenses that apprenticeship and training programs have routinely incurred. Consequently, many plans will have to make changes to avoid potential personal liability for its fiduciaries. Specifically, the DOL defines "modest" graduation ceremony very narrowly, even forbidding graduation dinners. The best advice the DOL provides is that every apprenticeship and training plan must establish and follow written expense policies and internal controls. The DOL is signaling that expenditures will be much easier to defend if they are part of a written expense policy subject to internal controls. Plan fiduciaries must be prepared to demonstrate that they thoughtfully ensured plans assets were efficiently used to promote the plans' training mission. The only way for trustees to gain comfort is to proactively assess and analyze all expenses before they happen. And as always, given the inherent uncertainties in potential liability and enforcement by the DOL, the only real comfort is to ensure that your plan has adequate fiduciary liability coverage in the event of a challenge to your plan's operations.

The Euclid Perspective is an occasional commentary from Euclid Specialty Managers on fiduciary liability and other liability events relevant to our affinity insurance programs.

About Euclid

Founded in 1952, Euclid Insurance Services, Inc. is a family-owned, managing general agent and underwriting manager and claims administrator. The firm offers a wide range of professional liability, property, casualty, life, accident and health insurance products through agents and brokers nationwide.

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