

Trustee Expenses— In Depth

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OF EMPLOYEE BENEFIT PLANS 

The Agenda

- Plan-related expenses vs. other expenses
- Areas of potential concern
- Documentation and policies
- How good people can make poor choices
- Training your new trustees
- Areas drawing DOL attention

Rules, Rules and More Rules!

Rules—The Lawyer's Perspective

- Trustees' expenses trigger two rules
 - Fiduciary duties
 - Prohibited transactions

Fiduciary Duty

- Act solely in the interest of the participants and beneficiaries
- Hold and deal with plan assets for the exclusive purpose of paying benefits and defraying reasonable costs of Plan administration
- Act prudently
- Diversify plan assets
- Act in accordance with plan documents that comply with ERISA

Prohibited Transactions

- Prohibited transaction rules impose a strict standard:
 - ERISA §406(b) A fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account; and
 - And ERISA §405 imposes co-fiduciary liability if the trustee or other fiduciary fails to meet the obligation of §404(a) or knows of a breach and does not take steps to remedy it

Prohibited Transactions

- Exceptions for necessary services, reasonable compensation to trustees not receiving full-time pay, reimbursement for expenses properly/actually incurred
- Potential consequences for breach
 - Personal liability
 - Restoration of loss to plan
 - Potential penalties (20% from DOL) or excess taxes
 - Criminal penalties
 - Other remedies, *e.g.*, removal as a trustee

Summary—The Main Principles

Guidance from the DOL can be expressed as three principles:

1. Expenses must be necessary to the benefit plan.
2. Expenses need to be reasonable.
3. Payment of expenses must be authorized by an express policy or plan/trust provision.

ERISA Makes Me Want to Drink!

- Thirsty Tim is a trustee. After listening to Travis and Aaron, he decides he needs alcohol to calm his nerves. He meets his fellow trustee, Wingman Will, at the hotel bar, and they review the Annual Conference sessions they attended today.

ERISA Makes Me Want to Drink!

What is appropriate to expense to the Fund?

- A. Nothing, alcohol is a personal expense
- B. The bar tab because he discussed Fund business
- C. The bar tab, but only if the bill includes chicken wings

Alcohol— Reasonable and Necessary?

- This may depend on where you are. DOL regions vary in their positions
- Typically:
 - Served with a meal: One may not be challenged (2?)
 - Bar tabs: This is a no-no
 - BYOB: This is a no-no too unless you don't ask for reimbursement
 - The standard: Be reasonable and cautious

Rules—The Auditor's Perspective

- Trustees' expenses trigger two considerations for auditors → Why the antennas MUST go up
 - Fraud
 - ...and more fraud

The Fraud Triangle

- Three key elements
 - Opportunity
 - Incentive
 - Rationalization

Expense and Education Policies

- The case for expense policies
 - Policies reflect thought and process
 - DOL looks for process and rationale behind decisions
 - Demonstrates uniform parameters
 - Procedures for accountability
- And the downside...
 - Policy doesn't allow flexibility—Tough, but fair
 - A vague policy could be better than a rigid policy

The Expense and Education Policy

- Should include:
 - Statement that only actual expenses will be reimbursed
 - Statement that plan will not reimburse an expense reimbursable by another party
 - A standard expense report form that must be used
 - A list of required documentation
 - What happens when documentation is not provided
 - Limits on transportation costs, lodging, meals and other allowed expenses

The Expense and Education Policy

- Should also include:
 - A list of expenses (*e.g.*, personal expenses) that will not be allowed
 - Method for submitting expenses—Electronic, manual...
 - Procedures for payment
 - Description of education programs that will be reimbursed and any limits on them
 - Timeframe for submitting the expenses
 - Whether the policy applies to Fund staff
 - Provision for exceptions to the policy if approved in advance by the Trustees

Documentation Requirements

- Nature of expense
- Date of expense
- Amount
- Where the expense was incurred
- Who was in attendance
- Why the expense was incurred; nature of Fund business discussed
- Credit card receipt and the original detailed receipt

Documentation and Retention

- Submitting the scraps of paper
 - Do we need to collect those receipts?
 - Is there a threshold below which we do not need receipts?
 - What form must the documentation take?
 - What happens if there is not the required documentation?

Documentation and Retention

- The need for a retention schedule (policy)
 - Imagine the issue if the documentation is destroyed right before a regulator requests it, and the trust does not have a policy
- How long is long enough?
 - Tax liability periods
 - Fiduciary liability exposure period

Reporting Expenses as Compensation

- Obligations on Form 5500 Schedule C
 - The DOL has published guidance on the types of items that must be reported on the 5500 Schedule C
 - These items focus on payments or things of value received from service providers
 - It also covers expenses paid to trustees and employees attending conferences
- Form 990 disclosures
 - Ditto

5500 Schedule C

- Payments from the Trust for educational conferences
 - Payments from the plan for the full range of expenses reasonably and necessarily incurred are expected to be listed on the 5500 C. This includes payments made directly by the plan for the trustee and reimbursements to the trustee.

5500 Schedule C

- Payments of expenses by service providers
 - Payments for the same type of expenses above that are paid by a service provider are not reportable **if** the payments or benefit is not in whole or in part due to the recipient's position with the plan. Otherwise, they are includable.

5500 Schedule C

- Are expenses paid by the plan on behalf of any trustee or employee always reportable on Schedule C? Yes generally but should consider:
 - For trustees, if all reportable compensation is \$5,000 or more during the plan year
 - For employees, if total compensation including expenses received exceeds \$25,000
- Direct vs. indirect compensation

5500 Schedule C

- The DOL's guidance with respect to gifts, meals and entertainment is strictly for Schedule C reporting. "Filers are strongly cautioned that gifts and gratuities of any amount paid to or received by plan fiduciaries may violate ERISA and give rise to civil liabilities and criminal penalties."

Applying the Rules

Trustee A—Scrupulous Steve

- Trustee Steve lives in the great state of Maryland and travels to Oregon to attend a Board Trustees meeting for a Pension Plan where he is a Trustee. Upon arrival, he noticed that his hotel is over an hour away from PDX airport and decides to arrange for an Uber ride. Because of the length of drive (and his previous back problems), Trustee Steve opts for Uber Black in order to take advantage of the extra space. The difference in price from a regular Uber to Uber Black for this route was \$150. Has Trustee Steve done anything wrong?

Trustee A—Scrupulous Steve

How much should Steve be reimbursed?

- A. Nothing, the Uber Black was not reasonable.
- B. The amount of a regular Uber ride
- C. The amount of a cab ride
- D. An amount not listed

Trustee A—Scrupulous Steve

After the Trustee meeting, Scrupulous Steve finds the best steak joint in Portland and rewards himself for a hard day listening to the Funds' counsel and auditor. He enjoys an appetizer, a ribeye, several side dishes and the recommended dessert.

Trustee A—Scrupulous Steve

How much should Steve be reimbursed?

- A. Nothing; the meal was not reasonable.
- B. The actual cost of the meal and tip
- C. A lesser amount

Trustee B—Shameful Shane

Trustee Shane resides in Los Angeles, CA and needs to be in Boston for Trust Fund business. He books a first-class roundtrip flight months in advance in accordance with the Plan's reimbursement policy and submits the request for reimbursement upon payment for the fare. Closer to the meeting, Trustee Shane cancels the original fare and books coach. His intention was to use the difference on incidentals on the trip and put the excess towards Super Bowl 2025 tickets. His stance is that he followed the letter of the law of the Plan's reimbursement policy. Has Shameful Shane done anything wrong?

Shameful Shane

Has Shameful Shane done anything wrong?

A. Yes

B. No

Shameful Shane

Shameful Shane really hates using his own money. He asks for an upfront payment from his Funds to cover his expenses in San Diego.

Shameful Shane

What is the proper response from the Fund?

- A. Yes, an advance is acceptable but all receipts must be turned in at the end of the trip
- B. No, per diems are not permitted

Trustee C—Clever Clarice

Trustee Clarice was born, raised, and never left Portland, Maine. She is a Trustee of a Health Plan holding a Trustee meeting in Hawaii to coincide with the IFEBP's 2025 Annual conference. She would later discover that 3 other Plans, where she is also a Trustee, will be doing the same. She provides a detailed breakdown of her airfare and allocates between two of the 3 Plans since the 3rd Plan is experiencing some financial hardship. She takes her role as a Trustee seriously, and her fiduciary duty is telling her to save the 3rd Plan money where she can. Has Trustee Clarice done anything wrong?

Clever Clarice

Has Trustee Clarice done anything wrong?

A. Yes

B. No

Trustee Harry Hilton

Trustee Harry Hilton checks into the San Diego Hilton Bayfront and provides his email to earn Hilton Honors points. This stay should keep Harry Hilton in Diamond Status for another year.

Trustee Harry Hilton

Can Trustee Harry Hilton earn rewards points but still get reimbursed by the Fund for the hotel stay?

- A. Yes
- B. No

Emergency Erick

Trustee Erick learns of an emergency back home and needs to leave the Annual Conference on Monday night.

Emergency Erick

Erick incurs a fee to change his flight to Monday night. Can the fee be reimbursed by the Fund?

- A. Yes
- B. No
- C. It depends on the fee amount

Emergency Erick

Erick will not be able to earn his Conference Certificate, a requirement of the Expense Reimbursement Policy. Can Erick still be reimbursed by the Fund for the Conference?

- A. Yes
- B. No

Trustee Compensation

- No compensation for a trustee who receives full-time pay from an employer, an employer association or from a union whose members participate in the plan.
- A trustee who is not receiving full-time pay from an employer, employer association or union may be paid reasonable compensation. The compensation must be reasonable. A guiding factor is to make the non-salaried trustee whole. For example, if an hourly employee serves as a trustee, the plan may compensate the trustee for the actual lost straight time wages.
- If a trustee will be compensated, the trustee must not participate in the process by which the other trustees set the rate of compensation.

Key Takeaways

- Act in the interest of the participants always
- Draft a trustee travel and reimbursement policy and revisit annually for changes that should be adopted
- Always get receipts
- Only claim expenses that are reasonable and actually incurred
- Be careful with alcohol reimbursements
- Provide a report to the board showing each trustee's costs for attending the conference

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