Training and apprenticeship programs are subject to many state and federal laws governing training procedures, antidiscrimination laws and fiduciary obligations. Familiarity with the laws governing apprenticeship programs can help training coordinators, trustees and committee members avoid unnecessary legal problems. This article will survey many legal issues facing apprenticeship programs.

Training and Education Funds

An Overview of Legal and Fiduciary Issues

by Michael A. Ledbetter

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The Taft-Hartley Act protects employee bargaining rights by prohibiting most financial transactions between employers and unions. An exception is contained in the law for payments by employers to apprenticeship and training trust funds. Like any other multiemployer trust, an apprenticeship trust must be in writing, provide for joint labor-management representation and have a mechanism for breaking deadlocks. The trust must be audited on an annual basis and the audit must be available to interested parties such as the union and contributing employers. Any money or thing of value paid to an apprenticeship trust must be used for the sole and exclusive benefit of the program.

The National Apprenticeship Act requires the secretary of labor to safeguard the welfare of apprentices and establish rules governing the creation and operation of apprenticeship programs. The act gives the Department of Labor (DOL) oversight of apprenticeship plans and allows for cooperation with state apprentice councils.

An *apprenticeable occupation* is a skilled trade that is learned through a period of on-the-job training and related classroom instruction of at least 2,000 hours.[1] Each training program must have an apprenticeship standards document that extensively details the organization and structure of the program.[2] Once apprenticeship standards are developed, they must be registered with DOL or

a state apprenticeship council. Apprenticeship and training programs may not discriminate on the basis of race, color, sex, religion or national origin and must adopt an affirmative action plan to recruit and retain minority and female applicants.

Prior to beginning a program, each apprentice must be presented with an apprenticeship agreement. The agreement describes the term of the program, the hours spent on the job and in the classroom, the wage schedule and the circumstances under which an apprentice may be terminated. The agreement must also describe the appeal rights available to terminated apprentices, as well as an equal-opportunity statement.

The Internal Revenue Code and Apprenticeship Programs

Apprenticeship programs generally qualify for tax-exempt status under the Internal Revenue Code if organized for "educational" purposes under Section 501(c)(3) or as a "labor organization" under Section 501(c)(5) of the Code. Programs can risk the loss of their tax-exempt status by attempting to influence legislation or by campaigning for or against any candidate for public office.[3] The Internal Revenue Service (IRS) requires most 501(c)(3) organizations, including apprenticeship funds, to file a Form 990 Return of Organization Exempt From Income Tax. The Form 990 is filed 4½ months after the end of the program's plan year.

Trustees of a 501(c)(3) apprenticeship program should be aware of the excise tax imposed by IRS for an "excess benefit transaction." When a 501(c)(3) organization provides a benefit to a person who holds substantial influence over the organization, the benefit must be commensurate with the value received.[4] "Sweetheart" deals such as excessive compensation can result in excise taxes of up to 200% of the amount in question.

ERISA and Apprenticeship Programs

While the law allows employers to help defray the cost of apprenticeship programs, it requires payments be held in trust. Apprenticeship programs financed with trust assets are subject to regulation under the Employee Retirement Income Security Act (ERISA). A trustee's fiduciary obligation to participants under ERISA has been described as "the highest known to law."[5] ERISA bans people who have been convicted of certain crimes of violence, fraud and corruption from serving in any capacity to an employee benefit plan for up to 13 years from their date of conviction or release, whichever is later. The law also makes it a crime to knowingly hire or retain such a person, and the offense carries a $10,000 fine and a five-year prison sentence. Thus, reasonable inquiries should be made before a person is appointed to serve as a fiduciary to an apprenticeship program.

Plans subject to ERISA must be established by a written trust instrument that identifies the "named fiduciaries" with the authority to manage the plan. A joint board of trustees is typically the named fiduciary of a multiemployer plan. Additionally, ERISA provides that any person who renders investment advice for a fee or who exercises discretionary authority over the administration of the plan will be considered a functional fiduciary. Fund counsel, accountants and clerical employees can unintentionally become fiduciaries by stepping out of an advisory role and making decisions regarding plan administration. Unions and employers are also considered fiduciaries when appointing and removing trustees.[6]

Every apprenticeship trustee must act as a "prudent man" in the administration and operation of the training program. ERISA requires trustees to diversify plan assets, to act solely in the interest of the plan and to administer the plan in accordance with the written instruments. A lack of knowledge or experience is not a legitimate defense to fiduciary violation. The "prudent man" standard means well-intentioned actions can still lead to liability under ERISA. A fiduciary's subjective beliefs are irrelevant in determining whether a violation has occurred. For this reason, programs might want to consider sending newly appointed trustees to an educational seminar designed to explain their responsibilities.

ERISA does not allow fiduciaries to ignore others' misdeeds. An "innocent" fiduciary can be held responsible for violations by another person if that fiduciary helps conceal a wrongful act, ignores a wrongful act or allows a breach of fiduciary respon-

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Bonus Term

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sibility to occur due to inattention to the trust. Once a fiduciary learns of a wrongful act, a protest resignation will not shield the fiduciary from liability.[7] Regulations suggest fiduciaries should note their objections in the minutes of the meeting, notify DOL and possibly request an injunction be filed in federal court.[8]

Fiduciary Expenses and Compensation

Fiduciaries may not be compensated from an apprenticeship trust if they are already receiving "full-time" pay from a contributing employer, an association or a union. A person who is compensated on an hourly basis and who suffers a loss of pay as a result of service as a fiduciary is not considered to be receiving "full-time" pay.[9] As a result, salaried fiduciaries should not receive supplemental pay for service to the program, even if such work is after hours or on weekends.

ERISA permits fiduciaries to be reimbursed for reasonable expenses properly incurred while working on a plan's behalf. The reimbursement of expenses is an issue that will be closely examined in an audit by DOL or IRS. Whether an expense is reasonable depends upon the "facts and circumstances" of each case. Nonetheless, there are several types of expenditures that draw regular scrutiny from investigators, including first-class airfare; unnecessary lodging costs; alcohol (especially large bar tabs); excessive meal expenses; rental cars when less costly transportation, i.e., taxis, shuttles, are available; and any expenses of a personal nature. Fiduciaries are often held personally responsible for improper expenditures made by other fiduciaries or employees.

A written compensation reimbursement policy should be adopted by every apprenticeship program. Fiduciaries and employees should be required to submit detailed reimbursement requests outlining every expense incurred on behalf of the program. Fiduciaries may not vote upon the reimbursement of their own expenses or compensation because doing so is a violation of ERISA, even when the payments are reasonable.

Prohibited Transaction Rules

Section 406 of ERISA prohibits fiduciaries from engaging in certain transactions with people who are deemed *parties in interest* to the plan. The term is very broad and includes fiduciaries, service providers, contributing employers, affiliated labor organizations, shareholders of contributing employers and certain family members.[10] Fiduciaries should be very cautious when contemplating any transfers of goods, money or services between a plan and a party in interest.[11] Although there are several exceptions to the prohibited transaction rules, fiduciaries should always discuss such transactions with fund counsel. Even a deal that is favorable to the plan can constitute a prohibited transaction and lead to penalties from DOL. Such penalties cannot be paid from the general assets of the trust.

Section 408 of ERISA lists 13 transactions that are statutory exceptions to the PT rules. Of particular importance to an apprenticeship program is an exemption allowing plans to obtain office space and administrative services from a party in interest for a reasonable fee. This exemption allows an arm's-length lease between a union and an apprenticeship fund so long as the fund may terminate the lease prior to the end of the term and pay only "reasonable" expenses related to the vacancy. This exemption also allows an apprenticeship program to pay a reasonable share of expenses to a union or a fund office for secretarial and/or bookkeeping services.

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In addition to the statutory exemptions, the secretary of labor has discretion to grant other exceptions to the prohibited transaction rules. Several "class" exemptions have been authorized that are relevant to transactions involving apprenticeship programs. Prohibited Transaction Exemptions 76-1, 78-6 and 77-10 involve special exceptions for delinquent employer contributions; construction loans; shared office space, administrative services and goods; the purchase of property from contributing employers; the lease of personal property from a contributing employer; and the lease of real property from a union or a contributing employer. Neither the statutory nor class exemptions allow an apprenticeship program to purchase real estate from a union or an employer, purchase or lease personal property from a union or employer, or sell real estate owned by the apprenticeship program to a union or contributing employer.

Fiduciaries also have the right to seek individual exemptions to the prohibited transaction rules. DOL requires the proposed transaction to be reasonable, feasible and in the best interest of all participants and beneficiaries. By securing an individual exemption, the fiduciaries and parties in interest can avoid future scrutiny from IRS and DOL. The individual exemption process cannot be used once an investigation is underway.

Insurance Considerations for Apprenticeship Programs

Training an inexperienced and diverse workforce carries different risks from those faced by retirement and health funds. Many apprenticeship programs have inadequate insurance coverage, a problem that comes to light only after a serious accident or a complaint of discrimination. While nearly every plan maintains the mandatory fidelity bond and optional fiduciary liability coverage, many do not consider the other types of coverage that can help mitigate a risk of loss.

Directors and officers insurance offers protection to nonprofit apprenticeship programs against claims that may not be covered by the plan's fiduciary coverage. A typical policy will contain employment practices coverage that can provide insulation against legal action involving discrimination and harassment. This is important because apprenticeship programs are far more likely than other plans to face allegations of discrimination. A directors and officers policy may also contain provisions protecting against claims of libel and defamation.

Commercial package policies are available to apprenticeship programs and combine multiple types of coverage at a premium discount. The following coverages are important to an apprenticeship program.

- *Commercial general liability and property* covers claims of bodily injury or property damage.

- *Business automobile* policies will cover vehicles owned, rented, leased or used by the program's employees when acting in furtherance of the business of the fund.
- *Inland marine* policies provide protection for the equipment (e.g., laptop computers, training materials, training equipment) of the apprenticeship program while off site.

Scholarship Loan Agreements

The use of scholarship loan agreements (SLAs) is common among apprenticeship and training programs. Most apprenticeship programs are funded through hourly contributions by a group of participating employers. An SLA is designed to prevent a person from receiving heavily subsidized training and immediately accepting employment with a noncontributing employer. Typically, apprentices are asked to sign an SLA at their time of indenture and annually thereafter. The SLA assigns a dollar value to each year of training and requires the apprentices to repay the "loan" in cash, or through in-kind credits earned by remaining employed with contractors that sponsor the apprenticeship program. The SLA is viewed as an important tool for retaining a quality workforce. Unfortunately, a series of court decisions have made SLAs more difficult to enforce.

The *Great-West v. Knudson* case was decided by the U.S. Supreme Court in January 2002.[12] Prior to *Knudson*, plans were permitted to use ERISA as a basis to sue former apprentices who breached their SLAs. While the *Knudson* decision had nothing to do with apprenticeship programs, the decision essentially eliminated the ability to use ERISA as an SLA enforcement mechanism. Shortly after *Knudson*, two decisions from circuit courts of appeal dismissed actions by apprenticeship funds seeking to use ERISA to enforce SLAs.[13]

The *Knudson* decision did not bar the use of SLAs but ruled that they must be enforced using a mechanism other than ERISA. Since then, *Knudson* SLAs have been enforced through:

- *Injunctions:* Some programs have structured the SLA similar to traditional noncompete agreements, which are enforced through injunctions in state or federal courts. Former apprentices can lift the injunction by paying the remainder of the amount due on their agreements.
- *Collection agencies:* This is a relatively simple approach, but most agencies will retain 40%-60% of monies collected as compensation for their services.
- *State claims:* Some programs have successfully brought claims in state court, but an apprentice could argue that federal law, i.e., ERISA, preempts a state lawsuit.
- *Binding arbitration:* SLAs can be amended to include arbitration clauses. Decisions rendered by an arbitrator are enforceable in federal court. This method can be more costly but should be effective.

USERRA and Apprenticeship Programs

Apprenticeship committees are responsible for notifying employees and apprentices of their rights and responsibilities under the Uniformed Services Employment and Reemployment Act (USERRA). A sample USERRA poster and detailed compliance information is available from DOL on the Veterans' Employment and Training Service Web site.[14] The 2005 USERRA regulations clarified that an apprentice who returns from qualifying military service is to be placed "at a level that reflects both the experience and training he or she received pre-service."[15] In other words, the returning service member is required to complete all training, testing and on-the-job hours before advancing in the program. Once service members complete the apprentice program, they are entitled to be credited with all preservice, military and postservice time for purposes of seniority and pay.

Conclusion

Fiduciaries who serve apprenticeship and training programs are faced with the same legal responsibilities as those who serve retirement and welfare funds. Additionally, apprenticeship trustees are more likely than their counterparts to face allegations of discrimination and unlawful employment practices. It is therefore important that apprenticeship trustees are familiar with their basic legal obligations and can identify situations when professional advice should be sought on behalf of the program. Regular consultation with national apprenticeship programs, insurers and professional advisors can help minimize the risks faced by apprenticeship and training programs. B&C

Endnotes

1. 29 CFR §29.4.
2. 29 CFR §29.5.
3. IRS Publication 557 (3/2005) "Tax-Exempt Status for Your Organization."
4. Instructions to IRS Form 4720 (www.irs.gov/pub/irs-pdf/i4720.pdf).
5. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982).
6. 29 CFR §2509.75-8, D-4.
7. See, e.g., *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629 (D.C.Wis., 1979); 29 CFR §2509.75-5 ("It should be noted that, where a trustee believes that a co-trustee has already committed a breach, resignation by the trustee as a protest against such breach will not generally be considered sufficient to discharge the trustee's positive duty under Section 405(a)(3) to make reasonable efforts under the circumstances to remedy the breach.").
8. 29 CFR §2509.75-5.
9. ERISA General Information Letter (June 4, 1993).
10. 29 U.S.C. §1002(14).
11. 29 U.S.C. §1106(a)(1)(A)-(E).
12. 534 U.S. 204 (2002).
13. *Anderson v. Newman*, 35 Fed. Appx. 204 (6th Cir. 2002); *Honolulu JATC v. Foster*, 332 F.3d 1234 (9th Cir. 2003).
14. See www.dol.gov/vets.
15. *Federal Register*, Volume 70, Number 242, pp. 75246-75292.

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