Trustee Expense Reimbursements / Acceptance of Gratuities

by
Ian D. Lanoff, Principal
Richard K. Matta, Principal
Groom Law Group, Chartered

Over the past year or two there has been a growing amount of information and misinformation regarding when and to what extent trustees and other fiduciaries of ERISA-governed retirement plans may accept meals, entertainment, gifts, and expense reimbursements (for lack of a better term, "gratuities") from plan service providers (or may themselves charge such expenses to the plan). Of course, this development is of acute interest to fiduciaries of non-ERISA public plans either because applicable statutory provisions are ERISA based or simply because rules issued by the federal government may be taken into account by state and local courts as "best practices."

These issues are enormously complex and the regulatory environment is changing rapidly. However, the following brief overview may serve as a starting point for plan trustees:

Sources of Liability:

- ERISA § 406(b)(3): Anti-Kickback Rule
    - A fiduciary of a plan may not "receive consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."
    - If the payment is related to plan business, and plan assets could have been used, arguably no violation occurs because the payment benefits the plan and not the fiduciary personally.
    - Proper plan expenses under ERISA: a plan may pay (and a fiduciary may be reimbursed) "reasonable expenses of administering the plan."
- 18 USC § 1954: Criminal Kickback Rule
    - Whoever being a trustee of any employee … benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift,

loan, money, or thing of value prohibited by this section, shall be fined under this title [not more than $10,000] or imprisoned not more than three years or both.

- Will recent § 1954 cases require stricter proof?

  - Sun Diamond 526 U.S. 398 (Sup. Ct. 1999): Under analogous law, the court held that the U.S. must prove a link between a gift and a specific official act for or because of which the gift was made.

  - U.S. v. Kirkland (No. CR 02-350-BR) (D. Oregon 2004) Trustees were acquitted, according to the court, because there was no evidence of their subjective state of mind sufficient to prove that a hunting trip to Argentina and fishing trips to Alaska from the plan's investment manager (who was convicted) were received "because of" a specific act to be performed or taken in the past by the trustees.

Relevant considerations in whether a "gratuity" may be permissible:

Unfortunately, much of the difficulty in analyzing the application of ERISA relates to the fact that so much turns on "subjective" factors such as the intent of the parties, their relationships, and other factors. However, in analyzing whether any gratuity may be permissible, the following factors should be considered (the first point is key, the others are helpful and appropriate to answering it in the affirmative):

- Whether the purpose of the gratuity is solely and exclusively for the benefit of plan participants and beneficiaries (e.g., the purpose is to aid in the administration of the plan, contribute to the trustee's prudent and diligent performance of their fiduciary responsibilities, etc.), and would otherwise be a reasonable and legitimate expense of plan administration if it were paid directly out of plan assets. (In other words, is this something the plan itself could pay for?)

- Whether the gratuity is authorized or even required by the plan or contract.

- Whether the plan has a written gratuities policy (and it is followed).

- Whether the receipt/payment of the gratuity is disclosed.

- Whether detailed and complete records are maintained of the activity, circumstances, business discussed, parties in attendance, etc.

- Whether the cost is extravagant (e.g., a $50 meal versus a $500 meal, first class airfare versus coach, etc.).

- Whether there is evidence of intent to influence a specific decision (e.g., acceptance of a new contract) versus maintenance of general "goodwill".

- The relationship between the expense and the benefit to the plan (e.g., three nights room and meals to attend a half-day meeting).

- Frequency and degree.

- Err on the side of being conservative.

Gratuities that should be avoided:

Only in a few cases has the Labor Department (DOL) or the Justice Department formally addressed (or challenged) specific gratuities in the ERISA plan context; in general, these have been "abusive" situations. Informally, however, particularly in plan audit situations, DOL has questioned some specific practices. In the absence of further guidance from DOL, many trustees have determined that it is advisable to avoid the following (by the trustee or the trustee's family):

- Free or discounted personal services from a service provider or its affiliates, such as below-market rates on loans, discounted brokerage from a broker, free legal or financial advice, free accounting services, free computers, free use of homes, boats, cars.

- Cash awards, retirement parties or gifts, non-cash gifts of more than nominal value (such as certificates and plaques), charitable contributions in the name of the trustee or staff or in connection to a plan sponsor event.

- Expenses of spouses, family members and friends at meals, conferences, entertainment events.

- Personal expenses of trustees or staff while traveling (e.g., spa fees, movies, room service meals, incidentals, dry cleaning, personal phone calls).

- Purely recreational activities, i.e., not involving or incident to business discussions (e.g., an afternoon sailing outing or historical tour for trustees or staff and spouses after a morning seminar).

- Expense-paid overseas trips.

Specific types of gratuities that may be acceptable:

Each specific case must be examined individually. In general, however, certain gratuities paid by a service provider arguably should be permissible under appropriate circumstances and subject to reasonable guidelines (see "relevant considerations", above). The following are still considered by many to be acceptable, roughly the order of least risky to most risky:

- Meals in conjunction with business meetings, whether in-house or at restaurants.

- Educational conferences/seminars – seminar costs (e.g., speaker fees, etc.), reasonable hotel, meal, reception and travel expenses of trustees or staff (not spouses).

- Alcohol – reasonable and infrequent amounts, specifically in connection with otherwise permissible meals, conferences, etc.

- Business entertainment – some still argue that attendance at sporting events, golf outings, etc. should be acceptable to the extent that these activities involve or are incident to discussion of business (including networking with other clients). Informally, however, some DOL staff have suggested that entertainment expenses are never appropriate.

Recommended "going forward" strategy:

Generally, plans and plan service providers should consider the following, as relevant:

- Develop and adopt written gratuity policies and guidelines.

- Incorporate specific language in service contracts "requiring" gratuities under certain circumstances. For example, trustees should consider requiring that an investment manager as part of its services offer periodic educational activities for the trustees, other plan fiduciaries and/or in-house non-fiduciary staff. Similarly, the contract may require as part of the manager's compensation that the trustees or staff periodically attend manager-sponsored events in order to allow the manager and its affiliates to describe (but not promote) their products and services.

- Ask not what the provider is willing to pay, but what the plan could pay . . .

- Moderation, moderation, moderation.

- Consider plan policies.

    - Types, amounts and frequency.

    - Relationship in time to trustee or staff decisions.

Two additional potentially relevant DOL actions for trustees to keep in mind:

- The DOL ERISA Program has issued a letter requiring that any trustee who recuses himself or herself from a decision must disclose the grounds for recusal if it would be considered "material information" that other trustees require in order to render a prudent decision. Certainly some gratuities will satisfy the materiality test.

- The DOL union regulatory program under the Landrum-Griffin Act has issued guidance for employers, and union officials and employees who serve as plan trustees, to file reports listing payments and the receipt of payments, particularly gratuities (anything over $25). Though ERISA never applies to governmental plans, the Landrum-Griffin exceptions are more complicated:

    - A state or local government, and a public plan all of whose trustees and staff are government employees, generally will not be an “employer” subject to Landrum-Griffin and will not be obligated to file a Form LM-10 Employer Report in connection with payments made by it to union members.

    - A union official or employee who serves as a public plan trustee – even if otherwise a full-time government employee - will **not** be exempt from filing a Form LM-30 Labor Organization and Employee Report *unless* the union *exclusively* represents public employees – note, in this case, that it is the status of the union, *not* the employer or employee, that is the relevant factor.