



# Collecting Employer Contributions

**THE ERISA  
LITIGATION GUIDE**

**Travis J. Ketterman**

**International Foundation**  
EDUCATION - BENEFITS • COMPENSATION



*Accomplish More.*

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# Dedication

This book is dedicated with love, appreciation and gratitude to Samantha, Zoë, Ava and Tes Ketterman.

The book is also dedicated to the men and women of the United Brotherhood of Carpenters and Joiners of America and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, who have provided me with the honor of representing them each and every day of my legal career.

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# About the Author



Travis J. Ketterman is a partner with the Chicago law firm of Whitfield McGann & Ketterman, where his practice is devoted to representing labor organizations and multiemployer fringe benefit trust funds in federal court litigation. He also serves as an adjunct professor for the Loyola University Chicago School of Law, where he teaches appellate advocacy.

Mr. Ketterman graduated cum laude from Marquette University in 1993 with a triple major in political science, philosophy and criminology. He received his juris doctor degree from Loyola University Chicago School of Law in 1996.

In the area of alternative dispute resolution, Mr. Ketterman received his mediator credentials from Northwestern University. He serves as a court-appointed arbitrator and mediator in Cook County and Kane County state court litigation. He is also a mediator in the Western Division (Rockford) of the U.S. District Court for the Northern District of Illinois.

Mr. Ketterman serves as a member of the Federal Trial Bar. He is active in the Illinois State Bar Association, where he was appointed to the Federal Civil Practice Section Council. He is also a member of the Illinois Appellate Lawyers Association and the Federal Bar Association.

In 2003 and 2006, the Illinois State Bar Association awarded Mr. Ketterman the Lincoln Legal Writing Award. *Chicago Magazine* named Mr. Ketterman one of the “Rising Stars” of the Illinois legal community in February 2008.

Mr. Ketterman has published numerous articles, all involving the federal practice of law. In addition, Mr. Ketterman has been quoted discussing legal events in the *Chicago Tribune*, the *Chicago Sun Times*, *Crain's*, the *Business National Affairs* labor journals and on Chicago television newscasts.

# VII.

## Collecting the Federal Judgment

Although obtaining a judgment is a worthwhile endeavor, the trust fund is only truly successful if the employer actually pays the trust fund. This payment is known as *satisfying the judgment*. This chapter explores the various actions taken by the trust fund to collect money after obtaining a judgment from the federal court.

### **Action: Enforce the Judgment on the Employer**

Federal district courts use the enforcement procedures of the state in which the federal district court is located.<sup>1</sup> Thus, if the trust fund obtains a judgment in the U.S. District Court for the Northern District of Illinois (in Chicago), the trust fund will use the laws of the State of Illinois to collect the judgment. Procedures used to collect the judgment depend on the state in which the federal court is located.

Importantly, the Federal Rules of Civil Procedure expressly stay the enforcement of any judgment for ten days. Thus, the trust fund must wait at least ten days before attempting to collect the judgment.

Most states allow the trust fund to require the employer to answer questions about the employer's assets. Mandatory interviews (conducted under oath and with a court reporter present) are known as *citations to discover assets* or *interrogatories* (not to be confused with the discovery procedure). For ease, this chapter will refer to these collection procedures as *citations*.

Regardless of what the interviews are called, the trust fund should issue the appropriate summons to the employer to require that the employer's representative appear either in court or at the offices of the trust fund's attorney at a set time and date.

The citations are a court-ordered appearance; attendance is not optional. If the employer refuses to attend the citation, the trust fund may file a *motion for rule to show cause* and begin the process for holding the employer in contempt of court.

### ***Checklist: Collecting the Judgment From the Employer***

In the written summons to the employer, the trust fund should require that the employer produce the following documents at the beginning of the citation:

- Federal and state income tax returns for the past two (2) calendar years
- Records of checking accounts
- Records of savings accounts
- Title or other evidence of ownership of real estate
- Documents regarding any equitable or beneficial ownership of any real estate
- Titles or other evidence of ownership of automobiles, trucks, vans, campers, motorcycles, snowmobiles or other motor vehicles of any type or description
- Titles or other evidence of ownership for equipment, machinery, tools and the like
- All accounts receivable due
- A list of jobsites worked during the past 12 months
- All notes or other loans due
- All lawsuits, claims or causes of action by the employer against any other person, persons or companies
- All stocks, bonds or similar instruments owned by the employer
- All written or oral trusts of which the employer is a beneficiary
- All accounts of any kind in which any person is holding any item of value for the employer for safekeeping or as custodian or trustee
- Evidence of any safe deposit boxes
- Leases in which the employer has the right to receive rent or anything else of value
- Estates of which the employer is an heir, devisee or legatee.

During the actual questioning, the trust fund should obtain the following information from the employer in order to collect the judgment:

- The names of current officers, directors and shareholders
- Accounts with any financial institutions
- Safety deposit box locations
- Liens against the employer
- Jobs in progress
- Open bids in which the employer is competing
- Accounts receivable
- Money owed to the employer by anyone else
- Loans made by the employer

- Real estate owned
- Trust of which the employer may be a beneficiary
- Tools owned by the employer
- Vehicles owned by the employer
- Lawsuits by the employer
- Equipment, vehicles or other assets loaned by the employer to others
- Stocks, bonds, money markets or other investment accounts
- Other judgments pending against the employer
- Tax liens against the employer
- Pending lawsuits against the employer
- Threatened lawsuits against the employer.

### **Forms**

- Motion for Rule to Show Cause. *See p. 237.*
- Citation to Discover Assets (Defendant Employer). *See p. 292.*
- Outline for Conducting a Citation to Discover Assets. *See p. 299.*

### **Action: Enforce the Judgment Through the Employer's Bank**

In the attorney referral packet, the trust fund should provide a copy of a check used by the employer to pay fringe benefit contributions. This initial step will allow the trust fund's attorney to file a *citation to discover assets* on the bank immediately after the judgment may be enforced (ten days after the judgment is entered).

The citation effectively freezes money held by the bank for the employer. In fact, under many state laws, the bank is allowed to freeze assets in an amount greater than the judgment. For example, in Illinois, a bank may freeze an amount equal to double the amount of the judgment. The bank is not allowed to release the frozen assets until receiving another order from the court.

The citation technically requires a representative of the bank to appear at a specific time and date in the office of the trust fund attorney or at court. However, unlike the employer representative, the trust fund should waive this physical appearance if the bank provides the records to the trust fund.

If the bank is holding money belonging to the employer, the trust fund must file a *motion for turnover order* with the federal court that entered the judgment. The order will direct the bank to pay the frozen money directly to the trust fund on behalf of the employer.

If the judgment is paid without using the bank accounts, the trust fund must release the citation, thus lifting the freeze on the accounts.

### **Checklist: Collecting the Judgment From a Bank**

In the citation on the bank, the trust fund should request the following documents:

- A current statement which reflects the amount of funds currently held in all accounts belonging to the employer
- Signature cards to each account belonging to the employer
- Documents which reflect the closure of accounts belonging to the employer, including the date and reason that such accounts were closed
- Documents which reflect any liens, levies, garnishments and secured interests in accounts belonging to the employer
- Documents evidencing mortgages or equitable interest in any real property of the employer
- Documents evidencing any loans of money to the employer, including the amounts paid and outstanding under the loans.

### **Forms**

- Motion for Rule to Show Cause. *See p. 237.*
- Citation to Discover Assets (Financial Institution). *See p. 295.*
- Citation to Discover Assets (Motion for Turnover Order and Draft Turnover Order). *See p. 304.*
- Release of Citation and Judgment. *See p. 306.*

### **Action: Enforce the Judgment Through General Contractors Who Subcontract Work to the Defendant**

In addition to the employer and the employer's bank, the trust fund may serve citations on any person or entity that may owe money to the employer (known as third parties). In the construction setting, this group includes owners, developers, general contractors and other subcontractors. The citation prevents the other party from paying the money to the employer without a court order.

The citation will require a representative of the third party to appear at a specific time and date in the office of the trust fund attorney or at court. Like the bank representative, the trust fund should waive this physical appearance if the third party provides the records to the trust fund.

If the third party is holding money belonging to the employer, the trust fund must file a motion for turnover order with the federal court that entered the judgment. The order will direct the third party to pay the frozen money directly to the trust fund on behalf of the employer.

If the judgment is paid without using the third party's money, the trust fund must release the citation, thus lifting the freeze on the money owed by the third party to the employer.

### ***Checklist: Collecting the Judgment From a Third Party***

In the citation on third parties, the trust fund should request the following documents from the third party:

- Any and all written agreements or contracts entered into with the employer
- Any and all invoices submitted by the employer for work performed or materials purchased
- Documents evidencing payments submitted to the employer for work performed
- A current statement which lists all funds paid to the employer and all amounts owed to the employer
- Documents evidencing outstanding payments owed to the employer
- Documents evidencing a secured interest in the employer's personal or real property
- Copies of all notices of mechanics' liens for work performed by the employer or work subcontracted by the employer
- Copies of any and all performance of payment bonds or other bonds which concern any project where the employer performed work.

### ***Forms***

- Citation to Discover Assets (Third Party). *See p. 297.*
- Citation to Discover Assets (Motion for Turnover Order and Draft Turnover Order). *See p. 304.*
- Release of Citation and Judgment. *See p. 306.*

### **Action: Place the Employer Into an Involuntary Bankruptcy**

In the usual case, an employer halts collection efforts by declaring bankruptcy. However, the Bankruptcy Code provides a mechanism for the trust fund to use the bankruptcy law to its advantage in collecting on a judgment.

Three creditors with claims that are noncontingent and not subject to a bona fide dispute may file a *petition for involuntary bankruptcy* against the employer.<sup>2</sup> While a single creditor cannot force an employer into bankruptcy, a trust fund generally consists of three independent funds (and thus, three separate creditors): a pension fund, a health and welfare fund, and an apprentice fund. Thus, the trust fund may file an involuntary bankruptcy petition without needing other creditors. The three claims by the trust fund must total at least \$12,300.

Importantly, the debts owed by the employer must be noncontingent and not subject to a bona fide dispute as to both the amount owed and the liability. Thus, the trust fund is protected in filing a petition based on a judgment (which has removed liability and the amounts from the realm of dispute and the judgment is noncontingent).

However, the trust fund must be extremely cautious about utilizing the involuntary bankruptcy procedures in other situations.

An involuntary bankruptcy petition may be filed under either Chapter 7 (the employer ceases doing business) or Chapter 11 (the employer stays in business under a plan or reorganization).

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1. Fed.R.Civ.P. 64.
  2. 11 U.S.C. §303(b)(1).