WORKSHOP:
Reciprocity Agreements

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Reciprocity Defined

- A situation or relationship in which two people or groups agree to do something similar for each other, to allow each other to have the same rights, etc.: a reciprocal arrangement or relationship.

- A mutual exchange of privileges; specifically: a recognition by one of two institutions of the validity of licenses or privileges granted by the other.
  
  – Miriam-Webster Online Dictionary
Reciprocity Explained
Reciprocity Agreements

• General Concepts
  – Participant works in covered employment
  – Employer makes contributions to an ERISA-governed multiemployer benefit fund on the participant’s behalf for covered work
  – Such an arrangement is set forth in a written document
    • Collective bargaining agreement (CBA)
    • Participation agreement
Reciprocity Agreements

• General Concepts (continued)
  – What if a participant works outside the jurisdiction of his home local as contemplated by the CBA between his union and the employer?
    • Does the participant get credit for that work from his home benefit fund?
    • To which benefit fund should the employer be sending the contributions that are owed under the governing CBA?
Reciprocity Agreements

• **General Concepts (continued)**
  – These issues are addressed by reciprocity agreements
    • Entered into by and between benefit funds
    • Designed to encourage the portability of benefits
    • Intended to protect participants working in multiple jurisdictions
    • Govern the transfer of employer contributions between benefit funds
Reciprocity Agreements

• General Concepts *(continued)*
  – Reciprocity agreements are contracts that are:
    • Open to negotiation
    • Subject to interpretation
    • By and between two parties, with potential third-party beneficiaries
    • The basis for litigation
    • Unenforceable if in violation of contract law or in conflict with ERISA or other statutory authority
Reciprocity Agreements

• General Concepts (continued)
  – Some definitions:
    • Home Fund: The benefit fund co-sponsored by the Participant’s home local union
    • Away Fund: The benefit fund in the jurisdiction in which the traveling participant is working and to which contributions are being made on his behalf
    • Traveling Participant: The individual who is working outside of the jurisdiction of the home local union
Types of Reciprocity Agreements

• “Money Follows the Member”
  – The Away Fund obligates itself to collect the contributions on behalf of the traveling participant and sends them to the Home Fund so that the traveling participant’s benefits are paid for when he/she receives them from his/her Home Fund.
    • Almost always limited to contributions collected and processed
    • Administrative fee is rarely charged in collection
Types of Reciprocity Agreements

• “Pro Rata”
  – The Away Fund obligates itself to collect the contributions on behalf of the traveling participant but only sends to the Home Fund the amount of contributions that would have been collected by the Home Fund had the work been performed in the jurisdiction of the home local
    • Recognition of different contribution rates in different jurisdictions
Participants’ Role in Reciprocity Agreements

- Participants are not parties to reciprocity agreements
- But they do play a role:
  - Participants generally must register with a clearinghouse or web-based system so that contributions can be transferred
  - Affirmative election is often required
  - May have to direct contributions if Home Funds are not compatible with Away Funds
  - Participants will monitor contributions to ensure they are receiving credit for hours worked
Participants’ Role in Reciprocity Agreements

- Case Study #1: *Keegan v. Steamfitters Local Union No. 420 Pension Plan*, 67 F. App’x. 744 (3d Cir. 2003)
  - Participants monitored service credits awarded
  - Participants sought retroactive application of reciprocity agreements to provide them with more credits, and thus, higher pensions
  - Dispute arose after merger of local unions
  - Participants sought credit for hours worked prior to merger
  - Participants sued for breach of fiduciary duty and for a declaration that they were entitled to additional service credits
  - Court concluded that reciprocity agreements could not be applied retroactively
  - Court applied general principles of contract interpretation
Reciprocity Agreements: Key Terms

- Reciprocity agreements should address the following:
  - PBGC premiums
  - Credit for vesting purposes
  - Benefit accruals
  - Past service credit
  - Dispute resolution
  - Termination provisions
  - Limitations on liability
  - Preservation of confidential information
Reciprocity Agreements: Key Terms

  - Traveling participants work in another jurisdiction
  - Contributions are made to Away Fund
  - Trustees of the Away Fund adopt rehab plan that:
    - Eliminated future benefit accruals for Traveling Participants
    - Withheld the first dollar of each contribution made to the Away Fund
  - Traveling participants ask Away Fund to transfer the withheld contributions to Home Fund
  - Away Fund denies the request

- Traveling participants bring suit for recovery of benefits under Section 502(a)(1)(B) of ERISA and breach of fiduciary duty under Section 502(a)(2) of ERISA
- Traveling Participants claim that the Away Fund’s amendment to withhold contributions violated the reciprocity agreement
- Trustees of the Away Fund moved to dismiss the complaint arguing that the traveling participants:
  - Were not participants of the Away Fund, so had no legal standing to bring suit
  - Forfeited their right to sue because they signed a waiver
  - Had no right to sue under the reciprocity agreement because they were not a party to the agreement
Reciprocity Agreements: Key Terms

  – The Court ruled in favor of the traveling participants with respect to all three arguments:
    • Traveling participants were participants of the Fund as they met the plan’s definition for participation
    • There was no waiver of rights because the traveling participants only waived their rights to seek benefits in connection with contributions that were transferred by the Away Fund, not with respect to contributions being withheld by the Away Fund
    • Traveling participants were not suing to enforce the terms of the reciprocity agreement, but instead were suing to enforce the terms of the plan, which in turn incorporates the reciprocity agreement
  – The case was appealed to the Ninth Circuit and is pending
Withdrawal Liability and Reciprocity Agreements

• Withdrawal Liability
  – Section 4203 of ERISA defines a withdrawal by an employer as, among other things, a permanent cessation of “an obligation to contribute under the plan”
  – Section 4212(a) of ERISA defines “obligation to contribute” as an obligation arising:
    • Under one or more collective bargaining (or related) agreements, or
    • As a result of a duty under applicable labor management relations law
Withdrawal Liability and Reciprocity Agreements

• Does the transfer of contributions from the Away Fund to the Home Fund under the reciprocity agreement create an “obligation to contribute” on behalf of the Away Fund?

• If so, could the Away Fund be subject to an assessment of withdrawal liability by the Home Fund?
Withdrawal Liability and Reciprocity Agreements

• Case Study #3: PBGC Opinion No. 85-22, 1985 WL 1253778 (Sept. 11, 1985)
  – Reciprocity agreement entered into among both defined benefit (DB) and defined contribution (DC) plans
  – Under the terms of the reciprocity agreement:
    • Contributions must be transferred to Home Fund if traveling participant provides written authorization and only if the contributions are made and collected
Withdrawal Liability and Reciprocity Agreements

• Case Study #3: PBGC Opinion No. 85-22, 1985 WL 1253778 (Sept. 11, 1985)
  – Contributions are made to a DC Away Fund
  – Contributions are transferred to a DB Home Fund
  – The employers are not party to the reciprocity agreement
  – The reciprocity agreement is not referenced in the governing CBAs or plan document
Withdrawal Liability and Reciprocity Agreements

- Case Study #3: PBGC Opinion No. 85-22, 1985 WL 1253778 (Sept. 11, 1985)
  - PBGC analyzes whether the DC Away Fund is subject to withdrawal liability to the DB Home Fund
  - Provides several caveats, including that it is the plan sponsor’s responsibility to determine if a withdrawal has occurred and to determine the identity of the liable employer
Withdrawal Liability and Reciprocity Agreements

• Case Study #3: PBGC Opinion No. 85-22, 1985 WL 1253778 (Sept. 11, 1985)
  – Will the DC Away Fund be liable?
Withdrawal Liability and Reciprocity Agreements

- Case Study #3: PBGC Opinion No. 85-22, 1985 WL 1253778 (Sept. 11, 1985)
  - “Withdrawal liability was intended to apply only to employers, as employers are the entities that generate contributions to multiemployer plans.”
  - PBGC thinks it is “clear” that a multiemployer pension plan is not an “employer” for withdrawal liability purposes with respect to the employees of its contributing employers.
Withdrawal Liability and Reciprocity Agreements

• Case Study #3: PBGC Opinion No. 85-22, 1985 WL 1253778 (Sept. 11, 1985)
  — “Defined contribution plans would not be liable for withdrawal liability for a transfer of assets from a multiemployer plan to another plan.”
Withdrawal Liability and Reciprocity Agreements

• Does the adoption of a reciprocity agreement by a DB Home Fund make the Fund’s contributing employers potentially liable for withdrawal liability to DB Away Funds that are parties to the reciprocity agreement?
Withdrawal Liability and Reciprocity Agreements

  - Reciprocity agreement entered into by multiemployer plans in construction industry
  - Under the terms of the reciprocity agreement:
    - Contributions must be transferred to Home Fund upon traveling participant’s request
    - Home Fund must treat transferred amounts as the “equivalent of contributions” for vesting and accrual purposes
Withdrawal Liability and Reciprocity Agreements

  - Under the terms of the reciprocity agreement:
    - Traveling participants are not participants of the Away Funds for PBGC premium calculations
    - Away Funds are only liable for the contributions to be transferred
    - No employer is a contributing employer in an Away Fund; only to the fund with which the employer has an obligation to contribute under a CBA or other written agreement
Withdrawal Liability and Reciprocity Agreements

  - PBGC addresses the question: does the adoption of the reciprocity agreement make contributing employers liable for withdrawal liability to the Away Funds that ultimately receive the contributions?
  - Notwithstanding the language of the reciprocity agreement, can the employers be considered to have an obligation to contribute to the Away Funds such that withdrawal liability must be imposed as a matter of law?
Withdrawal Liability and Reciprocity Agreements

• Case Study #4: PBGC Opinion No. 89-02, 1989 WL 205346 (Feb. 14, 1989)
  – ERISA defines key terms: participant; employer; obligation to contribute; all of which cannot be changed by agreement of the parties
  – Thus, a review of the plan document, reciprocity agreement or CBA, will not, by itself, resolve the question
Withdrawal Liability and Reciprocity Agreements

  - PBGC states that whether an employer has an obligation to contribute to a plan under ERISA is critical in determining if a withdrawal can occur
  - Stated differently, do reciprocity agreements give rise to an obligation to contribute?
Withdrawal Liability and Reciprocity Agreements

• Case Study #4: PBGC Opinion No. 89-02, 1989 WL 205346 (Feb. 14, 1989)
  – Legislative history suggests that reciprocity agreements do not give rise to such an obligation
  • Employers do not agree to be bound
  • Reciprocity is treated differently for asset transfer rules
  • There is a desire to promote portability of benefits
Withdrawal Liability and Reciprocity Agreements

  - “An appropriately structured reciprocity agreement does not in and of itself create in any employer an obligation to contribute, within the meaning of Section 4212(a), to any transferee plan.”
  - BUT . . .
Withdrawal Liability and Reciprocity Agreements

• Case Study #4: PBGC Opinion No. 89-02, 1989 WL 205346 (Feb. 14, 1989)
  – Circumstances could be created in which a reciprocity agreement could reflect an undertaking by contributing employers to contribute to an Away Fund
  – PBGC refuses to speculate about such circumstances
Withdrawal Liability and Reciprocity Agreements

• Case Study #4: PBGC Opinion No. 89-02, 1989 WL 205346 (Feb. 14, 1989)
  – Is there a recurrent transfer of relatively large amounts of contributions to an Away Fund?
  – Is the Home Fund’s jurisdiction occupied by traveling participants such that it will be impossible to forestall insolvency of the Home Fund?
  – Is an employer only using traveling participants to decrease its own contribution levels to a certain Home Fund?
Session #P16

WORKSHOP: Reciprocity Agreements

- Understand the material terms of reciprocity agreements and what impact they may have on your fund, your fund’s participants or your company and employees.
- Is there fund administration in place to enforce and monitor reciprocity arrangements?
- Remember that terms of the agreement may not trump ERISA.
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