Written Collection Procedures: The Collection Team’s Playbook

by Travis J. Ketteman
The former head coach of the Green Bay Packers Mike Holmgren scripted the first 25 plays of every Packers game. The football coach and the players entered every game with the knowledge of what would be done, and who would do it, to advance the ball and score touchdowns. When combined with the skill of the players and the wisdom of the head coach, the use of the playbook produced victories and a Super Bowl championship.

Working together, trustees, plan administrators, plan personnel, auditors and attorneys form the plan’s collection team. While football teams try to score touchdowns and kick field goals, victory for the collection team is measured by the collection of contributions owed by signatory employers to the plan. Football trophies provide bragging rights, but victories by the plan collection team provide health insurance and pension benefits.

In order to effectively and efficiently collect contributions, the plan collection team’s efforts must be based on written collection procedures adopted by the board of trustees. These written collection procedures form the playbook by which the entire collection team acts.

The Duty to Collect Contributions

Trustees have a fiduciary duty to collect employer contributions, including delinquent contributions. The Employee Retirement Income Security Act (ERISA) provides expansive powers to the trustees to collect these contributions and imposes extraordinary remedies against delinquent employers, including the award of liquidated damages, interest, and attorney fees and costs. As with any breach of a fiduciary duty, the failure of the trustee may lead to personal liability.

The adoption of written collection procedures is not optional. The written collection procedures must establish “systematic, reasonable and diligent collection efforts” in order to avoid committing a prohibited transaction under ERISA. While no regulatory guidelines exist that specifically address the collection of delinquent contributions, the Department of Labor issued Prohibited Transaction Exemption 76-1. PTE 76-1 sets forth the circumstances when a plan may provide an extended payment schedule or accept less than the full amount of money owed by a delinquent employer. Without written guidelines and adher-
ence to procedures, the trustees may be liable for providing the equivalent of an interest-free loan to delinquent employers.

The Components of the Written Collection Procedures

In football, playbooks have plans for offensive and defensive actions. Plays are designed so that the players know the route of the ball and the actions of the other players. In short, the playbook provides knowledge to the players that lead to a victory when executed correctly. Likewise, the playbook for the collection team should contain a series of plays that allow the collection team to know how to proceed with the effective and efficient collection of contributions. The written collection procedures should include the provisions listed below.

Definition of Delinquent Contributions

The collection procedure should specifically define when contributions are due and when additional damages will be assessed against a delinquent employer. For the due date, contributions are often due by the 15th day of the month following the month in which work was performed. For purposes of defining when additional damages accrue, this definition is expressed in terms of the number of days after which contributions are owed.

Liquidated Damages

Liquidated damages are amounts that may be assessed for failing to make timely contributions. In essence, liquidated damages reimburse the plan for hard-to-quantify expenses such as plan employees’ time spent collecting delinquent contributions. The collection procedures should provide (a) when liquidated damages will be assessed; (b) the rate at which liquidated damages will be assessed; and (c) the method used by an employer that seeks a waiver of liquidated damages.

Under ERISA, liquidated damages are capped at 20%. However, many plans assess a lower amount of liquidated damages if the contributions are paid prior to the filing of a lawsuit. For example, a common provision assesses liquidated damages at 1.5% compounded for each month the delinquent contributions are owed. If the plan is forced to file a lawsuit to collect the contributions, the statutory cap of 20% may apply.

Given the difficult economic conditions faced by signatory employers, a plan may also adopt a written waiver procedure. Under such a procedure, a delinquent employer may seek relief from liquidated damages by requesting a waiver in writing. In order to qualify for the waiver, a plan should require (a) all contributions are currently paid and (b) the employer has timely made all other contributions for a set period of time (e.g., 24 months).

Interest

In a fashion similar to liquidated damages, the written collection procedures should specify (a) when interest will be assessed and (b) the interest rate that will accrue. These written procedures will assist the plan in convincing an employer of its duty to pay the interest and demonstrating the appropriate calculation of damages in a lawsuit.

Time Frame to Pursue Delinquent Contributions

The written collection procedures should specify what actions will be taken and by whom when an employer is delinquent on making the monthly contributions. For example, the plan may generate a letter when contributions are five days past due. A plan employee may call the employer when the delinquency reaches ten days. The time frames should be specific, realistic and followed.

Audit Program

The written collection procedures
should define the scenarios under which the plan conducts audits. For example, a plan may audit contractors (a) randomly, (b) annually based on prior discrepancies, (c) upon the cancellation of a surety bond, (d) when a collective bargaining agreement is terminated, (e) after receiving complaints about contributions from participants, and (f) a designated period of time after an employer first signs a collective bargaining agreement.

If the plan uses agreed-upon procedures with the auditing firm, those procedures should be incorporated into the written collection procedures. However, the agreed-upon procedures should also be adopted independently by the board of trustees.

**Legal Referrals**

Specifically, the plan should adopt a procedure as to when the collection of delinquent contributions is referred to the plan's legal counsel. For example, legal action may be required in the following scenarios:

- The employer refuses to respond to an audit (by either paying or disputing) within a set time frame (e.g., 30 days).
- Plan employees and the employer have reached an impasse in attempting to resolve an audit and no further progress is reasonably expected.
- The employer is three months delinquent on submitting reports and contributions to the plan.

Moreover, the written collection procedures should provide the ability of the plan to make expedited referrals in cases where the employer ceases operations, declares bankruptcy or files for the assignment for the benefit of creditors, or the amount of the delinquency is large enough to justify an accelerated referral to legal counsel.

**Attorney Fees and Costs**

Law firms do not provide coupons in the Sunday newspapers; accordingly, any legal action a plan undertakes to collect delinquent contributions will cost the plan money to prosecute. An important remedy provided by ERISA is the mandatory recovery of reasonable attorney fees and costs upon entry of a judgment in favor of the plan. In addition to this statutory basis, a plan should specifically set forth when attorney fees and costs will be assessed against employers. For example, situations may arise when an employer refuses to submit books and records necessary for the plan to conduct an audit of the employer. After legal action is initiated, the audit may show no discrepancies. To seek legal fees for the efforts to obtain the books and records, the plan will need to demonstrate a written procedure of assessing the attorney fees and costs for the unreasonable audit refusal.

**Auditor Fees**

Likewise, a plan incurs expenses to obtain the services of an independent auditing firm to review the records of signatory employers. The written collection procedure should expressly describe the circumstances under which the plan will seek reimbursement of the auditor fees from an employer. For example, the plan may seek auditor fees for any situation in which the plan is forced to file a lawsuit to recover the audit discrepancies. Some plans require the payment of auditor fees anytime that the audit discrepancies exceed the auditor fees.

**Surety Bonds**

Given the harshness of economic conditions, a plan cannot rely solely on payments by signatory employers. Collective bargaining agreements may require employers to obtain wage-
and-benefit surety bonds based on the number of employees hired by the employer. In addition, trust agreements may provide the plan with an independent ability to require the posting of a surety bond based on the average monthly contributions submitted by the specific employer. In any event, the written collection procedure should define how the surety bonds will be secured, and how the proceeds will be applied in the event the entire amount owed is not collected (e.g., wages first; oldest debt first). This written procedure will prevent charges of unfair application or discrimination from participants.

**Settlement Guidelines and Authority**

The plan may not be able to recover the full amount owed to the plan, or the financial condition of the signatory employer may compel the plan to provide for an installment plan to pay the amounts owed. In either event, the written collection procedures should designate the factors to be considered by the plan. The procedures must be designed to allow for the “reasonable, diligent and systematic effort” of the plan to collect the full amount owed. However, the existence of settlement factors may lead the plan to compromise and settle if such settlements are in the best interest of the participants. The plan representative and the attorney should make a realistic assessment of the following factors:

- Ability to collect a judgment
- Risk of the employer filing bankruptcy, entering into an assignment for the benefit of creditors or simply ceasing operations
- Strengths and weaknesses of the plan’s case
- Cost of continued litigation
- Time needed to continue litigation and the effect of the delay on the participants and the plan.

The procedures should require that all settlements are memorialized in writing. Moreover, the written collection procedures must designate who makes settlement decisions on behalf of the plan. Ultimately, the trustees are responsible for all collection efforts; however, the magnitude of many plans makes the day-to-day involvement of the trustees impracticable. In such cases, either the administrator or another representative is vested with the authority to enter into settlements on behalf of the plan.

**Shutdowns**

Unfortunately, the best interest of the participants may require action to halt the operations of a signatory employer. Often, the plan may advise the union of the delinquency and the union may undertake actions to have the employees cease work until the appropriate resolution. Such a work stoppage assists the plans in collecting delinquent contributions and prevents the delinquency from growing.

**Withdrawal Liability Procedures**

A pension plan should adopt a separate written procedure for imposing and collecting withdrawal liability assessments. However, the general written collection procedures may incorporate the withdrawal liability procedures by reference.

**Mistaken Contributions/Credits**

The written collection procedures should define the situations, if any, under which the plan will provide credits for mistakenly paid contributions. The procedures should be drafted in a manner in which these credits are given only in rare circumstances when innocent mistakes were made and participants will not be harmed.

**Mechanics’ Liens**

The written collection procedures should expressly authorize plan employees and legal counsel to pursue mechanics’
liens in cases in which a traditional recovery of delinquent contributions is questionable. While the use of ERISA litigation with its mandatory imposition of damages beyond the delinquent contributions is preferable, mechanics’ liens represent another avenue of recovery for plans.

**NSF Payments**

The written collection procedure should set forth what additional amounts will be assessed against a signatory employer that presents a check returned for nonsufficient funds.

**Escape Clause**

Of course, the one thing worse than not having a written collection procedure is not following the adopted procedure. Accordingly, the written collection procedure should have a provision that authorizes the plan to deviate from the written procedure in those unique circumstances that arise. In addition, the plan should state the obvious: The written collection procedures do not supersede the collective bargaining agreement or the trust agreement.

**Conclusion**

Football teams win games when the playbook is properly executed. Likewise, a plan will effectively and efficiently collect contributions when the collection team of trustees, administrators, plan employees, auditors and attorneys know the playbook and follow the written collection procedures.

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