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# JATC BULLETIN

Insights on recent legal developments
and trends affecting
Joint Apprenticeship Training Programs

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Institute for Apprenticeship, Training and Education Programs

## Celebrate National Apprenticeship Week! Nov. 1-7

The Department of Labor joins with leaders in business, labor, education and others to celebrate the first ever National Apprenticeship Week that starts **November 1**!

Throughout the week, local community colleges, employers, unions and others are hosting more than 175 open houses and other events to help tell the unique story of how apprenticeship works for America. A listing of the events happening can be found here: **http://doleta.gov/oa/naw/files/NAW_Events_List.pdf**

You can join the fun! Use the hashtag **#ApprenticeshipWorks** and **#NAW2015** to elevate and expand the conversation on Twitter, Facebook, and Instagram all week long.

## JATC Collection Efforts: Employer Contributions and Scholarship Loan Agreements

The Department of Labor (DOL) was authorized as the governing agency for apprentices and apprenticeship programs when the National Apprenticeship Act (the Fitzgerald Act) was adopted in 1950. The Internal Revenue Service (IRS) and Employee Retirement Income Security Act (ERISA) also provides laws and regulations for the establishment and administration of an apprenticeship training trust fund. An apprenticeship training trust fund is deemed to be an employee welfare benefit plan under the IRS and ERISA guidance. As with other employee welfare benefit plans, a board of trustees must pursue monies owed to its apprenticeship training fund. **For apprenticeship programs, monies are typically owed to the fund in two ways: employer contributions to the fund and scholarship loan agreements with apprentices.**


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## Delinquent Employer Contributions

*BE AWARE!*
*Trustees may be held liable for plan losses stemming from the failure to collect delinquent contributions.*

Signatory contributing employers may delay or stop paying contributions to the apprenticeship fund. There are many reasons why a delinquency may occur: financial difficulties of the employer, nonpayment to the contributing employer from a general contractor, or even a new bookkeeper that is unfamiliar with how the monthly contributions to the fund work. Unfortunately, delinquent contributions to the fund by an employer puts the board of trustees of the apprenticeship fund in a precarious position.

The apprenticeship program is established pursuant to the collective bargaining agreement requiring contributions and a written trust agreement pursuant to the Taft-Hartley Act. The trust agreement must specify the fiduciaries who have authority to manage and control the fund, including the collection and monitoring of fund assets. The board of trustees is deemed to be the fiduciaries under the trust agreement to the apprenticeship program. As fiduciaries, the trustees must act in the best interests of the fund and exercise a duty of loyalty and duty of prudence.

The trustees must act in a manner that preserves and maintains the trust fund assets as fiduciaries of the fund. Pursuant to the fund documents and case law, delinquent contributions may become fund assets as soon as they are due and owing. This is why it is important to address delinquencies timely and effectively.

The DOL has released guidance reiterating that trustees must allocate responsibility for the monitoring and collection of delinquent plan contributions. The guidance set forth that the failure to monitor and collect could result in the trustees being held liable for plan losses stemming from the failure to collect contributions.

***Recommendation**:*
*Develop and follow a delinquent collection policy to help address delinquencies in a timely and effective manner*

Under ERISA, a prohibited transaction occurs when the fund enters into a transaction with a party in interest. A contributing contractor falls under ERISA's definition of a party in interest. A loan of money between the fund and a party in interest is deemed to be a prohibited transaction. The DOL has interpreted an employer that is delinquent in paying contributions to the fund to be a loan of money between the fund and a party in interest, thereby rendering the delinquency a prohibited transaction.

For these reasons, it is recommended to develop and follow a delinquent collection policy to help address the delinquencies in a timely and effective manner.

## Working with Others

It is imperative that trustees collect as many facts as possible for the given situation in order to make a decision about the delinquency that is in the best interests of the fund. Important factors the trustees should know about the employer include: the employer's contribution history, the company's status, the assets available to the


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employer, the jobs currently being worked on (and whether public or private jobs), and the union the delinquent employer is bargained with.

Coordination and cooperation with the local unions and the apprenticeship program trustees will be necessary to gather this information. The trustees will need to ensure an adequate flow of information with the local union involved. If a local union realizes a local contractor might be experiencing cash flow problems or a contractor has decided to shut its doors and sell assets, the apprenticeship program needs to be informed. A contractor experiencing financial difficulties may continue to pay health and welfare benefits but decide to not make or may delay the apprenticeship contributions causing delinquencies to the apprenticeship program to not be detected as quickly as with other fringe benefit funds.

For traveling contractors in the area, apprenticeship programs may not be informed of when the contractor's project is done in the area and the contractor may appear as a delinquent contractor. The fund will need to work closely with the local union to determine if any of that local union's members worked for the contractor during the period in question. Good communication is key to effective collections. **The faster the trustees can move during the collection process equals the more likely the fund is to recoup any money that is owed.** The trustees must actively monitor contributions and follow plan procedures if a delinquency occurs.

Besides just working with the local union regarding delinquent contributions, apprenticeship funds should communicate and cooperate with other funds on the collection of delinquent contributions. Often, the amounts due an apprenticeship program will be significantly lower than amounts due to the health and welfare fund or pension fund. For this reason, it may become cost prohibitive for the apprenticeship program to collect delinquent amounts on its own. Delinquent contributions tend to occur across multiple funds, and it is recommended that apprenticeship funds "piggyback" on the lawsuit of the larger fringe benefit funds and pay only its pro-rata portion of the legal fees and costs involved. Trustees should contact other trust funds as soon as possible after the apprenticeship fund becomes aware of a delinquent employer.

## Tools to Collect Delinquencies

There is a wide array of tools available to apprenticeship programs to collect on delinquent contributions and these tools should be set forth in a delinquent collection policy with specific timelines to be followed by the Fund.

First, the apprenticeship program should set timelines for consistent notices to be sent to any delinquent employers. At times, an internal issue of the employer may cause the employer to be delinquent instead of a financial issue. A notice from the apprenticeship fund may be all that is needed to collect on the delinquent amount. The local union should be contacted at this stage to see if it has any knowledge about the employer, for instance, whether the employer is no longer working in the area.


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The apprenticeship program should also collect information from other funds regarding the contributions from the employer.

***Tools to Collect:***

1. *Notices from the Fund*
2. *Demand letter from legal counsel*
3. *Pulling posted bonds*
4. *Litigation or arbitration*
5. *Mechanic's lien filings*
6. *Public project lien filings*

If notices from the fund do not remedy the problem, we recommend contacting legal counsel for next steps. Legal counsel will start by sending a demand letter to the delinquent employer requesting the contributions to be made within a set period of time, otherwise the employer will incur the costs of collection (including attorney fees, payroll audits, court costs, and interest) moving forward. If the balance of the contributions due is not determinable, the trustees may request a payroll audit to be conducted on the delinquent employer to determine the amount that should be contributed. If the payroll auditor is unable to get in the door of the employer to perform the audit, information from the local union will be key. The local union will likely need to be contacted to try to collect information on the hours worked by employees on the job to determine the amounts unpaid to the fund.

If the demand letter from legal counsel is ignored, legal counsel may move forward with several different methods of collecting. Legal counsel may request payment pursuant to any bonds held by the local union on the employer, file private mechanic's liens on projects of the employer, file public liens on public projects of the employer, and pursue lawsuits against the employer for collection. There are many different ways legal counsel may attempt to collect from the delinquent employer and the facts and circumstances of the employer is key in helping legal counsel determine the most effective and efficient method for collection. Many times, legal counsel may use more than one method to collect.

## Scholarship Loan Agreements

***BE AWARE!***
*Trustees may be held liable if the trustees do not seek reimbursement from the former apprentice under a breached scholarship loan agreement*

Trustees must pay close attention to collecting on breached scholarship loan agreements. These agreements are typically adopted by apprenticeship programs to help retain indentured apprentices and journeyman after completing their indenture. For instance, these agreements help collect funds if a journeyman seeks employment from employers that do not contribute to the fund after completing his/her indenture with the program at the expense of contributing employers. These agreements have been effective in the retention of apprentices in the labor industry through their indenture and after.

Depending on the terms of the scholarship loan agreement, the agreement may be breached by an apprentice voluntarily withdrawing from the program, being terminated from the program, or a journeyman obtaining work after graduation with a non-contributing employer. A violation of the agreement can result in the need to seek reimbursement under the agreement on behalf of the fund. Similar to the delinquent contribution situation, trustees have a fiduciary duty to protect the assets of the fund, which would include seeking reimbursement from the apprentice/journeyman under a breached scholarship loan agreement.


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**There are several ways to try to collect under the scholarship loan agreements. At times, a simple demand letter from the apprenticeship program is all that is needed to collect. Other times, the situation needs to be turned over to legal counsel. Legal counsel will typically start by sending a demand letter to the apprentice after the apprentice fails to pay pursuant to notices from the program. If a demand letter is not effective, the apprenticeship program may try to recoup the funds through a state court action for breach of contract or arbitration if a mandatory arbitration clause is included in the agreement.**

Our firm has been successful in confirming that former apprentices cannot discharge scholarship loan agreement amounts due in bankruptcy court because the scholarship loan agreements are deemed to be educational loans that are excepted from discharge, unless the former apprentice is able to establish undue hardship. The courts have upheld the agreements to be educational debt because the apprentices enter into the agreements prior to receiving his or her training in the program. **To ensure the best legal argument, the apprenticeship training program should have each apprentice sign the scholarship loan agreements prior to indenture.**

### Do You Always Have to Pursue?

The DOL closely monitors whether trustees comply with their duty to monitor the assets of the plan. However, many times trustees question whether it is cost-effective to continue pursuing the delinquent employer or the former apprentice under a breached scholarship loan agreement.

Trustees must act prudently, but spending a large sum of money to collect a smaller sum may seem imprudent. The DOL has carved out an exemptions for trustees to follow if the trustees choose to act in the best interests of the plan and discontinue collection efforts or postpone collection proceedings.

***Recommendation**: If you rely on one of these exemptions, it is recommended to document in writing the steps taken to meet each condition of the exemption.*

The exemption allows the collection of **amounts due to be extended** (i.e., enter into a payment plan) if the following conditions are met:

1. The program has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such amount due;
2. The terms of such arrangement, agreement or understanding are set forth in writing and are reasonable under the circumstances based on the likelihood of collecting such amount or the approximate expenses that would be incurred if the plan continued to attempt to collect such amount due through means other than such arrangement, agreement or understanding; and
3. Such arrangement, agreement or understanding is entered into or renewed by the program in connection with the collection of such amounts and for the exclusive purpose of facilitating the collection of such amounts.


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The apprenticeship program may **accept less than the entire amount owed** in satisfaction of the amount due if:

1. Prior to entering into such arrangement, agreement, or understanding the program has made or has caused to be made, such reasonable diligent and systematic efforts as are appropriate under the circumstances to collect the amount in its entirety;
2. The terms of such arrangement, agreement or understanding are set forth in writing and are reasonable under the circumstances based on the likelihood of collecting such amount or the approximate expenses that would be incurred if the JATC continued to attempt to collect such amount through means other than such arrangement, agreement or understanding.

The apprenticeship program may **deem an amount uncollectible** if:

1. Prior to making such a determination, the program has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such amount due or any part thereof; and
2. Such determination is set forth in writing and is reasonable and appropriate based on the likelihood of collecting such amount or the approximate expenses that would be incurred if the program continued to attempt to collect such amount or any part thereof.

It is recommended to document in writing the steps taken to meet the above exemptions. Trustees may wish to engage fund counsel to prepare a memorandum setting forth the reasons for ending the pursuit of collection and relying on one of the above exemptions.

## What Should You Do Now?

The apprenticeship program needs to be diligent in its collection of delinquent contributions and breached scholarship loan agreements. The fiduciaries need to keep sight of the best interests of the apprenticeship training fund. Consistent and reasonable collection efforts are necessary to collect even small amounts of debt owed to the program. Trustees will need to monitor and collect debt owed to the program and cannot blindly rely on the union or other funds to monitor and collect on behalf of the apprenticeship program. All efforts to collect should be recorded in the meeting minutes for the program.

**Trustees should make sure a delinquent collection procedure policy is in place and up-to-date. The policy should coincide with the trust agreement and collective bargaining agreement. The policy should be shared with contributing employers to let them know what is expected of them and what penalties they may incur if delinquent. Trustees should review and be familiar with the delinquent collection procedure policy and the terms of the scholarship loan agreements.**


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*Need continuing education credits?*

*The biennial Institute for Apprenticeship, Training and Education Programs is a great way for Trustees to get continuing education and discuss their program together.*

# Institute for Apprenticeship, Training and Education Programs

Every other year the International Foundation of Employee Benefit Plans offers training specific to apprenticeship programs. The next institute for apprenticeship programs is being offered January 18-20, 2016 at the Westin Mission Hills, Rancho Mirage (Palm Springs), California. If you are in need of continuing education courses to further your understanding of the latest trends affecting apprenticeship programs, you may consider attending this institute. More information can be found on the International Foundation of Employee Benefit Plans website at www.ifebp.org by following the link for Education > Schedule > Institute for Apprenticeship, Training and Education Programs.

# Disclosure

The information in this Bulletin is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. No attorney-client relationship has been or will be formed by any communication(s) to, from or with this JATC Bulletin. This JATC Bulletin is based on the most current information at the time it is written. Since it is possible that laws or other circumstances may have changed since publication, please call to discuss any action you may be considering as a result of reading this Bulletin.


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