



## DOL Issues Guidance on Fiduciary Responsibility for Collection of Delinquent Plan Contributions

*The DOL has issued a Field Assistance Bulletin (FAB) clarifying that the failure of a plan's named or functional fiduciary to assign the obligation to monitor and collect delinquent plan contributions to either a trustee, an investment manager, or a fiduciary who will direct a limited power trustee may result in liability to the fiduciary.*

### Background

Under ERISA, one or more fiduciaries who have exclusive authority to control and manage the operation and administration of a plan must be named in the plan document. In addition, plan assets must be held in trust by one or more trustees who are named in the document and have exclusive authority and discretion to manage and control plan assets. Alternatively, the plan document may expressly subject a trustee to the direction of a named fiduciary, or delegate the authority to manage, acquire or dispose of plan assets to an investment manager.

During numerous pension plan investigations, the DOL discovered trust documents purporting to relieve the plan trustee of any responsibility to monitor and collect delinquent plan contributions, while no other document assigned the obligation to another trustee or imposed the obligation on a named fiduciary with authority to direct a trustee. The DOL also found instances where plan documents and instruments were silent or ambiguous with respect to monitoring and collecting delinquent plan contributions. Where instruments are ambiguous, employer contributions are delinquent if not made within a reasonable time after the obligation to make the contribution arises.

In [FAB 2008-01](#), the DOL has now clarified trustees' and named fiduciaries' responsibilities to monitor and collect delinquent plan contributions.

### FAB 2008-01

The FAB states that it is a plan trustee's responsibility under both common law trust principles and ERISA to collect plan contributions, including delinquent contributions. Under common law trust principles, the trustee must determine exactly what property belongs to the trust and take control of it without unnecessary delay. This responsibility includes enforcing valid claims such as those for unpaid employer contributions. Under ERISA, the trustee is a plan fiduciary and is required to discharge its responsibilities prudently and solely in the interests of the plan's participants and beneficiaries, including determining what collection actions to take. Trust documents cannot excuse trustees from their duties under ERISA.

The DOL concludes that it is the responsibility of the named or functional fiduciary having power to appoint the plan's trustee(s) to ensure that the authority over a plan's assets, including the obligation to collect contributions, is appropriately assigned to a plan trustee with discretionary authority over the assets, a trustee subject to the directions of a named fiduciary, or an investment manager. If a fiduciary enters into a trust agreement under which a particular trustee is not responsible for monitoring and collecting contributions, and if no other trustee or investment manager has this responsibility, the fiduciary with authority to hire the trustees may be liable for plan losses due to failure to collect contributions.

The DOL further cautions that a fiduciary is liable for the breach of another fiduciary if it has knowledge of the breach and fails to take reasonable efforts under the circumstances to remedy it. Thus, even a directed trustee with limited fiduciary discretion over the plan may still be liable as a co-fiduciary for failure to act with respect to delinquent contributions.

***BUCK COMMENT.*** *Although the FAB notes that the failure to collect delinquent contributions may be considered a prohibited transaction if it appears to be part of an arrangement or understanding (express or implied) between the plan and the delinquent employer, it does not address related civil and criminal liability issues.*

## Conclusion

Both defined benefit and defined contribution plan sponsors should review their plan documents, trust agreements and investment manager contracts to ensure that they have properly assigned and delegated responsibility to monitor and collect plan contributions, including delinquent contributions. As the FAB makes clear, failure to do so could result in fiduciary liability.

Buck's consultants would be pleased to discuss this FAB and its implications with you.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*