Dealing With Fringe Benefit Audits

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Union contractors know very well the types of fringe benefit plans contained in their union agreements. Those benefit plans are referred to as Taft-Hartley plans, because they are permitted under Section 302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c), which allows contributions to *jointly trusteed* funds providing pension, health and welfare, and apprenticeship training benefits. Note the term *jointly trusteed*—it means that the persons with ultimate responsibility for the funds' operations are the trustees who are appointed by *both* union and management (an equal number of each). Union contractors should know who the management trustees are on their Taft-Hartley funds and should not be afraid to approach them with any questions or concerns about the funds' operations.

The trustees, however, are not the ones with whom contractors will deal on most fund matters—and that includes audits of a contractor's contributions to the funds. The funds have an obligation to confirm that employers are complying with the contribution requirements of the collective bargaining agreement (CBA) and trust agreements, and they do that through audits. This article is intended to provide a brief overview of how to deal with those audits.

THE LEGAL BACKGROUND

In addition to the Taft-Hartley Act, fringe benefit funds are subject to the Employee Retirement Income Security Act (ERISA), which regulates pension and health and welfare plans, including the multiemployer plans that union contractors pay into. Both ERISA and the Taft-Hartley Act provide for lawsuits to enforce the terms of the underlying agreements, to compel audits, and/or to collect delinquent contributions.

Advantage Goes To The Trust Funds: Trust Funds are separate legal entities from the union and must be dealt with as such. The Fund is NOT the Union and vice versa (even though on a daily "real world" basis it may seem otherwise). Funds can and usually do sue under ERISA and Section 301 without the union being a party to the lawsuit. They generally do not have to arbitrate disputes under the CBA, but get to go directly to court. And if they prevail the contractor will pay the funds' attorneys fees – but if they lose, the odds are that the funds will not have to pay the contractor's attorney's fees.

Defenses Are Limited—The Written Language Governs: There are very few defenses available in lawsuits arising out of trust fund audits. As a general rule, either contributions are owed or not, depending on whether the work in question was covered or not. It will not matter in a trust fund suit that a contractor had a verbal agreement with a union president or business representative that contributions for certain covered work or employees are not required, if the written contract says otherwise. Examples include:

- "Sign this contract – it will only require you to pay into the Funds for your employees on this job."
- "You can have a 30-day 'try-out' for employees to see if they work out, and you don't have to pay into the Funds on them."
- "This contract will let you hire union employees for your commercial work. You can continue your residential work outside the contract."

If those verbal representations are contradicted by the written agreement, they are worthless. And it is no defense to a trust fund suit to say "he lied" –you are expected to read what you sign before you sign it!

THE GOVERNING DOCUMENTS AND AUDIT OBLIGATION

Collective Bargaining Agreements: The CBA sets out the work jurisdiction and geographic jurisdiction of the union. It defines the contributions that must be made to the funds, the basis on which they must be made (e.g., hours worked v. hours paid) and sets out other provisions that affect a contractor's obligation to pay into the Funds (e.g., subcontracting restrictions and payments for supervisors who are union members or who do work "with the tools").

"*Know Your Contract*" is a phrase that cannot be overemphasized. A signatory contractor must know the entire scope of work claimed by the union in its collective bargaining agreements. Why is this important? – because of the potential for a claimed subcontracting violation by contractors who simply ask, for example, if a subcontractor "is union." It may be the wrong union. The fact that another union may do the exact same work will not save a contractor from having to potentially pay twice for that work if it is covered by the CBA and was improperly subcontracted to another employer (even another union employer) under the CBA. CBAs also contain language requiring contractors to cooperate with fund audits by the production of information.

The Trust Agreements: They are normally incorporated by reference into the CBA. Signatory contractors are entitled to copies of these agreements. The trust agreements, like the CBAs, contain specific provisions relating to the production of books and records to trust fund auditors.

BOTTOM LINE: At some point every contractor will undergo an audit. Do not ignore the audit request letter and do not provoke a lawsuit over the production of records to an auditor. Courts don't like them, and if the Funds file a suit to force an audit, the Court will require the production of records for an audit. That starts running up fees for the funds and the suit will likely not be dismissed until the resulting audit is resolved entirely.

DEALING WITH AN AUDIT

The auditor is there to determine compliance with the terms of your agreement. Auditors, like attorneys, are not neutral fact finders. They represent the funds and the odds are that some discrepancy will exist – hopefully a small one. Cooperation with auditors, however, is not a bad thing to do. Get everything in order before they show up.

Audits can be triggered in any number of ways. Often, it is random. Trust funds must have audit programs in place and every few years it will be your turn. It's better to be audited every three years instead of after 6-7 years, simply because if a problem exists you should know about and resolve it as quickly as possible. Audits can also be triggered by a specific complaint or event, such as a subcontracting to a nonsignatory company. Finally, audits are also triggered by a bad history with the Funds. Like any other creditors, Funds will keep problem contractors on a shorter leash than timely-paying contractors.

What do auditors ask to see? While the word "everything" comes to mind, it is not a particularly helpful description. Here is a list of typical audit demands:

Bank Statements and Cancelled Checks	Cash Disbursement Journals
Cash Receipts or Records of Deposits	Check Register / Stubs / Vouchers
Construction Loan Data and/or Sworn Statement for Contractors	Contribution Reports to Other Trust Funds
General Ledgers	Federal Income Tax Returns
Invoices and Waivers of Lien for Payments to Sub-Contractors	Individual Earnings Records
Quarterly Federal Tax Return (Form 941)	Payroll Journals or Registers
Report of Miscellaneous Income Payments (1099)	Quarterly Unemployment Wage Reports
Time Cards or Uniform Daily Timesheets	Summary of Information Returns (1096)
Vendor Listing	Transmittal Of Income And Tax Statements (W-3)
Workers' Comp. Audit & Employee Classif.	Wage and Tax Statements (Form W-2)

Auditors typically do not see all these documents, but they do see most of them. Critical documents include:

- Payroll journals or registers (something reflecting the hours worked and paid—can include timecards and other records of work and pay)
- Quarterly payroll reports
- W-2s and Forms 1099
- Cash disbursement journals and/or check registers
- General ledgers
- Contribution report forms for the trust fund performing the audit *and for all other funds to which contributions were made*
- Subcontractor invoices and related documents

Review of these records will help the auditor in his/her main tasks, which are to:

- verify the completeness and timeliness of payments made by the employer on behalf of covered employees
- determine if there may be other "unreported hours" for other employees (employees not reported who nonetheless do "covered work")
- determine if there are suspicious cash payments to employees that represent wages and "hidden hours"
- determine whether improper subcontracting has occurred and what, if any, contributions may be due for a subcontractor's work

Remember at all times that the fact that an employee performing bargaining unit work is not a union member is irrelevant to whether you owe contributions to the funds on his/her behalf. It is unlawful to distinguish between employees on the basis of union membership in this respect—so the key will always be whether the individual performed covered work under the CBA.

CHALLENGES TO AUDITS

A. Good News: it is not unusual for an audit claiming hundreds of thousands of dollars to be resolved for only a few thousand. Sometimes they can even be "zeroed out" (usually involves subcontracting claims).

B. Bad News: the audit challenge process can be time consuming and expensive. Depending on the size and complexity of the audit, a contractor should hire someone or have its own staff examine the audit in detail – and don't delay because the Funds will not hesitate to sue.

C. The Goal: stay out of court. Almost nothing good can happen if the audit is brought to court. Even if the funds prevail on only a small portion of their claims, the fees (yours and theirs) will normally outstrip the audit and make this a losing gamble.

D. Key To Challenges:

- Records--be able to produce the documentation you need to support a challenge. This can include documentation provided by your subcontractors.
- Timely dialogue—once you get the audit do not "sit on it"--put the ball back in their court—do not "wait" to start your challenges and if you need more time ask for it *in writing.*
- Written challenges—always put your challenges *in writing* if you can.
- Contacts with disputed individuals—be prepared to supply addresses and telephone numbers so the funds can contact those individuals as well.

If contractors follow these guidelines they should be able to work their way through most audits and reach a compromise—or at least narrow the issues that remain unresolved and which may require the attention of legal counsel for the company and the funds.

ONE LAST WORD OF CAUTION

In these days of dwindling work and competing unions, it is becoming more common for auditors to claim work performed by other trades in their audit. A contractor who is faced with such a claim should be sure to produce the report forms for the other trade to show that those hours were paid to another fund, and should tell the auditor that the work in question was assigned to and performed by that other trade

under that trade's collective bargaining agreement—in other words, the auditor's claim for "double payment" for those hours worked by the other trade is a "jurisdictional dispute." If that is not sufficient to eliminate those hours from the audit, contractors should consult further with their Association and their own labor counsel.

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