



CLIENT BULLETIN

Court Rules Multiemployer Pension Fund's Withholding Of First \$1/Hr. of Employer Contributions From Traveler Violated the Plan, The Reciprocal Agreement and ERISA

In this case, the District Court granted summary judgment to a "traveler's" claim that an "Away" multiemployer pension fund that withheld the first dollar an hour of employer contributions for "funding improvement purposes" violated the terms of the Plan, the reciprocity agreement applicable to the "traveler" and the *Employee Retirement Income Security Act of 1974 (ERISA)*.

For clarity's sake, we use the term "Away Fund" to describe the trust fund which received the employer contributions earned by the traveler and the term "Away Fund Pension Plan" to refer to that Fund's pension plan document. We use the term "Home Fund" to describe the trust fund associated with the traveler's local union which receives the contributions transferred from the Away Fund and the term "Home Fund Pension Plan" to refer to that Fund's pension plan document.

The case is *Lehman v. Trustees of the IBEW Pacific Coast Pension Plan*, U.S. District Court of Washington, Western District, Cause Number C13-1835 and is available by "[clicking here](#)." The plaintiff seeks to have the case certified as a "class action" and will include any other "travelers" affected by the Away Fund's withholding practices.

The case potentially has wide-ranging implications for reciprocity agreements and non-credited employer contributions withheld from money reciprocated to a traveler's home pension fund. Here, the plan held back monies prior to and as part of a rehabilitation plan under the *PPA*. Both withholdings were held invalid.

It is important to note that the case does not automatically prohibit any withholding of reciprocity contributions by an "Away" fund. Rather, the ability to withhold is dependent on the terms of the plan documents and reciprocity agreements.

Facts

The plaintiff brought the case as a purported class action pursuant to *ERISA* to recover reciprocity contributions that should have been made to his Home Fund, the Puget Sound Electrical Workers Pension Trust that he alleges were improperly withheld by the defendants, the IBEW Pacific Coast Pension Fund trustees (Away Fund).

Like many union members, the plaintiff's profession frequently required him to perform work for employers outside of the jurisdiction of his Home Fund, including in a region governed by the Away Fund. For example, in the latter half of 2008 alone, Mr. Lehman worked over 1,000 hours within the jurisdiction of the Away Fund.

In order to protect such employees who work in multiple jurisdictions from losing benefits or being unable to accumulate them in one pension fund, the National Electrical Industry Pension Reciprocal Agreement (hereinafter, the "Reciprocity Agreement") was created to govern transfer of contributions between electrical industry funds.

Section 11 of the Reciprocity Agreement provides that:

"Participating Fund(s) shall transfer to the Temporary Employee's Home Fund(s) an amount of money equal to all Contributions Received. There shall be no administrative fee charged by a Participating Fund for the transfer or for any other reason."

The Away Fund is a participating fund to the Reciprocity Agreement. During the time that the plaintiff worked in the jurisdiction of the Away Fund, he requested that the employer contributions for his hours of service be transferred to his Home Fund, in accordance with the Reciprocity Agreement and with transfer and contribution provisions of the Away Fund Pension Plan.

Section 5.04 of the Away Fund Pension Plan, provides that:

Under the Reciprocity Agreement at least monthly, each Participating Fund shall collect and transfer to the Home [Pension] Fund all contributions received on behalf of the Employee for work performed by the Employee within the jurisdiction of the transferring Participating Pension Fund. The transferred contributions shall be accompanied by such records and reports as are required by the National Electrical Industry Pension Reciprocal Agreement.

The Away Fund and Home Fund had also entered into their own reciprocity agreement providing for reciprocal contribution transfers between those two funds. To allow for these reciprocal transfers, the plaintiff executed an Electronic Reciprocal Transfer System ("ERTS") authorization form, which authorizes the transfer of pension contributions from the Away Fund to his Home Fund.

On May 8, 2008, the Trustees of the Away Fund approved Amendment No. 14 to the Away Fund Pension Plan for the purpose of improving the Plan's funding condition. Pursuant to the Amendment, defendants began to withhold the first dollar of each hourly contribution into the Away Fund Pension Plan, including outgoing contributions made for reciprocal transfers pursuant to Article 5 of the Away Fund Pension Plan. As a result, the Away Fund has withheld \$1.00 for all hourly contributions made on behalf of the plaintiff since July 1, 2008, with the remaining contributions continuing to be transferred into his Home Fund.

For instance, in March 2009, the plaintiff worked 136 hours in the jurisdiction of the Away Fund, for which his employer contributed \$4.62 per hour towards the plaintiff's pension. Of the total \$628.32 of pension contributions, the Away Fund withheld \$136.00 for its use and transferred \$492.32 to plaintiff's Home Fund.

The Away Fund Pension Plan entered critical status for the Plan year beginning April 1, 2009. In response, the Away Fund trustees developed a Rehabilitation Plan pursuant to the *Pension Protection Act of 2006 (PPA)*. The Rehabilitation Plan created a default schedule, incorporated into the Away Fund Pension Plan, which provides, in relevant part, that traveling employees who work inside the Away Fund Pension Plan's jurisdiction "*shall have the first dollar of each hourly contribution (for contribution rates less than \$3.00 per hour), all increased non-benefit contributions under any Schedule and all employer surcharge contributions remain in the [Pacific Coast Fund] for funding purposes only.*"

Note: In general, under a default schedule, future accruals cannot be less than 1% of contributions. Some exceptions apply.

The Away Fund thereafter continued to withhold the first dollar for each hourly employer contribution made on behalf of the plaintiff, for which he received no pension benefits. In May 2013, the plaintiff sent a letter to the Away Fund making a claim for contributions made on his behalf, requesting that all withheld contributions be transferred to his Home Fund. The plaintiff received no response to his claim.

In October 2013, the plaintiff filed the suit against the trustees of the Away Fund stating three claims for relief pursuant to *ERISA*: recovery of benefits due under Section 502(a)(1)(B), relief for fiduciary breaches under Section 502(a)(2), and equitable and injunctive relief under Section 502(a)(3). The plaintiff claimed that the withholding of \$1.00 for each hourly contribution into the Away Fund without any benefit accrual violates the Away Fund Pension Plan provisions, the Reciprocal Agreement incorporated into the Away Fund Pension Plan and Sections 204 and 305 of *ERISA*.

Court Rules for Plaintiff

The District Court granted summary judgment to the plaintiff on his claim under ERISA 502(a)(1)(B) and denied summary judgment on the other two claims for relief.

The Court ruled that the plaintiff was entitled to a transfer to his Home Fund of the reciprocity contributions wrongfully withheld by defendants. The Court clarified that the plaintiff is entitled to the future transfer of all such funds to his Home Fund without withholding, so long as Article 5 of the Away Fund Pension Plan and the Reciprocity Agreement governing transfers from the Plan remain in effect. Let's take a closer look at the Court's reasoning.

A Closer Look At The Court's Opinion

1. Withholding The First Dollar Per Hour Of Contributions From A Traveler Violates The Away Plan And Reciprocal Agreement Terms

The Court agreed with the plaintiff that the plan language of Article 5 of the Away Fund's Pension Plan document *precluded withholding* of any funds subject to an outgoing reciprocity transfer. Section 5.04 of the Away Fund's Pension Plan document mandates that the Away Fund's Pension Plan collect and transfer "all contributions received on behalf of the Employee." (emphasis added)

Article 5 also contains various indications that it is to be construed in accordance with the terms of the Reciprocity Agreement. Section 5.01 of the Away Fund Pension Plan provides that Article 5 is only operative if the Reciprocity Agreement has been adopted by the signatory funds in the jurisdiction in which the Employee works. Section 5.04 of the Away Fund Pension Plan document further provides that outgoing reciprocity contributions are to be "*accompanied by such records and reports as are required by the [Reciprocity Agreement].*"

The Court found the Reciprocity Agreement itself was unambiguous in disallowing withholdings on contributions subject to outgoing reciprocity transfer: "*The participating fund(s) shall transfer to the Temporary Employee's Home Fund(s) an amount of money equal to all Contributions received.*" The Agreement bars withholdings for the purposes of subjecting transfers to an "*administrative fee*" or "*for any other reason.*" (emphasis added)

The Court noted that a Participating Fund may not unilaterally amend the terms of the Reciprocity Agreement, which can only be altered by the approval of a simple majority of participating funds. Thus, the Court concluded that to the extent that Article 5 of the Away Fund Pension Plan remains in effect, defendants' withholdings from plaintiff are in violation of its terms.

2. The Away Plan Rehab Plan Amendment Authorizing Withholding Of Monies For Funding Purposes Violates ERISA Section 305.

Amendment No. 14 to the Away Fund Pension Plan provides for the withholding of the first dollar of required contributions for each hour of Covered Work on and after July 1, 2008 to be used to improve funding of the Away Fund Pension Plan and is also applicable for Contributions made pursuant to outgoing reciprocal transfers.

However, the Court held that Away Fund Pension Plan Amendment No. 14 cannot supersede the incorporated provisions of the Reciprocity Agreement regulating reciprocal transfers, which itself can only be amended by a majority of participating funds. No such amendment of the Reciprocity Agreement had occurred.

Moreover, the Court held the Away Fund Pension Plan, as amended by Amendment No. 14, would violate *ERISA* Section 305, which prevents pension plans from adopting rehabilitation plan default schedules that would entirely eliminate future accruals, due to the following Court statements:

- The defendants violated this statutory floor of *ERISA* Section 305 by withholding some of the employer contributions made on the plaintiff's behalf without providing him any benefit accrual on the withheld funds.
- Once the defendants diverted contributions from transfers to the plaintiff's Home Fund and deposited them into the Away Fund, the plaintiff was entitled to a minimum accrual equal to one percent of withheld contributions under *ERISA* Section 305(e)(6).
- The Away Fund trustees, in adopting the rehabilitation plan, were bound to satisfy the requirements of *ERISA* Section 305 and cannot shift that plan's accrual obligations onto a different fund.
- The Away Fund trustees breached their fiduciary duties by interpreting Amendment No. 14 in a way that violates the Away Plan's governing documents as well as *ERISA* Section 404(a)(1)(D).

The Court rejected the defendants' argument that that plaintiff continued to accrue benefits under his Home Fund or that he executed an ERTS form providing for reciprocal transfers rather than pro rata pension accrual in both Funds.

***ERISA* Section 204 claim (anti-cutback)**

Having located a violation of the Away Fund Pension Plan and *ERISA* Section 305, the Court did not consider the plaintiff's additional argument that the trustees' interpretation of the Away Fund Pension Plan Amendment 14 violated the anti-cutback provisions of *ERISA* Section 204.

Summary Judgment GRANTED to Plaintiff

As noted earlier, the Court granted summary judgment in favor of the plaintiff on his cause of action for benefits pursuant to *ERISA Section 502(a)(1)(B)*, found that the plaintiff is entitled to a transfer to the plaintiff's Home Fund of the reciprocity contributions wrongfully withheld by the defendants and that the plaintiff is entitled to the future transfer of all such funds to his Home Fund without withholding, so long as Article 5 of the Away Fund Pension Plan **and** the Reciprocity Agreement governing transfers from the Away Fund Pension Plan remain in effect.

The Court denied without prejudice the plaintiff's Motion for Summary Judgment on his other claims for relief.

Conclusion

While this case is particularly applicable to travelers, such as the plaintiff, work in the jurisdiction of Funds that withhold some employer contributions for "funding purposes (either with or without a rehabilitation plan involved), it may have an impact on travelers who work in an Away Fund that may withhold some of his employer contributions for funding contributions if the Away Fund's employer contribution rate is higher than the traveler's Home Fund's employer contribution rate. Whether such contribution differential withholdings would be unlawful would depend on the terms of the specific plan documents and reciprocity agreements involved.

We will watch and see if the case is appealed and report on any further proceedings. In the meantime, Funds that have similar plan language, similar withholding practices and similar reciprocity agreement language about "no withholdings" may wish to evaluate their documents to ensure they are operating in accordance with the documents and ERISA.

Similar legal actions on behalf of similarly-situated travelers will probably be filed against other Away Funds that have analogous reciprocity language in their documents. With over 100 multiemployer pension plans in critical or endangered status under the PPA, this fact pattern may be common.

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