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To The United States Department Of Labor,
Office Of Labor-Management Standards:

Re: RIN 1245-AA09--Labor Organization Annual Financial Reports for Trusts in Which a Labor Organization is Interested, Form T-1

NPRM, 84 Fed. Reg. 25130 (May 30, 2019)

Comments of the Laborers' National Health and Welfare Fund

Greetings:

On behalf of the Laborers' National Health and Welfare Fund (Fund) and its joint labor-management Board of Trustees, I hereby submit comments in response to the request of the Office of Labor Management Standards (OLMS) for public comments concerning its Proposed Rule to require labor organizations to submit to OLMS annual financial reports (Form T-1 Trust Annual Report) regarding certain "trusts" in which the labor organization is "interested" within the meaning of the Labor Management Reporting and Disclosure Act (LMRDA).

The Health and Welfare Fund

The Fund is a multiemployer, joint labor-management trust fund established in 1989 pursuant to Section 302(c)(5) of the Labor Management Relations ("Taft-Hartley") Act of 1947 by the Laborers' International Union of North America (LIUNA) and various employers for the purpose of providing health benefits, life and disability insurance, and related benefits to workers represented by LIUNA and affiliated Local Unions. In accordance with the Taft-Hartley Act, the Fund is governed by a Board of Trustees on which Labor and Employer Trustees have equal authority and responsibility in the management and control of the Fund.

More than 125 employers contribute to the Fund on behalf of their employees pursuant to scores of collective bargaining agreements with LIUNA or Local Unions. The Fund depends on collectively bargained employer contributions and investment returns to fund the promised benefits, like all multiemployer, labor-management trust funds.

The Fund is an "employee welfare benefit plan" regulated by the Employee Retirement Income Security Act (ERISA), As required by ERISA, the Fund files with the Labor Department each year a Form 5500 Annual Financial Return / Report including all required schedules. The Form 5500 is due by the end of July each year, the last day of the seventh month following the end of the Fund's fiscal year (December 31st), although extensions of the filing date are available. The Fund's Form 5500 is publicly available through the Labor Department's public disclosure program and through various free and paid on-line services.

The Fund is also a tax-exempt trust under Section 501(c) of the Internal Revenue Code. As required by the Code, the Fund files with the Internal Revenue Service each year a Form 990 Return Of Organization Exempt From Income Tax. The Form 990 is due by May 15th, the 15th day of the fifth month following the end of the Fund's fiscal year (December 31st), although extensions of the filing date are available. The Fund's Form 990 is publicly available through the IRS's public disclosure program and through various free and paid on-line services

As required by ERISA and the Taft-Hartley Act, the Fund undergoes an annual financial audit by an independent certified public accountancy firm. The audit is conducted in accordance with ERISA's stingent standards. As required by Section 302(c)(5) of the Taft-Hartley Act, the annual audit report is available to interested parties, including Union members, at the Fund's administrative office. The audit is also attached to the Fund's Form 5500, which is publicly available online.

Comments

The Final Rule Must Preserve The Exemption For ERISA-Regulated Employee Benefit Plans.

1. The Proposed Rule provides that no Form T-1 need be filed "for any trust that is an employee benefit plan that files a Form 5500 under the Employee Retirement Income Security Act of 1974 for a plan year ending during the reporting period of the labor organization." However, the NPRM also asks for public comments on whether this exemption should be included in the Final Rule.

Inclusion of ERISA-regulated plans, like the Fund, as "trusts" for purposes of the Rule is not necessary to prevent circumvention or evasion of the LMRDA's Title II reporting requirements. That is, treatment of ERISA plans is not necessary for the OLMS to accomplish its objectives in issuing the regulation.

As noted earlier in this submission, the Fund is already heavily regulated by ERISA, the Internal Revenue Code and the Taft-Hartley Act. This regulatory burden includes expansive and detailed Government reporting requirements including the Form 5500, the Form 990 and an annual independent financial audit, the report of which is filed with the Form 5500. All of these reports to the Labor Department and IRS are easily available to the public, including Union members.

The NPRM indicates that the Proposed Rule's exemption for ERISA plans filing Form 5500s is intended "to minimize any overlapping reporting obligations that exist under other laws where such reports are publicly available and provide information roughly comparable to that required by the Form T-1." 84 Fed. Reg. 25139. The proposed Form T-1 substantially duplicates the Form 5500, and the 5500 is publicly available.

Moreover, OLMS can readily obtain access any employee benefit plan's Form 5500 from the Employee Benefits Security Administration (EBSA). Indeed, OLMS and EBSA have in effect a joint Memorandum of Understanding that provides for a sharing

of information between the agencies and expressly grants OLMS access to Form 5500 information. This Memorandum of Understanding reflects LMRDA Section 607 which encourages the Secretary "to avoid unnecessary expense and duplication of functions among Government agencies...by making arrangements for cooperation or mutual assistance in the performance of [his] functions under this Act."

The T-1 also substantially duplicates the Form 990 filed with the IRS annually by the Fund. The Fund's 990s are readily available to the public, including Union members, online too.

2. If not exempted, the Fund would most likely be unable to timely provide to the reporting Unions the information required to complete and file their Form T-1 by March 31st each year.

No Union will have the information regarding the Fund that is required to complete a T-1. The Union would have to obtain the information from the Fund. Under the Proposed Rule, a Union required to file a T-1 regarding the Fund would have to file the T-1 with its LM report 90 days following the end of its fiscal year, which is commonly a calendar year. The Fund's fiscal year is a calendar year. This means as a practical matter that the Fund would have to provide T-1 information to all of the interested Unions earlier than 90 days after the end of the year, March 31st.

The Fund's well-established systems and procedures are not set up to comply with such a short reporting period. They are geared for the IRS-required Form 990 and ERISA-required Form 5500, which are not due until May 15th and July 31st respectively and which deadlines can be extended for several months if needed by the Fund. Preparation for completing and filing these detailed reports requires a complete financial audit of the Fund by an independent certified public accounting firm (CPA) complying with ERISA's audit requirements. It typically takes several months after December 31st each year to arrange for the CPA to conduct and complete the audit as well as the Forms. As a practical matter, it would not be feasible to compel the CPA to undertake and complete its audit in advance of March 31st.

That Congress set ERISA's 210-day filing period for the Form 5500, has not shortened that period over the past 40-plus years, and allows extensions of the filing date, all reflects the reality of how difficult it is for most employee benefit plans to comply with financial reporting requirements. The Fund is simply not able to accelerate this auditing process, and it would not be comfortable providing financial information for the T-1 without first undergoing the normal auditing process.

Furthermore, during the first three months of each year the Fund is already very busy complying with various ERISA and IRS reporting and disclosure requirements not to mention the other regular work involved in administering a national multiemployer Fund. If the Fund became obligated to provide T-1 information to the many Unions whose members participate in the Fund, compliance with this LMRDA obligation would necessarily divert resources and disrupt the Fund's administrative office to the detriment of the Fund's obligations to its participants and beneficiaries, contrary to ERISA's fundamental purpose.

In addition, the Fund does not maintain information in the manner required for accurate completion of the T-1, and may not even have all the information required for the T-1 within 90 days following the end of a year. For example, employer contributions for December are not even due until the end of the following January, and may be delayed beyond then. Further, it takes time after the end of the year to reconcile investment accounts, including dividends and interest payments. And, in any event, there is no way that the finances can be audited in time for the Unions to meet their March 31st deadline for the T-1 filing.

3. For the same reason, the Proposed Rule's alternative means of compliance–submitting the trust's financial audit report in lieu of a full T-1--would be unworkable for the Fund. The Fund's audit would not be completed, and the report would not be available, before the March 31st deadline for the T-1 filing by the Union. The Proposed Rule's so-called "audit option" would be illusory for the Fund and the reporting Unions. Yet, as indicated above, the audit report is filed with the Fund's Form 5500 each year, and it is publicly available online.

4. Even if the Fund could have the T-1 required information available each year in advance of March 31st, doing so would require the expenditure of significant amounts of Fund assets, including payment of professional fees for auditors and for employee overtime.

If required to make extraordinary efforts to provide Unions with T-1 information before the March 31st deadline, the Fund's joint labor-management Board of Trustees may reasonably conclude, on the basis of legal advice, that such an expenditure of Fund assets for such a purpose would violate ERISA's fiduciary standards because the Fund is not required by ERISA to submit a T-1 or to provide T-1 information to any Union. Under ERISA, employee benefit plans are separate legal entities distinct from their sponsoring unions as confirmed by the Supreme Court in a series of cases including NLRB v. Amax Coal, mentioned above, and Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985). Further, ERISA prohibits the use of plan assets for the benefit of a union whose members are covered by the plan and other "parties in interest". ERISA Sections 404(a), 406(a); 29 U.S.C. §§ 1104(a), 1106(a).

5. Beyond the cost to Fund assets, the Board of Trustees would have fiduciary concerns about disclosing confidential and sensitive information. The Proposed Rule would require itemization in the T-1s of all receipts and all disbursements during the applicable year that exceeded $10,000, including the names and address of the payors and payees and the purpose of the receipt or disbursement. *See* proposed Form T-1 Schedules 1 and 2, 84 Fed. Reg. 25152-53.

The Fund receives collectively bargained contributions in excess of $10,000 annually from many employers. The amount of any particular employer's contributions to the Fund is sensitive business information that could be useful to the employer's competitors. Employers commonly regard their contribution history as confidential proprietary information that could, if made public, provide competitors with a business advantage. The instructions to the Form T-1 in the Proposed Rule provide "Exemptions"

RAY LAW

from disclosure "if the receipts are derived from pension, health, or other benefit contributions that are provided pursuant to a collective bargaining agreement covering such contributions." 84 Fed. Reg. 25164. Absent this Exemption, no ERISA benefit fund could lawfully provide such sensitive business information to a union for disclosure to the public in a Form T-1.

What is not covered by the Proposed Rule's Exemptions is the disclosure of personal health information to a union for public disclosure in a T-1. Schedule 2 would apparently require disclosure of the names, addresses, and benefit amounts of all participants and family members who receive $10,000 or more in benefits from the Fund in the year, and all health care providers who received assigned benefit payments of $10,000 or more for providing medical services to participants and their family members.

This information would be made public by OLMS; indeed, it would be easily accessible through the Labor Department's Internet website. Such public disclosure of personal, confidential information about a participant or family member is unjustifiable, particularly in this age of rampant identity theft. Moreover, such disclosure would be contrary to the spirit, if not the letter, of the privacy rules of the Health Insurance Portability and Accountability Act (HIPAA).

6. In sum, it is essential that the Proposed Rule's exemption for ERISA plans that file Form 5500s be included in the Final Rule. An T-1 for these plans would merely duplicate the reports already being annually filed with the Labor Department and IRS. Application of the T-1 requirement to these plans would invite mass resistence because of ERISA fiduciary concerns by the plans' trustees.

Respectfully submitted,

/s/ James S. Ray

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