No Magic

Selected Problems Wit

by | **Michael T. Joliat**

Multiemployer employee benefit plans have a long history of using reciprocity agreements to provide benefits to mobile workers. How can plans avoid legal trouble with these arrangements?

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Travel today is easier than ever.[1] Information is more readily available. Connections are more easily made. Transportation is less expensive. As barriers to travel fall, employees and employers travel farther from home in search of work, better work or better pay. Multiemployer employee benefit plans have a long history of providing benefits to mobile employees.[2] Travelers—employees who work outside the jurisdiction of the local unions where they are members—have long been a challenge for multiemployer plans.[3]

Often, a job in an away jurisdiction does not last long enough for travelers to become eligible for benefits under the multiemployer plans of the away jurisdiction.[4] To counter that problem, many plans enter reciprocity agreements whereby travelers can have certain employee benefit plan contributions earned while traveling transferred back to their home plans. This reduces the chance of forfeiture of retirement benefits and increases the chance of continuity in health benefits.[5] Reciprocity is frequently used in the building trades.

Plans are not required to enter reciprocity agreements[6] and they occur only by written agreement between plans.[7] Trustees can choose which plans, if any, they wish to reciprocate with. For instance, if a traveler and an employer made a private agreement that contributions would be reciprocated to the traveler's home plans, that agreement would not bind any plan to reciprocate.

takeaways

- Many multiemployer employee benefit plans use reciprocity agreements to allow workers to have benefit contributions earned by traveling workers transferred back to their home plans.
- Reciprocity agreements allow employees to travel with minimal economic loss and inconvenience, but plans may misunderstand how they work.
- When a worker's home and away plans require different contributions to different plans, employers and plans should consult counsel regarding how to legally level benefits between jurisdictions.
- Plan fiduciaries can reduce their risks in connection with reciprocity by requiring travelers to sign a reciprocity authorization agreement that includes a waiver of claims against the plan.
- Plan fiduciaries should establish policies to ensure that they have a sensible and defensible reciprocity program.

Some international unions have encouraged the adoption of a multilateral reciprocity agreement that establishes reciprocity among all signatory plans.[8-10] These multilateral agreements are optional, but many plans choose to participate since they may ease the burden of maintaining and administering numerous reciprocity arrangements.

Key features of reciprocity typically include the following:

- The away plan transfers all (100%) of the contributions it receives for a traveler to the traveler's home plan. The home plan provides benefits based on those contributions in the same manner that it would if the contributions had been earned in the home jurisdiction.
- Reciprocity is strictly health plan to health plan and retirement plan to retirement plan. Many defined contribution (DC) retirement plans do not reciprocate with defined benefit (DB) retirement plans and vice versa. Other types of plans, such as apprenticeship plans and vacation plans, rarely reciprocate. Fringe benefit funds that are not governed by the Employee Retirement Income Security Act (ERISA), e.g., market recovery funds and industry promotion funds, typically do not reciprocate.

As beneficial as reciprocity can be to both employers and employees, it is not perfect. It is not a magic wand that renders work performed in an away jurisdiction the equivalent of work performed in a home jurisdiction. For those employers and employees who act on a mistaken understanding of reciprocity, the result can be shocking. As worker mobility grows and the use of reciprocity agreements increases, plans may encounter more problems and, potentially, litigation over these agreements. This article describes some common misunderstandings of reciprocity, disastrous "solutions" to avoid, and practical solutions to mitigate problems and avoid costly litigation.

Reciprocity Is an Excellent but Imperfect Innovation

Reciprocity is imperfect. The following example illustrates some of the difficulties.[11] Suppose a collectively bargained employee works in an away jurisdiction. The multiemployer plans of both the away local and the home local are signatory to nationwide multilateral reciprocity agreements.[12] The table provides details about the hypothetical plans and contributions.[13]

TABLE

Comparison of Contributions for Hypothetical Away and Home Multiemployer Benefit Plans

Plan Type	Away Fringes	Home Fringes	A-H Reciprocity?	$ Reciprocated
Health	$7	$11	Yes	$7
Defined Benefit	$0	$9	No	$0
Defined Contribution	$10	$0	No	$0
National Pension	$3	$0	No	$0
Apprentice	$3	$3	No	$0
Vacation	$1	$2	No	$0
Industry Promotion	$.50	$0	No	$0
Market Recovery	$.50	$0	No	$0
Total	**$25**	**$25**		**$7**

As the table shows, the away jurisdiction fringe benefit package consists in large part of a modest health plan contribution and a DC retirement plan contribution. The traveler's home jurisdiction has a much greater health plan contribution and a DB retirement plan contribution. The away health plan contribution will be reciprocated. However, because it is $4 per hour less than the contribution for the traveler's home plan, the traveler may lose coverage under the home health plan despite reciprocity. The remaining plans and funds do not reciprocate.[14] In the end, only one of the seven away plans reciprocates, resulting in just $7 of the $25 fringe benefit package being reciprocated to the home plans.

This example demonstrates how reciprocity—even under the favorable auspices of national multilateral reciprocity agreements—can fall far short of ideal.[15] This shortcoming has led employees and employers to antics of all kinds. Unfortunately, many "solutions" to this problem can lead to expensive litigation.

The Law of Reciprocity

No statutes or regulations specifically regulate reciprocity, even though it has been in practice for 70 years and multiemployer plans today collectively transfer billions of dollars each year.[16] Without any express exceptions for reciprocity in the law, the laws that apply to the payment, receipt and collection of employee benefit contributions under a collective bargaining agreement (CBA) apply regardless of whether reciprocity is involved. This impacts travelers, their employers and multiemployer plans in unexpected ways.

Problem 1: Transfer Authorization

Suppose the hypothetical scenario above changes slightly and the away DC plan agrees to reciprocate with the home DB plan. The traveler works continuously in the away jurisdiction for a decade, then retires. All the while, the away plan reciprocates more than $1,500 per month to the home plan for the traveler. Unbeknownst to the fiduciaries of the away plan, the home plan has serious funding issues. Of the $10 per hour reciprocated to the DB plan in the traveler's home jurisdiction, less than half generates additional accruals. Had the away plan retained the contributions, the traveler would have had an account with the away plan worth $300,000 upon retirement. Instead, the traveler has pension accruals under the home plan with a present value at retirement of $150,000.

When a multiemployer plan receives contributions on an individual's behalf under a CBA, that individual becomes a plan participant.[17] It is difficult to reconcile a plan fiduciary's duties under ERISA with the idea that a plan fiduciary may absolve itself of responsibility toward a participant simply by transferring contributions to another plan with-

out evaluating the recipient plan.[18, 19] From this, litigation may follow.

The hypothetical traveler may sue the fiduciaries of the away plan, asserting that reciprocating contributions to the home plan was a breach of fiduciary duty under ERISA. The traveler argues that the away plan fiduciaries breached their duty of loyalty by reciprocating against his wishes and that they breached their duty of prudence by reciprocating to an obviously distressed plan. How are the fiduciaries of the away plan to defend themselves?

This potential lawsuit raises many questions. Can a plan reciprocate without an individual's express written direction? Do plan fiduciaries have a duty to determine whether reciprocating is in an individual's interests? If so, does it matter whether an individual has directed the plan to reciprocate?

Congress, the Department of Labor (DOL) and the courts have not answered these questions. However, it would almost certainly be crucial in some circumstances to have a written record that a traveler explicitly authorized reciprocity. Courts err strongly on the side of protecting employee benefits. Because liability can depend on whether a plan has a record that a traveler explicitly authorized reciprocity, caution favors requiring all travelers to enter a written reciprocity authorization agreement.

Problem 1: Solutions

A plan may reduce the chance of litigation over reciprocity and have a strong defense by instituting a process for obtaining reciprocity authorization agreements from participants before transferring contributions out. The Supreme Court has ruled that a participant's knowing and voluntary waiver of ERISA benefits does not violate ERISA.[20] Plans should, therefore, require reciprocity authorization agreements and include a waiver of all claims against the plan in the agreement.

Plan fiduciaries should also consider their plan's reciprocity practices as a whole. To avoid the haphazard results of administering reciprocity with informal practices, plan fiduciaries should develop written reciprocity policies alongside their reciprocity authorization agreements.

Problem 2: Self-Help

Suppose the traveler's home employer secures a project in the away jurisdiction and asks the traveler to work on the project. Reciprocity does not put the traveler in the same economic position as working in the home jurisdiction. The loss of value for fringe benefit contributions will be significant and may outweigh any incentives the employer can realistically provide. What should the parties do?

It is not a solution for the employer to unilaterally bypass reciprocity and pay directly to the home funds. The away plans will audit the employer, discover the lack of contributions for the traveler and sue to collect. Neither the possibility of "double" contributions nor an oral agreement are viable defenses for the employer. The likely outcome is that the employer will ultimately pay double (plus the away plans' litigation costs) when the away plans come knocking to collect.[21, 22]

Another approach some have taken is to overpay away plans. In the scenario where the away health plan contribution is $4 less than the home plan contribution, the parties may believe they can solve this problem by having the employer overpay the away plan by $4 per hour. However, the away plan may still only reciprocate $7 per hour. More importantly, every monthly overpayment is a separate felony violation of LMRA Section 302, which carries a potential penalty of up to five years in prison and $15,000. In short, overpayment is not a good solution.

Problem 2: Solutions

Differences between an away fringe benefit package and a home package may be legally addressed globally, through the away CBA, or plan by plan, with participation agreements. Neither of these approaches, however, is easy to implement.

An employer and an away local union may agree in their CBA that the employer may make fringe benefit contributions for travelers directly to their home plans. Under such a CBA, the employer would have no exposure to a delinquency action by the away plans. This concept has been in very limited practice for years.[23] It may be attractive in concept, but its limited adoption suggests that many bargaining parties are unwilling or unable to agree on such a provision.

To address a contribution discrepancy between two plans, an employer can enter a participation agreement with a home plan to pay the difference directly to the home plan. This option does not violate LMRA 302 or ERISA.[24] Applying this to the hypothetical above, the employer could enter a participation agreement with the home plan to pay $4 per hour that the traveler works in the away jurisdiction. When combined with the $7 per hour contributions reciprocated by the away health

plan, the aggregate contributions for the traveler would be $11 per hour—the equivalent of working in the traveler's home jurisdiction. Of course, the lag in reciprocity can still be a problem. And this option means the employer's total cost for the away fringe benefit package is $29 rather than $25. The employer may find the increase in cost uneconomic. This option is theoretically possible, but plan fiduciaries who explore this concept in earnest may find themselves heading down the proverbial rabbit hole.

The most practical and universal solution to Problem 2 is awareness and acceptance. The law of contributions often makes it impossible for reciprocity to deliver to travelers fringe benefit packages that have comparable value to their home plans. Useful as reciprocity is, it is a limited tool best suited to travel between jurisdictions with similar economic conditions and member preferences.

Actions Plan Fiduciaries Can Take to Avoid Reciprocity Problems

Reciprocity tends to function quietly in the background, out of sight, out of mind. The fact that something has not gone wrong, however, does not mean it will not go wrong.[25] The number of travelers—and the risk associated with reciprocity—will only increase with time. Multiemployer plan fiduciaries who have not recently, or not ever, reviewed their reciprocity policies, forms and practices should consider doing so.

When reviewing or designing reciprocity policies, it is important to be aware of the contractual obligations and administrative necessities the plan has under all its reciprocity agreements. The aim should be to work within those constraints to design a sensible and defensible reciprocity program.[26] A reciprocity policy may address the following practical questions.

- What guidelines will the plan follow when considering requests to enter new reciprocity agreements?
- Will the plan reciprocate with plans of the same general type or only with plans of the exact same kind (e.g., DC to DB, or only DC to DC; health reimbursement arrangement (HRA) to comprehensive medical, or only HRA to HRA)?
- Will the plan's reciprocity authorization agreements last indefinitely, or will they expire?
- How does a traveler revoke or modify a reciprocity authorization agreement?

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- Will the plan reciprocate contributions that were received before the plan had a reciprocity agreement in place with the away plan?
- If the plan terminates a reciprocity agreement, will it reciprocate contributions received after the termination for work performed before the termination?
- Will the fund allow retroactive reciprocity authorization (i.e., reciprocity of contributions the plan received before it received a signed reciprocity authorization)? If so,
  - –How far back can retroactive authorization reach?
  - –If the contributions to be reciprocated were invested while the plan held them, what happens to investment gains?
  - –If the plan experienced an investment loss on the contributions, will it reduce the reciprocated amount accordingly?
  - –If the plan is a health plan and it provided coverage attributable to part of the contributions reciprocated, will it still reciprocate? If so, how much? What if the plan provided coverage but there were no claims?
- What happens if an employer is delinquent with respect to contributions that would have been reciprocated if timely received?
- If the plan collects on a delinquency with respect to contributions that would have been reciprocated if timely received, what, if anything, will it reciprocate from the collection proceeds? Will interest and liquidated damages be reciprocated? Will part of the expenses of collection be deducted? What happens if the plan settles a delinquency claim for less than the full amount due?
- How will the plan handle complaints about reciprocity by individuals? Will the plan treat them like claims for benefits? Will there be a separate procedure? Or will the plan disregard reciprocity complaints by individuals and only recognize complaints by plans?

These are merely representative questions. A reciprocity policy could address many more. Trustees should involve the administrator and fund counsel in addressing reciprocity issues to help them focus on the questions that are most relevant to the plan.

The views expressed in this article are exclusively those of the author.

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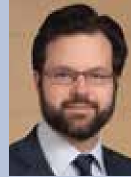

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Endnotes

1. For an excellent primer on the basics of travelers and reciprocity, see "Understanding Reciprocity Agreements," L. Evans and J. Reyes-Jones, *Benefits Magazine,* Volume 54, No. 8, August 2017, pages 22-27.
2. See "Reciprocity and Pension Portability," W. Kolodrubetz, *Monthly Labor Review,* September 1968, pages 22-28.
3. See Id. (stating that reciprocity agreements were adopted by multiemployer pension plans as early as 1952 to address the problem that "mobility tends to disrupt continuous pension plan coverage").
4. Throughout this article, the term *home* refers to a jurisdiction where an individual is a member of the local union, *home plans* refers to the multiemployer plans of the home jurisdiction, *away* refers to a jurisdiction in which an individual is not a member of the local union, and *away plans* refers to the multiemployer plans of the away jurisdiction.
5. Reciprocity often takes significantly longer to arrive at a home plan than a contribution for work performed in the home jurisdiction, which sometimes causes a loss of health care coverage notwithstanding the fact that sufficient contributions will eventually be received to continue coverage.
6. See *Caterino v. Barry,* 8 F.3d 878, 885 (1st Cir. 1993).
7. See IRS Multiemployer Plan Examination Guidelines, www.irs.gov/irm/part7/irm_07-011-006 (accessed October 15, 2023).
8. See "Reciprocity and Pension Portability," supra.
9. Some unions have negotiated nationwide collective bargaining agreements (CBAs) in addition to nationwide multilateral reciprocity agreements. These are not at all the same. Nothing in this article is intended to apply to nationwide CBAs.
10. Examples include the IBEW Electronic Reciprocal Transfer System and the United Association Reciprocity System.
11. This article concerns problems with reciprocity. In many circumstances, reciprocity works quite well and allows travelers to work away from home with minimal loss and inconvenience.
12. See "Understanding Reciprocity Agreements," supra.
13. This chart is loosely based on multiple actual circumstances with which the author has personal experience.
14. This assumes that the away defined contribution (DC) plan will not reciprocate with the home defined benefit (DB) plan. This is common since employers contributing to DC plans may have concerns that reciprocity with a DB plan could result in unexpected withdrawal liability.
15. The example assumes that both jurisdictions have fringe benefit packages of equal total value. The result could be better or worse if there was a substantial discrepancy in the fringe benefit package value.
16. There is exactly one reference to reciprocity in regulations under the Internal Revenue Code (IRC) and one reference under the Employee Retirement Income Security Act (ERISA). Under the IRC regulation pertaining to plan mergers and spinoffs, "the shifting of assets or liabilities pursuant to a reciprocity agreement between two plans in which one plan assumes liabilities of another plan is a transfer of assets or liabilities." 26 CFR § 1.414(l)-1(b)(3). ERISA Section 4234(c) (29 USC § 414(c)) provides that the part of ERISA that governs mergers between multiemployer plans does "not apply to transfers of assets pursuant to written reciprocity agreements."
17. 29 USC §1002(7); see also *Norris v. Mazzola,* 231 F.Supp.3d 412, 422 (N.D. Cal. 2017) (holding that a traveler is a "participant" in an away plan).
18. 29 USC §1104.
19. For instance, DOL has held since 1995 that, before transferring an obligation to pay retirement benefits to an insurance company by purchasing an annuity, ERISA fiduciaries must conduct a thorough investigation of the insurance company. See 29 CFR §2509.95-1; see also "Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1," August 29, 2023, www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/statement-regarding-interpretive-bulletin-95-1.
20. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285, 288 (2009).
21. ERISA Sections 515 and 502 empower multiemployer plan fiduciaries to sue to collect delinquent contributions when necessary. 29 U.S.C. § 1145; 1132. Courts have consistently recognized only two defenses to an ERISA Section 515 collection action: "that the contributions are themselves illegal or that the collective bargaining agreement is void." *Central States vs. Independent Fruit & Produce, Co.,* 919 F.2d. 1343, 1349 (8th Cir. 1990). As one court put it, "the Funds rightly note that the possibility of 'double' contributions does not free employers from their contractual obligations." *Hollow Metal Tr. Fund v. Elevator Entrances of N.Y., Inc.,* No. 10 CIV. 8535 JSR, 2012 WL 75200, at *3 (S.D.N.Y. Jan. 4, 2012).
22. An employer may recoup some of its costs by requesting a refund of mistaken contributions from the home plans. 26 CFR 1.401(a)(2)-1.
23. Agreements with this provision are sometimes referred to as "key employee" or "key man" agreements.
24. "A Participation Agreement, which incorporates the Trust Agreement, although not a CBA, sufficiently comports with the writing requirements of the LMRA and ERISA." *Bukovac v. Central States Pension Fund,* 2016 WL 6268086 (N.D. OH., 2016).
25. *Iron Workers Welfare Fund v. Jefferson Davis Memorial Hosp.,* 1992 WL 46329 at *3 (E.D. La. 1992).
26. See *Lehman v. Nelson,* 943 F.3d 891, 897 (2019).