

SCHOLARSHIP LOAN AGREEMENTS

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OVERVIEW

- Scholarship Loan Agreement Basics
 - Background and Purpose
 - The Model Scholarship Loan Agreement and Promissory Note
- Legal Issues Related to Scholarship Loan Agreements
- Alternatives to Scholarship Loan Agreements

BACKGROUND AND PURPOSE

- A scholarship loan agreement is like an educational loan
 - In exchange for training, an apprentice agrees to pay back the cost of the training upon graduation.
 - Payment can be in cash or through in-kind service to contributing contractors.

BACKGROUND AND PURPOSE

- SLAs serve many purposes:
 - Encourage apprentices to finish training;
 - Encourage apprentices to work for contributing contractors after graduation;
 - Prevent freeloading and unfair competition from non-contributing contractors;
 - Encourage contractors to invest in training by protecting that investment; and
 - Help to keep training fund solvent by ensuring that journeymen trained by the program work for contributing contractors.

MODEL SCHOLARSHIP LOAN AGREEMENT

- Model includes two parts:
 - Loan Agreement
 - Promissory Note
- Apprentice and Committee sign new agreement and promissory note each year.
- Annual agreements serve two purposes:
 - 1. Remind the apprentice of his/her obligations; and
 - 2. Allow the JATC to accurately calculate the cost of each year of training.

MODEL SCHOLARSHIP LOAN AGREEMENT

Key
Components
of the Model
SLA and
Promissory
Note

- Agreement states the cost of the training;
- Agreement states the amount of the loan;

COST OF TRAINING AND LOAN AMOUNT

- The loan amount must be a reasonable approximation of the costs of training.
- Cost of training should be calculated each year, and may include equipment, maintenance, cost of operating training center, instructors' salaries, and materials.
- Cost should exclude: grants or funds from a source other than employer contributions, and expenses the JATC incurs for any training for non-apprentices (Journeymen/CW-CEs).
- Base the calculation on last year's costs:
 - Divide total cost of training by the number of apprentices trained.
- Result is the maximum **loan amount** that may be charged for the training period.
 - You can always charge less, but never more than the maximum.

MODEL SCHOLARSHIP LOAN AGREEMENT

Key
Components of
the Model SLA
and Promissory
Note

- Agreement states the cost of the training;
- Agreement states the loan amount;
- **Agreement states Apprentice's agreement to neither seek nor accept employment from a non-contributing employer;**

WORKING FOR CONTRIBUTING EMPLOYERS

- Apprentices must agree that, after graduation, they will not seek or accept employment in the Electrical Industry, unless the work is performed under a collective bargaining agreement that provides for the payment of contributions to:
 - The Committee; or
 - Another JATC sponsored by or affiliated with a local union of the IBEW.
- Not enough that contractor is a union employer; contractor must be a **contributing** employer.

WORKING FOR CONTRIBUTING EMPLOYERS

- Electrical Industry is defined broadly to include:
 - All work covered by CBAs to which the IBEW or its affiliated local unions are a party;
 - All work falling under the trade jurisdiction of the IBEW Constitution; or
 - Any work to which an electrical worker has been assigned, referred, or can perform by virtue of electrical training.

MODEL SCHOLARSHIP LOAN AGREEMENT

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- Agreement states the cost of the training;
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- Agreement states Apprentice's agreement to neither seek nor accept employment from a non-contributing employer;
- **Agreement and Note state terms of repayment;**

REPAYMENT

- **Option 1: In-Kind Credits**
 - 5 Year commitment to work for contributing employers after graduation.
 - Journeymen earn credits for each "journeyworker working year," which is defined by each JATC as a certain number of hours in a 12-month period.
 - In-kind repayment obligation is typically capped at a total number of journeyman hours or actual years of employment.
 - Model Promissory Note sets out a back-loaded repayment schedule.

REPAYMENT

Repayment Schedule

Journeyworker Working Years	% Total Reduced	Annual Amount Reduced	Cumulative Amount Reduced	Net Amount Due
1	10%	\$_____	\$_____	\$_____
2	15%	\$_____	\$_____	\$_____
3	20%	\$_____	\$_____	\$_____
4	25%	\$_____	\$_____	\$_____
5	30%	\$_____	\$_____	\$_____
Total	100%			

REPAYMENT

Repayment Schedule

Journeyworker Working Years	% Total Reduced	Annual Amount Reduced	Cumulative Amount Reduced	Net Amount Due
1	10%	<u>\$1,000</u>	<u>\$1,000</u>	<u>\$9,000</u>
2	15%	<u>\$1,500</u>	<u>\$2,500</u>	<u>\$7,500</u>
3	20%	<u>\$2,000</u>	<u>\$4,500</u>	<u>\$5,500</u>
4	25%	<u>\$2,500</u>	<u>\$7,000</u>	<u>\$3,000</u>
5	30%	<u>\$3,000</u>	<u>\$10,000</u>	<u>\$0.00</u>
Total	100%			

REPAYMENT

- Option 2: Repayment in Cash
 - Borrower always has this option.
 - In reality, only triggered if the Agreement is breached.

MODEL SCHOLARSHIP LOAN AGREEMENT

Key Components
of the Model SLA
and Promissory
Note

- Agreement states the cost of the training;
- Agreement states the loan amount;
- Agreement states Apprentice's agreement to neither seek nor accept employment from a non-contributing employer;
- Agreement and Note state terms of repayment;
- **Agreement and Note state consequence of breach; and**

BREACH

- Three ways the borrower can breach the agreement:
 - 1. Work for a non-contributing employer in the Electrical Industry;
 - 2. Quit or be terminated from the program; or
 - 3. Work outside the industry.

BREACH

- Upon breach:
 - Borrower forfeits option to pay the loan through in-kind credits
 - Outstanding loan amount due and payable immediately
 - Borrower must pay interest from date of Agreement to final payment.
- Borrower does receive credit for any previous in-kind credits.
 - Ex. If the borrow worked for 3 years as a journeyman, then owes 55% of total amount of loan at breach.

MODEL SCHOLARSHIP LOAN AGREEMENT

Key Components of
the Model SLA and
Promissory Note

- Agreement states the cost of the training;
- Agreement states the loan amount;
- Agreement states Apprentice's agreement to neither seek nor accept employment from a non-contributing employer;
- Agreement and Note state terms of repayment;
- Agreement and Note state consequence of breach; and
- **Agreement and Note state how terms may be enforced.**

ENFORCEMENT

- Model Agreement and Note contain a mandatory arbitration process for enforcing SLA obligations.
- Under this process:
 - Arbitration is mandatory;
 - Arbitrator must award interest on any monetary award;
 - Arbitrator must award prevailing party costs and fees, including arbitrators' fee, attorneys' fees, etc.; and
 - Arbitrator's award may be enforced in court.

MODEL SCHOLARSHIP LOAN AGREEMENT AND NOTE

Questions?

LEGAL ISSUES

- Three Primary Legal Issues:
 - Scholarship Loan Agreements are valid and binding contracts;
 - Scholarship Loan Agreements become part of the “welfare benefit plan” for the purposes of ERISA coverage; and
 - ERISA coverage impacts fiduciary obligations and enforcement options.

SCHOLARSHIP LOAN AGREEMENTS ARE VALID CONTRACTS

- Courts have rejected various challenges to the validity of Scholarship Loan Agreements.
 - SLAs are not contrary to public policy because nothing in the agreement restricts a person's ability to work. It just provides for consequences should the person work for a non-contributing employer, and the barrower can pay off the loan in cash.
 - SLAs are consistent with public policy because they encourage unions and contributing employers to invest in training.

ERISA COVERAGE

- Apprenticeship Fund is a welfare benefit plan under ERISA because it is established and maintained for the purpose of providing "apprenticeship or other training programs . . ." 29 U.S.C. 1002(1).
- SLAs become part of the "welfare benefit plan" for the purpose of ERISA.
- Has a significant impact on administration and enforcement of SLAs.

FIDUCIARY OBLIGATIONS

Fiduciary Obligations Extend to Administration and Enforcement of Scholarship Loan Agreements

- **Administration:**
 - SLAs are consistent with fiduciary obligations because:
 - Trustees have a duty to protect fund assets;
 - Recovering training funds benefits all fund participants.
- **Enforcement:**
 - Repayment amount must be a reasonable estimate of costs;
 - Repayment cannot be a penalty or punishment; and
 - Enforcement must be evenhanded – no discrimination or arbitrary enforcement.

ERISA'S IMPACT ON ENFORCEMENT

- Prior to 2002, SLAs were typically enforced under ERISA Section 502, which provides federal courts with jurisdiction over civil actions for “appropriate equitable relief.”
- Equitable relief for the purpose of ERISA is defined as injunctive relief, mandamus, or restitution. *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).
- Seeking repayment was considered “restitution” for the purpose of fitting into “appropriate equitable relief.”

ERISA'S IMPACT ON ENFORCEMENT

- In 2002, the Supreme Court held that equitable restitution means only actions seeking the return of an identifiable “res.” *Great-West v. Knudson*, 534 U.S. 204 (2002).
 - Res means a thing – Ex. Particular identifiable funds or property in the possession of another.
- Money owed under a contract is not a specifically identifiable thing.
- Instead, a suit seeking contractual damages seeks “legal” – not “equitable” – relief.
- Because ERISA provides only “equitable” relief, a Plan cannot sue for re-payment under ERISA.

ERISA'S IMPACT ON ENFORCEMENT

- JATCs may no longer use ERISA to enforce SLA re-payment obligations.
 - *Honolulu Joint Apprenticeship & Training Committee v. Foster*, 332 F.3d 1234 (9th Cir. 2003).
 - *Sheet Metal Workers Local 24 JATC v. Newman*, 35 Fed. Appx. 204, 28 EBC 1599 (6th Cir. 2002).

ERISA'S IMPACT ON ENFORCEMENT

- What can you do?
- Option 1: Arbitration
 - Use model agreement's arbitration provision.
 - If borrower complies with the arbitrator's decision, that is the end of the dispute.
 - If the borrow does not comply, must go to court to enforce the arbitrator's decision.
 - After *Great-West*, the question is: Which court?

ERISA'S IMPACT ON ENFORCEMENT

- At least one federal court has held that an SLA arbitration award is not enforceable in federal court.
 - *Reading Joint Apprentice & Elec. Comm. v. Hiester*, No. 5:16-cv-04306, 2016 BL 393967 (E.D. Pa. Nov. 28, 2016).
- But an SLA arbitration award should be enforceable in state court.

ERISA'S IMPACT ON ENFORCEMENT

- Option 2: State court breach of contract suit
 - SLA and Promissory Note are contracts.
 - State courts have jurisdiction to hear claims for breach of contract.
 - BUT SLAs are also “welfare benefit plans” under ERISA, and ERISA preempts all state laws – including breach of contract claims– that ‘relate to any employee benefit plan.’
 - Question after *Great-West*: If JATC cannot enforce a SLA using ERISA, can ERISA still preempt a state court enforcement action?

ERISA'S IMPACT ON ENFORCEMENT

- Answer: The courts have split on this question.
- Oregon, Florida, and Delaware have held that ERISA preempts state court contract action
 - *Liberty Northwest*, 85 Pac. 3d 871 (OR 2004)
 - *MEBA Medical and Benefits Plan*, 867 So. 2d 1184
 - *Asbestos Workers*, Docket No. 04C-06-210 (Del. Super. Ct. 2006)
- BUT

ERISA'S IMPACT ON ENFORCEMENT

- Other states have ruled that ERISA does not preempt state court contract actions:
 - *AFL Hotel & Restaurant Workers*, 132 P.3 1229 (Haw. 2006);
 - *National American Insurance Co.*, 157 P.3d 100 (Okla. 2006);
 - *Hamrick's, Inc.*, 115 S.W.3d 468 (Tenn. Ct. App. 2002);
 - *JATC (SMART Local 36)*, 2016 LRRM 363864 (E.D. Mo. Nov. 01, 2016).
- Courts appear to be moving in the direction of holding that ERISA does not preempt state court breach of contract actions.

ENFORCEMENT

- Enforcement decisions must be made on a case-by-case and state-by-state basis.
- In addition to arbitration and state court actions, some JATCs have:
 - Successfully sued in small claims court on the promissory note itself (can't do this if contains arbitration clause); or
 - Used a collection agency.

ENFORCEMENT

- What about borrower's bankruptcy?
 - Borrower's obligation is not avoidable in bankruptcy.
 - SLAs are "educational loans" under the Bankruptcy Code, so the borrower cannot obtain forgiveness under the Code.
 - To preserve rights, Fund must participate in bankruptcy action.

ALTERNATIVES

- Some JATCs are experimenting with alternatives to SLAs
 - Alternatives seek to incentivize graduation and continued employment in the industry rather than penalizing those who leave. Also seek to eliminate enforcement problems.
 - Ex. Tuition Reimbursement Plan
 - Apprentice pays tuition (via hourly contributions) to JATC in exchange for training.
 - JATC refunds tuition once a graduate fulfills certain conditions.

QUESTIONS?

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