

# **OPERATING ENGINEERS TRUST FUNDS JOINT CONTRIBUTION COMMITTEE**

## **COLLECTION POLICY & PROCEDURES UPDATED FEBRUARY 2019**

The Operating Engineers Funds, Inc., (“Fund Office”) collects required contributions from employers who are signatory to collective bargaining agreements between the International Union of Operating Engineers, Local Union No. 12 (“Local 12”), and certain Southern California and Southern Nevada contractor associations and individual “short-form” contractors. The Joint Contribution Committee of the Boards of Trustees (“Committee”) oversees the collection of all delinquent employer contributions.

### **1. Contributions**

Contributions to each of the funds shall be due and payable on the 10<sup>th</sup> day of each month covering the hours worked by each employee through the last payroll period in the prior calendar month. At the same time, each employer shall also file a monthly report on the form established by the Fund Office, and such report shall be filed regardless of whether the employer has employed any employees, unless it has requested to be placed on the inactive list and the request has been approved by the Committee.

The delinquency date (“Delinquency Date”) for making payments and filing reports is 4:30 p.m. on the 20th day of the month following the work month. If the Delinquency Date falls on a weekend or holiday, the Delinquency Date will become 4:30 p.m. on the first following business day. All payments and reports must be postmarked or hand delivered by the Delinquency Date. Electronic reporting and/or payment of contributions shall be permitted, subject to the Fund Office implementing procedures for securely accepting reports and payments. The electronic report and payment must be received by the Delinquency Date. Metered postage is acceptable for payments; however, reports received after the Delinquency Date without a valid postmark showing mailing before the Delinquency Date shall be deemed to be received after the Delinquency Date.

### **2. Delinquency**

Any employer who fails to pay contributions to the Fund Office on or before the Delinquency Date, issues a non-sufficient funds check, fails to submit timely reports to the Fund Office, or fails to produce records for an audit when requested, will be considered delinquent and subject to the following:

- The employer will be assessed liquidated damages in the amounts permitted under the applicable collective bargaining agreement and Trust Agreement, which for most employers is 10% of the delinquent fringe benefit contributions or \$25.00, whichever is greater. This amount shall be paid by the employer in addition to the contributions owed.

- The employer will also be assessed simple interest at the annual rate of 8% on the unpaid fringe benefits from the Delinquency Date until the date of payment. The Committee shall adjust the interest rate to reflect current economic conditions.
- If a lawsuit is filed to collect the delinquent contributions, simple interest shall be claimed at the annual rate of 8% on the unpaid or late paid fringe benefit contributions, plus liquidated damages shall be claimed in the amount of 10% of the unpaid or late paid fringe benefit contributions, \$25.00, or the amount of interest due under 29 U.S.C. Section 1132 (g) (2) (C), whichever is greater.
- The employer shall be placed on the next delinquency list published by the Fund Office and remain on the list until the delinquency is resolved.

### **3. Delinquencies Arising From Expired Collective Bargaining Agreements.**

The Committee shall have the authority to pursue claims for fringe benefit contributions from employers after the expiration of their collective bargaining agreement. Current case law requires that claims for fringe benefit contributions arising after the expiration of a collective bargaining agreement be exclusively made with the National Labor Relations Board (“NLRB”) in the form of an unfair labor practice charge. The NLRB is required to investigate the charge and, if it considers it appropriate, file a complaint against the employer for an unfair labor practice charge. The Committee and the Fund Office, with the assistance of legal counsel, shall have the power to file charges with the NLRB and cooperate with the NLRB in prosecuting the unfair labor practice charge. The initial unfair labor practice charge must be filed within six months of the Delinquency Date.

The charge shall cover all unpaid fringe benefit contributions accrued from the date of expiration of the collective bargaining agreement to the last date permissible under applicable law at the time the charge is filed.

### **4. Delinquency Notices**

Following the Delinquency Date, the Fund Office will send a letter to every employer that failed to report to the Fund Office, or who reported but did not pay contributions, regarding their delinquency. The Fund Office shall advise the delinquent employer to correct the delinquency within ten (10) days of the Notice. However, the failure of the Fund Office to give such notice shall not relieve the employer of its obligation to pay the contributions and any additional amounts due hereunder. The Fund Office may also notify in writing the last reported employees of the delinquent employer and request that they keep a copy of their paycheck stubs and record of the hours worked on specific jobs for lien purposes. If the employer remains delinquent, the Fund Office may send a declaration of hours form to the employees. The Fund Office shall require the delinquent employer to provide a list of its jobs and the covered hours worked on each job. The Fund Office will follow up with phone calls and personal contact by Fund Office Field Representatives to the employers to collect the delinquent contributions. The Fund Office will notify the employers and any general contractor or public agency that owes the delinquent employer money in writing on a monthly basis of their status until all contributions are paid in full.

**5. Delinquency List**

The Fund Office shall maintain a list of all delinquent employers. It shall distribute the list to Local 12, all employer associations with collective bargaining agreements with Local 12 and other signatory employers who request a copy of the Delinquency List from the Fund Office. Local 12 shall be provided with such other information as may be requested about the delinquency, including but not limited to, information needed to remove the employees from employment with the employer. The decision to request employees to cease working for a delinquent employer shall in all instances be made by Local 12.

Written reports on audits, bankruptcies, requests by employers for inactive status and refunds for mistaken contributions will be prepared by the Fund Office and provided to the Joint Contribution Committee, at their meeting.

The obligations arising from subcontracting to a contractor on the delinquency list shall be enforceable only through a lawsuit authorized by the Committee.

**6. Waiver of Liquidated Damages and Interest**

The assessment of monetary liquidated damages may be waived by the Fund Manager once each calendar year. The Fund Manager may also waive non-monetary delinquencies once each calendar year for late reporting or non reporting where there are no fringe benefits actually due and the employer has voluntarily complied with the reporting requirements and provided a written explanation acceptable to the Fund Office for the non-monetary delinquency. The Fund Office shall report to the Committee all waivers granted by the Fund Office. The employer must apply for any other waivers of liquidated damages and any waivers of interest in writing. All such written requests in excess of \$10,000.00 will be reviewed and decided by the Committee. The Fund Manager shall review and approve all requests under \$10,000.00 and report his actions to the Committee for ratification. The Committee shall have sole discretion to decide all such requests for waivers of liquidated damages, interest, or other fees. The decision of the Committee shall be final and binding.

**7. Payment Plan Agreements**

Employers may request in writing that their delinquency be placed on a payment plan. Fund Office staff and/or legal counsel will review the request and make a recommendation regarding approval. Amounts under \$25,000.00 with a payment plan of less than 36 months shall be reviewed and approved by the Fund Manager, subject to ratification by the Committee. The Committee, or the Chair and Co-Chair of the Joint Contribution Committee, may approve a payment plan. The following conditions must be included in a payment plan agreement: the agreement must state the amount of the delinquency; the period of time of the payment plan; the agreed payment structure; any assessed liquidated damages; interest prorated over the term of the payment plan, the total of which is calculated and included in the payment structure. Each payment plan shall require the employer to provide to the Fund Office job site information on where the work was performed that generated the delinquency to permit the filing of liens for the unpaid contributions. In addition, the employer must agree in writing on behalf of the company, whereby the employer agrees to pay timely pursuant to the terms of the payment plan, as well as agrees to

pay all current and future contributions timely and agrees that any failure to meet any of the agreed upon conditions may result in a default of the payment plan.

Requests for reinstatement of payment plans, when the delinquent amount causing the breach is less than \$25,000.00 and that amount has since been paid, shall be reviewed and approved by the Fund Manager, subject to ratification by the Committee.

**8. Eligibility for Benefits Based on Unpaid Hours**

Rules and procedures regarding participant eligibility for benefits based on unpaid contributions, or late contributions, shall be the responsibility of each Trust Fund that has adopted these delinquency procedures.

**9. Actions by Counsel**

If an employer is delinquent for more than Sixty (60) days after the first of the month following the initial delinquency, upon notice of a delinquency by the Fund Office, or if the delinquency is more than \$25,000.00, or upon the filing of a bankruptcy petition by an employer, the Fund Office shall refer the matter to legal counsel to send a demand letter and commence all other appropriate actions to collect the amounts due. These actions by legal counsel may include, but are not limited to, assistance with joint check agreements arranged with general contractors, the filing of stop notices, Miller Act claims, and mechanic's liens, as well as filing suit to collect the unpaid contributions and other damages due the Trusts. The Fund Office and the Committee shall authorize legal counsel to institute a lawsuit against the delinquent employer or other parties to collect the amounts owed, including liquidated damages, interest, costs, and attorney fees.

**10. Joint Contribution Committee**

The members of the Committee shall consist of those trustees of the Southern California and Southern Nevada Operating Engineers Trust Funds that have adopted these collection policies and procedures and for whom the Fund Office is collecting fringe benefit contributions. The trustees of each Trust Fund shall appoint trustees to participate in the meetings of the Committee. All actions by the Committee shall be made by a vote of those members present pursuant to the voting rules contained in the Trust Agreement for the Southern California Operating Engineers Pension Trust. A quorum for the Committee to meet shall be one committee member from Labor and one committee member from Management. The Committee shall elect a Chair and Co-Chair, one from Management, one from Labor, to preside at the meetings. The Chair and Co-Chair shall serve terms of one year. The Committee will meet as necessary as determined by the Committee to review the status of all delinquent employers. At each meeting, the Fund Office will present a written report about the delinquent employers. Legal counsel shall present a written report with counsel's recommendations on all the matters that require action by the Committee. Minutes will be kept of the meetings and submitted to each participating Board of Trustees for their information.

**A. Authority to settle and compromise claims** The Committee has the authority to compromise any claim or to enter into written settlement agreements with delinquent employers on the terms it deems appropriate. The Committee also has the authority to write-off amounts past due when it is convinced that the costs of additional collection efforts will outweigh the potential recovery.

The Chair and Co-Chair of the Committee shall have the authority to appoint individuals, including themselves, to attend court ordered mediation and settlement conferences, compromise and settle claims between meetings of the Committee subject to the ratification of all actions at the next Committee meeting.

**B. Recusal of Trustee.** A Trustee member of the collection committee or a fiduciary shall recuse himself/herself whenever the Trustee or fiduciary is the owner or employee of a delinquent employer or the delinquent employer is owned by the trustee, a relative of the Trustee as defined in ERISA Section 3(15) or a fiduciary. The trustee member of the committee or fiduciary shall not vote or influence directly or indirectly any decision regarding the delinquency of such an employer and shall physically excuse himself/herself from the meeting during any deliberations concerning that employer's delinquency.

#### **11. Payroll Audit Program**

The Fund Office's audit staff shall conduct periodic audits of the accuracy of the contributions by the employers. These audits shall follow agreed upon procedures that test whether contributions have been made on behalf of all covered employees in the correct amounts. The Fund Office shall report the results of its audits in writing to the Committee, and these reports shall be reviewed by the Committee. If contributions are found to be due, the employer will be assessed liquidated damages, interest, and will be required to pay the cost of the audit. If the total audited amount found due in unpaid contributions is less than 5% of the total contributions paid by the employer during the audit period, the Fund Office may waive the costs of the audit provided the employer voluntarily pays the unpaid contributions, interest and liquidated damages within 30 days of the date the audit findings are mailed to the employer. If an employer fails to provide all records needed for an audit within a reasonable time, or refuses to allow an audit, or cancels more than two audit dates, the matter will be referred to legal counsel to compel an audit and, if necessary, file a lawsuit to obtain the documents needed and to collect any amounts owed. Audits may be required of any employer at any time at the request of the Fund Manager, the Committee, a trustee of any of the Trusts, or legal counsel.

#### **12. Applying Payments**

When a partial payment for a contribution month is received (not including minor shortages), it shall be processed as an underpaid report. The underpaid report will be presumed to be employee payroll contributions and shall be applied first to fund those contributions made from employee payroll deductions for the entire delinquency. Thereafter the remaining funds shall be prorated across the entire delinquency, for all hours and all funds for that month unless otherwise required by applicable law. If there are additional amounts that have been collected for interest, liquidated damages, costs and attorney fees, those amounts shall be divided between the Pension Trust, the Health and Welfare Fund, the Vacation –Holiday Savings Trust and the Training Trust for the area where the work was performed (either Southern California or Nevada) in proportion to the allocation of expense between these trusts calculated by the Fund Office and affirmed by the independent accountants for the Trusts.

When several months are delinquent and a payment is received, after the payment of the employee payroll deductions, the payment will be applied to the oldest delinquency unless

otherwise directed by the Committee or required by applicable law. However, payments from a third party covering specific hours or jobs shall be applied to those hours or jobs, unless otherwise directed by the Committee or as required by law.

**13. Statements to Participants**

The Fund Office sends the participants annual statements reflecting vacation-holiday contributions received by the Fund Office. The Fund Office will research inquiries from participants regarding missing hours or contributions and, whenever appropriate, collection procedures will be instituted against the employers.

**14. Crediting Hours**

Each Trust Fund shall determine whether, when and how it will credit their participant's account for unpaid fringe benefit contributions.

**15. Settlement of Certain Claims**

If an employer's total delinquency is less than \$10,000.00, the Fund Manager may enter into a settlement of the delinquency, subject to ratification by the Committee. If the proposed settlement is within 10% of the total delinquency, the Fund Manager may enter into a settlement of the delinquency, subject to ratification by the Committee.

**16. Actions involving claims by the Vacation Holiday Savings Trust**

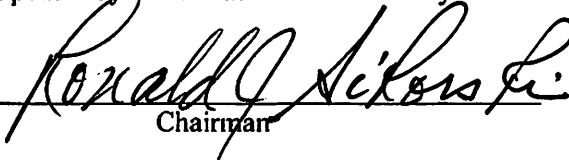
If an employer's delinquency to the Vacation Holiday Savings Trust exceeds \$15,000, and if it appears that these amounts were actually deducted from the employees' paychecks, collection counsel is authorized to pursue legal action against the individuals legally liable for the payments to collect the Vacation Trust delinquency.

Adopted by the Committee at their duly held meeting on June 25, 2008.

Section 10 (A) and 16 added by action by the Committed at duly held meeting on September 25, 2013.

Updated by the Committee at their duly held meeting on September 6, 2015.

Updated by the Committee at their duly held meeting on February 27, 2019.

  
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Chairman

  
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Secretary