NORTHERN CALIFORNIA PIPE TRADES TRUST FUNDS FOR UA LOCAL 342

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October 2018

To: **Contributing Employers**

Re: **Consequences of Transmitting Deferred 401(k) Employee Contributions Late**

The U.S. Department of Labor (DOL) is serious about employers making timely employee 401(k) deferrals to 401(k) Plans (employees have deferred amounts out of wages to the 401(k) Plan) and as a result, imposes special rules and penalties when an employer fails to timely contribute the 401(k) deferrals. This memo summarizes issues related to late deferrals to the Northern California Pipe Trades Supplemental 401(k) Retirement Plan.

Timely Contributions of 401(k) Deferrals is Very Important—Excise Tax Assessed. Contributions to the 401(k) Plan (and other Trust Funds) must be submitted to the Trust Fund Office no later than the 15th business day following the month in which the hours were worked. If contributions are late, liquidated damages of 20% of the delinquent contributions and interest at the rate of 12% per annum may be assessed. If any delinquent contributions are employee 401(k) deferrals, the law treats the employee deferral delinquency as an improper loan to the employer, which the DOL considers to be a prohibited transaction subject to an excise tax equal to 15% of the lost earnings resulting from the late contribution of the 401(k) deferrals. By way of example, if you are late two consecutive months on your 401(k) deferrals and the lost earnings on the late 401(k) deferrals was $200, you would owe an excise tax of 15% or $30.00 (15% of $200). Unfortunately, there is no de minimis rule.

Make-up Lost Earnings. If you submit your employees' 401(k) deferrals late, the DOL requires that you make up the earnings the employee lost because of the late contribution (based on interest rates set by the DOL).

Filing IRS Form 5330 to Pay Excise Tax/Consult with your Tax Advisor. If you are late on a 401(k) deferral contribution, you may want to review IRS Form 5330. If you fail to pay the excise tax (using IRS Form 5330), you may be charged penalties and interest in addition to the unpaid excise tax.

Other Option. If you are late in contributing the 401k) deferrals in any month, you have the option of making a filing under the DOL's Voluntary Fiduciary Correction Program (VFCP). A VFCP filing requires sending certain information to the DOL identifying the delinquencies and documenting the correction (including restoration of earnings). We acknowledge that in many situations, the cost of a VFCP filing will exceed the excise tax.

Make-up Employee Deferrals if Contribution not Made/Compliance Test Reveals Late Payments. If you fail to contribute an employee's 401(k) deferral amount to the Plan and that employee is no longer working for you, you may have to make that 401(k) contribution to the Plan even though you already paid the employee the same amount in wages (yes, a double payment). (This can often happen when a compliance test of a prior period discloses an earlier late payment.) The same rule could apply if the employee is still working for you if the employee does not agree to an adjustment.

The Plan's auditor is required to report late employee contributions on Schedule G of the Plan's tax form (5500).

You are urged to consult with a tax advisor or legal counsel regarding the impact of late 401(k) deferrals.