NORTHERN CALIFORNIA PIPE TRADES TRUST FUNDS FOR UA LOCAL 342

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To: **Contributing Employers**

Re: **<u>Consequences of Late Deferred 401(k) Employee Contributions</u>**

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

<u>Timely Contributions of 401(k) Deferrals is Very Important</u>. Contributions to the 401(k) Plan (and other Trust Funds) must be received and paid no later than the 15th business day of the month following the month in which the hours were worked that produced the contributions and are delinquent if not received and paid by the 22nd (you are urged to contribute at least the 401(k) deferrals by the 15th business day). If contributions are delinquent, liquidated damages of up to 20% and interest of up to 12% of the delinquent contributions may be imposed. If any of those delinquent contributions are employee 401(k) contributions, the law treats the employee contribution (deferral) delinquency <u>as a loan from the Plan to the employer</u>. Unfortunately, the “DOL” considers a loan from the Plan to an employer to be a prohibited transaction subject to an excise tax equal to 15% of the amount of the of the prohibited transaction, which in this situation, is the lost earnings resulting from the late payment of the 401(k) deferrals). Unfortunately, there is no de minimis rule.

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

<u>Requirement to Pay 15% of Lost Earnings Resulting From Late 401(k) Contributions</u>. Once you have been late on a 401(k) deferral, you will owe a 15% excise tax to the IRS. By way of example, if you were late two consecutive months on your 401(k) contributions 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). (This tax is in addition to any liquidated damages (up to 20%) and interest (up to 12%) that you owe the Trust Fund on all of your late contributions.) The excise tax is payable to IRS.

<u>Filing IRS Form 5330 to Pay Excise Tax/Consult with your Tax Advisor</u>. If you are late on a 401(k) deferral contribution, you may want to review IRS Form 5330 to learn more about the excise tax. If you fail to pay the excise tax (using IRS Form 5330), you may be charged penalties and interest in addition to the unpaid taxes. **We suggest that you consult with your tax advisor regarding the consequences of making a late contribution of employee deferrals to the 401(k) Plan.**

<u>Other Option</u>. If you were 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). You can read more on the DOL’s VFC program at <u>http://www.dol.gov/ebsa/compliance_assistance.html#section8</u>. We acknowledge that in many situations, the cost of a VFCP filing will exceed the excise tax that would otherwise be assessed if you file Form 5330. You may wish to consult with your tax advisor regarding this option.

<u>Make-up Employee Deferrals if Contribution not Made/Payroll Audits Discovering Late Payments.</u> If you fail to contribute an employee’s 401(k) deferral amount to the Plan and that employee is no longer working for you, pursuant to governmental requirements, you will have to make that 401(k) deferral contribution to the Plan even though you already paid the employee the same amount in wages (yes, a double payment). That same rule could apply if the employee is still working for you, if the employee does not agree to an adjustment of his deferral amount. Moreover, if a payroll audit performed by the Plan’s auditing firm uncovers employee deferrals that should have been made to the 401(k) Plan during a prior period (such as three years), you may end up having to make a double payment given that wages would already have been paid. Thus, getting the 401(k) deferrals correct is important.

The Plan’s auditor is required to report the total of the late employee contributions on Schedule G of the Plan’s annual Tax Form 5500.

Please be advised that the Trust Fund Office cannot provide tax or legal advice. You are urged to consult with a tax or legal advisor regarding the ramification of making late 401(k) employee deferral contributions.