# Memorandum

To:
Cc:
From: Adrienne H. Wyker
Date: November 21, 2003
Re: Non-Bargaining Unit Employee Participation in Taft-Hartley Multiemployer Health and Welfare Plans
Our File No:

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## I. INTRODUCTION

As you know, there are two government agencies with jurisdiction to regulate employee benefit plans covered by the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"): the Department of Labor ("DOL") and the Internal Revenue Service ("I.R.S."). The regulations of each of these agencies may not be exactly the same, and when it comes to determining who can participate in a Taft-Hartley multiemployer employee welfare benefit plan (hereinafter, "Plan") that is established or maintained pursuant to a collective bargaining agreement ("CBA"), the I.R.S. regulations are generally more stringent. In almost all situations, if a Plan meets the I.R.S. standard, it will also meet the DOL standard.

This memo will first review the Department of Labor requirements and their impact on a Plan's ability to offer participation to non-bargaining unit ("NBU") personnel. We start with a consideration of DOL requirements because they provide a basis for understanding the more stringent I.R.S. requirements which are discussed in the next session of the memo. For example, the Plan needs to satisfy the DOL standards of being collectively bargained in order to qualify for the special treatment accorded multi-employer plans. Without that status, analysis of the I.R.S. requirements is drastically altered. Following the discussion of I.R.S. requirements, the memo concludes with a summary and discussion of specific questions of interest to multiemployer plan sponsors.

## II. DEPARTMENT OF LABOR REQUIREMENTS

The DOL rules generally determine whether an employee benefit plan will be treated as one "established or maintained pursuant to a collective bargaining agreement." If it is, and if more than one employer is signatory to a collective bargaining agreement ("CBA") requiring contributions to the welfare plan, it is considered a multiemployer plan. A self-funded multiemployer welfare benefit plan is generally exempt from state insurance laws.[1]

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[1]If more than one employer contributes to the plan, but it is determined under the DOL regulations not to be "established or maintained pursuant to a collective bargaining agreement," then it is considered a multiple employer welfare arrangement ("MEWA"), and is required to make additional filings with the DOL. A MEWA is not automatically exempt from state insurance law.

Employee welfare benefit plans are not subject to the participation, vesting, and non-discrimination requirements set forth under Part 2 of ERISA. ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061. The Internal Revenue Code's (I.R.C.) non-discrimination provisions do not apply to employee welfare benefit plans. I.R.C. § 401(a).

In order to maintain a Plan's favorable status as a multiemployer plan under ERISA, the Plan must establish that it is maintained under or pursuant to one or more agreements which the Secretary of the DOL finds to be CBA's between one or more employee organizations and more than one employer. ERISA § 37; 29 C.F.R. § 2510.3-37. The DOL has recently promulgated a regulation explaining the criteria for determining when a plan is established and maintained pursuant to one or more CBA's and thus qualifies as a multiemployer plan. 29 C.F.R. § 2510.3-40.

The new DOL regulation states that an employee welfare benefit plan is "established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements" for any plan year in which the plan meets four specified criteria and does not fit any of these specific exclusions. The four mandatory criteria are:

1) The plan must be an employee welfare benefit plan within the meaning of ERISA § 3(1) (29 U.S.C. § 1002(1));

2) At least 85% of the total participants (dependents and other beneficiaries of primary participants are not counted in this calculation) must fall into any combination of one or more of the following ten categories:

    a) active bargaining unit employees,

    b) retirees who meet either of the following two criteria:

        i) participated in the plan for five of the last 10 years preceding their retirement, or

        ii) are receiving benefits as participants under a multiemployer pension benefit plan that is maintained under the same agreements under which the welfare benefit plan is maintained,

    c) participants on extended coverage required by statutes or court or administrative agency decisions, such as COBRA, FMLA, USERRA, LMRA,

    d) participants who were active bargaining unit participants, and whose coverage is extended under the terms of the plan, such as by self-payment, hour bank, disability extension, etc., so long as the charge to the individual for such coverage does not exceed the maximum COBRA continuation coverage premium,

e) active bargaining unit participants covered through a reciprocity agreement with one or more other employee welfare benefit plans established or maintained under or pursuant to one or more CBA's, and that are multiemployer plans,

f) employees of:

i) the employee organization(s) (union) that sponsors, jointly sponsors, or is represented on the joint board of trustees,

ii) the plan or associated trust fund,

iii) other employee benefit plans or trust funds to which contributions are made pursuant to the same CBA that requires contributions to this plan, or

iv) the employer association that is the authorized employer representative that *actually engaged in the collective bargaining* that led to the CBA,

g) alumni (that is, individuals who were employed under the CBA, provided that they are currently employed by one or more employers that are parties to the CBA, and are covered under the plan on terms that are generally no more favorable than those that apply to similarly situated active bargaining unit participants),

h) non-bargaining unit employees of employers who are bound by the CBA and who employ personnel covered by the CBA, so long as the NBU participants are covered under the plan on terms that are generally no more favorable than those that apply to active bargaining unit participants,

*To the extent that participants in this category exceed 10% of the total population of participants in the plan, they will be disregarded for purpose of making sure that at least 85% of the total population of participants in the plan are from one of these categories. If all of the other participants meet one of the other nine categories, a plan can have up to 25% of its total population as individuals who meet this category. If there is a possibility that the Plan will cover individuals who cannot fit into any of these ten categories, those "non-nexus" participants can be no more than 15% of the total population of participants, as long as the other 85% are from these categories, with no more than a total of 10% out of this category (h).*

i) employees of carriers subject to the Railway Labor Act (in industries governed by this Act), or

j) licensed marine pilots covered under a qualified merchant marine plan (if applicable).

3) The plan must be incorporated or referenced in a written agreement between one or more employers and one or more employee organizations, provided that the written agreement itself or

in combination with other agreements between or among the same parties meets each of the following five criteria:

a) is the product of a *bona fide collective bargaining* relationship between the employers and the employee organization(s),

b) *identifies the employers and the employee organization(s)* that are parties to, and bound by, the agreement,

c) *identifies the personnel, job classifications, and/or work jurisdiction covered* by the agreement,

d) *provides for terms and conditions of employment* in addition to coverage under, or contributions to, the plan, *and*

e) is *not unilaterally terminable, or automatically terminated* solely for non-payment of benefits under, or contributions to, the plan; and

4) The fourth criterion sets forth a list of factors that must be considered, among others, in order to reach a determination that a bona fide collective bargaining relationship exists between the parties. This criterion actually refers back to the requirement of 3(a) above. Generally, the existence of a bona fide collective bargaining relationship is to be presumed where at least four of these factors are established, as long as all other relevant objective or subjective indicia of actual collective bargaining and representation are considered. The prescribed factors to be considered are:

a) the purported CBA provides for contributions to a labor-management trust fund structured according to § 302(c)(5), (c)(6), (c)(7), (c)(8), or (c)(9) of the Taft-Hartley Act (also known as the Labor Management Relations Act or "LMRA"), 29 U.S.C. § 186(c)(5), (6), (7), (8), or (9), or to a plan lawfully negotiated under the Railway Labor Act;

b) the purported CBA requires contributions by substantially all of the participating employers to a multiemployer pension plan that is structured in accordance with I.R.C. § 401, and is either structured in accordance with LMRA § 302(c)(5) or is lawfully negotiated under the Railway Labor Act, *and* substantially all of the active participants covered by the employee welfare benefit plan in question are also eligible to be participants in that pension plan;

c) the predominant employee organization that is a party to the purported CBA has maintained a series of agreements incorporating or referencing the plan since before January 1, 1983;

d) the predominant employee organization that is a party to the purported CBA has been a national or international union, *or* a federation of national and international unions, *or* has been affiliated with such a union or federation, since before January 1, 1983;

e) a court, government agency, or other third-party adjudicatory tribunal has determined, in a contested or adversary proceeding, or in a government-supervised election, that the predominant employee organization that is a party to the purported CBA is the lawfully recognized or designated collective bargaining representative with respect to one or more of the bargaining units of personnel covered by the purported CBA;

f) employers who are parties to the purported CBA pay at least 75% of the premiums or contributions required for the coverage of active participants under the plan;

(for purpose of determining the 75% of the premiums or contributions for active employees, coverage under the plan for vision or dental care, coverage for excepted benefits, and amounts paid by participants and beneficiaries as co-payments or deductibles in accordance with the terms of the plan are disregarded)

g) the predominant employee organization that is a party to the purported CBA provides, sponsors, or jointly sponsors a hiring hall(s) and/or a state-certified apprenticeship program(s) that provides services that are available to substantially all active participants covered by the plan;

h) the purported CBA has been determined to be a bona fide CBA for purposes of establishing the prevailing practices with respects to wages and supplements in a locality, pursuant to a prevailing wage statute of any state or the District of Columbia;

i) other objective or subjective indicia of actual collective bargaining and representation, such as:

i) that arm's-length negotiations occurred between the parties to the purported CBA,

ii) that the predominant employee organization actively represents employees covered by the purported CBA with respect to grievances, disputes, or other matters involving employment terms and conditions other than coverage under, or contributions to, the employee welfare benefit plan,

iii) that there is a geographic, occupational, trade, organizing, or other rationale for the employers and bargaining units covered by the purported CBA,

iv) that there is a connection between the purported CBA and the participation, if any, of self-employed individuals in the employee welfare benefit plan established or maintained under or pursuant to such purported CBA.

Any one of the following serves as a ***disqualifying*** criterion:

1) The plan is self-funded or partially self-funded, *and* is "marketed" to employers or sole proprietors:

a) by one or more "insurance producers,"

b) by an individual who is disqualified from, or ineligible for, or has failed to obtain, a license to serve as an insurance producer to the extent that the individual engages in an activity for which such license is required, *or*

c) by individuals other than the individuals described in the two previous paragraphs, who are paid on a commission-type basis to market the plan.

2) The agreement under which the plan is established or maintained is a scheme, plan, stratagem, or artifice of evasion, a principal intent of which is to evade compliance with state law and regulations applicable to insurance.

3) There is fraud, forgery, or willful misrepresentation as to the factors relied on to demonstrate that the plan satisfies the four mandatory criteria, described above.

In conclusion, as long as the plan is based on a legitimate, bona fide collective bargaining agreement, is not a sham, and no more than 15% of the participants fall outside the categories discussed on pages 3 to 6 above, the plan will meet the DOL requirements.

## III. INTERNAL REVENUE SERVICE RULES

There are three separate tax issues affecting employee benefit plans, in addition to the DOL issues. The tax issues involve:

(A) deductibility of the contribution by the employer;

(B) exemption from tax on the income of the trust; and

(C) exclusion of the benefits under the plan from income of the participant or beneficiary.

### *A. Deductibility of Employer Contributions*

An employer's contributions to an employee welfare benefit plan are tax-deductible under I.R.C. § 162, so long as the contributions constitute "ordinary and necessary business expenses," and so long as they do not exceed the limitations imposed by I.R.C. §§ 419 and 419A. Those two sections impose strict limits on the amount of a permitted deduction for contributions that are in excess of current costs to run the plan. However, I.R.C. § 419A(f)(5) provides that no such limits apply to contributions made to a separate welfare benefit fund under a CBA.[2] As long as the plan meets the

[2]The I.R.S. has published guidance indicating that it intends to publish regulations that will apply the limits of I.R.C. §§ 419, 419A, and 512 to collectively bargained welfare benefit funds, but these rules will not go into effect until after the issuance of final regulations applying these limits to such plans.

requirements of being a *separate* welfare benefit fund (the assets are not intermingled with assets used for any other purpose) and the plan meets all the requirements for being established and maintained under a CBA, all contributions called for under the CBA are deductible to the employer. The justification behind this exception is basically that the arm's length negotiations are the safeguard preventing any improper use of the funds contributed to the plan. (That is, an employer will not make excessive contributions to the fund and then use them to benefit owners or key employees unfairly or in a discriminatory manner.)

The I.R.S. has not yet issued regulations specifically describing what is necessary to constitute a "separate" fund, but it is highly unlikely that a Taft-Hartley fund would not satisfy any such regulations to be promulgated in the future. The I.R.S. has indicated in published guidance (Internal Revenue Notice 2003-24) that it "understands that there are bona fide collectively bargained welfare benefit plans that provide benefits to one or more employees who are not collectively bargained, and that some of these plans might not have maintained a separate and distinct fund for only the collectively bargained employees." The Department of the Treasury and I.R.S. have sought public input regarding how to satisfy the "separate" fund requirement in I.R.C. § 419A(f)(5). The comment period closed August 3, 2003, so proposed regulations should be forthcoming within the next year. The American Bar Association ("ABA") has submitted comments to the I.R.S. recommending that the I.R.S. promulgate regulations that are similar to and consistent with recently promulgated DOL regulations, allowing up to 15% "non-nexus" (essentially, non-bargaining unit employee) participants in a qualified collectively bargained plan.

Even if the trust fund has been determined to be exempt from income tax under I.R.C. § 501(c)(9) and the union co-sponsoring the plan has been recognized as tax exempt under I.R.C. § 501(c)(5), employer contributions are not automatically tax-deductible. In order to be tax-deductible, the I.R.S. must determine that the trust fund (or other method of funding the benefits) and the liability for contributions were determined under a legitimate CBA. The I.R.S. reserves the right to make a determination of whether an agreement is a bona fide CBA between bona fide employee representatives and one or more employers. I.R.C. § 7701(a)(46); Treasury Regulation ("Treas. Reg.") § 301.7701-17T. The I.R.S. has not issued detailed guidance on its procedure for determining whether an agreement is a bona fide CBA or what criteria it uses to make such a determination. In the absence of explicit guidance from the I.R.S., it is safe to rely on DOL regulations for determining the existence of a bona fide CBA. Currently effective temporary regulations provide that a plan will meet the requirements of being a "welfare benefit fund maintained pursuant to a collective bargaining agreement" if the DOL determines the agreement maintaining the Plan to be a CBA, *and* if the benefits provided through the Plan were the subject of arms-length negotiations between employee representatives and one or more employers, *and* the circumstances surrounding the CBA must evidence good faith bargaining between adverse parties over the welfare benefits to be provided through the Plan. The I.R.S. will automatically determine that the plan is *not* maintained pursuant to a CBA if more than 50% of the employees eligible to receive benefits under the fund are not covered by the CBA. Treas. Reg. § 1.419A-2T.

The I.R.S. has discovered certain sham arrangements purporting to be union-negotiated collectively bargained health and welfare plans, but which have actually been determined to be complex tax-avoidance schemes. The I.R.S. has issued specific guidance on these types of arrangements and the criteria to be subject to sanctions and penalties for participation in such a scheme. The I.R.S. has said that an arrangement involving a purported collectively bargained welfare benefit fund is such a sham if, in any year, the employer's contributions with respect to the owner or owners of the employer(s) are more than one-half of the total employer contributions, but only if there is at least one owner with respect to whom the employer contributions exceed $20,000. Another example of a sham is a plan that provides more favorable coverage for an owner of the employer than for employees who are not owners. Any other arrangement that is the same as, or substantially similar to, one of these arrangements will trigger tax-shelter rules and sanctions.

### ***B. Tax-Exempt Status of the Trust Fund, Itself***

Investment income, earnings, gains, and other income to the trust used to fund benefits is exempt from federal income tax only if the trust meets a specific exemption criteria under the I.R.C. § 501(a). That section provides exemptions from tax on corporations and certain trusts. Generally, a self-funded employee welfare benefit plan may only receive tax exempt status under I.R.C. § 501(a) by virtue of qualification as a voluntary employee beneficiary association ("VEBA") under I.R.C. § 501(c)(9).[3]

I.R.C. § 505 requires VEBA's to meet certain non-discrimination requirements. However, a VEBA is exempt from I.R.C. § 505 non-discrimination rules if it is part of a plan maintained pursuant to an agreement that the I.R.S. finds to be a CBA, so long as the I.R.S. finds that the plan was (or benefits provided thereunder were) the subject of good faith bargaining. I.R.C. § 505(a)(2). The I.R.S. standards for determining whether the plan is maintained pursuant to a CBA are described above.

If the VEBA fails the I.R.S. test for determining whether it is maintained pursuant to a CBA, it must meet a two-part non-discrimination test. I.R.C. § 505(b). First, each class of benefits under the plan must be provided to a classification of employees which is set forth in the plan and which the I.R.S. finds not to be discriminatory in favor of highly compensated employees. Then, the I.R.S. looks to see that under each class of benefits, the benefits provided do not discriminate in favor of highly compensated employees. For purposes of the non-discrimination test, certain employees may be excluded, such as employees who have not completed 3 years of service, employees under age 21, seasonal employees, employees who work less than half-time, employees who are not covered by the plan because they are covered by a separate CBA that specifically excludes such coverage when that class of benefits was the subject of good faith bargaining in reaching that CBA, and certain non-resident aliens. I.R.C. § 505(b)(2). A "highly compensated employee" is any employee who was a 5% owner at any time during the current or preceding years, who had compensation in excess of

[3]Certain trusts providing welfare benefits may be exempt from tax under I.R.C. § 501(a) as a "labor organization" under I.R.C. § 501(c)(5).

$80,000 the preceding year, or who was in the "top-paid group" of employees if the plan sponsor makes the "top-paid group election." I.R.C. § 414(q). If the trust fund used to provide benefits under the welfare plan fails both the CBA test and the non-discrimination test, it can lose its tax exempt status.

In order to qualify as a VEBA, all "members" or participants in the plan, must be employees (who may benefit, along with their spouses and dependents), and eligibility to participate must be defined by reference to objective standards that constitute an employment-related common bond among such individuals. Treas. Reg. § 1.501(c)(9)-2. Employees employed by a common employer, or a group of affiliated employers, or who are related based on coverage of a particular CBA or membership in a particular local union, or employees of one or more employers engaged in the same line of business in the same geographic locale are considered to share an employment-related bond for purposes of a VEBA. Treas. Reg. § 1.501(c)(9)-2(a)(1). Employees of the labor union are also considered to share an employment-related bond with members of the union, and employees of an employers' association are considered to share an employment-related bond with members of the association and their employees. *Id.* The plan will not be denied tax-exempt status as a VEBA just because some participants are not employees, as long as they share an employment-related bond, such as the proprietor of a business whose employees are participants. *Id.* So long as 90% of the total population of participants in the plan (not including dependents or beneficiaries of participants) on one day of each quarter of the plan's taxable year are "employees," the plan can qualify as a VEBA. *Id.*

Whether an individual is an "employee," for purposes of whether the membership (or participation) in the VEBA is comprised at least 90% of "employees," is determined by reference to the legal and bona fide relationship of employer and employee. Treas. Reg. § 1.501(c)(9)-2(b). An individual is an "employee" for this purpose if he or she:

a. is considered an employee for employment tax purposes (that is, the employer is required by federal income tax law to withhold taxes from compensation paid by the employer to the individual for services provided by that individual),

b. is considered an employee under any applicable CBA,

c. is considered an employee for purposes of the LMRA,

d. originally became a participant by reason of being or having been an employee (such as an individual who is temporarily unemployed, who continues coverage through disability, FMLA, COBRA, etc.), or

e. is the surviving spouse or dependent(s) of an employee.

It does not matter whether the individual would qualify as an employee under applicable common law rules.

In sum, 90% of the participants (excluding dependents and beneficiaries) must be "*employees*" (note: this does not require that 90% of these employees be members of the bargaining unit – just that each employee meet the six criteria enumerated immediately above; accordingly, non-bargaining unit employees count, but owners do not), and *all* must share a common, employment-related bond. The criteria for determining whether the plan is "established or maintained under or pursuant to a collective bargaining agreement" must also be met. This criterion is discussed in depth above.

### *C. Exclusion of the Plan Benefits from Income of the Participant or Beneficiary*

The general rule is that amounts received by an employee through accident or health insurance (which, for purposes of this analysis, includes benefits under either an insured or self-funded employee accident or health plan) *are included* in the employee's gross income, if the benefits are attributable to employer contributions that were not included in the employee's gross income at the time of the contribution. I.R.C. § 105(a). However, to the extent the benefits paid under the Plan are paid, directly or indirectly, to the employee as reimbursement for expenses incurred for medical care provided to himself, his spouse, or his dependents, these benefits *are not included* in the employee's gross income. I.R.C. § 105(b).

An exception to this exception applies for excess reimbursements paid to a highly compensated employee from a discriminatory self-insured medical expense reimbursement plan (defined at I.R.C. § 105(h)(6)). I.R.C. § 105(h). Such a plan satisfies this non-discrimination test only if the plan does not discriminate in favor of highly compensated individuals as to eligibility to participate, *and* the benefits provided under the plan do not discriminate in favor of participants who are highly compensated individuals.[4] I.R.C. § 105(h)(2). For the purpose of this non-discrimination test, a highly compensated employee is an individual who is: (1) one of the five highest paid officers; (2) a shareholder who owns more than 10% of the value of the employer; or (3) one of the highest paid 25% of all employees. Treas. Reg. § 1.105-11(d).

We are still researching whether this discrimination testing is done on an employer-by-employer basis, or whether all employees of all participating employers are aggregated for purposes of determining whether the plan is discriminatory in participation or benefits. It appears that non-discrimination testing and determination of highly compensated employees is done on an employer-by-employer basis, and will not affect the tax status of the Plan as a whole or of any other employer or the employees of any other employer. If all employees of all employers are aggregated, it would be the Plan's responsibility to determine whether it is discriminatory and who the highly compensated employees are. If testing is done on an employer-by-employer basis, it is each employer's responsibility to determine whether the Plan is discriminatory *as to that employer*, and who that employer's highly compensated employees are (if any).

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[4]This is the same non-discrimination test that applies to the Plan as a whole if the Plan does not meet the I.R.S. requirements to qualify as a plan established or maintained under or pursuant to a CBA.

The Plan will not be found to discriminate in favor of highly compensated individuals as to *eligibility* to participate if 70% or more of all employees are eligible to participate.[5] I.R.C. § 105(h)(3)(A)(i). The following categories of employees do not have to be considered in determining whether 70% or more of all employees are eligible: employees who have not completed 3 years of service; employees under age 25; part-time employees (i.e., employees whose customary weekly employment is less than 35 hours, if employees in similar work with the same employer have substantially more hours, or any employee whose customary weekly employment is less than 25 hours, Treas. Reg. § 1.105-11(c)(2)(iii)(C)); seasonal employees; employees who do not participate because they are members of a bargaining unit subject to a CBA when the benefits provided under the Plan were the subject of good faith bargaining which led to the CBA that excludes them from coverage; and certain non-resident aliens. I.R.C. § 105(h)(3)(B).

The Plan will not be found to discriminate with respect to benefits if all benefits that are available under the Plan to highly compensated employees are also available to all participating non-highly compensated employees, and benefits available to the dependents of highly compensated employees are also available to the dependents of non-highly compensated employees. Treas. Reg. § 1.105-11(c)(3)(i). The Plan must also be operated in accordance with its non-discriminatory governing plan documents. Treas. Reg. § 1.105-11(c)(3)(ii). A Plan will satisfy non-discrimination requirements if provides for a single level of benefits available to all participants and is administered in accordance with its governing documents.

The "excess reimbursements" which will be included as income to highly compensated employees if the Plan fails to meet the non-discrimination test are calculated based on formulas set forth in I.R.C. § 105(h)(7) and Treas. Reg. § 1.105-11(e). If the Plan fails the discriminatory benefit test, then any benefits that are provided to highly compensated employees, but not provided to non-highly compensated employees, are excess reimbursements which must be included as income to the highly compensated employee. If the Plan fails the discriminatory participation (coverage) test, the excess reimbursements are determined by multiplying the total amount of the highly compensated employee's benefits paid during the plan year by a fraction, the numerator of which is the total benefits provided to all highly compensated employees for the plan year, and the denominator of which is the total benefits paid by the Plan during the plan year to all participants.

The result of this is that non-highly compensated employees will always be able to exclude from their gross income any benefits they receive under this Plan. If the Plan is determined to be discriminatory with respect to participation, then any highly compensated employees will have to include excess reimbursements in their gross income.

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[5]There are two alternative participation non-discrimination tests. If at least 80% of all employees eligible to participate are enrolled, when at least 70% of all employees are eligible to participate, the plan does not discriminate with respect to participation. If the employer establishes a classification of employees who are eligible to participate and the I.R.S. determines that the classification is non-discriminatory, the plan will be found not to discriminate in participation.

## IV. CONCLUSION

The client's Plan's current rules provide that at least 90% of participants in this Plan must be members of the bargaining unit covered by the CBA pursuant to which this Plan is maintained. As long as the Plan continues to be maintained pursuant to one or more CBA's, and the benefits provided under the Plan are the subject of good faith bargaining between the employee representative and the employers (or a representative of the employers), and as long as the representatives actually act on behalf of the employees or employer(s) for whom they purport to represent, this Plan can maintain its favorable tax status and will not have to conduct Plan-wide discrimination testing.[6] Based on current plan design, it appears that the only discrimination testing that needs be done is to determine whether Plan benefits will be treated as income to highly compensated employees.

[6]Subject to our further research to determine how the I.R.C. § 105(h) testing is done.