SEYFARTH SHAW
MANAGEMENT ALERT

March 20, 2006

Department of Labor Sets New Deadline for FY 2005 LM-10 Reports and Provides Further Guidance for First-Time Filers

DOL Extends FY 2005 LM-10 Filing Deadline

The Labor Department's Office of Labor-Management Standards (hereafter referred to as DOL) announced on March 7th that employers will have an additional 45 days to file their Form LM-10 for fiscal year 2005. At the same time, the DOL released additional guidance in a revised and expanded FAQ format.

The Form LM-10 is used by employers to disclose payments and gifts made to unions and their officers and employees, pursuant to the requirements of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 433. As previously outlined in Seyfarth Shaw Management Alerts dated July 22, 2005 (view full alert) and January 26, 2006 (view full alert), the form ordinarily must be filed within 90 days of the end of an employer's fiscal year. Under the DOL's most recent advisory, however, employers whose fiscal year ended on December 31, 2005, will now have until May 15, 2006 to file the form.

Last November, when the DOL first announced the fiscal year 2005 filing deadline, the Department provided several incentives to encourage employers with reportable activity to file their Form LM-10. One such incentive was that if employers filed a timely LM-10 for fiscal year 2005, they would not need to file delinquent Form LM-10s for any previous years in which they had reportable activity. In announcing the new filing deadline, the DOL reassured employers that if they comply with the May 15th deadline, they will not be required to file LM-10s for prior years.

In the accompanying FAQ, the DOL further explained how employers with no reportable activity for fiscal year 2005 can still take advantage of the one-time grace period. To do so, an employer must maintain or create records that will confirm that it identified no reportable activity during fiscal year 2005, either after establishing internal procedures or making reasonable or good faith efforts to identify such activity. Such records must be maintained by the employer for a period of five years. The DOL has expressly instructed employers **not** to submit a blank Form LM-10, or any other filing, as a way to take advantage of the one-time grace period.

Other Notable DOL Form LM-10 Guidance

In response to recent inquiries from employers about the Form LM-10, as previously noted, the DOL published an expanded FAQ guidance. The new FAQ now contains 87 questions and can be found at http://www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm. The following discussion summarizes some of the more noteworthy insights contained in the DOL's revised guidance. This alert will only highlight some of the new Q&As; therefore, employers are encouraged to review the entire guidance on the DOL's Web site if they still have unanswered questions about the form.

Businesses With No Employees Still May Qualify as Employers For LM-10 Reporting Purposes

In previous advisories, the DOL has stated that a business does not meet the LMRDA definition of an employer for reporting purposes if it does not employ at least one employee. Under the new guidance, the DOL explains that the definition of employer also includes "any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee." The DOL gives the example of an individual hired by a financial services firm to generate new business. Even if the individual employs no employees, if s/he engages in reportable activity (e.g., gives a union official season tickets to a sporting event to solicit business with the union on behalf of the financial services firm), s/he would be required to file a Form LM-10.

Partnerships Ordinarily Do Not Satisfy Employer Definition

In general, a partnership does not satisfy the LMRDA definition of employer. However, the DOL notes that if a partnership contains many partners but only a few actually

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control the enterprise (managing partners), the non-managing partners may qualify as employees, thus making the partnership an employer for LMRDA reporting purposes.

Corporate Entities with Subsidiaries and Affiliates

The most recent guidance suggests that in the case where a corporation has subsidiaries and affiliates and maintains centralized administrative records, each subsidiary or affiliate who *made* a reportable payment would be required to submit a Form LM-10. In deciding which entity is an employer for reporting purposes, the DOL indicated that one should consider the structure of the businesses, as well as the "non-LMRDA law governing when two entities are considered separate, and when they are considered to be one."

Donated Office Space

If an employer were to provide a dedicated office space for continuous use by a union, the value of the office space would have to be reported on a Form LM-10. However, if the employer merely allowed union officials to reserve or use office or conference room space on a "temporary and episodic basis," the employer would have no reportable activity. The DOL explained that this "type of fleeting use" of an employer's facilities, "where permission, timing and location are entirely within the employer's discretion" possesses no "reasonably quantifiable market value."

Widely-Attended Gathering Exemption

In addition to the *de minimis* exemption, the DOL outlined two new exemptions for employers who host "widely-attended gatherings" and spend $125 or less per attendee. A widely-attended gathering is defined as an event where attendees include both union officials and a substantial number of individuals with no relationship to the union. The DOL does not specify how many people must be in attendance to qualify as a widely-attended gathering. These exemptions only apply where union officials are treated the same as those individuals in attendance who have no association to a union. In computing the per attendee cost at a widely-attended gathering, the employer must factor in the following expenses: food and beverage, service, and entertainment. The employer, however, does not have to include the cost of the hall in which the reception is held, security for the event, or employee time spent in planning or running the event. If the employer pays for a union official's travel expenses to such a gathering, these expenses need to be separately tabulated and tracked.

If an employer holds a widely-attended gathering and spends $20 or less per attendee, it will not be required to track or report these expenditures for LM-10 reporting purposes. The DOL does not appear to place a limit on the number of such widely-attended gatherings an employer can host in a given year.

The second exemption permits an employer to hold up to **two** widely-attended gatherings in a year where the same union officials are present and the employer spends $125 or less (but more than $20) per attendee, without incurring any recordkeeping or reporting obligations. In other words, an employer would not have to include the cost of hosting such gatherings when computing whether it had exceeded the $250 *de minimis* threshold. The DOL cautions, however, that if an employer is not sure how many such gatherings it will host in a year, it should track and maintain records of the union officials in attendance. The exemption will be lost in the event the employer hosts more than two such gatherings in a year. In that instance, the money spent must be added to the employer's tally of potentially reportable activity. It goes without saying that this exemption is not available to employers who spend in excess of $125 per attendee, although the annual $250 *de minimis* threshold would continue to apply.

Reimbursed Expenses

An employer does not incur any reportable activity for gifts that are rejected or returned and for hospitality items (e.g., meals, beverages) where reimbursement is made. To avoid reportable activity, reimbursement must be made within the same fiscal year in which it was given. However, if the payment or gratuity is made at the end of the year, an employer will not incur reportable activity if timely reimbursement is made in the next fiscal year. In the event of an untimely reimbursement, the employer would report the payment (in the event the employer exceeds the *de minimis* threshold) and note that reimbursement was made, albeit in an untimely manner. Cash payments not promptly reimbursed must include interest or the forgone interest must be reported as a gift.

Payments to a Union Official's Spouse

Ordinarily, a payment to a union official's spouse would not be deemed reportable activity. However, where a payment by an employer could be construed as an "indirect" payment to a union official, it would be treated as reportable activity. This would be the case where an employer provided sports tickets to the spouse of a union official and the employer had "no meaningful, independent relationship" with the spouse, except that the employer had upcoming contract negotiations with the union official.

DOL's Enforcement Authority

The DOL's enforcement authority under the LMRDA is limited. Thus, in the event an employer fails to file a timely Form LM-10, the DOL has the following tools at its disposal: 1) bring a civil action to compel the

employer to file the report; or 2) seek criminal penalties for willfully failing to file a report or submitting a false report. The DOL does not have authority to seek civil monetary penalties for failing to comply with LMRDA's filing requirements.

If you have any questions or require further guidance on how to respond to the LMRDA's reporting requirements, please contact the Seyfarth Shaw LLP attorney with whom you work or any labor and employment attorney on the website at www.seyfarth.com.

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