

July 22, 2005

New Labor Department Focus on Old LMRDA Reporting Requirements Imposes Burdensome Filing Obligation on Unsuspecting Employers

As part of the federal government's campaign to promote greater transparency in the financial activities of unions, the U.S. Department of Labor ("DOL") recently announced its intentions to begin enforcing certain filing requirements under the Labor Management Reporting Disclosure Act ("LMRDA"), 29 U.S.C. § 401 *et seq.* The LMRDA requires both employers and unions (along with their representatives and employees) to submit annual reports detailing, with limited exceptions, payments, gifts, gratuities, favors and other things of value provided by an employer to a union, union representative or labor relations consultant in the previous year. However, reporting such activity exposes employers to potential criminal and civil liability for engaging in transactions prohibited by other federal statutes. Although the LMRDA reporting requirements have been on the books since its 1959 enactment, the DOL had not previously actively enforced them.

The DOL's new enforcement initiative requires all employers — both union and non-union — to determine whether they gave a labor organization or its representative or employee something of value worth more than \$25 in 2004. This determination should be made promptly since it appears that the employer 2004 report filing deadline will be shortly after August 15, 2005. If an employer determines that it has engaged in reportable union transactions, then it must gather such information as the date of the transaction, the union recipients, the value of the payment (or other thing of value), etc. Employers submit their information on a DOL Form LM-10. Failure to timely file a LM-10 subjects an employer to criminal and civil penalties.

Why Are Employers Being Asked to File These Reports?

The LMRDA was originally enacted to redress the financial misdeeds of certain union officials and to better protect the rights and interests of union-represented employees. Among the law's remedial provisions is a section outlining the

financial reporting and disclosure requirements for unions, their officials and employers. The DOL's renewed enforcement of its LM-10 filing requirements appears to be associated with its broader move to strengthen the unions' LMRDA reporting obligations. For example, in 2003 the DOL enhanced the annual reporting disclosure requirements for larger unions and introduced a new filing requirement for unions with a financial interest in union-created trust funds.

The DOL is expected to use employers' LM-10 reports to gauge the accuracy and thoroughness of the DOL Form LM-30 filings it receives from the unions covering the same transactions. What is not altogether clear is whether the DOL will also use the information disclosed in LM-10 (and LM-30) filings to investigate employers for potential violations of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act"), 29 U.S.C. § 186. This could pose a significant problem for employers unfamiliar with the LMRA's prohibition against certain employer payments to unions and their representatives.

The LMRDA Reporting Requirements

LM-10 and LM-30 reports are to be submitted *only* following those years in which an employer has engaged in reportable transactions (discussed below). Once submitted to the DOL, these reports become a matter of public record and are available on the DOL's website and in person at its headquarters. Blank copies of these forms and the accompanying instructions are available on the DOL website at http://www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/blanklmforms.htm.

Filing Deadline

These reports are required to be submitted annually to the DOL's Office of Labor-Management Standards ("OLMS"), ordinarily within 90 days following the end of the employer's or union's fiscal year. For example, if an

employer or union uses a calendar year, the form would be due by March 31 of the following year. Because these reports typically have not been filed, and because the new enforcement initiative was not announced until well after March 31, 2005, the OLMS has given unions until August 15, 2005 to file their 2004 LM-30s.

Although the OLMS has not officially extended a grace period for employers to file their 2004 LM-10s, a July 18, 2005 DOL advisory stated that it will be issuing guidance and a grace period for employer LM-10 filers “analogous” to that issued to unions. We suspect that by the time the DOL issues its guidance to employers, it will need to provide a grace period beyond the current August 15, 2005 union deadline. The DOL further reassured employers that it will not take any enforcement action against them concerning LM-10 filings until *after* its guidance has issued and the filing grace period has expired.

Who Must Sign the LM-10?

The form requires two signatories, the employer’s president and treasurer (or other corresponding principal officers), unless the employer is a sole proprietor. An original signature is required on the form; stamped or mechanical signatures will not be accepted. Those who sign the form are held personally liable for its filing and for ensuring the accuracy of the information reported on the form.

Record Retention Requirements

For each year an employer is required to file a LM-10 form, the LMRDA requires that an employer retain the documents capable of verifying, explaining, clarifying, or checking the accuracy/completeness of the form for a period of five years. The statute sets forth what documents the employer shall maintain: vouchers, worksheets, receipts, and applicable resolutions.

Penalties for Failing to Comply with the LMRDA Reporting Requirements

An employer is subject to both civil and criminal penalties for failing to file the LM-10 form, for failing to properly maintain the supporting records, or for knowingly providing false or incomplete information on the form. The signatories are held personally responsible for the filing of the form, and for the accuracy and completeness of the information contained in the form (if s/he has knowledge of the falsehood). The criminal penalties include one year imprisonment and/or a fine not to exceed \$10,000.

Reportable Employer-Union Transactions

The LMRDA and the LM-10 form itself specify that the following transactions are to be reported when filing a LM-10 form:

- ♦ Any payment or loan, direct or indirect, to a union or officer, agent, shop steward, or employee (excludes

payments or loans made in the regular course of business by a financial institution such as a bank, credit union or insurance company);

- ♦ Any payment to an employee or group of employees for the purpose of causing that person(s) to persuade other employees to exercise or not to exercise their right to organize and bargain collectively;
- ♦ Any expenditures made, directly or indirectly, for the purpose of interfering or restraining employees in the exercise of their right to organize and bargain collectively or to obtain information about the activities of employees (excluding information sought for use in an administrative, arbitral or judicial proceeding); and
- ♦ Any agreement or arrangement with a labor relations consultant whose object is to persuade employees to exercise or not to exercise their right to organize and bargain collectively.

Excluded Employer-Union Transactions

The LM-10 instructions expressly exclude from reporting “sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and terms unrelated to the recipients’ status in a labor organization; for example, traditional Christmas gifts.” The DOL has advised that the term “insubstantial value” means items of \$25 or less in value. It has also advised in connection with unions filing a LM-30 report that there is no reporting obligation “if an employer frequently provides a catered lunch during long meetings with groups” and does the same with a union office (provided the value of the lunch was less than \$25).

The LM-10 instructions expressly exclude payments made “in the regular course of business to a class of persons determined without regard to whether they are, or are identified with, labor organizations and whose relationship to labor organizations is not ordinarily known to or readily ascertainable by the payor” and provides by way of example the payment of interest on bonds or dividends on stocks. As written, this exclusion only applies where the employer is utterly ignorant of the recipient’s union affiliation.

A payment also need not be reported to the DOL if it falls under one of the nine exceptions contained in LMRA § 302(c): 1) payments for work performed by a union official who is also the employer’s employee; 2) a settlement or judgment of a legal claim; 3) a prevailing market price sale or purchase; 4) deducted initiation fees and union dues; and 5) to 9) trust fund payments that meet stringent requirements.

Absent one of the above exceptions, however, employers will need to report meals, travel and lodging, tickets to sporting or entertainment events, contributions to union-sponsored charities and the like, when provided to unions or their representatives.

LM-10 Filings May Reveal LMRA, ERISA and Other Violations

The LMRDA reporting requirements do not differentiate between lawful and unlawful transactions, thus requiring disclosure of events without regard to their legality under the LMRA and other statutes. As such, LM-10 filings may place some employers in the position of effectively incriminating themselves. This concern is particularly apparent with respect to LMRA § 302(a) which, absent the above-referenced exceptions in § 302(c), renders illegal both the provision and the receipt of things of value between employers and union representatives. LMRA § 302(a)'s scope is intentionally broad because it was enacted to rid all forms of corruption between management and labor officials. A violation of § 302(a) can result in criminal penalties that include imprisonment and a fine, depending on the value of the prohibited transaction.

Further, an employer can violate § 302(a) regardless of whether it has union-represented employees. Section 302(a)(2) bars payments by an employer to any union or officer or employee thereof “which represents, seeks to represent, or *would admit to membership*, any of the employees of such employer” (Emphasis added.) The italicized text has been interpreted by some federal courts to include unions that have no present intention or even the ability to seek to represent an employer's employees, where a union official receives bribes in exchange for discouraging his union from trying to organize or assert jurisdiction at a particular employer's worksite. To violate § 302(a)(2), an employer need not intend to violate the law or, for that matter, even be aware of it.

Section 302(a)(4) bars payments by an employer to any officer or employee of a union made: 1) with *intent to influence* him/her in respect to his or her actions as a representative of employees, or 2) with *intent to influence* him/her in respect to his or her actions as an officer or employee of such labor organization. As written, § 302(a)(4) contains no limitation on the type of decision the employer seeks to influence. In contrast to § 302(a)(2), an employer only violates § 302(a)(4) if it *intended* to influence the recipient of the payment or gift. The U.S. Department of Justice's Attorney's Manual characterizes (a)(4) cases as bribery cases. Bribery normally connotes an intention to corrupt, and an agreed-upon *quid pro quo* from the recipient in exchange for the money or thing of value that has been provided.

In addition to the possible disclosure of LMRA violations, employers providing business services to Taft-Hartley trusts should also be wary of violating § 406(a)(1)(C) of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1106(a)(1)(C). Section 406(a)(1)(C) prohibits a service provider from providing anything of value to a plan fiduciary (such as a

union trustee). Additionally, under the federal racketeering statute (RICO), 18 U.S.C. § 1954, it is a crime for a trustee of an employee benefit plan to receive any kind of fee, kickback, gift, loan, commission, money or thing of value that would influence the trustee's actions, decisions or other duties relating to any question or matter concerning such benefit plan.

Few Employers Will Be Exempt from the LMRDA Reporting Requirements

What makes the LMRDA reporting requirements especially burdensome for employers is its (and the DOL's) definition of “employer,” as well as the DOL's definition of what constitutes a “payment.”

A company is subject to the LMRDA reporting requirements even if it does not have an existing labor agreement with a union and is not the target of a union organizing campaign, as the statute covers any business employing at least one employee that has engaged in reportable transactions with a union or its representatives. As such, businesses providing services to a Taft-Hartley trust fund (e.g., accounting and law firms, investment managers, consulting firms, other financial institutions), or hotels providing free or discounted lodgings, meals, or entertainment to anyone associated with a union as part of a marketing campaign to secure a contract for services, are subject to the LMRDA. This is true whether or not such services or free or discounted items are also given to persons other than unions in the normal course of the employer's business. Further guidance can be found on the DOL's website at http://www.dol.gov/esa/regs/compliance/olms/LM30_LM10_Trusts_info.htm.

Next Steps for Employers

Notwithstanding some remaining uncertainty regarding the DOL's LM-10 and LM-30 enforcement efforts, employers should start taking the following steps (if they have not already) to ensure their compliance with the LMRDA reporting requirements:

- ◆ Begin gathering the required information regarding potentially reportable events for fiscal year 2004.
- ◆ In gathering this information, the following issues should be considered from the outset:
 - What entity is the appropriate “employer” (see LMRDA definition, 29 U.S.C. § 402(e)) for purposes of LM-10 reporting, given the potential labor relations and legal consequences of this designation. This determination is particularly important for companies comprised of different legal entities.
 - Decide how to value the gift, gratuity or favor provided to the union or its representative for

purposes of determining whether the DOL's \$25 threshold has been exceeded (*e.g.*, cost to employer, fair market value, etc.).

- Carefully review the reporting exclusions discussed in the instructions the DOL has provided for filling out the LM-10 form (particularly those set forth in Part A, Question 8.a) to see whether any may apply to the relevant transactions.
- Review the transactions for compliance with the LMRA, RICO and ERISA.
- ◆ Employers should expect to receive information requests from their unions seeking documents and other details associated with their LM-30 reportable transactions, since most unions will have no record of these transactions. Although it is arguable whether unionized employers are required to provide this information to a requesting union (and vice versa) under the National Labor Relations Act, employers should be prepared to handle such inquiries and to decide whether they will seek information on LM-10 reportable transactions from their unions.
- ◆ Employers should develop compliance programs and policies to protect against illegal transactions, and to define and regulate legal but reportable transactions.
- ◆ Employers should develop systems to monitor and track potentially reportable transactions.
- ◆ Employers should develop record retention policies and procedures to ensure compliance with the LMRDA retention requirements.

If you have any questions or require further guidance on how to respond to the LMRDA reporting requirements, contact your Seyfarth Shaw attorney.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact the firm's Labor & Employment Practice Group.