SEYFARTH SHAW
MANAGEMENT ALERT

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Labor Department Clarifies Employers' LMRDA Reporting Obligations

Early last year, the U.S. Department of Labor (DOL) announced its intentions to begin enforcing certain filing requirements under the Labor Management Reporting Disclosure Act (LMRDA), 29 U.S.C. § 401 *et seq*. Under the LMRDA, both employers and unions must report when anything of value is given to a labor organization or its representatives. Employers must report transactions on a DOL Form LM-10 and unions must report such transactions on a DOL Form LM-30.

When the new enforcement initiative was first announced last year, employers were advised that they would have to file a Form LM-10 if they gave something of value that was worth more than $25. At the end of 2005, however, the DOL issued a new advisory clarifying several issues regarding LM-10 reporting and, significantly, raised the monetary threshold (for reporting purposes) from $25 to $250. Thus, annual aggregate payments to union or union officials of $250 or less will not need to be reported to the DOL.

This alert discusses what changes have been made by the DOL respecting employer's LM-10 reporting obligations and offers additional guidance to those employers, most of whom will be filing this report for the first time. For further background on the LM-10 reporting, click here to view the July 22, 2005 Management Alert on "New Labor Department Focus on Old LMRDA Reporting Requirements Imposes Burdensome Filing Obligation on Unsuspecting Employers."

Most Private Businesses Meet Definition of "Employer" for LM-10 Reporting Purposes

The DOL's decision to start enforcing the LMRDA's reporting requirements caught many unsuspecting employers off guard — due in part to the law's all encompassing definition of "employer." In a nutshell, the definition includes every U.S. private sector business or organization that employs at least one employee and is engaged in an industry affecting commerce. What is essential to note is that an employer does not need to have employees who are represented by a union or are the subject of a union organizing campaign to satisfy the LMRDA's definition of an employer. Any service provider who makes a payment to a union, union-sponsored trust (e.g., pension or welfare fund), or union official, that is not made in the regular course of business, will be required to file a Form LM-10, provided that the payment exceeds $250.

In its most recent guidance, the DOL provided several examples of payments or gratuities made to a union or union official that would trigger completion of a LM-10 report:

- An investment management firm who offers a union official the use of a vacation home or paid travel and lodgings in an effort to establish a business relationship between the firm and a pension plan for which the union official is a trustee;
- A law firm who provides something of value to a union or union official that is on, or actively vying to be included on, a union's list of "designated counsel," which allows the firm to be recommended by the union to its membership;
- Credit institutions (e.g., banks, credit unions, insurance companies) who provide expensive meals and entertainment to union officials, even if they are provided on a routine basis to favored clients;
- Any kind of business development or client relations expenditures for marketing purposes; and
- Directors' fees paid to a union officer for services as a member of a corporate board of directors. Such fees are distinguishable from compensation paid as salary because of the lack of an employee-employer relationship between the union officer and the corporation. The DOL observed that these payments "raise potential questions of a conflict of interest, due to the employer's role in selecting the directors and setting the amount of the fee."

Even payments, gifts or gratuities given to a union officer and made from an employee's *personal funds* can, under certain

circumstances, trigger a LM-10 filing. If any of the following questions are answered in the affirmative, the employer must report the transaction on a LM-10 report:

- Does employee hold a key position with the employer?
- Is employee responsible for generating or maintaining business relationships with unions or affiliated trusts?
- Is employee responsible for labor relations activity on behalf of the employer?
- Is employee acting, directly or indirectly, for the employer when giving the payment or gift?

Payments to a union's scholarship or apprenticeship fund do not need to be reported on a Form LM-10.

Filing Deadline

The LM-10 report is ordinarily required to be submitted annually to the DOL's Office of Labor-Management Standards, within 90 days following the end of the employer's fiscal year. For example, if an employer uses a calendar year, the form would be due by March 31st of the following year.

Originally, the DOL put employers on notice that it expected employers with reportable activity to complete a Form LM-10 for fiscal year 2004. Previously, few employers complied with this reporting requirement; nor did the DOL actively enforce the rule. In its most recent advisory, the DOL announced that first-time filers will not have to submit reports for fiscal years beginning *prior* to January 1, 2005 — even if such reports should have been filed. If, however, the employer fails to file a timely report for the first fiscal year beginning after January 1, 2005, the DOL may seek to enforce that employer's reporting obligations for the previous five years, as provided for under the LMRDA. Other reasons why the DOL would seek LM-10 reports for years prior to fiscal year 2005 fall under the rubric of "extraordinary circumstances" and include the following: 1) existence of an ongoing investigation relating to a financial interest, and 2) evidence of egregious conflicts of interest or attempts to purchase official favors through cash or in-kind payments.

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.

DOL Revises its Definition of a Non-Reportable De Minimis Payment

The LMRDA exempts from its reporting requirements any "sporadic or occasional gifts, gratuities, or favors of insubstantial value given under circumstances and terms unrelated to the recipients' status in a labor organization." 29 U.S.C. § 433(a). Known as the "de minimis exemption," a transaction does not need to be reported if the item is of "insubstantial value." To qualify for the exemption, the transaction *also* must be unrelated to the recipient's status in a labor organization. The DOL has said that a gift is unrelated to the recipient's status if the employer ordinarily provides such consideration to individuals in similar circumstances who are not union officials.

When the DOL first announced its intention to enforce the LMRDA reporting requirements, the Department defined a de minimis gift as any item worth $25 or less. In November, the DOL revised its definition of a de minimis payment by raising the value from $25 to $250. The DOL noted, however, that the value of the payments must be aggregated for the year. The DOL has advised that gifts or payments "from multiple employees of one employer should be treated as originating from a single employer" when calculating whether the $250 threshold has been exceeded for the year. Thus, if the *total* value of all items given by a single employer to an individual union or union official is more than $250, the items must be reported.

Although the de minimis exemption expressly provides that the gifts or gratuities can only be provided on a sporadic or infrequent basis, the DOL has indicated that it does not intend to enforce the reporting requirement where the payments are routine, so long as their aggregate value does not exceed $250 per union or union official. Consequently, an employer who routinely provides union officials with coffee and donuts worth $10 at its monthly meetings, will not need to report this expense. However, if the meetings were held on a weekly basis, the employer would exceed the $250 threshold and be required to report this expense.

In its most recent advisory, the DOL also provided some guidance on how employers should go about computing its payments to unions or union officials. If a service provider sponsors an educational conference on employee benefit matters for plan trustees/union officials at no cost to them, the employer would compute the value of the conference to each union official by factoring in the cost of refreshments, meals, travel and lodgings. The employer would not have to include in that computation the cost of the conference room or use of audio-visual equipment. An employer is permitted to divide this amount by the number of individuals in attendance. This manner of computation is also permissible where an employer takes several individuals out for dinner, not all of whom are union officials, but can not recall who ordered what for dinner. If more than one employer contributes to a single payment or gratuity, each employer must file a report on that payment or gratuity, provided that the amount each employer paid

exceeded the $250 threshold. Finally, if one service provider makes a reportable payment but is later reimbursed by another service provider, only the latter employer is required to report the payment. If, however, the latter service provider does not meet the definition of an employer, then the service provider who was reimbursed is required to report the payment.

Prohibited Payments Under LMRA

Because the LMRDA's reporting requirements do not differentiate between lawful and unlawful transactions, employers need to be vigilant about not engaging in any of the prohibited payments set forth in LMRA § 302(a), least they be disclosed in the course of complying with the LMRDA. These prohibited transactions were discussed in the firm's initial alert on the LM-10 reporting requirements. Not to be taken lightly, violations of LMRA § 302(a) can result in criminal penalties that include imprisonment and a monetary fine.

Who Must Sign the LM-10?

Ordinarily, the form requires two signatories, the employer's president and treasurer or corresponding principal officers, unless the employer is a sole proprietor. For fiscal years commencing before January 1, 2006, certain employers will not be required to comply with this requirement. Employers who satisfy the following criteria need not comply with the dual signature rule: 1) the employer did not have procedures for tracking covered payments because they believed that the LMRDA did not require them to report such payments; 2) the employer has acted diligently and in good faith to reconstruct the records of covered transactions; and 3) the employer has filed a timely LM-10 for fiscal year 2005. If all three conditions are met, employers may substitute key official(s) who conducted or supervised the good faith search to sign the form. Please note that this exception will only apply for fiscal year 2005 reports.

Attestation

Normally, a Form LM-10 is signed "under penalty of perjury." For fiscal year 2005 only, and for employers who meet the three signing criteria discussed in the previous paragraph, the DOL is authorizing employers to strike the "under penalty of perjury" attestation and replace it with the following language:

> Each of the undersigned, duly authorized officers of the above employer declares, after good faith investigation and diligent inquiry, that all of the information submitted in this report (including the information in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, complete as possible based on existing and reconstructed records.

Thereafter, all LM-10 reports covering activity during a fiscal year commencing on or after January 1, 2006 will have to be signed by the employer's president and treasurer.

Meeting LMRDA's LM-10 Reporting Deadline

Hopefully, employers have already determined whether they will need to file a Form LM-10 report and begun the task of collecting the necessary information. If this is not the case, you will need to act promptly to ensure compliance with the LMRDA's reporting requirements. The penalty for not filing a timely Form LM-10, potentially having to file reports for the *previous five years*, is not a task any employer would want. To that end, employers need to:

- Begin gathering the required information regarding reportable events for fiscal year 2005.
- In gathering this information, the following issues should be considered:
  - Determine the entity that 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 $250 threshold has been exceeded (e.g., cost to employer, fair market value, etc.).
  - Carefully review the reporting exclusions discussed in the instructions 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.
- 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's retention requirements.

If you have any questions or require further guidance on how to respond to the LMRDA's reporting requirements, please contact your Seyfarth Shaw attorney or any attorney on our website at www.seyfarth.com.

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