Form LM-10 Reporting Requirements

Department of Labor Issues Much Anticipated Additional Guidance Regarding Employer Reporting Requirements Under the Labor Management Reporting and Disclosure Act

SUMMARY

As we reported in our July 27, 2005 Memorandum, the United States Department of Labor (“DOL”) earlier this year announced a new enforcement initiative in connection with the disclosure requirements of the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”).\(^1\) The DOL’s initiative could affect companies that have arms-length business dealings with unions or union-based financial institutions, and could put them at risk if they fail to report ordinary accommodations offered to union-related clients or counterparties that until now have not caused concern. The reporting requirements apply to accountants, lawyers, broker-dealers, investment banks, investment advisors, and investment managers who provide services to unions or related union trust funds and who may not have previously considered themselves obligated to report such business and entertainment payments. Even banks, credit unions, insurance companies and other credit institutions – whose loans or payments made to labor unions or officials in the regular course of business are exempt from the LMRDA – must file the LM-10 with respect to entertainment expenses made to labor unions or officials for business development or client relations purposes. Further, employers should take steps promptly to implement the necessary tracking and recordkeeping systems if they are not already in place because the required reports must be signed and attested to by the employer’s president and treasurer or their corresponding principal officers.

BACKGROUND

The LMRDA requires disclosure of certain financial transactions or agreements made between an employer and a labor organization, union official, employee, or labor relations consultant. For years, these reporting requirements were not strictly enforced, but in June the DOL issued new guidelines concerning who must report and what transactions must be reported under the LMRDA. On November 9, 2005, the DOL issued additional guidance for employers, explaining further who is obligated to file the LM-10 report, broadening the \textit{de minimis} exception to the reporting requirements, providing a filing deadline for this year and an anticipated grace period during which employers will not have to file reports.
for previous years, and addressing certain other issues.\textsuperscript{2} As we noted in our July 27, 2005 Memorandum, these reporting requirements concern only the disclosure of payments, not their propriety. Section 302 of the LMRDA governs the legality of payments or transactions, and generally prohibits all payments by employers to or for the purpose of influencing the actions of representatives of unions that represent or seek to represent the employer’s employees. There is no \textit{de minimis} exception.

**WHO MUST FILE**

The DOL has stated clearly that “except in rare cases, every private sector business or organization within the United States that has one or more employees” will be considered an employer under the LMRDA. Thus, regardless whether the employer’s own employees are represented by a union, if the employer fits into one of several broad categories and makes covered payments to a labor union or its officials, the payments must be reported annually to the DOL on Form LM-10. Significantly, these broad categories include employers who buy, sell, or lease directly or indirectly to or from, or otherwise deal with, (ii) the recipient’s union; (ii) a trust fund in which the recipient’s union has an interest; or (iii) an employer whose employees are represented by the recipient’s union (provided that such buying, selling, leasing or dealing constitutes a “substantial part” of the reporting employer’s business). The requirements also apply to any employer in direct, active competition with an employer in one of the foregoing categories. “Covered payments” includes any payment not expressly excluded under Section 302 of the LMRDA, and therefore includes entertainment expenses, gifts and gratuities paid to union representatives for the purpose of cultivating a business or client relationship.

**WHAT MUST BE REPORTED**

The guidelines provide some specific examples to assist employers in determining their reporting obligations. For example, the DOL specifically addressed the situation in which an investment manager hosts a holiday party for clients to which union officials or representatives are invited. Unless the expenditure per union official falls within the \textit{de minimis} exception described below, the employer is obligated to report the expenditure on the LM-10. Recognizing that recordkeeping for previous large scale events may not permit such itemization, the DOL has stated that it will accept “any reasonable estimate that is made in good faith and based on available reconstructed records” when completing the report for the fiscal year commencing on or before December 31, 2005. Similarly, if an employer takes multiple individuals to lunch, only some of whom are union officials, the employer may, in absence of the actual cost per individual, make a good faith estimate per participant and report that amount on the LM-10.

An investment manager who offers a union official the use of a vacation home, or pays for the travel or lodging associated with a business or social trip, in order to establish a business relationship with a trust
fund on which the union official serves as a trustee, must report those expenses. Further, if an investment manager of a pension or welfare fund hires a consultant on behalf of the fund, and the consultant is an employer and makes a covered payment, and the consultant is reimbursed by the investment manager for such payment, the investment manager must report the payment. If the consultant is not reimbursed, it must report the payment.

Even if an individual makes payments to union officials out of his own pocket, his employer may be required to disclose those payments if the individual holds a “key” position with the employer, generates or maintains business with unions or their affiliated trust funds, engages in labor relations activity on behalf of the employer, or acts on the employer’s behalf when making the payment but nevertheless chooses not to seek reimbursement.

**DE MINIMIS EXCEPTION**

Under the previous guidelines, non-union employers who do business with unions or their trust funds would have been required to report “sporadic or occasional” business entertainment payments as small as $25. The new guidelines provide more leeway, indicating that insubstantial offers of hospitality – including restaurant meals and holiday gifts – need not be reported even if they individually exceed $25. The DOL has stated that it will not seek to enforce the reporting requirement in such instances provided the aggregate value of employer's gifts or gratuities does not exceed $250 per union or union representative during the fiscal year. It is still the case, however, that the gifts or gratuities must be unrelated to the individual’s role in a labor organization to avoid the disclosure obligation. If the union official is being treated like any other client under similar circumstances, the payment is unlikely to be viewed as related to his or her status as a union official.

**GRACE PERIOD**

One of the most important features of the new guidance is the definitive statement that employers must submit Form LM-10 for the fiscal year beginning on or after January 1, 2005 within 90 days after the conclusion of that fiscal year; however, absent “extraordinary circumstances,” employers have been relieved of the requirement to submit Form LM-10 for years before 2005. The “extraordinary circumstances” include limited situations where there is an ongoing investigation relating to a specific financial interest or there is evidence of egregious conflicts of interest or outright attempts to buy favors from union officials.

**SIGNING THE LM-10**

Ordinarily the LM-10 must be signed and attested to by the employer’s president and treasurer or their corresponding principal officers. Acknowledging the concerns of numerous broker-dealers, investment
advisors, investment companies and investment banks that have not previously filed Form LM-10 and have had no systems in place to track and record the necessary data, the DOL has created a signing exception applicable to LM-10s filed for the fiscal year commencing on or before December 31, 2005. Provided the employer has diligently and in good faith attempted to identify all covered transactions and reconstruct the necessary records, and has prepared a report based on that effort, the officer(s) who supervised the investigation and report may sign and attest to the accuracy of the report instead of the president and treasurer. This exception does not apply to reports filed for fiscal years commencing on or after January 1, 2006, and thus, employers are encouraged to take prompt steps to implement the necessary tracking and recordkeeping systems.

PROPOSED REVISIONS TO THE LM-30
The new guidelines conclude by encouraging employers to comment on the proposed revisions to Form LM-30, which is a parallel form that officials and employees of labor organizations must file when they receive covered payments from employers. The proposed changes to the LM-30, which are reported in the Federal Register of August 29, 2005 (70 FR 51166), will not directly affect the LM-10, but because there are certain standards and provisions applicable to both, decisions interpreting the revised LM-30 may affect the enforcement and interpretation of LM-10. Comments on the proposed revisions must be submitted on or before January 26, 2006.

ENDNOTES

1 Attached for your convenience is a copy of the July 27, 2005 Memorandum.


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