DECEMBER 2005

REPORTING REQUIREMENTS UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959: REPORTS OF GIFTS TO UNION OFFICIALS

The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") establishes reporting requirements for employers, union officers, and employees of labor organizations.[1] The LMRDA requires employers to file LM-10 forms with the Department of Labor ("DOL") annually, disclosing payments, loans, or any gifts of value (including reimbursed expenses) to any labor organization or officer, agent, shop steward, or other representatives of a labor union.[2] Similarly, officials and employees of unions (except those performing exclusively clerical or custodial functions) are required to file LM-30 forms annually, reporting payments or benefits received from, and certain financial interests in, employers and businesses with which their union engages or may engage either through collective bargaining or as a customer. In addition, union officials and employees must report relevant payments or benefits received by a spouse or minor child.[3]

In recent years, the DOL has made increasing compliance with LMRDA requirements a priority.[4] Initially, the DOL significantly revised the LM-2 forms that unions must file annually disclosing detailed information on union finances. In March 2005, the DOL's Office of Labor-Management Standards ("OLMS") revised its LMRDA interpretative manual, establishing and clarifying reporting requirements for employers and union employees and officials. And, more recently, on June 22 and November 10, 2005, the OLMS posted guidance on its web site for completing LM-30 and LM-10

1 29 U.S.C. § 401 et seq.
2 29 U.S.C. § 433.
3 *Id.* § 432.
4 *See Labor Department: Proposed Rulemaking on LM-30 Forms Should be Out Soon, DOL Official Tells ABA,* 154 DLR C-1 (8/11/05).

forms. As described in more detail below, the most notable effects of these recent pronouncements concern the establishment of a *de minimis* exemption for reporting payments of less than $250, confirmation of a broad reading of the term "employer," maintenance of significant record-keeping requirements, and establishment of a grace period during which employers will not have to file delinquent reports.

In fact, in a Notice of Proposed Rulemaking published in the Federal Register on August 29, 2005, the DOL sought comments on numerous aspects of the Form LM-30.[5] The DOL is accepting comments on the Form LM-30 rulemaking from interested members of the public, including employers, until January 26, 2006. While "currently there is nothing on the Department of Labor's regulatory agenda on LM-10s," the *Daily Labor Report* reported in an August article entitled "Labor Department: Trusts, Others Scramble to Comply with LMRDA Disclosure Requirements," that according to a DOL spokesperson, "OLMS is methodically reviewing the forms and guidance that have been provided in order to make sure that they are clear and consistent with the statute."[6]

CONDITIONS FOR REPORTING UNDER THE LMRDA

Employer Reports. Every "employer" who in any fiscal year makes a payment, loan, promise, agreement, or arrangement of a specified nature must file a report with the DOL Secretary of Labor. This report, to be filed in duplicate on the DOL Form LM-10 entitled "Employer Report," must be signed by the employer's president or treasurer and show in detail the date and amount of each such transaction, and the name, address, and position in any firm or labor organization of the person to whom the payment was made. The report must also provide a full explanation of the circumstances of all such payments, including the terms of any agreement that was made.[7]

What Must Be Reported? Specifically, the employer is required to report on the Form LM-10:

- Payments made to any labor organization, officer, shop steward, or other representative of a labor organization.
- Payments made to any employee or group of employees for the purpose of causing them to persuade other employees with regard to the exercise of their rights under the National Labor Relations Act ("NLRA").
- Expenditures made where an object was to interfere with employees' rights under the NLRA.
- Expenditures made where an object was to obtain information related to the activities of employees in relation to a labor dispute.
- Agreements or arrangements with a labor relations consultant where an object was (1) to persuade employees with regard to the exercise of their rights under the NLRA, or (2) to obtain information related to the activities of employees in relation to a labor dispute.[8]

Exemptions from Employer Reporting Requirements. Employers are not required to report the following payments/transactions:

- Payments made in the regular course of business to a class of persons determined without regard to whether they are identified with a labor organization and whose relationship to a labor organization is not ordinarily or readily ascertainable by the payer; for example, interest on bonds and dividends on stock issued by the reporting employer.
- Loans made to an employee under circumstances and terms unrelated to the employee's status in a labor organization.
- Payments made to employees as wages, so long as payment is: (1) required by law or a collective bargaining agreement, (2) made pursuant to a custom or practice under a collective bargaining agreement, or (3) made pursuant to a custom or practice that was established by the employer without regard to the employee's position in a labor organization.

---

5 Specifically, the DOL seeks comments on three broad categories of changes to the Form LM-30: (1) clarification of definitions, including expanding the definition of "labor organization" to cover the parent and/or subordinate organization of a union; (2) elimination of certain exemptions, including the *de minimus* exemption; and (3) changes to the form's layout. *See* 70 FR 51166.

6 *Labor Department: Trusts, Others Scramble to Comply with LMRDA Disclosure Requirements*, 160 DLR C-1 (8/19/05).

7 *See* 29 U.S.C. § 433(a); 29 CFR Part 405.

8. *See id.;* Form LM-10, "Employer Repot," Instructions at http://www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/LM-10%20instructions.pdf.

- Initiation fees and assessments paid to labor organizations and deducted from an employee's wages.
- Payments in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of duress or fraud.
- Payments to Taft-Hartley trust funds.[9]

Union Officer and Union Employee Reports. Every officer or employee of a labor organization (except employees performing exclusively clerical or custodial services) must file a signed report with the DOL Secretary of Labor listing and describing certain financial transactions with employers that occurred during the preceding fiscal year. Union officers and employees are required to file, in duplicate, the DOL Form LM-30, entitled "Labor Organization Officer and Employee Report," if the officers or employees, or their spouses or minor children, hold or have held an interest in; have received income, a loan, or any other benefit with monetary value from; or have engaged in certain specified financial transactions with the employer.[10]

What Must Be Reported? Specifically, union officers or employees are required to report on the Form LM-30 if they (or their spouses or minor children):

- Have any of the following interests or dealings related to an employer whose employees their union represents or is actively seeking to represent:
  (1) Hold any stock, bond, security, or other interest in, and any income or other benefit with monetary value (except wages or other benefit received as a bona fide employee) from, such employer.
  (2) Participate in any transaction involving any stock, bond, security, or other interest in, or loans to or from, such employer.
  (3) Have any business transaction or arrangement with such employer.
  (4) Have any stock, bond, security, or other interest in, or income or benefit from, or sell or lease to, or otherwise deal with, such employer.
- Have received any payment of money or other thing of value (including reimbursable expenses) from an employer or person who acts as a labor relations consultant for an employer, except payments from trust fund contributions for certain designated purposes.
- Have any security or other interest in, or income or other benefit from, a business that buys from, sells or leases to, or otherwise deals with their union or any trusts in which their union is interested.[11]

Exemptions from Reporting Requirements. Reports are not required on bona fide investments in securities traded on a registered securities exchange, shares of a registered investment company, securities of a registered public utility holding company, or any income derived from such bona fide investments.[12] Holdings of, transactions in, or income from securities not listed or registered as described above are also not reportable if the holdings or transactions involve $1,000 or less and the income received from any one security is $100 or less. These exceptions, however, do not apply to gifts of stock that are reportable.

In addition, transactions involving purchases and sales of goods and services from the employer in the regular course of business at prices generally available to any employee of the employer are also not reportable.[13]

WHO IS AN EMPLOYER FOR PURPOSES OF LMRDA REPORTING?

The LMRDA defines the term "employer" expansively to include any employer, or a group or association of employers, within the meaning of any law of the United States relating to the employment of employees.[14] The DOL has interpreted

9 *See* 29 U.S.C. § 433(c)-(e); 29 CFR § 405.6, Form LM-10, "Employer Report," Instructions at http://www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/LM-10%20instructions.pdf.
10 29 U.S.C. § 432; 29 CFR Part 404.
11 *See* 29 U.S.C. § 432(a); 29 CFR § 404.3, Form LM-30, "Employer Report," Instructions at http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm.
12 *See* 29 U.S.C. § 432(b).
13 *See* "Filing Form LM-30, An Overview of Union Officer and Employee Reporting," at http://www.dol.gov/esa/regs/compliance/olms/compllmrda.htm.
14 29 U.S.C. § 42(e).

this definition broadly to encompass any entity that employs employees, ostensibly without regard to whether the entity's employees are represented (or may be represented) by the union involved. Indeed, in its most recent guidance, the DOL advised that "[e]xcept in rare cases, every private sector business or organization within the United States that has one or more employees is considered an employer under [the LMRDA], and thus may have reporting obligations under the LMRDA."[15]

Consistent with this liberal definition and interpretation, the DOL has advised that service providers, such as investment managers, consultants, accountants, and attorneys, are "most likely" included in the definition of "employer."[16] Additionally, any Taft-Hartley trust fund that employs employees is considered an employer subject to the requirements of the LMRDA, including the filing of the Form LM-10.[17] Finally, while payments and loans made in the regular course of doing business as a bank, credit union, insurance company, or other credit institution are specifically exempt from the LMRDA, payments merely incidental to the regular course of business of the payer are not within the exception.[18] For example, expensive meals and entertainment may routinely be offered by some credit institutions to favored clients, but such gratuities are only incidental to the regular course of business and are thus reportable on the Form LM-10.[19]

***De Minimis* Exemption for Gifts or Payments Valued Under $250**

Prior to the latest revisions to the DOL's LMRDA interpretative manual, the *de minimis* exemption was vague; the manual indicated that an employer's paying for the lunch of a union representative was an example of a *de minimis* expense, while a car was listed as an example of something that would have to be reported. [20]

However, recent guidance issued on OLMS's web site indicates that payments will be considered *de minimis*, and do not need to be reported by employers, union officers, or union employees if they: (a) have a value of $250 or less; (b) are sporadic or occasional; and (c) are given under circumstances unrelated to the recipient's status in a labor organization.[21]

For example, the DOL advises that if an employer provides lunch, tickets to a sporting or theater event, travel or hotel accommodations, etc., to a labor organization (or its officers or employees), the employer, union officer, and union employee must file the Form LM-10 or Form LM-30, respectively, for each expenditure over $250, unless the item falls within one of the exemptions indicated above. On the other hand, the DOL advises that an employer who provides union officials with coffee at biweekly meetings over the course of a year would not be required to report these gratuities on the Form LM-10.[22]

If the aggregate value of multiple gifts or loans from a single employer to a single union or union official exceeds $250 in a fiscal year, the transaction will no longer be treated as *de minimis*, and the aggregate value of the transactions will be reportable. Gifts or loans from multiple employees of one employer should be treated as originating from a single employer when calculating whether the $250 threshold has been exceeded.[23]

It is important to note that the gift or gratuity must be unrelated to the recipient's status in a labor organization in order to fall within the *de minimis* exemption. In assessing whether a gift is unrelated to union status, the DOL advises that the test is "whether the employer ordinarily provides such consideration to individuals in similar circumstances who are not

---

15 *See* "Form LM-10 – Employer Reports, Frequently Asked Questions," at http://www.dol.gov/esa/regs/compliance/olms/lm10_FAQ.htm ("The fact that a payment is not made in relation to a direct employment relationship, or in the context of collective bargaining, is not relevant to whether the payment is reportable").

16 *See* DOL's Q&A Responses regarding Forms LM-30 and LM-10 at http://www.dol.gov/esa/regs/compliance/olms/lm30_lm10_trusts_info.htm.

17 *See id.*

18 *See* 29 U.S.C. § 433(a)(1)(A); "Form LM-10 – Employer Reports, Frequently Asked Questions," at http://www.dol.gov/esa/regs/compliance/olms/lm10_FAQ.htm.

19 *See id.*

20 *See Labor Department: Trusts, Others Scramble to Comply with LMRDA Disclosure Requirements*, 160 DLR C-1 (8/19/05).

21 *See* "Form LM-10 – Employer Reports, Frequently Asked Questions," at http://www.dol.gov/esa/regs/compliance/olms/lm10_FAQ.htm. It is important to note that the DOL has sought comment on the de minimis standard and the applicable dollar threshold in its Notice of Proposed Rulemaking regarding the Form LM-30, published in the Federal Register on August 29, 70 FR 51166. To the extent the standard is revised as a result of those comments, or a different dollar threshold is adopted for the purposes of the Form LM-30, it is likely that the same standard would apply to the Form LM-10.

22 *See id.*

23 *See id.*

union officials.... If, for example, an employer routinely provides meals to all its clients (union affiliated or not) during the course of day-long meetings, the meal would be unrelated to union status."[24]

On the other hand, the DOL gives the following example of a gratuity related to union status: If an employer holds a conference designed to educate and explain employee benefit issues and products at no cost to employee pension and welfare plan personnel, including union officials, the employer must calculate the value of the conference to each union official in attendance to determine whether the *de minimis* exemption applies, and if not, how much to report on the Form LM-10. The cost to the employer of the refreshments, meals, travel, and lodging must be included in this calculation. The DOL advises deriving the figure representing the value of the conference received by each union official by dividing the total cost of refreshments, meals, travel, and lodging by the number of attendees.[25]

DEADLINE FOR FILING THE FORM LM-10 AND THE FORM LM-30: GRACE PERIOD FOR FILINGS PRIOR TO JANUARY 1, 2005

Employers, union officers, and union employees must file the appropriate forms annually, within 90 days of the end of their fiscal year.[26] Accordingly, employers whose fiscal year extends from January 1, 2005, to December 31, 2005, must file a report by March 31, 2006.

Under a special enforcement policy and grace period, new filers of Forms LM-30 and LM-10 will not have to submit reports or maintain records for fiscal years beginning prior to January 1, 2005, even if such reports should have been filed. Specifically, in the interest of achieving greater compliance with the reporting requirements, the Department will not require a new filer to submit reports for any prior years absent extraordinary circumstances. The new filer must submit its report for the first fiscal year beginning on or after January 1, 2005, on time, and without further direction by OLMS. For those who do not take advantage of this special enforcement policy, OLMS will continue to follow its normal practice, in which OLMS may seek reports from covered employers for the five prior years.

"Extraordinary circumstances" under which OLMS may require a new filer to submit reports covering the same financial interest for previous years include: (1) existence of an ongoing investigation relating to the financial interest; and (2) evidence of egregious conflicts of interest, such as those that would constitute serious violations of section 302(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(a), or represent outright attempts to purchase official favors through cash or in-kind payments.[27]

SIGNING FORM LM-10 WHEN RECORDS HAVE NOT BEEN MAINTAINED

Generally, the LMRDA provides that the Form LM-10 must be signed "by [the employer's] president and treasurer or corresponding principal officers."[28] When so signing, the filer must swear to the following:

> Each of the undersigned, duly authorized officers of the above employer declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct and complete.[29]

Under the DOL's new guidance, reports for fiscal years commencing on or before December 31, 2005, need not be signed under penalty of perjury. In cases where an employer

---

24 *Id.*
25 *See id.*
26 *See* 29 U.S.C. §§ 431, 437; 29 CFR §§ 404.2, 405.2.
27 *See* "Form LM-10 (Employer Reports) Advisory" at http://www.dol.gov/esa/regs/compliance/olms/lm10_advisory.htm.
28 29 U.S.C. § 433(a).
29 *See* LM-10, Employer Report.

did not institute procedures for tracking and reporting payments in the belief that the LMRDA did not require such reporting, where the employer has acted diligently and in good faith to reconstruct the records and identify all covered transactions, and where the employer has prepared a report that discloses all the transactions revealed by its good-faith inquiry, the employer may strike out the "under penalty of perjury" attestation.[30]

Instead, the employer may substitute the following:

> 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.[31]

Because the president and treasurer may themselves have limited knowledge of the results of the good-faith investigation, the DOL has recognized that any good-faith search will be necessarily ad hoc, in contrast to records maintained contemporaneously through established internal procedures. In the circumstances described above, employers may authorize key officials in their organization who supervised or conducted the good-faith search to sign the Form LM-10 in their place.

As a matter of enforcement discretion, the Department will not institute an enforcement action against a Form LM-10 filer who meets the criteria and files a report with the modified attestation, signed by the described key officials, for fiscal years commencing on or before December 31, 2005. Reports for fiscal years commencing on or after January 1, 2006, however, must be signed with an unaltered attestation by the employer's president and treasurer or corresponding principal officers.[32]

FIVE-YEAR RECORD-KEEPING REQUIREMENT

Every person required to file the Form LM-10 or Form LM-30 must retain for five years the records needed to verify, explain, or clarify the report, including but not limited to vouchers, worksheets, receipts, and applicable resolutions.[33]

ENFORCEMENT

Civil Enforcement. The OLMS has authority to conduct investigations concerning compliance with the LMRDA's reporting requirements, and the Secretary of Labor may file civil actions in federal courts to restrain violations and ensure compliance.[34]

Criminal Penalties. Willful violations of the reporting requirements, as well as knowing misrepresentations or material omissions, carry a fine of not more than $10,000 or one year's imprisonment, or both. Additionally, each individual required to sign the reports is personally liable for the failure to file these reports timely or for filing them with inaccurate information.[35]

OTHER REPORTS

In addition to the employer report of payments, loans, promises, agreements, or arrangements discussed above, the DOL may require from employers, union officers, or union employees the submission of "special reports," *i.e.*, reports on pertinent information with respect to specifically identified personnel.[36] The DOL may also require from employers "terminal reports" (*i.e.*, reports required where merger, consolidation, dissolution, etc., causes the employer to lose its identity as a reporting employer).[37]

---

30 *See* "Form LM-10 (Employer Reports) Advisory" at http://www.dol.gov/esa/regs/compliance/olms/lm10_advisory.htm.
31 *See* "Form LM-10 – Employer Reports, Frequently Asked Questions," at http://dol.gov/esa/regs/compliace/olms/lm10_FAQ.htm.
32 *See id.*
33 *See* 29 U.S.C. § 436; 29 CFR §§ 404.7; 405.9.
34 *See* 29 U.S.C. § 430.
35 *See id* § 439.
36 *See* 29 CFR §§ 404.4, 405.5.
37 *See id.* § 405.4.

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Shari M. Goldsmith
1.212.326.3772
smgoldsmith@jonesday.com