

# Client Alert

A report  
for clients  
and friends  
of the firm     June 2005

## The Department of Labor Issues an Expanded Interpretation of an Employer's Reporting Requirements under the Labor Management Reporting and Disclosure Act

The United States Department of Labor ("DOL") has announced a new enforcement initiative that will require virtually *all* employers to begin complying with the reporting requirements of the Labor Management Reporting and Disclosure Act ("LMRDA"). Although the LMRDA was enacted 46 years ago to provide in-depth disclosure of expenses incurred in labor-management activities, the breadth of the disclosure now being required by the DOL represents a dramatic increase in the scope and coverage of the reporting obligation. Employers will need to report all payments made directly or indirectly to labor organizations, union officers or union employees and other specified payments related to their employees or unions. **Immediate action** is required in order to avoid potential criminal and civil penalties.

Our Employee Benefits Group will be sending a separate Client Alert regarding the reporting obligations of Taft-Hartley trusts and their trustees.

### Why Are Employers Being Required To File Disclosure Reports at this Time?

The DOL's decision to expand and enforce employers' reporting obligations under the LMRDA follows its recent initiative to require union officers and union employees to file reports of all payments *received* from, and certain transactions with, employers or entities that do business with employers or unions (DOL Form LM-30), and its substantial revision of the annual financial disclosure forms required from unions (DOL Form LM-2). It is anticipated that the DOL will use the disclosures filed by employers to track the adequacy and accuracy of the reports filed by unions, union officers and union employees.

### What Has To Be Filed?

Employers must report any payment, loan of money or other thing of value (including reimbursed expenses) to, or any agreement concerning such payment with, any labor organization or officer, agent, shop steward, or other representative of a labor organization, as well as certain payments to employees or labor relations consultants. Every employer who has made such payments, directly or indirectly, or has engaged in any such transactions must file a detailed report with the DOL on a Form LM-10.<sup>1</sup>

The Form LM-10 requires the employer to report (among other things):

- payments made to any labor organization, officer, shop steward, or other representative of any 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");

<sup>1</sup> The DOL Form LM-10 is available on the DOL Website at [http://www.dol.gov/esa/regs/compliance/olms/GPEA\\_Forms/blanklmforms.htm](http://www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/blanklmforms.htm).

- 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 to persuade employees with regard to the exercise of their rights under the NLRA; and
- agreements or arrangements with a labor relations consultant where an object was to obtain information related to the activities of employees in relation to a labor dispute.

If any such payment, expenditure, agreement or arrangement has been made, the employer is required to disclose, among other things, to whom the payment, expenditure, agreement or arrangement was made, the date of the payment, expenditure, agreement or arrangement, and its circumstances, including the terms of any agreement or undertaking pursuant to which it was made. An employer who has not made any such payment, expenditure, agreement or arrangement does not need to file a Form LM-10.

### Who Is an Employer with an Obligation To File?

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. The DOL has interpreted this definition exceedingly broadly to encompass any entity that employs employees, apparently without regard to the affiliation of these employees with a union (i.e., the DOL's interpretation would not necessarily require any management/union affiliation or connection at all). Consistent with its broad interpretation, in response to a question whether the Form LM-10 applies to service providers such as investment managers, consultants, accountants, attorneys, and other service providers, the DOL has stated: "most likely; the definition of 'employer' as used in DOL Form LM-10 is very broad, and generally includes every individual or entity that employs one or more employees. Thus, if an accounting or law firm gives gifts to a union officer, the firm must report it on a LM-10."<sup>2</sup>

### Are There Payments That Do Not Have To Be Reported?

The DOL has publicly advised that payments will be considered *de minimis*, and need not be disclosed, if: (i) they have a value of \$25 or less; (ii) are sporadic or occasional; and (iii) are given under circumstances unrelated to the recipient's status in a labor organization. The DOL has stated that, unless the payments come within the *de minimis* exception, employers must disclose gifts or other things of value provided to union officers or employees such as meals, travel, hotel accommodations, contributions to union-sponsored charities, golf outings and tickets to theatre and sporting events (just to name a few). In the instructions for the Form LM-10, the DOL lists traditional Christmas gifts as an example of what does not need to be reported. The DOL, in its Fact Sheet for the Form LM-30, also notes that "if an employer frequently provides a catered lunch during long meetings with various groups, a union officer would not have to report the receipt of such a lunch if it has a value of \$25 or less."

Under the LMRDA, 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 with 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 for service as a regular employee of the employer, or by reason of his service as an employee of such employer, for periods during regular working hours in which such employee engages in activities other than productive work, so long as: (a) the payment is required by law or a collective bargaining agreement; (b) made pursuant to a custom or practice under a collective bargaining agreement; or (c) made pursuant to a custom or practice that was established by the employer without regard to the employee's position in a labor organization;
- initiation fees and assessments paid to labor organizations and deducted from an employee's wages; and
- payments to Taft-Hartley trust funds.

<sup>2</sup> The DOL's Q&A Responses regarding Forms LM-10 and LM-30 is available on the DOL Website at [http://www.dol.gov/esa/regs/compliance/olms/LM30\\_LM10\\_Trusts\\_Info.htm](http://www.dol.gov/esa/regs/compliance/olms/LM30_LM10_Trusts_Info.htm).

In addition, the LMRDA does not require disclosure of payments by employers to labor relations consultants (such as law firms) by reason of their giving or agreeing to give advice to employers or representing employers before any court, administrative agency, or tribunal of arbitration or engaging in collective bargaining on behalf of the employer. However, if the labor relations consultant engages in any direct "persuader" activities with the employees, the employer must disclose payments to the consultant on the Form LM-10. There are no other specified exceptions to the Form LM-10 requirements, so any other payments that fall within the general reporting requirements must be reported.

### **When Must the Form LM-10s Be Filed?**

DOL Form LM-10s must be filed within 90 days after the end of the employer's fiscal year. We anticipate that the DOL will announce shortly a grace period for employer filings for 2004.<sup>3</sup>

### **What Are the Recordkeeping Requirements?**

Employers must retain for five years the records necessary to verify, explain, or clarify the Form LM-10, including, but not limited to, vouchers, worksheets, receipts, and applicable resolutions.

### **What Are the Penalties for Failing To Comply with the Reporting Obligation?**

Willful violations of the LMRDA's reporting requirements, as well as knowing misrepresentations or material omissions, carry a fine of not more than \$10,000 or one year imprisonment, or both, and each individual required to sign the reports is personally liable for the failure to file these reports timely or filing them with inaccurate information. Under the statute, both the President and Treasurer, or the corresponding principal officers, of the reporting employer must sign the completed Form LM-10.

### **What Payments Are Employers Permitted To Make to Unions or Union Officers?**

The DOL's recent pronouncement relates only to reporting obligations and does not address whether specific payments or transactions are lawful or unlawful. The legality of such payments or transactions continues to be governed primarily by Section 302 of the Labor Management Relations Act, which generally prohibits *all* payments by employers or any person who acts as a labor relations expert, adviser, or consultant to an employer (or anyone acting in the interest of an employer) to unions, union officers or union employees, *regardless of intent*. Employers should re-

examine their practices regarding such payments (including payments for meals, travel, hotel accommodations, contributions to union-sponsored charities, golf outings and tickets to theatre and sporting events) which may have developed in past years in the absence of any enforced reporting obligation by employers or union officers. Questions regarding the reporting of payments made in 2004 which could be in violation of the strict prohibitions of Section 302 should be addressed with your legal counsel on a case-by-case basis.

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#### **Client Alert**

**Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. The following individuals serve as contacts and would welcome any questions you may have:**

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<sup>3</sup> The DOL has previously announced a grace period through July 15, 2005 for filing of the Form LM-30 by union officers and union employees for 2004. The DOL understands that these forms have not been filed in the past and has stated that, except in extraordinary circumstances, there will be no enforcement action for late filing during this grace period.