

Client Alert

A report
for clients
and friends
of the firm

November 2005

At Long Last! The Department of Labor Issues New Guidance Regarding Employer Reporting Requirements Under the Labor Management Reporting and Disclosure Act

On November 9, 2005, the United States Department of Labor ("DOL") issued important new guidance regarding employers' reporting responsibilities under the Labor Management Reporting and Disclosure Act ("LMRDA").¹ As you may recall, after nearly a half-century enforcement hiatus, the DOL just this past June announced a new enforcement initiative requiring all employers to begin complying with the LMRDA reporting requirements. Under the LMRDA, employers must report virtually all payments made directly or indirectly to labor organizations, union officers or union employees, and other specified payments related to their employees or unions. (A copy of our June 2005 Client Alert, regarding the LMRDA can be accessed [here](#); and a copy of our July 2005 Client Alert, regarding its applicability to Taft-Hartley Trust Funds and their trustees can be accessed [here](#)).

We are pleased to advise you that, as a direct result of a concerted effort among the U.S. Chamber of Commerce, the banking and financial services industry, and members of our law firm, the new guidance issued by the DOL establishes a grace period affecting prior failures to file the Form LM-10, explains who is required to report and provides further guidance on the content of reports.

Employer Grace Period

Most significantly, the DOL provided important relief for employers that have not filed reports in the past. This relief was announced following intensive efforts by various groups in response to the DOL's June 2005 enforcement initiative, including meetings with government officials at the DOL and the Office of Management and Budget attended by Proskauer attorneys, its clients, and representatives from the U.S. Chamber of Commerce.

Specifically, the DOL's new guidance provides that, absent extraordinary circumstances, employers will *not* be required to submit a Form LM-10 covering fiscal years prior to January 1, 2005. Forms will be due 90 days after the end of an employer's fiscal year beginning on or after January 1, 2005.² The DOL guidance available at the website denoted above sets forth in greater detail examples of "extraordinary circumstances."

Recognizing that some employers were unaware of their obligation to file the Form LM-10, the DOL's guidance also provides further relief for Forms LM-10 filed for the employer's fiscal year beginning in 2005. Under this relief, employers that make diligent, good faith efforts to search for records and file the Form LM-10 may delete the statement that the Form LM-10 is being filed "under penalty of perjury" and replace it with modified language provided in the guidance.

¹ The DOL's November 9, 2005 Q&A Responses regarding employers' reporting responsibilities is available on the DOL website at http://www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm

² For example, an employer whose fiscal year begins on November 1, 2005, would not need to submit an LM-10 until 90 days following the close of its fiscal year on October 31, 2006, covering its immediately preceding fiscal year.

Furthermore, reports for fiscal years beginning in 2005 may be signed by the official who supervised or conducted the good faith search for records, rather than the president and treasurer (as previously had been required). These special attestation and signature requirements do not apply to fiscal years beginning after 2005.

Who Has To Report?

The DOL has confirmed its extremely expansive definition of the term “employer,” noting that it includes, “except in rare cases, every private sector business or organization within the United States that has one or more employees,” and that its application is not limited *solely* to those employers whose employees are represented by a union.

However, the guidance does limit reporting to payments from the following employers:

- 1) An employer whose employees the recipient’s labor organization represents or is actively seeking to represent;
- 2) An employer a substantial part of whose business consists of buying from, or selling or leasing directly or indirectly, or otherwise dealing with an employer whose employees the recipient’s labor organization represents or is actively seeking to represent;
- 3) An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with the recipient’s labor organization;
- 4) An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with a trust in which the recipient’s labor organization is interested; or
- 5) An employer in active and direct competition with an employer described in categories 1-4.

The guidance takes the position that, assuming an entity meets one of these requirements, it is required to file a Form LM-10, even if the payments are not made in connection with collective bargaining or are not made to unions or union officials representing its own employees. Thus, for example, service providers to unions or related trust funds related thereto (such as accountants, investment managers and lawyers) generally must file.³ The DOL’s guidance also contains specific rules relating to benefits provided by service providers, including conferences and

general receptions. With respect to the latter, the reporting requirements for the fiscal year beginning in 2005 do not include the disclosure of certain costs related to the event (e.g., conference rooms and audio visual equipment).⁴ The DOL guidance also sets forth rules for reporting when one entity (whether a service provider or otherwise) reimburses another for a covered payment.

Payments Made By Employees Of An Employer Out Of Personal Assets

The DOL guidance concludes that an employer may need to disclose payments made by one of its employees to a labor union or union official, even if that employee makes the payment out of his or her own personal assets. This reporting is required if that employee either: (i) holds a key position with the employer, such as a manager; (ii) has responsibilities to generate or maintain business relationships with unions or affiliated trust funds; (iii) has responsibilities to engage in labor relations activity for the employer; or (iv) is acting, directly or indirectly, for the employer when making the payment (e.g., if the employee could seek reimbursement from the employer but nonetheless has elected not to).

Payments Made By Taft-Hartley Trust Funds

The DOL is still considering (in connection with its rulemaking with respect to the Form LM-30, which is the counterpart form to the Form LM-10, required to be filed by union officers and employees) the extent to which the LMRDA reporting requirements should apply to payments from Taft-Hartley pension and welfare trust funds to union officials who are also trustees of the trust funds. Accordingly, until the LM-30 rulemaking is completed, the DOL will not be requiring these trust funds to file a Form LM-10.

De Minimis Exception

The DOL also extensively revised its prior interpretation of the *de minimis* exception to Form LM-10 reporting, pursuant to which payments that are “sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and terms unrelated to the recipients’ status in a labor organization” will not need to be reported.

Specifically, reporting will not be required for gifts and gratuities provided by an employer, even if they are made on a regular basis, as long as the aggregate value of gifts and gratuities from that employer, and all employees of the employer, in the fiscal year is \$250 or less per recipient. This exception only applies where the gift or gratuity is unrelated

³ Although payments made by any national or State bank, credit union, insurance company, savings and loan association, or other credit institution are exempt from reporting under the LMRDA, the DOL’s guidance limits this exemption to payments *made in the regular course of business*, such as loans and interest payments. However, payments or expenditures for business development or client relations (e.g., entertainment expenses for clients or prospective clients) are not considered to be in the “regular course of business” and, therefore, must be disclosed.

⁴ For the fiscal year beginning in 2005, the DOL will accept as compliant any reasonable estimate of the cost per person of an event (such as a holiday reception) so long as that estimate is made in good faith and based on available and reconstructed records.

to the recipient's status in the labor organization. For example, if a service provider to a Taft-Hartley plan provided only a reasonably priced meal to union and management trustees, and it provides similar meals to its clients under like circumstances, the meal would be unrelated to the union officials' status and the service provider would not be obligated to disclose the cost of the meal.

In order to determine whether the *de minimis* exception is satisfied when multiple employers share the cost of a payment (e.g., two service providers pay for a union official's meal), each employer must take into account only its share of the cost. Similarly, if the exception is not satisfied, each employer need only report its share.

As with certain other aspects of its guidance, the DOL has indicated that the *de minimis* exception will coordinate with the exception for the LM-30 filing (which, as noted above, is in the process of rulemaking). Because of this overlap between LM-10 and LM-30 filing, employers who have an interest in the scope of either the *de minimis* exception or LM-10 reporting generally should consider commenting on the DOL's LM-30 rulemaking.⁵ The DOL's guidance encourages employers to do so.

Director Fees

The DOL stated that an employer's payment to a union officer for compensation for service as a member of the Board of Directors of the employer is reportable on Form LM-10. However, the DOL will not require reporting of these payments until the fiscal year beginning in 2006.

Contributions To Charity

The DOL guidance indicates that contributions made to certain entities, such as jointly trustee scholarship or apprenticeship and training funds covered under Sections 302(c)(6) and (7) of the Labor Management Relations Act ("LMRA") do not need to be reported. Moreover, contributions to charities (even where a union official is a director) and union relief funds (e.g., funds established to provide assistance to the members of a union and other employees during times of natural disaster or similar distress) generally are not reportable, even where solicited by a union official.

Guidance Does Not Address The Taft-Hartley Act

As noted in our June 2005 alert, the DOL's interpretation of the LMRDA does not address whether specific payments are lawful or unlawful. The legality of such payments or transactions continues to be governed primarily by Section 302 of the LMRA (and, in the case of a Taft-Hartley Fund, ERISA and certain criminal laws). Section 302 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*. It is important to note that there is no *de minimis* exception in this statute. Questions regarding the reporting of payments made or contemplated that could be in violation of the *very* strict prohibitions of Section 302 (or in violation of the various laws governing employee benefit plans) should be addressed with your legal counsel on a case by case basis.

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This Client Alert is only a brief summary of significant guidance published by the DOL. If you have any further questions regarding the DOL's guidance or require assistance in LMRDA compliance, please contact any of the attorneys listed below.

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Client Alert

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⁵ The deadline for employers to comment is January 26, 2006.