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Client Alert

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The United States Department Of Labor Issues Further Guidance Regarding Employers' Reporting Obligations Under The LMRDA

On March 7, 2006, the United States Department of Labor ("DOL") issued important new guidance regarding employers' reporting responsibilities under the Labor Management Reporting and Disclosure Act ("LMRDA"). As discussed in prior Client Alerts, 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.

This Client Alert will focus on the more significant new developments. For further information regarding the provisions that were simply reiterated in the new guidance, please see our prior Client Alerts. (A copy of our June 2005 Client Alert, regarding the LMRDA can be accessed here; a copy of our July 2005 Client Alert, regarding the LMRDA's applicability to Taft-Hartley Trust Funds and their trustees can be accessed here; and a copy of our November 2005 Client Alert regarding employers' reporting obligations can be accessed here).

Employer Grace Period

The DOL has extended the grace period for employers to file Form LM-10. Specifically, employers whose Form LM-10 for the fiscal year beginning in 2005 is due by March 31, 2006 (which includes all employers whose fiscal year is based on the calendar year) need not file Form LM-10 until May 15, 2006.

What Payments Are Reportable/Not Reportable

The DOL also provided its opinion on whether specific activities are reportable under the LMRDA (assuming that the *de minimis* or other reporting exception is inapplicable). For example, the DOL stated that the following are examples of reportable activities:

- A vendor of financial services to a union-affiliated pension plan that provides a gift worth more than $250 to a union trustee.
- An employer that provides a prize worth more than $250 to the winners of a golf tournament for union members and their families.
- An investment advisor of a Taft-Hartley Trust Fund that provides a golf outing worth more than $250 to a union-appointed trustee.
- An employer that sends a payment to a union and the union directs the donation to a tax-exempt organization.

Furthermore, the DOL listed several activities which are not reportable. The nonexhaustive list includes:

- Payments which are included in Section 302(c) of the Labor Management Relations Act ("LMRA"), such as payments to jointly-administered union scholarship funds and vacation plans.
- Payments made by insurance companies and credit institutions in the regular course of their business.
- Payments to a 501(c)(3) tax-exempt entity so long as the entire donation is remitted directly to the tax-exempt organization.

Employers should refer to this list for further guidance on specific types of payments, although they should be mindful that the list is not exhaustive.

Office Space

The DOL advised that an employer must report the value of office space provided to a union without cost. However, no report is required where an employer permits its employees' union officials to reserve on a temporary and episodic basis office or conference space on an as-needed basis for conducting union business.

Payments to Spouses and Minor Children

The DOL guidance indicated for the first time that, generally, a payment to a spouse or minor child of a union official is not reportable on Form LM-10 (although the union official must report it on Form LM-30). However, it recognized that there are unusual circumstances in which the payment to a spouse can be considered an indirect payment to the union official. For example, a meal purchased by a service provider for a union officer's spouse is not reportable, whereas a luxury watch provided by the service provider would be where the service provider has no meaningful relationship with the spouse.

Reimbursed Expenses

The DOL guidance indicated that employers need not report items of value if the employer is reimbursed by the recipient in the same fiscal year (or, in the case of items provided near the end of the fiscal year, the employer is reimbursed promptly). In addition, if the employer is not reimbursed promptly, it must receive interest in the case of cash payments or payment for the value of the use of the item in the case of boats, cars or similar items. Even in the case of reimbursed expenses, the DOL reserved the right to request reporting in unique specific circumstances.

Scholarship Fund Donations

An employer's donation to a union scholarship fund is not reportable if the fund satisfies the requirements of Sections 302(c)(5) & (7) of the LMRA (*i.e.*, the basis on which the payments are made is specified in a written agreement such as a collective bargaining agreement; employees and employers are equally represented in the administration of the fund; the statutory deadlock procedure is followed; and a statement of the fund's results are available for inspection). However, it is reportable if these requirements are not met. Similar rules would apply to other types of union funds.

Widely-Attended Gatherings

The DOL issued two special rules that exempt, in limited circumstances, reporting in connection with "widely-attended gatherings," which include gatherings attended by a large number of persons that include both union officials and a substantial number of individuals with no relationship to a union (and these two groups are treated similarly).

First, if an employer holds no more than two widely-attended gatherings per year attended by the same union officials, it has no LM-10 reporting obligation with respect to those gatherings as long as it spends $125 or less per attendee per gathering. The value per attendee also need not be included in the calculation of the annual $250 *de minimis* exception. Thus, employers that decide at the start of their fiscal year not to hold more than two widely-attended gatherings at which one or more of the same union officials will be in attendance need not keep records of the attendees at the gatherings.

Second, an employer that holds more than two such widely-attended gatherings that the same union officials attend also has no reporting obligation if the value conferred is less than $20 per attendee. If this requirement is not met, the employer would need to identify and keep records of each attendee who is a union official and disclose that payment if the union official received over $250 over the course of the employer's fiscal year.

If neither of these exceptions is met, the value to each attendee (as determined in reasonable and in good faith) of the food, beverage, service and entertainment (but not the cost of reception hall, event security or time spent planning and running the reception) is generally reportable.

Union Trustees of Taft-Hartley Funds

The DOL provided further guidance regarding the reporting requirements applicable to a union trustee of a Taft-Hartley fund including the following:

- It appears that the DOL is taking the position that a union trustee is considered a union official if the union trustee is appointed by the union, even if the union trustee is not otherwise a union officer.

- For fiscal years beginning before 2006, an employer that does not know whether a union trustee was appointed by the union need only make a reasonable inquiry and exercise due diligence to determine the status of the union trustee (*e.g.*, by asking the plan, the trustees or the union). After those fiscal years, due diligence and reasonable inquiry will not be sufficient, and the employer will have to institute procedures to record this information accurately.

Partnerships and Sole Proprietorships

The DOL stated that neither a sole proprietor who works alone at his firm nor a partnership with no workers other than the partners is subject to the LM-10 reporting requirements unless the sole proprietor or partnership is acting as an agent of an employer.

Public Sector Unions

An employer need not report payments to individuals who are officers or employees of a union composed entirely of state, county or municipal employees. However, if any union members are employed by a private sector employer, the payments are reportable. The DOL guidance explains how information about the union's membership can be obtained.

Procedural Issues

The DOL issued a variety of procedural clarifications including the following:

- One employer in a consolidated group of affiliated employers cannot submit a Form LM-10 for other members of the group.

- An employer that does not have a reportable interest in the fiscal year beginning in 2005 does not need to file a Form LM-10 for that fiscal year in order to take advantage of the grace period that provided a limited amnesty for failure to file in prior fiscal years. The DOL stated that, in those circumstances, the employer must create and maintain for five years records sufficient to verify that (i) it established internal procedures or exercised reasonable good faith efforts to identify any reportable interests for the fiscal year beginning in 2005, and (ii) despite those procedures/efforts, no reportable interests were identified. These records must be maintained for five years.

Guidance Does Not Address The Taft-Hartley Act

As noted in our previous alerts on this issue, 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). Questions regarding the reporting of payments made or contemplated that could be in violation of the 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 a 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

The Employee Benefits and Executive Compensation Law Practice Group at Proskauer Rose LLP counsels clients on the full spectrum of benefit and compensation issues, communicating technical and complex legal concepts in an intelligible, pragmatic manner.

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