

## SECURITIES ALERT

### LMRDA REPORTING REQUIREMENTS MAY CREATE REPORTING ISSUES FOR PUBLIC COMPANIES



This year the U.S. Department of Labor (DOL) has moved forward with its enforcement initiative under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). For nearly 50 years DOL limited its LMRDA compliance efforts to union filings. DOL largely ignored reports required of union officials and employers. The renewed focus on employers and union officials may expose employers to criminal liability. As discussed in our previous alerts, the DOL's enforcement initiative focuses on increasing both union and employer compliance with the LMRDA's reporting requirements. (*See DOL's Proposed Revisions to Form LM-30 Raise Concerns for Employers* (Sept. 1, 2005), *New LMRDA Disclosure Regulations May Trap Unwary Employers* (Aug. 9, 2005) and *New Reporting Requirements May Expose Employers to Criminal Liability* (July 8, 2005), available at [http://www.akingump.com/alerts.cfm?practice\\_id=56](http://www.akingump.com/alerts.cfm?practice_id=56)). Under certain circumstances, a company may be required to detail such liability in reports required by federal securities laws.

In July 2005 DOL implemented new regulations for union disclosures requiring unions, in certain circumstances, to identify by name and address employers who provide the union with "anything of value." DOL also has published a proposed rulemaking for disclosures that union employees must make under Form LM-30. In general, the proposed changes would increase dramatically the type of transactions with employers that union employees must report, and make reportable some common labor practices that previously were considered exempt. DOL also has announced that once it completes its work on the union filing requirements, it will turn its attention to employer filing obligations on Form LM-10. Up until the DOL announcement, many employers were not even aware that the LMRDA imposed upon them a filing obligation.

Of significance to employers are the interrelated criminal provisions of the LMRDA and Section 302 of the Labor Management Relations Act (LMRA). Under the LMRDA, employers must report "anything of value" that they have provided to unions or union employees. Each failure to report can result in criminal penalties that include a fine of up to \$10,000 and/or imprisonment for up to one year. 29 U.S.C. § 439. On the other hand, the LMRA makes providing "anything of value" to unions or union employees a criminal violation. A violation

of the LMRA is itself a criminal violation. If the money or thing of value is over \$1,000, the violator may be convicted of a felony and subject to a fine up to \$15,000 and/or imprisonment for up to five years. If the money or thing of value is \$1,000 or less, the violation is a misdemeanor and the violator may be subject to a fine up to \$10,000 and/or imprisonment for up to one year. Each prohibited payment constitutes a separate violation of the LMRA. *See United States v. Alaimo*, 297 F.2d 604 (3d Cir. 1961), *cert. denied*, 369 U.S. 817 (1962). DOL has taken the position that “[r]eports required of employers ... must be submitted notwithstanding the fact that the information required to be included in the report may disclose a violation of section 302 of the Taft-Hartley Act.” LMRA Interpretive Manual, § 251.100.

For public companies, the situation may be more complex as exposure under the LMRDA or LMRA could present disclosure issues under the federal securities laws. Disclosure requirements under the securities laws pertaining to unadjudicated wrongdoing are themselves quite complex. The starting point under federal securities laws is the general rule that public companies are not required to disclose “all material facts, as they occur.” Public companies are required to make disclosures only if there is an independent duty to disclose and the facts in question are material. However, to some extent exceptions eviscerate the general rule. In the area of unadjudicated wrongdoing, exceedingly difficult disclosure questions often arise under Item 303 of Regulation S-K relating to the “Management’s Discussion and Analysis” section of annual reports on Form 10-K, quarterly reports on Form 10-Q or registration statements for public offerings. A disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have a material effect on the registrant’s financial condition or results of operations. Thus, Item 303 may require the disclosure of uncertainties and other forward-looking information in annual or quarterly SEC reports or registration statements.

While some case law suggests that management is not required to accuse itself of unadjudicated wrongdoing, difficult disclosure issues are presented under Item 303 if the company presently knows of an impending liability that is likely to be material to the financial condition or results of operations of the company. SEC rules also require a company to include in its SEC reports such additional information as may be necessary to make expressly required statements, in light of the circumstances under which they are made, not misleading. A company’s discussion of LMRDA or LMRA issues in an SEC filing could present issues under these rules. Additional considerations include potential duties to correct or update prior disclosures, obligations arising under stock exchange rules, and duties that may arise under Rule 10b-5 if the issuer or insiders are trading in the company’s stock. Disclosure of material pending legal proceedings and material legal proceedings known to be contemplated by governmental authorities is expressly required in annual and quarterly reports and in certain registration statements.

Where the company has a duty to disclose information, the question turns upon whether the information is “material.” A fact is “material” if there is a substantial likelihood that an investor would consider the fact important in making an investment decision or, in the proxy context, in deciding how to vote. While not all exposures under the LMRDA and LMRA would be “material” to a company, they certainly could be, and would have to be carefully evaluated. This evaluation would include a balancing of the probability and magnitude of the potential liability under the LMRDA and LMRA in light of all of the facts and circumstances.

For public companies that deal with union representatives, DOL's new enforcement initiatives raise issues in addition to the labor law issues directly addressed by DOL. For now, DOL has suspended the employer filing requirements until after it addresses the issue in a promised guidance for employers. In addition, DOL has indicated that it will be providing an amnesty for years prior to 2004 for first-time employer filers who file their 2004 report. Until then, employers should be gathering any information necessary for compliance and developing a consistent position for both their labor and corporate filing obligations.

## CONTACT INFORMATION

If you have questions or would like to learn more about this topic, please contact the partner who represents you, or:

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