

## LABOR AND EMPLOYMENT ALERT

### DOL ISSUES LMRDA GUIDANCE FOR EMPLOYERS: TIMELY FILERS TO GET AMNESTY



Last week the Department of Labor (DOL) issued the promised guidance and grace period for employers required to file annual LM-10 forms under the Labor-Management Reporting and Disclosure Act (LMRDA). DOL's guidance provides some direction to employers regarding future compliance with the LMRDA, as well as raises some new questions.

Employers who engage in certain transactions with unions or union representatives are required to file an LM-10 form on an annual basis. Prior to DOL's announcement, employers were required to report all payments to unions and union representatives, unless the payments were exempted by the so called "*de minimis*" exemption. To qualify for a *de minimis* exception, payments had to be "sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and terms unrelated to the recipients' status in a labor organization..." LM-10 Instructions, Part A, Item 8.a. DOL did not designate a specific dollar value to the *de minimis* exemption. Rather, the *de minimis* exemption was applied on a case-by-case basis.

DOL's guidance for employers establishes a new *de minimis* exemption, which exempts payments of \$250 or less. To calculate whether payments qualify as *de minimis*, payments or other things of value given by an employer to a union or union representative must total \$250 or less in the aggregate for the fiscal year. Interestingly, the threshold far exceeds the *de minimis* threshold for union representatives reporting (LM-30) receiving payments or gifts of \$25. DOL is considering even eliminating that exception. See 70 Fed. Reg. 51,175. In its announcement, DOL stated that it likely will reconcile this disparity when it finalizes its rules on the LM-30 filing requirements. Until then, DOL advises employers to use the \$250 threshold.

As previously promised by DOL, the guidance provides an amnesty for employers who have not filed an LM-10 report in the past. Such first-time filers that submit reports for the fiscal year beginning on or after January 1, 2005, will not be required to submit reports for prior years absent "extraordinary circumstances." DOL defines extraordinary circumstances as follows:

- (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 violation of section 302(a) of the Labor Management Relations Act, 1947, 29 U.S.C. 186(a), or represent outright attempts to purchase official favors through cash or in-kind payments.

Where extraordinary circumstances do not exist, filing within the amnesty period will allow employers to avoid liability for any failure to file in prior years. If an employer fails to file and later is investigated by DOL, DOL may seek reports covering a five-year period.

Recognizing that DOL historically has not enforced the LM-10 filing requirements, DOL also has provided additional relief for employers with respect to their year 2005 filings. DOL is waiving the requirement that the LM-10 form be signed under penalty of perjury. First-time filers may strike out the penalty-of-perjury language contained in the LM-10 and replace it with language stating:

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, as complete as possible based on existing and reconstructed records.

Form LM-10 – Employer Reports, Frequently Asked Questions (Nov. 9, 2005). However, this concession by DOL contains two important caveats. First, the exception applies only where the employer did not have in place procedures for tracking payments to unions or union representatives based on the employer's belief that the LMRDA did not apply. This caveat itself raises significant questions as to how DOL will evaluate an employer's "belief" and whether ignorance of the LMRDA obligations is sufficient for the exception.

The second caveat to the exception is that the employer act "diligently and in good faith to identify the covered transactions, and prepare[] a report that discloses all the transactions revealed by [the employer's] good faith inquiry...." This caveat will raise difficult issues for employers. Information disclosed in any such report could result in criminal liability under the Labor Management Relation Act (LMRA). (See *LMRDA Reporting Requirements May Create Reporting Issues for Public Companies* (Nov. 2, 2005), *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)). The amnesty provided by DOL applies exclusively to the LMRDA filing requirements and expressly excludes any LMRA violations. Consequently, employers must consider carefully the results of their actions under multiple statutes before proceeding.

Finally, DOL is waiving regulations that require the employer's president and treasurer to sign the LM-10 form. DOL has waived the requirement because it "recognizes that the president and treasurer may themselves have limited knowledge of the results of the good faith investigation." Because the "good faith search will be necessarily ad hoc, in contrast to records maintained contemporaneously through established internal procedures," employers filing now may "authorize key officials in their organization who supervised or conducted the good faith search to sign the Form LM-10."

In sum, DOL's guidance on LM-10 filings provides employers with the information that will enable them to properly evaluate their risks under the LMRDA and LMRA. It also provides guidance on what steps employers may take to minimize the risk. However, the amnesty is not a complete amnesty, and employers should carefully review their options before adopting a course of action.

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