

LABOR AND EMPLOYMENT ALERT

DOL'S PROPOSED REVISIONS TO FORM LM-30 RAISE CONCERNS FOR EMPLOYERS



Last week, the Department of Labor (DOL) issued a *proposed* rule addressing the LM-30 form and filing requirements of union representatives under the Labor Management Reporting and Disclosure Act (LMRDA). Generally speaking, the proposed rule seeks to extend the reporting obligation to virtually all transactions between employers and union representatives. Because employers have parallel reporting obligations under the LMRDA, the proposed revisions may create significant issues for employers.

One area of concern for employers is DOL's proposal to change the reporting obligation for "union leave" or "no docking" agreements, which provide for continued payment of wages to employees while they perform union business. Historically, such payments were exempt from disclosure "on the theory that the employee officer is being paid for work performed of value to the employer who is interested in seeing to it that grievances are immediately adjusted." LMRDA Manual, § 248.005. As discussed in our Labor and Employment Alert, *New LMRDA Disclosure Regulations May Trap Unwary Employers* (<http://www.akingump.com/docs/publication/796.pdf>) (August 9, 2005), these payments have not been considered a violation of the Labor Management Relations Act's (LMRA) prohibitions on payments to union representatives under the same rationale.

DOL's proposal to require reporting of payments made under union-leave or no-docking arrangements may indicate that DOL also views these payments to be prohibited by the Labor Management and Reporting Act (LMRA). Indeed, in support of its proposal, DOL relied in part on the dissenting opinion of Judge Mansmann in *Caterpillar v. United Auto Workers*, 107 F.3d 1052 (3d Cir. 1997) (en banc), which arose under the LMRA. In his dissent, Judge Mansmann observed that such payments should be outlawed because they "create a conflict of interest for union negotiators who may agree to reduced benefits for employees in exchange for financial support for the union." Under this interpretation of the LMRA, both the employer making a payment and union representatives receiving a payment would commit criminal violations of the LMRA. See August 9, 2005, Labor and Employment Alert, *supra*. Consequently, any disclosure of such payments could lead to criminal prosecution.

DOL's proposed rule also seeks to limit the "regular course of business" exemption for transactions between employers and unions. The change would require reporting of most transactions that presently are not reported. For example, a union representative who receives compensation from an employer for contract work would have to report such payment. DOL's basis for requiring such reporting is that a "union official with an employer as a client has a conflict between personal interests and union loyalties"

DOL also is seeking comment on whether to eliminate the *de minimis* exemption for anything with a value of \$25 or less. If DOL decides to eliminate the exemption, it is likely to result in substantially increased disclosure obligations for employers and unions, and possibly complicate routine interactions between employers and union representatives. Even the occasional lunch meeting could result in a reporting obligation, with its attendant record keeping.

Another proposed change of significance for employers is the proposed definition of "benefit with monetary value," which would include any "forebearance." This term arguably would apply to the relatively recent union tactic of obtaining "neutrality agreements" pursuant to which, generally speaking, employers agree to refrain from opposing union organizing. If this definition encompasses neutrality agreements, then neutrality agreements also may be found to be illegal under the LMRA, which prohibits employers from providing anything of value to employee representatives. It appears that DOL may, in fact, be moving in this direction as it also proposes to clarify the definition of employee representative by defining "actively seeking to represent" to include "obtaining or requesting an employer to enter into a neutrality agreement."

DOL's focus on union filings is having its desired effect, encouraging unions and union representatives to be more forthcoming in their disclosures. According to DOL, over 10,000 LM-30 reports already have been filed, as compared to only 244 LM-30 filings from 2001 to 2004. In addition, DOL's notice of proposed rulemaking demonstrates that DOL is taking advantage of the searchable database it has created by requiring electronic filing. As discussed in the notice, DOL reviewed union LM-2 reports from 2002 to identify union officers that should have filed LM-30s but failed to do so. These filings similarly can be used to review union filings to identify employers who made payments to unions, but who have not filed their own LM-10 forms.

To date, DOL's increased enforcement and oversight efforts primarily have been aimed at unions and union representatives. DOL has stated that it soon will turn its attention to employers and LM-10 reports. While DOL plans to issue guidance and possibly an amnesty period for employers, employers should already be considering the potential impact of these new disclosure requirements.

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