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LABOR AND EMPLOYMENT ALERT

DOL ISSUES REVISED GUIDANCE FOR EMPLOYER LM-10 REPORTS

On March 7, 2006, the Department of Labor (DOL) issued two important updates concerning employer reporting obligations under the Labor Management Reporting and Disclosure Act (LMRDA). First, DOL extended the filing deadline for most employers and union representatives filing forms LM-10 and LM-30 this year. Second, DOL published a revised, and expanded, list of "Frequently Asked Questions" addressing what must be reported on form LM-10. (*See* www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm.)

Last November, DOL issued guidance to employers regarding their filing obligations under the LMRDA. At the same time, DOL announced that employers filing LM-10s for the first time for their fiscal year beginning on or after January 1, 2005, would qualify for amnesty for prior years as long as they timely filed a 2005 form LM-10. Under the LMRDA, employers are required to file their LM-10s within 90 days of the close of the employer's fiscal year. For employers whose fiscal year ended December 31, 2005, the deadline would have been March 31, 2006.

After issuing the guidance, DOL received many inquiries from employers regarding their LMRDA obligations. These questions prompted DOL to issue revised guidance on March 7, 2006, in the form of additional Frequently Asked Questions. Because of the late date of this new guidance with respect to the filing deadline, DOL granted an extension to first-time filers whose reports would have been due on March 31, 2006. DOL has stated that it will not enforce the statutory 90-day deadline against employers who file on or before May 15, 2006. DOL also provided union representatives with an extension for filing their LM-30 forms.

DOL's new guidance attempts to clarify the confusion over the *de minimis* exemption, but it is not clear that the guidance has done so. In Frequently Asked Questions published on November 9, 2005, DOL stated that to qualify for the *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 . . . ." In the revised Frequently Asked Questions, DOL appears to have abandoned the limitations of the *de minimis* exemption, leaving only the $250 threshold. The question posed was whether an employer would have to report a business meal with a union representative where only labor-management business is discussed. DOL answered the question in the affirmative, but observed that the employer would incur a reporting obligation only if the meal cost more than $250, or if multiple meals exceeded

the $250 threshold for the fiscal year. Under DOL's previous analysis, the meal would have been reportable irrespective of the cost, because it was not "given under circumstances and terms unrelated to the recipients' status in a labor organization." While it seems that DOL now has adopted an absolute *de minimis* standard of $250 with no other limitations, DOL's conflicting statements continue to create issues.

DOL's new guidance also addresses a significant number of questions regarding items required to be reported on the LM-10 form. For example, the new guidance seeks to resolve the confusion that exists over the definition of "employer" under the LMRDA. The LMRDA requires "every employer" who has made a payment covered by the LMRDA to report such payment in an LM-10 form. 29 U.S.C. § 433. The new guidance discusses how the term "employer" should be defined in an organization with various subsidiaries and affiliates, where recordkeeping is centralized. DOL states that in such cases, the corporation must make "reasonable judgments" to determine which entity or entities should file the LM-10 form. DOL identifies a number of factors for consideration in making such a judgment, including the structure of the corporation, the business in question and whether the entities would be considered separate under other laws.

DOL also has provided some examples of transactions that it considers reportable transactions. Of particular interest is DOL's treatment of certain benefits that historically have been provided to union representatives under collective bargaining agreements. Our September 1, 2005, client alert (available at www.akingump.com/docs/publication/799.pdf) regarding proposed changes to the LM-30 form discussed how it appeared that DOL was taking the position that union leave and no-docking arrangements would be reportable. In its latest guidance, DOL has addressed a related issue. In its guidance, DOL takes the position that an employer providing office space to a union who represents its employees must report the value of the office space provided to the union. Indeed, DOL emphasizes that there is "[n]o exception for providing cost-free office space . . . ." Thus, it appears that DOL will require reporting of many arrangements that historically have been viewed as outside the purview of the LMRDA.

Another issue that DOL seeks to clarify is whether employers must report expenses incurred in hosting general events that also are attended by union officials. DOL's position is that "if an employer holds a widely attended gathering and spends $20 or less per attendee, it has no Form LM-10 obligations with regard to tracking or disclosing these costs." *See* Form LM-10 Reports, Frequently Asked Questions, Question 61. The $20 per attendee exemption for widely attended gatherings applies irrespective of the number of events hosted by the employer and does not count toward the $250 threshold of the *de minimis* exemption. DOL defines "widely attended" as an event where "a large number of persons will attend and attendees will include both union officials and a substantial number of individuals with no relationship to a union."

If the employer spends over $20 per attendee at a widely attended gathering, the employer still may not be required to track and disclose these costs if the new $125 recordkeeping and reporting exemption applies. According to DOL, if the employer hosts one or two widely attended gatherings attended by the same union representatives, and the employer spends more than $20 but not more than $125 per attendee per event, the employer will not be required to track or disclose these costs. If the $125 exemption does not apply, however, the employer may be required to track and disclose the costs for each union representative if the aggregate costs exceed $250 for the fiscal year. DOL also has extended the $125 per attendee per event exemption to union representatives.

Another issue clarified by DOL is whether an employer must file a form LM-10, even if the employer did not make any reportable payments in fiscal year 2005, to obtain the amnesty offered by DOL. DOL has made it clear that an employer may take advantage of the amnesty provision without filing so long as it creates records that verify it made a

good-faith effort to identify any reportable transactions. Accordingly, employers should not submit a blank LM-10 form if they have no reportable transactions, but they must maintain records of their investigation for a five-year period. *See* Form LM-10 Reports, Frequently Asked Questions, Question 72.

The new DOL Frequently Asked Questions resolve a number of issues for employers. The examples discussed above are not exhaustive, but are intended to highlight some of the key questions clarified by DOL. Combined with the extension of the filing deadline, the new guidance should reduce employer compliance burdens for fiscal year 2005.

CONTACT INFORMATION

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