January 2006

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## NEW DOL ENFORCEMENT INITIATIVE ON LM-10 REPORTING AIMED AT A BROAD CLASS OF EMPLOYERS

*Recently issued guidance from the Department of Labor (DOL) explains "[e]xcept in rare cases, every private sector business or organization within the United States that has one or more employees is considered an employer … and thus may have reporting obligations" under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").*

*Although the DOL takes the position that all private employers have always been subject to the reporting requirements in the LMRDA, the recently published DOL guidelines make clear that many employers, even those with non-union workforces, many of whom may not have realized this, may have reporting obligations. Investment advisers, insurance companies, financial institutions, even accounting and law firms that sell their goods and services (or that compete for the business) to unions or trust funds with union trustees may provide gifts, tickets, golf outings, etc. as part of their sales efforts. Provision of such "things of value" must be reported annually to the DOL on Form LM-10. Accordingly, to avoid potential civil and criminal penalties, all employers must assess their reporting obligations and establish and maintain systems to comply with the LMRDA requirements.*

### Reportable Payments

Pursuant to the LMRDA, employers that provide "things of value" to unions or their officers, agents, shop stewards, employees, or other representatives ("union officials") must annually disclose such dealings to the DOL on Form LM-10 reports. With certain exceptions, reportable financial dealings include any payments, loans, or gifts made to unions or union officials that have more than a *de minimis* value. Here are some examples:

- An investment manager hosts a complimentary pension investment conference attended by union trustees of a multiemployer pension fund.
- An investment banker invites a union trustee to a golf club.
- A lawyer at the employer's law firm takes union representatives of the employer out to a fancy restaurant after a meeting.

- A sales person for a health insurer gives Broadway tickets to union trustees of a multiemployer health plan.
- An accountant allows a union official to use his vacation home for a weekend.

The LMRDA also generally requires reporting of certain other transactions such as hiring labor consultants or making payments to employees to persuade other employees with regard to their right to organize.

Payments made by an employee from his or her own funds to a union official must also be reported under the following conditions:

- The employee holds a key position, such as manager.
- It is within the employee's job responsibilities to generate or maintain business relationships with a union or union-affiliated trusts.
- It is within the employee's job responsibilities to engage in labor relations activities for the employer.
- The employee is acting directly or indirectly for the employer when giving the gifts or other items.

Payments by employers or their representatives to officials of unions that represent or are attempting to represent their employees are illegal under federal labor law. *See* 29 U.S.C. § 186. Payments made to trustees, officials, employees or representatives of benefit funds for the purpose of influencing their actions are also illegal. *See* 18 U.S.C. § 1954. Reporting such payments on an LM-10 does not render them legal. Conversely, the fact that making the payments is illegal does not exclude a covered employer from the duty to report them.

Payments *not* subject to Form LM-10 reporting requirements generally include these:

- Payments of wages to employees.
- Forwarding of dues to a union.
- Payments in satisfaction of a judgment or administrative order.
- Payments for the purchase of a commodity or service at market rates.
- Transmittal of union dues.
- Payments to jointly trusteed employee benefit funds pursuant to a collective bargaining agreement.
- Charitable contributions to tax exempt organizations, even though made at the request of a union official.

Payments to unions or union officials of unions whose membership consists *entirely* of employees of a state or local government are not covered by the reporting requirements.

**De Minimis Exemption**

For purposes of Form LM-10 reporting, a gift or gratuity is *de minimis* and need not be reported if it is (1) insubstantial and (2) unrelated to the recipient's status as a union official. A gift is insubstantial if the aggregate value of all the gifts and loans from a single employer to a single union or union official is less than $250 in a

reporting year. In calculating whether the $250 threshold has been exceeded, gifts and loans from multiple employees of a single employer are treated as originating from a single employer. A gift is unrelated to the recipient's status as a union official when the employer provides similar gifts in similar circumstances to individuals who are not union officials. Gifts made solely to union officials do not meet the *de minimis* test and must be reported regardless of value.

**Filing and Record Keeping Requirements**

Form LM-10 reports must be filed within ninety days after the end of the employer's fiscal year. Thus, for example, an employer whose fiscal year extended from January 1, 2005 to December 31, 2005, must file a report by March 31, 2006.

In general, the LMRDA provides that Form LM-10 must be signed under penalty of perjury "by [employer's] president and treasurer or corresponding principal officers." 29 U.S.C. § 433(a). However, in recognition of the fact that its new enforcement initiative will likely catch many employers unaware, the DOL guidance provides for modified attestation procedures for fiscal years commencing on or before December 31, 2005. In cases where an employer (i) did not institute procedures for tracking and reporting payments based on a belief that the LMRDA did not apply to it, (ii) acts diligently and in good faith to identify the covered transactions, and (iii) prepares a report that discloses all the transactions revealed by its good faith inquiry, the DOL has stated that the employer may strike out the "under-penalty-of-perjury" attestation and substitute modified language provided by the DOL for that one year.

All employers who must file Form LM-10 reports are required to maintain supporting records for a period of at least five years after such reports have been filed. Such records include any record necessary to verify, explain, or clarify the report including, but not limited to, vouchers, worksheets, receipts, and applicable resolutions.

**Grace Period**

In the interest of achieving greater compliance with the reporting requirements, the DOL will not require a new filer to submit reports for any prior years absent extraordinary circumstances such as outright attempts to purchase favors from a union official. To take advantage of the grace period, a new filer must submit its report for its first fiscal year beginning on or after January 1, 2005 on time. For those that do not take advantage of this special enforcement policy, the Office of Labor Management Standards ("OLMS") will continue to follow its normal practice, in which it may seek reports from covered employers for the five prior years.

**Penalties for Noncompliance**

Civil and criminal penalties may apply for violation of these reporting and disclosure obligations. For example, the following violations are each punishable by a fine of up to $100,000, imprisonment of up to one year, or both: (1) willfully failing to file a Form LM-10 or to maintain the required records; (2) knowingly making a false statement or representation of material fact or knowingly failing to disclose a material fact in an LM-10 filing; or (3) willfully making a false entry in, or withholding, concealing, or destroying documents

required to be kept. Additionally, the OLMS has authority to conduct an investigation concerning compliance with the reporting requirements of the LMRDA and may file civil actions in the federal courts to ensure compliance.

**Steps for Compliance**

Each employer must determine whether it is making payments or engaging in transactions that fall within the reporting requirements. Employers subject to the reporting requirements should:

- Identify those employees within the organization who are likely to make reportable payments or engage in reportable transactions and make sure they are aware of the reporting and record retention requirements.
- Since the reports will be made available to the public, consider establishing a policy or guidelines restricting the size of such payments and the circumstances under which they are to be made.
- Establish a reporting and record retention system to capture and maintain the information needed to complete Form LM-10.
- Centralize reporting to ensure compliance with *de minimis* guidelines.
- Complete and file Form LM-10 in a timely fashion each year.

**Conclusion**

Given the DOL's new enforcement initiative and the potential civil and criminal penalties for non-compliance, many employers need to be more proactive regarding their LMRDA compliance efforts than in the past. Many employers who never thought that they had a reporting requirement will now need to keep records and file LM-10s annually. Further, since "things of value" may take many forms, all transactions with union officials should be reviewed.

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If you have any questions regarding LM-10 reporting or your obligations thereunder, please contact **Michael F. McGahan** in the **New York** office at 212/351-3768, **mmcgahan@ebglaw.com**. **Matthew Banner**, an associate in EBG's **New York** office, assisted with the preparation of this alert.