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A recently issued Department of Labor guidance clarifies employer reporting and disclosure requirements under the LMRDA, and puts a special grace period in effect for filing LM-10 reports for the 2005 fiscal year.

## Employer Reporting Requirements Under The LMRDA

*By Ronald J. Holland and Kimberly Owens*

Since its enactment in 1959, the Labor-Management Reporting and Disclosure Act (LMRDA or “the Act”) has required employers and labor unions alike to file annual reports disclosing certain financial transactions relating to unions. One of the purposes of the Act is to reveal money spent by employers in efforts to sway their employees with respect to unionizing. Employers must file a Form LM-10 within ninety (90) days of the end of their fiscal year, while unions meet their corresponding reporting requirements by filing a Form LM-30.

Lax enforcement of the LMRDA’s reporting requirements in the past and a lack of guidance regarding exactly what payments must be reported have caused many employers to either fail to file a LM-10 report entirely or to misinterpret the reporting requirements. A Department of Labor (DOL) crackdown on the LMRDA’s reporting requirements for unions, however, has also led to stricter enforcement of the reporting requirements for employers. The DOL’s recent announcement of a special enforcement policy and grace period for employers who timely file a Form LM-10 for the 2005 fiscal year, along with the issuance of DOL “guidance” answering frequently asked questions about employer reporting requirements, makes this an excellent time for employers to audit their practices and ensure compliance with the LMRDA.

## Special Enforcement Policy and Grace Period

The DOL’s ordinary practices allow it to seek delinquent Form LM-10s going back five years. The special enforcement policy and grace period now in effect, however, allow employers who timely file a Form LM-10 for the first time for the 2005 fiscal year to avoid filing Form LM-10s for past years in which they did not comply with the reporting requirements. The DOL has stated that it will not require a new filer to submit reports from previous years “absent extraordinary circumstances.”

Furthermore, an employer that has not instituted procedures to track reportable payments based on the mistaken belief that it was not subject to the LMRDA is now permitted to prepare a report that discloses transactions revealed by a good faith search without verifying the accuracy of the report under penalty of perjury. Instead of the usual requirement that the organization’s president and treasurer sign the Form LM-10, an employer may authorize the official who supervised or conducted the good faith search to sign the Form LM-10 for the 2005 fiscal year. This special enforcement policy provides employers who have not closely tracked relevant financial transactions an opportunity to nonetheless meet the reporting requirements for the 2005 fiscal year.

## Financial Transactions that Employers Must Disclose

The financial transactions that must be reported on the Form LM-10 share one common feature — they are all payments that may give the appearance that the employer is trying to influence unions or employees with respect to their bargaining and representation rights. The goal of the Form LM-10 is to bring these payments out into the open. While some payments obviously must be disclosed, others are less evident.

### Payments and Loans to Any Union or Union Official

Employers must generally disclose all payments and loans made to any union or union official. However, the following types of payments to unions and union officials need not be disclosed: (1) payments and loans made by insurance companies and credit institutions in the regular course of business; (2) wages and other compensation paid to employees as compensation for, or by reason of, their services as an employee; (3) payments made to satisfy a court or administrative judgment or to settle a dispute; (4) payments made to sell or purchase an article or commodity at the prevailing market price in the regular course of business; (5) payments of union dues deducted from employees wages; and (6) payments to certain health and welfare trust funds or labor management committees.

### Gifts to Any Union or Union Official

Gifts from employers to unions and union officials can create the appearance that the employer is attempting to influence the union. Employers may give some items of value to unions, however, without even realizing it. For example, an employer may provide food or beverages to union

officials or pay for a conference room for collective bargaining agreement negotiations. Must an employer report these small payments? Not if these payments fall within the *de minimis* exemption discussed below.

#### De Minimis Exemption

Form LM-10 contains a *de minimis* exemption, which does not require employers to report “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 its recent guidance, the DOL outlined new requirements for the applicability of Form LM-10’s *de minimis* exemption. For a payment to fall under the *de minimis* exemption, several requirements must be met.

First, the value of the gift or favor must be “insubstantial.” The DOL now considers gifts and gratuities to be insubstantial if the aggregate value of all gifts and gratuities that an employer gives to a single union or union official in one fiscal year is \$250.00 or less. Payments from multiple employees to a union should be treated as originating from a single employer and totaled to determine whether the maximum aggregate value for the *de minimis* exemption has been met.

Second, the DOL has clarified that it will not seek to enforce the reporting requirement for frequent small gifts, such as coffee provided to union officials at bi-weekly meetings, as long as the aggregate value does not exceed \$250.00. In other words, gifts no longer need to be “sporadic or occasional” to fall within the *de minimis* exemption.

Third, the gift or gratuity must be “unrelated to the recipient’s status in a labor organization.” The test for this prong is “whether the employer ordinarily provides such consideration to individuals in similar circumstances who are not union officials.” It does not matter

that the union official would not be present to receive the payment absent his or her position with the union. For example, if an employer regularly provides coffee to people attending meetings at the employer’s place of business and the employer similarly provides coffee to union officials during a meeting held to negotiate a collective bargaining agreement, the coffee would be unrelated to the recipient’s union status and thus its value need not be reported on the Form LM-10.

Employers may exclude items that meet these requirements from their LM-10 disclosure. Examples of items that may fall within the *de minimis* exemption include beverages and food provided at a negotiations meetings, restaurant meals or small holiday gifts.

#### Gifts Given by Individual Employees

In the recent guidance, the DOL also clarified that employers need not report certain gifts given by individual employees to union officials. Such gifts need not be reported if (1) the employee purchased the gift with his or her personal funds; (2) the employee does not hold a key position with the employer, such as a management position; (3) the employee’s job responsibilities do not include generating or maintaining business relationships with unions; (4) the employee’s job responsibilities do not include engaging in labor relations activity for the employer; and (5) the employee was not acting, directly or indirectly, for the employer when giving the gift. Employers may exclude gifts meeting these requirements from their LM-10 report.

### Payments to Persuaders

Employers must also report any payments (including reimbursed expenses) made to individuals to cause them to “persuade” employees regarding their bargaining and representation rights. Persuader activities

include any acts performed with the object of persuading employees to exercise or not exercise the right to organize and bargain collectively, or to influence the manner in which employees exercise these rights. The following activities have been identified in case law as examples of persuader activities:

- directly arguing to employees the economic consequences of unionization;
- passing out anti-union propaganda;
- questioning employees as to union sympathies and activity;
- taking notes of expressions of employees at meetings;
- visiting employees' homes to persuade them to vote against the union; and
- making speeches to employees regarding unions.

Conversely, giving legal advice, representing an employer before a court or administrative agency, and engaging in collective bargaining on behalf of an employer are not persuader activities.

### Third-Party Persuaders

Employers must disclose any arrangements with and payments made to third party labor relations consultants or other persons who are hired specifically to persuade employees. Payments made to third parties hired to obtain information on employee or union activities in connection with a labor dispute must also be disclosed unless the information is obtained solely for use in a judicial, administrative or arbitral proceeding. This may include payments made to outside counsel if they directly perform persuader activities.

### Internal Persuaders

A less obvious type of transaction that employers must report is payment made to any of an employer's *own employees* (including a group or committee of employees) *for the purpose of* causing them

to persuade other employees with respect to their bargaining and representation rights. An employer must also report employee expenses that it reimburses for this purpose.

There are, however, two important exceptions to this disclosure requirement. First, an employer need not disclose these payments if other employees are told about these payments before or at the same time the payments are made. Because the goal of the LMRDA is to avoid hidden payments, an employer can avoid reporting this type of payment to the public on the Form LM-10 by telling employees that it is making the payment.

Second, an employer is not required to report "expenditures made to any regular officer, supervisor or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer." 29 U.S.C. § 433(e). Under this exception, an employer need not disclose the regular wages or salaries it pays to supervisors or employees who may perform persuader activities. On the other hand, payments that are above regular wages and made for the purpose of causing employees to perform persuader activities ordinarily must be disclosed. For example, if an employer pays money above regular wages to, or reimburses the expenses of, a group of employees who organized a meeting to persuade other employees to vote against a union, the employer must report that payment, unless the other employees are informed of the payment contemporaneously to, or in advance of, the meeting. In contrast, an employer would not have to report on a Form LM-10 that it paid an employee his or her regular wages to hold such a meeting.

To ensure full compliance with the LMRDA, employers should carefully review the statutory requirements and consult legal advice if they encounter any questionable payments. The grace period

and special enforcement policy in effect for the 2005 fiscal year will not last, so employers who are filing an initial LM-10 report should take advantage of this opportunity to meet the LMRDA's reporting requirements. All other employers who make reportable payments should, in turn, develop or update internal policies and procedures to ensure they comply with ongoing LM-10 reporting requirements as clarified by the new DOL guidance.

Text of the full twelve-page guidance on the Form LM-10, which consists of twenty-six questions and answers, appears at [http://dol.gov/esa/regs/compliance/olms/m10\\_faq.htm](http://dol.gov/esa/regs/compliance/olms/m10_faq.htm). A blank Form LM-10 and instructions for completing the report can be found at [http://www.dol.gov/esa/regs/compliance/olms/GPEA\\_Forms/blanklmforms.htm](http://www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/blanklmforms.htm).

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