



The Employment and Labor Practice of Sidley Austin Brown & Wood LLP

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We also provide comprehensive counseling to our clients on a wide variety of employment and labor issues.

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RECENTLY-RELEASED DOL GUIDANCE EXPANDS RESPONSIBILITY OF "EMPLOYERS" TO REPORT UNION PAYMENTS OR GIFTS

Recent guidance from the U.S. Department of Labor ("DOL") appears dramatically to expand the scope of certain reporting requirements under the Labor-Management Reporting and Disclosure Act, interpreting such reporting requirements to cover virtually all businesses and entities that provide services to unions - including accounting firms, law firms, investment firms, and consulting firms.

The Labor-Management Reporting and Disclosure Act ("LMDRA") sets forth various reporting requirements that apply to labor unions and employers. Among other things, the LMDRA requires union officers and employees to report if they (or their spouses or minor children) receive certain types of payments, gifts or other things of value from an employer. Likewise, the LMDRA requires "employers" to report payments, gifts or other financial arrangements given to or made with any union or any union officer, agent, shop steward, or other representative or union employee (collectively "Covered Persons"). The report submitted by union officers and employees is called a Form LM-30, and the report submitted by employers is called a Form LM-10.

Who is an "Employer" for Purposes of the LMDRA's LM-10 Reporting Requirement?

A recently-released question and answer guidance ("Q & A") issued by the DOL appears to significantly expand who will be deemed an "employer" for purposes of the Form LM-10 reporting requirement. This requirement has long been assumed to apply only when an employer made a gift or payment to a Covered Person who was associated with a union that represented employees of that employer. However, the DOL's recent Q & A suggests that every employer who makes a gift or payment to a Covered Person (subject to certain narrow exceptions, discussed below) must submit a Form LM-10 to the DOL, even if such gift or payment is made to a union or to a union officer representative that does not represent the employees of that

employer.

The Q & A states that the definition of "employer" for purposes of the Form LM-10 "includes every individual or entity that employs one or more employees" – an expansive definition that covers virtually all businesses. Thus, according to the Q & A, any business falling within this broad definition would have to report payments and gifts to any Covered Person, even if there is no relationship between the business and the applicable union. Under this broad definition, accounting firms, law firms, investment firms, consulting firms and other businesses who may market themselves or provide services to unions may have LM-10 reporting obligations – even if such unions do not represent the employees of these firms and businesses. Informal communications with the DOL confirm that the DOL supports this broad view of the definition of "employer."

What Must Be Reported?

Employers covered by the Form LM-10 reporting requirements must report, among other things, any payment or loan of money or other thing of value (including reimbursed expenses) to, or any such promise or agreement with, any Covered Person, subject to (a) a de minimis exclusion and (b) exclusions under Section 302(c) of the Taft-Hartley Act (both of which are discussed below). Therefore, as a general matter, reportable gifts may include many items that routinely are offered to clients or prospective clients of a business or firm, such as lunches, holiday party invitations, golf outings, tickets to sporting events, and employer-sponsored receptions.

(a) De Minimis Exclusion

Gifts that otherwise are reportable need not be reported if they (1) have a value of \$25 or less; (2) are sporadic or occasional; and (3) are given under circumstances unrelated to the recipient's status in a labor organization.

(b) Exclusions Under Section 302(c) of the Taft-Hartley Act

Section 203(c) of the Taft-Hartley Act, 29 U.S.C. § 186, sets forth additional types of gifts and/or payments that are not covered by the LM-10 reporting requirement. Among these exclusions are: (1) payments made to an employee as compensation for the employee's services as an employee (i.e., wages); (2) payments made in satisfaction of a judgment or decision of any court or arbitrator or in settlement of a complaint or grievance; (3) moneys deducted from wages in payment of union dues (subject to certain other conditions); (4) moneys paid into specified of trust funds, including those that provide medical care, pensions, life insurance, disability insurance, vacation benefits, and scholarships.

When Must Such Reports be Made?

The Form LM-10 must be filed within 90 days of the close of the employer's fiscal year. The DOL can seek reports (or seek to review records related to a previously-filed report) for up to the previous five years. Thus, employers must maintain records containing information and data necessary to verify the accuracy and completeness of such reports for five years.

Notably, the general rule with respect to the Form LM-30, the form filed by unions, similarly is that it be filed within 90 days of the close of a filer's fiscal year, and the DOL similarly may require reports for up to the previous five years. However, the DOL recently granted a one-time "amnesty" or "grace"

period through July 15, 2005 (which since has been extended to August 15, 2005) in which union officers and employees can file this year's report without being required to file past due forms from previous years. This "grace" period has not been extended to Form LM-10 filings, although informal communications with the DOL indicates that such a "grace" period for LM-10 reports is under consideration.

What are the Penalties for a Failure to Report?

The president and treasurer or corresponding principal officers of a reporting employer, who are required to sign the Form LM-10, are personally responsible for the form's filing and its accuracy. Under the LMDRA, these individuals are subject to criminal penalties for: (i) willfully failing to file a

report or keep required records; (ii) knowingly making a false statement or representation of material fact or knowingly failing to disclose a material fact in a report or other required document; and (iii) willfully making a false entry in, or withholding, concealing, or destroying documents required to be kept. Such acts are punishable by a fine of not more than \$100,000, imprisonment or not more than one year, or both.

The DOL also has authority to conduct investigations concerning compliance with the reporting requirements of the LMDRA, and the Secretary of Labor may file civil actions in federal courts to restrain violations and ensure compliance with such reporting requirements.

For further information, contact any member of the Sidley Austin Brown & Wood LLP Employment and Labor Group.

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