



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

Our **Employment and Labor** practice has decades of experience in litigating virtually all types of employment and traditional labor claims before federal and state courts and agencies, ranging from single-plaintiff cases to complex class actions.

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

**For further information on the
Employment and Labor group please call.**

**Brian J. Gold (312) 853-2064
Chicago Office**

**Jeffrey A. Berman (213) 896-6655
Los Angeles Office**

**Laura H. Allen (212) 839-5975
New York Office**

**Jeffrey S. Berlin (202) 736-8178
Washington, D.C. Office**

To receive future copies of the
Employment and Labor Alert via email,
please send your name, company or
firm name and email address to
Diane Olsen at dolsen@sidley.com

This **Employment and Labor Newsletter** has been prepared by Sidley Austin Brown & Wood LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

**POSSIBLE CHANGE TO 25% TEST UNDER
ERISA AND NEW DOL GUIDANCE
REGARDING REPORTING OF UNION
PAYMENTS OR GIFTS.**

On June 30, 2005, the House Committee on Education and Workforce approved the Pension Protection Act (H.R. 2830), which contains comprehensive pension reform (all 27 Republicans on the House Committee on Education and Workforce voted in support of the bill, while Committee Democrats simply voted "present"). One part of the Pension Protection Act directs the Department of Labor ("DOL") to issue regulations to change the standards for determining when an entity's assets are considered assets of plans that directly or indirectly invest in the entity and that are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"). If an entity's assets constitute such "plan assets," the entity's operations must comply with the fiduciary duty and prohibited transaction provisions of ERISA as well as the prohibited transaction provisions of Section 4975 of the Code. Section 4975 of the Code imposes an excise tax on certain persons who engage in a "prohibited transaction" and defines "prohibited transaction" substantially similarly to the definition contained in ERISA.

Current DOL regulations provide that an entity's assets will not be "plan assets" if less than 25% of each "class of equity interests" of the entity are held by "benefit plan investors." The term "benefit plan investors" is defined to include plans subject to ERISA or Section 4975 of the Code, as well as foreign plans and government plans that are not subject to ERISA or Section 4975 of the Code. The Pension Protection Act would require the DOL to increase the 25% threshold to 50% and to change the definition of "benefit plan investor" to include only plans subject to ERISA or Section 4975 of the Code, thus excluding foreign and governmental plans. In addition, the Pension Protection Act appears to require the new 50% test to be applied in the to all classes of equity interests in the aggregate, rather than to each "class of equity interests" separately. If enacted, this provision would have significant

impact on an entity's ability to accept investments by plans without having the entity's operations become subject to ERISA.

For questions regarding this potential change to ERISA, please contact Beth Dickstein, or anyone in the Employee Benefits group.

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

The 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.

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, asset management firms which 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."

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 certain exclusions. 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.

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.

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

The affiliated firms, Sidley Austin Brown & Wood LLP, a Delaware limited liability partnership, Sidley Austin Brown & Wood LLP, an Illinois limited liability partnership, Sidley Austin Brown & Wood, an English general partnership and Sidley Austin Brown & Wood, a New York general partnership, are referred to herein collectively as Sidley Austin Brown & Wood.



SIDLEY AUSTIN BROWN & WOOD LLP
AND AFFILIATED PARTNERSHIPS

BEIJING BRUSSELS CHICAGO DALLAS GENEVA HONG KONG LONDON LOS ANGELES NEW YORK
SAN FRANCISCO SHANGHAI SINGAPORE TOKYO WASHINGTON, D.C.

www.sidley.com