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DOL Guidance on Employer Payments and Expenses
Provides Important LM-10 Compliance Information for Employers and Service Providers

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Last month, the Department of Labor (DOL) issued long-awaited guidance for employers concerning LM-10 reporting and disclosure obligations under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401 *et seq*. The guidance clarifies a number of open enforcement issues and acknowledges – as the employer community made clear to the DOL over the past several months – that most employers were unaware of, and thus unprepared for, their LM-10 filing obligations. Among the significant changes, the new DOL guidance sets forth compliance requirements for first-time filers, including filing deadlines and years for which LM-10 reports must be filed. The guidance also outlines a new *de minimis* exception and seeks to clarify which financial transactions must be reported.

Employers Covered

To the extent the issue was unclear in prior guidance, the DOL has confirmed that LM-10 reporting obligations apply to virtually every private sector business or organization that has one or more employees, provided that the employer in any year engages in reportable conduct. All employers – including broker-dealers, investment advisors, pension consultants, investment banks, insurance companies, third-party administrators, record-keepers and other service providers to Taft-Hartley trusts and unions – are covered by the LMRDA and may have an LM-10 reporting obligation.

Initial Filing Requirements

1) Filing Deadline

New filers only must submit LM-10 reports for fiscal years beginning on or after January 1, 2005. These reports are due within the statutorily prescribed filing period, which is within 90 days of the close of the employer's fiscal year. Employers that submit initial reports on time will not be required to file for prior fiscal years or be penalized for having failed to file in prior years, absent extraordinary circumstances. The practical effect of this new guidance for most employers is that a timely filed *initial* report eliminates the filing requirement for prior reporting periods (i.e., reports covering the employer's fiscal years beginning before calendar year 2005).

To be timely, the *initial* report for an employer operating on a calendar-year basis must be filed within 90 days of December 31, 2005 (i.e., by March 31, 2006). For employers operating on other than a

calendar year, to be timely, the *initial* report must be filed within 90 days of the close of such fiscal year.

2) <u>President and Treasurer Need Not Sign Initial Reports</u>

The DOL has stated that the president and treasurer of the reporting employer need not sign an employer's *initial* LM-10 report, provided the employer previously was unaware of its LM-10 reporting obligation. Instead, the report may be signed by the key officials who collected information concerning reportable payments and prepared the LM-10 report. Similarly, employers that (1) did not institute procedures for tracking reportable payments for a fiscal year commencing before December 31, 2005 based on a belief that it did not have an LM-10 reporting obligation; (2) have acted diligently and in good faith to reconstruct records; and (3) submit a report disclosing payments discovered through its good-faith inquiry may eliminate the "under-penalty-of-perjury" attestation on Form LM-10 by substituting alternative language provided by the DOL. These accommodations apply only to the employer's *initial* report (i.e., reports for fiscal years commencing between January 1, 2005 and December 31, 2005). The company president and treasurer – or other corresponding principal officers – will be required to sign, subject to the "under-penalty-of-perjury" attestation, any LM-10 reports filed for later years.

De Minimis **Exception**

Under a new *de minimis* exception, payments need not be reported if (1) the total value of payments provided to any one union, union officer, union agent, or union employee is $250 or less in any fiscal year; and (2) the payment is unrelated to the recipient's status in a labor organization. Unlike the prior *de minimis* exception, which required *each* payment to be $25 or less, employers may now aggregate the value of payments provided to each individual or organization during the course of the employer's fiscal year. Once the total value of payments provided to any one union, union officer, union agent, or union employee in a fiscal year exceeds $250, *all* of the payments made to that organization or individual must be reported.

The prior *de minimis* exception also required payments to be "sporadic or occasional" which could render the exception inapplicable to employer-paid meetings or events that occurred more than four or five times per year. Under the new *de minimis* exception, the "sporadic or occasional" requirement has been dropped, so particular payments or expenses need not be reported – regardless of how often they occur – as long as the aggregate value in any fiscal year does not exceed $250.

The DOL also has clarified that the test for whether a payment is unrelated to union status depends on whether the employer ordinarily provides such payments to individuals in similar circumstances who are not union officials. The DOL's guidance indicates that meals routinely provided by an employer to all of its clients (union affiliated or not) during the course of day-long meetings would be unrelated to union status. Similarly, if a service provider to a Taft-Hartley pension or welfare plan provides meals to both union and management trustees, and these types of meals ordinarily are offered to the service provider's nonunion-affiliated clients under like circumstances, the meals would be viewed as unrelated to the union officials' status. Both elements of the *de minimis* exception must be met, however, to make a payment nonreportable.

LM-10 Reportable Transactions

The new DOL guidance seeks to clarify the financial transactions that are reportable on the LM-10.

1) Reportable Payments

The DOL indicates that the following financial transactions may be reportable, at least if the *de minimis* or other reporting exceptions do not apply:

- Business development and customer relations expenditures (including meals, entertainment, travel and lodging) made by an employer in connection with a customer-supplier relationship (e.g., a union purchasing products or services from an employer).
- Business development and client relations expenditures made by an employer acting in the capacity of a financial service provider to a union or union official.
- Payments by broker-dealers, investment advisors, investment companies and investment banks to union officials and union-appointed trustees of a pension or welfare fund.
- Business development and client relations expenditures by banks, credit unions, insurance companies or other credit institutions (exception for financial institutions applies only to payments or loans made in the regular course of business, at arm's length, on neutral terms and without regard to the recipient's status as a union official).
- Payments to union officers for serving as members of corporate board of directors (payments for fiscal years commencing on or before December 31, 2005, need not, however, be reported).

2) Nonreportable Payments

The DOL indicates that the following financial transactions generally are not reportable:

- Payments made by trusts, such as pension and welfare funds, pending the completion of the DOL's Form LM-30 rulemaking process.
- Gifts to a union official purchased by an employee with the employee's personal funds, provided the employee (1) does not hold a key position with the employer; (2) is not responsible for generating or maintaining business relationships with unions or trusts affiliated with a union; (3) is not responsible for labor relations activities; and (4) is not acting directly or indirectly for the employer.
- Payments from a financial institution to a client who is an officer of a union with respect to his/her personal investments/accounts.
- Payments paid by an employer that are reimbursed by another reporting employer.
- Donations to Section 501(c)(3) tax exempt organizations at the request of a labor organization or union official.

Calculating Value of Meals and Other Events Provided to a Union Official

If the actual cost of noncash benefits provided to a specific union or union official can reasonably be determined, the employer should report that amount with respect to such union or official. If not, the DOL indicates that one "reasonable" approach would be to add the costs of an entire meal or event,

divide the total cost by the number of attendees, and allocate and report the average cost per person to each attending union official.

Importance of Compliance, Possible Section 302 Criminal Violations and Implications Under Other Related Statutes

The DOL's new LM-10 guidance does not eliminate the risk of criminal prosecution for noncompliance, notwithstanding the greater leniency afforded by an expanded *de minimis* exception and the elimination of the reporting requirements for fiscal years beginning before 2005. The guidance also does not answer the question of whether or when conduct reported in an LM-10 report may expose an employer to Labor Management Relations Act (LMRA) Section 302 prosecution. Among other things, Section 302 makes it unlawful for employers to provide payments or any "thing of value" to union officers or union employees, subject to certain exceptions listed in Section 302(c). The extent to which Section 302's prohibitions apply to those employers whose employees are not represented or being organized by a union is, however, unclear. Willful violations of Section 302 – regardless of whether they are reported – can be criminal offenses punishable by fines and/or imprisonment.

The DOL states that "although some payments from employers to unions and union officials may constitute a crime, not all such payments do." Even more ominously, the new guidance states: "When concluding that a payment is reportable, the guidance does not interpret the provisions of [LMRA] section 302(c), and conclusions reached by the DOL regarding payments of the kind referred to in section 302(c) would not bind the Department of Justice in carrying out its criminal enforcement responsibilities." As was the case before, it appears that employers (and unions) must decide for themselves what types of payments or expenses may result in possible criminal prosecution and sanctions under LMRA Section 302.

Furthermore, the reporting of these types of payments to trustees and other fiduciaries of employee benefit plans may have consequences under the fiduciary provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the prohibited transaction rules of the Internal Revenue Code of 1986. These payments also may have implications under Title 18 U.S.C. § 1954, which prohibits agents and employees of an organization that provides Taft-Hartley benefit plan services from giving kickbacks or other things of value to agents and employees of an ERISA benefit plan with an intent to influence actions, decisions or duties relating to a plan.

Future Policies and Procedures

Although the DOL has relaxed certain requirements for *initial* LM-10 reports, it is clear that employers will be required to comply fully with LM-10 reporting requirements in subsequent filing years. For example, future reports must be signed by the president and treasurer and the attestation as to the report's accuracy must be made under penalty of perjury. As a result, employers must begin developing policies and procedures to ensure compliance with their ongoing LM-10 reporting obligations. Relevant considerations include:

- The company's policy with respect to providing meals, gifts or other gratuities to unions and/or labor officials. Many employers are considering whether such payments should be limited or even discontinued all together.
- Internal approvals and/or reporting protocols for reportable payments.

- Internal recordkeeping procedures to identify, track and maintain information concerning all reportable payments.

Future Morgan Lewis Webcast Presentations

Morgan Lewis will host additional webcast presentations on January 4 and 5, 2006, and January 10 and 11, 2006, to discuss the LM-10 guidance and practical considerations, including policies and procedures, for employers going forward. More information concerning these webcasts will be forthcoming. In the meantime, if you would like further information concerning the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Philip A. Miscimarra	312.324.1165	pmiscimarra@morganlewis.com

Los Angeles

Peter J. Hurtgen	213.612.7400 (LA)	phurtgen@morganlewis.com
	949.399.7130 (IR)	
	202.739.5160 (WA)	

New York

Michael A. Curley	212.309.6711	mcurley@morganlewis.com

Philadelphia

Doreen S. Davis	215.963.5376	dsdavis@morganlewis.com
I. Lee Falk	215.963.5616	ilfalk@morganlewis.com
Steven D. Spencer	215.963.5714	sspencer@morganlewis.com

Washington, D.C.

Charles I. Cohen	202.739.5710	ccohen@morganlewis.com
John F. Ring	202.739.5096	jring@morganlewis.com
Steven W. Stone	202.739.5453	sstone@morganlewis.com

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