traps for the UNWARY

LM-10 reporting requirements

Your company is in the middle of contentious negotiations for a new collective bargaining agreement and your chief negotiator decides the only way to break the impasse is to have a one-on-one meeting with the union's lead negotiator, a representative of the international union, over dinner and drinks. Your chief negotiator picks up the tab, and you learn of this dinner only after it has happened. What do you do? What if your labor relations personnel want to serve company-supplied coffee and doughnuts at monthly meetings between management and union officials, both as a good faith gesture, and because it would be awkward to force the union officials to pay $1.23 for the coffee and doughnut? Would you have to report the cost of that food to the federal government? Are criminal charges a possibility if you don't tell your labor relations personnel to charge the union officials?

Your company wants to give year-end bonuses to its employees, including those who serve as shop stewards. Can the company pay bonuses to all employees, including the union representatives? Does that result in federal reporting obligations?

The local union president is retiring and the vice president asks your company to "buy a table" at his farewell dinner for $1,000. Would your company be committing a crime if it purchased the table?

One of your employees who serves as the shop steward asks for an office at the plant, out of which she will prepare grievances, gather evidence in support of unfair labor practice charges, and perform other representational duties. Can you provide her with a spare office? Would the provision of that office space trigger an obligation to calculate the value of the space and an obligation to report the arrangement to the Department of Labor? Could someone really go to jail over office space?

By Laura H. Huggett, Kris D. Meade, and Rebecca L. Springer

These are just a few examples of the questions facing corporate labor counsel in the wake of guidance recently issued by the Office of Labor Management Standards (OLMS), the unit within the Department of Labor (DOL) that has responsibility for enforcing the Labor-Management Reporting and Disclosure Act (LMRDA). After decades of little enforcement activity, OLMS issued new guidance in late 2005, regarding employer obligations to complete and submit "LM-10" reports to the DOL. This guidance, in the form of Frequently Asked Questions (DOL FAQs), may signal a new period of regulatory attention to employer payments of "things of value" to union representatives.[1] The stakes are particularly high with respect to this reporting obligation because payments that trigger LM-10 reporting obligations would likely also subject the company—and individuals within the company—to criminal liability. As a result, employers and company officials who deal with union representatives face substantial exposure if they do not know how to approach situations such as those outlined above.

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The Law and the DOL Guidance

Federal law makes it a crime for a company or its supervisors and managers to provide certain payments or things of value to a union, or to individuals who serve as employees or officers of a union that represents or seeks to represent its employees, 29 U.S.C. § 186 (Section 302). Further, every company is required to report any such payments—via an LM-10 Report—to the DOL on an annual basis. The president and treasurer of the company must certify the accuracy of the LM-10 Report under penalty of perjury. It is a crime to knowingly make false statements or to fail to report any such payments.

Section 302

Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186, generally prohibits a company from giving "any money or other thing of value" to officers or employees of a union that represents the company's employees. This prohibition, designed to criminalize bribery and other forms of corruption in the union-employer relationship, has existed since the 1940s. Excepted from this prohibition are the following types of payments, delineated in Section 302(c) of the LMRA:

- money or benefits paid to an individual as "compensation for, or by reason of," that person's service as an employee;
- money or other thing of value paid in satisfaction of a court or administrative judgment or in settlement of a dispute;
- money or other thing of value paid in connection with the sale or purchase of an article or commodity at the prevailing market price in the regular course of business;
- money deducted from wages of employees for payment of union dues; and
- money paid to certain health and welfare trust funds or labor management committees. In addition, the LMRDA specifically states that employers or persons will not have a reporting obligation "by reason of his giving or agreeing to give advice," or "agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer."

Section 302 also prohibits an employer from giving money or other things of value to an employee or group for the purpose of causing direct or indirect influence over other employees regarding their right to organize and bargain collectively. *Violating Section 302 is a federal crime and can subject your company and its top executives to fines and/or imprisonment.*

The LM-10 Reporting Requirement

If your company makes any of the following types of payments, it has an obligation to report the payments to the federal government pursuant to Section 203(a)(1) of the LMRDA, 29 U.S.C. § 433:

- "Any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefore" to "any labor organization, or officer, agent, shop steward, or other representative of a labor organization or employee of any labor organization" that represents or is actively seeking to represent your company's employees.
- Any expenditure for the purpose of interfering with, restraining or coercing employees in the right to organize and collectively bargain.
- Any expenditure to gather information concerning the activities of employees or of a labor organization in connection with a labor dispute in which your company is involved.

Whether a **payment** or **action** must be reported on the LM-10, and whether it is a criminal offense under **Section 302,** often turns on whether the payment is made to a **non-employee** who is a union official or employee of the union, or whether the payment is made to a **company employee** who is also serving as a union officer or representative, such as a union steward or a member of the union **bargaining committee.**

- Any agreement or arrangement with a labor relations consultant or other person or organization for the purpose of persuading employees to exercise or not exercise their right to organize and collectively bargain, and any resulting expenditure (commonly referred to as "persuader" activities).
- Any agreement or arrangement with a labor relations consultant or other person or organization to furnish you information concerning activities of employees, or of a labor organization in connection with a labor dispute in which your company is involved, and any resulting expenditure.

If your company has a reporting obligation, it must file the LM-10 Report within 90 days of the end of your company's fiscal year. *Your company's president and treasurer must attest to the report's accuracy under penalty of perjury and can be held personally liable for its contents.*

The DOL's "Frequently Asked Questions"- LM-10

In November 2005, the OLMS published guidance for employers regarding their LM-10 reporting obligations in the form of Frequently Asked Questions. In March 2006, the DOL provided updated FAQs in response to numerous inquiries it received from employers struggling to interpret the November 2005 FAQs. While the guidance does not impose new legal obligations, the FAQs effectively highlight the traps for unwary employers and foretell a new era of heightened enforcement activity.

Perhaps most importantly, the DOL's LM-10 initiative highlights the "Catch-22" situation for employers: on the one hand, the DOL is authorized to bring a civil action to compel the filing of the LM-10, and companies can face criminal penalties for willfully failing to file the report; on the other hand, reporting certain activity required by the LM-10 Form may be tantamount to an admission of criminal conduct under Section 302.

In-house counsel can take little comfort from two disclaimers contained in the DOL's FAQs. First, that "[w]illful violations of section 302 . . . are subject to criminal prosecution *only* by the Department of Justice, not the Department of Labor," and second, that "[w]hen concluding that a payment is reportable, the guidance does not interpret the provisions of Section 302(c), and conclusions reached by [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."[2] In other words, all bets are off concerning potential criminal prosecution in the event an employer reports payments on the LM-10 Report that may also be violative of Section 302.

Payments to Nonemployee Union Officials

Whether a payment or action must be reported on the LM-10, and whether it is a criminal offense under Section 302, often turns on whether the payment is made to a non-employee who is a union official or employee of the union, or whether the payment is made to a company employee who is also serving as a union officer or representative, such as a union steward or a member of the union bargaining committee. The former are almost always reportable, and most likely illegal. The latter may or may not be reportable or illegal, depending upon the circumstances.

First, a look at what we know to be absolutely prohibited—payments of money or things of value to non-employee union officials. As a general rule, the company—including its supervisors and managers—may not provide money or a thing of value to a union, a paid official of a union, or an employee of a union. This prohibition would clearly extend to the following activities, if the union officer is not an employee of the employer:

- Taking a union officer to dinner and paying for his or her meal,
- Giving a union officer tickets to a sporting event, and
- Paying for the hotel room for a union officer to attend a company convention or a collective bargaining session.

What about the table at the farewell dinner, mentioned in the introduction? If the company bought seats for the dinner for more than the fair market value of the dinner, it would be committing a federal crime and it would be required to report

the crime on its LM-10 Report, subject to the *de minimis* exception discussed below. What if your bargaining team buys lunch, for everyone engaged in negotiations, including the union officials who are not employees of your company? While buying a $5.00 sandwich in the middle of collective bargaining may seem innocuous, this is a reportable expense under the LM-10 guidelines (subject to the *de minimis* threshold), and it is a "thing of value" prohibited under Section 302. The best course of action is that the company should either not pay for the lunch, or it should determine the per-person cost for the lunch and charge the union the cost for each union official. Another alternative is to simply break for lunch if it is feasible to do so.

What if the employer rents a conference room at a hotel in which to hold the negotiations? If the employer does not obtain reimbursement from the union for part of that cost, has it broken the law? Does the company have to report that expenditure on the LM-10? These are tougher questions. In response to an FAQ about an employer-hosted educational conference attended by union officials, the DOL states that an employer "must calculate the value of the conference to each union official . . . the cost to the employer of refreshments, meals, travel, and lodging must be included in the calculation. The costs of the conference rooms, and audio-visual equipment need not be included."[3] Thus, the DOL guidance suggests that paying for the conference room does not trigger a reporting obligation. Nonetheless, the room is a thing of value, and by providing it at no cost to the union, the company has arguably violated Section 302. Thus, best practice is to split the costs of all expenses associated with collective bargaining negotiations.

Does this mean you must report every cup of coffee you buy for a union officer who is not an employee? Surprisingly, the answer is now "no," but the DOL believes you should track each such purchase. In its FAQs, the DOL recognizes a narrow *de minimis* exception to the reporting requirements for such minor expenditures—an exception that does not exist in Section 302 or in the LMRDA. According to the FAQs, employers need not 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." The guidance provides that gifts and gratuities with an aggregate value of $250 or less, *over the course of the entire reporting period*, will be considered insubstantial.

Of course, a number of serious questions flow from the *de minimis* exception articulated by the DOL. First, what does it mean for the payment to be "unrelated to the recipient's union status?" The test is whether the employer ordinarily provides such consideration to individuals in similar circumstances who are not union officials. If the company wants to provide lunch to a union official, the question becomes whether the company routinely provides lunch to clients or other groups in similar circumstances. Easy enough to apply, unless there is more to the *de minimis* exception. Which there is, including the aggregation principle: expenses for the entire year must be added together. Thus, if you take a union official out to dinner once and the cost is $100 per person, you are within the *de minimis* exemption. However, if you take him or her out for a comparable meal two more times during the fiscal year, you have now exceeded the limit and must report all the meals on the company's LM-10 filing. So, with the *de minimis* exception comes a need to establish a tracking mechanism.

Of course, you and your company are not out of the thicket just yet, because Section 302 continues to lurk in the background. While the *de minimis* exception may excuse the company's LM-10 reporting obligation, **there is no de minimis exception to the prohibitions of Section 302.** Thus, even though you may not have to report it on the LM-10, any payment of any value to a union official —including the one-time $100 dinner or even a one-time $10 dinner—could subject your company, and the person making the payment, to criminal and civil liability. As such, the best advice is to ignore the *de minimis* exception and maintain a policy prohibiting supervisors and managers from paying for any meals or providing anything else of value to union officers who are not company employees.

Payments to Employee-Union Officers

The line is clear with respect to union officials or paid

ACC Extras on… LM-10 Reporting Requirements

Available via ACC Online:

- Labor Agreement (Peru): *www.acc.com/resource/v6480*

Also available online:

- Form LM-10—Employer Reports FAQs: *www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm*
- LM-10 Form: *www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/lm-10p.pdf*
- Instructions for LM-10 Form: *www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/LM-1_instructions.pdf*

Returning to **another question raised** in the introduction—**whether** a company can provide a **shop steward or union committeeman** with an office in which to handle **representational duties.**

employees of the union—providing them something of value violates Section 302, and, in most instances, must be reported on the LM-10 form. But what about your company's employees who are also union officers? There, the issues become a bit more complicated. Section 302(c) creates an exception for payments or things of value provided to an employee as "compensation for, or by reason of, his service as an employee." What does this mean?

First, as a general rule, your company can provide money or a thing of value to an employee who is also a union representative if the money or thing of value is also provided to other company employees who are not union representatives. In answer to one of the questions raised in the introduction, the company can pay a bonus to employees who are also union officers, provided they are paying bonuses based upon the same criteria to other employees as well. And because this bonus falls within the exceptions delineated by Section 302(c), the company need not report it on an LM-10.

Second, your company can also provide money or a thing of value to an employee who also serves as a union representative if the purpose of such expense is related to the resolution of grievances or other administration of the collective bargaining agreement. For example, under current law, the company may pay the salary of an employee who also serves as a union steward or committeeman, and who either takes time off from work under a no-docking clause to handle grievances, or who takes a full-time leave of absence to serve as a union officer. These payments are generally considered to be compensation for, or "by reason of," his service as an employee of the company, one of the recognized exceptions under 302(c).[4]

Returning to another question raised in the introduction—whether a company can provide a shop steward or union committeeman with an office in which to handle representational duties. Can the company give him a phone? A computer? Internet access? These are harder questions to answer, and the answer provided by the DOL is far from clear. One of the DOL FAQs raises directly the question, "Is an employer required to file a Form LM-10 if the employer provides office space dedicated for use by the union that represents its employees?" The response states that "assuming the office space is provided without cost to the union, the value of the office space is reportable." This FAQ, however, does not indicate whether the office space is being used by non-employee union officials and/or union employees, or by an employee of the company who is on a leave of absence (either full-time or under a no-docking arrangement) to serve as a union officer.

Certainly, providing an office to a non-employee union official or union employee would violate 302 and would be reportable. But is providing an office to your employee shop steward more analogous to paying his salary while he is on full-time leave to serve as a union officer? Case law suggests that in most instances, such office space, if provided to an employee to perform his representational duties, would likely be permissible. Indeed, some of the Section 302 case law suggests it is imperative that the employee-union representative perform his or her contract administration duties on the employer's site to satisfy the "employee" exception of Section 302(c).[5] Thus, such expenditure would not violate Section 302 and would not be reportable on the LM-10.[6]

This is not a settled issue in the law, however, and companies should recognize the risk they are assuming when entering into such arrangements. Certainly, if the company were to provide the employee extravagant benefits, such as a new car or significantly more expensive office furniture than is provided to others, that could call into question whether the benefit is truly being provided "by reason of" the employee's service or for some other more nefarious purpose. By contrast, if the employer permits employees to make use of empty office space for other reasons, such as to gather food for a food drive or as a staging area for a blood drive, then providing such space for use by employee representatives of the union would be more defensible.

Persuader Activity

As noted above, the LM-10 reporting requirements also cover any agreements with and/or expenditures paid to a labor relations consultant or other independent contractor who is hired to:

Best Practices for Addressing LM-10 Reporting Obligations

Now that you know that your president and treasurer may have an obligation to file an LM-10 report with the DOL, and that the company may face criminal and civil liability if it fails to meet its reporting obligations and/or engages in conduct that is prohibited by Section 302, what do you do about it? The following are some best practices to ensure compliance with the LMRDA and Section 302.

Inform Senior Management of the Obligations

The first step is to ensure that senior management—the president/CEO, general counsel, and treasurer, at a minimum—understand the LM-10 reporting obligation and the related Section 302 concerns. Since it is the obligation of the president and treasurer to file accurate reports, it is critical that they understand the breadth of the reporting obligation and the timing of the reports. The goal, of course, should be to ensure that the company has no reportable activity in any year.

Survey Appropriate Workforce to Identify Reportable Activities

Second, you should undertake a legally-privileged due diligence process to determine whether your company has made any payments that should be reported. You should start with a survey instrument distributed to the labor relations and management personnel who are most likely to interact with unions and union representatives. The survey instrument should explain clearly the three types of conduct that may be reportable: 1) payments or provision of things of value to non-employee union officials; 2) payments or provision of things of value to employee union representatives; and 3) payments for, or agreements regarding, "persuader" activities. You should provide examples of the types of transactions that are, and are not, reportable under each of the three types of conduct. Identify a point of contact who employees can call with any questions regarding activities that must be reported; that person should be a lawyer or someone acting at the direction of counsel. Establish a return date for the survey sufficiently in advance of the filing deadline (90 days after the end of the company's fiscal year) to allow those responsible for gathering and assessing the responses to follow up with questions or further investigation if necessary. To the extent employees identify reportable payments to unions or union officials, consider the extent to which the company can seek reimbursement for those expenses within the reporting period.

Review the Union's Filings

Unions and union officials have mirror obligations to report their receipt of money, or a thing of value, from an employer whose employees the union represents. Any such payments are to be identified on "LM-30 Reports" filed with the DOL on an annual basis. Thus, your due diligence should include review of the LM-30 Report, if any, filed by the union(s) and union officer(s) with which the company deals, to determine whether the union or union official has reported any payments from the company or company officials.

Provide Assurance to Those with Signing Obligations

Once the survey instruments have been returned and all potential reportable activity has been properly identified, compile the information necessary to assure to the president and treasurer that appropriate due diligence has been conducted. Detail the process undertaken, the results of the investigation, and further steps taken, if any.

Conduct Training

The best way to avoid liability is to ensure that employees have a solid understanding of what conduct is prohibited and what must be reported on the LM-10 Form. Conduct training sessions on a regular basis for any employees that are likely to be in a position to make or authorize reportable expenditures. The training should also help employees identify situations that may give rise to 302 violations and/or LM-10 reporting obligations. To reach that goal, you must explain the prohibitions of Section 302 and the LM-10 reporting obligations in practical and concrete terms. Provide examples of common situations the employees are likely to encounter. Draw clear lines where possible, and emphasize the importance of contacting an appropriate person for authorization before taking any action that could give rise to liability. Refresher training should be scheduled regularly to ensure that existing and new employees alike understand the rules of the road.

Establish Preauthorization Process for Expenditures

Finally, the company should establish a pre-approval process for any payments or other things of value that an employee wants to provide to a union official, an employee union representative, or a labor consultant, that may give rise to 302 liability and/or LM-10 reporting obligations. The individual(s) designated to provide authorization should review each proposed payment or action in advance to determine whether it falls into a recognized exception to Section 302, and should seek counsel in making those determinations. This approval process should be explained in detail in a written procedure provided to each employee who is likely to confront a situation that may give rise to reportable conduct.

> If you **change the facts** such that your company is paying to obtain information regarding the **union's activities** against your company, such payments are reportable unless the information is being obtained solely for use in a **judicial, administrative, or arbitral proceeding.**

- persuade employees to exercise or not exercise their right to organize and bargain collectively; or
- (2) provide the company with information concerning the activities of employees or a labor union in connection with a labor dispute involving the company. Such payments do not cause employers as much heartburn as payments to union officials because they are not, in most instances, unlawful under Section 302. But they are reportable on the LM-10.

While the rules regarding "persuader" activity are not new, some ambiguity exists even in this area. Consider two examples. In example one, a union is engaged in an organizing campaign at one of your establishments. You hire a management lawyer/consultant to come speak to the employees and tell them the company's views on unionization. Unlawful? No. Reportable? Yes. What if the management lawyer is hired to provide your management team with advice on how to respond to an organizing campaign, and the lawyer drafts a "24-hour speech" to be delivered by the plant manager to the employees? This agreement, and resulting payment to the consultant, is *not* reportable because the LMRDA provides an exception for expenditures or agreements to hire consultants to provide "advice" to an employer, 29 U.S.C. § 433(c). Because the company retains the discretion to accept or reject the advice from the consultant, and because the consultant does not meet directly with the employees, the agreement with the consultant and the payment to him or her is not reportable.

In example two, a union is engaged in an aggressive organizing campaign against your company and is publicizing false information about your business practices in an effort to put pressure on your company. Your labor relations personnel hire a private investigations firm to obtain information about the union and its activities involving other businesses. Unlawful? No, provided the firm gathers the information by lawful means. Reportable? Probably not, because even though you are paying to "obtain information concerning the activities" of the union, those activities involve another employer and are at least arguably not "activities . . . in connection with a labor dispute involving *your* company." If you change the facts such that your company is paying to obtain information regarding the union's activities against *your company*, such payments are reportable unless the information is being obtained solely for use in a judicial, administrative, or arbitral proceeding.

Finally, employers are also required to report payments to any of its employees where the purpose of the payment is to persuade other employees with respect to bargaining and representation rights, *unless* the company tells other employees about these payments before or when the payment is made. However, payments need not be reported if the employee—such as a labor relations manager—is engaging in conduct within the normal scope of his or her job.[7]

Have a comment on this article? Email editorinchief@acc.com.

Notes

1. A copy of the Department of Labor's LM-10 Frequently Asked Questions can be found at *www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm*
2. DOL FAQ #87.
3. See DOL FAQ #55.
4. *See NLRB v. BASF Wyandotte Corp*., 798 F.2d 849 (5th Cir. 1986); *Caterpillar, Inc. v. UAW*, 107 F.3d 1052 (3rd Cir. 1997); LMRDA Interpretative Manual § 253.321.
5. *Intl. Ass'n of Machinists v. BF Goodrich Aerospace*, 387 F.3d 1046 (9th Cir. 2004).
6. See *NLRB v. BASF Wyandotte Corp*., 798 F.2d 849 (5th Cir. 1986); see also *BF Goodrich Aerospace*, *infra*.
7. See LMRDA Interpretative Manual § 254.100