

INSIDE

LM-10 FORMS:

THE REQUIREMENTS AND COMPLIANCE RECOMMENDATIONS . . .	1
Introduction:	1
PART I: THE REPORTING OBLIGATIONS . . .	1
What is a Reportable Activity?	1
The De Minimis Rule	2
Filing Requirements and "Grace Period" . . .	2
Tracking Procedures and Maintaining Records	2
What Are Some Exceptions?	2
PART II: COMPLIANCE	2
Avoiding Covered Transactions	2
The De Minimis Exception	2
The Need to Adopt New Company Policies . . .	3
CHANGING POLICIES AT THE NLRB	3
FMLA: TIGHTENING THE DEFINITION OF "SERIOUS HEALTH CONDITION" . . .	4

IMPORTANT NOTE: The LM-10 Article that follows should be reviewed by all unionized companies and any company that might be involved in a union-organizing campaign.

LM-10 FORMS: THE REQUIREMENTS AND COMPLIANCE RECOMMENDATIONS

Introduction:

Since 1959, the Labor Management Relations Act has prohibited employers from paying or giving any "money or thing of value" to a "labor organization, or any officer or employee thereof." Federal law also requires that employers file reports with the Department of Labor (DOL) listing and itemizing all such payments.

In practice, this filing requirement was largely ignored. Recently, the Department of Labor has issued several documents which state clearly the DOL's intention to begin enforcing this law in 2006 for the fiscal year now in effect. A copy of the DOL form that is to be used to report covered transactions – the LM-10 Form – is enclosed with this bulletin. The effect of this change in policy is to require that employers whose payments to union officials of "money" or "things of value" exceed the "de minimis" limit must file LM-10 Forms annually which itemize all such payments of gifts.

The LM-10 enforcement requirements are causing untold problems for many companies and have triggered widespread complaints. One complaint is that because a payment of "money" or a "thing of value" is unlawful, reporting those payments might force

companies to report transactions that are themselves illegal. Another problem is that reports of covered transactions must be filed by both companies and union officials. This poses the obvious risk that the reporting of a transaction by one party will expose the other party's failure to report that transaction.

This article is in two parts. The first explains the reporting requirements. The second discusses what companies can and might do to comply and possibly avoid any reporting obligations. As explained below, in our view, the best way to manage the issues posed by these regulations is to avoid the kinds of transactions that must be reported.

PART I: THE REPORTING OBLIGATIONS

What is a Reportable Activity?

Page 2 of the LM-10 Form lists the six types of reportable activity. Note that reportable activities include more than giving money or things of value to a union or union official (which, for example, would include paying for a meal, a train ride, a hotel room, or use of a vacation home). Covered activities also include: payments made to obtain information about a union in a labor dispute (8(d) on the LM-10 Form) or to a labor consultant or attorney to provide such information (8(f)). Thus, if an employer pays to obtain information about a union which is organizing its employees or pays an attorney or consultant to obtain that information, those payments are "reportable activities." Similarly, 8(e) of LM-10 Form requires reporting of payments made to attorneys or consultants for the purpose of "persuading employees" about "the right to organize or bargain collectively." Thus, if your attorney

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writes a letter that you distribute to employees in a union organizing campaign, your payment for that letter must be reported. If your attorney or consultant is assisting in communicating with your employees, be sure to discuss with him or her the LM-10 requirements and how best to manage them.

The *De Minimis* Rule

In order to avoid reporting small transactions, the DOL has established a *de minimis* rule which, under defined circumstances, exempts from reporting "insubstantial offers of hospitality" like coffee and donuts at meetings, restaurant meals or holiday gifts. A transaction is exempt from reporting under this rule if two conditions are met: (1) the amounts are "insubstantial," which is defined as \$250 or less; and (2) the "gift is unrelated to the recipient's status in a labor organization." Whether gifts are "insubstantial" is determined based on total gifts from the employer to a union in a fiscal year.

The second requirement is more difficult to apply. According to DOL, "the test is whether the employer ordinarily provides such consideration to individuals in similar circumstances who are not union officials." For example, according to DOL, if "an employer routinely provides meals to all its clients (union-affiliated or not) during the course of day-long meetings, the meal would be unrelated to union status" and, therefore, would not have to be reported. In other words, to avoid the reporting requirement, the company would have to show that the meal which it paid for was "ordinarily" provided to others under similar circumstances.

Filing Requirements and "Grace Period"

LM-10 Forms must be filed no later than 90 days after the end of the employer's fiscal year. DOL requires that the form be certified by the President and Treasurer of the reporting employer who, according to DOL, "are personally responsible for its filing and accuracy" and subject to "criminal penalties for willful failure to file a required report and/or false reporting."

Recognizing that few companies have been reporting covered payments in the past, DOL has established a "grace period" so that no reporting will be required for fiscal years that commenced before January 1, 2005. LM-10 Forms must be filed only for fiscal years beginning after that date. However, for the fiscal year now in effect, *i.e.*, the first filing for most companies, the LM-10 Form need not be signed by the President and Treasurer but can be signed without the "penalty of perjury" attestation by a company official who acts diligently and in good faith to identify the covered transactions and prepares a report listing them. All reports filed for fiscal years which begin after January 1, 2006 must be attested to under penalty of perjury by the employer's President and Treasurer.

Tracking Procedures and Maintaining Records

Since the President and Treasurer of the employer will likely not have personal knowledge of the covered transactions but are required to certify their accuracy, employers will have to establish company-wide tracking procedures to insure that all covered transactions are reported. Records must be maintained for the purpose of verifying the accuracy and completeness of the reports.

What Are Some Exceptions?

The primary exemption is for payments that meet the *de minimis* requirements (see above).

Other payments that are exempt from reporting include: (1) money deducted from paychecks and paid to the union for union dues; (2) payments to jointly-trusted benefit plans; (3) payments made pursuant to court order or arbitration award or as part of a settlement of a claim; and (4) wage payments to employees for time during the work day when the employee conducts union business if done pursuant to contract or past practice.

PART II: COMPLIANCE

Avoiding Covered Transactions

As noted above, reporting obligations arise only if an employer engages in covered transactions. Avoiding such transactions has two principal benefits. First, because the line between a lawful and unlawful gift is ambiguous, refraining from making the gift eliminates the risk of illegality. Second, it limits and can eliminate the obligation of reporting.

You may well find that avoiding a covered transaction – such as paying for a union official's meal, or sending a holiday present or a wedding gift to a union official – does not encounter resistance from the union official who received such gifts in the past. This is because, as a result of the DOL's new enforcement policies, union officials must themselves report gifts of money or "things of value" received from employers. Unlike the employer's obligation, which falls on the company, the reports on the union side must be filed by the official who received the gift, not by the union as a whole. For this reason, most unions have instructed their officials not to accept gifts, and you may already have found that union officials are now insisting on paying for their own meals. For this reason, avoiding such gifts will probably not pose significant relationship problems.

The *De Minimis* Exception

The *de minimis* exception (see above) allows an employer to make some gifts without the obligation to report. Keep in mind, however, that this is an exception for the company as a whole, not for individuals within the company. Therefore, if one company representative takes union official A to dinner (cost - \$100), there is no reporting obligation. But if other representatives of the same company take two other union officials to dinner (cost \$100/meal) during the same fiscal year, the *de minimis* exception would be unavailable because the total gifts from the company have exceeded \$250.

The Need to Adopt New Company Policies

Insuring compliance with the new rules will require that all company personnel who might make such payments receive training about the new rules and report covered transactions if made.

Companies should consider adopting explicit policies which state clearly what kinds of payments, if any, will be permitted. The policy might also require approval before any gift is made to a union or union official, and it should establish tracking policies which require that any payment or gift made by company personnel be reported with appropriate receipts to a central coordinator. Such tracking and centralized reporting is necessary because the LM-10 Form is filed by the employer, not by the individuals who make the gifts. Without a central record of all gifts by the employer, it will be very difficult to insure that the LM-10 Form is complete and accurate, a requirement that becomes particularly important because the company President and CFO must personally certify the accuracy of the LM-10 report.

If you have questions about the LM-10 requirements or need assistance in drafting an LM-10 policy, please call the labor/employment attorney in our firm that you work with or Jane Jacobs.

CHANGING POLICIES AT THE NLRB

We are now beginning to see changes in labor law because of the shift to a Republican-controlled NLRB. While these changes clearly favor management, they represent a very sharp departure from the decisions of prior Boards.

An example of new policy is the new Board's interpretation of who is a supervisor. Determinations of supervisory status have a significant effect because "supervisors" are not covered by the National Labor Relations Act. For that reason, a "supervisor" is not protected by the NLRA, can be fired for union activity and does not have the

right to vote in NLRB-conducted elections.

The difference between the Bush Board definition of supervisor and the Clinton Board's definition is well illustrated by the recent case of *Wilshire at Lakewood*, 345 N.L.R.B. No. 80 (2005). In that case the Clinton Board had found that Lisa Jochims, a registered nurse, was not a supervisor. By 2-1 vote, two Bush appointees reversed the earlier decision and found that Jochims did have supervisory authority.

By any standard, the indicia of Jochim's supervisory status was thin by traditional NLRB standards. The Board cites the fact that she attended management meetings; checked to see if employees were properly performing their jobs and corrected them when necessary; documented "gross" infractions on disciplinary forms; reported to higher officials on two occasions when she found employees unfit to work; and on two occasions released employees from work because of family emergencies. The Board's dissenting Member, echoing the views of the Board's earlier decisions, found that reporting infractions to higher officials did not make someone a supervisor, unless the "write-up" contained a recommendation for discipline. The Board's decision that a "write-up" of an infraction evidences supervisory status, because it constitutes the first step in the disciplinary process instituted by another and higher-ranking member of management, represents a very expansive definition of "supervisor" that we have not seen before in NLRB decisions.

Another sharp change in policy is reflected in the decisions involving employer claims of inability to pay. It has long been the law that when an employer claims an inability to pay as opposed to an unwillingness to pay ("can't pay" as opposed to "doesn't want to pay"), it must, on request, provide financial data to corroborate its statement. The recent decision in *Richmond Times-Dispatch*, 345 N.L.R.B. No. 11 (2005) illustrates the

new Board's approach to that problem.

In that case, the employer sent a letter to employees during negotiations stating that, "we are in the midst of the worst downturn in a decade . . . that is having a devastating effect on financial performance;" "we hope to avoid a major layoff;" "the revenue outlook for the rest of the year is bleak;" and "as a result of the poor economic climate, we are unable to pay holiday bonus this year." (Emphasis added). The union responded by asking for financial information. In its letter responding to the union's request, the company advised that it would not provide the requested information and "clarified" that its earlier letter to the employees was not a claim of inability to pay but simply a statement that the company had chosen not to pay the bonus.

The Board assumed that the company's letter constituted a claim of inability to pay but found that the subsequent "clarification" effectively retracted that claim even though the initial letter to the employees literally stated that the company was "unable" to pay the bonus. The dissenting Member argued that if claims of inability to pay could be "clarified" and "retracted" in self-serving subsequent statements, then employers had a virtually fool-proof mechanism for avoiding disclosure of financial information, thereby frustrating the Supreme Court's decision upholding the right of unions to financial information when employers plead inability to pay. We have little doubt that most Labor Boards in the past would have found the employer obligated to open its books when a clear statement of inability to pay was made and that a post-hoc retraction would have been viewed as self-serving and insufficient to nullify the earlier clear claim of "poverty."

A third example is the Board's approach to an age-old issue – when does a no-strike clause ban sympathy strikes (honoring another union's picket line). In *Teamsters Local 688*, 345 N.L.R.B. No. 96 (2005) the contract contained two apparently contradictory clauses. The no-strike clause prohibited "any strikes, work stoppages, or interference with the activities required of

employees." It also stated that the "only" exceptions to the no-strike clause would be two situations not germane in this case. However, a separate clause in the contract contained language common in many Teamster contracts – that it is "not a violation of this agreement . . . in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute, or refuses to go through or work behind any lawful primary picket line." The issue in this case was whether the no-strike clause prohibited sympathy strikes.

The Board found that it did. It held that the no-strike clause was unambiguous in that it prohibited all strikes and work stoppages and that the "only" exceptions to that prohibition did not include sympathy strikes. The second clause was not considered inconsistent with the no-strike clause. According to the Board, that clause simply allowed the employee to make a choice about whether to honor another union's picket line; it did not permit the union to threaten the employee with fines because he had decided not to cross the picket line.

What makes this decision surprising is that the right to honor another union's picket line is considered to be a statutorily protected right. For that reason, the Board has held that that right will not be deemed waived by a no-strike clause unless the waiver is clear and explicit. If there had been only one clause at issue in this case – the no-strike clause – it would be easy to conclude that the prohibition of "any strikes, work stoppages" constituted a clear waiver of the right to engage in a sympathy strike. But, until this decision, we had thought no "clear" waiver could be found where, as here, an apparently broad no-strike clause is counterbalanced with a clause which, by its terms, appears to permit sympathy strikes.

FMLA: TIGHTENING THE DEFINITION OF "SERIOUS HEALTH CONDITION"

The FMLA entitles a qualified employee to up to twelve weeks' leave because of "a serious health condition." The definition of "serious health condition" includes a "condition" that involves "continuing treatment." Many, including this Report, have expressed concern that the Department of Labor's definition of "continuing treatment" has been interpreted to allow employees to qualify for FMLA leave even though they do not have "serious" medical conditions. A recent decision by the court of appeals in Denver tightens the definition of "continuing treatment." *Jones v. Denver Public Schools*, DLR E-4 (November 4, 2005).

Under the DOL regulations, "continuing treatment by a health care provider" includes "a period of incapacity . . . of more than three consecutive calendar days, and . . . treatment two or more times by a health care provider. . . ." Under this definition, several courts have found that an employee who, for example, is incapacitated for seven days and is treated twice – once during the seven day period – and once after that, has a "serious health condition." This was the issue posed by the *Jones* case. The court interpreted the DOL regulation as requiring that the two medical visits occur during the period of incapacity. Since Jones' second visit occurred after the period of incapacity when he was "improving" and no longer incapacitated, the court held that Jones did not have a serious health condition. It is at least questionable that the court's interpretation of the regulation matched DOL's actual intent. The decision does not solve the problem of abuse since an employee who visits the doctor twice during the period of incapacity will still probably qualify for FMLA leave for a flu-like condition. Nonetheless, this decision reflects a practical tightening of what many have viewed as an overly-expansive definition of "serious health condition."

KLEIN, ZELMAN, ROTHERMEL & DICHTER'S Report From Counsel is published periodically with the intent to inform readers of recent legal developments and issues. It is not intended, nor should it be used, as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations.

FORM LM-10 EMPLOYER REPORT

This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

For Official Use Only

E

READ THE INSTRUCTIONS CAREFULLY BEFORE PREPARING THIS REPORT

Part A

<p>1. File Number E- <input style="width: 50px;" type="text"/></p>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; text-align: center;">2. Fiscal Year Covered</td> <td style="width: 25%; text-align: center;">Month/Day/Year (mm/dd/yyyy)</td> <td style="width: 25%;"></td> </tr> <tr> <td style="text-align: center;">From:</td> <td style="text-align: center;"><input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/></td> <td style="text-align: center;">Through:</td> </tr> <tr> <td></td> <td style="text-align: center;"><input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/></td> <td></td> </tr> </table>	2. Fiscal Year Covered	Month/Day/Year (mm/dd/yyyy)		From:	<input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/>	Through:		<input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/> / <input style="width: 20px;" type="text"/>	
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<p>3. Name and address of Reporting Employer (inc. trade name, if any).</p> <p>Employer <input style="width: 100%;" type="text"/></p> <p>Trade Name <input style="width: 100%;" type="text"/></p> <p>Attention To <input style="width: 100%;" type="text"/></p> <p>Title <input style="width: 100%;" type="text"/></p> <p>Mailing Address</p> <p>P.O. Box, Bldg., Room No., if any <input style="width: 100%;" type="text"/></p> <p>Street <input style="width: 100%;" type="text"/></p> <p>City <input style="width: 100%;" type="text"/></p> <p>State <input style="width: 100%;" type="text"/> ZIP Code + 4 <input style="width: 100%;" type="text"/></p>	<p>4. Name and address of President or corresponding principal officer, if different from address in Item 3.</p> <p>Name <input style="width: 100%;" type="text"/></p> <p>P.O. Box, Building and Room Number, if any <input style="width: 100%;" type="text"/></p> <p>Street <input style="width: 100%;" type="text"/></p> <p>City <input style="width: 100%;" type="text"/></p> <p>State <input style="width: 100%;" type="text"/> ZIP Code + 4 <input style="width: 100%;" type="text"/></p>									
<p>5. Any other address where records necessary to verify this report will be available for examination.</p> <p>Name <input style="width: 100%;" type="text"/></p> <p>Title <input style="width: 100%;" type="text"/></p> <p>Organization <input style="width: 100%;" type="text"/></p> <p>P.O. Box, Building and Room Number, If any <input style="width: 100%;" type="text"/></p> <p>Street <input style="width: 100%;" type="text"/></p> <p>City <input style="width: 100%;" type="text"/></p> <p>State <input style="width: 100%;" type="text"/> ZIP Code + 4 <input style="width: 100%;" type="text"/></p>	<p>6. Indicate by checking the appropriate box or boxes where records necessary to verify this report will be available for examination.</p> <p><input type="checkbox"/> Address in Item 3</p> <p><input type="checkbox"/> Address in Item 4</p> <p><input type="checkbox"/> Address in Item 5</p>									
<p>7. Type of organization.</p> <p><input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Individual <input type="checkbox"/> Other (specify) <input style="width: 100%;" type="text"/></p>										

Signatures

Each of the undersigned, duly authorized officers of the above employer declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct, and complete. (See Section VIII on penalties in the instructions.)

<p>13. Signed _____ President (if other title, see instructions)</p> <p>Title <input style="width: 100%;" type="text"/> President</p> <p>On <input style="width: 50px;" type="text"/> / <input style="width: 50px;" type="text"/> / <input style="width: 50px;" type="text"/> Date Telephone Number <input style="width: 100%;" type="text"/></p>	<p>14. Signed _____ Treasurer (if other title, see instructions)</p> <p>Title <input style="width: 100%;" type="text"/> Treasurer</p> <p>On <input style="width: 50px;" type="text"/> / <input style="width: 50px;" type="text"/> / <input style="width: 50px;" type="text"/> Date Telephone Number <input style="width: 100%;" type="text"/></p>
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Name of Reporting Employer:	File Number E-
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8. Type of Reportable Activity Engaged In By Employer

Read the following questions and the accompanying instructions carefully, taking into consideration the exclusions listed in the instructions for these items, and check either "Yes" or "No" for each item. For each item that is answered "Yes", you must attach a Part B which appears on Page 3. Complete a separate Part B for each "Yes" answer to any of Items 8.a. through 8.f. Also, if the answer is "Yes" for more than one person or organization, complete a separate Part B for each person or organization. If you answer "Yes", enter the number of Part Bs that are submitted for that item in the line indicated.

DURING THE FISCAL YEAR COVERED BY THIS REPORT:

	YES	NO	If "Yes", number of Part Bs attached
8.a. Did you make or promise or agree to make, directly or indirectly, any payment or loan of money or other thing of value (including reimbursed expenses) to any labor organization or to any officer, agent, shop steward, or other representative or employee of any labor organization?	<input type="checkbox"/>	<input type="checkbox"/>	<input style="width: 30px; height: 15px;" type="text"/>
8.b. Did you make, directly or indirectly, any payment (including reimbursed expenses) to any of your employees, or to any group or committee of your employees, for the purpose of causing them to persuade other employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing without previously or at the same time disclosing such payment to all such other employees?	<input type="checkbox"/>	<input type="checkbox"/>	<input style="width: 30px; height: 15px;" type="text"/>
8.c. Did you make any expenditure where an object thereof, directly or indirectly, was to interfere with, restrain, or coerce employees in the right to organize and bargain collectively through representatives of their own choosing?	<input type="checkbox"/>	<input type="checkbox"/>	<input style="width: 30px; height: 15px;" type="text"/>
8.d. Did you make any expenditure where an object thereof, directly or indirectly, was to obtain information concerning the activities of employees or of a labor organization in connection with a labor dispute in which you were involved?	<input type="checkbox"/>	<input type="checkbox"/>	<input style="width: 30px; height: 15px;" type="text"/>
8.e. Did you make any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertook activities where an object thereof, directly or indirectly, was to persuade employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or did you make any payment (including reimbursed expenses) pursuant to such an agreement or arrangement?	<input type="checkbox"/>	<input type="checkbox"/>	<input style="width: 30px; height: 15px;" type="text"/>
8.f. Did you make any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertook activities where an object thereof, directly or indirectly, was to furnish you with information concerning activities of employees or of a labor organization in connection with a labor dispute in which you were involved; or did you make any payment pursuant to such agreement or arrangement?	<input type="checkbox"/>	<input type="checkbox"/>	<input style="width: 30px; height: 15px;" type="text"/>

TOTAL NUMBER OF PART Bs FOR THIS REPORT IS 0

