Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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U.S. DOL PROPOSES AMENDMENTS TO LM-2 FORMS RESULTING IN HEAVIER BURDENS ON UNIONS

On September 30, 2020, the U.S. Department of Labor Office of Labor-Management Standards ("OLMS") announced a proposed rule seeking to modify labor union reporting requirements, specifically modifying the annual financial disclosure forms known as LM-2s. The proposed rule establishes a new long-form LM-2 for labor organizations with annual receipts of $8 million dollars or more ("LM-2 LF"). OLMS also proposes amendments to Form LM-2. OLMS proposes the rule apply prospectively for fiscal years beginning on or after the effective date of a final rule.

The proposed rule alleges that changes to the reporting forms are necessary for a few reasons: (1) union members have an increasing familiarity with and expectancy for financial data; (2) to make investigation easier; and (3) union corruption remains a problem today. With respect to corruption, OLMS specifically references a few criminal investigations over the last several years, including the allegations against UAW officials. OLMS recognizes that this rule will result in heavier burdens on unions but it concludes that those burdens are "necessary and appropriate to ensure transparency and prevent malfeasance before it happens."

Under the proposed rule, modified form LM-2 would require unions to disclose: (1) whether an officer or employee received $10,000 or more from another labor organization and the amount of the disbursement; (2) the date of a union's current constitution and bylaws and whether the union is under trusteeship; (3) separate accountings of cash disbursements for political activity, lobbying, contract negotiation/administration, and organizing; (4) more detail regarding sales and purchases of investments and fixed assets, including the identity of parties with which a union transacts; (5) the identity of purchased or sold automobiles by make, model, year and VIN; (6) indirect travel-related expenses paid by a union on behalf of employees or officers; and (7) the number of retired union members.

For larger labor organizations, Form LM-2 LF would additionally require a union to: (1) disclose the amount of money it has in any strike fund; and (2) itemize cash receipts of $5,000 or more for various categories including dues, agency fees, per capita tax, fees, fines, assessments, work permits, sales of supplies, and rents.

OLMS admits that disclosure of the contents of a strike fund would help employers in negotiations and may lead to less favorable contracts. But OLMS concludes that this harm is outweighed because disclosure would create more opportunity for the discovery of financial impropriety and would make it easier for members to review the information. OLMS contends that separate itemization of contract administration and organizing is necessary because members may have differing opinions as to the value of organizing, proclaiming that organizing's "benefits to the organized members are attenuated." OLMS justifies the division of political activities and

lobbying on its opinion that "lobbying is more germane to the core function of a labor organization. . . ."

On the other hand, only a couple of changes reduce the burden of reporting on labor organizations. The rule proposes to increase certain reporting thresholds from $5,000 to $7,500 to account for inflation and to eliminate the reporting of the percentage of time officers and employees spend on particular categories of activities.

Comments can be submitted within sixty days of publication in the Federal Register. OLMS requested comments on the following general prompts: (1) whether any additional changes to the LM forms will help deter or expose misuse of union members' funds; (2) problematic practices within unions which could be deterred or exposed by revisions to the forms; (3) changes to the forms which would help ensure transparency; (4) other means for union members to obtain information sought in the proposal that would decrease the reporting burden on unions or maintain confidentiality without sacrificing transparency and accountability.

More specifically, OLMS seeks comments on: (1) how it can best ascertain proper and transparent use of union funds, including strike funds; (2) whether to establish a separate schedule for foreign transactions; (3) whether to modify, narrow, or eliminate the confidentiality exception; (4) whether to require disclosure of EIN for vendors receiving payments of over $5,000; (5) whether to require unions to identify whether they have a written whistleblower policy; and (6) if it should raise the threshold for filing an LM-2 from $250,000 to $300,000 to adjust for inflation.

U.S. DISTRICT COURT SENDS WITHDRAWAL LIABILITY ACCELERATION CASE TO ARBITRATOR

In *National Retirement Fund v. InterContinental Hotels Group*, 1:19-cv-8108 (GHW) (S.D.N.Y. April 21, 2020), US District Court Judge Gregory H. Woods rebuffed a challenge to a provision of a retirement fund's withdrawal liability rules which accelerated all amounts to be due immediately upon an employer's failure to provide information requested by the Fund. The Court's ruling assumes greater importance as increasing numbers of employers close due to COVID and pension plans look to protect assets.

The National Retirement Fund (the "Fund" or "NRF") assessed withdrawal liability against InterContinental Hotel Group ("IHG"), which IHG disputed, sending the matter to arbitration under the Multiemployer Pension Plan Protection Act ("MPPAA"). Thereafter, IHG failed to respond to a request for information made by the Fund pursuant to MPPAA §1399(a) and the Trust Agreement. Consequently, the Fund invoked a Trust Agreement provision requiring full immediate payment of the withdrawal liability assessment due, rather than installments, because the trustees believed that such failure to provide information would indicate "a substantial likelihood that an employer will be unable to pay its withdrawal liability." The Fund sued to collect the full amount assessed and IHG moved to dismiss, arguing that the Fund provision exceeded MPPAA authority.

Judge Woods denied the motion, leaving the claim viable. Judge Woods first held that the dispute fell squarely within MPPAA's mandatory arbitration rule. Accordingly, the Court would not adjudge the merits of whether the Fund's acceleration rule met or violated the statutory requirement that an acceleration can be made where "an event of default" would indicate "a substantial likelihood that an employer will be unable to pay its withdrawal liability" within the meaning of MPPAA §1399(c)(5)(B). Pending the arbitrator's resolution of that question, the Fund had met its pleading requirements sufficient to deny IHG's motion to dismiss. The parties did not dispute that MPPAA § 1399(c)(5) permits acceleration upon "default," defined as non-payment of an assessed installment amount or "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." The Fund adequately pled that based on their experience, the trustees properly included and applied the acceleration provision in their Trust Agreement because they believed failure to respond to an information request indicated a substantial likelihood of later non-payment. Whether the trustees' action met MPPAA requirements, and any factual issues, must await arbitral determination, explained the Court. Accordingly, the claim survived pending arbitral decision on the merits.

DE BLASIO SIGNS THREE BILLS TO PROTECT HOTEL WORKERS, SMALL BUSINESSES, AND EMPLOYEE SICK LEAVE

On October 2, 2020, Mayor Bill de Blasio signed three bills designed to extend and strengthen COVID-19 protections. The first bill guarantees the jobs and current pay of hotel workers for 90 days after a property is sold to a new owner. After that period workers must be retained if they receive positive written evaluations. The second bill shields small business owners from personal liability if they cannot pay their commercial rent due to COVID-19, such as barber shops and gyms that were forced to close under the governor's executive order or restaurants that had to limit service. The legislation bars landlords from pursuing the owners' personal assets. The last bill extends the city's paid sick leave to match a recently-expanded state law. That law requires businesses with fewer than 100 employees to provide 40 hours of paid leave while larger companies have to give up to 56 hours.

The sick leave bill, sponsored by Council Member Andrew Cohen, provides for expanded paid safe and sick leave to employees of small businesses with four or fewer employees and a net income of more than $1 million. The legislation also expands paid leave for workers at the largest businesses, those with 100 or more employees must now provide up to 56 hours of paid sick leave. It also brings domestic workers in line with other private sector workers by allowing them to accrue and use leave the same as other private sector workers.

The personal liability law, sponsored by Council Member Carlina Rivera extends the sunset date of the temporary prohibition of enforcement personal liability provisions in commercial leases or rental agreements involving COVID-19 impacted tenants, September 30, 2020 to March 31, 2021.

Finally, the hotel workers law, sponsored by Council Member Mark Levine, establishes protections for displaced hotel service workers in the event of a sale or transfer of a hotel. New

owners will be required to provide existing employment and maintain wages for a period of 90 days. At the end of the 90-day period, the new employer would perform an evaluation of the worker. The law also establishes consumer protections and notice requirements for service disruptions for guests of hotels.

Council Member Mark Levine, the prime sponsor of Intro 2049-A, said: "When tourists eventually return to our city, drawn to all the things that make us a world-class destination, it is only fair that hotel workers have a path back to their jobs. We also need to ensure that guests will have confidence that their hotel stay will be free of disruptions, so our bill will provide them with important safeguards. This legislation will ensure that a just rebound happens in a way that is fair for workers, and fair for guests -- because doing so will ultimately only strengthen the hotel industry and our city."

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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