

GUIDE TO FEDERAL FINANCIAL AND REPORTING RULES FOR UNION OFFICERS

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IN 2007, DANIEL HENNEFELD IS EXPECTED TO COMPLETE HIS LEGAL EDUCATION AT NEW YORK UNIVERSITY SCHOOL OF LAW. BEFORE ATTENDING LAW SCHOOL, HENNEFELD WORKED FOR UNITE-HERE FIGHTING AGAINST SWEATSHOP CONDITIONS IN THE GARMENT INDUSTRY. HE RECEIVED HIS BACHELORS DEGREE FROM HARVARD UNIVERSITY. THIS GUIDE WAS WRITTEN TO FULFILL PART OF HIS RESPONSIBILITIES AS THE FIRM'S SUMMER LAW CLERK IN 2006. THIS IS NOT INTENDED TO SUBSTITUTE FOR COMPETENT LEGAL ADVICE GAINED THROUGH CONSULTATION WITH AN ATTORNEY FULLY FAMILIAR WITH THE FACTS OF YOUR CIRCUMSTANCES. PLEASE CONSULT WITH AN ATTORNEY BEFORE RELYING UPON THE INFORMATION CONTAINED HEREIN.

INTRODUCTION

Labor unions and union officers are subject to a set of federal laws that regulate the financial affairs of unions. The primary purpose of these laws is to prevent corruption within unions. Obvious examples of corruption, such as stealing money from the union or accepting bribes from an employer, are crimes under these laws. But the laws also contain technical rules for conducting, recording, and reporting the financial affairs of the union. A union officer might inadvertently violate these rules simply because of inexperience, mistake, oversight, or carelessness, rather than “corruption.” An officer who violates the rules may face civil lawsuits in which he is personally liable for damages, and criminal prosecutions resulting in fines and/or jail time.

This guide is intended for union officers in the private sector, especially new officers who are treasurers or have other financial or record-keeping responsibilities, or who are not very familiar with the applicable federal laws. The aim is to provide officers with a practical overview of the laws and how they have been interpreted and applied by federal courts, with suggestions for steps officers can take to make sure that they comply with the laws and avoid needlessly running afoul of them.

The guide is divided into three sections, discussing: (1) restrictions on payments from employers to unions, and important rules for dues deductions and fund contributions; (2) financial reporting and record-keeping requirements for unions and officers; and (3) rules regulating the “fiduciary duty” of union officers.

RESTRICTIONS ON PAYMENTS FROM EMPLOYERS

A good first example of how a union officer might inadvertently run afoul of federal laws is by failing to comply with the rules for union dues deductions and employer contributions to union-affiliated benefits funds. These transactions are regulated by § 302 of the Labor Management Relations Act (LMRA, also known as the Taft-Hartley Act).¹ Section 302 prohibits most types of payments from an employer to a union or union representative. Willful violation of § 302 is a crime. The statute includes limited exemptions allowing unions and their representatives to receive certain kinds of payments from employers, most importantly for union dues deductions and benefit plan contributions. But in order to qualify under these exemptions, and avoid making unlawful transactions, unions must follow the LMRA's rules governing the exemptions.

PROHIBITED PAYMENTS

Section 302 generally makes it “unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value” to a union or union representative.² The prohibition applies not only to payments made directly by employers, but also on behalf of employers, including payments made by employer associations, employer consultants, and any other person “who acts in the interest of an employer.”³

The statute also makes it unlawful “to request, demand, receive, or accept, or agree to receive or accept” any such payment from an employer.⁴ Generally, unions and their officers and employees should avoid accepting payments from any employers with any connection to the

¹ 29 U.S.C. § 186 (2004).

² 29 U.S.C. § 186(a) (2004).

³ *Id.*

⁴ § 186(b)(1).

union (except for the exempt types of payments discussed below). Section 302 applies only under certain conditions, but it is not hard for the conditions to be met.

The prohibition on payments to a union (and its officers and employees) applies to a particular union and employer if the union “represents, seeks to represent, or would admit to membership, any of the employees of [that] employer.”⁵ This language clearly applies where a union already represents an employer’s workers or is trying to organize them. It also applies where the union “would admit to membership” any of the employer’s workers, which has been interpreted broadly by courts. The “would admit” language can apply where any of the employer’s workers might end up being represented by the union in the future, even if the union has no “present intention” to organize these workers, and even if there are significant practical or legal obstacles that would make it hard for the union to organize these workers.⁶

The prohibition also applies to any payment from an employer to an officer or employee of a union that looks like a bribe, where the employer intends “to influence him in respect to any of his actions, decisions, or duties” for the union.⁷ This prohibition applies regardless of whether or not the union does or could represent the employer’s workers.⁸ Courts have also interpreted the “influence” prohibition broadly, holding that it can apply where the employer intends to influence union decisions other than just the collective bargaining process itself.⁹

Section 302 prohibits an employer from giving a union not only money but also “other thing[s] of value.” This language has also been interpreted broadly, applying to a wide range of

⁵ § 186(a)(2).

⁶ *United States v. Pecora*, 798 F.2d 614, 621–24 (3d Cir. 1986) (“would admit” language applied even though employer’s workers were already represented by another union).

⁷ § 186(a)(4).

⁸ *See United States v. Burge*, 990 F.2d 244, 250 (6th Cir. 1992) (“There is no requirement [under the “influence” provision] that the [union officer] soliciting or receiving payments be an official or agent of the organization that currently represents employees of that employer.”).

⁹ *Pecora*, 798 F.2d at 625; *see Wabash Pub. Co. v. Dermer*, 650 F. Supp. 212, 215 (N.D. Ill. 1986) (citing legislative history showing that the “influence” provision is intended to have “extensive reach”).

items, services, benefits, and discounts. For example, § 302 has been found applicable to: free chauffeuring services;¹⁰ below-cost construction services on a union employee's residence;¹¹ free cruise tickets;¹² and leasing of a car for a union officer (paid for by the employer).¹³ The prohibition applies to loans (of "money or other thing[s] of value") in addition to straight-up grants and payments. Defendants have been convicted under § 302 for indirect transactions that attempted to disguise payments from an employer to a union officer. For example, a union officer was convicted when his girlfriend received a salary from an employer for a no-show job, and the girlfriend acted as a "straw man" for the officer.¹⁴

EXEMPTIONS UNDER § 302(C)

Section 302(c) provides exemptions making certain types of payments from employers to unions lawful. The most important exemptions are for union dues deductions and qualified benefit plan contributions, discussed below.

Another important exemption is for legitimate compensation paid by an employer to a union representative for that individual's services as an employee of the employer.¹⁵ This exemption applies to both wages and fringe benefits.¹⁶ There has been some uncertainty among federal appeals courts about whether this exemption applies when an employee is compensated by an employer to do union representation work full-time. But courts are willing now to find

¹⁰ United States v. Cody, 722 F.2d 1052 (2d Cir. 1983).

¹¹ *Id.*

¹² United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982).

¹³ United States v. Boffa, 688 F.2d 919 (3d Cir. 1982).

¹⁴ United States v. Lanni, 466 F.2d 1102 (3d Cir. 1972).

¹⁵ 29 U.S.C. § 186(c)(1) (2004) (exempting payments an employer makes "to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer").

¹⁶ IAM, Local Lodge 964 v. BF Goodrich Aero. Aerostructures Group, 387 F.3d 1046, 1056 (9th Cir. 2004).

that such a situation is lawful under the compensation exemption, especially where the employee's compensation was collectively bargained for.¹⁷

Also exempted by § 302(c) are: payments made by an employer to a union as part of a judgment or settlement in a legal dispute;¹⁸ payments to “a plant, area or industrywide labor management committee” pursuant to the Labor Management Cooperation Act of 1978;¹⁹ and payments in connection with “the sale or purchase of an article or commodity at the prevailing market price in the regular course of business.”²⁰

Labor-Management Trust Funds

The trust funds exemptions of § 302(c) allows an employer to make contributions to certain types of employee benefits funds that comply with the statute's requirements. The requirements, briefly explained below, are: The fund must be solely for the benefit of the employer's employees; there must be a written agreement governing the employer's contributions; the union and the employer must be equally represented on the fund's board; there must be a method for breaking ties on the board; and there must be an annual audit of the fund, available for inspection.²¹ As with the dues exemption, employer contributions to a union fund are lawful *only* if these requirements are met.

Most importantly, the fund must distribute benefits only to the contributing employer's employees and their families and dependents. Multi-employer funds can qualify for the exemption, as long as the fund only distributes benefits to workers who are employees of the

¹⁷ *See id.*; *Caterpillar, Inc. v. UAW*, 107 F.3d 1052 (3d Cir. 1997).

¹⁸ § 186(c)(2).

¹⁹ § 186(c)(9).

²⁰ § 186(c)(3).

²¹ § 186(c)(5).

employers who contribute to the fund.²² Furthermore, the fund can only provide benefits to a particular employee if his employer has made contributions to the fund for him (on his behalf).²³

Section 302(c) only exempts funds that provide certain types of benefits to employees, but the list of allowable benefits is fairly comprehensive, including: a variety of health, retirement, and unemployment benefits;²⁴ vacation, holiday and severance benefits;²⁵ financial assistance for training and apprenticeships;²⁶ financial assistance for education (scholarships), child care centers, and housing;²⁷ and financial assistance for legal services (except not for certain types of legal proceedings, such as lawsuits against the employer or the union).²⁸ Any fund that provides pension or annuity benefits must be kept in a trust fund separate from other types of benefits, and cannot be used for any purpose other than pension or annuity benefits.²⁹

The union must have a “written agreement” with the employer that specifies “the detailed basis on which . . . payments are to be made” to the fund by the employer.³⁰ Without such a written agreement, the employer’s contributions to the fund violate § 302.³¹ Any change to that agreement must be made in writing, not orally.³² If the “written agreement” about contributions is part of the collective bargaining agreement, the “written agreement” is still valid even after the

²² *Id.*

²³ *Capo v. Bowers*, 2001 U.S. Dist. LEXIS 2139 (S.D.N.Y. March 2, 2001).

²⁴ § 186(c)(5) (allowing payments “for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance”).

²⁵ § 186(c)(6).

²⁶ *Id.*

²⁷ § 186(c)(7).

²⁸ § 186(c)(8).

²⁹ § 186(c)(5).

³⁰ *Id.*

³¹ *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968).

³² *Pierce County Hotel Employees & Rest. Employees Health Trust v. Elks Lodge*, B.P.O.E. No. 1450, 827 F.2d 1324, 1328 (9th Cir. 1987).

bargaining agreement expires.³³ Therefore, after the bargaining agreement has expired, the employer must still make contributions to the fund, and § 302 is not violated.³⁴

In order to qualify for the fund exemption, the fund's "written agreement" must also include three types of provisions. First, the agreement must provide for equal labor and management representation in the administration of the fund.³⁵ That means either the total number of fund trustees (which make up the governing body) selected by the union should equal the total number selected by the employer or each side's voting power when voting as a block must have equal weight.³⁶ Second, the agreement must provide for *either* a "neutral" trustee to break "deadlocks" between the union's and employer's trustees, *or* referral of such deadlocks to an "impartial umpire" (generally an arbitrator) to resolve them.³⁷ Third, the agreement must provide for an independent audit of the trust fund to be conducted every year, and the trustees must issue a report containing the results of each audit and make the reports available for public inspection.³⁸

Note that the requirements of the fund exemption only need to be met if the fund would otherwise violate § 302 (where the employer is making contributions to a fund with which the union is involved). If the union maintains its own fund with no contributions whatsoever from the employer, or if the employer maintains its own fund without the union being involved in administration of the fund, then § 302 is not implicated, so the funds need not comply with §

³³ Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987).

³⁴ *Id.* If the bargaining agreement has expired, but the union and employer have not yet reached "impasse," then the employer must continue making contributions to the fund just as it had done before the bargaining agreement expired, or else the employer will violate § 8(a)(5) of the NLRA. *Id.* After the union and employer have reached impasse, the employer may unilaterally implement changes in its fund contributions as long as the changes were "reasonably contemplated" within the employer's final offer in bargaining. *Id.*

³⁵ § 186(c)(5).

³⁶ Associated Contractors of Essex County, Inc. v. Laborers Int'l Union, 559 F.2d 222, 227 (3d Cir. 1977) ("the essence of equal representation [between labor and management] is that each side have veto power on any proposed action").

³⁷ § 186(c)(5).

³⁸ *Id.*

302(c)'s exemption requirements.³⁹ Also note that any joint labor-management employee benefits fund must comply with the extensive regulations of the Employee Retirement and Income Security Act (ERISA).⁴⁰ (Discussion of ERISA law is beyond the scope of this Guide, but see “Coverage of Employee Benefits Funds in “Fiduciary Duty” section.)

Dues Deductions

The dues exemption makes it lawful for an employer to deduct union membership dues from employee wages and give the dues money directly to the union (“check-off”), provided that the employer has proper check-off authorization from each employee.⁴¹ Dues deduction payments from an employer to a union are lawful *only if* the authorization requirements of § 302(c) are met.

It is not necessary that every employee in a bargaining unit authorizes check-off in order for the employer to be able to do check-off at all. But the employer cannot give the union money deducted from a particular employee’s paycheck unless *that* employee has authorized check-off. So, for example, if 99 employees in a unit do not authorize check-off, but one employee does authorize it, then the employer can do check-off for that one consenting employee, but not for the other 99.

For proper authorization, the employee must make a “written assignment” (consent) to have the dues deducted from his wages.⁴² The consent *must* be written.⁴³ Also, the employee

³⁹ See *Mechanical Contractors Ass’n. v. Local Union 420*, 265 F.2d 607, 609 (3d Cir. 1959) (fund “under exclusive management and control” of employer does not implicate § 302); *Oxy USA, Inc.*, 329 N.L.R.B. 208 (1999) (same for union-administered fund with no employer contributions).

⁴⁰ See 29 U.S.C. § 1001 *et seq.* (2004).

⁴¹ § 186(c)(4). The provision exempts:

money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

⁴² *Id.*

must have the option to revoke his consent when one year (at most) has passed, or when the bargaining agreement expires (whichever happens sooner).⁴⁴

The union and employer may agree to restrict the employee's right to revoke consent, but any restrictions must comply with the timing requirements above. Courts have allowed unions and employers to agree that each employee check-off authorization will be automatically renewed (if not revoked by the employee), as long as the agreement gives the employee an "escape period" each year during which he can revoke consent, so that the employee's right to revoke is not restricted for more than one year at a time.⁴⁵ Therefore, the following check-off authorization program was found lawful under § 302: Once an employee gave his consent, he could not revoke it until a year passed (or the bargaining agreement expired, if that happened in less than a year); once the year passed, there was a 15-day "escape period" for the employee to revoke consent; if the employee did not revoke during that 15-day period, his authorization would be automatically renewed for another year.⁴⁶ In order for a check-off to qualify for the dues exemption, though, an employee's right to revoke consent may not be restricted *at all* during periods when there is no collective bargaining agreement in place.⁴⁷

Of course, in order for a check-off program to qualify for § 302(c)'s dues exemption, the money deducted must be for legitimate membership dues. Courts though have defined "membership dues" broadly, to include periodic "assessments" imposed on members (such as for

⁴³ See *Jackson Purchase v. IBEW, Local 816*, 646 F.2d 264, 267 (6th Cir. 1981). The employee's written consent also must be voluntary—although this is not explicitly required by § 302, an unfair labor practice will be found when an employee is required or coerced to authorize check-off. *Windsor Castle Health Care Facilities, Inc.*, 310 N.L.R.B. 579 (1993) (violation of NLRA § 8(a)(2) for employer to require employees to authorize check-off); *Electrical Workers Local 601 (Westinghouse Corp.)*, 180 N.L.R.B. 1062 (1970) (violation of NLRA § 8(b)(1)(A) for union to coerce employees to sign check-off authorizations).

⁴⁴ § 186(c)(4). If the applicable bargaining agreement and the written assignment itself contain no restrictions on the employee's right to revoke consent, then the employee can revoke at will (whenever he wants).

⁴⁵ See *Monroe Lodge 70, IAM v. Litton Bus. Sys.*, 334 F. Supp. 2d 310, 315 (W.D. Va. 1971), *aff'd*, 1972 U.S. App. LEXIS 9548 (4th Cir. May 15, 1972).

⁴⁶ *Id.*

⁴⁷ *Anheuser-Busch, Inc. v. Int'l Bhd. of Teamsters*, 584 F.2d 41, 43 (4th Cir. 1978).

a strike),⁴⁸ and “agency fees” imposed on non-member bargaining unit employees under a “union security” clause⁴⁹ (separate rules for non-member fees are discussed next).

Note: Rules for Non-member Fees (Employees’ “Beck Rights”)

There are separate legal restrictions on a union’s collection of mandatory fees from non-member bargaining unit employees whom the union represents. These restrictions apply regardless of whether the union collects fees from non-members directly or through check-off. The restrictions are known as employees’ “Beck rights” (from the Supreme Court case *Communication Workers of America v. Beck*⁵⁰). Violation of these rules is not a crime and probably will not implicate LMRA § 302, but results in an unfair labor practice and a breach of the duty of fair representation by the union.⁵¹ When a union requires all bargaining unit employees to pay dues or fees to the union, it can only require non-members to pay the amount needed to fund collective bargaining activities, as opposed to “political” or other activities.⁵² The union also must inform all employees of their “Beck rights” and provide them with relevant information about how their fees are spent.⁵³

In *Beck*, the Supreme Court held that unions subject to the NLRA can only require from non-members “those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”⁵⁴ The Supreme Court has not given much guidance about what types of union activities are permissible as part of the union’s representation “duties,” except that the activities must be

⁴⁸ Int’l Union of Mine Workers, Local 515 v. Am. Zinc, Lead & Smelting Co., 311 F.2d 656, 658–59 (9th Cir. 1963).

⁴⁹ Grajczyk v. Douglas Aircraft Co., 210 F. Supp. 702, 705 (S.D. Cal. 1962).

⁵⁰ 487 U.S. 735 (1988).

⁵¹ *Id.*; NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1286 n.3 (10th Cir. 2003) (unfair labor practice for violation of Beck rights “is an entirely separate issue from” § 302 violation).

⁵² *Id.*

⁵³ California Saw & Knife Works, 320 N.L.R.B. 224 (1995), *enforced sub nom.* Machinists v. NLRB, 133 F.3d 1012 (7th Cir. 1998), *cert denied sub nom.* Strang v. NLRB, 525 U.S. 813 (1998).

⁵⁴ 487 U.S. at 762.

relevant “to collective bargaining, contract administration or grievance adjustment.”⁵⁵ The NLRB held that a union may pool the costs of its bargaining duties among multiple bargaining units, and charge non-members in one unit for costs of another unit, as long as it is for services that may ultimately provide some benefit to the non-members.⁵⁶ The NLRB also held that organizing is a permissible activity related to bargaining, so that a union may charge non-members for the costs of organizing, as long as it is limited to organizing employees within the same “competitive market” that the non-members work in.⁵⁷ Note that for unions representing employers who are subject to the Railway Labor Act (as opposed to the NLRA), the Supreme Court has held that the costs of organizing efforts cannot be included in non-member fees.⁵⁸

The NLRB has determined that a union must inform an employee of his *Beck* rights when (or before) the union requires him to pay dues or fees.⁵⁹ The union must inform the employee that he has a right to remain a non-member of the union and still work in the bargaining unit.⁶⁰

The union must also inform the employee that non-members have the right:

(1) to object to paying for union activities not [relevant] to the union’s duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object [about fees]; and (3) to be apprised of any internal union procedures for filing objections.⁶¹

If a non-member does object and requests to pay the lower fee (as opposed to the regular member dues), the union must inform him “of the [fee] reduction [he will receive], the basis for the calculation [of the reduction], and [his] right to challenge these figures.”⁶²

⁵⁵ *Id.* at 745.

⁵⁶ *California Saw, supra* note 53.

⁵⁷ *United Food & Commercial Workers*, 329 N.L.R.B. 730 (1999), *aff’d en banc*, 307 F.3d 760 (9th Cir. 2002).

⁵⁸ *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

⁵⁹ *California Saw, supra* note 53.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Before your union enforces a union security clause in a collective bargaining agreement you should review your Beck notification procedures with your union's attorneys. If the union fails to give correct and timely notice, it may be held liable for the discharged employee's lost wages. To avoid potential liability you should also have counsel review all drafts of proposed correspondence to employees failing to maintain their good standing before mailing them to ensure that they are legally sufficient and correct.

CRIMINAL PENALTIES FOR PROHIBITED PAYMENTS

The U.S. Department of Justice investigates and prosecutes violations of § 302. The statute has a general criminal standard for prohibited employer payments to unions, and a separate standard for dues deductions and fund contributions that do not comply with the exemption requirements of § 302(c).

For a prohibited payment other than dues deductions and fund contributions, the prosecution must show that the giver or receiver of the payment (the defendant) "willfully violate[d]" the statute.⁶³ The prosecution only has to show that the defendant had a "general intent" to commit the act, meaning that he voluntarily (deliberately) gave or received the payment.⁶⁴ The defendant can be convicted even if he did not have bad intentions or knowledge that the payment was wrong or illegal.⁶⁵

The prosecution has a higher burden where the payments in question are dues deductions or fund contributions. This situation would arise if the deductions or contributions were done in a way that failed to comply with one or more of the exemption requirements discussed above—for example, if the union received dues money deducted from an employee's wages without that employee's written consent. In such a situation, the prosecution must show that the defendant

⁶³ 29 U.S.C. § 186(d)(2) (2004).

⁶⁴ United States v. Georgopoulos, 149 F.3d 169 (2d Cir. 1998).

⁶⁵ *Id.*

had a “specific intent,” meaning an “intent to benefit himself or to benefit other persons he knows are not permitted to receive” the payment.⁶⁶ If the failure to comply with the exemption requirements was an honest mistake, the defendant will not be convicted.

The penalty is the same for a convicted defendant, regardless of whether the conviction involves dues deductions or fund contributions, or any other prohibited payments. The penalty does depend on whether the total amount of prohibited payments was more than \$1,000. If the amount exceeded \$1,000, then a convicted defendant shall “be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both.”⁶⁷ If the amount was \$1,000 or less, then the defendant “shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.”⁶⁸

⁶⁶ § 186(d)(1).

⁶⁷ §§ 186(d)(1) & (d)(2).

⁶⁸ *Id.*

REPORTING AND RECORD-KEEPING REQUIREMENTS

The Labor-Management Reporting and Disclosure Act (LMRDA) is the other federal statute, in addition to the *LMRA*, that sets financial rules for unions. The federal agency that enforces the LMRDA is the Office of Labor-Management Standards (OLMS) within the U.S. Department of Labor (DOL). The LMRDA requires unions to submit certain reports to OLMS in order to provide the government with information about the union's finances and operations. Every union must file an initial report (when the union is first established) and a yearly financial report. Also, individual union officers and employees must file a yearly report if they engaged in certain types of financial dealings during the year. (Employers and labor relations consultants also must file reports with OLMS, not discussed in this Guide.⁶⁹) Once the reports are filed, they become public information.⁷⁰ Unions, and any officers and employees who must file reports, are required to maintain accurate records (documents) related to the information in the reports. Unions have a duty to make the information from their reports and related records available to their members; if a union fails to do so, the member can sue for access to the information. Unions and individuals are also subject to criminal penalties for failing to comply with the LMRDA's reporting and record-keeping requirements.

REPORTS REQUIRED FROM UNIONS

Initial Report (LM-1)

When a "labor organization" is first established and becomes subject to the LMRDA, the union has 90 days to file its initial report with OLMS, called the "Labor Organization Information Report" ("Form LM-1").⁷¹ The LMRDA requires every union to adopt a

⁶⁹ 29 U.S.C. § 433 (2004).

⁷⁰ Once a report is filed, the contents of the report may be published by the DOL, and any person may request to examine or obtain copies of the contents of the report. 29 U.S.C. § 435 (2004).

⁷¹ 29 U.S.C. § 431(a) (2004); 29 C.F.R. § 402.2 (2005).

constitution and bylaws, and file two copies of the constitution and bylaws with OLMS along with the LM-1.⁷² The LM-1 includes basic information such as the union's contact information and the name and title of each union officer.⁷³ The form also includes information about the union's membership dues and fees.⁷⁴ In addition, the LM-1 requires the union to describe (or list the relevant sections of its constitution and bylaws that describe) the union's structure and operating procedures.⁷⁵ The LM-1 must be signed by the President and Secretary of the union,⁷⁶ and filed by mail.⁷⁷

If any of the information contained in a union's LM-1 changes later on, the union must report the new information when it files its next annual financial report (discussed below).⁷⁸ If the union amends its constitution or bylaws, the union must file two copies of the new constitution or bylaws with OLMS.⁷⁹ If any of the union's structure and operations information changes, and those changes were not recorded in an amended constitution or bylaws, then the union must file an amended LM-1 describing the changes.⁸⁰

Annual Financial Report (LM-2)

Every year, each union must file an annual financial report with OLMS, called the "Labor Organization Annual Report" ("Form LM-2").⁸¹ Unions that have total annual receipts of less than \$250,000 (and are not in trusteeship) may file less detailed versions of the annual report

⁷² 29 U.S.C. § 431(a); 29 C.F.R. § 402.1 (2005); OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP'T OF LABOR, REPORTS REQUIRED UNDER THE LMRDA AND THE CSRA 5 (2005), <http://www.dol.gov/esa/regs/compliance/olms/trlo/ReportsRequired.pdf>.

⁷³ 29 U.S.C. § 431(a); Office of Labor-Mgmt. Standards, U.S. Dep't of Labor, Form LM-1 (2006) ("LM-1").

⁷⁴ § 431(a); LM-1.

⁷⁵ § 431(a); LM-1.

⁷⁶ § 431(a).

⁷⁷ LM-1 (Instructions).

⁷⁸ *Id.*

⁷⁹ 29 C.F.R. § 402.4(a) (2005).

⁸⁰ § 402.4(b); REPORTS REQUIRED UNDER THE LMRDA, *supra* note 72, at 5.

⁸¹ 29 U.S.C. § 431(b) (2004); 29 C.F.R. § 403.3 (2005).

(“Forms LM-3 and LM-4”).⁸² In the LM-2, the union must provide accurate information about its finances for the prior year, including its assets and liabilities, its receipts, and its expenditures.⁸³ The report must be filed within 90 days after the end of the union’s fiscal year.⁸⁴ Unlike the LM-1, the LM-2 must be filed online (electronically).⁸⁵ The LM-2 must be signed electronically by the union’s President and Treasurer.⁸⁶ Every union must make “the information required to be contained” in its LM-1 and LM-2 (meaning copies of the actual reports or the content of the union’s answers) available to all of their members.⁸⁷

Report Required From Officers and Employees (LM-30)

Union officers and employees who have engaged in certain types of financial dealings during the prior fiscal year must file a report with OLMS called the “Labor Organization Officer and Employee Report (“Form LM-30”).⁸⁸ The LM-30 must be filed by mail within 90 days after the end of the officer’s tax fiscal year, which is almost always results in the filing being due on March 30th for the previous year’s activities.⁸⁹ The LM-30 generally requires officers and employees to report potential conflicts of interest, including: income or other economic benefit they have received from employers, or from companies that do substantial business with the union itself or its trust funds or employers; ownership interests they have held in such companies; and transactions they have done with the union’s employers.⁹⁰ The LM-30 reporting requirements also apply to dealings by the spouse or minor child of a union officer or employee (the spouse or child does not file a separate LM-30, instead the officer or employee reports his

⁸² 29 U.S.C. § 438 (2004); 29 C.F.R. § 403.4 (2005).

⁸³ 29 U.S.C. § 431(b); Office of Labor-Mgmt. Standards, U.S. Dep’t of Labor, Form LM-2 (2006) (“LM-2”).

⁸⁴ 29 U.S.C. § 437(b) (2004).

⁸⁵ REPORTS REQUIRED UNDER THE LMRDA, *supra* note 72, at 8.

⁸⁶ § 431(b); REPORTS REQUIRED UNDER THE LMRDA, *supra* note 72, at 8.

⁸⁷ § 431(c).

⁸⁸ 29 U.S.C. § 432(a) (2004); 29 C.F.R. § 404.3 (2005).

⁸⁹ 29 U.S.C. § 437(b) (2004).

⁹⁰ 29 U.S.C. § 432(a); Office of Labor-Mgmt. Standards, U.S. Dep’t of Labor, Form LM-30 (2006) (“LM-30”).

spouse's or child's dealings in his own LM-30).⁹¹ If a union officer or employee (and his spouse and minor children) has not engaged in any applicable dealings during the prior year, then that individual is not required to file an LM-30 (basically, he has nothing to report).⁹²

The LM-30 requires an officer or employee to report any income from, transaction with, or interest held in, "an employer [that the union] represents or is actively seeking to represent."⁹³ For example, if an officer's spouse receives a loan from an employer represented by the union, then the officer must report that loan.⁹⁴ However, a union officer or employee is not required to report legitimate compensation received from the employer for services rendered.⁹⁵ The LM-30 also requires the officer or employee to list any other "payment of money or other thing of value" received from any employer or labor relations consultant, excluding all the types of payments that are exempted by § 302(c) of the LMRA (discussed earlier).⁹⁶ Finally, the officer or employee must report any dealings with companies that do substantial business with any of the following entities: the union itself, or one of the union's affiliated trust funds, or an employer that the union represents or seeks to represent.⁹⁷ For example, if an officer is part-owner of a small printing shop that prints newsletters for the union, then the officer must report his interest in the printing company and any financial benefits he received from the company.⁹⁸ Officers

⁹¹ § 432(a); LM-30.

⁹² § 432(c).

⁹³ LM-30.

⁹⁴ OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP'T OF LABOR, FILING FORM LM-30 2 (2006), <http://www.dol.gov/esa/regs/compliance/olms/LM30factsheet.pdf>.

⁹⁵ § 432(a); LM-30 (Instructions). Also similar to § 302(c) of the LMRA, a union officer or employee is not required to report "transactions involving purchases and sales of good and services in the regular course of business at prices generally available to any employee of the employer." § 432(a); LM-30 (Instructions).

⁹⁶ § 432(a)(6); LM-30 (Instructions).

⁹⁷ LM-30.

⁹⁸ FILING FORM LM-30, *supra* note 94, at 3.

and employees do not have to report dealings in many types of securities (stock), including public stocks traded on a registered exchange such as the New York Stock Exchange.⁹⁹

OLMS allows a “de minimis exemption” on the LM-30, so that union officers and employees “do not have to report any sporadic or occasional gifts, gratuities, or loans of insubstantial value, given under circumstances and terms unrelated to the [individual’s] status in a labor organization.”¹⁰⁰ OLMS considers an item to have “insubstantial value” if the total value of the item given by an employer to a union officer or employee does not exceed \$250 (over the course of the fiscal year).¹⁰¹ OLMS also states that it will not require reporting of “small gratuities” that do not exceed the \$250 level, even if it is a benefit that is provided frequently—for example, “a union officer or employee who receives coffee, provided by an employer, at bi-weekly meetings over the course of a year.”¹⁰²

RECORDS MUST BE MAINTAINED

When the Requirement Applies

The LMRDA includes a general requirement that records related to the required reports (described above) must be maintained for possible future examination by OLMS.¹⁰³ Willful failure to comply with this requirement is a criminal violation, separate from any violation of the reporting requirements. The time period for record-keeping is five years, meaning that the records related to a particular report must be preserved and kept available for at least five years after the report has been filed.¹⁰⁴

⁹⁹ § 432(b); LM-30 (Instructions).

¹⁰⁰ Office of Labor-Mgmt. Standards, U.S. Dep’t of Labor, LM-30 Advisory: De Minimis Exemption Increased (Nov. 2005), http://www.dol.gov/esa/regs/compliance/olms/LM-30_DeMinimisAdvisory.htm.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 29 U.S.C. § 436 (2004).

¹⁰⁴ *Id.*

The record-keeping requirement applies to “every person” required to file a report.¹⁰⁵ Because the LMRDA defines “person” to include a “labor organization,” a union itself is subject to the record-keeping requirement for records related to the union reports.¹⁰⁶ An officer who is required to sign a union report is also responsible (along with the union itself) for maintaining records for that report.¹⁰⁷ Therefore a union President, who must sign both the LM-1 and the LM-2, is required to maintain the union’s records for those reports. Individual union officers and employees should also maintain records (in their own files or in the union’s files) for any LM-30s that they are required to submit.

Types of Records Required

The LMRDA does not provide an extensive description of what records must be maintained. The statute states that, for any particular report, records must be kept “which will provide in sufficient detail the necessary basic information and data” that was used to fill out the report, so that the report “may be verified, explained or clarified, and checked for accuracy and completeness.”¹⁰⁸ The statute states that required records “shall include vouchers, worksheets, receipts, and applicable [union] resolutions;”¹⁰⁹ but that is *not* a complete list of the types of records that should be kept by unions. OLMS advises unions to “retain all types of records used in the normal course of doing business.”¹¹⁰ Examples include: “receipts and disbursements journals, cancelled checks and check stubs, bank statements, dues collection receipts, employer

¹⁰⁵ *Id.*

¹⁰⁶ 29 U.S.C. § 402(d) (2004).

¹⁰⁷ *United States v. Ottley*, 509 F.2d 667, 672 n. 8 (2d Cir. 1975); *United States v. Chittenden*, 530 F.2d 41, 42 (5th Cir. 1976).

¹⁰⁸ § 436.

¹⁰⁹ *Id.*

¹¹⁰ OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP’T OF LABOR, FACT SHEET: LMRDA RECORDKEEPING REQUIREMENTS FOR UNIONS (2004), <http://www.dol.gov/esa/regs/compliance/olms/rrlo/ReportsRequired.pdf>.

checkoff statements, per capita tax reports, vendor invoices, payroll records.”¹¹¹ OLMS also advises retaining:

Credit card statements and itemized receipts for each credit card charge; member ledger cards for former members; union copies of bank deposit slips; bank debit and credit memos; vouchers for union expenditures; internal union financial reports and statements; minutes of all membership and executive board meetings; accountants’ working papers used to prepare financial statements and reports filed with OLMS; fixed assets inventory.¹¹²

In a leading case interpreting the reporting requirement, a federal appeals court stated that the LMRDA does not mandate any “particular bookkeeping system,” but the statute does require that “whatever system is adopted [by a union], it must be able to give anyone reviewing the records an accurate picture of all the financial operations the union has undertaken.”¹¹³ That case held that unions must maintain the following records:

(1) accurate, contemporaneous records reflecting all union receipts and disbursements; (2) supporting documents reflecting the entry of transactions into the union’s accounts and their reproduction in the annual financial statement; and (3) any interim financial records that can serve to check that annual report.¹¹⁴

Basically, this means maintaining financial data in each phase that it is tracked by the union: from original records (such as actual vouchers and receipts); to “supporting” records showing how the original receipt was accounted for, and “interim” records (such as monthly financial statements¹¹⁵); to final records showing that the data above was incorporated into the report.

A union or officer may violate the record-keeping requirement by maintaining records that provide incomplete or inadequate information.¹¹⁶ For example, even though a union officer

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *United States v. Budzanoski*, 462 F.2d 443, 450 (3d Cir. 1972), *cert. denied*, 409 U.S. 949 (1972).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Chittenden*, 530 F.2d at 43.

retained the union's cancelled checks, he did not maintain "specific expense receipts and itemization" for the checks; retaining the checks alone was a "woefully insufficient" form of record-keeping.¹¹⁷ Similarly, an officer did not necessarily comply by retaining voucher slips, because the slips were "minimal" and "contained only the date, the amount received from the union, [the officer's] signature and the notation 'for reimbursed expenses.'"¹¹⁸ The officer was criticized for failing to "at least include[] a breakdown of how the money was spent on the reverse side of the slip."¹¹⁹

Members' Right to Inspect Records Related to Union Reports

In addition to the general requirement that records must be retained so that OLMS may examine them, the LMRDA also places a "duty" on unions and their officers to permit union members "to examine any books, records, and accounts necessary to verify" the union's reports (primarily the LM-2).¹²⁰ The records that are subject to this rule are basically the same records related to the union reports that must be maintained under the general requirement discussed above.¹²¹ As part of union members' right to "examine" these records, the union must allow members (within reason) to make copies of documents for themselves, and to bring in outside accountants or other experts to help them examine the records.¹²²

If a member is denied access to such records, the member may sue the union and its officers in state or federal court to enforce his right of access.¹²³ If the member prevails in the lawsuit, the court may order the union to provide appropriate access for that member; the court

¹¹⁷ *Id.*

¹¹⁸ *Ottley*, 509 F.2d at 674 n.11.

¹¹⁹ *Id.*

¹²⁰ § 431(c).

¹²¹ *Cf. Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 286 (5th Cir. 1993) (considering the two requirements together).

¹²² *Gabauer v. Woodcock*, 594 F.2d 662, 666 (8th Cir. 1979).

¹²³ *Id.*

also has discretion to order the union to pay the member's attorney fees and legal costs.¹²⁴ In order to prevail, the union member must show that he has "just cause" to examine the records he has requested.¹²⁵ The "just cause" standard is meant to prevent union members from "harass[ing] union officials with repeated requests for documents;" but the standard is "minimal" and does not require a strong showing by the union member.¹²⁶

There is some disagreement among federal appeals courts about the requirements for showing just cause. The Fifth Circuit held that the just cause standard requires "circumstances that would put a reasonable union member on notice of a possible discrepancy between the records required to be kept" and the union's reports.¹²⁷ The Ninth Circuit found that the following types of suspicious circumstances support just cause: when a certain item in the union's LM-2 is "disproportionately high;" or when an officer contends that he did not incur the expenses reported in the LM-2; or when the LM-2 shows that the union made a major loan, without showing the purpose of the loan.¹²⁸

The Seventh Circuit has adopted a looser standard, holding that just cause requires *either* that "the union member had some reasonable basis to question the accuracy of the LM-2 or the documents on which it was based," *or* "that information in the LM-2 has inspired reasonable questions about the way union funds were handled."¹²⁹ The Seventh Circuit rejected any suggestion that union members have just cause only if they seek the records in order "to verify figures in the LM-2."¹³⁰ The Second Circuit (which governs New York) has not addressed the just cause standard. The Southern District of New York ("SDNY," the federal district court for

¹²⁴ § 431(c).

¹²⁵ *Id.*

¹²⁶ *Kinslow v. Am. Postal Workers Union, Chicago Local*, 222 F.3d 269, 273–74 (7th Cir. 2000); *see Fruit & Vegetable Packers & Warehousemen v. Morley*, 378 F.2d 738, 744 (9th Cir. 1967).

¹²⁷ *Fernandez-Montes*, 987 F.2d at 286.

¹²⁸ *Morley*, 378 F.2d at 744.

¹²⁹ *Kinslow*, 222 F.3d at 274 n.11.

¹³⁰ *Id.*

Manhattan) has not examined the standard in depth, but seems to come down somewhere in between the Fifth and Seventh Circuits, closer to the Seventh Circuit's looser approach. The SDNY held that just cause is established simply "if a reasonable union member would be put to further inquiry" by statements or numbers in the union's reports, such as "economic increases, alterations, shifts, and other notations contained in" the union's reports.¹³¹

Of course, a union member can sue for access to the union's records only if the member has already requested access and been denied by the union. Courts are uncertain whether the member must notify the union of his basis for just cause (the reasons for his request) when he makes his request to the union; or instead whether the member only needs to provide his reasons to the court, when he later brings the lawsuit.¹³² In any case, if the union rejects the member's request for access without asking the member for his reasons, then the union "waives" any right to be given those reasons before the lawsuit.¹³³ Therefore, when a member requests access to records, the officer handling the request should ask the member to provide his reasons.

Similarly, if the member makes a very broad information request but the union fails to ask the member to be more specific, then the union may have "waived" its objection to the vagueness of the request.¹³⁴ Therefore, the union officer handling such a request should ask the member to be more specific about what documents he wants. But "only minimal specificity" is required in the member's request.¹³⁵ Thus in one case a member's "request was sufficiently specific" where the member requested "full financial disclosure of our Local's Financial business including copies of the General Account, Payroll Account and also the full minutes of both the

¹³¹ Johnson v. Local 1199, Hospital and Health Care Employees Union, 1986 U.S. Dist. LEXIS 29790, at *3-4 (S.D.N.Y. Jan. 31, 1986).

¹³² See *id.* at 275-76 (discussing uncertain authority for notification requirement).

¹³³ *Id.*

¹³⁴ *Id.* at 276.

¹³⁵ *Id.*; but see *Fernandez-Montes*, 987 F.2d at 286 ("union member must specify what he is seeking to verify in the LM Reports, and how he believes the records he is requesting will assist him").

Executive Board and General meeting minutes.”¹³⁶ However, a member’s request is inadequate if it is a general blanket request for information, without any indication of which specific records are sought.¹³⁷ The SDNY stated that a “wholesale random audit” is generally not appropriate, but that the scope of the records that the union must provide depends on the scope of subjects that the union member is justifiably investigating, and that “[i]t is better to run the risk of too much, rather than too little” information being provided by the union.¹³⁸

PENALTIES FOR VIOLATING REPORTING AND RECORD-KEEPING REQUIREMENTS

There are three types of criminal violations of the LMRDA’s reporting and record-keeping requirements: “willful violation” of any of the requirements;¹³⁹ “willful false entry in or concealment, etc., of books and records;”¹⁴⁰ and “false statements or representation of fact with knowledge of falsehood” in required reports.¹⁴¹ Each type of violation is a misdemeanor, with conviction resulting in a fine of “not more than \$10,000” and/or a prison sentence of “not more than one year.”¹⁴² Like the general reporting requirement, the criminal penalties apply to “any person;”¹⁴³ therefore, individual officers and the union itself may be convicted. The LMRDA makes “each individual required to sign [the union reports (LM-1 and LM-2)] personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.”¹⁴⁴

¹³⁶ *Kinslow*, 222 F.3d at 276.

¹³⁷ *McCraw v. United Ass’n of Journeymen & Apprentices*, 216 F. Supp. 655, 663 (E.D. Tenn. 1963), *aff’d*, 341 F.2d 705 (6th Cir. 1965).

¹³⁸ *Johnson*, 1986 U.S. Dist. LEXIS 29790, at *7.

¹³⁹ 29 U.S.C. § 439(a).

¹⁴⁰ § 439(c).

¹⁴¹ § 439(b).

¹⁴² § 439(a)–(c).

¹⁴³ *Id.*

¹⁴⁴ § 439(d).

Willful Violation

A union or “personally responsible” officer may commit the first type of crime, a general “willful violation” of the requirements, by (for example) failing to file a required report at all; or failing to answer all the questions in the report; or failing to maintain adequate records related to the report. To be convicted, the defendant’s violation must have been “willful,” which means for LMRDA misdemeanor crimes that the defendant acted “with reckless disregard for the law.”¹⁴⁵ The defendant can be convicted even if he did not specifically intend to violate the law and did not have an “evil or bad purpose.”¹⁴⁶ When the defendant’s violation consists of failing to do something required by the statute, such as failing to maintain adequate records, the violation is “willful” either if the defendant “knew what the law required but failed to comply with it,” or if the defendant closed his eyes and deliberately avoided knowledge of the requirements.¹⁴⁷

False Entry or Concealment

The crime of “false entry or concealment” applies to “any person who willfully makes a false entry in or willfully conceals, withholds, or destroys” any of the records that must be maintained under the LMRDA’s record-keeping requirements.¹⁴⁸ Like with the general “willful violation” crime above, a defendant must have acted “willfully” (“with reckless disregard for the law”) to be convicted for false entry or concealment.¹⁴⁹ Typically, a convicted defendant made a false entry knowing and intending that it was false, such as when union officers were convicted for their scheme to submit false expenditure vouchers in order to obtain union money for their

¹⁴⁵ United States v. Budzanoski, 331 F. Supp. 1201, 1205 (W.D. Pa. 1971), *aff’d*, 462 F.2d 443 (3d Cir. 1972).

¹⁴⁶ *Id.*

¹⁴⁷ *Ottley*, 509 F.2d at 673.

¹⁴⁸ § 439(c).

¹⁴⁹ *Budzanoski*, 331 F. Supp. at 1205; *but see* United States v. Morales, 108 F.3d 1031, 1037 (9th Cir. 1997)

(“Willfulness requires that an act be done knowingly and intentionally, not through ignorance, mistake or accident . . . [Defendant] had to know that her entries were false.”).

own purposes.¹⁵⁰ A union officer or employee may be convicted of false entry even if he did not actually make the entry himself, if he “intentionally caused a false entry.”¹⁵¹ This could happen if the defendant directed another person (other union personnel or an accountant) to make the false entry, or gave the other person false information knowing that he would enter it in the records—for example, the defendant asked for a union check from an officer, and lied to him about the purpose of the check, knowing that the officer would record that purpose.¹⁵²

False Statement

The crime of making a “false statement” applies to “any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact” in a filed report (or in any documents required to be attached/submitted along with the report itself).¹⁵³ So this crime covers the reports (LM-2 etc.), whereas “false entry” (above) covers the internal records related to the reports. In order to be convicted of the “false statement” crime, a defendant must have *known* that the statement or representation was false.¹⁵⁴ The LMRDA makes any union officer who is required to sign a report “personally responsible” for that report; so if the “responsible” officer knew that a particular statement made in the report was false, then the officer may be convicted even if he did not actually write or direct the statement himself.¹⁵⁵ This officer might have a defense if he relied on an accountant to write the statement, but only if the officer provided the accountant with full and accurate (rather than false) information.¹⁵⁶

¹⁵⁰ *Budzanoski*, 331 F. Supp. at 1203–04.

¹⁵¹ *United States v. Haggerty*, 419 F.2d 1003, 1007 (7th Cir. 1969).

¹⁵² *Id.*

¹⁵³ § 439(b).

¹⁵⁴ *United States v. Bath*, 504 F.2d 456, 460 (10th Cir. 1974).

¹⁵⁵ *See id.* (presumption that officer who signed report knew its contents).

¹⁵⁶ *Id.*; *United States v. Oates*, 467 F.2d 129, 132 (3d Cir. 1972).

FIDUCIARY DUTY

The LMRDA establishes and regulates the “fiduciary duty” of union officers and representatives to the union and its members. This duty is primarily a responsibility to make sure that the union’s assets are managed and used properly. Under the LMRDA, union officers and representatives who violate their fiduciary duty may be held personally liable for monetary damages. Union members have a right to sue officers for breaches of fiduciary duty.

Related to the fiduciary duty, the LMRDA makes it a crime for any person to embezzle or otherwise take the union’s assets for non-union purposes. It is also a crime for a union to make a loan of more than \$2,000 to an officer or employee of the union. Any union officer or representative who handles the union’s money is required by the LMRDA to be “bonded” (like an insurance policy, to cover losses in case of financial wrongdoing by the individual). Failure to comply with the bonding requirement is a crime.

Before purchasing a bond for your local union check with the national union. Many national and international unions maintain a bond that covers all local officers that need to be bonded provided you have timely told them of your existence.

INDIVIDUALS TO WHOM THE FIDUCIARY DUTY APPLIES

The fiduciary duty of § 501(a) applies to individuals who are “fiduciaries” of a union, meaning that they “occupy positions of trust in relation to” the union and its members.¹⁵⁷ The duty applies to “[t]he officers, agents, shop stewards, and other representatives of a labor organization.”¹⁵⁸ The LMRDA clarifies that this list of titles covered by § 501(a) includes union officials and staff who exercise authority, but not nonsupervisory staff:

¹⁵⁷ 29 U.S.C. § 501(a) (2004).

¹⁵⁸ *Id.*

[The list] includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel.¹⁵⁹

The term “officer” has been interpreted broadly by courts to “include all union officers, no matter how minor their responsibilities.”¹⁶⁰ In cases where it is unclear whether a particular individual falls under one of the job categories explicitly covered by § 501(a), courts will look at the facts of the individual’s specific job duties and whether the individual serves in a “position of trust.”¹⁶¹ An example of a union employee who was deemed “key administrative personnel” covered by § 501(a) was an employee who had significant day-to-day responsibility “for preparing checks, and for assisting in the collection of dues.”¹⁶² If an individual is a union “fiduciary” covered by § 501(a), then the individual may be sued for breaching his fiduciary duty (see section on “Civil Lawsuits” below).

RULES AND VIOLATIONS OF FIDUCIARY DUTY

Section 501(a) of the LMRDA lists the 5 general rules that union officers must follow in order to carry out their fiduciary duty.¹⁶³ The 5 rules are listed below, followed by explanations of each rule and types of actions that could violate these rules, and additional related rules, based on federal court cases in which union members have sued officers for violating § 501(a).

¹⁵⁹ 29 U.S.C. § 402(q) (2004).

¹⁶⁰ *United States v. Sullivan*, 498 F.2d 146, 149 (1st Cir. 1974). The LMRDA defines “officer” as “any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.” 29 U.S.C. § 402(n) (2004).

¹⁶¹ *See Aho v. Bintz*, 290 F. Supp. 577, 580 (D. Minn. 1968).

¹⁶² *Sullivan*, 498 F.2d at 149–50.

¹⁶³ § 501(a).

Officers:

1. MUST hold the union's assets solely for the benefit of the union and its members;
2. MUST manage and spend the union's assets only in ways that comply with the union's governing rules (constitution, bylaws, and resolutions);
3. CANNOT deal with the union as an "adverse party" in connection with union duties;
4. CANNOT hold any asset or interest that conflicts with the interests of the union;
5. MUST account to the union for any profit received on behalf of the union.¹⁶⁴

First and Second Rules: Handling of Union Assets

The First and Second rules above are closely related and are most often the basis for lawsuits against union officials for violations of fiduciary duty. The First rule means that union officers must use the union's assets only for legitimate union purposes, not for personal purposes or other purposes that do not benefit the union.¹⁶⁵

The question of whether or not a particular purpose is a legitimate union purpose is based largely on the purposes that are permitted by the union's governing rules, especially the union's constitution.¹⁶⁶ (A union's governing rules also include its bylaws, and any resolutions validly adopted by the union's executive board or other governing body, in compliance with the constitution and bylaws.¹⁶⁷) When officers use union assets for purposes that are permitted by the union's rules, it is unlikely that a violation of fiduciary duty will be found under § 501(a)¹⁶⁸ (but see exceptions below). On the other hand, if an officer uses union assets in a way that is

¹⁶⁴ *Id.*

¹⁶⁵ *See Gabauer v. Woodcock*, 594 F.2d 662, 670–73 (8th Cir. 1979).

¹⁶⁶ *Guzman v. Bevona*, 90 F.3d 641, 647 (2d Cir. 1996).

¹⁶⁷ *See* § 501(a).

¹⁶⁸ *Guzman*, 90 F.3d at 647.

forbidden by the union’s rules, that action clearly violates the Second rule above, and is “the classic case of breach of fiduciary duty.”¹⁶⁹

An officer may violate the Second rule of § 501(a) not only by using union assets for a forbidden purpose, but also by failing to follow the union’s rules of procedure for using union assets. For example, if the union’s constitution requires membership approval of a certain type of expenditure by the union, then an officer who spends union money for that purpose, without getting the required approval from the membership, violates § 501(a).¹⁷⁰

Even if a specific vote of approval for an expenditure is not required by the union’s constitution, officers are much less likely to be found in violation of § 501(a) if they do obtain authorization. When a use of union assets has been properly authorized, courts will generally defer to that authorization and presume that the expenditure was not a violation of fiduciary duty.¹⁷¹ Proper authorization of expenditure can consist of specific authorization contained in the union’s governing rules, or a valid vote or decision (complying with the union’s governing rules) made by the union’s membership or governing body.¹⁷²

When an officer makes an expenditure of union assets that was not properly authorized, but is not clearly forbidden by the union’s rules, the officer does not necessarily violate § 501(a), but a court will not simply defer to the officer’s spending decision.¹⁷³ Instead, the court will examine the reasonableness of the expenditure; if the court determines that it was “manifestly [(clearly)] unreasonable” (see discussion below), then the court will find a violation of § 501(a).¹⁷⁴ If an officer *benefits personally* from an unauthorized expenditure, then the court may

¹⁶⁹ *Id.*

¹⁷⁰ *Int’l Ass’n of Bridge Workers v. Norris*, 383 F.2d 735, 739–740 (5th Cir. 1967).

¹⁷¹ *Ray v. Young*, 753 F.2d 386, 390 (5th Cir. 1985); *Council 49 v. Reach*, 843 F.2d 1343, 1347 (8th Cir. 1988).

¹⁷² *Ray*, 753 F.2d at 390.

¹⁷³ *Reach*, 843 F.2d at 1347.

¹⁷⁴ *Id.*

examine it more harshly, and may find a violation even if it is not so obvious that the expenditure was unreasonable.¹⁷⁵

While it is preferable for officers to have proper authorization for their expenditures, such authorization is not a complete defense to an alleged violation of fiduciary duty.¹⁷⁶ If an officer benefits personally from an *authorized* expenditure, then a court will find a violation of § 501(a) if the expenditure was “manifestly unreasonable.”¹⁷⁷ Typically, this situation can arise when officers use union assets to provide themselves (or their friends and relatives) with unjustifiable or excessive compensation and benefits. One court found a violation when the executive director of a union was overpaid by approximately \$10,000, and his wife was overpaid by more than \$2,000 in one month.¹⁷⁸ Courts will not find a violation if the officers’ compensation is merely “generous;” authorized compensation violates § 501(a) only when officers receive “excessive benefits, significantly above a fair range of reasonableness.”¹⁷⁹ For example, the Second Circuit held that three years’ severance pay for an employee who had worked 35 years for the union was not excessive,¹⁸⁰ and that a union employee’s pre-tax pension benefit was not excessive because it did not exceed his highest pre-tax wage level.¹⁸¹

Not all expenditures that somehow benefit an officer are considered suspicious under § 501(a). A properly authorized union expenditure that benefits an officer indirectly but also benefits the union will not be scrutinized in court as a possible violation.¹⁸² “For example, when

¹⁷⁵ *Anderson v. Int’l Union*, 370 F.3d 542, 554 n.11 (6th Cir. 2004) (using less deferential standard than “manifestly unreasonable”).

¹⁷⁶ *Morrissey v. Curran*, 650 F.2d 1267, 1272 (2d Cir. 1981) (“*Morrissey III*”).

¹⁷⁷ *Id.* at 1274.

¹⁷⁸ *Reach*, 843 F.2d at 1346.

¹⁷⁹ *Morrissey III*, 650 F.2d at 1275.

¹⁸⁰ *Id.* at 1276.

¹⁸¹ *Id.* at 1286.

¹⁸² *Erkins v. Bryan*, 785 F.2d 1538, 1544 (11th Cir. 1986) (finding no violation of fiduciary duty when union gave strike leaders higher strike benefit than other members, because the higher benefit allowed the strike leaders to devote more time and effort to the strike, to the union’s benefit).

a union officer enjoys a legitimate business dinner at union expense, he has received an indirect benefit,” but the dinner presumably benefits the union and serves union purposes, so it does not violate § 501(a).¹⁸³

Another way an expenditure that is *authorized* by a union vote or decision may still violate § 501(a) is if it goes beyond the legitimate union purposes permitted by the union’s constitution, or if it conflicts with the purposes of the LMRDA or other statutes.¹⁸⁴ One court stopped a union from paying the legal defense fees for union officers who were accused of violating their fiduciary duty, because that would go beyond union purposes and conflict with the policy goals of the LMRDA.¹⁸⁵ Another court held, for similar reasons, that a union could not “retroactively” authorize expenditures made by union officers, after those expenditures had already been found improper under § 501(a) in an earlier court decision.¹⁸⁶

Third Rule: No Dealing with Union as “Adverse Party”

A general illustration of what it means to deal with the union as an “adverse party” is where a union officer does a transaction with the union for his/her own benefit. For example, a union officer violated § 501(a) when he arranged to purchase a used luxury car from the union, for his personal use, for a price that was less than the car’s fair market value.¹⁸⁷ This kind of fiduciary breach is sometimes called “self-dealing,” and it can overlap with a breach of the asset-handling rules discussed above.¹⁸⁸ For example, union officers violated § 501(a) when they used the union’s assets to make a bad loan, that was not repaid, to a corporation in which they were

¹⁸³ *Reach*, 843 F.2d at 1347 n.3.

¹⁸⁴ *Highway Truck Drivers & Helpers, Local 107 v. Cohen*, 182 F. Supp. 608, 620–21 (E.D. Pa. 1960), *aff’d*, 284 F.2d 162 (3d Cir. 1960).

¹⁸⁵ *Id.*

¹⁸⁶ *Morrissey v. Curran*, 423 F.2d 393, 398 (2d Cir. 1970) (“*Morrissey I*”).

¹⁸⁷ *Anderson v. Vestal*, 79 L.R.R.M. 2725 (M.D. Tenn. Sept. 20, 1971).

¹⁸⁸ *See id.* at 554 n.11.

major shareholders.¹⁸⁹ In that type of situation, the officers benefit personally from their mismanagement of union assets, by “playing both sides” of the deal.

Fourth Rule: No Conflicts of Interest

A union officer’s loyalty to the union must be undivided, so officers may not have any financial or personal interests that would undermine their loyalty to the union and that might cause them to act against the interests of the union. For example, union officers violated § 501(a) when they requested and accepted financial contributions to their social club from employers who were represented by the union.¹⁹⁰ The officers were using the social club to support their reelection campaigns.¹⁹¹ The court found that the officers “obtain[ed] a personal interest adverse to the union . . . by operating the [social club] with funds from employers, thus creating a conflict between their interest in reelection and their duty to deal with employers at arm’s length.”¹⁹² Accepting such payments from employers may also be a crime under LMRA § 302, discussed earlier (“Restrictions on Payments From Employers”).

One federal appeals court in a case called *Johnson v. Nelson* interpreted the “conflicts of interest” rule, combined with the “adverse party” rule, very broadly.¹⁹³ The court said that union officers “may not act adversely to their [union] or to the members as a group, or acquire a personal interest which is contrary to the interests of the [union].”¹⁹⁴ Instead, officers “must subvert their own personal interests to the lawful mandates and orders of the [union].”¹⁹⁵ In that case, the court found that officers violated § 501(a) by refusing to pay certain attorney fees after

¹⁸⁹ Hood v. Journeymen Barbers Int’l Union, 454 F.2d 1347, 1355 (7th Cir. 1972).

¹⁹⁰ Chathas v. Local 134 IBEW, 233 F.3d 508, 514 (7th Cir. 2000).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 325 F.2d 646 (8th Cir. 1963).

¹⁹⁴ *Id.* at 650.

¹⁹⁵ *Id.*

the membership had voted for the fees to be paid.¹⁹⁶ The court stated that the officers “allowed their personal feelings towards [certain union members] to interfere with their duties as officers . . . and have thus assumed positions adverse to the interests of the local union as expressed in a majority vote.”¹⁹⁷

Fifth Rule: Account for Profit Received

The rule that union officers must “account to” the union means that they must turn over to the union, rather than keeping for themselves, any profit they receive on behalf of the union or connected with the union. For example, when a union officer was paid for serving on the board of a bank owned by the union, he violated § 501(a) by failing to give that money to the union.¹⁹⁸ The court in that case found that the officer was serving on the bank’s board “on behalf of the union,” because his membership on the bank’s board was “necessitated” by the union’s majority ownership of the bank.¹⁹⁹ Because the officer was serving in the bank position as part of his union duties, he had to account to the union for that compensation.²⁰⁰ However, this rule has never been applied to legitimate salary and other compensation that a union officer receives from his employer for services rendered (whether his “employer” is the union or an employer).

The “account for profit” rule can be thought of as following logically from the other fiduciary duty rules. Since these profits really belong to the union rather than the officer, the officers would be misusing union assets for their personal benefit by keeping the profit for themselves. Also, if a union officer deals with the union as an “adverse party” in a transaction

¹⁹⁶ *Id.* at 652–53.

¹⁹⁷ *Id.* at 653; *see also* Pignotti v. Sheet Metal Workers’ Int’l Ass’n, 477 F.2d 825 (8th Cir. 1973).

¹⁹⁸ United Mine Workers of Am. v. Boyle, 1975 U.S. Dist. LEXIS 14916, *20–21 (D.C. Cir. Dec. 9, 1975).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

with the union, like in the case where the officer bought a used car from the union, then the officer must account to the union for whatever profit he made on the transaction.²⁰¹

Additional Rule: Do Not Permit Other Officers to Violate Fiduciary Duty

In some cases, courts have held decision-making union officers jointly liable for knowingly permitting, authorizing, or enabling other officers to commit violations of fiduciary duty. For example, one court held a “dominant union officer” liable for improper compensation paid by the union to other officers, because the dominant officer had “knowingly authorized” these payments.²⁰² Another court held the members of a union’s executive board liable for knowingly approving an excessive salary for the union’s executive director.²⁰³ In the “adverse party” used car case, the court held liable not only the officer who purchased the car from the union at a discount, but also the officer who conducted the sale on behalf of the union and thereby “participated in the breach” of fiduciary duty.²⁰⁴

Additional Rule: “Exculpatory Provisions” are Void

Section 501(a) also says that “general exculpatory provisions” for fiduciary duty in a union’s governing rules are void (have no effect).²⁰⁵ An “exculpatory provision” is a clause that relieves an individual of liability (gets the person off the hook for any harm caused to the union). So a general exculpatory provision for fiduciary duty would say something like: “The officers of this union shall not owe any fiduciary duty to the members, and shall not be liable for any

²⁰¹ *Vestal*, 79 L.R.R.M. 2725 at *3–4 (officer who purchased used car from union must account to union for the amount of the discount he got on the car as compared to its fair market value).

²⁰² *Morrissey III*, 650 F.2d at 1283. The district court decision that was on appeal in *Morrissey III* had held that the other union officers besides Curran (the “dominant officer”) should not be held liable for the union’s improper payments to Curran, because: “[Curran had] virtually absolute dominance of the Union. The other officers were not directly involved in authorizing most if not all of the challenged expenditures and they probably could not have stopped them if they had tried.” 482 F. Supp. 31, 61 (S.D.N.Y. 1979), *aff’d in relevant part, rev’d in part on other grounds, vacated in part on other grounds, Morrissey III*.

²⁰³ *Reach*, 843 F.2d at 1348 n.4.

²⁰⁴ *Vestal*, 79 L.R.R.M. 2725 at *3.

²⁰⁵ § 501(a).

violation of fiduciary duty.” Under § 501(a), this type of clause is void, meaning that the existence of this clause in a union’s governing rules would do nothing to prevent an officer from being held liable for violating § 501(a). Another way to think of this is that a union and its members cannot *wave* their right to have their union officers comply with the fiduciary duty.

NOTES ON SCOPE OF FIDUCIARY DUTY

Coverage of Additional Duties Beyond Financial Affairs

As discussed above, the focus of the fiduciary duty under § 501(a) is to ensure proper conduct by union officers with respect to the union’s assets and financial affairs. However, federal appeals courts have disagreed about whether the fiduciary duty also applies to other officer activities beyond financial matters.

The Second Circuit (the federal appeals court that governs New York) has interpreted that § 501(a) applies only to officer conduct involving “money and property,” and that § 501(a) “is not a catch-all provision under which union officials can be sued on any ground of misconduct.”²⁰⁶ Therefore, the Second Circuit ruled that union officers’ actions regarding changes to the union’s voting rules could not violate § 501(a), because those actions did not focus on financial affairs.²⁰⁷ When an officer’s actions focus on something other than financial affairs, then there will be no § 501(a) violation under Second Circuit law, even if the officer’s actions result in an incidental financial change.²⁰⁸ The Second Circuit found no violation in union officers’ efforts to restructure their union, even though the restructuring involved an incidental shift in union funds.²⁰⁹

²⁰⁶ *Gurton v. Arons*, 339 F.2d 371, 375 (2d Cir. 1964).

²⁰⁷ *Id.*; *see also* *Coleman v. Bhd. of Railway Clerks*, 340 F.2d 206 (2d Cir. 1965) (no violation of § 501(a) where union officers allegedly withheld information and failed to follow proper procedures for resolution vote at union’s convention).

²⁰⁸ *Head v. Bhd. of Railway Clerks*, 512 F.2d 398, 400 (2d Cir. 1975).

²⁰⁹ *Id.*; *but see* *Guzman*, 90 F.3d at 646 (distinguishing *Head* and finding potential §501(a) violation where officers’ use of union funds for improper purpose was focus of allegations).

Unlike the Second Circuit, other federal appeals courts have interpreted § 501(a) to create a wider range of fiduciary duty, especially regarding union democracy issues. In *Johnson v. Nelson*, discussed above, the Eighth Circuit held that § 501(a) “imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs.”²¹⁰ In that case, the court found that union officers violated § 501(a) by obstructing the will of the majority of the membership as expressed by a vote.²¹¹ The Ninth Circuit held that § 501(a) “establishes that union officials have fiduciary duties even when no monetary interest of the union is involved.”²¹² The Ninth Circuit thus found that union officers violated § 501(a) by failing (in violation of the union’s constitution) to submit a collective bargaining agreement to the general membership for a vote.²¹³ The Third and Seventh Circuits have also adopted a broad view of the scope of § 501(a).²¹⁴

Even under a broad interpretation of § 501(a), union officers’ fiduciary duty does not apply to the quality and effectiveness of the union’s performance as a bargaining representative.²¹⁵ Thus union officers did not violate § 501(a) merely by failing to secure optimal contract terms in collective bargaining.²¹⁶

Coverage of Employee Benefits Funds

There is some legal uncertainty about how § 501(a) applies to jointly administered collectively bargained employee benefits funds, and the trustees of those funds, especially

²¹⁰ 325 F.2d at 651.

²¹¹ *Id.* at 653.

²¹² *Stelling v. IBEW*, 587 F.2d 1379, 1386 (9th Cir. 1978).

²¹³ *Id.* at 1387 (“Although the breaches complained of do not relate to the financial affairs of the union, they are related to the fiduciary duties of the [defendants] in their official capacities as union officers.”).

²¹⁴ *See Sabolsky v. Budzanoski*, 457 F.2d 1245, 1250–51 (3d Cir. 1972); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 514 (7th Cir. 2000) (“Although section 501 is primarily aimed at preventing officers from misusing union funds . . . it is not limited to that conduct.”). Some federal appeals courts have thus far reserved judgment on the scope of § 501(a). *See Quinn v. Di Giulian*, 739 F.2d 637, 653 n.30 (D.C. Cir. 1984); *Ray v. Young*, 753 F.2d 386, 390 n.2 (5th Cir. 1985).

²¹⁵ *Carr v. Learner*, 547 F.2d 135, 138 (1st Cir. 1976).

²¹⁶ *Id.*

because (since 1974) those funds and their trustees are regulated extensively by the Employee Retirement and Income Security Act (ERISA). Court precedents suggest that § 501(a) does cover the assets of these benefits funds, but does not necessarily apply to the trustees of the funds.

In 1972, before ERISA was enacted, the Seventh Circuit held that § 501(a) applies to assets held by a union-affiliated pension fund.²¹⁷ The court also held that union representatives serving as trustees (on the governing committee) of the pension fund have a fiduciary duty under § 501(a), in their roles as trustees, to manage the fund’s assets properly.²¹⁸ However, in 1973, the Second Circuit suggested (without making it a rule) that § 501(a) does not apply to trustees.²¹⁹ In 1980, after ERISA had been enacted, a federal trial court refused to apply § 501(a) to a union officer in his role as a trustee of the union’s pension fund.²²⁰ The trial court found it inappropriate, at least in that case, to apply the § 501(a) fiduciary duty to the “administration” (management) of the pension fund.²²¹

In 1981, the Second Circuit provided a possible resolution to these issues—the Second Circuit held that § 501(a) does apply to the use of pension fund assets by union officers, but preserved the idea that the statute should not apply to fund trustees.²²² The court held union officers liable under § 501(a) for receiving payments for improper purposes from the union’s pension fund.²²³ (The pension fund had paid for the officers and their wives to take personal vacations in Europe.²²⁴) The court stated: “The [union officers] in this case have breached their

²¹⁷ Hood v. Journeymen Barbers Int’l Union, 454 F.2d 1347 (7th Cir. 1972).

²¹⁸ *Id.* at 1354.

²¹⁹ Morrissey v. Curran, 483 F.2d 480, 484 (2d Cir. 1973) (“*Morrissey II*”).

²²⁰ Brink v. Da Lesio, 496 F. Supp. 1350, 1373–1374 (D. Md. 1980), *aff’d in part, rev’d in part on other grounds*, 667 F.2d 420 (4th Cir. 1981).

²²¹ *Id.*

²²² *Morrissey III*, 650 F.2d at 1284–85.

²²³ *Id.* at 1284.

²²⁴ *Id.*

duty to the membership not in their capacity as pension fund trustees, i.e., in deciding to *make* the [improper] payments, but in their capacity as union officers *receiving* them.”²²⁵ The assets of the pension fund belonged to the union members, so the court prohibited the officers from “looting” those assets.²²⁶

For certain types of benefits funds, it is clear that § 501(a) applies. The statute definitely applies to the management of any benefits funds that are established and administered by the union alone, without employer involvement.²²⁷ It is also clear that § 501(a) applies to the act of creating a benefits fund (whether it is collectively bargained or established solely by the union), meaning that a union officer may violate § 501(a) by creating a fund that is fraudulent or for an improper purpose.²²⁸

Any union officer who serves as trustee of a jointly administered employee benefits fund should be aware of his fiduciary duty under ERISA to manage the fund’s assets properly. ERISA’s fiduciary duty rules are similar to the rules of § 501(a), but more detailed and extensive.²²⁹ Like § 501(a), the ERISA rules focus on making sure that fund trustees will manage the fund’s assets strictly in the best interests of the fund’s members (the participants and beneficiaries).²³⁰ Further discussion of ERISA is beyond the scope of this Guide. Consult with your union or fund’s attorney if you need more information.

²²⁵ *Id.* (emphases added).

²²⁶ *Id.*

²²⁷ *See* Am. Fed. of Grain Millers, Local No. 67 v. Am. Fed. of Grain Millers, Int’l, 133 L.R.R.M. 3040, at *8 (N.D. Ill. Dec. 5, 1989) (“single purpose funds established by unions . . . such as the ‘strike funds’ in this case . . . are covered by § 501(a) just as the general treasuries of unions are”); John M. McEnany, *The Fiduciary Duty Under Section 501 of the LMRDA*, 75 Colum. L. Rev. 1189, 1212 (1975) (envisioning “application of section 501 to entirely union-run welfare and pension plans”).

²²⁸ *See* *Wenzel v. Amalgamated Bank*, 1996 U.S. Dist. LEXIS 9947, at *9–10 (S.D.N.Y. July 16, 1996) (officers charged with establishing an invalid pension plan in breach of their fiduciary duty to the union).

²²⁹ *See* 29 U.S.C. § 1104 (2004).

²³⁰ *See id.*

CIVIL LAWSUITS FOR VIOLATIONS OF § 501(A)

Union Member's Right to Sue

Under § 501(b) of the LMRDA, union members have a right to sue officers and other representatives of their union for violating the fiduciary duty of § 501(a).²³¹ Union members can only sue individual union representatives under § 501(b), so the union itself cannot be a defendant.²³² Because this is a civil lawsuit, the plaintiff union member only has to show by a “preponderance of the evidence” (more likely than not) that the defendant union officers violated § 501(a). If a union member prevails in this type of lawsuit, the court may order an injunction (to stop the officers from engaging in the illegal conduct) and/or the court may order the officers to pay money to the union to compensate for the loss or misuse of union assets. The court may also order the officers to pay the union member’s attorney fees and other legal costs.²³³ As discussed earlier, the court may hold certain officers liable for damages if they knowingly approved violations of fiduciary duty, even if those officers were not the primary culprits.²³⁴

²³¹ 29 U.S.C. 501(b) (2004). The section states:

Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses.

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

²³² See *Sabolsky*, 457 F.2d at 1249.

²³³ § 501(b).

²³⁴ See *supra* text accompanying notes 200–202.

Requirements for a § 501(b) Lawsuit

A union member must meet certain requirements in order to be allowed by the court to proceed with a § 501(b) lawsuit. Most importantly, before a union member can sue for a violation of § 501(a), the member must first make a formal request to union leadership (“the labor organization or its governing board or officers”), demanding that the leaders take action themselves to remedy the violation.²³⁵ This is called the “demand requirement” of § 501(b).²³⁶ The member can sue only if the union leaders “refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by [the] member.”²³⁷ Thus officers may prevent members from suing by taking action themselves to recover the funds or secure other “appropriate relief” (how to “seek relief” is discussed below).

Another requirement for a § 501(b) lawsuit is that the union members who bring the lawsuit (the plaintiffs) must be the same individuals who made the request to the union leadership.²³⁸ Also, the union members can only sue if they seek relief that is “for the benefit” of the union and its members in general, not just for the benefit of the individual plaintiffs.²³⁹ Finally, the court must find that there is “good cause” for the lawsuit, to prevent union members

²³⁵ § 501(b).

²³⁶ Some courts will allow a union member to sue without having made a formal demand that the union leaders sue, if the union member’s demand would obviously be “futile” (meaning that the demand would be pointless because there is no chance that the union leaders would take action); however, most courts will not excuse the demand requirement. *Compare Coleman*, 340 F.2d at 208 (futility is no excuse), *with Sabolsky*, 457 F.2d at 1253 (demand excused because it would be futile).

²³⁷ § 501(b).

²³⁸ *Id.*; *Int’l Bhd. of Teamsters v. Hoffa*, 242 F. Supp. 246, 248–49 (D.D.C. 1965).

²³⁹ § 501(b); *Phillips v. Osborne*, 403 F.2d 826, 832 (9th Cir. 1968).

from bringing frivolous suits just to harass union officers.²⁴⁰ But many courts use a relaxed standard that makes it easy for union member plaintiffs to show “good cause.”²⁴¹

How Officers Can Seek Relief in Response to a “Demand”

Union officers can preempt a § 501(b) lawsuit by taking action themselves to obtain relief, through their own lawsuit or internal union procedures. But if union members make a “demand” to officers for remedial action, and the officers then fail or refuse to seek relief “within a reasonable time,” the union members can bring a § 501(b) lawsuit. In order for a court to find that the officers properly sought relief in response to the “demand” (rather than that they “failed or refused” to seek relief), the officers must have pursued the matter promptly and vigorously. Of course, if the officers do nothing, then they have “failed” to take action. A “reasonable time” can be as little as one month, meaning: If it has been a month since the union member made the “demand” to the officers, and the officers have failed to take action during that time, then the union members can sue.²⁴² If the officers simply refuse to take any action, then the members can sue, even if little time passes between the members’ demand and the officers’ refusal.²⁴³

There are two options for how union officers can seek relief when members accuse union personnel of fiduciary violations: The officers can either sue the accused personnel in court, or conduct investigative and disciplinary actions against them under the union’s internal procedures. Each of these two options has advantages and disadvantages that officers should consider when deciding which option to use. Of course, officers should also consider their

²⁴⁰ § 501(b); *Phillips*, 403 F.2d at 830.

²⁴¹ *See* *Loretangeli v. Critelli*, 853 F.2d 186, 192 (3d Cir. 1988) (in determining whether plaintiffs have “good cause,” court should only look at whether there are jurisdictional or fundamental defects in plaintiffs’ complaint).

²⁴² *Carroll v. Bd. of Trs., Ohio Highway Drivers Welfare Trust*, 573 F. Supp. 935, 937 (S.D. Ohio 1983).

²⁴³ *See* *Frantz v. Sheet Metal Workers Union Local No. 73*, 470 F. Supp. 223, 227 (N.D. Ill. 1979) (allowing union members to sue just four days after having made demand to union officers, because the officers had refused the demand).

specific circumstances, including the internal politics of the union, when deciding whether a lawsuit is preferable to internal action.

For the lawsuit option, the officers would file a suit against the accused personnel in state court under state common law (judge-made law) or state statutes if applicable. The officers could be plaintiffs in the suit themselves; alternatively, or in addition, the union itself could be a plaintiff.²⁴⁴ (Most courts have held that a union cannot be a plaintiff in a § 501(b) lawsuit, which means that the union itself can only sue under state law.²⁴⁵) If the union is a plaintiff in the state lawsuit, then the legal expenses for the suit may be paid by the union (of course, the officers should obtain proper authorization for those expenses). The plaintiffs' complaint in the lawsuit would allege that the defendants misappropriated or stole union assets, as the case may be, and would seek recovery of the assets and any other appropriate relief.²⁴⁶ In each situation, the officers considering bringing the lawsuit will need legal advice about applicable state law. In New York, for example, a union may sue its officers and agents under the state's Labor and Management Improper Practices Act for breaches of fiduciary duty.²⁴⁷ If the union prevails in the lawsuit, the court may award attorney fees to the union.²⁴⁸

While it might seem unnecessary for officers or the union to file a lawsuit just to prevent the members from filing a similar lawsuit, there may be good reasons to do so. If the officers sue first, they can direct the process—they can choose the attorney to represent them or the union; they can try to control the costs of the lawsuit; and they can oversee the suit to make sure it is

²⁴⁴ See *Filippini v. Austin*, 106 F.R.D. 425 (C.D. Cal. 1985).

²⁴⁵ *Safe Workers' Org. v. Ballinger*, 389 F. Supp. 903, 908 (W.D. Ohio 1974); *Building Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 506 (9th Cir. 1989); *contra Bhd. of Railway Clerks v. Orr*, 1977 U.S. Dist. LEXIS 15840, at *2 (E.D. Tenn. May 18, 1977) (union has standing to sue under § 501(b)).

²⁴⁶ See *Filippini*, 106 F.R.D. at 427 (union brought claims against officer under state law for conversion of union funds and breach of covenant of fair dealing).

²⁴⁷ N.Y. LAB. LAW § 725.1 (Consol. 2004).

²⁴⁸ § 725.2.

conducted effectively and responsibly. The officers cannot do these things if it is the members' lawsuit under § 501(b).

For the internal (non-lawsuit) option, the officers would use the union's investigative and disciplinary procedures (provided for in the union's governing rules) to obtain relief from the accused personnel, such as requiring them to pay restitution or a fine to the union, and/or removing them from their offices/positions. This option has the advantage of avoiding the potential problems of the members' lawsuit, (probably) without having to go to court. The internal procedures may be preferable to the greater costs, length, uncertainty, and perhaps publicity of a lawsuit. However, the union's procedures may allow for appeals (to the international union etc.) that could lengthen and complicate the internal process. Also, if the union disciplines the accused personnel and they refuse to comply (refuse to pay etc.), then the union could still end up having to sue them to force them to comply.²⁴⁹

A drawback of the internal option is that it is (somewhat) less certain to preempt the members' lawsuit. If the officers choose the lawsuit option, and then the members still try to bring their own lawsuit under § 501(b), the court simply will not let the members sue, as long as the officers have sued all the wrongdoing personnel for appropriate relief.²⁵⁰ When the union chooses the internal option, however, the court will not automatically trust that the union's internal process results in "appropriate relief." The court may be skeptical if the union's internal process is informal and not based on written rules, or if there is evidence that the process is not

²⁴⁹ See *Toussaint v. Hall*, 2004 U.S. Dist. LEXIS 15332 (S.D.N.Y. Aug. 6, 2004) (enforcing judgment rendered against an officer in a union disciplinary proceeding).

²⁵⁰ Compare *Filippini* (dismissing union members' suit because union had already filed lawsuit seeking appropriate relief), with *Saunders v. Hankerson*, 312 F. Supp. 2d 46, 64 (D.D.C. 2004) (members' suit permitted even though union had already brought its own lawsuit, because union failed to sue all the wrongdoers).

thorough or objective or fair, or that it does not comply with the union's governing rules.²⁵¹ (The LMRDA's "Bill of Rights" for union members, not otherwise discussed in this Guide, provides that a union member cannot be disciplined by his union unless he is given a "full and fair hearing."²⁵²) A nominal effort by the officers to act internally, by merely talking with the union members who made the demand or claiming that an investigation is underway, will not be enough to preempt the members' lawsuit.²⁵³ However, if the union does conduct an investigation or disciplinary proceeding objectively and properly (under the union's governing rules), courts generally defer to the results of the proceeding rather than allowing the members to sue.²⁵⁴

CRIMINAL PENALTIES FOR TAKING UNION ASSETS

The crime of taking union assets, under § 501(c) of the LMRDA, is closely related to the asset-handling rules of fiduciary duty under § 501(a), and it is not uncommon for actions that violate § 501(a) to result also in criminal convictions under § 501(c).²⁵⁵ Section 501(c) is different though because it applies to more kinds of people, and it involves a criminal

²⁵¹ See *Purcell v. Keane*, 406 F.2d 1195, 1200 (3d Cir. 1969) (court doubted whether union could take objective internal action because "subcommittee appointed to investigate the charges made by [union members] was composed of the same individuals who were charged with the misuse of funds").

²⁵² 29 U.S.C. § 411(a)(5) (2004). The provision states in full:

Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

²⁵³ *Carroll*, 573 F. Supp. at 937; *Bona v. Barasch*, 2003 U.S. Dist. LEXIS 4186, *92-93 (S.D.N.Y. Mar. 20, 2003).

²⁵⁴ See *Hoffman v. Kramer*, 362 F.3d 308, 316-17 (5th Cir. 2004) ("an objectively reasonable decision by union leadership not to pursue a claim is entitled to some deference").

²⁵⁵ 29 U.S.C. § 501(c) (2004). The section states:

Embezzlement of assets; penalty. Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$ 10,000 or imprisoned for not more than five years, or both.

prosecution by the federal government rather than a civil lawsuit by union members, so the legal standards for proving a violation are different.

Individuals Who May Be Charged Under § 501(c)

A § 501(c) criminal charge may be brought against any person who improperly takes a union's assets and who is an officer of the union, or is "employed, directly or indirectly" by the union.²⁵⁶ Unlike § 501(a), § 501(c) is not limited to individuals who are "fiduciaries" of the union (who have significant authority or responsibility).²⁵⁷ Therefore, *any* person who is employed by the union may be charged under § 501(c). Also, individuals who serve as official representatives of the union may be charged even if they are not formally employed by the union;²⁵⁸ and independent contractors who are indirectly employed by the union (such as consultants) may be charged as well.²⁵⁹

Types of Actions that May Violate § 501(c)

A § 501(c) crime is committed when any applicable person (as discussed above) "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another," any of the union's assets.²⁶⁰ This language prohibits several types of misconduct involving the union's assets.

An obvious way to violate § 501(c) is simply to "steal" union assets; for example, where an employee of the union secretly takes some cash from the union office's petty cash drawer and

²⁵⁶ *Id.*

²⁵⁷ *See* United States v. Capanegro, 576 F.2d 973, 979 (2d Cir. 1978); Doyle v. United States, 318 F.2d 419, 423 (8th Cir. 1963).

²⁵⁸ United States v. Ford, 462 F.2d 199, 200–01 (7th Cir. 1972).

²⁵⁹ United States v. Seidman, 156 F.3d 542, 552 (4th Cir. 1998). One court held that individuals who are not even indirectly employed by the union may be charged with helping ("aiding and abetting") a union employee to commit a § 501(c) crime. United States v. Coleman, 940 F. Supp. 15, 17–18 (D.D.C. 1996).

²⁶⁰ § 501(c). The assets of a union that are covered by § 501(c) are "any of the moneys, funds, securities, property, or other assets" of the union. *Id.* Courts have interpreted this language broadly to cover all assets that are owned by a union, including assets owned by a separate entity (such as a non-profit corporation) that is in turn owned by the union. *See* United States v. Hartsel 199 F.3d 812, 819–20 (6th Cir. 1999).

spends it for personal purposes. But an officer need not actually steal and spend union money for himself in order to violate § 501(c). The act of “converting” union assets (prohibited by § 501(c)) is broader than stealing; it “include[s] misuse or abuse of [assets].”²⁶¹ An officer can be guilty of “converting” union assets even if the assets are initially properly in his possession (as part of his job), and even if he does not intend to keep the assets for himself.²⁶²

An officer violates § 501(c) whenever he improperly takes union assets for “his own use, or the use of another.” This is interpreted to mean using union assets for non-union purposes, whatever they may be; so an officer may violate § 501(c) even if he does not get a “personal advantage” from his use of union assets.²⁶³ Like the asset-handling rules of § 501(a), § 501(c) may be violated when an officer spends union money in a way that is not a legitimate union purpose and/or is not properly authorized. An officer may also violate § 501(c) “passively” by knowingly accepting improper payments from the union, even if the officer did nothing himself to bring about the payments.²⁶⁴ For example, a union official was convicted under § 501(c) when he accepted unauthorized salary increases, with knowledge that they were unauthorized.²⁶⁵

Proper and accurate documentation and accounting for all union expenditures and financial dealings is important for avoiding liability under § 501(c) (as well as § 501(a)). When officers do not have documentation (such as receipts, vouchers, expense reports) about the

²⁶¹ *United States v. Harmon*, 339 F.2d 354, 357 (6th Cir. 1964) (quoting *Morissette v. United States*, 342 U.S. 246, 271–73 (1952)).

²⁶² *Id.* (an officer may be guilty of “converting” if he fails to keep union funds separate from his own money). Courts consider “embezzling” of union assets to be a type of “conversion” where the defendant has responsibility for the assets as part of his fiduciary duty to the union. *See Colella v. United States*, 360 F.2d 792, 799–800 (1st Cir. 1966).

²⁶³ *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976); *United States v. Harrelson*, 223 F. Supp. 869, 869 (E.D. Mich. 1963).

²⁶⁴ *United States v. Sullivan*, 498 F.2d 146, 150 (1st Cir. 1974).

²⁶⁵ *Id.*

purpose of major expenditures, a jury may conclude that the expenditures were not for legitimate union purposes, even without proof of specific improper purposes.²⁶⁶

²⁶⁶ *United States v. Silverman*, 430 F.2d 106, 117 (2d Cir. 1970); *United States v. Walsh*, 928 F.2d 7, 13 (1st Cir. 1991).

“Willfulness” Under § 501(c)

Because violation of § 501(c) is a criminal offense, the prosecution (federal government) must prove “beyond a reasonable doubt” that the defendant committed the crime. Specifically, the prosecution must prove not only that the defendant took union assets improperly, but also that the defendant committed this act “willfully.” Because a § 501(c) crime is a felony rather than a misdemeanor, “willfulness” under § 501(c) is more than just the “reckless disregard” required for LMRDA misdemeanors (such as violations of the reporting and record-keeping requirements, discussed earlier). Under § 501(c), willfulness means that the defendant committed the act voluntarily and knowingly, with an intent to defraud the union.²⁶⁷ To prove willfulness, the prosecution can use circumstantial (indirect) evidence²⁶⁸ (in addition to unlikely direct evidence, such as a memo written by the defendant saying, “I intend to defraud the union”). Because the defendant must have intended to commit the wrongful act, a defendant will not be convicted under § 501(c) if he can prove that the act was merely an accident or mistake.²⁶⁹

To determine whether or not a defendant committed the act willfully, courts generally look at whether the expenditure was authorized and whether it benefited the union, or whether the defendant at least had a “good faith belief” that the expenditure was authorized and/or benefited the union. The federal appeals courts differ from each other somewhat on rules and standards applicable to the issues of authorization and benefit to the union.²⁷⁰ The bottom line is that even though authorization is not necessarily a complete defense, it is highly advisable for union officers seeking to avoid § 501(c) liability to get proper authorization for significant

²⁶⁷ United States v. Dibrizzi, 393 F.2d 642, 644 (2d Cir. 1968).

²⁶⁸ *Id.* at 644–45.

²⁶⁹ United States v. Goad, 490 F.2d 1158, 1166 (8th Cir. 1974).

²⁷⁰ Compare United States v. Gibson, 675 F.2d 825, 828-29 (6th Cir.) (prosecution must show lack of authorization and lack of defendant’s good faith belief that expenditure would benefit union), with *Sullivan*, 498 F.2d at 150 (not including lack of benefit to union as element of crime); see also United States v. Oliva, 46 F.3d 320, 324 (3d Cir. 1995) (discussing different approaches).

expenditures and transactions (as was discussed above for § 501(a)). As with § 501(a), proper authorization is granted by the union membership or appropriate governing body, in compliance with the union's governing rules; approval just from an individual union official (even a superior) does not necessarily constitute proper authorization.²⁷¹

Investigations and Penalties Under § 501(c)

Investigations of possible § 501(c) violations are conducted by OLMS. If OLMS believes a § 501(c) crime has been committed, OLMS then refers the case to federal prosecutors to indict and prosecute the defendants. Individuals convicted under § 501(c) “shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.”²⁷² The court may also order a convicted defendant to pay restitution to the union for misappropriated funds.

Note that union representatives may also be prosecuted under state criminal statutes for crimes such as embezzlement (for misappropriating union funds) or larceny (for stealing union funds).²⁷³ In New York, a “willful and knowing” violation of the Labor and Management Improper Practices Act is “a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than \$1,000 dollars, or by both.”²⁷⁴ A conviction under New York State law of the crime of “grand larceny” (which can include embezzlement) can result in a prison sentence of up to 7 years (but typically shorter) if the defendant stole between \$3,000 and \$50,000.²⁷⁵

²⁷¹ United States v. Stockton, 788 F.2d 210, 217 (4th Cir. 1986) (“An appropriation or expenditure of union funds is therefore unauthorized if it is done without the permission of the union, even if it is approved by a superior union official.”).

²⁷² § 501(c).

²⁷³ 29 U.S.C. § 604 (2004) (“Nothing in [the LMRDA] shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny . . .”).

²⁷⁴ N.Y. LAB. LAW § 725.4 (Consol. 2004).

²⁷⁵ N.Y. PENAL LAW §§ 70.00 (“Sentence of imprisonment for felony”) & 155.35 (“Grand larceny in the third degree”) (Consol. 2004).

CRIMINAL PENALTIES FOR LOANS TO UNION OFFICERS & EMPLOYEES

Section 503(a) of the LMRDA prohibits unions from making loans exceeding \$2,000 to their officers and employees.²⁷⁶ Section 503(c) makes it a crime for “any person” to “willfully violate” this prohibition.²⁷⁷ Because the LMRDA defines “person” to include “one or more individuals,” any union officials who make, authorize, or permit an improper loan may be charged under § 503(c) along with the officer or employee who receives the loan.²⁷⁸ The person who authorizes the loan could be the same person who receives it, when an officer simply gives himself a loan from the union.²⁷⁹ When two officers signed a union check that was an improper loan to one of those officers, both of the officers were criminally liable.²⁸⁰ Also (unlike in proceedings under §§ 501(b) and 501(c)), the union itself may be a defendant in an improper loan case, because the LMRDA also defines “person” to include a “labor organization.”²⁸¹

Section 503(a) clearly applies to loans made by a union (with the union’s money). It is less likely, but possible depending on the circumstances, that § 503(a) also applies to loans made (to a union officer or employee) by a union trust fund (such as a pension fund). One federal appeals court held that § 503(a) applies to a loan made by a union fund if the fund is a mere “instrumentality” of the union, set up to evade legal restrictions, rather than a “bona fide separate and distinct entity.”²⁸²

²⁷⁶ 29 U.S.C. § 503(a) (2004). The provision states:

Direct and indirect loans. No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of \$ 2,000.

²⁷⁷ 29 U.S.C. § 503(c) (2004).

²⁷⁸ 29 U.S.C. § 402(d) (2004).

²⁷⁹ See *United States v. Briscoe*, 65 F.3d 576 (7th Cir. 1995).

²⁸⁰ *United States v. Int’l Bhd. of Teamsters*, 817 F. Supp. 337, 344 (S.D.N.Y. 1993), *aff’d*, 14 F.3d 183 (2d Cir. 1994).

²⁸¹ § 402(d).

²⁸² *United States v. Ferrara*, 451 F.2d 91, 95 (2d Cir. 1971).

The most obvious way for § 503(a) to be violated is if a union formally makes a direct loan to an officer or employee. But loans that are informal or indirect also violate § 503(a). A salary advance in excess of \$2,000 is an improper loan.²⁸³ A loan to an officer or employee that is disguised as something else may also violate § 503(a). For example, a union may violate § 503(a) by making an otherwise valid loan to an individual who is not an officer or employee of the union, knowing that the individual is really a “conduit” who will give the money to an officer or employee.²⁸⁴

As with § 501(c), a defendant can only be convicted under § 503(c) if he “willfully violated” the statute.²⁸⁵ However, because § 503(c) is a misdemeanor crime rather than a felony, the “willfulness” required for a conviction is only “reckless disregard.” To be convicted under § 503(c), the defendant need not have *known* that the loan was improper. Instead, the defendant must have committed the act (making or receiving the loan) “with reckless disregard of the law, i.e., no reasonable effort is made to determine whether the [transaction] would constitute a violation of the law.”²⁸⁶ Therefore, an officer who might be involved in any transaction of this nature should, at a minimum, make a reasonable and honest effort beforehand to find out if the transaction is legal. Mere ignorance of the law is no excuse.²⁸⁷ A defendant may avoid “willfully violating” the statute if he relied on advice from a lawyer, but only if the defendant’s reliance was reasonable; in order for the reliance to be reasonable, the defendant must have provided the lawyer with full and accurate information about the situation.²⁸⁸

²⁸³ *Briscoe*, 65 F.3d at 587; *Teamsters*, 817 F. Supp at 344.

²⁸⁴ *See Ferrara*, 451 F.2d at 93–94.

²⁸⁵ § 503(c).

²⁸⁶ *Briscoe*, 65 F.3d at 587.

²⁸⁷ *Teamsters*, 817 F. Supp at 344–45.

²⁸⁸ *Id.* at 345.

In addition to prohibiting loans as described above, § 503 of the LMRDA prohibits a union or employer from paying any fine incurred by an officer or employee through a conviction of any willful violation of the LMRDA.²⁸⁹ Therefore, union officers should not allow such fines to be paid out of union funds, and also should not allow an officer or employee to receive extra pay from the union for the purpose of compensating for a fine that the individual had to pay.

A person who willfully violates the prohibitions on improper loans and payments of fines “shall be fined not more than \$ 5,000 or imprisoned for not more than one year, or both.”²⁹⁰ The person may also be ordered to pay restitution for the improper loan or payment.

FINANCIAL BONDING REQUIREMENTS

Section 502 of the LMRDA requires that any union officer, representative, or employee who handles the union’s funds, or who handles funds for the union’s affiliated “trusts,” be “bonded.”²⁹¹ Each “bond” is like an insurance policy taken out for the individual, to cover

²⁸⁹ 29 U.S.C. § 503(b) (2004). The section states: “**Direct or indirect payment of fines.** No labor organization or employer shall directly or indirectly pay the fine of any officer or employee convicted of any willful violation of [the LMRDA].”

²⁹⁰ § 503(c).

²⁹¹ 29 U.S.C. § 502(a) (2004). The provision states, in relevant part:

Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed \$ 5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others. The bond of each such person shall be fixed at the beginning of the organization's fiscal year and shall be in an amount not less than 10 per centum of the funds handled by him and his predecessor or predecessors, if any, during the preceding fiscal year, but in no case more than \$ 500,000. If the labor organization or the trust in which a labor organization is interested does not have a preceding fiscal year, the amount of the bond shall be, in the case of a local labor organization, not less than \$ 1,000, and in the case of any other labor organization or of a trust in which a labor organization is interested, not less than \$ 10,000. Such bonds shall be individual or schedule in form, and shall have a corporate surety company as surety thereon. Any person who is not covered by such bonds shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested. No such bond shall be placed through an agent or broker or with a surety company in which any labor organization or any officer, agent, shop steward, or other representative of a labor organization has any direct or indirect interest.

losses in case of financial wrongdoing by that individual. The bond may be paid for by the union, but does not have to be.²⁹²

A union's affiliated trust funds are covered by § 502 via the phrase "a trust in which a labor organization is interested."²⁹³ The LMRDA defines this phrase to mean a "trust or other fund or organization" that: (1) was created by a union, *or* has at least one trustee or governing board member selected by a union; *and* (2) primarily provides benefits for union members or their beneficiaries.²⁹⁴ According to OLMS, for employee benefits funds that are subject to the separate bonding requirements of ERISA, "no additional bonding is required under the LMRDA."²⁹⁵

The individuals who must be bonded are those "who handle funds or other property" for the union or affiliated trust. The DOL's regulations interpreting § 502 state that "funds or other property" include cash and "quick assets" that are "held, not for use, but for conversion into cash;" not included are assets "of a relatively permanent nature" (such as land and buildings) that are used in union (or trust) operations.²⁹⁶ The regulations state that a person is deemed to "handle" the applicable assets, and thus must be bonded, when the person's job duties involve a significant risk of financial loss if that person acts fraudulently with the assets.²⁹⁷ The bonding

²⁹² 29 C.F.R. § 453.24 (2005).

²⁹³ 29 U.S.C. § 502(a).

²⁹⁴ 29 U.S.C. § 402(1) (2004). The section states:

"Trust in which a labor organization is interested" means a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

²⁹⁵ OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP'T OF LABOR, BONDING REQUIREMENTS UNDER THE LMRDA AND THE CSRA, <http://www.dol.gov/esa/regs/compliance/olms/bonding.htm>.

²⁹⁶ 29 C.F.R. § 453.7 (2005) (also listing as assets that are covered: "checks and other negotiable instruments, government obligations and marketable securities;" and listing as other assets that are not covered: "furniture, fixtures, and office and delivery equipment").

²⁹⁷ 29 C.F.R. § 453.8(b) (2005) (a person is deemed to "handle" the assets "whenever his duties or activities with respect to given funds or other property are such that there is a significant risk of loss by reason of fraud or dishonesty on the part of such person, acting either alone or in collusion with others").

requirement applies to an individual who has access to, authority over, or responsibility for funds, even if the individual does not physically handle the funds.²⁹⁸ This includes individuals who are authorized to sign checks on behalf of the union (or trust), or otherwise disburse funds.²⁹⁹ The statute states: “Any person who is not covered by such bonds shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property” of the union or trust.³⁰⁰

Under the statute, the bond for each covered individual must be fixed at the beginning of the union’s (or trust’s) fiscal year.³⁰¹ The amount of the bond for each covered individual must be, at a minimum, 10% of the amount of funds handled by that individual (or his predecessors) during the prior fiscal year, up to a maximum bond value of \$500,000.³⁰² Therefore, the value of the bond taken out for each individual will probably need to be recalculated from year to year.

Willful violation of the bonding requirements is a crime: “Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.”³⁰³ This is similar to the misdemeanor penalty provision for § 503, discussed above. Therefore, multiple individuals and the union itself may be criminally liable at the same time, and the type of “willfulness” required for a conviction is “reckless disregard of the law.” If an unbonded individual is given duties that involve “handling” union funds, he may be criminally liable *along with* the union official who assigned him those duties.³⁰⁴

²⁹⁸ § 453.8(d). A clerical employee who does physically handle funds, but only under close supervision such that there is little risk of loss from that employee’s behavior, may not be subject to the bonding requirement. § 453.8(c).

²⁹⁹ § 453.8(e).

³⁰⁰ 29 U.S.C. § 502(a).

³⁰¹ *Id.*

³⁰² *Id.* If it is the first year of the union’s or trust’s existence, the minimum bond amount is \$1,000 for a local union and \$10,000 for all other unions and for trusts. *Id.*

³⁰³ § 502(b).

³⁰⁴ 29 C.F.R. § 453.22 (2005).

For more information on the bonding requirements, particularly on how to calculate the minimum amount required for each bond and how to obtain a bond, refer to the OLMS pamphlet *Bonding Requirements Under the LMRDA and the CSRA*, available at <http://www.dol.gov/esa/regs/compliance/olms/bonding.htm>.

INDIVIDUALS CONVICTED OF CERTAIN CRIMES CANNOT HOLD UNION POSITION

Section 504 of the LMRDA bars individuals who have been convicted of certain types of crimes from working for any labor organization for a period of 13 years after the conviction (or after the end of imprisonment).³⁰⁵ This rule applies to a guilty plea, even if it results in an alternative sentence (without imprisonment).³⁰⁶ Section 504 applies to convictions of serious violent crimes such as murder, arson, and rape.³⁰⁷ The rule also applies to any conviction of violating the LMRDA's reporting and record-keeping provisions (and the LMRDA's provisions for union trusteeships, not discussed in this Guide).³⁰⁸ Section 504 does not explicitly apply to convictions of the other (LMRA and LMRDA) crimes discussed in this Guide, but § 504 is interpreted to apply to some of those crimes. It applies generally to any conviction of a crime involving "bribery," "embezzlement," or "grand larceny," and "any felony involving abuse or misuse of [defendant's] position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan."³⁰⁹ Except for convictions that fall under that last provision ("felony involving abuse or misuse"), it does not matter for purposes of § 504 whether

³⁰⁵ 29 U.S.C. § 504(a) (2004). The 13-year period may be reduced to as little as 3 years by the sentencing court, or the individual may seek an exemption from the court through a special proceeding. *Id.* However, the individual bears a heavy burden when seeking these exceptions. *See Carollo v. Herman*, 84 F. Supp. 2d 374 (E.D.N.Y. 2000).

³⁰⁶ *Nass v. Warehouse Employees Union*, 503 F. Supp. 217 (E.D.N.Y. 1980); *Harmon v. Teamsters Local Union 371*, 832 F.2d 976 (7th Cir. 1987).

³⁰⁷ § 504(a).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

the crime is a felony or a misdemeanor.³¹⁰ Section 504 certainly applies to a § 501(c) conviction of embezzlement.³¹¹ It is also likely to apply to the other types of § 501(c) convictions (stealing and “conversion”).³¹² Section 504 likely applies to most convictions of violating LMRA § 302’s prohibitions on employer payments to union officers or employees.³¹³ Section 504 is not likely to apply to convictions of LMRDA § 503 (illegal loan)³¹⁴ or § 502 (bonding requirements).

When § 504 applies to an individual, it prohibits that individual from serving in any position with any union—the individual may not serve “as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, employee, or representative in any capacity of any labor organization.”³¹⁵ The individual is also barred from serving in several other types of union-related positions, including: consultant to a union;³¹⁶ labor relations consultant or bargaining agent for an employer;³¹⁷ and officer or executive of any company that does substantial business providing goods or services to any union.³¹⁸ Section 504 prohibits the individual from accepting any of these positions, and also prohibits any other person, such as a union officer or the union itself, from knowingly hiring or retaining the

³¹⁰ *United Union of Roofers v. Meese*, 823 F.2d 652 (1st Cir. 1987).

³¹¹ *Ottley*, 509 F.2d at 669.

³¹² Section 504 would apply to a § 501(c) conviction of “converting” under the “felony involving misuse or abuse” provision. Section 504 would apply to § 501(c) “stealing” either under that same provision, or as a form of “grand larceny.” *See Illario v. Frawley*, 426 F. Supp. 1132 (D.N.J. 1977) (Congress intended broad interpretation of “larceny”).

³¹³ If the payment is over \$1,000 (making it a felony), then the conviction could fall under the “felony involving misuse or abuse” provision. Before Congress added that provision to § 504, a court held that § 504 applies to a conviction under LMRA § 302 for payment with “intent to influence,” as a form of bribery. *Hodgson v. Chain Service Rest. Employees*, 355 F. Supp. 180 (S.D.N.Y. 1973).

³¹⁴ *See Ottley*, 509 F.2d at 669 (§ 504 did not apply to union officer who pled guilty to causing union to make a loan in excess of \$2,000 to another officer).

³¹⁵ § 504(a)(2).

³¹⁶ § 504(a)(1).

³¹⁷ § 504(a)(3).

³¹⁸ § 504(a)(4).

individual in the position.³¹⁹ Willful violation of § 504 is a felony resulting in a fine of not more than \$10,000 or imprisonment for not more than 5 years, or both.³²⁰

RECOMMENDATIONS FOR COMPLYING WITH FIDUCIARY RULES

Below is a (non-comprehensive) list of important steps union officers can take in order to carry out their fiduciary duty and comply with the LMRDA fiduciary rules. This list serves as a summary of key points in the sections above.³²¹

- Obtain proper authorization for expenditures and transactions, in compliance with the union's governing rules. Make sure there is a record of the authorization, such as in meeting minutes.
- It is especially important to obtain proper authorization for any expenditure that personally benefits you or other officers (such as a salary increase for officers), and to make sure that the expenditure is not unreasonable or excessive.
- Do not make expenditures that are not allowed under the union's governing rules, or that are not for legitimate union purposes.
- For all expenditures, maintain documentation that shows the nature and purposes of the expenditures.
- Require that at least two union officers (not just one) sign all the union's checks, and do not sign any blank or incomplete checks.
- Make sure that all dues and other funds collected by the union are promptly deposited in the bank; and that records are maintained of all the dues and other funds collected.
- Remove any former officers' names from union bank accounts.

³¹⁹ § 504(a).

³²⁰ § 504(b).

³²¹ Some of these recommendations are drawn from OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP'T OF LABOR, LMRDA COMPLIANCE: A GUIDE FOR NEW UNION OFFICERS (2005), <http://www.dol.gov/esa/regs/compliance/olms/LMRDAComplianceFactSheet.pdf>.

- Keep union funds separate from officers' personal funds (in bank accounts, union credit cards, etc.).
- When making investment decisions involving the union's assets, invest responsibly, based on sound advice from objective professionals. Avoid investing in any assets in which you or other officers have a personal or financial interest.
- Have trustees or an audit committee perform periodic audits of the union's finances and report to the membership.
- Do not make sales or other transactions between yourself and the union.
- Turn over to the union any profits you receive in connection with the union.
- Do not acquire any asset that creates a conflict of interest with your duty to the union.
- Do not permit union officers or representatives to misappropriate union assets or otherwise violate their fiduciary duty. If you discover a possible violation, take action to investigate, stop the violation, and recover the misappropriated assets. If appropriate, contact your national or international union or OLMS.
- Do not allow any loan exceeding \$2,000 to be made by the union to an officer or employee.
- Do not allow the union to pay any fines incurred by officers for willful violations of the LMRDA.
- Figure out which union officers, employees, and representatives "handle" union funds as part of their job duties. Make sure, at the start of each fiscal year, that an adequate bond is taken out for each of these individuals.
- Do not assign or allow anyone who is not bonded to "handle" union funds.

- Educate other union officers and employees about how to comply with the LMRDA rules. Write and adopt union rules or guidelines to implement policies for responsible financial practices. Establish a committee on the union's executive board to oversee this.

CONCLUDING REMARKS

As you have seen, there are many laws regulating a union's financial affairs. And they can be difficult to understand in some instances. Do not hesitate to consult with a knowledgeable attorney about these issues in the event that you think you might have a compliance problem. Very often, with proper advice, small problems can be prevented from growing up into large ones. Hopefully, this Guide will have helped you to identify potential problems long before they have sprouted into small ones.