

section 3(j) of the LMRDA if the intermediate body is "subordinate to a national or international labor organization which includes a labor organization engaged in commerce." The Department proposed to follow this holding by adding language to the instructions for Forms LM-2, LM-3, and LM-4 clarifying that any "conference, general committee, joint or system board, or joint council" that is subordinate to a national or international labor organization will be required to file an annual financial report if the national or international labor organization is a labor organization engaged in an industry affecting commerce within the meaning of section 3(j) of the LMRDA.

The three union commenters objected to the application of the LMRDA to wholly public sector intermediate bodies pursuant to *Bremerton* as contrary to the statutory language, established case law, and Department of Labor regulations at 29 CFR 451.3(a)(4). Additionally, the NEA and AFT opposed the extension of the LMRDA to wholly public sector bodies through the regulatory process and commented that such an extension should require Congressional action. They further commented that the decision in *Bremerton* does not bring wholly public sector intermediate bodies within LMRDA coverage, and any reference to *Bremerton* should, therefore, be taken out of the new rules where such reference is used to attempt coverage of wholly public sector organizations.

The expanded language in the instructions merely incorporates and restates the language of section 3(j) of the statute. The reference to the *Bremerton* decision clarifies that the Department intends to interpret this language in a manner consistent with that decision. *Bremerton* is the most recent court decision interpreting section 3(j). The Department recognizes that the interpretation of section 3(j) set forth in *Bremerton* represents a departure from previous court decisions and the Department's prior administration of the Act. However, the Department has concluded that the *Bremerton* court's interpretation is the correct reading of the statutory language. Further, neither the Department nor the court has added statutory language or otherwise encroached on Congressional prerogatives here. The court, pursuant to its constitutional authority, interpreted terms contained in the statute, and the Department, operating within its authority to administer the statute, has stated its intention to adopt that interpretation. The stated intent of

Congress was to exempt "wholly public sector" labor organizations from the coverage of the Act. The *Bremerton* court found that an intermediate labor organization is not "wholly public sector" and exempt from the Act where it is subordinate to a parent organization that meets the definition of a labor organization engaged in an industry affecting commerce. The Department's regulation at 29 CFR 451.3(a)(4) is not contrary to the *Bremerton* decision when the regulation is read as giving effect to the court's interpretation of the term "wholly public sector labor organization." The Department concludes that none of the commenters provides a persuasive argument for disagreeing with the *Bremerton* court's reading of the statute and therefore will maintain the expanded language in the instructions for the Form LM-2. The expanded language adopting the *Bremerton* court's construction of the statute will also be added to the instructions for Forms LM-3 and LM-4, but since no other changes will be made to those forms, neither the forms nor the instructions for those forms will be reprinted in the appendix.

In its comments, the NEA incorporated by reference the arguments presented by its state affiliates in *Alabama Education Association, et al. v. Chao*, No. 1:03CV00253 (D.D.C. filed Feb. 14, 2003). There, the NEA's state affiliates argue that they represent only public employees and are self governing, autonomous organizations affiliated with the NEA, not subordinate bodies within the meaning of section 3(j)(5) of the LMRDA and, therefore, not subject to the LMRDA, even if the NEA is subject. The AFL-CIO, in a comment related to the NEA state affiliates' argument in *Alabama Education Association, et al. v. Chao*, cautioned that neither the Department of Labor nor the Ninth Circuit can do away with the statutory limitation of the section 3(j) proviso to entities that are "subordinate" to a national or international union covered by the LMRDA. The AFL-CIO further commented that the proposal to amend coverage language should not be used to preempt pending litigation, and the NPRM preamble should not be used to create an argument in litigation that the Department of Labor's adoption of this statutory instruction is entitled to deference.

The question whether a particular labor organization falls within the *Bremerton* test is not decided by the proposed language of the instructions or the references to *Bremerton* in the NPRM. That coverage issue involves a factual determination that will turn on

the application of the statutory terms to the circumstances of each case. While this rulemaking provides a vehicle for making clear the Department's interpretation of the statutory term, after notice and comment, the factual question whether a particular labor organization meets the statutory test applying that interpretation cannot and should not be resolved in this context. The NEA's state affiliates and other entities are free to challenge the application of the *Bremerton* interpretation to their organizations and to pursue any avenues relative to the issue of their coverage under the LMRDA. The proposed language in the instructions and accompanying references are not intended to forestall any such action, but rather to make clear the Department's views regarding the general meaning of the statutory terms.

One commenter mistakenly read the instructions and the preamble language to include state or local central bodies among those organizations that must file. The LMRDA and the Department's regulations at 29 CFR 451.5 make clear that a "state or local central body" is excepted from the definition of labor organization in section 3(i) and the definition of a labor organization deemed to be engaged in an industry affecting commerce in section 3(j). The Department's adoption of the reasoning of the *Bremerton* court does not bring these organizations within the ambit of the LMRDA, either explicitly or implicitly.

An additional comment urged the Department to continue to seek full disclosure from the Washington State Education Association, as state law provided no comparable protection for public sector employees. The Department will seek compliance from all organizations required by the LMRDA to file labor organization reports.

B. Itemization of Major Receipts and Disbursements

1. General Comments Concerning Itemization

The Department received numerous comments concerning proposed Schedules 14 through 19. These Schedules call for individual identification of certain receipts and disbursements for various categories that reflect the services provided to union members. Receipts and disbursements are allocated to Schedules 14 through 19 and are either listed as individual entries or as