

DOL Issues Controversial Union Persuader Rule Impacting Reporting Requirements for Companies and Their Attorneys

Labor & Employment Law Update

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The U.S. Department of Labor has issued the Persuader Rule which has been hotly debated and protested by employers and attorneys.

First proposed in 2011, the Persuader Rule amends the federal Labor Management Reporting and Disclosure Act to require employers and labor relation consultants (including attorneys) to submit detailed reports including the type of consulting or legal services provided and any fees paid.

Historically, under the “Advice Exception,” lawyers have been excluded from this reporting requirement, as long as they did not directly interact with workers. The “Advice Exception” allowed employers to seek labor advice without fear of potential disclosure of attorney-client privileged information (e.g., the very fact that the company has hired an attorney to assist with counter-organizing campaign).

The Persuader Rule completely eviscerates the “Advice Exception” by requiring employers and lawyers to report all actions, conduct, or communications that have a direct or indirect object to persuade employees, including among other things:

- Planning, direction, or coordination of managers to persuade workers;
- Planning, directing or conducting employee meetings;
- Training managers, supervisors or employer representatives in conducting meetings;
- Coordinating or directing the activities of supervisors or employer representatives;
- Providing persuader materials to employers to disseminate to workers;
- Establishing or facilitating employee committees;

- Drafting, revising or providing speeches;
- Conducting union avoidance seminars; and
- Developing or implementing personnel policies or actions to persuade workers; and
- Identifying employees for disciplinary action, reward, or other targeting.

While the final Persuader Rule still recognizes attorney-client privilege, if the attorney-client discussions are not solely legal and also involve advice on persuading employees regarding union representation the Persuader Rule puts into question whether the attorney-client privilege will apply. Moreover, the Persuader Rule expressly requires the disclosure of the identity of a lawyer's client, the fee arrangement and the scope and nature of the persuader agreement in cases where the lawyer is providing services other than legal services, which are intended to persuade employees regarding union representation.

The Persuader Rule will be effective July 1, 2016; however, it is anticipated that there will be many legal challenges to the enforceability of the new regulations. Employers and lawyers will need to monitor these developments closely to determine their reporting obligations under the law.

It should be noted that while public-sector employers are excluded from coverage under the NLRA, they are subject to state laws, which can include specific regulations on the use of persuaders. For example, in Illinois the law prohibits the expenditure of public funds to any external agent or consultant in an attempt to influence the outcome of a union election – but expressly provides that seeking or obtaining advice from legal counsel is allowed. The Persuader Rule could create issues for Illinois public sector employers as it puts into question interpretations of the state law by broadly defining what it considers “persuasion” that must be reported and expressly providing that persuasion advice that is not solely legal advice by an attorney must be reported.

As such it is important to consult with experienced labor and employment law attorneys when faced with these issues.

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