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LABOR & EMPLOYMENT ALERT

Department of Labor Issues Final Union "Persuader" Rule

March 24, 2016

On March 24, 2016, the Department of Labor (DOL) published the long-awaited final union "Persuader Rule," which significantly expands the public reporting requirements of employers and their consultants (including attorneys) with respect to a wide range of activities falling under the general heading of union avoidance. Under the new rule, which will become effective on April 23, 2016, and will apply to engagements entered into after July 1, 2016, detailed disclosures must be made to the DOL regarding any agreements or arrangements that involve activities intended to persuade employees in the exercise of their organizing or collective bargaining rights—even if such activities do not include direct communication with the employees. The required disclosures include the names and addresses of the employer and the consultant (or law firm), the specific nature of the services performed, and the fees paid for such services. Employers who are facing—or those who in the future may face—union organizing efforts should take note of the Persuader Rule in order to ensure compliance with the new reporting requirement.

Old Reporting Rule

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) establishes reporting and recordkeeping requirements for employers and labor relations consultants. Sections 203(a) and (b) of the LMRDA require employers and labor relations consultants to report on any agreements or arrangements to persuade employees as to their collective bargaining rights. 29 U.S.C. § 433(b). The reporting requirement is subject to an exception in Section 203(c), which states that no one is required to file a report covering services of a consultant "by reason of his giving or agreeing to give advice" to the employer. *Id.* at § 433(c). Historically, employers have relied on the "advice" exception to avoid disclosing details regarding their relationships with labor relations consultants and attorneys hired during a union organizing drive, provided that the consultant/attorney did not communicate directly with employees.

New Reporting Requirements

The Persuader Rule broadens the reporting requirement under Sections 203(b) and (c). For employer-consultant agreements and arrangements entered into (and payments made) after July 1, 2016, the employer and consultant must submit an approved form to the DOL indicating whether the consultant engages in, or agrees to engage in, "persuader activities." The reporting requirement also extends to attorneys providing such services. "Persuader activities" are defined as "any actions, conduct or communications with employees that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights." For instance, reporting will now be required where a consultant or attorney agrees to manage a campaign or program to avoid or counter union organizing efforts. Consulting activities that will trigger the reporting obligation include:

- Planning, directing or coordinating activities undertaken by supervisors or other employer representatives including meetings and interactions with employees;
- Providing material or communications for dissemination to employees;
- Conducting a union avoidance seminar for supervisors or other employer representatives; and
- Developing or implementing personnel policies, practices or actions for the employer.

The Persuader Rule does not require reporting when a consultant or attorney merely gives "advice" to an employer, such as, for example, when a consultant offers guidance on employer personnel policies and best practices, conducts a vulnerability assessment for an employer, conducts a survey of employees, counsels employer representatives on what they may lawfully say to employees, conducts a seminar without developing or assisting the employer in developing anti-union tactics or strategies, or makes a sales pitch to undertake persuader activities. In addition, reporting is not required when an attorney represents an employer in court or during collective bargaining, or otherwise provides legal services to an employer. Nevertheless, given the fluidity of a typical union organizing campaign, legal advice is often intertwined with recommendations regarding clear and effective communication. Thus, it remains to be seen if the slimmed down advice exception in the new rule will serve as much of an exception at all.

Recommendations

The full impact of the Persuader Rule will not be known for some time. Both legal and legislative challenges to the Persuader Rule are a near certainty. However, in the short term, employers who are currently seeking assistance with union avoidance efforts, or who may be seeking such assistance in the future, should take note of the reporting requirement and contact counsel with any questions regarding compliance.

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