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DOL's New Persuader Rule Has Major Consequences for Employers And . . . The New Seattle Workplace Poster

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The various labor-relations laws can seem like a minefield in which innocent conduct can lead to unfair-labor-practice charges and other adverse consequences for employers. The laws regulating union elections are particularly tricky, and well-intentioned employers rely heavily on competent labor counsel to help them comply with these complex laws while educating their employees about the pros and cons of unionization.

As we noted in February, the Obama Administration has been using its final months to significantly alter the legal landscape for employers through administrative rulemaking. On March 24, the Department of Labor (DOL or Department) published its anticipated final revised "persuader" rule, which requires employers and their advisors to report certain activity related to union-organizing campaigns. The new version of the rule will require employers to report the use of legal advisors that until now had been deemed exempt. The rule could therefore reduce the amount and quality of legal guidance employers seek. The new rule takes effect on July 1, 2016.

The Current Law. Among other things, the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) requires employers to report any agreement with a consultant whose services are intended to directly persuade employees to exercise or not exercise their right to organize. The rule thus became known as the "persuader rule." Since its enactment, the LMRDA has exempted consultants who merely "advise" employers. The DOL interpreted this exemption as requiring disclosure only when the attorneys and others directly attempted to persuade employees but not where they merely advised employers without directly contacting employees. The bright-line "advice" test made clear when consultant activity needed to be reported and allowed employers to receive necessary legal advice confidentially.

The New Rule. The Department's new rule, which was originally proposed in 2011, will narrow the scope of the "advice exemption" considerably to now reach direct and "indirect" persuader activity. The DOL's new interpretation no longer "shield[s] employers and their consultants from reporting requirements in which the consultant has no face-to-face contact with employees but nonetheless engages in activities behind the scenes . . . where an object is to persuade employees concerning their rights to organize and bargain collectively." Accordingly, the Department will begin requiring employers and their consultants (including attorneys) to report a significant amount of activity that had been deemed exempt. The Department justified its departure from its prior interpretation, which had been in effect for more than 50 years, by claiming that increased transparency will allow employees to make better decisions regarding organizing and collective bargaining. In a glaring omission, however, the Department did not explain why the source of the employer campaign should influence employee decisions about unionization since the facts and statements shared by the employer in a campaign must still pass muster under controlling labor laws. In addition, the campaigning union is typically aware of who the employer is relying on to craft a campaign and readily shares this information with employee voters.

Significantly, the Department's proposed disclosure form for employers, the Form LM-10, contains categories of consultant activity and attorney advice that are now subject to disclosure, including:

- Drafting, revising, or providing speeches, written communications, or other materials to an employer for presentation to employees
- Strategic planning for meetings with individual employees or groups of employees
- Training employer representatives to conduct individual or group employee meetings
- Developing personnel policies or practices related to union organization efforts
- Identifying employees for disciplinary action

Under the old rule, employers and consultants were not required to report any information about these activities unless the consultants themselves directly sought to persuade employees.

Impact on Employers. The new rule will create uncertainty about whether certain conduct is exempt "advice" or non-exempt "persuader" activity. Often, it is impossible for an attorney to properly advise an employer without also engaging in some amount of persuader activity. For instance, an attorney who reviews a proposed employer speech to determine its lawfulness and suggests language to lawfully strengthen the speech's message may be engaging in persuader activity, thus subjecting the attorney's activity to public disclosure. The rule will also give labor unions even more ammunition with which to convince employees to vote for a union. Consequently, the rule change might cause employers to seek less legal advice, which would make them more susceptible to inadvertent violations of labor laws and less able to effectively combat aggressive union organizing efforts.

The American Bar Association has criticized the rule as an infringement on attorney-client privilege and employer organizations and law firms have already filed three lawsuits challenging the new rule. However, these lawsuits are unlikely to conclude before the new rule takes effect on July 1, 2016. Thus, even if the rule is ultimately overturned, it is likely that employers and their consultants will be expected to comply with the reporting requirements for at least a while.

Bottom Line. Even though it may be tempting to try to avoid these reporting requirements by eschewing legal advice regarding union organizing efforts, we urge employers not to. Labor-relations laws are riddled with traps for unsuspecting employers, many of which have much more significant consequences than the requirement to report "persuader" activity.

IMPORTANT REMINDER FOR SEATTLE EMPLOYERS: As of April 1, 2016, employers with employees in Seattle must post the 2016 Seattle Labor Standards Ordinances poster in a conspicuous and accessible place at the jobsite. The poster provides information about four Seattle ordinances: (1) Paid Sick and Safe Time Ordinance, requiring employers to provide paid sick and safe leave; (2) Fair Chance Employment Ordinance, restricting how employers can use criminal records for hiring decisions; (3) Minimum Wage Ordinance, governing wages; and (4) Wage Theft Ordinance, requiring written notices to employees about wages, tips, and other information. Employers must display the poster in English and any other primary language(s) spoken by employees. The poster is currently available for download here.
