Insight

IN-DEPTH DISCUSSION

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Department of Labor Issues Long-Awaited "Persuader Activity" Final Rule

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On March 24, 2016, the U.S. Department of Labor (DOL) issued a final rule, 81 Fed. Reg. 15924, that will require employers to file public reports with the DOL when they use consultants (including lawyers) to provide labor relations advice and services that have the purpose of persuading employees regarding union organizing or collective bargaining. The consultants will also be required to file similar reports containing the details of advice and services provided and the amount of payment received for that advice and service. Previously, those reports were required only when a consultant providing advice had direct contact with employees. Now the reports are going to be required whenever the advice provided has a persuasive purpose, unless a court blocks the new rule. These changes will impose significant new reporting requirements on employers and their consultants.

The LMRDA's Reporting Obligations With Respect to Employers and Those Who Provide Persuader Services

The Labor-Management Reporting and Disclosure Act (LMRDA) is a federal statute that, among other things, contains reporting provisions that require unions to disclose information about their structure and financial condition. The statute also contains reporting provisions that apply to employers and persons who are "persuaders."

Specifically, Section 203(b) of the LMRDA requires the filing of public reports by consultants (including law firms) who engage in activities intended, directly or indirectly, "to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing." Consultants who engage in such activities must disclose, among other things: (1) the terms and conditions of the agreement or arrangement entered into between the employer and the consultant; (2) the consultant's "receipts of any kind from employers on account of labor

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relations advice or services, designating the sources thereof;" and (3) the consultant's "disbursements of any kind, in connection with such services and the purposes thereof." Anyone with such reporting obligations must submit two separate reports to the DOL's Office of Labor-Management Standards (OLMS): (1) a Form LM-20, which must be submitted to the OLMS within 30 days of the consultant agreeing to provide reportable activity, and (2) a Form LM-21, which must be submitted to the OLMS within 90 days after the completion of the consultant's fiscal year.

The Form LM-20 requires disclosure of, among other things, the nature of the agreement with the employer and the specific activities that the consultant will perform on behalf of the employer. The Form LM-21 requires the consultant to report the names and addresses of all of the employers for whom the consultant provided labor relations advice or service "regardless of the purpose of the advice or service," and all receipts and disbursements from those employers in connection with those services.

Similar reporting requirements exist for employers who use consultants to provide persuader services on the employers' behalf. An employer that enters into such an agreement or arrangement must submit a Form LM-10 within 90 days of the completion of the employer's fiscal year. The Form LM-10 requires the employer to document the date and amount of each "payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made."

Any person who "willfully violates" the applicable provisions of the LMRDA or "who knowingly fails to disclose a material fact" in a report required pursuant to the LMRDA is subject to a fine of up to $10,000 and/or up to one year's imprisonment.

The "Advice Exception"

The LMRDA includes an "advice exception" from the reporting requirements discussed above. The advice exception, which is set forth in Section 203(c) of the LMRDA, provides that "[n]othing in this section shall be construed to require any employer or other person to file a report covering the services of such persons by reason of his giving or agreeing to give advice to such employer . . ."

From 1962 until the issuance of the final rule, the DOL utilized a bright-line standard to determine whether particular activities were exempted from reporting obligations as a result of the advice exception. Under this bright-line test, an employer and consultant providing advice regarding persuader activities do not incur any reporting obligation so long as: (1) the consultant providing advice does not directly deliver or disseminate persuasive material to employees; (2) the employer has the ability to reject or modify persuasive material prepared by the consultant providing the advice; and (3) there is no deceptive arrangement between the employer and the consultant providing the advice.

The DOL's new final rule rejects the 54-year interpretation of the advice exemption.

The DOL's New Rule

Pursuant to the DOL's final rule, advice intertwined with persuader activities triggers reporting obligations under the LMRDA for both the employer and the consultant providing the advice. As an example, in the final rule, the DOL has referenced as an activity that would trigger a reporting obligation a consultant providing "with an object to persuade" material or drafted communications to an employer for dissemination or distribution to employees. Beyond that, the DOL notes that a consultant "revising employer-created materials, including edits, additions, and translations" with "an object" to "enhance persuasion, as opposed to ensuring legality" as another example of an activity that would prompt a reporting obligation. Similarly,

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the preparation of a campaign speech or giving supervisors a seminar on lawful campaign activity or tactics would be reportable.

The DOL's final rule notes that no report is required with respect to an agreement or arrangement to "exclusively" provide advice to an employer. According to the final rule, a consultant who "exclusively" counsels employer representatives on "what they may lawfully say to employees," ensures a client's compliance with the law, offers guidance on employer personnel policies and best practices or provides guidance on NLRB practice or precedent, is providing "advice," and thus need not report such activities. A summary of the details of the final rule is discussed below.

The final rule will become effective on April 25, 2016. However, the final rule is applicable only to arrangements and agreements and to payments (including reimbursed expenses) made on or after July 1, 2016.

It is anticipated that there will be immediate litigation regarding the final rule. The final rule includes modest revisions from the proposed rule the DOL issued regarding the advice exception in June 2011. These revisions were intended to address concerns raised regarding the legality of the proposed rule. Despite these revisions, there are significant questions as to whether the final rule violates the First and Fifth Amendments, is inconsistent with the LMRDA, and improperly interferes with attorneys' ethical obligations not to disclose confidential client information. Particularly until any litigation challenging the final rule is ultimately resolved, employers who seek advice regarding labor issues should consult with counsel regarding the extent to which such activities could trigger reporting obligations and determine how they wish to proceed in light of the new rule.

Summary of Key Changes Instituted as a Result of the DOL's Final Rule

Timing

- The final rule is "effective" April 25, 2016.
- However, the final rule is only applicable to arrangements and agreements and to payments (including reimbursed expenses) made on or after July 1, 2016. Therefore, it is not clear what effect the final rule has prior to that date.

Indirect Persuasion

- Reporting is required if the consultant – with an object to persuade – plans, directs, or coordinates activities undertaken by supervisors or other employer representatives.

Materials/Communications

- Reporting is required if the consultant provides – with an object to persuade – material or communications to the employer, in oral, electronic (including, *e.g.*, email, Internet, or video documents or images), or written form, for dissemination or distribution to employees.
- Reporting would be required, for example, if the consultant drafted, revised, or selected persuader materials for the employer to disseminate or distribute to employees. In revising employer-created materials, including edits, additions, and translations, a consultant must report such activities only if an "object" of the revisions is to enhance persuasion, as opposed to ensuring legality.
- The sale, rental, or other use of "off-the-shelf" persuader materials, such as videos or stock campaign literature, which are not created for the particular employer who is party to the agreement, will not be reportable unless the consultant helps the employer select the materials.

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Seminars

- Seminar agreements must be reported if the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer, the employers' supervisors or other representatives.
- Employers whose representatives attend such seminars generally will have no reporting obligation.

Personnel Policies/Actions

- Reporting is only required if the consultant develops or implements personnel policies or actions for the employer with an object to persuade employees.
- For example, a consultant's identification of specific employees for disciplinary action, or reward, or other targeting based on their involvement with a union representation campaign or perceived support for the union, would be reportable. As a further example, a consultant's development of a personnel policy during a union organizing campaign in which the employer issues bonuses to employees equal to the first month of union dues, would be reportable.
- On the other hand, a consultant's development of personnel policies and actions are not reportable merely because they improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees.
- To be reportable, the consultant must undertake the activities with an object to persuade employees, as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking.

Examples of What Constitutes "Advice" that Need not be Reported

- The final rule ensures that no reporting is required by reason of a consultant merely giving "advice" to the 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 (other than a push survey, *i.e.*, one designed to influence participants and thus undertaken with an object to persuade);
    - 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.
- Reporting is also not required for merely representing an employer in court or during collective bargaining, or otherwise providing legal services to an employer.

Trade Associations

- Trade associations, as a general rule, will only be required to report in two situations:
    1. where the trade association's employees serve as presenters in union avoidance seminars or
    2. where they undertake persuader activities for a particular employer or employers (other than by providing off-the-shelf materials to employer-members).
- The DOL expects that trade associations typically will sponsor union avoidance seminars but rely on other consultants to actually present the seminar.

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Protected, Concerted Activities

- The DOL has eliminated the term "protected concerted activities" from the definition of "object to persuade employees."

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