A Timely Analysis of Legal Developments

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The DOL's soon-to-be published changes to persuader activity rules are expected to restrict options and increase risk for employers during union representation campaigns.

Department of Labor's Changes to "Persuader Activity" Rules Are Imminent

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The U.S. Department of Labor (DOL) has announced its intent to publish in November 2010 proposed new standards for interpretation and enforcement of the Labor-Management Reporting and Disclosure Act (LMRDA) as applied to employers regarding persuader activity. The new standards are expected, at the very least, to narrow significantly the scope of the "advice exemption" in LMRDA Section 203(c), thereby broadening the scope of what is treated as direct persuader activity that must be reported to the DOL. Other changes are possible as well, including new standards regulating conduct and speech by an employer's own managers and supervisors. The exact details will not be known until DOL publishes its notice of proposed regulations in the Federal Register, but the DOL has signaled its intent to radically change rules that will affect employers' rights in dealing with union organizing activity.

Background: LMRDA, Current Persuader Rules, and the "Advice" Exemption

The LMRDA was passed in 1959. Mostly focused on reporting and disclosure by labor organizations, it also contains sections requiring employers and outside labor relations consultants to file disclosure reports as to any arrangement where the consultant was retained to: (1) persuade employees regarding union organizing or collective bargaining, and/or (2) obtain information about employee or union activities related to a "labor dispute." These reportable activities are often called "persuader activities," and the reporting consultants are often called "third party persuaders." When there is reportable persuader activity, both the employer and the third party consultant must file respective reports with the DOL that disclose detailed financial and other information as prescribed on the report forms.[1] The persuader activity that triggers the duty to report is not unlawful in itself. Rather, it is the failure to file properly that is a violation of the LMRDA.

LMRDA Section 203(c) provides an exemption for "advice" an employer receives. Since exempt advice is not considered reportable persuader activity, the advice exemption permits employers to consult with labor counsel about what is lawful for the employer

to do during a union campaign. In short, the exemption preserves the right to counsel, often critical for employers who want to speak directly and lawfully with their own employees regarding union representation matters.

What is reportable persuader activity, and what is not because it falls within the "advice exemption," is covered by regulations historically developed by the DOL's Office of Labor-Management Services (OLMS). The current standard has been in place for decades. The historical view, traceable to 1962, is that speech and materials delivered directly to employees by an outside consultant or attorney is reportable persuader activity. But if an outside attorney has no employee contact or communication, the advice exemption includes preparation of draft communications for an employer to consider using with its employees, as long as the employer has the ability to decide whether to use those materials or not, and whether to modify them.

What Will the New Standards Be?

No one can know for sure what OLMS will do now, but there are two sources for clues. First, at a public meeting on May 24, 2010, OLMS sought comments on persuader reporting. The OLMS stated "this so-called 'advice exception' has been broadly interpreted to exclude from the reporting any agreement under which a consultant engages in activities on behalf of the employer to persuade employees concerning their bargaining rights but has no direct contact with employees, even where the consultant is orchestrating a campaign to defeat a union organizing effort." The OLMS said a narrower construction will result in reporting that more closely reflects the intent of the LMRDA.

The second source for clues is the unsuccessful attempt to change the standard in the final "lame duck" weeks of the Clinton Administration. In January 2001, DOL issued a notice of revised interpretation, to be effective 30 days later (after President Bush was sworn in), to narrowly limit the advice exemption. This lame duck attempt was nullified by the new Bush Administration before it became effective, and the historical standards continued. But the attempt is a clue as to what the DOL may have in mind now.

The revision proposed in January 2001 provided that "the duty to report can be triggered ... without direct contact between a consultant or lawyer and employees, if persuading employees is an object (direct or indirect) of the person's activity ...." Thus, "when such person prepares or provides a persuasive script, letter, videotape, or other material for use by an employer in communicating with employees, no exemption applies and the duty to report is triggered." That proposed "test" or standard – whether persuading employees is an object (direct or indirect) of the activity – is obviously vague and overbroad. Such a standard could encompass many important services, including legal advice, that have never been treated as reportable before. It also could include something as basic as training programs for supervisors and managers about how to stay within the law when talking to employees about unionization.

Likely Effects of New Standards

The DOL Regulations, if enacted in the manner suggested by the DOL, would have serious negative impacts on employers by creating new impediments on employer speech rights and the right to legal counsel during union organizing campaigns. Employer free speech will be limited due to the chilling effects on access to outside counsel. Legal advice during union organizing campaigns, historically treated as exempt from LMRDA reporting, is often critical given the complexities of labor law. If companies are without access to counsel in such circumstances, they may feel inhibited and will limit or stop open discussions with employees regarding unionization in order to avoid violating the law.

New restrictions on employer access to legal counsel are only part of the anticipated changes that could have a "gag rule" effect for employers. Based on what the OLMS said at its public meeting in May 2010, the new persuader activity standards may also include changes making activity by an employer's own managers and other in-house personnel reportable persuader activity.

Changed DOL standards would give organized labor additional opportunities for making allegations of unlawful employer action, and for seeking government agency investigations and enforcement actions. A common corporate campaign tactic is to initiate "investigations" of a targeted employer where the validity of the allegations are secondary to the primary objectives of forcing the company to defend against the charge and allowing the union to cast the company in a negative light. Also, because failure to report persuader activity can carry both civil and criminal penalties, any overly vague standards would have increased chilling effect because the corporate officers

required to sign the disclosure reports will likely try to avoid the risk of criminal sanctions by not engaging in activity that might remotely be construed as triggering reporting obligations.

We will continue to monitor the DOL's progress in issuing proposed regulations and will provide a detailed analysis of the proposed regulations when they are issued.

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[1] Employer reporting is on the Form LM-10 ("Employer Report"). LM-10s must be filed for each fiscal year in which the employer entered into an agreement or arrangement for persuader activity, and for each fiscal year in which it made any persuader payments (LMRDA Section 203). Consultant reporting is on Form LM-20 ("Agreement and Activities Report"), and Form LM-21("Receipts and Disbursements Report"), with the latter detailing all labor relations advice provided by the persuader to other employers, even if that other advice is not persuader activity itself and otherwise not reportable.