Barley Snyder

Employers Must Prepare Immediately for the Persuader Rule

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On March 23, 2016 the United States Department of Labor issued its final "persuader rule" for publication. The persuader rule "modifies" the "advice exemption" under the Labor-Management Reporting Disclosure Act of 1959 (LMRDA). The final rule comes nearly five years after the publication of the initial proposed rule. The rule goes into effect on July 1, 2016.

Pursuant to the controversial final rule, an employer-consultant agreement is reportable if a consultant engages in "persuader activities," which are defined as any "actions, conduct or communications 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." Under a typical reportable agreement or arrangement, a consultant agrees to manage a campaign or program to avoid or counter a union organizing or collective bargaining effort, either jointly with the employer or separately. Under the DOL's prior interpretation of the law, the employer and consultant would be required to file a report only if the consultant communicated directly to the workers. The final rule requires that both direct and indirect activities must be reported.

The persuader rule also requires reporting for the provision of materials or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees. A consultant's revision of employer-created materials, including edits, additions, and translations, if an object of the revisions is to ensure legality as opposed to persuasion, does not trigger reporting. However, if the revisions are intended to increase persuasiveness of the material, then the reporting obligation is triggered.

Activities that trigger reporting include direct contact with employees with an object to persuade them, as well as these categories of indirect consultant activity undertaken with an object to persuade employees:

- 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.
- Developing or implementing personnel policies, practices, or actions for the employer.

However, the DOL has made clear that an employer is not required to report (*i.e.*, file a Form LM-10) for attendance at a multiple-employer union avoidance seminar.

The rule revises the instructions to forms filed by employers (Form LM-10) and labor relations consultants (Form LM-20) to report persuader agreements and arrangements. The revised forms are not yet available electronically. However, Form LM-20 Facsimile and Form LM-20 Instructions, as well as Form LM-10 Facsimile and Form LM-10 Instructions are now available in pdf. Form LM-20 must be filed by the consultant within 30 days of the engagement or agreement to provide persuader services and by employers on Form LM-10 within 90 days after the end of the fiscal year in which the employer engaged persuader services.

Ultimately, the DOL has expanded significantly the scope of reportable persuader activities well in excess of any prior interpretations. The rule's vague language, which is open to "interpretation" by the DOL, could potentially impact something as seemingly innocuous as handbook provisions, if those provisions are designed to persuade employees to forgo joining a union.

While there will be legal challenges to the rule, because of the short timeframe involved, employers need to take immediate steps to prepare for their expanded reporting obligations.

Barley Snyder's Employment Law Group assists private sector businesses in all aspects of labor law. Employers needing assistance in complying with the new Department of Labor persuader rules should feel free to contact an attorney in our Employment Law Group.