

Return of The Persuader Rule

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Employers may recall the Department of Labor's prior attempts to implement the "persuader rule" which seeks to narrow the "advice" exemption with respect to what union-related communications between employers and attorneys remain confidential. The rule proposal was initially made in 2011; however, opposition to the proposed rule led many to believe that the DOL would take no further action. Unfortunately, the DOL recently indicated that it intends to finalize the rule by March 2016 and on December 7, 2015 submitted the final rule to the Office of Management and Budget for review.

The new rule would narrow the "advice" exemption in Section 203(c) of the Labor Management Reporting Disclosure Act (LMRDA). The law currently requires employers and legal consultants to report any arrangement to persuade employees directly or indirectly regarding the right to organize or bargain collectively. But there presently exists a carve out which has consistently been interpreted to exclude an employer's engagement of labor counsel to assist them with organizing campaigns, as long the employer's attorney has no direct contact with employees and the employer is free to accept or reject its attorney's recommendations.

Under the proposed rule, lawyers who both provide legal advice to employers and engage in activities designed to influence the labor organizing process would have to file periodic reports, even if they do not have contact with their client's employees. As a result, employers who engage attorneys to assist in organizing campaigns will now have to file publicly available reports detailing all the labor work that the law firm performs for the employer, regardless of whether it is considered persuader activity or not.

There are numerous critics of the rule, including, but not limited to, the American Bar Association (ABA). The ABA's position is that the proposed rule requires lawyers to disclose privileged attorney-client information in violation of the Professional Rules of Ethics governing lawyers. Business groups claim further that the rule will place enhanced burdens on employers to comply, which may result in employers foregoing the use of consultants or attorneys when confronted with a union election petition.

As of this time, businesses do not need to make any changes in their reporting. However, employers should be considering their options in light of the imminent publication of the new rule.