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CLIENT BULLETIN





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# U.S. DOL PROPOSES EXPANDED PERSUADER REPORTING RULES FOR EMPLOYERS AND LABOR RELATIONS CONSULTANTS

By David Phippen
Fairfax, VA

The Obama Administration is continuing its apparent quest to impose its view of neutrality in labor organizing activity. On June 21, 2011, President Obama's Department of Labor released **proposed regulations** announcing a new, narrow interpretation of the "advice exemption" of the Labor Management Reporting and Disclosure Act ("LMRDA"), which would vastly expand the reach of the "persuader" reporting obligations for employers and their labor relations consultants under the LMRDA. Attorneys who engage in such persuader activities would also be covered by the reporting requirements. The rationale for the proposed change is essentially that it needs to be done. The details of the proposed change are described below.

**Background**

Section 203 of the LMRDA requires employers and third-party consultants (including lawyers) with agreements or arrangements to engage in (1) persuading employees regarding union organizing or collective bargaining; or (2) obtaining information about employee or union activities related to a labor dispute, to report details of such agreements and arrangements to the DOL on DOL-required forms, Form LM-10 and Form LM-20. But Section 203(c) of the LMRDA provides an exception from the reporting requirement for agreements or arrangements for "advice." This "advice exception" has, since a 1962 interpretation by the DOL, permitted employers and third-party consultants to avoid reporting when the consultants have no direct contact with employees and act only through the employer who has the choice whether or not to accept and use the advice. In other words, when the consultant's role was advisory, no reporting was required. When the consultant's role was to effect persuasion, then reporting was required.

**The DOL's New Proposed Rulemaking**

The new DOL proposal throws out the longstanding interpretation and proposes a narrow view of advice, rejecting the factual reality of a third-party consultant's advisory role and adopting the position that any activity with the object of persuading employees (directly or indirectly) must be reported even if there is no direct contact by the consultant with employees and even if the employer is free to accept or reject the consultant's activity. Under the proposal, all activity in speechwriting, preparation of campaign materials, letters, videos, or other materials for employer communi-

cation for employees must be reported. A narrow advice exception is left for a consultant: (1) telling an employer what it may lawfully say to employees; (2) ensuring employer compliance with a law; and (3) providing guidance on National Labor Relations Board practice or procedure.

**The Implications and Probable Effect of the Proposed Rulemaking**

The LMRDA's reporting requirements are burdensome, costly and often vague and confusing. Meanwhile, the LMRDA carries criminal penalties for its violation. Many employers and consultants, rather than risk violation of the newly-broadened "persuader" rule, may choose simply to avoid any persuader agreements or arrangements. This may have the effect of employers' not getting legal advice on an efficient and timely manner in order to communicate the "employer message" to employees. Employers may be muted in their speech rather than bear the two-sided risk of an LMRDA reporting violation on the one hand, or committing an unfair labor practice under the National Labor Relations Act on the other (by saying something that might later be determined by the NLRB to interfere with employee rights). Employers certainly will find themselves between "a rock and a hard place" and may just give up some or all of their rights to speak out in a union campaign, thus upsetting the equilibrium that has existed for many years. And this appears to be exactly what the DOL wants – employer silence in union organizing efforts.

**Employers and Consultants May Respond**

The original deadline for comments on the proposed rulemaking was August 22, 2011, but the DOL announced today that it will extend the deadline until **September 21, 2011**. (To submit a comment online, go **here**, and in the "Enter Keyword or ID" field, enter **1245-AA03**.) Employers and their consultants, as well as professional and industry associations affected by the proposed rule-making, may wish to consider submitting comments opposing or seeking clarification of the proposed rule.

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