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**DEMOCRATIC WORKPLACE**

## **The Department of Labor's Persuader Regulation**

### *Proposed Regulation Intended to Limit Employer Speech*

*With a newly-installed Secretary of Labor and the first fully-confirmed National Labor Relations Board in 10 years, organized labor is demanding policy changes to increase its membership rolls. The unions' current policy priority is the finalization of the Department of Labor's (DOL) proposed persuader regulation. If finalized as proposed, the regulation would change federal disclosure rules to hamstring employers during union organizing campaigns by making it more difficult for them to access counsel and by coercing them into giving up their federally protected free speech rights.*

### **Current Disclosure Rules**

Currently, employers must disclose arrangements with consultants where the object thereof is to persuade employees regarding their rights whether to choose to bargain collectively. However, employers do not have to disclose when the arrangement is limited to simply giving "advice." In other words, under the existing rule, consultants or attorneys who are hired by an employer to directly communicate with employees must disclose their arrangement to the DOL. However, if the attorneys or consultants do *not* communicate directly with employees, but instead simply advise the employer, then they do not have to disclose. Most employers, attorneys, and consultants have found that this bright-line rule has been easy to interpret and apply in most situations.

### **The Proposed Changes**

DOL's proposed rule narrows the scope of this "advice" exemption so that virtually all interaction with labor lawyers and consultants will be subject to the disclosure requirements. For example, the following situations could all trigger the reporting requirement under the new proposal:

- A law firm reviews a speech an employer plans to give to employees on unionization
- A consultant conducts a seminar for employers on how to achieve positive employee relations
- An attorney drafts a social media policy for an employer

## **Potential Impact**

- If lawyers engage in persuader activity, DOL requires them to disclose the identity of *all clients* for whom labor advice is provided. By eliminating the advice exemption and expanding the scope of what constitutes persuader activity, law firms will find it very difficult to maintain client confidentiality. Therefore, the safest way to avoid violating client confidences and/or the attorney-client privilege is to cease offering any type of labor relations advice.
- In its comments opposing the DOL's persuader regulation, the American Bar Association warned against this potential infringement into the attorney-client relationship: "[T]he ABA is not taking sides on a union-versus-management dispute, but rather is defending the confidential client-lawyer relationship and urging the Department not to impose an unjustified and intrusive burden on lawyers and law firms and their clients."
- Employers faced with a union campaign will have a harder time finding competent counsel to represent them, providing more opportunities for unions to catch unsuspecting employers mistakenly running afoul of complicated labor laws.
- By limiting access to counsel, the proposed changes will make it harder for employers to train supervisors on how to communicate with employees about labor issues without violating the law.
- By making disclosure more complicated and detailed, many employers will be less likely to exercise their federally protected free speech rights to discuss the pros and cons of unionization with employees.
- Furthermore, the disclosure form must be signed by the company president and treasurer under penalty of perjury. Facing criminal sanctions for complicated disclosures, many employers can be expected to bite their tongues and not respond to union rhetoric, leaving employees to guess at the truth during union campaigns.
- These proposed changes are clearly designed to work hand-in-glove with the Board's "ambush" election proposal by limiting employers' ability to communicate with their employees regarding the pros and cons of unionization.

## **Timeline for Finalization**

The commentary period for the proposed regulation has long-since closed. The next step before finalization is for the proposal to be reviewed by the Office of Management and Budget. The current Regulatory Agenda has the persuader regulation scheduled for finalization this coming November. With other high-profile DOL regulations recently moving quickly through the regulatory process, it is suspected that the persuader regulation will be the next to go.