

The Department of Labor's Persuader Regulation

Proposed Regulation Intended to Limit Employee Free Choice & Employer Free Speech

Organized labor is demanding the government make policy changes in order to increase union membership rolls at the expense of employee free choice and employer freedom of speech. One of labor's current policy priorities 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 make it more difficult for employers to access legal counsel and legally communicate with employees about the pros and cons of a particular union or unionization generally.

Current Disclosure Rules

Currently, employers, consultants and attorneys must disclose any arrangements between the employer and consultant or attorney to persuade employees about employees' decision as to whether or not to unionize if the consultant or attorney directly communicates with employees. This is to ensure that employees know that the employer has hired the third party that is communicating with them. If the attorneys or consultants do *not* communicate directly with employees, however, but instead simply advise the employer about how to legally communicate with employees, then no disclosure is required. 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 between employers and 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 December. 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.