COALITION FOR A
DEMOCRATIC WORKPLACE

The Department of Labor's Persuader Regulation

DOL's Persuader Regulation is intended to limit employees' free choice & employers' free speech

During the Obama administration, organized labor demanded the government make policy changes to increase union membership rolls at the expense of employee free choice and employer free speech rights. One such policy priority was the Department of Labor's (DOL) persuader regulation, which went into effect in July 2016. The regulation changes federal disclosure rules to make it more difficult for employers to access legal counsel or other expert advice on labor and employee relations issues, interfering with employers' ability to engage in positive employee relations and legally communicate with employees about the pros and cons of unionization. In November 2016, a federal court in Texas permanently enjoined the final rule. DOL should withdraw the rule and abandon any appeal of the court's decision.

PREVIOUS DISCLOSURE RULES

Previously, employers and the experts they hire, including attorneys, had to disclose any arrangements where an expert was hired to communicate directly with employees about their decision to unionize. This was intended to ensure employees knew the expert was acting on behalf of the employer and was not a neutral third party. If the attorneys or other hired experts did *not* communicate directly with employees, however, but instead simply provided "advice" to the employer about how best to legally communicate with employees, then no disclosure was required under the law. This was reasonable, because if the employer was the one communicating with the employees, they were already aware the employer was the source of the information they were receiving. Most employers, attorneys, and experts believed this bright-line rule was easy to interpret and apply in most situations.

THE CHANGES

DOL's final rule narrowed the scope of this "advice" exemption, so that a host of interactions between employers and hired experts providing advice on employee or labor relations, or even associations providing such information, are now subject to the disclosure requirements. For example, the following situations could trigger the reporting requirements under the new regulation:

- An attorney advises an employer on how to lawfully communicate with employees prior to a union representation election;
- An expert conducts a seminar for employers on unions;
- An attorney drafts a social media or other workforce policy for an employer that DOL deems was intended to subtly affect or influence employees' views on unions; or
- An association provides a webinar on labor relations or unions to its members, who are human resource professionals or other representatives of an employer's management team.

Under the rule, if lawyers engage in persuader activity, DOL requires them to disclose the identity of *all clients* for whom labor advice is provided. These disclosures are complicated, detailed, and must be signed by the company president and treasurer under penalty of perjury.

THE IMPACT

By eliminating the advice exemption and expanding the scope of what constitutes persuader activity, attorneys will find it very difficult to maintain client confidentiality. In its comments opposing the regulation, the American Bar Association warned against this potential infringement to the attorney-client relationship. The safest way for these

firms to avoid violating client confidences and/or the attorney-client relationship is to cease offering any type of legal advice on employee or labor related issues.

The result? Employers will have a harder time finding competent counsel to represent them, and unsuspecting employers will mistakenly run afoul of complicated labor and employment laws. Many employers will therefore be less likely to exercise their federally protected free speech rights to discuss the pros and cons of unionization with employees. This is bad for employees who will have to make decisions on whether or not to vote for a union based only on the union rhetoric and promises, which are often unrealistic.

Because of the rule's vague and expansive requirements, employers and the experts they hire could inadvertently and unwittingly violate the law and face criminal charges for activities that are not at all or only tangentially related to labor relations and union organizing, such as attending educational conferences or seminars or hiring experts to advise on employee relations.

WE NEED TO STOP THIS BURDENSOME REGULATION

The final rule went into effect on July 1, 2016. Congress introduced legislation challenging the rule in the 114th Congress, but their efforts were not successful. CDW strongly urges Congress to quickly introduce and pass legislation eliminating the rule.

Additionally, in November 2016, a federal court in Texas permanently enjoined the final persuader rule. DOL appealed the decision to the 5th Circuit. CDW strongly urges the Trump administration to withdraw the rule and abandon its appeal of the court's decision.