COALITION FOR A
DEMOCRATIC WORKPLACE

The Department of Labor's Persuader Regulation

Obama's Persuader Regulation was intended to limit employees' free choice & employers' free speech

The Obama administration's Department of Labor (DOL) issued the "persuader" regulation on March 24, 2016. The regulation, which went into effect in July 2016 but was enjoined by a federal court in November 2016, would have changed federal disclosure rules to make it more difficult for employers to access legal counsel or other expert advice on labor and employee relations issues. This rule interferes with employers' ability to engage in positive employee relations and legally communicate with employees about the pros and cons of unionization. In June 2017, President Trump's DOL began the process of rescinding the rule through a new Notice of Proposed Rulemaking (NPRM). DOL needs to quickly complete the process of revoking this damaging rule.

PREVIOUS DISCLOSURE RULES

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

THE CHANGES

The Obama persuader rule narrows 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 Obama 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 Obama rule, if lawyers engage in persuader activity, they are required 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, the Obama rule makes it very difficult for attorneys 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 would 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 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 hiring experts to advise on employee relations or attending educational conferences or seminars.

WE NEED TO STOP THIS BURDENSOME REGULATION

In November 2016, a federal court in Texas permanently enjoined the final persuader rule. Obama's DOL appealed the decision to the 5th Circuit Court of Appeals, but the litigation has been delayed numerous times under the Trump administration.

On June 6, the Secretary of Labor under President Trump, Alexander Acosta, issued a new Notice of Proposed Rulemaking (NPRM) proposing DOL rescind the rule in its entirety and requesting public input on the potential action. CDW is submitting comments on the NPRM, strongly urging the Trump administration to withdraw the rule in its entirety and abandon its appeal of the court's decision.