

The DOL Remains Unpersuaded - New "Persuader" Rule is Coming Soon

Insights

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The anxiety of employers and labor attorneys only worsened this week when the Department of Labor took another step towards finalizing and publishing the much anticipated changes to the so-called "persuader" rule. On Monday, the DOL's Office of Labor-Management Standards submitted a proposed final rule to the Office of Management and Budget (OMB), the final step before a rule may be published. The DOL has signaled that it intends to publish the final rule by March 2016, but some, based upon the OMB's typical review timeframe, believe the rule may be published even sooner.

Through the proposed rule, the DOL is attempting to narrow an exemption under the Labor Management and Disclosure Act (LMRDA) for what union-related communications between employers and outside consultants, including attorneys, remain confidential. Under the LMRDA, employers and outside attorneys are obligated to disclose certain information to the DOL when the attorney is retained to persuade employees regarding their rights to organize and collectively bargain. For years, however, the LMRDA has included an "advice exemption" that excludes from the reporting obligations communications between outside attorneys and employers so long as the employer may review, revise and/or reject the advice provided by the attorney even if it contains a persuasive component (i.e., recommendations influencing whether an employee should or should not join a union). Under the revised rule, however, only oral or written recommendations from outside attorneys would now fall within the advice exemption included in the LMRDA. Activities subject to the LMRDA's reporting requirements would now include actions or activities by an outside attorney on behalf of an employer that could directly or indirectly persuade employees concerning their right to organize and bargain collectively regardless of whether the attorney has direct contact with employees and regardless of whether the employer accepts or rejects the attorney's advice.

The impact of the new “persuader” rule, which again from all indications will be published in the coming months, is stark and clear. The new rule will result in employers and outside attorneys being saddled with significantly increased reporting obligations. More fundamentally than this, however, the rule could, and many believe will, result in a chilling effect where employers and attorneys cannot freely communicate out of concern that their otherwise privileged communications would be subject to the disclosure obligations under the LMRDA. The candid advice employers seek and expect to receive on labor issues from attorneys, that for years has and remained confidential, could now be subject to the LMRDA’s disclosure obligations. In light of the changes to the relationship between employers and outside attorneys that will be caused by the new “persuader” rule, lawsuits seeking to strike down the new rule will be filed almost immediately after it is published presumably in early 2016. Stay tuned for further developments.