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DOL Issues New, More Expansive, Interpretation of Persuader Rule

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In March of this year, the Office of Labor-Management Standards ("OLMS") issued new regulations regarding the Persuader Rule. *See* 29 CFR Parts 405 and 406. The new regulations, which become fully effective on July 1, 2016, require employers and their law firms or consultants to comply with federal reporting and disclosure requirements if they engage in certain labor relations advisory activities. This rule does not apply to governmental employers such as the U.S., any wholly owned corporation of the U.S., any State or political subdivision, but it does apply to private sector employers and many non-profit organizations. This change is problematic for employers, law firms and consultants because it may require the disclosure of confidential information and may make retention of advisors in anticipation of a union organizing campaign more difficult.

The Historical Context of the Persuader Rule

The National Labor Relations Act, which was originally passed in 1935, was designed to protect workers from employer oppression. But by the 1950s (as unions increased in size and number) there was a substantial question whether union officials had begun to abuse their new found power and collude with employers to the detriment of individual workers. For example, in hearings held before the Senate's "McClellan Committee," it was revealed that it was not unheard of for union officials to agree to "sweetheart" collective bargaining agreements in exchange for under the table bribes from the employer.

These revelations led to the enactment of the Labor Management Reporting and Disclosure Act ("LMRDA") in 1959. Not surprisingly, the LMRDA imposed reporting requirements on both unions and employers in an effort to discourage unsavory financial transactions and to minimize the conflicts of interest that tended to undermine the labor relations ecosystem.

Most importantly, the LMRDA required "every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof, is directly or indirectly, to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing" to annually file a report with the Secretary of Labor that identifies all payments made to them for the services as well as a myriad of other information. *See* LMRDA Section 203(b)(1) (i.e. the "Persuader Rule").

However, until recently, law firms, consultants and other advisers who engaged in indirect persuasive activities were excluded from the reach of the Persuader Rule under the "Advice Exemption" and therefore were not subject to LMRDA's reporting requirements. *See* LMRDA Section 203(c) ("Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer . . ."). In practice, this meant that employers could retain counsel or consultants to engage in indirect persuasive activities without the fear that confidential information regarding the relationship would have to be disclosed in order to comply with the Persuader Rule. Reports were required only where the employer's advisor directly contacted and communicated with the employer's employees.

The New, More Expansive, Persuader Rule

The new regulations issued by OLMS change the interpretation of the word "advice" and have substantially narrowed the activities that are excluded from the LMRDA's reporting requirements under Section 203(c). *See* 29 CFR Parts 405 and 406. Under the new regulations, advisory activities that are commonly provided by law firms and consulting firms (e.g. drafting training materials, directing supervisors, developing personnel policies and presenting

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union avoidance seminars) are not considered advice. Instead, such activities will now be considered "indirect persuasion" activity that is subject to reporting under the Section 203(b)(1).

The Department of Labor claims the new interpretation increases transparency for workers and will help them make a more informed decision during union elections. *See* DOL Website. The new regulation certainly increases transparency in that it gives workers more information than they would have otherwise. But it is highly questionable whether knowing details about the contractual obligations between an employer and its law firms or consultants will have any impact on worker free choice. Ironically, the rationale offered by the DOL appears to rest on the dubious proposition that the identity of the author is more important than the content of the message presented. We anticipate the new regulation will likely have little, if any, impact on worker free choice. Instead, it will be an administrative trap for the unwary that can result in severe consequences such as civil and criminal penalties.

Getting "Grandfathered In" Under the Old Persuader Rule

The new Persuader Regulations are very controversial and have provoked several lawsuits challenging the enforceability of the new regulation. Those lawsuits are still ongoing and the ultimate outcome of those lawsuits is unclear. However, the DOL has clarified that the new rule will not apply to services provided under any agreement between the advisor and the employee entered into before July 1, 2016, in which the advisor agrees to provide persuader services on or after July 1, 2016.

In other words, forward looking agreements for advisory services entered into before July 1, 2016 will essentially be "grandfathered in" under the original Persuader Rule.

If your company relies on lawyers or consultants for advice on labor relations issues or would like to reserve the possibility of doing so in the future, then you should consider entering into a forward looking agreement on or before July 1, 2016 for such services. Please contact an attorney in Spencer Fane's Labor and Employment Group if you wish to enter into a forward looking agreement prior to July 1, 2016 or if you have any questions regarding the new Persuader Regulations.

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