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CLIENT ALERT

# DOL Issues Final Persuader Rule

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The Department of Labor's Office of Labor-Management Standards (OLMS) has published the long-awaited "persuader rule," *Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act*. First proposed in June 2011, the persuader rule requires that employers disclose the hiring of a third-party labor relations attorney or other consultant to try to prevent its employees' unionization attempts. This disclosure obligation arises if the consultant engages in persuader activities that go beyond the plain meaning of advice. Significantly, the newly published rule requires disclosure even if the consultant has no direct contact with workers.

Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA or Act), in part, requires the disclosure of agreements by employers and consultants, or persons who work on behalf of employers, to persuade employees to exercise or not exercise their rights to organize or collectively bargain, or to persuade employees as to how they should exercise such rights. Under the LMRDA disclosure requirements, employers are required to file an LM-10 Employer Report, while the consultant is obligated to file an LM-20 Agreement and Activities Report. However, the Act provides an exemption to this "persuader" reporting requirement in situations where the persuader is merely "giving or agreeing to give advice" to an employer. The primary focus of the new persuader rule is the revision of its interpretation of the "advice" exemption by limiting the definition of the types of activities that constitute "advice."

Under the prior interpretation, reporting was effectively triggered only when a consultant communicated directly with employees. The final persuader rule now provides that an employer and consultant will have to report to the OLMS when they are engaged in the following activities:

- Planning or conducting employee meetings;
- Training supervisors or employer representatives to conduct meetings;
- Coordinating or directing the activities of supervisors or employer representatives;
- Establishing or facilitating employee committees;
- Drafting, revising, or providing speeches;
- Developing personnel policies designed to persuade employees; or

- Identifying employees for disciplinary action, reward, or other targeting.

The rule does exempt, however, reporting agreements in which the consultant agrees to merely provide "advice" to the employer, defined as "recommendations regarding a decision or course of conduct." The rule also exempts traditional privileges and disclosure requirements associated with the attorney-client relationship.

Additionally, the OLMS has revised the LM-20 and LM-10 forms and instructions to require more detailed reporting on employer and consultant agreements. The rule also requires that the LM-10 and LM-20 forms be filed electronically.

Following years of consideration and debate over the 2011 proposed rule, the final rule was implemented with a number of modifications, including:

- Identifying persuader activities that trigger reporting (direct persuasion and four sub-categories of indirect persuasion: providing persuader materials; directing supervisors; developing personnel policies and actions; and presenting union-avoidance seminars).
- No longer requiring employers to report their attendance at a union avoidance seminar.
- Requiring trade associations generally to report only in two situations—where the trade association's employees serve as presenters in union avoidance seminars or where they undertake persuader activities for a particular employer or employers. Trade associations are not required to report when they only organize—but do not present at—union avoidance seminars.
- Narrowing the situations in which persuader activity had to be reported to cover only activities undertaken to influence employees about union organizing and collective bargaining. "Protected concerted activities" have been removed from the definition of "object to persuade employees." Persuasion efforts around broader efforts to promote concerted activities (aside from organizing and collective bargaining) no longer trigger reporting requirements.
- Not requiring reporting of agreements that exclusively consist of providing pre-existing or off-the-shelf materials, such as stock videos or anti-union campaign documents, when selected by an employer. Where a consultant agrees to select particular material for an employer, however, the agreement must be reported.
- Clarifying burden numbers, including identifying the number of Form LM-20 reports covering union avoidance seminars and acknowledging that the rule imposes a burden on certain non-filers as well as the filers.

The rule takes effect on April 25, 2016, and will be applicable to arrangements, agreements, and payments made on or after July 1, 2016. The OMLS' employer-consultant reporting page can be accessed here, and the final rule in the Federal Register is here. However, given the expansion of obligations as described above, legal challenges are likely to be filed. In addition, several employer organizations have announced plans to seek legislation that would undo the new rule's requirements.

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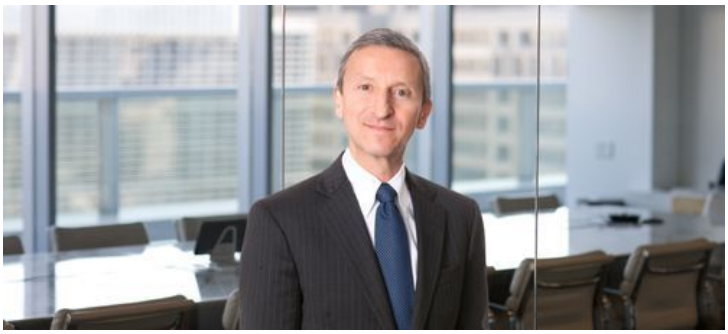

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