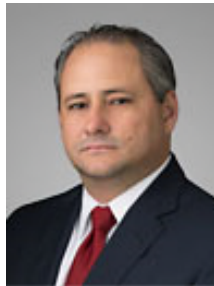


Take Action Today: DOL Provides Important Guidance Regarding “Persuader Rule”

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Agenda

1. LMRDA Persuader Reporting Obligation
2. The Longstanding Old Rule
3. The New Amended Persuader Rule
4. Pending Litigation and Legislation
5. DOL-OLMS Provides Clarification and Limited Safe Harbor Opportunity
6. Resources

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Labor Management Reporting and Disclosure Act Obligations / What is the LMDRA

What is the LMRDA

- Federal Statute enacted in 1959 to make labor-management relations more transparent/less corrupt
- Imposed certain financial reporting obligations on employers, unions and labor relations consultants

- Definition of **Labor Relations Consultant:**

Any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities or collective bargaining activities.

29 U.S.C. Section 402(m)

- *This includes law firms and attorneys*

Persuader Reporting Obligation

- The **LMRDA** requires the following reports:
 - Labor organizations must report a wide array of financial information, including, for unions that are organizing workplaces, information on how much they spend on organizing campaigns
 - Employers that retain labor relations consultants to engage in persuader activities must report these relationships, including how much they spend on these activities
 - Labor relations consultants must report their clients for whom they provide persuader services

Persuader Reporting Obligation

The “Persuaders”

- The LMRDA includes an exception for “**advice.**” The law exempts employers from the duty to file reports when they engage a labor relations consultant for advice.
 - Historically, “advice” included only direct communication, thus exempting all consultant activities unless a consultant had direct contact with employees
 - **2016 Amended Rule** changed the advice exception – The USDOL added indirect persuader activities to the reporting obligation

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The Longstanding Old Rule

The Longstanding Old Rule

- Since 1962, only “**direct**” persuader activity, i.e. communication directly to employees by a labor relations consultant reportable
- An employer and labor relations consultant providing advice did not incur any reporting obligation so long as:
 - The consultant providing advice did not directly deliver or disseminate persuasive material to employees; and
 - The employer had the ability to reject or modify persuasive material prepared by the consultant providing the advice
- This was a simple “**bright line**” test based on **Donohue Memorandum** sent by Solicitor of Labor –
 - Direct Contact – reportable
 - No Direct Contact – not reportable

The Advice Exemption

- Under the **“old” rule**, the DOL held the 203(c) advice exception of the LMRDA in determining whether certain activities were exempt from reporting obligations. This exemption applied if:
 - The person providing the advice did not deliver or disseminate persuasive material directly to employees; and
 - The employer had the ability to reject or modify persuasive material prepared by the person providing the advice; and
 - There was no deceptive arrangement between the employer and the person providing the advice.

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The New Definition of Persuader Activity

Applicability and Effectiveness

- **New definition** proposed 2011
- DOL issued amended rule on **March 23, 2016**
- Amended rule only applies to agreements, arrangements entered into **on or after July 1, 2016**
- Some lack of clarity as to effective date and dates of reporting

New Requirements of “Indirect” Persuaders

- This Amended Rule requires that employers and the consultants they hire file reports **not only for direct persuader activities** – labor relations consultants talking to workers – **but also for indirect persuader activities** – labor relations consultants scripting what managers and supervisors say to workers
- What must be reported:
 - The identity of the client,
 - The fee arrangement, and
 - The scope and nature of the persuader agreement in cases where a labor relations consultant has agreed to provide services **other** than legal services – “specifically, to take action with the intent to persuade employees regarding union representation or collective bargaining”
- The DOL contends this information is not privileged and that the Final Rule does not affect the **attorney-client privilege**.

New Requirements of “Indirect” Persuaders

- Labor relations consultants, including attorneys, must report when they are engaged and when they:
 - Plan, direct, or coordinate managers to persuade workers
 - Provide persuader materials to employers to disseminate to workers
 - Conduct union avoidance seminars
 - Develop or implement personnel policies or actions to persuade workers
- DOL has said it intends to interpret these requirements **“very broadly”**

Examples of Reportable Conduct

- Reports are supposed to be filed if an employer retains a labor relations consultant, including attorney, who:
 - Plans, directs or coordinates a campaign
 - Provide material to the employer for dissemination to employees
 - Conducts training programs for supervisors
 - Develops personnel policies
 - If any of the above are done with **“an object to persuade”** employees about concerted activities
- Many confusing and illogical exceptions under the amended Rule

Very Narrow Exemption Remains

- The new rule narrows the advice exemption by concluding that advice linked with persuader activities prompts reporting obligations for the advisor and the employer
- Agreements and arrangements in which the person giving the advice engages in the indirect persuasion of employees will now be subject to reporting
- **DOL:** Agreements are not reportable if the consultant merely advises or represents the employer.
 - For example, agreements under which a consultant exclusively provides legal services are not reportable
 - Representation of an employer before a court or similar tribunal or during collective bargaining negotiations also does not trigger reporting

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Pending Litigation & Legislation

Pending Cases

Status regarding injunction

■ Three cases

- *Associated Builders and Contractors of Arkansas v. Perez, et. al.*, No. 4:16-CV169 (E.D. Ark. Mar. 30, 2016);
- *National Federation of Independent Businesses v. Perez, et. al.*, No. 5:16-CV-00066-C (N.D. Tex. Mar. 31, 2016);
 - Oral argument on injunction application June 20, 2016
 - *Rulings on injunction possible before July 1, 2016*
- *Labnet Inc. d/b/a Worklaw Network v. Hayes*, No. 0:16-cv-00844 (D. Minn. Mar. 31, 2016)
 - Oral argument on injunction application May 27, 2016
 - **Injunction denied June 22, 2016 (appeal expected)**

Legislation

- There has been ongoing activity before Congress, as the business community, management lawyers, and other employer advocates have criticized the new Rule
- Resolution under Congressional Review Act passed the House and is Pending in the Senate
 - President would likely veto
- Possibility of attaching as an amendment to an Omnibus Spending Bill

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DOL Provides Clarification and Limited Potential Safe Harbor

June 2016 Statements By DOL

- The DOL recently stated that the Amended Rule new rule will not apply to any agreement between an employer and a labor relations consultant, including an attorney, entered into before July 1, 2016, in which the advisor agrees to provide “persuader” services **on or after July 1, 2016**, provided that those persuader services would not have otherwise triggered reporting obligations prior to the issuance of the new rule.
- Direct Persuader activity would still be reportable

This is not a formal rule or announcement

Possible Safe Harbor

- Entering into agreements with labor counsel **prior to July 1, 2016** should protect advice and assistance provided by counsel from reporting and disclosure to the DOL
- Would apply to the employer and labor counsel
- Does not appear necessary that the employer be facing a current threat of union organizing or an existing bargaining obligation for the employer to enter into such a relationship and take advantage of this opportunity to shield itself from future reporting obligations under the new, amended Persuader Rule

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Resources

Additional Resources

- **U.S. Department of Labor- LMRDA, Implementing Regulations, and Final Rule**
 - [Section 203 of the LMRDA](#)
 - [Electronic Code of Federal Regulations \(eCFR\)](#) (29 CFR Parts 405 and 406)
 - [Federal Register](#)
 - [Persuader Final Rule Overview and Summary](#)
 - [Defendants' Status Report Regarding Scheduling Matters](#)
- **Act Now Advisory, [“DOL Provides Important Guidance Regarding “Persuader Rule”](#)**
(June 17, 2016)
- **Management Memo** blog,
 - [“Court Denies Injunction to Keep Amended Persuader Rule from Taking Effect – Finds DOL Exceeded Authority Under LMRDA”](#) (June 23, 2016)
 - [“Department of Labor Releases New Persuader Rule Intended to Aid Union Organizing”](#) (March 23, 2016)
 - [“First Kill All The Lawyers” – Obama’s Persuader Rules Target Employer’s Right to Counsel](#) (Dec. 2, 2013)
- **Donohue Memorandum**
- **Order Denying Injunction** in *Labnet Inc. d/b/a Worklaw Network v. Hayes*, No. 0:16-cv-00844 (D. Minn. Mar. 31, 2016)

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Persuader Rule Webinar

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