Rest in Peace, Persuader Rule: The DOL Rolls Back Labor Relations Reporting Requirements

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Earlier this month, the U.S. Department of Labor (DOL) handed employers a win, announcing that it was giving the notorious 2016 "Persuader Rule" the axe. The rule had delineated the bounds of an advice exception under the Labor-Management Reporting and Disclosure Act (LMRDA) and imposed additional reporting requirements on employers and labor relations consultants (third parties hired to advise on labor issues, including, among other things, unionization). The rollback of the rule is good news for employers, who not only get a reprieve from administrative reporting requirements, but can also rest easily in consulting with attorneys and other third parties regarding union and labor activities.

LMRDA Background

The LMRDA, passed in 1959, mandates certain procedures for establishing and operating labor unions. The act includes, among other things, reporting requirements for labor organizations, union officers and employees, employers, labor relations consultants, and surety companies.

Under the law, employers and labor unions must file annual reports disclosing certain relationships and financial transactions relating to unions, including an employer's engagements with consultants or labor relations attorneys who directly seek to persuade employees regarding unionization.

The LMRDA provides an exception to the reporting requirement where the consultant or attorney is only engaged to give advice to the employer; to represent the employer before a tribunal; or to engage in collective bargaining on behalf of the employer. *29 U.S.C. § 433(c)* (2017). In the past, the Department of Labor has interpreted this exception as encompassing advice on policies or communication strategies that a consultant gives to an employer but that the consultant does not communicate directly to employees. In other words, as Nathan Mehrens, the Deputy Assistant Secretary for the Office of Policy at the DOL, has explained, "[p]ersonal interactions with employees done by employers' consultants triggered reporting obligations, but advice between a client and attorney did not."

This interpretation has safeguarded confidential communications between employers and their lawyers for years.

2016 Persuader Rule

However, on March 24, 2016, DOL published its final rules expanding the definition of "persuader activity," requiring disclosures of *any* relationships involving *any* persuader activity (*e.g.*, providing advice on how employers can persuade employees against unionization). The new rules required disclosures about the nature of the consulting relationship and the compensation paid to the consultant. In addition, they required the consultant to report the scope of services to be provided, which could include a description of the consultant's or attorney's tasks.

Many in the business community viewed the changes as effectively preventing employers from seeking legal counsel on union activity, since the term "labor relations consultant" covers attorneys. In fact, several associations filed suit against the DOL requesting that the agency be enjoined from enforcing the Persuader Rule. They argued, among other things, that the rule 1) exceeded the agency's authority under the LMRDA; 2) contained reporting requirements inconsistent with attorney-client privilege and confidentiality; and 3) was an unconstitutional violation of the right to free speech.

Federal Court Injunction

One association, the National Federation of Independent Business, battled the rule in federal court in the Northern District of Texas, asserting that employers have a right to an open and honest relationship with their attorneys. Apparently, the association's argument was more persuasive than the Persuader Rule itself. On June 27, 2017, just three months after the rule's publication, the Texas court temporarily enjoined the DOL from enforcing the rule. On Nov. 16, 2016, the court made the injunction permanent.

Formal Rollback

Not surprisingly, any hopes of appealing the federal court's decision and reviving the Persuader Rule lost steam – if not totally collapsed – upon the transition from President Obama's administration to President Trump's. Since last November, the status quo has been for employers to ignore the enjoined reporting requirements.

But on July 17, 2018, the DOL made it official and issued a news release stating that it had rescinded the Persuader Rule, which it said "exceeded the authority of the Labor-Management Reporting and Disclosure Act" and "impinged on attorney-client privilege by requiring confidential information to be part of disclosures."

That the DOL has formally taken the Persuader Rule off the table comes as a welcome and final relief to most employers, who no longer have to worry about engaging and consulting with attorneys on labor relations issues for fear that their confidential relationship or discussion will be the subject of an annual report to a government agency. *Note: the rescission is not fully effective until August 17, 2018.*

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