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Legal Update

February 2014

PREPARE FOR PRO-UNION MOVES IN 2014: NEW "PERSUADER" AND "QUICKIE ELECTION" RULES

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The U.S. Department of Labor (DOL) is expected to issue its final "persuader" rule next month, and employers may need to reevaluate their union strategies to meet this and other new challenges. The NLRB has also recently re-proposed the controversial "quickie election" rule, designed to expedite union representation elections, although a final version of the rule likely will not issue until later this year.

Background

The Labor-Management Reporting and Disclosure Act (LMRDA) imposes certain reporting requirements on "persuaders" and the employers who use them. A "persuader" is someone who is engaged by an employer (1) to persuade employees not to exercise their right to organize and bargain collectively or (2) to supply the employer with information concerning the activities of employees or a labor organization in connection with a labor dispute (*e.g.*, legal counsel, labor consultants). Under the LMRDA, persuaders must file reports with the DOL's Office of Labor-Management Standards (OLMS) within 30 days of entering into an agreement with an employer and must also file annual reports identifying payments received. In addition, employers who engage persuaders to convince their employees not to be represented by a union must also report any persuader activities to the OLMS. The OLMS publishes persuader reports on its website.

The Current Advice Exemption for a Company's Legal Counsel

Traditionally, the LMRDA has provided an "advice exemption" to the persuader rule. A person who has not had direct contact with employees and who has limited his or her activity to providing the employer with advice in persuading employees has not had to submit public reports. In an attempt to significantly limit this exemption, the DOL first proposed changes to the persuader rule in 2011, but they were postponed several times until March 2014.

The DOL's Proposed Changes

Under the DOL's proposed new persuader rule, which is scheduled to take effect next month, the advice exemption may no longer apply to an employer's outside legal counsel or labor consultant. Assuming the final rule is consistent with the DOL's previous proposals, a persuader will be able to claim the advice exemption only if he or she does not have the direct or indirect object to persuade employees concerning their rights to organize or bargain collectively. Thus, an employer's legal counsel who provides crucial human resources functions, such as meeting with employees, training supervisors to conduct meetings about union representation, and preparing or reviewing policies and procedures designed to persuade employees may become subject to the persuader rule's new reporting requirements.

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The DOL's proposed changes aim to draw a distinction between attorneys who only provide purely legal advice to their clients and attorneys whose activities have the objective of directly or indirectly persuading employees. If an employer's attorney or outside consultant communicates directly with employees in an effort to persuade them, the advice exemption may not apply. Even indirect contact with employees may trigger reporting obligations for persuaders if, for example, a lawyer's or consultant's activity is aimed at persuading employees regarding union representation. Thus, if an employer has outside counsel prepare persuasive form letters, media, and other materials to be used by the employer in communicating with its employees, or if counsel provides the employer with information obtained from research or investigation concerning employees or labor organizations, this will trigger reporting requirements under the new persuader rule if it mirrors previous proposals. Furthermore, the DOL has proposed that reporting will be required in any situation where it is impossible to separate legal advice from activities that go beyond strictly legal advice.

Potential Consequences of the New Persuader Rule

Attorneys whose activities require reporting may need to publicly disclose their clients' identities, details regarding the nature and description of services provided to clients, and the amounts paid by their clients for all labor relations advice annually. Many have already expressed concerns that this may violate the attorney-client privilege or force their attorneys to disclose confidential client information. Nevertheless, failure to comply with the persuader rule can trigger civil and criminal penalties, including fines of up to $10,000 and up to one year in jail.

Employers should be prepared for the expected new persuader rule (assuming there are no further delays). Employers may want to work closely with their legal counsel to identify activities that could trigger the new reporting requirements. Employers should evaluate their options for compliance with the new persuader rule and consider strategies to mitigate any risks such public disclosures may pose to their attorney-client relationship and the ability to obtain confidential legal advice if confronted with union activities.

NLRB's "Quickie Election" Rule

The National Labor Relations Board (NLRB) has also signaled that it will continue to be active this year. While its "quickie election" rule had initially stalled in 2012 because appellate courts decided that the "recess appointments" of certain NRLB members in office when the rule was first proposed were unconstitutional, the NLRB has now re-proposed the quickie election rule. The NLRB will accept public comments on the re-proposed quickie election rule until April 7, 2014, and employers should anticipate that the NLRB will issue a final rule before the end of 2014.

The NLRB's re-proposed "quickie election" rule expedites union representation elections. Among other changes, the re-proposed rule requires an employer to provide a list of the full names, home addresses, telephone numbers, e-mail addresses, work locations, shifts, and job classifications of employees eligible to vote in the election. It also requires that all pre-election hearings take place seven days after the filing of a union representation petition. An employer would have to file by the hearing date a comprehensive, written Statement of Position describing the employer's position on all legal issues related to the election, and would waive every possible argument and defense not included in the Statement of Position. The quickie election rule also would significantly limit an employer's ability to litigate issues (*e.g.*, who is eligible to vote) before the election. Ultimately, the elimination of many pre-election procedures and the significantly shorter election process may leave employers unprepared to withstand a union organizing campaign.

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In light of the anticipated new persuader rule and the "quickie election" rule, employers may want to take some steps to fortify their ability to resist a union organizing effort.

1. Employers should make sure that their wages, benefits, and policies are competitive and that they treat employees well. Employers should also identify factors that could potentially cause employees to consider union representation.
2. To the extent that supervisors have not been educated about the advantages and disadvantages of unions, the federal labor laws, and what they may and may not legally say, it is advisable to have them trained—preferably before the persuader law goes into effect and before any union organizing efforts arise. If the NRLB does issue a final "quickie election" rule this year, employers will have less time to train supervisors to lawfully respond to union activity and to educate its employees about relevant issues before an election.
3. It behooves employers to make sure that they have in place, long before a union organizing campaign, personnel policies to help defend against a campaign. For example, to limit employee authorization card solicitation on its premises, an employer should adopt and publish a written "no solicitation" rule that is not aimed at unions. The rule must be worded and enforced carefully to avoid violating the law. The rule should focus on preventing disruption of work when either the employee who does the soliciting or the employee being solicited is on "working time." "Working time" is the period when an employee is required to perform her duties. When an employee is not on "working time," solicitation may not be restricted, unless the solicitation concerns employees who are on "working time." Non-working time includes lunch hours, scheduled breaks, time before and after work, and standing in line to sign in or out – even if an employee is being paid during these periods. To be valid, a "no solicitation" rule must be adopted before a union organizing effort surfaces and uniformly enforced. If an employer prohibits union solicitation but does not prohibit solicitation for other purposes, it may violate the law.
4. Likewise, an employer should adopt and publish a written "no distribution" rule that is not aimed at unions to place appropriate limits on literature and handbills that may be distributed. Again, this kind of rule needs to be in place before a union organizing campaign commences, and it must be uniformly applied. Employers should also consider adopting a "no access" policy limiting access to the interior of the facility and working areas by off-duty employees. Such a policy should limit access for any purpose and be uniformly applied and enforced.
5. Employers who would like to seek advice regarding the anticipated new rules may be at a disadvantage if they wait to do so. Employers who wait to seek advice may trigger public disclosure requirements under the new persuader rule, which could expose the employer's previously confidential strategizing with outside counsel.

Conclusion

The DOL's anticipated "persuader" rule and the NLRB's re-proposed "quickie election" rule could present serious consequences for employers confronted with a union organizing campaign. Employers that do not have their houses in order would be well advised to prepare themselves now.
