I’m Not Persuaded: The DOL’s New “Persuader” Rule Close to Implementation

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Law firms are often retained by employers facing the fast-paced, distracting, emotionally charged experience of unionization efforts. Part of the union organizing process is legal in nature, and part feels more like politics, particularly where an employer wants to communicate to its employees that it would prefer to deal with them directly, rather than through a union. Hence “persuasion”: many times, an employer attempts to persuade employees not to support a union, just as a union is trying to persuade employees to support it.

Historically, many “persuasion” efforts emerged from an employer’s anti-union animus. Decades ago, in fact, employers would hire “employees” to plant among the workforce, as if they were just regular workers, but who instead would sow fear, dissent, and confusion about the effects of unionizing – for example, by expressing the “belief” that employees would lose their jobs if they unionized. These were the original “persuaders,” and it was ugly, surreptitious business. The Labor Management Reporting and Disclosure Act (“LMRDA”) of 1959 attempted to “out” these bare-knuckled, unlawful tactics by requiring employers using persuaders to report those paid relationships to the U.S. Department of Labor (“DOL”).

But some outside help for employers is perfectly lawful. For example, if an employer wants to communicate its views on the Internet or in flyers, it makes good sense to have a law firm review the communications to make sure they can’t be misinterpreted as containing unlawfully coercive or threatening statements. Law firms also provide training to supervisors during organizing campaigns on the “do’s and don’t’s” for managers – what you can do and say lawfully, and what you can’t. Having done a lot of this training myself, I can tell you that managers are almost always confused when a union campaign hits: can I talk about this? Can I answer employees’ questions? Am I allowed to say that I was in a union once and had a bad experience? What am I supposed to say if an employee tells me she doesn’t want to join the union? In those circumstances, just like with vetting campaign communications, law firms are actually helping employers to comply with the law – not helping employers “persuade” anyone of anything, and certainly not engaging in anti-union activity.

The DOL has just sent the final version of its revised “persuader rule” to the Office of Management and Budget, the final step before implementation of the Rule in March 2016. The new rule will change a lot by narrowing the so-called “advice exemption” in the LMRDA. Up until now, communications or materials provided by an attorney where there is no *direct* contact between the attorney and employees need not be disclosed to the DOL. But it’s exactly this kind of routine communication that will fall within the ambit of the new persuader rule. This means that employers will have to file a report describing *all* of the activities of a law firm it engages in connection with a union organizing campaign, including:

- Drafting, revising or providing written or multimedia materials for presentation, dissemination or distribution to employees.
- Drafting, revising or providing a speech for presentation to employees.
- Drafting, revising or providing website content for employees.
- Planning or conducting individual or group employee meetings.
- Developing or administering employee surveys concerning union awareness, sympathy or interest.
- Training supervisors or employer representatives to conduct individual or group employee meetings.
- Coordinating or directing the activities of supervisors or employer representatives.
- Establishing or facilitating employee committees.
- Developing HR policies or practices.
- Deciding which employees to target for persuader activity or disciplinary action.
- Conducting a seminar for supervisors or employer representatives.
- Other oversight activities.

That is, pretty much everything.

The new rule was originally proposed in 2011, and there was so much public pushback that discussion of the rule fell silent for a few years. Since the DOL's new Secretary of Labor, Thomas Perez, was confirmed in July 2013, the DOL has revived the effort as part of its 2013 Regulatory Agenda. Employers can expect to be living under the new rule by March 2013.

What does this mean for employers and law firms? Part of the trouble with the new rule is that its disclosure requirements extend to *all* communications between the law firm and the employer. In fact, that was a major reason for the pushback, including from the American Bar Association and the Association of Corporate Counsel: the rule is overbroad in requiring the disclosure of communications that are almost certainly privileged. But fundamentally, employers and the law firms representing them during union organizing campaigns have a choice to make: either keep the law firm at a real distance and limit it to providing purely legal advice; or be prepared to disclose the relationship with the law firm, and the exact activities performed by the firm on the employer's behalf, to the DOL.