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EMPLOYER LAW BLOG

Employers: Watch Out For The New Persuader Rules

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On March 23, 2016, the Department of Labor issues its new “persuader” rule which has been the matter of much controversy since 2011. The persuader rule is designed to implement Section 203(b) of the Labor Management Reporting and Disclosure Act of 1959. A prior rule existed, but the Obama Department of Labor thought that it did not go far enough (translation: did not favor organized labor sufficiently - writer’s opinion).

The new rule which takes effect for any consulting agreement made after July 1, 2016, requires employers and consultants employers hire to file reports for direct and indirect persuader activity. The new persuader rule requires employers and their hired consultants to report when the consultants directly persuade workers or when the consultants plan, direct, or coordinate managers to persuade workers; provide persuader materials to employers to disseminate to workers; conduct union avoidance seminars; and, develop or implement personnel policies or actions to persuade workers.

The rule further provides that employers and consultants will have to report to the Office of Labor Management Standards when they engage in planning or conducting employee meetings; train supervisors or employer representatives to conduct meetings; coordinate or direct the activities of supervisors or employer representatives; establish or facilitate employee committees; draft, revise, or provide speeches; develop personnel policies designed to persuade employees; and, identifying employees for disciplinary action, reward, or other targeting.

One of the controversial aspects of the rules is whether they will interfere with the attorney-client relationship and/or attorney-client privilege. The American Bar Association has said the rule could threaten the relationship between employers and their attorneys and/or cause lawyers to run afoul of ethical obligations. The Department of Labor contends that the rules do not affect the attorney-client relationship or privilege. The Department of Labor argues that the rule as written exempts agreements by which the consultant agrees to merely provide advice which is defined as recommendations regarding a decision or course of conduct. The rule also exempts agreements that involve only the provision of legal services. Whether the rule will interfere with the attorney-client relationship and attorney-client privilege remains to be seen. As indicated, the ABA is doubtful as are many management attorneys and their professional associations.

Forms are required to be submitted to the OLMS.

Employers who are facing organizational campaigns or who otherwise wish to keep their work places free of union representation must seek legal advice to appropriately comply with the new persuader rule. Legal challenges are likely; however, the rule will be in effect July 1. Employers needing assistance to comply with the new rules should consult qualified legal counsel in advance of the July 1 deadline.