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Should the New Persuader Rule Silence You?

In the weeks since the U.S. Department of Labor issued the final version of its "persuader rule" – the revision of the longstanding proposed rule designed to chill employers' use of labor relations consultants and labor attorneys– the new rule looms as a potential threat for organizations facing union organizing campaigns.

It shouldn't.

Yes, the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) was designed in part as a vehicle to "expose" the use of external experts by organizations hoping to preserve a direct working relationship between employees and their managers. It requires employers to report to the Department of Labor any work with attorneys or other outside experts on union-related issues involving activities to "persuade" employees regarding their views toward unions. These reports are available to the public on the Department of Labor website. The new rule places additional costs and burdens on employers that are not imposed upon the unions targeting those employers.

By design, the central implication of the new rule is that an employer's efforts to educate employees about unionization are somehow inappropriate if not downright unethical. That, of course, is the union spin. Employers need to be ready to tell a different story.

First, some background:

- The Department of Labor published the final version of the rule on March 23, 2016 which went into effect on April 22.
- The rule requires reporting of any outside work or advice in which the "actions, conduct or communications by a consultant or attorney on behalf of an employer that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively."
- The new rule interprets the LMRDA, by adopting a far broader definition of the kinds of labor relations activities that employers must report to the government.
- The rule applies to union education campaigns when outside help is used to review or develop communications with employees in the bargaining unit with an objective to persuade employees regarding unionization issues. It applies to union organizing campaigns and collective bargaining with existing unions.
- Reporting is required for all "arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016."
- As of late April, three major legal challenges have been filed by business and industry groups.
- In addition, Republicans on Capitol Hill are mounting a legislative challenge that kicked off April 27 with a hearing by a House Education and Workforce subcommittee. GOP lawmakers have introduced a joint

resolution[1] to block the persuader rule under the Congressional Review Act.

There is little doubt of the administration's political agenda in changing a rule that had been in place for a considerable period of time. In a news conference unveiling the revised rule, U.S. Labor Secretary Thomas E. Perez said it would "pull back the curtain on the activities of consultants who craft the message" during a campaign so that workers "know whether the messages they're hearing are coming directly from their employer or from a paid, third-party consultant."[2] The clear implication is that if an employer seeks outside help, then the message generated with such outside assistance is not authentic or is otherwise suspicious.

In its written interpretation of the rule, the Department of Labor said:

"In the context of an employer's reliance on a third party to assist it on a matter of central importance, it is possible that an employee may weigh differently any messages characterizing the union as a third party. In these instances, it is important for employees to know that if the employer claims that employees are family -- a relationship will be impaired, if not destroyed, by the intrusion of a third party into family matters – it has brought a third party, the consultant, into the fold to achieve its goals.

Similarly, with knowledge that its employer has hired a consultant, at substantial expense, to persuade them to oppose union representation or the union's position on an economic issue, employees may weigh differently a claim that the employer has no money to deal with a union at the bargaining table."

Critics of the new rule deride its one-sided focus, noting that unions routinely spend significant sums on outside counsel and services to help them "persuade" employees during organizing campaigns that they will not be required to report the way employers targeted in those campaigns will. The new rule now imposes that requirement on businesses but not unions.

In one news article on the new rule, a union leader was quoted as saying that employees would be "shocked and often outraged" by what employers are willing to spend on union-avoidance.[3] But in his comment, Bill Cruice, Executive Director of the Pennsylvania Association of Staff Nurses and Allied Professionals did not mention that the union's members are not provided any similar transparency about where their dues go.

It is true that the LMRDA requires unions to file annual LM-2 forms that include their spending. Such reports, however, only require reporting in broad categories like "Representational Activities", "Political Activities and Lobbying" and "General Overhead." Such reports do not, however, have to provide specifics on how the money was used. In addition, current Department of Labor requirements do not distinguish between expenses for organizing new members (which can be significant) and expenses related to representing current union members, instead lumping both of these under "Representational Activities."

For example, among the $316 million the Service Employee International Union reported spending in 2014, $1.3 million went to a single New York consulting firm for "organizing research," $478,000 for Facebook ads recorded as "support for organizing" and more than $10 million dollars to various law firms for "legal

[1] H.J. Res. 87, Rep. Bradley Byrne
[2]https://www.dol.gov/newsroom/releases/olms/olms20160323

[3]*Philadelphia Inquirer, March 24, 2016*

support for organizing." The union was not required to report any further details.

Are there now risks to employers in hiring outside labor relations consultants and attorneys?

In addition to the additional costs and compliance burdens the new rule will provide opportunities for the media and/or other public scrutiny of employer spending on labor consultants and attorneys. Such broad reporting requirements can admittedly be uncomfortable. For example, media coverage of executive compensation, company financial information and the results of government audits or inspections is often very negative with a bias supporting a union perspective

That "risk" must of course be weighed against the benefits of those services and with recognition that a union – if elected to represent employees – would have access to a great deal of an organization's financial and operational information through information requests permitted in collective bargaining.

In our view, there is clear value in the services labor relations experts provide, particularly in arenas governed by the National Labor Relations Act or Railway Labor Act that require expertise and experience many organizations don't maintain in-house. This is particularly true in the era of "quickie" union organizing campaigns that followed new National Labor Relations Board (NLRB) rules designed to fast track NLRB elections from union petition filing to election.

Many labor relations firms and consultants have direct experience in hundreds of campaigns and bring to the table not only guidance regarding compliance with federal labor law, but also extensive knowledge of how to provide manager training in employee rights, labor communications and the common methods and tactics unions employ during organizing campaigns. This kind of training not only helps organizations avoid unfair labor practice charges, but also helps managers acquire confidence in discussing issues related to unions with employees and overall better equip managers with skills to manage their workforce.

Without outside expertise, employers may be at an even greater disadvantage against unions that have built entire operations with professional organizers, technologies and campaign materials designed to influence employees to seek union representation.

Ultimately, employers who decide to use outside support to manage an organizing campaign must include in their campaign planning communications to explain and address the expenses reported under the persuader rule.

How to talk to employees about hiring labor relations support.

Like anyone trying to sell a product or service, union representatives trying to organize a new workplace advertise only the potential benefits of joining a union. Soft drink manufacturers don't tell consumers that their product is bad for their teeth. Real estate agents don't focus on the property taxes or maintenance costs of the homes they list. And unions don't tell prospective members that they will have little influence on how much they'll pay in dues, whether they'll have to walk a picket line, how difficult the process is to eject the union once it is elected, or how much of their dues money goes to support the union's overhead, political initiatives and organizing efforts at other companies or industries.

Who should tell that story? The employer, through basic, factual information that also educates employees on their rights under the National Labor Relations Act and how unionization works.

The objective is to use the same common-sense employee education approach we advise employers to use in asking employees to attend meetings or read a website or flyers about the union campaign. Whether the goal is to start a conversation or respond to questions, employers can:

- Explain that the company is investing in employee education so that employees can make an informed decision about whether to sign a union authorization card or voting in a representation election.
- Acknowledge the need for special expertise in the same way the organization relies on attorneys, accountants, designers, marketing firms, engineering/construction firms or any other contractor or vendor companies routinely use.
- Position leaders and supervisors as a trusted resource for information in an environment in which the union is spending a great deal of money to "sell" union membership without sharing all of the relevant information about joining a union that may be important to employees.

Leaders of companies and organizations that have strong cultures and a clear philosophy about the benefits of a direct working relationship in the workplace should also be comfortable in challenging the Department of Labor's premise that there is something furtive or manipulative about working with labor consultants to help communicate with employees.

Just as most employers work with HR consultants to help communicate the details of a health or retirement plan, it is similarly appropriate to work with labor experts to help leaders communicate their position and important considerations related to unionization.

What activities must employers now report to the Government under the revised rule?

The new rule expands the definition of "persuader" activity from a consultant or educators ***direct*** *contact with employees, to a wide variety of* ***indirect*** *educational efforts, including:*

- **Educating supervisors and managers**. This includes offering workshops or seminars designed to help leaders communicate with employees during a union campaign
- **Planning or coordinating the activities of supervisors and managers**. Reportable activities include management training and coaching, interviewing managers to assess employee support in their departments, assisting with employee communications related to the union, preparing a campaign plan or calendar and taking part in meetings related to labor issues.
- **Reviewing, drafting or implementing HR policies focused on union education.** In this case reporting is only required when those policies are designed to influence employee positions about unionization.
- **Creating or providing input on communications designed to influence employees**. While employers can buy generic union education materials, any service or advice they receive in customizing labor materials for their workplace must be reported if the intent is to persuade employees regarding unions (including during collective bargaining with existing unions).

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