

## Employers Face New Reporting Requirements after DOL Issues Final Persuader Rule

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March 24, 2016

On March 23, 2016, the Department of Labor (“DOL”) finalized its long anticipated “persuader” rule, which requires that employers and legal consultants report pay arrangements regarding any attempts to persuade employees, *either directly or indirectly*, about their right to union representation or to bargain collectively.

The new regulations, which the DOL first proposed in 2011, significantly narrow the DOL’s interpretation of Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), which has been in force since 1962. Section 203 requires employers to file reports with the DOL when they hire consultants or attorneys to persuade employees concerning their rights regarding union representation. However, Section 203(c) has long contained an exception to the reporting requirement for “advice” given to an employer.

For more than 50 years, the DOL has interpreted the advice exception to include an attorney’s drafting of letters, speeches or other communications to employees or an attorney’s legal reviews of employer communications. Thus, under the advice exception, as long as the employer had the choice to either accept or reject oral or written material submitted by an attorney, the activities were not reportable under the LMRDA. On the other hand, under this interpretation, if an attorney (or other consultant) met directly with employees to persuade them with respect to their views on unions, such activity would be reportable.

Under the final “persuader” rule issued on March 23, 2016, the “advice exception” is now limited to advising employers on what they may lawfully say to employees, on their compliance with the law, or on general guidance about NLRB practice or precedent. Any actions, conduct, or communications on behalf of an employer that could directly or indirectly persuade workers concerning their right to organize and bargain collectively, regardless of whether the attorney/consultant has direct contact with workers and regardless of whether the employer accepts or rejects the proposed communications, are now reportable. In addition, under this new interpretation, employers will have to report if they hire an attorney or other legal consultant to prepare meeting outlines or scripts, letters, videos, or other communications that the employer intends to use to persuade employees regarding their rights to form or join a union or collectively bargain or to revise those materials prepared by the employer for the same purpose.

The new regulations also contain significant changes to the LM-10 and LM-20 forms upon which the DOL requires employers, attorneys and consultants to disclose such reportable activity. These revised forms provide examples of activities that would be reportable “if the object thereof was, directly or indirectly, to persuade employees,” such as:

- Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing a speech for presentation to employees
- Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing website content for employees
- Training supervisors or employer representatives to conduct individual or group employee meetings

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- Coordinating or directing the activities of supervisors or employer representatives
- Developing personnel policies or practices
- Conducting a seminar for supervisors or employer representatives

Penalties for failure to report such activities include potential criminal liability on the part of employers (and others engaged in persuader activity) who willfully fail to report such activities.

Prior to issuing its final rule, the DOL received nearly 9,000 comments about its proposed changes to the advice exception, including overwhelmingly negative comments from the American Bar Association, the U.S. Chamber of Commerce, and numerous other business groups who expressed concerns that such a narrow definition of the advice exception could substantially interfere with an employer's attorney-client relationship, disrupt an employer's ability to obtain legal advice when confronted by union activity, and have a chilling effect on employer free speech during such campaigns.

The final rule will apply to contracts beginning on July 1, 2016. It is anticipated that pro-business organizations will file a legal challenge to the rule, and Republicans in the United States House of Representatives have indicated that they will attempt to prevent the implementation of the rule through legislative means as well. As always, we will apprise you of any new developments.

If you have questions about this rule, please contact your Miller Canfield attorney.