

PUBLICATION

Wake Up – The Persuader Agreements Rule is On the Way

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The somewhat forgotten "persuader agreements" rule is now suddenly expected to be promulgated by the Department of Labor (DOL) as soon as March 2016. This proposed regulation (originally disclosed in June 2011), interpreting the term "advice" under the Labor-Management Reporting and Disclosure Act of 1959, will have a major impact in promoting union organizing by undermining the attorney-client relationship when companies seek legal advice concerning union activity. The rule accomplishes this goal by mandating that employers and their attorneys (including other consultants) electronically file with the DOL within 30 days of any persuader agreements revised Forms LM-10 and LM-20. These forms require disclosure of minute details of any such agreements between employers and their counsel. Of additional significance to employers and their counsel is the impact of these reporting requirements on the attorney-client privilege.

Exempted from the reporting requirements is strict "advice," ambiguously defined as an "oral or written recommendation regarding a decision or course of conduct." "Persuader activity," on the other hand, refers to a consultant providing material to or engaging in any conduct or communications on behalf of an employer that has the object, directly or indirectly, of persuading employees concerning their rights to organize or bargain collectively. Reporting is required where an agreement with an employer, in whole or in part, calls for the consultant to engage in persuader activities, regardless of whether advice is also given. There are possible criminal and civil penalties for failure to report or making a wrongful report. Activities pertaining to union counseling by an employer's attorney that require reporting include:

- conducting a seminar for supervisors on union avoidance;
- developing personnel policies;
- coordinating or directing the activities of supervisors or employee representatives;
- training supervisors to conduct employee meetings;
- developing employee attitude surveys concerning union awareness, sympathy or proneness; and
- drafting, revising, or providing written materials or a speech for presentation or distribution to employees.

This is only a partial listing of activities that would require reporting. Indeed, the line between pure legal advice to an employer (which does not require reporting) and persuader activities (even if legal advice is included), which requires reporting, is blurred.

Once filed, the reports are available to unions and employees alike. The reporting of this information is designed to "enable workers to become more 'informed' as they decide" whether to join a union. No doubt unions will exploit the information contained in these reports to their advantage. Time will tell if the courts uphold this controversial regulation.