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DOL Proposed Changes to Advice Exemption and Persuader Report Rules – Comment Period Ending Soon

By Jeffrey Kauffman

All companies and others interested are encouraged to submit any comments by **September 21, 2011**, on the Department of Labor, Office of Labor-Management Standards' proposed changes to the interpretations and guidelines ("rules") concerning the "advice exemption" and reportable "persuader activity." Read Littler's blog post on the proposed rule changes [here](#). More information and template comments from the U.S. Chamber of Commerce are below.

Background

On June 21, 2011, the U.S. Department of Labor's Office of Labor-Management Standards (DOL) published details about its proposed changes for employer and consultant reporting under the Labor Management Reporting and Disclosure Act (LMRDA) of "persuader activity." The DOL proposes to broaden the scope of reportable activities by substantially narrowing its interpretation of the "advice exemption" in Section 203(c) of the LMRDA.

DOL also proposes to broaden the scope of reportable persuader activity – and its own regulatory reach – by expanding what "persuasion" means in the first place. Historically, DOL has limited its focus on employer arrangements with outsider consultants to persuade employees about the "right to organize and bargain collectively," which is how Congress defined reportable persuader activity in the LMRDA. The main focus since the LMRDA was enacted has been about persuasive communications used with employees in connection with active union organizing or bargaining situations leading up to elections or votes.

The DOL now proposes to go beyond the organizing and bargaining context. The proposed changes would redefine "persuasion" to also cover activities that influence the decisions of employees with respect to any protected concerted activity in the workplace. This is exactly what DOL proposes for the new Form LM-10, Employer Report, as one of the instructions. The new LM-10 includes examples and provides that persuader reporting would extend to "developing employer personnel policies or practices designed to persuade employees."

With the proposed expansion of persuasion, the narrowing of the "advice exemption" is especially significant. DOL would treat "legal advice" exactly the same as any other "advice," and make any *persuasion* trump any *advice* (including legal advice) when both are part of the same arrangement. If any "arrangement provides for any reportable activity, the exemptions do not apply."

The DOL changes proposed, coupled with those proposed by the NLRB for quick elections, will substantially limit the ability of an employer to exercise its free speech rights in the shorter time available to respond to an actual union organizing effort. The DOL proposed changes to extend persuader reporting to historically exempt employer arrangements in developing lawful personnel policies in the absence of organizing activity will dramatically burden employers even if no union organizing takes place. These changes would significantly interfere with an employer's normally unfettered and protected right of access to legal counsel, both internal and external, for important legal advice and guidance once thought to be outside the scope of LMRDA reporting and disclosure.

What Concerned Companies Can Do

Employers are encouraged to submit comments in response to the DOL proposed rule changes. The U.S. Chamber of Commerce has prepared a Fact Sheet and template comments that are available here. In addition, Littler attorneys can assist in filing comments. Please contact your Littler attorney or Jeffrey Kauffman.

The deadline to submit comments on the proposed rulemaking has been extended to **September 21, 2011**. Comments may be filed electronically through the federal eRulemaking portal or by mail. Written comments must include the regulatory identification number (RIN): 1245-AA03 and may be sent to: Andrew R. Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210.

Register for the Webinar

Littler's Labor Management Relations Practice Group believes it is critical that employers understand the proposed rule changes: both the DOL persuader rule and the NLRB's proposed rule changes for representation elections. Please join our webinar on both of these proposed rule changes and what your company should be doing to prepare.

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