

Closing the Loophole:

How the Department of Labor's Persuader Rule Effectively Eviscerates the Advice Exemption of the Labor-Management Reporting and Disclosure Act

On March 24, 2016, the Department of Labor's ("DOL") Office of Labor-Management Services published a final rule concerning its updated interpretation of the "advice" exemption

of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, et seq. This revised interpretation, known as the "Persuader Rule," significantly expands the types of persuader-related activities and communications that an employer and

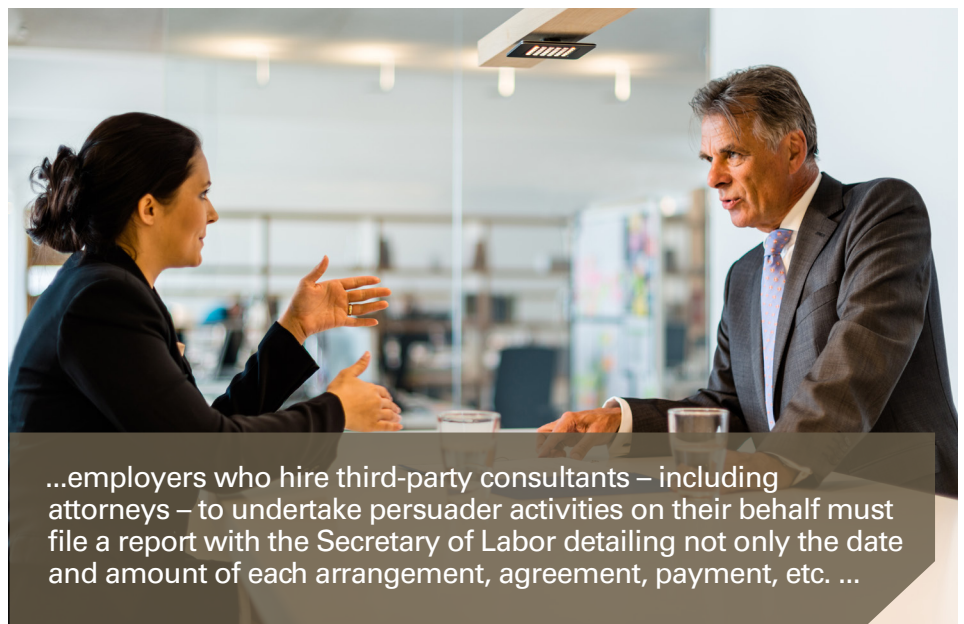
its advisors, including its attorneys, must disclose pursuant to the LMRDA. This article provides a brief background of the LMRDA as well as the DOL's prior interpretation of the "advice" exemption, a discussion of the changes set forth in the Persuader Rule, and an update regarding its current status.



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A. What is the LMRDA?

Following a public outcry against corruption in the labor movement, Congress enacted the LMRDA, also known as the Landrum-Griffin Act, in 1959. The LMRDA provides certain rights to union members and establishes democratic procedures within labor organizations to protect those rights. Included among the LMRDA's provisions are reporting requirements for labor organizations, consultants, and employers regarding persuader activities (i.e., activities "with an object, explicitly or implicitly, directly or indirectly, to affect an

employee's decision regarding his or her representation or collective bargaining rights") and expenditures related thereto.

Section 203 of the statute, 29 U.S.C. § 433, sets forth the reporting requirements for employers and their consultants. Section 203(a) mandates that employers who hire third-party consultants – including attorneys – to undertake persuader activities on their behalf must file a report with the Secretary of Labor detailing not only the date and amount of each arrangement, agreement, payment, etc. and "the name, address, and position, if any, in any firm or labor organization of

the person to whom it was made,” but also **“a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.”**¹ This report is known as a Form LM-10 and is due ninety days after the end of the employer’s fiscal year.²

Section 203(b) contains similar requirements for consultants (and attorneys) who undertake persuader activities on behalf of an employer. Specifically, Section 203(b) requires that these consultants file a report with the Secretary of Labor containing the details of the terms and conditions of their arrangement with the employer.³ This report is known as a Form LM-20 and is due thirty days after entering into the agreement or arrangement.⁴ Section 203(b) further provides that consultants must file an additional report, known as Form LM-21, which contains a statement of both “its receipts of any kind from employers on account of labor relations advice or services,” as well as “its disbursements of any kind, in connection with such services and the purposes thereof.”⁵ Form LM-21 reports are due ninety days after the consultant’s fiscal year.⁶

Despite these broad provisions, the LMRDA expressly limits the scope of the requirements in two ways. First, Section 203(c) contains an “advice” exemption that excludes from the reporting requirements arrangements or agreements pursuant to which a consultant provides only advice to the employer.⁷ Second, Section 204 provides for an exemption of attorney-client communications. Specifically, the statute provides that the LMRDA does not “require an attorney...to include in any report required to be filed pursuant to the provisions of [the LMRDA]

any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.”⁸ It is the “advice” exemption that the Persuader Rule significantly alters.

B. How Did the DOL Previously Interpret the Advice Exemption?

Although Section 203 of the LMRDA references both direct and indirect persuader activities, the DOL’s prior guidance defined “advice” to include indirect persuader activities, thereby mandating disclosure only when employers hired consultants to engage in direct persuader activities, that is, activities involving direct contact with employees. Thus, pursuant to this interpretation, employers could engage consultants, including attorneys, for purposes of responding to a unionization campaign without having to report such arrangements as long as the consultants did not have any direct contact with the employees and the employers maintained the ability to accept or reject the consultants’ recommendations.

C. How Does the Persuader Rule Differ from the DOL’s Prior Interpretation?

According to the DOL, its prior guidance “created a huge loophole,” which employers have unfairly taken advantage of to the detriment of employees who “weren’t getting important information about who was behind the messages that they were receiving.”⁹ In an attempt to close the loophole, the DOL published the Persuader Rule, which stands in stark contrast to the DOL’s prior regulations. In the new Rule, the DOL redefines “advice” as “recommendations regarding a decision or course of conduct” and specifically excludes persuader activities. “If the consultant engages in both advice and persuader activities, however, the

entire agreement or arrangement must be reported.”¹⁰ Thus, pursuant to the new Rule, “advice” and “persuader activities” are mutually exclusive categories.

Consistent with the DOL’s revision of the definition of “advice,” the Persuader Rule further provides that employers and consultants must now file reports when the consultants engage in direct persuader activities **or** indirect persuader activities that fall within one of the following four categories:

1. Plan, direct, or coordinate managers to persuade workers;
2. Provide persuader materials to employers to disseminate to workers;
3. Conduct union avoidance seminars; and,
4. Develop or implement personnel policies or actions to persuade workers.

Examples of reportable activities include: “planning or conducting employee meetings; training supervisors or employer representatives to conduct meetings; coordinating or directing the activities of supervisors or employer representatives; establishing or facilitating employee committees; drafting, revising or providing speeches; developing employer personnel policies designed to persuade employees; and identifying employees for disciplinary action, reward, or other targeting.”¹²

D. What Does This Mean for Employers?

It should come as no surprise that advice relating to an employer's response to a unionization campaign is not a black or white issue. As the DOL's prior guidance recognized, a purpose of a recommendation regarding a labor relations decision or course of conduct, *i.e.*, labor relations advice, very well could be to affect an employee's unionization decision. Given the DOL's sudden departure from this long-standing and reasoned approach, various groups have criticized the Persuader Rule. Among other things, its opponents argue that the Rule's treatment of "advice" and "persuader activities" as mutually exclusive categories will effectively eviscerate the advice exemption of the LMRDA and, further, that its expansive reporting requirements will force attorneys to violate their ethical duties of attorney-client confidentiality. Consequently, plaintiffs in three separate lawsuits filed in federal district courts located in Little Rock, Arkansas,¹³ Minneapolis, Minnesota,¹⁴ and Lubbock, Texas¹⁵ have challenged the validity of the Persuader Rule and sought to enjoin the DOL from implementing it.

On June 27, 2016, the United States District Court for the Northern District of Texas in *National Federation of Independent Business, et al v. Thomas E. Perez, et al.* granted the plaintiffs' and intervenor-plaintiffs' motion for a preliminary injunction Order, finding that (1) the DOL lacked the statutory authority to promulgate and enforce the Persuader Rule because it was contrary to, and effectively eliminated, the express, unambiguous language

of the advice exemption in Section 203(c) of the LMRDA; (2) the Persuader Rule was arbitrary and capricious because, among other reasons, it conflicted with the LMRDA's attorney-client privilege exemption as well as state rules governing the practice of law; (3) the Persuader Rule violated First Amendment free speech and association rights; (4) the Persuader Rule was unconstitutionally vague; and (5) the Rule violated the Regulatory Flexibility Act, which requires that an agency proposing a rule either prepare and make available for comment an initial and final regulatory flexibility analysis or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.¹⁶

The preliminary injunction Order, which the Court entered on a nationwide basis, prohibits the DOL from implementing the Persuader Rule until the sooner of the DOL's successful appeal of the Order, or the trial court's finding for the DOL after a trial on the merits.¹⁷ The DOL filed a Notice of Interlocutory Appeal with the Fifth Circuit Court of Appeals on August 25, 2016, which, as of November 16, 2016, is still pending.¹⁸

On November 16, 2016, the Court denied the DOL's motion for summary judgment and granted the plaintiffs' and the intervenor-plaintiffs' summary judgment motions, finding that the DOL's Persuader Rule "should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2), and the Court's preliminary injunction preventing the implementation of that Rule should be converted into a permanent injunction with nationwide effect."¹⁹ Therefore, absent a reversal of the Court's decision by the Fifth Circuit Court of Appeals or the United States Supreme Court, the DOL's Persuader Rule will not become effective.

After the Court issued its preliminary injunction Order, the DOL revised its website to inform the public that the revised 2016 Forms LM-10 and LM-20 "[would] not be applicable until further notice from the Department. Instead, consultants should continue to apply the pre-2016 [Forms LM-10 and LM-20] and instructions."²⁰ Given the Court's most recent decision, the revised forms will likely continue to remain inapplicable and the Persuader Rule, without effect. Consequently, employers now have a potentially indefinite window of time to seek advice from their attorneys regarding how best to address unionization campaigns. Until the DOL successfully appeals the Court's November 16, 2016 Order, employers and their attorneys can confidently engage in indirect persuader activities, such as manager training, personnel policy development, or speech preparation, without having to worry about the new reporting under the Persuader Rule.

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¹ 29 U.S.C. § 433(a) (emphasis added).

² See <https://www.dol.gov/olms/regs/compliance/ecr.htm>.

³ See 29 U.S.C. § 433(b).

⁴ See <https://www.dol.gov/olms/regs/compliance/ecr.htm>.

⁵ See 29 U.S.C. § 433(b).

⁶ See <https://www.dol.gov/olms/regs/compliance/ecr.htm>.

⁷ See 29 U.S.C. § 433(c).

⁸ 29 U.S.C. § 434.

⁹ See https://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf.

¹⁰ Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 FR 15924-01.

¹¹ See https://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf.

¹² *Id.*

¹³ *Associated Builders and Contractors of Arkansas, et al. v. Thomas E. Perez, et al.*, Case No. 4:16cv169-KGB (E.D. Ark. Mar. 30, 2016).

¹⁴ *Labnet, Inc. d/b/a Worklaw Network, et al. v. United States Department of Labor, et al.*, Case No. 16-cv-00844 (D. Minn. Mar. 31, 2016).

¹⁵ *National Federation of Independent Business, et al v. Thomas E. Perez, et al.*, Case No. 5:16-cv-00066-C (N.D. Tex. Mar. 31, 2016).

¹⁶ *Id.*, Doc. No.85.

¹⁷ *Id.*

¹⁸ *Id.*, Doc. No. 95.

¹⁹ *Id.*, Doc. No. 135.

²⁰ <https://www.dol.gov/olms/regs/compliance/ecr.htm>.