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Deadline Fast Approaching to Report Paid Agreements Under DOL's "Persuader Rule"

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The DOL has been ordered by a federal court not to enforce the Persuader Rule on a national basis after July 1, 2016 because the court was persuaded (sorry for the pun) that the rule would cause irreparable harm to business groups.

Had the final rule not been enjoined, after July 1, 2016, in accordance with the DOL's Persuader Rule, all employers will be required to report financial agreements with consultants and attorneys retained to give advice that could be viewed as efforts to "persuade" workers on union-related matters.

As we reported when the DOL published the final rule in March 2016, the new rule imposes substantial reporting obligations on employers. The old rule required reporting if the consultant engaged in direct persuader activity, such as if the consultant directly communicates with employees about union representation. The new rule adds reporting for indirect persuader activities; for example, when providing communication materials to employer to hand out to employees. These activities typically, but not exclusively, arise in the context of a union organizing drive. The final rule provided that it applies to "arrangements and agreements as well as payments (including reimbursed expenses) made on or after" July 1.

But, in an important development, the DOL has recently interpreted its new Persuader Ruleto exclude an agreement or arrangement signed before July 1, 2016, even if the services and payments occur after July 1. In an email exchange between the U.S. Chamber of Commerce and the DOL, the DOL said: "Services and payments made pursuant to a multi-year agreement, even if they occur after July 1, are not required to be reported on the new Form LM-20, so long as the agreement was signed prior to July 1. The prior form applies." The DOL's position now is that if the employer and consultant/attorney sign the agreement by July 1, then all payments made pursuant to *that* agreement are not reportable, regardless of when the indirect persuader services are performed.

This interpretation has substantial implications for companies who do not have in-house labor counsel (who are not subject to the rule). Regardless of whether any segment of the workforce is unionized, and whether the company has ever been through a union organizing effort, the company should consider *immediately* signing an

agreement for indirect persuader services. Having such an agreement is critical to ensure the privacy of the company's communications with its attorneys or consultants in the event of future labor activity.

What's reportable

The rule requires both employers and consultants to report when consultants directly persuade workers or when the consultants fall under one of these four categories:

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

Examples of reportable "persuader" 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.

Form LM-10

Any employer who has engaged in certain financial transactions, agreements, or arrangements with any labor organization, union official, employee or labor relations consultant, or who has made expenditures for certain objects relating to activities of employees or a union, must file a Form LM-10.

An employer required to file must complete only one Form LM-10 report each fiscal year that covers all instances of reportable activity even if activity occurs at multiple locations.

Both the president and the treasurer, or corresponding officers, of the reporting employer must sign the completed Form LM-1 0, though a report from a sole proprietor need only bear one signature. Covered employers must submit a Form LM-1 0 report within 90 days after the end of the employer's fiscal year.

Form LM-20

Each person who has entered into any agreement or arrangement to undertake reportable activities must file the LM-20 report within 30 days after entering into such agreement or arrangement. Any changes to the information reported in Form LM-20 (excluding matters related to "Extent of Performance") must be filed within 30 days of the change.

The information required to be reported on Form LM-20 includes:

- The party or parties to the agreement or arrangement;
- The object and terms and conditions of the agreement or arrangement, and
- The activities performed or to be performed pursuant to the agreement or arrangement.

In light of the expansive new reporting obligations, regardless of the nationwide injunction, all employers with existing or future labor relations issues should carefully study the new rule and its detailed form

instructions, and consider entering into an engagement agreement prior to July 1.