

LET ME PERSUADE YOU: DOL ISSUES NEW RULES AFFECTING EMPLOYERS, CONSULTANTS AND LAWYERS

For over five years, the U.S. Department of Labor has been pondering the issuance of new rules governing “persuader” activities. On March 24, 2016, the new **Persuader Rule** was officially published in the Federal Register, is set to become effective on April 25, 2016 and applies to all arrangements, agreements and payments made on or after July 1, 2016. The new rule has generated a heated outcry from employer groups and attorneys. Litigation is already pending that seeks to stop the rule altogether.

REPORTING REQUIREMENTS FOR PERSUADER ACTIVITY

The Persuader Rule requires employers and their hired consultants to report when the consultants directly persuade workers or when the consultants acts in 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; or
4. Develop or implement personnel policies or actions to persuade workers.

Under the Persuader Rule, as examples, employers and consultants will have to report any of the following activities: 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.

REPORTING FORMS AND INSTRUCTIONS

Two types of forms are required. One form, **Form LM - 20** with detailed **instructions**, is for consultants that provide persuader activities. A second one, **Form LM - 10** with detailed **instructions**, is for employers. Even a quick review of the forms and the lengthy and complex instructions will reveal just how difficult reporting may be.

CIVIL AND CRIMINAL LIABILITY

The reports require detailed financial and other information relating to the specific types of persuader activities provided. Failure to file the reports can result in civil penalties and criminal charges.

“ADVICE” IS NOT COVERED - BUT WHAT IS “ADVICE”?

The Persuader Rule exempts agreements by which the consultant agrees to merely provide “advice” to the employer, defined as “recommendations regarding a decision or course of conduct.” The rule also exempts any agreement that involves only the provision of legal services.

The Persuader Rule does not prohibit employers from using consultants or limit their services. Consultants can provide employers the same services as they may currently provide, but consultants and employers must now file the appropriate reports disclosing the persuader activities.

LEGAL CHALLENGES

Challenges to the Persuader Rule were filed almost immediately in courts across the country by employer groups and groups of attorneys. The challenges are based on several arguments, including claims that the rule violates First Amendment free speech and due process, exceeds the authority of the underlying statute, invades privacy, interferes with attorney client privilege and is overbroad, vague and ambiguous.

HEADS UP FOR EMPLOYERS, CONSULTANTS AND ATTORNEYS

If the Persuader Rule does go into effect, employers, their consultants and attorneys who provide assistance in outlining communications with employees must become immediately compliant with the complex reporting requirements. This involves close calls on what constitutes advice and legal services with the consequence of civil and criminal liability if the call is wrong.

We will be following the course of the litigation. In the meantime, if you have any questions, please contact Steve Lyman at slyman@hallrender.com, Bruce Bagdady at bbagdady@hallrender.com, Sevilla Rhoads at srroads@hallrender.com or your regular Hall Render attorney.

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