

DOL Proposes to Expand Reporting Requirements for Employers, Consultants and Attorneys Regarding Union-Related Communications

Labor Department's NPRM Effectively Eliminates the "Advice" Exemption Will Force Employers to Disclose Expenditures for Developing Strategy and Communicating with Employees Regarding Union Representation and Collective Bargaining

On June 21, 2011, the Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) to significantly expand the employer reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA) regarding the amounts paid by employers to consultants or attorneys under any "agreements or arrangements" to directly or indirectly persuade employees concerning their rights to organize and bargain collectively.¹ Specifically, the proposed regulations:

- Significantly expand the types of agreements or arrangements that employers must report by substantially narrowing the consultant and attorney "advice exemption"; and
- Considerably increases the amount of information about the agreements or arrangements that must be reported.

Currently, the advice exemption excludes from reporting services where a consultant or attorney prepares an entire speech or document, an employer has the ability to decide whether or not to use the materials, *and the materials are delivered entirely by the employer.*² Under the proposed rule, the duty to report can be triggered where a consultant or attorney just prepares an entire speech or document regardless of who delivers it.³

Although the NPRM provides many examples of what would be no longer covered under the advice exemption, it provides very few, if any, examples on what activities would remain covered. Given the criminal penalties associated with the reporting requirement, uncertainty over what remains covered and what is not covered by the exemption is particularly problematic.

Some specific examples of newly reportable persuader activities in the NPRM include:

- Developing employee attitude surveys concerning union awareness;
- Training supervisors or employer representatives to conduct individual or group meetings;
- Developing employer personnel policies or practices; and
- Seminars, webinars, or conferences offered by lawyers or labor consultants to employers and their representatives where guidance is offered to attendees on labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights.

Importantly, the NPRM does NOT require employers to report compensation paid to in-house legal counsel, executives, managers and supervisors for their involvement and participation in persuader activities. The same exclusion language in the current form is retained in the proposed form, i.e.: “payments made to any regular officer, supervisor, or employee as compensation for services as a regular officer, supervisor, or employee.” However, this exemption only applies to expenditures made for services which are performed by employees in the regular and ordinary course of their employment, i.e.: where an employer prepares a message to his employees to persuade them and his labor relations director, who is a regular staff member, delivers the message, no report would be due. On the other hand, if the employer called in one of his old and trusted employees who was a drill press operator, for example, and asked him (without disclosing the assignment to other employees) to persuade his fellow employees as to their right to organize, then a report would be due from the employer.⁴

As discussed below, the proposed changes substantially reinterpret the reporting requirements for employers, attorneys and consultants, and significantly amend the forms and instructions for reporting. Perhaps most importantly, the NPRM increases the scope of conduct that could trigger potential criminal liability on the part of employers and others engaged in persuader activities who fail to comply. The public comment period is open until September 21, 2011. After comments are received, DOL will publish a final rule in the Federal Register.

Current Law Requires Reporting of Consultant Agreements Under Section 203(c) of the Labor-Management Reporting and Disclosure Act, every employer who in any fiscal year has made any agreement or arrangement with, or any payment, loan, or promise to, “a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer . . .” is required to file an annual report, Form LM-10, with the Department of Labor. (29 U.S.C. 433(a)(4) and 29 C.F.R. 405.2 and 405.3)

There are only three exemptions to the current LM-10 reporting requirement:

1. If the *only* expenditures are made to any regular officer, supervisor, or employee as compensation for service as a regular officer, supervisor, or employee, then no report is required (29 U.S.C. 433(e)); or
2. If the agreements, arrangements, or services are exclusively for representing or agreeing to represent an employer before any court, administrative agency, or tribunal of arbitration; or engaging or agreeing to engage in collective bargaining on behalf an employer with respect to wages, hours, or other terms or conditions of employment (29 U.S.C. 433(b)(2) and (c)); or
3. If the agreements, arrangements, or services exclusively provide advice to an employer (29 U.S.C. 433(c)).⁵

The current LM-10 report requires employers to disclose the full name and address of all consultants and lawyers; whether the agreement with the consultant or lawyer was oral, written, or both; the dates and amounts of all payments; the conditions and terms of all agreements; and “a detailed account of services rendered” and “full explanation identifying the purpose and circumstances of the payments...”

Consultants have a similar/mirrored reporting requirement (LM-20 and LM-21) of the agreements they make, and the payments they receive from employers.

The LMRDA provides for both civil and criminal penalties for failing to file a LM-10 report or knowingly providing false information on the report, and the reports must be signed by the employer’s president, treasurer, or other corresponding principal officer. The signatory is personally responsible for the form’s filing and accuracy. If the employer fails to file a report, keep the necessary records, willfully provides false information, or knowingly fails to disclose a material fact, the relevant officers are subject to a maximum fine of \$10,000 and imprisonment of not more than 1 year.

Currently, the Department receives an average 930 LM-10 reports from employers per year and 191 LM-20 reports from labor consultants. Under the proposed rule, DOL estimates an additional 2,484 employers will have to file a LM-10 report.

The Current “Advice” Exemption As noted above, 29 U.S.C. 433(c) provides what is commonly called the “advice exemption” that excludes from reporting requirements services where the consultant is “giving or agreeing to give advice” to the employer. Since 1962,⁶ the Department of Labor has identified two areas that fall within the advice exemption: 1) where an employer drafts communications materials to be used with its employees and receives oral or written advice from a lawyer on the legality of the materials; and 2) where a consultant or lawyer prepares an entire speech or document, an employer has the ability to decide whether or not to use the materials, and the materials are delivered entirely by the employer.⁷ Under the current interpretation, the exemption does *not* apply if the lawyer or consultant also delivers the communications to the employees.

Proposed Changes To the “Advice” Exemption The Department is proposing to go back to its initial 1960 interpretation, which held that “reporting is required in *any* situation where it is impossible to separate advice from activity that goes beyond advice.”⁸ Reporting will be required in any case in which an agreement or arrangement, in whole or part, results in a consultant engaging in persuader activities, regardless of whether or not they also provide advice.⁹ Effectively, the advice exemption will not apply even if activities constituting advice are also performed or intertwined with the persuader activities.

Under the NPRM, the advice exemption will no longer apply when:

- A person prepares or provides a persuasive script, letter, videotape, or other material or communication, including electronic and digital media, for use by an employer in communicating with employees;¹⁰ or

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- A consultant revises an employer's material or communications to enhance the persuasive message, *unless the revisions exclusively involve advice and counsel regarding the exercise of the employer's legal rights*. Material or communications, or revisions thereto, are persuasive if they explicitly *or implicitly* encourage employees to vote for or against union representation, to take a certain position with respect to collective bargaining proposals, or refrain from concerted activity (such as a strike) in the workplace.¹¹

Under the NPRM the duty to report can be triggered even without direct contact between a lawyer or other consultant and employees; a consultant or attorney simply has to prepare an entire speech or document regardless of who delivers it.

Specific examples of persuader activities under the proposed advice exemption that either alone or in combination would trigger the reporting requirements include but are not limited to:¹²

- Drafting, revising, or providing a persuader speech, written material, website content, an audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly;
- Planning or conducting individual or group meetings designed to persuade employees;
- Developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness;
- Training supervisors or employer representatives to conduct individual or group meetings designed to persuade employees;
- Coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees;
- Establishing or facilitating employee committees;
- Developing employer personnel policies or practices designed to persuade employees;
- Deciding which employees to target for persuader activity or disciplinary action; and
- Coordinating the timing and sequencing of persuader tactics and strategies.

Reportable agreements or arrangements include those in which a consultant plans or orchestrates a campaign or program to avoid or counter a union organizing or collective bargaining effort, such as through the specific persuader activities illustrated above, or otherwise engages on behalf of the employer, in whole or part, in any other actions, conduct, or communications designed to persuade employees.¹³

Under the NPRM, persuader activities *may* additionally include:¹⁴

- Training or directing supervisors and other management representatives to engage in persuader activity;
- Establishing antiunion committees composed of employees;
- Planning employee meetings;

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- Deciding which employees to target for persuader activity or discipline;
- Creating employer policies and practices designed to prevent organizing; and
- Determining the timing and sequencing of persuader tactics and strategies.

Persuader activities *may* also include:¹⁵

- Seminars, webinars, or conferences offered by lawyers or labor consultants to employers and their representatives *if* during such events, guidance is offered to attendees on labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights.
 - For example, if persuader materials, which are intended for presentation, dissemination, or distribution to employees, are provided to employers at such events, then reporting is triggered. Additionally, if, at such events, consultants train supervisors to conduct individual or group employee meetings, then reporting is also triggered.
 - The Department generally views so-called “union-avoidance” seminars and conferences offered by lawyers or labor consultants to employers to involve reportable persuader activity.
 - The Department also cautions that employers and consultants cannot avoid the reporting requirements by inappropriately labeling an otherwise reportable persuader agreement or arrangement involving a seminar or conference as “advice.”

Proposed Exempt Agreements or Arrangements Under the NPRM, no report will be required concerning an agreement or arrangement to *exclusively* provide legal advice to an employer, such as when a consultant exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client’s compliance with the law, or provides guidance on NLRB practice or precedent.

Effectively, DOL is proposing to adopt the position that “reporting is required in any situation where it is impossible to separate advice from activity that goes beyond advice.” Thus, if a consultant engages in activities constituting persuader services, then the exemption would not apply even if activities constituting “advice” were also performed. Moreover, DOL’s position has consistently been, and remains, that in those cases in which an agreement or arrangement involves multiple activities, any one persuader activity covered by the agreement will trigger the duty to report *all* activities covered by the agreement or arrangement, subject to the Section 204 attorney client exemption and privilege discussed below.

Although generally no report is required for an agreement or arrangement where a lawyer or consultant conducts a group seminar or conference for employers *solely to provide guidance*, if a consultant engages in persuader activities at such meetings the reporting requirement is triggered. Furthermore, DOL cautions that employers and consultants in the NPRM that they cannot avoid the reporting requirements by labeling a reportable persuader agreement as a “seminar” or “conference.”

Attorney Client Exemption and Privilege Although Section 204 of the LMRDA exempts attorneys from reporting any information protected by the attorney-client privilege,¹⁶ attorneys who engage in persuader activity must file the Form LM-20, which may require disclosing the client's identity, the scope and nature of the agreement, and the fees involved. For example, if a lawyer drafts a speech for a company's top manager to give to workers in a captive audience setting, neither the lawyers' work to ensure its legal sufficiency or implications nor a characterization of the work product as legal advice would alter the reportability of the speech as persuader activity. However, to the extent that an attorney's LM-20 (consultant) report could disclose privileged communications, for instance where an attorney provides an employer with *both* legal advice and engages in persuader activities, the privileged matters are protected from disclosure.

Changes To the Forms Increases Amount of Information Reported The Department is also proposing four significant revisions to the Forms LM-10 (employer) and LM-20 (consultants). Specifically:

- A new detailed checklist that filers must complete to disclose the scope of activities that consultants have engaged, or intend to engage in (see below);
- The requirement to report both the employer and consultant Employer Identification Number and explanations for terms "agreement or arrangement;"
- Mandating electronic filing; and
- A revamped layout of the forms that divides the report into four parts, each presenting aspects of the reportable transactions, agreements, and arrangements.

Part of the confusion over whether or not the NPRM requires employers to report payments made to any regular officer, supervisor, or employee as compensation for services as a regular officer, supervisor, or employee stems from the substantial reformatting of the proposed Form LM-10. The current form does not have an explicit and separate section for reporting persuader payments to employees, whereas the proposed form does. As noted above, both the current rule the NPRM do NOT require employers to report compensation paid for services which are performed by officers, supervisors, or employees in the regular and ordinary course of their employment. However, both the current rule and NPRM require the reporting of payments, including compensation, made to employees outside of their regular and ordinary course of employment for the purpose of persuading other employees unless those payments are contemporaneously or previously disclosed to other employees.¹⁷

Both the proposed Forms LM-10 (employer) and LM-20 (consultants) have a new persuader agreement and arrangement section that includes a new check list of persuader activities that intended to describe and categorize the agreement. Employers are required to select one or more of the following activities that were performed, or are to be performed, under their specific agreements or arrangements:

- Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees;
- Drafting, revising, or providing a speech for presentation to employees;
- Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees;
- Drafting, revising, or providing website content for employees;
- Planning or conducting individual or group employee meetings;
- Developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness;
- Training supervisors or employer representatives to conduct individual or group employee meetings;
- Coordinating or directing the activities of supervisors or employer representatives;
- Establishing or facilitating employee committees;
- Developing personnel policies or practices;
- Deciding which employees to target for persuader activity or disciplinary action;
- Conducting a seminar for supervisors or employer representatives; and
- Other.

Employers are also required to select one or more of the following activities that were performed, or are to be performed, whereby the labor relations consultant provides information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer that were obtained from:

- Research or investigation concerning employees or labor organizations;
- Supervisors or employer representatives;
- Employees, employee representatives, or union meetings;
- Surveillance of employees or union representatives (video, audio, Internet, or in person); and
- Other.

Conclusion Although the implications of the NPRM for labor relation consultants and attorneys are significant, the proposed narrowing of the advice exemption may have less of an impact on most employers aside from the reporting burden and a potential public relations issue. The proposed changes substantially reinterpret the reporting requirements for employers, attorneys, and consultants, and significantly amend the forms and instructions for reporting. Perhaps most importantly, the NPRM increases the scope of conduct that could trigger potential criminal liability on the part of employers (and others engaged in persuader activity) who fail to comply. The public comment period is open until September 21, 2011. After comments are received, DOL will publish a final rule in the Federal Register.

¹ 76 Fed. Reg. 36178. The Department has also announced its intention to revise the consultant Form LM-21, Receipts and Disbursements Report to increase the amount of detail that is required to be reported in that report. A notice of proposed rulemaking on the Form LM-21 is expected in November 2011.

² Currently, the preparation of an entire document “can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer.” In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the consultant is operating under a deceptive arrangement with the employer, and the materials are delivered entirely by the employer, the fact that the consultant drafts the material in its entirety will not in itself generally be sufficient to require a report. See February 19, 1962 memorandum from then Solicitor of Labor Charles Donahue to John L. Holcombe, then Commissioner of the Bureau of Labor-Management Reports, in response to a November 17, 1961 memorandum from Commissioner Holcombe that sought guidance on the advice exemption; and 76 Fed. Reg. 36179.

³ 76 Fed. Reg. 36191.

⁴ U.S. Department of Labor, Office of Labor-Management Standards, LMRDA Interpretive Manual, Section 266.100.

⁵ Further, nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship. (29 U.S.C. 434)

⁶ Although the Department of Labor, on January 11, 2001 (less than two weeks before the end of the Clinton administration), announced a reinterpretation of the advice exemption without public comment, the incoming Bush administration first delayed the effective date of the reinterpretation to review it, and then rescinded the reinterpretation before it took effect.

⁷ Under the second area, the preparation of an entire document “can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer.” In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the consultant is operating under a deceptive arrangement with the employer, the fact that the consultant drafts the material in its entirety will not in itself generally be sufficient to require a report. See February 19, 1962 memorandum from then Solicitor of Labor Charles Donahue to John L. Holcombe, then Commissioner of the Bureau of Labor-Management Reports, in response to a November 17, 1961 memorandum from Commissioner Holcombe that sought guidance on the advice exemption; and 76 Fed. Reg. 36179.

⁸ 76 Fed. Reg. 36191.

⁹ 76 Fed. Reg. 36182.

¹⁰ 76 Fed. Reg. 36191.

¹¹ 76 Fed. Reg. 36191.

¹² 76 Fed. Reg. 36192.

¹³ 76 Fed. Reg. 36192.

¹⁴ 76 Fed. Reg. 36191.

¹⁵ 76 Fed. Reg. 36191.

¹⁶ 29 U.S.C. 434.

¹⁷ U.S. Department of Labor, Office of Labor-Management Standards, LMRDA Interpretive Manual, Section 266.100.