Department of Labor Wants Employers to Report Detailed Information Regarding Union Avoidance Activities

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On June 20, the U.S. Department of Labor (DOL) proposed to do away with an interpretation of the Labor-Management Reporting and Disclosure Act (LMRDA) that has prevailed for nearly 50 years. At issue is Section 203 of the LMRDA, which requires, among other things, that employers file reports with the DOL when they enter into an agreement with a consultant or contractor (including attorneys) to persuade employees on the issue of unions.

Background

Section 203(c) of the LMRDA contains an exception to the reporting requirement for "advice" given to an employer. Since 1962, with the exception of a few days during the end of the Clinton Administration, the DOL's interpretation of the advice exemption provided that services of an attorney drafting letters or speeches to employees or reviewing communications the employer drafted to ensure legality were "advice" and thus not reportable. In essence, so long as an attorney submitted oral or written material to an employer and the employer had the decision whether to accept or reject the advice, the attorney's activities were not reportable under the "advice exception." If the attorney (or other consultant or contractor) met directly with employees, however, the activities became reportable.

Proposed Interpretation

Under the proposed interpretation, the "advice exception" would be limited to advising employers what they may lawfully say to employees, employers' compliance with the law, or general guidance on NLRB practice or precedent. Reportable activities would now include any actions, conduct or communications on behalf of an employer that could directly or indirectly persuade workers concerning their right to organize and bargain collectively, regardless of whether the consultant has direct contact with workers and regardless of whether the employer accepts or rejects the proposals. This interpretation specifically includes preparation of persuasive scripts, letters, videos, or other digital media for use by an employer or revisions to employer documents by an attorney or consultant.

Further, under the new interpretation, persuader activities may additionally include: training or directing supervisors and other management representatives; creating employer policies to prevent organizing; determining the timing and tactics of employer activities; and providing seminars or webinars offered by attorneys or consultants that include "union avoidance" topics where guidance is offered to attendees.

In addition to this substantially different interpretation of the LMRDA, the DOL also proposes to make significant changes to the LM-10 and LM-20 forms. These are the forms used by the employer and consultant, respectively, to provide the information the DOL requires them to report. The DOL also wants to implement an E-Filing system.

Implications

The implications for the labor professional of the DOL's proposal are difficult to understate. The proposed changes drastically reinterpret the reporting requirements for employers and attorneys/consultants and significantly amend the forms and instructions for reporting

under Section 203. The DOL's proposed interpretation expands the reach of the LMRDA and increases, therefore, 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. A substantial chilling of an employer's right to free speech during a union organizing campaign, which Section 8(c) of the NLRA purports to guarantee, may be the ultimate result.

Employers or their trade organizations may want to submit comments to the DOL on the proposed interpretation through the Federal Register. The deadline for submitting comments is August 22, 2011. After comments are received, the DOL will finalize its interpretation, publishing it in the Federal Register. Proactive employers may also want to discuss with their labor counsel what actions they should take now in anticipation of the DOL's interpretation becoming final.

Finally, please note that last year the Vorys firm began a blog dedicated to the coverage of traditional labor law issues, like this one. So as to reduce duplication and increase the currency of the information we share with you, we will in the future send you links to the blog postings. Alternatively, you can visit the blog at www.vorysonlabor.com and sign up for the RSS feed or subscribe to the blog posts.
