Changes To DOL Persuader Regs: Practical Considerations

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Recently, employment law concerns facing Texas employers have included issues such as a new gun law that allows employees to bring firearms to work, and immigration landmines in which employers face steep sanctions if they hire undocumented workers. But as a largely nonunionized state, few Texas employers have dealt with increasingly complex and changing rules that surround union organizing.

But that may be changing as several federal agencies, including the U.S. Department of Labor, begin changing the rules in regulation of labor-management relations.

Currently, less than 7 percent of all Texas employees are unionized; however, in a flurry of much-publicized activity, the National Labor Relations Board (NLRB) has made clear that the current administration is intentionally stimulating union organizing and collective bargaining. The effects of such initiatives in largely non-union environments like Texas will be profound and unmistakable. And it is not just the NLRB that is taking aggressive action.

Last year, the DOL proposed a significant regulatory change to its decades-old interpretation of the Labor Management Reporting and Disclosure Act (LMRDA). Among other things, the LMRDA requires employers to file detailed annual disclosures with the DOL concerning agreements and financial arrangements with those who provider "persuader" services.

Generally speaking, "persuaders" are those who seek to influence employee opinions about unionization, or who communicate with employees on behalf of the employer about such matters. But where do attorneys stand when they provide legal advice and counsel to employers during union organization attempts? Are they persuaders? Are their communications with employer-clients privileged or subject to LMRDA disclosure? The answer is both yes and no, and proposed DOL rules will make the determination even more complicated.

While the DOL says it will not require reports concerning pure legal advice or traditional legal representation in matters such as advising clients about how to comply with the National Labor Relations Act or in connection with handling labor contract arbitrations or collective bargaining, other services that have a "persuader" objective will generally be considered reportable.

The new persuader rules portend a dramatic incursion into the traditionally privileged relationship between attorney and client in labor relations matters. With a distinct probability that the new rules

will be implemented, employers and their labor counsel will be dealing with a very different compliance landscape. As always, an ounce of prevention is worth considerably more than a pound of cure. Stay tuned for further developments as this potential sea change unfolds.

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