



Piling On! DOL Proposes Rule Changes That Will Impact Employers

Insights

7.21.11

By now you're aware of the NLRB's proposed rule changes aimed at speeding up elections to make it easier for unions to organize.

The Department of Labor has also joined the fight to try and keep unions healthy, with rule changes of its own. These proposals affect a law most employers are unfamiliar with but which could, directly or indirectly, alter how you communicate with your employees about unions. It's known as the LMRDA.

Background

The laws surrounding union-organizing campaigns can be convoluted and sometimes counterintuitive. To help themselves through the minefield of potential liability, many employers turn to labor attorneys or other outside consultants for advice and guidance. A law known as the Labor Management Reporting and Disclosure Act (LMRDA) requires employers to report any agreement or financial arrangements that they may have with such a third party, if they are being used as a "labor persuader."

The definition of labor persuader is someone hired to persuade employees as to their collective bargaining rights (whether or not to join a union, for example) or to obtain certain information concerning union activities in connection with a labor dispute. The consultants covered by this law are also required to file their own reports. Not surprisingly, there is no equivalent requirement that unions file such reports if they hire labor persuaders.

But an important exception to this requirement excludes those who give "advice" to the employer about these same union activities. This advice exception generally exempts lawyers who consult with their clients about the legal and practical issues that surround a union-organizing campaign. As well it should! The requirement that the details of such legal arrangements be publicly disclosed would undoubtedly lead to fewer employers entering into such agreements in the first place, and instead risk taking their chances by dealing with union organizing on their own. And that is likely the whole point of the rule changes.

The Potential Impact

The DOL's proposed rule change should be recognized as a very big deal to employers. Currently,

reportable activity by labor persuaders occurs when such a consultant speaks or writes directly to employees. But for now any written material prepared by a lawyer or labor consultant is not reportable so long as the purpose of the writing is not to persuade employees directly but instead is to advise the employer. So long as the employer is free to accept or reject the proposed communication, it does not make the consultant a persuader. But by narrowing the advice exemption the DOL would require reports on many activities that are not presently reportable, such as: proposing or drafting employer policies with an objective of remaining union free; coaching or counseling with supervisors in how to deal with employees in a campaign setting; or providing informative materials to employers for consideration and distribution to employees. Even webinars and seminars aimed at educating employers on how to remain union free could trigger the duty to report.

The DOL says it does not intend to require reporting on such pure "advice or representation" activities such as advising on how to comply with the National Labor Relations Act or representing clients in NLRB proceedings, arbitrations, or collective bargaining. The problem with even this, however, is that the DOL also says services like these with a persuasive element will also be reportable.

What's Next

The public is invited to submit comments through August 20, 2011. Based on those comments the DOL can then finalize its new interpretation. Hopefully some Fisher Phillips clients, particularly employer associations, will want to comment. For those who do, comments can be submitted online at www.regulations.gov. If you want help in drafting or editing comments, please contact your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific proposed regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.