



# Government Finalizes Troublesome New Persuader Rule; Legal Challenges Pending

Insights

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The federal government has finalized a significant new regulation that seeks to interfere with businesses seeking legal counsel to help in opposing or dealing with unions. The U.S. Department of Labor's (USDOL) new "persuader" rule would force attorneys and their clients to report in public records their confidential attorney-client and financial relationships, providing an unfair boost to unions in their organizing efforts.

For this reason, we expect numerous business organizations will file lawsuits seeking court orders blocking implementation of the new regulation. If the rule survives its legal challenges, Fisher Phillips will continue to provide traditional labor law services as before and will be fully prepared to guide our clients through the compliance process.

## **The Advice Exemption Has Been Honored For Over 50 Years**

The Labor Management Reporting and Disclosure Act (LMRDA) requires labor relations consultants to file government reports about any arrangement to persuade workers to reject unionization or collective bargaining. This rule has generally only been applied to situations where businesses retain non-lawyer consultants known as "persuaders" to help them during organizing drives or labor disputes.

For over 50 years, the rule had generally **not** been applied to lawyers or law firms offering advice and counsel to businesses about their rights and obligations under federal labor law. That's because the LMDRA expressly permits employers to receive "advice" without triggering the reporting requirements, so long as a client has been free to accept or reject the advice, and so long as the lawyer did not communicate directly with employees.

## **Government Rule Seeks To Tip The Scales In Favor Of Unions**

In a transparent effort to boost union organizing, the USDOL has waged a five-year battle to radically broaden the reporting requirements. Starting in June 2011 with the issuance of proposed revisions to the persuader rule, and culminating in today's publication of the final rule, the USDOL rammed through its changes over the objections of countless business groups, employer organizations, law firms, and the American Bar Association.

Under the new rule, pure legal advice would still be protected, provided there is no underlying object to persuade, but no longer would tactical consultations with your lawyer about maintaining

union-free status be immune from persuader reporting requirements.

### **What Would Need To Be Reported?**

Instead, under the new rule, any time your lawyer so much as helps you educate your workers on the perils of unionization, those activities would need to be disclosed in a public report. Also, any time your lawyer supplies you with information about a particular union or employee activities during a labor dispute, the reporting obligation would be triggered. The following routine services commonly provided to clients are among the countless that could trigger reporting under the new rule:

- conducting supervisory do's and don'ts training sessions;
- drafting or revising text for small group talks or other communications;
- drafting personnel policies and handbooks touching on the subject of unions;
- reviewing and revising orientation materials touching on the subject of unions; and
- delivering union-avoidance webinars or seminars.

Further, once a law firm is labelled as a “persuader,” coverage is triggered and the firm is required to report **all** of its receipts from clients relating to all labor relations advice and services, not just persuader services.

### **Fisher Phillips Supports Defeat Of The New Rule**

Fisher Phillips supports the efforts of those who choose to file lawsuits seeking to block the regulation. We believe that the new rule goes too far and will not withstand legal scrutiny, as it inappropriately interprets the LMRDA and impermissibly interferes with a law firm's relationships with clients.

Lawyers have a professional duty to maintain the confidences of their client relationships, and are generally obligated not to disclose them. This duty extends to all client information, not just privileged attorney-client communications. Although there may be limited occasions when lawyers are required to reveal confidential information – such as if a law or court ruling mandates disclosure – we do not believe that the LMRDA supports the USDOL's interpretation requiring wholesale disclosure.

**We want to make clear that the LMRDA does not require disclosure, nor will we ever disclose any of our privileged attorney-client communications. We will always hold the attorney-client privilege as sacred, because it is always the client's, not the attorney's, privilege to preserve or waive.**

### **What Do Employers Need To Know?**

Employers are also impacted by the new rule, as you must file a corresponding public report disclosing any persuader arrangement and all payments thereunder. Happily, the rule will only apply to persuader engagements which begin on or after July 1, 2016. Also, no employer reports are

due until 90 days after the end of any fiscal year in which you use persuader assistance, and by then we hope to have further clarity from the courts about the validity of this new rule.

Even if the rule survives the legal challenges, rest assured that Fisher Phillips will continue to perform the same kind of work we do now. Our attorneys are committed to practicing law and representing you just as vigorously as ever despite the changes in reporting this rule might bring.

### **What Will Happen Next?**

We are actively collaborating with some of the foremost legal authorities to determine whether attorneys and clients have an obligation to abide by the new reporting requirements while litigation is pending. When we have an answer to that, we will let you know. Even if the rule survives court challenges, however, you can count on Fisher Phillips to stand with you, both in compliance efforts and your dealings with labor unions.

We have developed specific compliance programs in anticipation of final implementation, and will craft individualized plans with each of our clients to ensure well-coordinated reporting. We encourage you to contact your Fisher Phillips attorney to begin the process of proactively addressing the action steps necessary to protect your interests.

If you have any questions about this matter, or how it may affect your business, please contact your Fisher Phillips attorney.

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

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