



TEXAS COURT HALTS LABOR DEPARTMENT PERSUADER RULE

On March 24, 2016 the Department of Labor (DOL) issued a final rule that will require employers to file public reports with the DOL when they use consultants (including lawyers) to provide labor relations advice and services that have the purpose of persuading employees regarding union organizing or collective bargaining. The consultants will also be required to file similar reports containing the details of advice and service. Previously these reports were only required when a consultant providing advice had direct contact with employees. In essence, this final rule drastically narrows the “advice” exemption from public reporting of persuader activity.

The rule was supposed to become effective on July 1, 2016. However, just last week a federal court in Texas granted a preliminary injunction that halted nationwide the rule’s implementation pending a determination of the merits of the three lawsuits challenging it (see below). The judge stated in his ruling that the “new rule is defective to its core because it entirely eliminates the...advice exemption.”

As written, the rule requires anyone with reporting obligations to submit two separate reports to the DOL’s Office of Labor-Management Standards (OLMS): 1) a Form LM-20 which must be submitted to the OLMS within 30 days of the consultant agreeing to provide reportable activity, and 2) a Form LM-21 which must be submitted within 90 days after the completion of the consultant’s fiscal year.

The Form LM-20 requires disclosure of, among other things, the nature of the agreement with the employer and the specific activities that the consultant will perform on behalf of the employer. The Form LM-21 requires the consultant to report the names and addresses of all of the employers for whom the consultant provide labor relations advice or service “regardless of the purpose of the advice or service,” and all receipts and disbursements from those employers in connection with those services.

According to the DOL’s [status report](#), made in response to a legal challenge, *agreements signed before July 1 are exempt from being disclosed, even if the execution of the agreement takes place after that deadline*. Because the DOL is applying the rule only to agreements made on or after July 1, even multi-year or open-ended agreements should be exempt from disclosure so long as they are made before July 1. As a reminder, this applies to *indirect* persuader activity only; direct activity must still always be reported. Direct persuader activity occurs where a third party directly engages with employees regarding unionization. Indirect persuader activity encompasses advice and recommendations made between a third party and an employer regarding unionization, even when the third party has no direct contact with employees.

Do's and Don'ts About Reporting:

Personnel Policies/Actions

- Reporting is only required if the consultant develops or implements personnel policies or actions for the employer with an object to persuade employees.
- For example, a consultant's identification of specific employees for disciplinary action, or reward, or other targeting based on their involvement with a union representation campaign or perceived support for the union, would be reportable. As a further example, a consultant's development of a personnel policy during a union organizing campaign in which the employer issues bonuses to employees equal to the first month of union dues, would be reportable.
- On the other hand, a consultant's development of personnel policies and actions are not reportable merely because they improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees.
- To be reportable, the consultant must undertake the activities with an object to persuade employees, as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking.

Examples of What Constitutes "Advice" that Need not be Reported

- The final rule ensures that no reporting is required by reason of a consultant merely giving "advice" to the employer, such as, for example, when a consultant:
 - offers guidance on employer personnel policies and best practices;
 - conducts a vulnerability assessment for an employer;
 - conducts a survey of employees (other than a push survey, *i.e.*, one designed to influence participants and thus undertaken with an object to persuade);
 - counsels employer representatives on what they may lawfully say to employees;
 - conducts a seminar without developing or assisting the employer in developing anti-union tactics or strategies; or
 - makes a sales pitch to undertake persuader activities.
- Reporting is also not required for merely representing an employer in court or during collective bargaining, or otherwise providing legal services to an employer.

Litigation Progress Report:

There are three active lawsuits challenging the DOL's persuader rule. The National Association of Manufacturers, the Coalition for a Democratic Workplace, and Associated Builders and Contractors [brought suit](#) on March 30, 2016, challenging the rule in the U.S. District Court for the Eastern District of Arkansas. This suit is pending.

Additionally, a coalition of law firms brought suit in U.S. District Court in Minnesota. While this District Court ruled against the plaintiff it was not proven that the rule caused irreparable harm stemming from the rule's implementation. However, the Court did find that ultimately the plaintiff will likely succeed in its challenge because they should be able to prove its ill effects.

Finally, a suit was brought in U.S. District Court in Texas by the National Federation of Independent Business, the National Association of Home Builders, and state and local associations in Texas. As mentioned above, this Court ruled in favor of the plaintiffs.

In all three cases, the plaintiffs have sought a preliminary injunction (PI). A court can issue a PI to quickly prevent a party from taking action (such as implementing a rule) while the court deliberates the merits of the suit. The plaintiffs are seeking PIs to prevent DOL from implementing the July 1 reporting date as detailed above. For the court to grant a PI, the party seeking the injunction generally must show (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is not granted, (3) that the harm of failing to grant the injunction outweighs any harm the injunction may cause, and (4) the injunction is in the public interest.