



Howard B. Jackson.....

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LONG REACH OF DOL'S CONTROVERSIAL NEW PERSUADER RULE EXTENDS BEYOND JUST UNION ORGANIZING CAMPAIGNS

On March 23, 2016, the Department of Labor released a rule requiring companies to disclose when they seek advice from outside consultants on a variety of matters involving employees. The so-called "Persuader Rule," first proposed in 2011, revises the federal Labor Management Reporting and Disclosure Act (LMRDA) to require detailed reports from employers and their advisers, including the types of consulting or legal services rendered and any fees paid. Under the DOL's prior interpretation of section 203 of the LMRDA, an employer and consultant would be required to file a report of persuader activities only if the consultant communicated directly to the workers. The new final rule requires that both direct and indirect communications be reported.

Although the Department of Labor is characterizing this new Rule as an effort to provide more transparency to employees regarding "the source of the views, materials, and policies that are being used to influence their decisions about how to exercise their right to choose union representation or engage in collective bargaining," in reality, the ramifications of this new rule reach beyond union organizing campaigns.

..... The new Rule interprets Section 203 of the LMRDA, which requires labor organizations, consultants, and employers to file reports and disclose expenditures regarding certain labor-management activities. However, according to the Department of Labor, a longstanding "loophole," otherwise known as the "advice exemption," allows employers to hire consultants (including attorneys) to create materials, strategies and policies for organizing campaigns - and to script managers' communications with employees - without filing LMRDA disclosures, as long as the consultant does not directly contact employees. The new rule purports to "close the loophole" by requiring reporting on "actions, conduct or communications that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights." This broad definition extends the reporting and disclosure obligations to settings other than union organizing campaigns. For example, the reporting obligations could arise in the context of collective bargaining, or supervisor training.

The rule limits the "advice exemption" by revising the instructions to forms filed by employers (Form LM-10) and labor relations consultants (Form LM-20) to report persuader agreements and arrangements. According to those instructions, reports must now be filed if the labor relations consultant undertakes activities that fall within the following categories:

1. **DIRECT PERSUASION:** A consultant engages in direct contact or communication with any employee, with an object to persuade such employee about how he or she should exercise representation or collective bargaining rights; or
2. **INDIRECT PERSUASION:** A consultant who has no direct contact with employees undertakes one or more of the following activities with an object to persuade employees:
 - **Planning, Directing, or Coordinating Supervisors or Managers.** Reporting is required if the consultant-with an object to persuade-plans, directs, or coordinates activities undertaken by supervisors or other employer representatives. This includes both meetings and other less structured interactions with employees.
 - **Providing Persuader Materials.** Reporting is required if the consultant provides-with an object to persuade-materials or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees. In revising employer-created materials, including edits, additions, and translations, a consultant must report such activities only if an "object" of the revisions is to enhance persuasion, as opposed to ensuring legality. In reality, this will arguably

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“Right-to-work laws prohibit unions and employers from requiring workers to pay union dues as a condition of employment.”

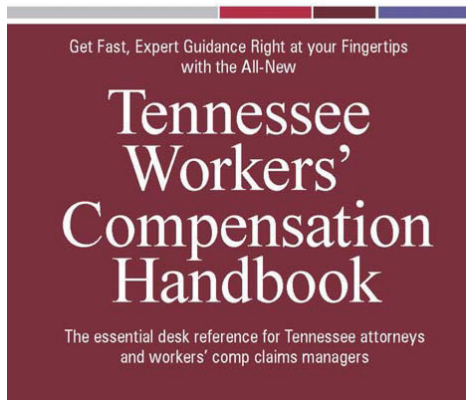
MAJORITY OF STATES NOW RIGHT-TO-WORK

West Virginia is due to become the 26th right-to-work state as of July 1, 2016. Right-to-work laws prohibit unions and employers from requiring workers to pay union dues as a condition of employment. While Democratic state legislators argue that right-to-work laws hurt unions and working families, others say that right-to-work laws promote economic development and economic freedom. West Virginia is the fourth state in four years to enact a right-to-work law, the others are Indiana in 2012, Michigan in 2013, and Wisconsin in 2015.

Two other developments concerning right-to-work laws are of note. On March 29, 2016, the U.S. Supreme Court in a 4-4 deadlocked ruling let stand a lower court ruling allowing unions to collect mandatory dues from government employees they represent, a practice allowed in more than 20 states. That case is *Friedrichs v. California Teachers’ Association*, which was brought by a religious group and a teachers’ group who contended that permitting the mandatory payment for functions such as collective bargaining violated teachers’ constitutional rights. The theory was that collective bargaining is a form of political speech that the teachers should not have to support.

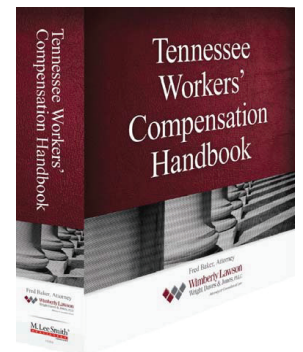
Prior to the death of Justice Scalia, it was widely predicted that the then five-Justice conservative majority would reduce the power of public employee unions to require employees to pay union dues or “fair share fees.” The deadlock among the Justices effectively let the lower court ruling stand, leaving the “fair share fees” practice intact. That outcome demonstrates how much one Justice can affect the outcome of a case at the Supreme Court level.

In the other development, reportedly some counties or municipalities in Illinois, along with Kentucky, have passed local right-to-work legislation. Section 14(b) the National Labor Relations Act allows states to pass such legislation. The question of whether this right extends to subdivisions of the states such as counties is currently being litigated.



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KNOW YOUR ADVISOR - CAROL R. MERCHANT

CAROL R. MERCHANT is a Consultant with Wimberly Lawson Wright Daves & Jones, PLLC. She provides consulting services, in conjunction with the firm's attorneys, with emphasis on compliance with regulations under the Fair Labor Standards Act, Family and Medical Leave Act, Davis Bacon and Related Acts, Service Contract Act, Contract Work Hours and Safety Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, H2A provisions of the Immigration Reform and Control Act, Employee Polygraph Protection Act and the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act).

Carol retired from the U. S. Department of Labor, Wage and Hour Division, in December 2007, after 33 years of service with the Division. From 2000 to the end of 2007 she was the Nashville District Director, supervising enforcement of Wage and Hour laws in the state of Tennessee. Prior to that she had been Assistant District Director of the Knoxville Wage and Hour office after 11 years as an investigator in Columbia, South Carolina.

During her years as District Director and Assistant District Director, she reviewed investigative files, conferred with the Solicitor's Office of the U.S. Department of Labor on cases that should be litigated, and assessed and negotiated payment of civil money penalties under the Fair Labor Standards Act (including child labor), Migrant and Seasonal Agricultural Worker Protection Act, H2A and Employee Polygraph Protection Act. She was responsible for managing all seven Wage and Hour offices in the State of Tennessee.

She worked on rewriting portions of the Wage and Hour Divisions' Field Operations Handbook, organized and conducted three national training classes for Wage and Hour Technicians, and co-wrote the national training manual for investigators on developing litigation cases.

From 2003 until her retirement in December 2007 she was the Southeast Regional Representative on the National Health Care Team examining compliance problems in the health care industry. She testified in Federal Court on numerous cases litigated by the U. S. Department of Labor.

Carol received her Master of Arts degree in American History from the College of William and Mary and her Bachelor of Arts degree in History from Columbia College. In 2000 she was awarded the Distinguished Career Service Award from the Secretary of Labor.

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encompass most or even all materials or communications made to employees. However, where a consultant merely provides an employer with “off-the-shelf” material selected by the employer from a library or other collection of pre-existing materials prepared by the consultant for all employer clients, then no reporting is required as long as the consultant does not play an active role in selecting the materials for its client’s employees based on the specific circumstances faced by the employer-client.

- **Conducting a Seminar for Supervisors or Other Employer Representatives.** Seminar agreements must be reported when the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer’s supervisors or other representatives. Keep in mind that some of these types of seminars occur in the absence of any actual union election campaign. However, not all seminars will be reportable. For example, a seminar where the consultant conducts the seminar without developing or assisting the employer-attendees in developing a plan to persuade their employees would not be reportable, nor would a seminar where a consultant merely makes a sales pitch to employers about persuader services it could provide. Further, an employer is not required to file a Form LM-10 for attendance at a multiple-employer union avoidance seminar.
- **Developing or Implementing Personnel Policies or Actions.** According to the DOL, reporting is only required if the consultant develops or implements personnel policies, practices, or actions for the employer that have as an object to, directly or indirectly, persuade employees. For example, the 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, or implementation of personnel policies or practices during a union organizing campaign 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. Rather, 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.

The final rule removed one of the more controversial provisions of the earlier version which would have required the reporting of the provision of legal advice to an employer. The final rule provides 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.

In the final rule, the Department has eliminated the term “protected concerted activities” from the definition of “object to persuade employees,” as had been proposed in the Notice of Proposed Rule-making. Instead, reporting is required only for agreements in which the consultant engages in activities with an object to persuade employees concerning representational and collective bargaining activities, but not “other protected concerted activities.” This is certainly an improvement, but the new Rule still creates far broader reporting obligations.

Although the DOL states that the final rule should not be “construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship,” many management-side labor and employment attorneys are not convinced that this is really the case. For example, if an attorney reviews an employer’s handbook policies to ensure that they are legal, and one of those policies is the company’s “view on unions,” the attorney may be engaging in a mixture of legal and persuader activities, and the result under the new Rule would be that the attorney must report the fee arrangement, including billing records, between the attorney and his/her firm and the company. Those billing records may contain attorney-client privileged information.

The new Rule was published in the Federal Register on March 24, 2016. It will be applicable to arrangements, agreements, and payments made on or after July 1, 2016. The final rule and additional information is available on the OLMS website. (See <http://www.dol.gov/olms/reg/compliance/ecr.htm>).

At least one lawsuit has been filed challenging the new Rule. Unless a Ruling is received before July 1, however, employers and their advisors, including legal counsel, must for compliance with this new standard.