Efforts by the U.S. Department of Labor to Restrict Employer Rights

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Attorney-client communications are privileged. Within this relationship, employers confidentially strategize with legal counsel concerning their labor philosophy and efforts such as staying union free, dealing with pickets and strikes, and maintaining positive labor relations. The U.S. Department of Labor (DOL) currently is trying to restrict these communications by requiring employers and their attorneys to publicly disclose these communications and the costs associated with them under the Labor-Management Reporting and Disclosure Act (LMRDA) 29 U.S.C. Sections 401 et seq.

The LMRDA requires employers, unions and labor consultants to make certain financial disclosures to the DOL. Generally, the LMRDA states that employers and labor relations consultants must report any agreement to engage in activity that has the direct or indirect object of persuading employees with respect to their rights to organize and bargain collectively or to supply information concerning activities of employees or labor organization regarding a labor dispute involving the employer. Employers must report this information on Form LM-10 and consultants must report on Forms LM-20 and 21. All the reports require a detailed description of the "persuader activity" and the amount paid for these services.

The LMRDA exempts from reporting services that are provided by reason of giving advice to the employer. Over the years, the "advice exemption" has protected attorneys from reporting advisory services such as drafting and revising speeches, developing employer campaign strategies, and training managers and supervisors to engage in persuader activities. This advice exemption has been upheld by the courts as long as consultants and lawyers refrained from giving direct speeches or presentations to employees.

The DOL's proposed rule significantly narrows the advice exemption and limits the definition of advice to only an "oral or written recommendation regarding a decision or a course of conduct." Examples provided include advising an employer on what may be lawfully said to employees, ensuring compliance with the National Labor Relations Act, and providing guidance on federal labor law. However, the definition of persuader activity would be expanded to include "providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their right to organize or bargain collectively." Reportable activities would include drafting materials or speeches for presentation to employees, training supervisors to conduct group employee meetings, and developing or revising certain personnel policies or practices.

The LMRDA includes a statutory exemption for certain "representational" activities by attorneys. DOL recently explained that the proposed regulation was not intended to require disclosure of information subject to the attorney-client privilege, but offered little guidance as to how this would work in practice.

Under the existing regulations, a bright line was established so that activities by attorneys were not reportable unless the attorneys communicated directly with the employees. The major problem with the proposed regulations is the uncertainty in determining when standard legal advice and services provided directly to the client and not involving communications with employees will be reportable. Such confusion will limit an employer's open and frank discussion with legal counsel and may have a chilling effect on the attorney-client relationship.

The DOL will allow public comment on the proposed regulations through August 2, 2011. The full text of the proposed regulations may be found on the U.S. DOL, Office of Labor Management Standards (OLMS) website.