Management Alert

Department of Labor Proposes Significant Changes to Obligations of Employers to Report Information Related to Union Organizing

On Monday, December 7, 2009, the U.S. Department of Labor (DOL) released its regulatory plan for 2010. As part of its agenda, DOL is proposing substantial changes to an employer's obligation to report certain information related to union organizing to the federal government under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). In this regard, DOL is actively looking at narrowing an existing and longstanding exemption in the statute from reporting "advice" provided by an employer's labor relations consultants and attorneys.

In the absence of such an exemption, section 203(a)(4) of the LMRDA, 29 U.S.C. §433, requires employers to disclose certain agreements or arrangements between the employer and labor relations consultants, including those where an objective is to persuade employees regarding their rights to organize and join a labor union, or to refrain from doing so. For example, the reporting requirements of the LMRDA can apply to employer agreements with consultants or the employer's attorneys to create materials such as memoranda, letters, speeches, or videos to be delivered to employees to persuade them not to join a union. In addition, section 203(a)(5) of the Act requires employers to report any payments made in connection with such agreement or arrangements.

When there is reportable activity, the employer must file a Form LM-10 with DOL, providing an explanation of the terms of covered agreements or arrangements, including payment details. Importantly, copies of the Form LM-10 reports filed by each employer are public documents and readily accessible on the DOL's website. Moreover, violations of the disclosure requirements can lead to civil and/or criminal penalties.

Section 203(c) of the LMRDA currently provides a significant exemption to the employer and labor relations consultant reporting requirements, often protecting consultant activities and payments received from disclosure. Under this provision, an employer is not required to file a report covering services of a labor relations consultant or attorney which constitute giving "advice" to the employer.

Historically, this "advice" exemption has shielded from disclosure activities where the consultant or attorney does not have direct contact with potential "bargaining unit" employees and limits his/her activities to providing the employer with advice or materials which the employer is free to accept or reject. This exemption has been used to protect employers from disclosing

the work of consultants or attorneys who prepare draft materials, including persuasive speeches, letters, or other documents, so long as the consultant or attorney does not provide the materials directly to the employees.

As part of the DOL's agenda for 2010, Labor Secretary Hilda Solis announced an intent to narrow the scope of this advice exemption by enacting new regulations in the coming year. While the DOL has not, as yet, provided insight into the specific changes it is seeking to implement, there was a similar effort to revise the LMRDA advice exemption at the end of the Clinton Administration in January 2001. The regulations enacted by the Clinton Administration dramatically limited the scope of the advice exemption, requiring disclosure of any activities where an objective is persuasion of employees. All persuasive scripts, letters, videotapes, or other materials drafted by an attorney or consultant had to be disclosed if persuading employees regarding their union rights was an objective of such activity, regardless of whether the consultant or attorney was in direct or indirect contact with employees. After delaying implementation of the January 2001 regulations, the Bush Administration rescinded them in April 2001, returning to the application of the advice exemption currently in force.

Given the likelihood that DOL, if it moves forward, will put in place regulations similar to the January 2001 ones, there is a good chance that employers will be subject to additional LMRDA reporting requirements. Aside from being time consuming, such requirements—if enacted—will be utilized by unions in an effort to embarrass the reporting employers (e.g., by showing how much money the employer is spending to defeat unionization). We will continue to monitor developments regarding these potential regulations.

For more information, please contact the Seyfarth attorney with whom you work, or any labor and employment attorney on our website: *www.seyfarth.com/LaborandEmployment*.

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