LEGAL UPDATES

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NLRB Changing the Rules ... Again

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TERRY L. POTTER
ST. LOUIS:
314.345.6438
TERRY.POTTER@
HUSCHBLACKWELL.COM

The National Labor Relations Board (NLRB) and the Department of Labor (DOL) have proposed new rules, which if adopted, will significantly accelerate the timing of union representation elections and require much broader disclosure of the identity of third parties assisting employers in opposing union representation.

The NLRB closed out the public hearings on July 19th on proposed changes to their internal rules and guidelines to expedite election procedures. Key features include the fact that hearings after a petition for representation has been filed "shall" occur within seven days, "absent special circumstances;" that an employer would be required to set forth in a "statement of position," its position regarding voter eligibility and the appropriateness of the unit by the date of the hearing; and that it will be barred from offering evidence or cross-examining witnesses concerning any issue not raised in their statement of position.

The speakers who wanted to comment on the proposed changes were allowed only five minutes to present their reviews but were allowed to submit, in advance, written statements supporting their respective viewpoints. Approximately 30 speakers spoke each day, which, in most cases, included a question and answer session by the board members with respect to each speaker. Additional information regarding the hearings, including transcripts of the proceedings, can be located at www.nlrb.gov/node/525. The board will be taking written comments on the proposed changes through late August of this year, so it is unlikely that any changes will be implemented until late Fall.

The NLRB's changes in its election processes will greatly accelerate the election process, thereby substantially reducing the amount of time the employer will have to communicate with its employees and campaign against the organizational attempt. The proposed rule will also limit the opportunity of the employer to fully develop its evidence for hearing on such critical issues as

defining the appropriate unit, voter eligibility and issues of election misconduct by the union.

At the same time, DOL has proposed changes to its long-standing interpretation of what activity by third-parties must be reported as "persuader" activity under the Labor-Management Relations Disclosure Act (LMRDA). The current interpretation is that employers are required to disclose by public filing any arrangement the employer has made with a third party to persuade its employees directly or indirectly about their collective bargaining rights or to secure information about the activities of a labor organization involved in a labor dispute with the employer. The LMRDA does not require disclosure for advice given to the employer by the third party. The DOL has interpreted that advice exception to not require disclosure where the third party consultant, usually a lawyer, does not have direct contact with the employees. Under this current interpretation the mere drafting or review of communications with the employees would not require disclosure.

The new DOL proposal significantly limits the term "advice" as used in the statute as "an oral or written recommendation regarding a decision or course of conduct." Under the proposed revised interpretation, if the third-party is involved in activities or communications that directly or indirectly attempt to persuade employees about the organizational attempt, such activities would require reporting without regard to the absence of any direct contact with the affected employees. Thus, such previously exempt activities as preparing or reviewing speeches, assisting in the scripting of video, drafting or reviewing letters or other communications to employees, would require disclosure as persuader activity. This proposed change in the interpretation could also require the third parties to file disclosures with the DOL of all of their labor relations advice or services provided to all employers during the year, including that which is not tied to persuader activity. For lawyers and law firms this would result in identification of their clients and the amounts charged to those clients during the reporting period.

UPDATE
The DOL today gave notice of an extension being issued on July 29, 2011, extending the deadline 30 days to September 21 for interested parties to comment on the proposed rulemaking interpretation expanding the definition of "Persuaders":

> **OLMS News 05-11: Employer-Consultant Reporting: Notice of Proposed Rulemaking: Deadline for Comments Extended**
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> The Office of Labor-Management Standards (OLMS) published on June 21, 2011 a Notice of Proposed Rulemaking (NPRM) to revise the interpretation of "advice" as it pertains to the employer and labor relations consultant "persuader" reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA). The comment period was to end on August 22, 2011.

In response to comments received, the Department will publish a notice in the *Federal Register* on July 29, 2011 extending the comment period an additional 30 days, to September 21, 2011.

For additional information, including information on how to submit comments, please visit the Employer-Consultant Reporting NPRM page on the OLMS Website at: www.dol.gov/olms/regs/compliance/ecr_nprm.htm.

What This Means to You

These proposed changes are likely to result in more successful organizational attempts by union organizers because the employer will have significantly less time to react and respond after a petition for representation is filed with the NLRB. Moreover, the persuader activity reporting requirements could discourage employers from obtaining the services of third-party experts to oppose the organizational attempt, and could well discourage law firms from taking on this representation where it would require disclosure of all income received from clients, even that totally unrelated to the persuader activity.

We strongly urge employers to review, and as necessary, enhance, its employee relations training with a focus on eliminating or mitigating those aspects that most often lead to the employees seeking union assistance.

Contact Info

Should you have further questions about these pending changes, please contact your Husch Blackwell attorney.

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