New DOL reporting requirement challenges employers' efforts to remain union-free

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The Department of Labor's (DOL's) recently issued "persuader rule," which took effect April 25, 2016, requires employers and their consultants to report to the DOL any activities that they undertake to persuade employees about organizing and bargaining collectively. This rule will apply to arrangements and agreements, as well as payments made to attorneys and consultants, on or after July 1, 2016. Specifically, employers and their consultants (including attorneys) must report any direct or indirect activities, including:

- Engaging in direct communication with employees with the intent of persuading them to not exercise their collective bargaining rights;
- Planning, directing or coordinating an employer's interactions with employees so as to persuade those employees to not exercise their collective bargaining rights (e.g., planning or directing meetings or advising supervisors on coordinating steps in a campaign).
- Drafting, providing or editing materials or communications discouraging unionization for employer's dissemination to employees (e.g., written materials, management speeches, etc.); however, this would not apply to merely reviewing such materials to ensure legality;
- Conducting seminars in order to assist employer-attendees to develop anti-union tactics or strategies; and
- Developing or creating personnel policies aimed at persuading employees to not exercise their representational and collective bargaining rights.

The exception to the DOL reporting requirement is for advice that is limited to "oral or written recommendations regarding a decision or course of conduct." As such, reporting is not required for advising employers on what they may lawfully say to employees, advising them about legal exposure, discussing unsettled legal issues with clients, suggesting best practices, or representing or defending employers in legal disputes or negotiations.

The final rule does not limit what employers or consultants may say or do in the face of a union organizing campaign or negotiations, but rather, its proponents claim it

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creates transparency for employees as to who had a hand in shaping their employer's views, materials and policies. These reporting requirements raise serious concerns for labor lawyers and their clients as it jeopardizes confidentiality and has the potential to destroy the attorney-client privilege. And, of course, the reports make such advice a matter of public record.

Currently, three lawsuits are seeking to block the rule's implementation. Unless the rule's July 1, 2016, reporting date is blocked by an injunction, employers have a narrow window of opportunity to act before the reporting obligation is triggered. Actions employers should consider taking before July 1 include updating their union avoidance policies, providing hands-on union avoidance training to supervisors and managers, and updating training materials or developing or updating a union-free program to be implemented in the face of organizing activity. Employers should promptly consider and discuss with counsel other actions they can take now to minimize organizing vulnerability, as any such activity must be implemented and concluded before July 1, 2016.

If you have questions or concerns regarding potential persuader activities or the impact reporting these persuader activities could have on your business efforts, please contact Betsy Swift at bswift@bricker.com or 614.227.8850 or Joëlle Khouzam at jkhouzam@bricker.com or 614.227.2311.