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Ohio Provider Resource Association

Important New Development Regarding DOL Persuader Rule: Agreement Prior to July 1 Could Limit Future Reporting Obligation

The United States Department of Labor (DOL) has recently interpreted its new Persuader Rule to exclude an agreement or arrangement signed before July 1, 2016, even if the services and payments occur after July 1. As a result of new Persuader Rule which was effective earlier this year, employers face substantial reporting requirements related to agreements they enter into with consultants and attorneys that could touch upon union organizing. Moreover, the range of activities about which employers must report is substantially broader, given the DOL's focus on what it calls "indirect" persuader activity. Most recently, in an email exchange between the U.S. Chamber of Commerce and the DOL, the DOL said: "Services and payments made pursuant to a multi-year agreement, even if they occur after July 1, are not required to be reported on the new Form LM-20, so long as the agreement was signed prior to July 1. The prior form applies."

The new rule imposes substantial reporting obligations on employers. The Vorys firm previously provided detailed information about the rule, which can be found **here**. In summary, the old rule required reporting if the consultant engaged in ***direct*** persuader activity (*e.g.*, the consultant directly communicates with employees about union representation). The new rule adds reporting for ***indirect*** persuader activities (*e.g.*, providing communication materials to employer to handout to employees). These activities typically, but not exclusively, arise in the context of a union organizing drive.

The final rule announced that it would become "applicable" on July 1, 2016. Specifically, the DOL's rule provided that the rule applies to "arrangements and agreements as well as payments (including reimbursed expenses) made on or after" that date.

The latest development arises out of one of the three lawsuits that have been filed challenging the rule. In a series of communications, starting with a status report filed in that case and culminating in the email exchange referenced above, the DOL has further explained its position on the "applicable" date language. A summary of the current status of those suits can be found **here**, on the Vorys labor law blog.

As a result, the DOL's position now is that if the employer and consultant/attorney sign the agreement by July 1, then ***all*** payments made pursuant to ***that*** agreement are not reportable on the new forms and pursuant to the new instructions, regardless of ***when*** the indirect persuader services are performed. It is important to note that direct persuader activity (*e.g.*, directly communicating with employees about union representation) has always been reportable, and remains reportable notwithstanding this development.

This revelation has substantial implications for ***all*** employers. Regardless of whether any segment of an employer's workforce is unionized, and whether the employer has ever been through a union organizing effort, an employer should ***immediately*** explore signing an agreement for indirect persuader services. Indeed, even if an employer never thinks it will be subject to union organizing activity, having an agreement of the type contemplated in the DOL's most recent communications is vitally important to ensure the privacy of the employer's communications in the event of such activity.

OPRA members have 2 free hours of legal services with the Vorys law firm on an annual basis as an OPRA member benefit. If you have questions or need further information relative to this alert, please contact Suzanne Scrutton (614.464.8313) or Nelson Cary (614. 464.6396) at the Vorys law firm.

This alert is for general information purposes and should not be regarded as legal advice. As always, please let us know if you want more information or have questions about how these developments apply to your situation.