



The Good, Bad and Ugly

The Final Persuader Rule – What's Next?



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Agenda

What's NOT in the rule (the good)

What IS in the rule (the bad)

What is COMING (the ugly)

The Good

DOL *did* listen to *some* of the feedback

What does NOT trigger reporting?

Surveys (mostly)

Handbook drafting (mostly)

Association dues

Conference/seminar fees (mostly)

Protected concerted activity

The Bad

The Key Change:

New Rule

“Indirect Persuasion” now triggers report

Old Rule

Only direct (face-to-face) persuasion
triggered reporting

What Must be Reported?

9. Check the appropriate box(es) to indicate whether an object of the activities undertaken is directly or indirectly:

- a. To persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.
- b. To supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.

10. Terms and conditions. (Explain in detail; see instructions. Written agreements must be attached by clicking the "Add Attachments" link at the top of the form. If reporting a union avoidance seminar, a single copy of the registration form and a description of the seminar provided to attendees also must be attached by clicking the "Add Attachments" link at the top of the form.)

What Must be Reported (continued)

11. Information regarding activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement. (See instructions.)

a. Nature of activities performed or to be performed by the labor relations consultant pursuant to the agreement or arrangement:

PER SUADER ACTIVITIES: Select from the following reportable activities those which, per agreement with the employer(s) named in item 6, have been or will be performed:

- Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing a speech for presentation to employees
- Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing website content for employees
- Planning or conducting individual employee meetings
- Planning or conducting group employee meetings

- Training supervisors or employer representatives to conduct individual or group employee meetings
- Coordinating or directing the activities of supervisors or employer representatives
- Establishing or facilitating employee committees
- Developing employer personnel policies or practices
- Identifying employees for disciplinary action, reward, or other targeting
- Conducting a seminar for supervisors or employer representatives
- Speaking with or otherwise communicating directly with employees.
- Other

INFORMATION-SUPPLYING ACTIVITIES: Select each activity whereby you supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer:

- Supplying information obtained from:
 - Research or investigation concerning employees or labor organizations
 - Supervisors or employer representatives
 - Employees, employee representatives, or union meetings
 - Surveillance of employees or union representatives (electronically or in person)
- Other

Indirect Persuasion

Planning, directing, coordinating managers

Providing persuader materials

Providing seminar for supervisors

Developing/implementing personnel
policies or actions

Planning, Directing, Coordinating

Interviewing managers

Coaching communicators

Drafting campaign calendar

Planning meetings (group or one-on-one)

Providing Persuader Materials

Drafting any communication

DOES include any communication
developed for employees
(written, online, video, multi-media, etc.)

Does NOT include off-the-shelf
communications drafted

Providing Training (Seminars)

For supervisors or “other representatives”

How to conduct employee meetings (group & individual) – “object to persuade”

Strictly legal advice NOT reportable (TIPS vs. FOE – can you really separate them?)

NOT multi-employer, public seminars

Personnel Policies or Actions

Policy to change someone's opinion –
“object to persuade”

Union-free statement, always – other
policies case-by-case

Targeting individual employee based on
union support

“Exempt” Agreements

No “object to persuade”

Counsel *exclusively* on legally permitted communication, legal compliance

Review of communication (vs. drafting)

Seminars that don’t train attendees on “anti-union tactics or strategies” for use by supervisors or representatives

“Exempt” Agreements (continued)

Surveys, vulnerability assessment for “union proneness” (push surveys DO trigger)

Off-the-shelf (OTS) material (custom, or choosing most persuasive DO trigger)

Associations can provide OTS materials or newsletters for all members (customization, newsletter to employees DO trigger)

The Ugly

DOL position: report *all* labor advice (even *non-persuasion*) in year report triggered

8th Circuit (*Rose Law Firm*) says only report persuader activity; 4th, 5th, 6th and 7th Circuits agreed with DOL position in past

DOL says LM21 form revised in September 2016

Am I Covered?

Applies to any outside consultant or attorney

Not limited to labor relations experts
(could be PR, benefits, government affairs)
– trigger is “object to persuade”

Does NOT apply to a bona fide employee

Other New Stuff

Electronic filing

Checklist for detailing activities

Employer must provide EIN number

When Is It Effective?

Any agreement entered on or after
July 1, 2016

Stay tuned... litigation will happen, will
request injunctive relief

ABA, US Chamber, many associations have
objected to the rule

What Should I Do?

Remember *Hitchhiker's Guide* (Don't Panic)

Watch litigation – look for injunction

Ask your law firm/consulting firm about their plan (file during litigation?)

Involve your GC, CEO in discussing *your* plan – it is a criminal statute (fine, prison)

Takeaways

- 1 Indirect Persuasion Triggers**
- 2 July 1, 2016 Effective Date**
- 3 Surveys, Seminars, OTS OK**
- 4 Stay tuned... We will**

Questions?

Set up a strategy call:

Call Tammy at 800-888-9115 to set up a time to talk with Phil

Also... no time like the present if you are considering custom CITC, orientation or campaign videos, etc.