



Overview/Summary

Persuader Agreements: Ensuring Transparency in Reporting For Employers and Labor Relations Consultants

“Our nation is stronger when prosperity is broadly shared. And as we’ve seen throughout our history, one necessary ingredient of shared prosperity is working people banding together and raising their voices.”

– Secretary of Labor Thomas E. Perez

Our nation is continuing to recover from the worst recession in generations, with an economy that created 14.3 million jobs over 72 months, and the longest streak of private-sector job growth on record.

But while productivity has increased, real wages are not climbing fast enough, and far too many families are finding it hard to get ahead. That’s a problem for all of us, as our nation is stronger when prosperity is broadly shared. And shared prosperity is easier when working people are able to band together and raise their voices. That’s why workers sometimes start organizing to join unions. We have rules promoting both employer and union transparency in that organizing process, which helps employees make well-informed decisions about union representation.

Some employers hire labor relations consultants to develop and implement their message in union organizing campaigns. Workers need to understand the source of the views, materials, and policies that are being used to influence their decisions so they can make the best, informed decisions about whether or not to be represented by a union or support its collective bargaining positions.

That’s where the Persuader Final Rule comes in, realigning the Department’s regulations with the text of a law passed by Congress, the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). This Final Rule requires that employers and the consultants they hire file reports not only for *direct* persuader activities – consultants talking to workers – but also for *indirect* persuader activities – consultants scripting what managers and supervisors say to workers. Workers often don’t know that their employer hired a consultant to manage its message in union organizing campaigns, including by scripting speeches by managers, talking points, letters, and other documents. Consultants may also direct supervisors

to express specific viewpoints that don’t match those supervisors’ actual views as individuals – something workers may find relevant in assessing the information they receive from their supervisors.

This Rule does not prohibit employers from hiring consultants or constrain them in what information they can provide; the Rule simply ensures that employees are given more information about the source of campaign material, which helps them make a more informed choice in exercising their rights.

Background: The LMRDA and the Advice Exemption

The LMRDA requires labor organizations, consultants, and employers to file reports and disclose expenditures on labor-management activities. This law was meant to prevent abuse, corruption, and improper practices by labor organizations, employers, and labor relations consultants alike.

The LMRDA requires two sets of parallel reports: (1) labor organizations must report a wide array of financial information, including, for unions that are organizing workplaces, information on how much they spend on organizing campaigns; and (2) employers who hire labor relations consultants to persuade employees one way or another on organizing and bargaining issues must also report these relationships, including how much they spend on these activities. The law specifically says that it applies to both direct and indirect persuader activities, but for a long time the Department’s rules implementing this law allowed employers to avoid reporting on indirect persuader activity.

The law also provides that employers do not have to file reports when they hire a consultant just to get “advice.” The Department’s previous reporting

guidance defined “advice” to include “indirect” persuasion, thus exempting all consultant activities unless a consultant had direct contact with employees. That created a huge loophole where employers could hire consultants to create materials, strategies, and policies for organizing campaigns – and could even script managers’ communications with employees – without disclosing anything.

Employers have taken advantage of this loophole. Although 71 to 87 percent of employers hire consultants to manage counter-organizing campaigns, the Department has received very few reports on these activities because employers deemed them to fall under the “advice” exemption, as it had been defined. Workers weren’t getting important information about who was behind the messages that they were receiving.

What’s in the Persuader Rule

The Persuader Rule requires employers and their hired consultants to report when the consultants directly persuade workers or when the consultants in one of the following four categories:

- 1) Plan, direct, or coordinate managers to persuade workers;
- 2) Provide persuader materials to employers to disseminate to workers;
- 3) Conduct union avoidance seminars; and
- 4) Develop or implement personnel policies or actions to persuade workers.

Under the Persuader Rule, as examples, employers and consultants will have to report any of the following activities: planning or conducting employee meetings; training supervisors or employer representatives to conduct meetings; coordinating or directing the activities of supervisors or employer representatives; establishing or facilitating employee committees; drafting, revising or providing speeches; developing employer personnel policies designed to persuade employees; and identifying employees for disciplinary action, reward, or other targeting.

The Persuader Rule still exempts agreements by which the consultant agrees to merely provide “advice” to the employer, defined as “recommendations regarding a decision or course of conduct.” The Rule also exempts any agreement that involves only the provision of legal services.

The Final Rule does not in any way prohibit employers from using consultants or limit their services. Consultants can provide employers the same services as they may currently provide, but consultants and employers must now file the appropriate reports disclosing the persuader activities.

The Final Rule does not affect attorney-client privilege. It only requires the disclosure of the identity of the client, the fee arrangement, and scope and nature of the persuader agreement in cases where the consultant has agreed to provide services *other* than legal services – specifically, to take action with the intent to persuade employees regarding union representation or collective bargaining. This basic information is not privileged. Section 204 of the LMRDA exempts from reporting “any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship, and has been construed to encompass all privileged communications, including legal advice.

The Final Rule builds from the Department’s previously proposed rule and responds to public comments received: clarifying what persuader activities trigger reporting (direct persuasion and four sub-categories of indirect persuasion: providing persuader materials; directing supervisors; developing personnel policies and actions; and presenting union-avoidance seminars) and when trade associations must report; removing from the reporting requirements employee surveys and union vulnerability assessments; and clarifying that “protected concerted activities” are not within the scope of “object to persuade employees.”

The Final Rule provides simple instructions for employers to fill out the required forms so employers can easily comply with the Final Rule – we estimate that it will only cost employers \$226.70 to fill out a form each year, which will provide workers with valuable information. The Department estimates that we will receive almost 4,200 reports from consultants and almost 2,780 reports from employers annually under the Final Rule.

The Bottom Line: More Information, More Informed Voters, Better Decisions

The Final Rule gives workers the information that they need to decide how to exercise their voice and cast their votes. It will provide new clarity to workers and the public. The Final Rule refreshes an outdated interpretation, putting in place a simple, commonsense reporting requirement for when employers pay for persuader services during union organizing efforts. The rule in no way limits what employers or consultants can say. It just means that workers will know who is saying what. The law already requires reporting by unions about their expenditures, including expenses on union organizing campaigns, and makes that information public. More information means more informed decisions and that means a system of workplace democracy that works.