

## Publications

### *Labor and Employment Alert: New Persuader Rule Alters Employers' Reporting Obligations*

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The U.S. Department of Labor (DOL) issued its new persuader rule yesterday. The final rule is largely unchanged from the proposed rule that was **originally published** in 2011. As expected, the DOL's new interpretation departs from decades of precedent to expand the definition of "persuader" activities while limiting the definition of "advice" activities.

As a result of this new rule, 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.

Historically, employers were only required to report to the DOL after engaging third parties (e.g., consultants or attorneys) during a union organizing campaign if the third parties directly communicated or met with employees. Agreements or payments to entities or individuals providing advice to employers on how to communicate with employees did not need to be reported.

The new rule continues the requirement that employers report when the consultants or attorneys the employer hires directly persuade workers. But it goes further to require that employers also report when the work of the consultant or attorney has an "object" to persuade, even if there is no direct contact with employees and even if the employer is free to disregard the consultant's or attorney's recommendation. This latter form of "indirect" persuasion can fall into one of the following four categories:

1. Planning, directing, or coordinating managers to persuade workers;
2. Providing materials to employers to disseminate to workers;
3. Conducting seminars for supervisors or other employer representatives; and

4. Developing or implementing personnel policies, practices, or actions to persuade workers.

A partial list of the types of engagements the DOL will now treat as reportable, indirect persuader activity includes:

1. Planning group or individual employee meetings;
2. Training managers or supervisors to conduct group or individual employee meetings;
3. Drafting, revising, or providing speeches, written material, website, audiovisual or multimedia content for distribution to employees;
4. Establishing or facilitating employee committees;
5. Coordinating the timing and sequencing of union avoidance tactics and strategies.

The DOL left the proposed rules substantially intact despite receiving comments that it could infringe on employers' First Amendment rights and the attorney-client privilege.

The rule will become effective on April 25, 2016 and will be applicable to arrangements, agreements, and payments made on or after July 1, 2016. There are likely to be legal challenges to the rule, but whether those will block or delay the rule is unknown.

If you have questions about the new rule, contact your Vorys attorney. In addition, the [Vorys on Labor](#) blog may be of interest if traditional labor relations developments from the DOL or the National Labor Relations Board have a particular significance to you or your company. If you would like to receive posts from Vorys on Labor in your inbox, [sign up here](#).