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Groundhog Day? The U.S. Department of Labor Revisits Its Union Reporting Rule

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Toward the end of the Obama administration in 2016, the U.S. Department of Labor (“DOL”) revised the Labor Management Reporting Disclosure Act of 1959 (“LMRDA”) “persuader” disclosure rules to broaden the number of companies, labor consultants, and individuals who were required to file LMRDA disclosure paperwork. These 2016 changes were blocked by a permanent nationwide injunction before they could go into effect. As first reported by Bloomberg Law, it seems the current DOL is reconsidering a return to this 2016-era change.

Why should employers care?
The LMRDA is a U.S. labor law that regulates labor unions' internal affairs and their officials' relationships with employers. For over 50 years, this law has required employers, labor consultants, and lawyers to file public disclosures when they engage in certain activities or communications with employees. Essentially, reporting is required for persuasive and direct communications between consultants (including attorneys) and employees and also indirect communications that do not fall under the broad definition of the “advice exception.” Section 203(c) of the LMRDA exempts the reporting of “advice” to employers. This “advice exemption” includes legal services by lawyers that do not involve direct communications with employees and that an employer is free to accept or reject.

In 2016, the DOL announced final regulations narrowing the LMRDA Section 203(c) “advice exemption” and expanding reporting obligations. In short, the revised rule required an employer and its consultants (including attorneys) to report all arrangements in

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which an object of the services being performed, whether directly or indirectly, was to “persuade” employees regarding unionization. This substantial change to the “advice exemption” meant, in essence, that an employer would have to report almost all activity, even where legal advice is given. Countless employers, lawyers, and interest groups were concerned about this required reporting of what is currently accepted as legal advice. However, the rule was blocked before it ever took effect, and the status quo from 1959 remained in place.

To fulfill its stated pro-labor agenda, the Biden DOL has signaled it may reinstate the 2016 revised persuader rules or even articulate new modifications, making union organizing campaigns more difficult for employers. If implemented, this broad interpretation would have a drastic impact on the confidential nature of the attorney/client relationship, as it would expand the types of union-related activities that would trigger reporting requirements from both employers and law firms. Both union and non-union employers should keep attuned to labor policy as it continues to develop and change under the Biden administration.

Stay tuned for additional updates as changes to this rule unfold under the Biden administration.