

Third Thursday –Crowell & Moring’s Labor & Employment Update

June 23, 2016

The webinar will begin shortly. Please stand by.

Today's Presenters



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What Employers Need to Know About the Obama Administration's Labor Law Agenda

Today's Discussion

- The DOL's New "Persuader" Rule
- An NLRB Update:
 - Continued hostility toward mandatory arbitration
 - The new joint-employer standard (BFI)
 - The "Ambush Election Rules" - one year later
 - The General Counsel's search for test cases

The LMRDA Persuader Rule

- The “old” Advice exemption was a bright-line rule
 - only direct communication with targeted employees triggered reporting obligation
- Final Rule greatly expands scope of reportable persuader activity
 - Now both direct and indirect activities must be reported
 - Focus is on whether activity has an object to persuade employees as rights to organize or bargain collectively

What is Reportable under the New Rule?

- Direct Communications
- Four additional non-direct areas
 - Planning, directing or coordinating supervisors or managers with object to persuade
 - Providing or revising persuader materials
 - Conducting Union Avoidance Seminars
 - Developing/implementing personnel policies with object to persuade

What Remains Non-Reportable?

- Pure legal advice
- Developing general personnel policies unrelated to potential union representation
- Purchase and use of stock, off-the-shelf campaign materials
- Representing an employer in collective bargaining negotiations

Reporting Mechanics

- **LM-20 (Consultant Form)**
 - Identity of employer, date of agreement, type of services provided, copy of agreement
 - Required 30 days after entry of agreement
- **LM-10 (Employer Form- Part C)**
 - Part C largely mirrors LM-20 information)
 - Annual filing 90 days after fiscal year end
- **LM-21 (Consultant Form triggered by LM-20)**
 - Fees re persuader activity and labor relations advice for all employers
 - Annual filing, but obligation currently on hold

Enforcement Date & Penalties

- Final Rule “effective” April 25, 2016
- Applies to agreements/arrangements made on or after July 1, 2016
- DOL guidance: does not apply to agreements that predate July 1, 2016, or related payments
- Legal challenges to the Final Rule pending
- Criminal and civil penalties for failure to file

The Practical Impact of the New Rule?

- Employers and consultants must assess their existing relationship
- Determine whether the arrangement should change (what work will/will not be performed in the future)
- Review internal accounting and reporting protocols for tracking purposes
- Keep abreast of DOL's enforcement position and the status of legal challenges

NLRB & Mandatory Arbitration

- NLRB remains hostile to mandatory arbitration
- *D.R. Horton* holds that mandatory arbitration agreements with class action waivers violate Section 7 of the NLRA
- NLRB reaffirmed *D.R. Horton* ruling in *Murphy Oil* despite Fifth Circuit's rejection

NLRB & Mandatory Arbitration

- NLRB continues to bring cases.
- Effect of explicit “carve out” language
- *Lewis v. Epic Systems* - a breach in the levee?

The Impact of *Browning Ferris Indus.*

- *BFI* expanded scope of entities that can be considered a joint employer
- Indirect or potential control can create joint-employer liability
- *BFI* appeal pending in the D.C. Circuit
- Employers should assess existing relationships and underlying contracts

The Ambush Election Rules

- The Process
 - Electronic filing of petitions
 - Excelsior List w/2 days of direction of election
 - Pre-election hearing 8 days after petition
 - Post-election hearing begin in 14 days
 - Post hearing briefs typically denied
 - No automatic stay for challenge to RD decision

The Impact of the Ambush Election Rules

- New Rules for NLRB Elections
 - Time to election has decreased.
 - 24 v. 38 days (petition to election)
 - 35 v. 50 (petition to certification)
 - 34 v. 64 (directed election cases)
 - Union win rate the same – about 70%
 - Slight increase in RC petitions 2144 v. 2141.

Potential NLRB Test Cases

- Cases in the Unionized Setting:
 - Reexamining withdrawal of recognition
 - Impasse based on a single issue deadlock
- Cases in Non-Union Setting
 - Applying *Weingarten* principles
 - Independent contractor misclassification as a violation of Section 8(a)(1)
 - Extending *Purple Communications*

Selected Authorities and References

- *Final DOL Rule* (LMRDA Section 203(c)), 81 Fed. Reg. 15924 *et seq.* (Mar. 24, 2016)
- DOL Compliance Video:
 - <https://www.youtube.com/watch?v=5pdSJ8R3NhY&feature=youtu.be>
- *Final NLRB Rule on Representation Case Procedures*, 79 Fed. Reg., 74308 *et seq.* (Dec. 15, 2014)
- *Browning Ferris Indus.*, 362 NLRB No. 186 (Aug. 27, 2015).
- *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013)

Selected Authorities and References

- *Murphy Oil*, 361 NLRB No. 72 (2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015)
- *SolarCity Corp.*, 363 NLRB No. 83 (Dec. 22, 2015).
- *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).
- *Lewis v. Epic Systems Corp.*, No. 15-2997, --- F.3d ----, 2016 WL 3029464 (7th Cir. May 26, 2016).
- *Associated Builders and Contractors of Texas Inc. et al. v. NLRB*. No. [15-50497](#) (5th Cir., June 10, 2016)

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