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## DOL Proposes Increased Reporting of “Persuader Activity” under the LMRDA

*On June 21, 2011, the DOL proposed significant revisions to the “persuader” regulations under the LMRDA. The proposal would substantially expand current reporting and disclosure requirements for employers and their labor relations consultants.*

### Background

Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ([LMRDA](#)) requires employers and others to annually report so-called “persuader activity” to the Department of Labor’s Office of Labor-Management Standards (DOL). Employers and their labor relations consultants must disclose any agreement or arrangement between them where an object of the agreement, directly or indirectly, is to:

- Persuade employees about exercising their rights to organize and bargain collectively; or
- Supply the employer with certain information about employee or union activities in connection with a labor dispute.

Employers must report these agreements or arrangements annually on Form [LM-10](#) (*Employer Report*). Their consultants must file a separate Form [LM-20](#) (*Agreement and Activities Report*) for each such agreement or arrangement within 30 days after entering into it, and a Form [LM-21](#) (*Receipts and Disbursements Report*) for each year in which the consultant made or received payments as a result of a reportable agreement or arrangement. In addition to information related to persuader activity, the LM-21 report must also disclose receipts from all employers for labor relations advice and services as well as disbursements made in connection with those services, regardless of whether they relate to persuader activity. Once filed, LMRDA reports are publicly available.

***BUCK COMMENT.*** *Because employers are also required to report matters unrelated to persuader expenditures or agreements on Form LM-10 (including certain payments to unions and individuals affiliated with unions), employers that have not engaged in persuader activities may still have to file this form.*

The LMRDA provides an important “advice exception” to the reporting requirements. Section 203(c) states that neither an employer nor a consultant is required to file a report covering consultant services “by reason of his giving or agreeing to give advice” to the employer, or by reason of representing an employer before a court, administrative agency, arbitral tribunal, or in collective bargaining. Under the DOL’s long-standing interpretation

of “advice,” employer-consultant arrangements are excluded from reporting if the consultant (often an attorney) did not have direct employee contact and only provided oral or written advice or materials to the employer (or its supervisors) which the employer could decide to accept or reject in connection with its persuader activities.

## The Proposed Regulations

On June 21, 2011, the DOL [proposed](#) significant revisions to the LMRDA persuader regulations that would narrow the advice exception and substantially expand currently required reporting and disclosures by employers and their labor consultants. The proposed regulations would limit the definition of “advice” for purposes of the exemption from reporting requirements to “an oral or written recommendation regarding a decision or a course of conduct.” Examples of consultants’ activities that would fit within the advice exception include counseling employer representatives on what they may lawfully say to employees, ensuring a client’s compliance with the law, or providing guidance on National Labor Relations Board practice or precedent.

The proposed regulations would expand the definition of persuader activity to include consultants’ actions, conduct or communications on behalf of an employer that are designed to directly or indirectly persuade employees on organizing or collective bargaining matters regardless of whether there is direct employee contact. Examples of activities that currently fall within the advice exception but would be reportable under the revised regulations, if designed to persuade employees, include:

- Preparing or providing materials such as speeches, letters, audiovisual or multimedia presentations, or website content for the employer’s distribution or delivery to employees;
- Coordinating or directing supervisors’ or employer representatives’ activities;
- Training supervisors or other employer representatives on conducting employee meetings;
- Developing or administering employee attitude surveys concerning unions;
- Developing or revising personnel policies or practices; and
- Drafting or implementing other employer policies that have an object to persuade employees.

If a consultant undertakes reportable persuader activities and also provides “advice” pursuant to an agreement or arrangement, the exemption would no longer apply and information for the entire agreement or arrangement would have to be reported. The regulations would, however, retain a reporting exemption for agreements that exclusively provide for representation before a court, administrative agency, arbitration tribunal, or in collective bargaining.

The proposed regulations would also expand the reporting obligation for “supplying information” activities. Such information would include information the consultant or attorney obtains from the following sources: supervisors or other employer representatives; employees, employee representatives, or union meetings; surveillance of

employees or union representatives (including monitoring internet activity); or the consultant's own research or investigation concerning employees or unions.

The DOL proposes revisions to the LM-10 and LM-20 reporting forms to reflect the proposed changes in the persuader regulations and require expanded reporting detail on employer-consultant agreements and arrangements. Although the DOL proposal would require electronic filing, the revised forms (and instructions) include a process for filers to seek a temporary or continuing hardship exemption from the requirement.

## Conclusion

The proposed regulations represent a substantial shift in the DOL's long-standing interpretation of the LMRDA persuader regulations. The narrow interpretation of the advice exception, as proposed, would significantly increase reporting and disclosure obligations for employers, labor consultants, and law firms that counsel employers on union issues. Because the broader definition of persuader activities may impact existing attorney-client relationships and potential criminal penalties may attach for noncompliance with LMRDA requirements, employers may wish to review these issues with their counsel.

In response to public commenters, the DOL has now extended the deadline for comments on the proposed rule until September 21, 2011. While we await final rulemaking, employers should consider whether they would have adequate supervisory training and employee communications materials, appropriate labor relations policies, and adequate systems in place to deal with the DOL's revised persuader rules.

Buck's consultants would be pleased to discuss the potential impact of the proposed changes on your labor and employment policies and practices.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*