



The “Persuader” Rule A Critical Deadline Approaches

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- The PowerPoint presentation will be available on our website at Foley.com in the next few days or you can get a copy of the slides in the Resource List widget.

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Introduction

■ Who we are



Kevin Hyde
Jacksonville, FL



Greg McClune
San Francisco, CA

- Purpose of this webinar
- Why time is of the essence

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What is the “Persuader Rule”?

- The “Rule” is issued by the Office of Labor-Management Services (“OLMS”) in the federal Department of Labor (“DOL”)
- The Rule determines what is “persuader activity” performed by a consultant (including an attorney) for an employer
- When there is an agreement to perform persuader activities both the employer and the consultant/attorney must file detailed, written reports with OLMS
- The Public has access to these reports
 - Includes employees and unions
- The employer and the consultant must retain records for five years

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Consequences for Employers Who Do Not Report

- What are the consequences for employers who do not report?
 - “Personal responsibility” for accurate reporting rests on the employer’s **CEO and CFO**
 - “Willful violations” can result in criminal prosecutions:
 - Fines of up to \$10,000;
 - One year’s imprisonment;
 - Or both
 - The Secretary of Labor can bring a civil action against “violators”, including seeking injunctions

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Consequences for “Consultants” Who Do Not Report

- What are the “consultant’s” consequences of not reporting?
 - Largely the same as the employer

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Consequences of “Persuader” Activity

- What are the consequences of a “consultant’s” performing “persuader” activity?
 - Must report the agreement for *that* employer, plus receipts and disbursements
 - But, must *also* report:
 - “receipts of any kind” and “disbursements of any kind”
 - From *any* employer for whom the consultant has performed “labor relations advice or services” **Section 203(b); Form LM-21**
 - Note: *Much broader* than “persuader activities”

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Consequences of “Persuader” Activity (2)

- Thus, when a “consultant” performs “persuader activity for one employer and then
- Provides non-persuader “labor relations advice” to a second employer (or multiple employers)
- Although the second employer does not have to report
- The consultant has to report detailed “receipts and disbursements” from the second employer.
- Must retain records for five years
- Information is made public

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Form LM-21 Reporting Requirements

- The “consultant” must report “labor relations advice or services on Form LM-21:
 - The names, addresses etc. of all covered employers
 - The receipts (i.e. cash) from the covered employers
 - The disbursements to “officers and employees” of the consultant

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The “Special Enforcement Policy”

- April 13, 2016 OLMS issued this Policy
- Until further notice OLMS does not require attorneys/consultants to file an LM-21
 - At least the portions relating to “labor relations advice or services”
 - Nor do the employer or the consultant have to retain records for that section
 - Usually for 5 years
- When will they start enforcing? Likely not until next Spring at the earliest.

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Changes with the New Rule

- What Changed with the New Interpretation (the “New Rule”)?
 - On March 24, 2016 OLMS published its new “Interpretation of the Advice Exemption”
 - At its simplest, before 3/24/16, a consultant did not engage in reportable “persuader” activity, unless he/she had **direct contact with “employees”**
 - The New Rule has created an extensive range of **indirect activities** that are now classified as “persuader activities”
 - Will refer to as “**Indirect Persuader Activities**”

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Changes with the New Rule

- Direct vs. Indirect Contact with “Employees”
 - Important to note that “employee” is precisely defined in the National Labor Relations Act.
 - So-called “statutory employee”
 - Thus, managers, supervisors, executives are *not* “employees”
 - Thus, under the old rule, so long as a consultant’s contact was with management, no reportable activity occurred.

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Indirect Persuader Activities to Report

- **What Indirect Persuader Activities Will Now Have to Be Reported? (All with an “object to persuade”)**
 - Drafting, revising or providing written materials for presentation to employees
 - Drafting etc. a speech for presentation to employees
 - Drafting etc. audiovisual/multimedia materials for employees
 - Drafting etc. website content for employees

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Indirect Persuader Activities to Report (*cont'd*)

- Planning/conducting individual employee meetings
- Planning/conducting group employee meetings
- Training supervisors/employer representatives to conduct group employee meetings
- Coordinating or directing activities of supervisors or employer representatives

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Indirect Persuader Activities to Report (*cont'd*)

- Conducting seminars for supervisors/employer representatives
- Establishing or facilitating employee committees
- Developing personnel policies or practices
- Identifying employees for discipline, reward or other targeting

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Effective Date of the New Rule

- **“This final rule is effective on April 25, 2016. The rule will be applicable to arrangements and agreements as well as payments (including reimbursed expense) made on or after July 1, 2016.”**

– Federal Register Vol.81 No.57 p.15924

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Initial Interpretation of the “Effective Date”

- Rule applies to:
 - “Arrangements and Agreements” made on or after July 1, 2016
 - All payments made on or after July 1, 2016

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OLMS Seminar/Webinar “Interpretation”

- May 26, 2016 OLMS held a seminar
- Slide said: “Applicability of new Rule: to agreements and arrangements made on or after July 1, 2016, and *any transactions pursuant to those agreements*”
Our emphasis
- Commentary said: “Note, the new rule applies to agreements and arrangements made on or after July 1, 2016. The agreements and arrangements entered into before that date use the prior form and instructions of the advice exemption.”

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“OLMS Interpretation” Becomes Known

- By week of June 13, becoming aware of this new OLMS interpretation
- On June 14, 2016 Foley & Lardner LLP communicated with a high level OLMS employee and posed a series of specific questions
- On June 16 received a written response

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June 16, 2016 OLMS Response to F&L re. “Grandfathering”

- If employer’s agreement with “consultant” has effective date *before* July 1, 2016
- *And*, services would not have been reportable under the old Rule
 - i.e. Indirect Persuader Activities
- Such services are *not reportable*
 - Even though would be reportable if under post 7/1/16 agreement
 - Even though they occur on or after July 1, 2016

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OLMS Response (*cont'd*)

- The “grandfathering” covers a “multiyear agreement”
- Provided agreement entered into before July 1, 2016
- And remains continuously in effect

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Notable Aspects of the “OLMS Interpretation”

- Does not matter when the agreement was entered into
 - So long as before July 1, 2016
- Could be June 30, 2016?
 - Apparently so

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Existing Agreement Questions

- Does the grandfathered exemption apply to services under an existing agreement which is **“modified”** to expressly add Indirect Persuader Activities?
 - Apparently “Yes”
- Does the grandfathered exemption apply to services under an existing agreement which is **“clarified”** to cover Indirect Persuader Activities?
 - Also apparently “Yes”

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Existing Agreements (*cont'd*)

- Does the grandfathered exemption apply to services under an existing agreement which **does not specifically** cover Indirect Persuader Activities?
 - In theory, yes, but less certainty
 - And more risk
- Does the grandfathered exemption apply to services under an existing **unwritten** agreement?
 - Again, in theory, yes, but becomes a question of proof and, therefore, much less certainty
 - And, again, more risk

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Existing Agreements (cont'd)

- There could be multiple agreements with multiple law firms (so long as they were all entered into before July 1, 2016)
- And multiple agreements with consultants.

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Advantages of Multiple Agreements

- Law firms may close
- Or may cease performing certain services
- Conflicts could arise preventing certain attorneys/law firms from representing a specific employer
- An employer may be driven to different law firms for budgetary reasons.
- Etc.

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One Certainty – Agreements On Or After July 1, 2016 Are Covered

- There may be some uncertainty about which agreements are grandfathered
- There is no uncertainty about agreements entered into after July 1, 2016
 - They *are* covered by the new rule
 - The range of reportable persuader activities for such agreements will be greatly expanded

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Status of Current Law Suits (Arkansas Case)

- *Associated Builders and Contractors of Arkansas et al v. Perez et al*, Docket No. 4:16-cv-00169 (E.D. Ark., filed Mar 30, 2016) Most Advanced Case
 - Complaint and docket – DOL has not yet filed an answer
 - Plaintiff’s Motion for Preliminary Injunction has been fully briefed
 - Hearing on 5/9/16
 - No ruling yet (belief there will be some decision before 7/1/16)

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Other Cases

- ***Labnet Inc. et al v. United States Department of Labor et al***
 - Minnesota
 - Plaintiff's Motion for TRO has been fully briefed, and oral argument was heard on 5/26/16. No ruling yet
- ***National Federation of Independent Business et al v. Perez et al*, Docket No. 5:16-cv-00066 (N.D. Tex., filed Mar 31, 2016)**
 - Texas
 - No motions filed

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What Can We Expect from the Lawsuits

- The Arkansas and Minnesota cases could have decisions of the injunctive relief before July 1, 2016
- (The OLMS interpretation of the effective date may have been designed to reduce that possibility)
- Significant range of possibilities
- If injunction granted, likely to affect all jurisdictions

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Next Steps

- We have developed language for a pre-July 1, 2016 agreement
- Could be a “clarification” of an existing agreement
- Could be characterized as an “addendum” to an existing agreement
- Since this is a client call, we will send to anyone on the call who requests it

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Next Steps Continued

- **Injunctive Relief and Other Court Action**
 - We will continue to monitor the existing cases and any future cases;
 - We will send out a Special Bulletin as soon as we have any news of substance
 - Will be sent to all clients on our Employment Law Update List

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Questions?



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