
Privileged and Confidential Communications Survive Upon Demise of Persuader Rule

By Kaitlin A. Brown

When employees band together to improve their working conditions in the private sector, they are engaging in protected concerted activities under the National Labor Relations Act, regardless of whether they are a member of an organized union.

Many efforts have been made to prevent employers from retaliating against employees who are engaging in such protected concerted activities. For example, the Labor Management Reporting and Disclosure Act of 1959 requires an employer and its attorneys or consultants to comply with certain reporting requirements when they engage in conduct intended to persuade employees to exercise or not to exercise their collective bargaining rights, and particularly when there is direct contact with non-management employees. On March 24, 2016, the Department of Labor issued the Persuader Rule, expected to be effective on July 1, 2016, in an effort to expand these reporting requirements and increase transparency of persuader activities, even when there is no direct contact with non-management employees.

The expanded reporting requirements under the Persuader Rule would have significantly impacted the attorney-client privilege with employer clients and the confidentiality of agreements between employers and other consultants. In particular, upon an attorney or consultant providing advice regarding policies, management, or employee disciplinary action, the Persuader Rule would have required full disclosure of the terms and conditions of the related agreement or arrangement, payments made as a result of such agreement or arrangement, and any receipts or disbursements on account of labor relations advice or services.

Due to the fact that the Persuader Rule applied only to agreements made on or after July 1, 2016, private employers felt a sense of urgency to enter into retainer agreements with law firms and other consultants prior to the anticipated effective date, so they could be grandfathered into the current disclosure requirements and

avoid the expansive requirements of the new rule. This sense of urgency was quelled with the issuance of a temporary injunction on June 27, 2016, preventing enforcement of the Persuader Rule. Now, any remaining concerns about the new rule may be set aside with the issuance of a permanent injunction on November 16, 2016 stating that the Persuader Rule is unlawful.

This means that employers may continue to seek advice to implement legally compliant personnel policies, evaluate appropriate promotion or disciplinary action for employees, and train management teams to properly supervise employees – without the heightened requirements for disclosure and even if the attorney or consultant has not been previously retained. The longstanding principles underlying the attorney-client privilege and confidential agreements with other consultants survive. Now is the time for employers to confirm that their policies are legally compliant and to train supervisors to enforce the policies implemented. Our employment law team at Maddin Hauser is available to assist in this regard.