CLIENT ALERTS & INSIGHTS

# Department of Labor Formally Kills Obama-Era Persuader Rule and Joint-Employer News

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*Obama-Era Persuader Rule is Finally Dead*

On July 17, 2018, the Department of Labor ("DOL") formally announced what has appeared inevitable since President Trump's election - the Obama-era "Persuader Rule" is officially dead.

The Persuader Rule was initially announced in 2016 when the DOL under President Obama revised its interpretation of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Historically, the LMRDA required employers to report relationships with labor relations consultants hired to persuade employees on organizing and bargaining issues, including money spent on activities. Under Section 203(c) of the LMRDA, indirect advice given to an employer is exempt from the reporting requirement. Thus, advice and materials provided to employers by outside counsel or consultants are not subject to such disclosures.

The new Persuader Rule expanded the disclosure requirement and required employers to report such advice that "indirectly persuades" employees under 203(c), as well. The revised rule aimed to prevent attorneys from providing advice during union election campaigns. However, before becoming effective, the new Persuader Rule was blocked by a temporary injunction in June of 2016 and a permanent injunction in November of 2016.

Following the election of President Trump, the likelihood of the administration defending the Persuader Rule in court appeared slim. In June of 2017, the DOL published a notice of proposed rulemaking to determine whether the Persuader Rule should be rescinded. In its announcement on July 17, 2018, the DOL concluded that the "reporting requirements in effect are the requirements as they existed before the Persuader Rule." Although the DOL had previously left open the possibility of issuing a new interpretation of Section 203, it determined that "finality" was appropriate instead. Thus, the DOL confirmed that indirect advice provided to employers regarding organizing and bargaining issues are not subject to disclosure.

*McDonald's Settlement with NLRB Rejected*

In other labor developments on July 17, a National Labor Relations Board ("NLRB") judge rejected a proposed settlement that would have resolved consolidated unfair labor practice complaints against McDonald's franchisees and McDonald's USA as an alleged joint-employer. The rejected settlement is just the next chapter of the on-going joint-employer saga before the NLRB stemming from the controversial *Browning-Ferris Industries* decision reached in 2015 that rewrote the joint-employer standard.

The McDonald's case dates back to December of 2014 when the NLRB issued complaints against a number of franchisees and McDonald's USA as joint-employer. In March of 2018, after the NLRB vacated its December decision in *Hy-Brand*, which reversed *Browning-Ferris* (see *Hy-Brand* bulletin from Dec. 15, 2017 and Feb. 27, 2018 bulletin reinstating *Browning-Ferris*), McDonald's announced that it settled the charges with the NLRB pending approval from the judge.

On July 17, that approval was denied as the judge found the arguments in favor of settlement "inadequate." The settlement did not include an admission from McDonald's USA that it was liable as a joint-employer, which was targeted as a reason for the rejection. Judge Lauren Esposito stated that the settlement did "not begin to approximate" the effects of a joint-employer liability finding if the case had been argued to final judgement. Judge Esposito continued that McDonald's obligations under the settlement were not comparable to potential joint and several liability.

While the broad *Browning-Ferris* standard remains the current authority on joint-employer liability after the decision to vacate *Hy-Brand*, numerous efforts are underway to vacate the test. The Save Local Business Act was passed by the House of Representatives and is pending in the U.S. Senate (see bulletin from Nov. 15, 2017). Current NLRB Chairman John Ring announced in early May that the NLRB plans to address the joint-employer test through administrative rulemaking. *Browning-Ferris* is actually pending on appeal before the D.C. Circuit, as well. And at least two joint-employer cases are currently in the administrative system and moving towards the NLRB.

While the failed settlement for McDonald's is another piece of the joint-employer story, the book on the *Browning-Ferris* test is far from over.

**For more information on this decision, contact a member of Benesch's Labor & Employment Practice Group.**

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