Published on *The National Law Review* https://www.natlawreview.com

Federal Government Continues Initiatives to Limit Employer Opposition to Union Organizing

Article By:

Donald S. Krueger

The United Stated Department of Labor Office of Labor-Management Standards ("OLMS") recently signaled an alarming willingness to use its broad subpoena powers under Section 601 of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 521 ("LMRDA" or "Act"), to examine records of explicitly lawful conduct by employers whose employees may be seeking to unionize. This effort maybe a precursor to OLMS's plan to significantly expand employer reporting and disclosure obligations under Section 203 of the Act which requires employers and labor consultants who engage in certain activities to persuade employees about their union activities or to supply information to employers to file reports of their expenditures for these purposes, which reports in turn would be made available to the public. This would represent a significant change as the LMRDA currently exempts employers from reporting payments or expenditures by or to its own officers, supervisors, and employees.29 USC §433(e)

Despite the LMRDA's plain language, the OLMS began an investigation into Starbuck's lawful payments to its own employees and manager as a potential LMRDA violation and issued a Subpoena seeking, in part, "… records of receipts, disbursements, and bonus records relating to certain

expenditures Starbucks may have made during fiscal years 2020 and 2021 in response to a union organizing campaign in Buffalo, New York. The DOL argued that these documents were relevant to OLMS' investigation as to whether Starbucks failed to file a financial disclosure report on those expenditures. (*Id*). As the OLMS Director candidly acknowledge in a recent blog post sarcastically titled "Subpoenas 101" , the agency historically has not issued subpoenas in connections with OLMS investigations. Starbucks refused to comply with the Subpoena and OLMS brought an action to enforce the Subpoena in the federal district court in Seattle, Washington in *Su v. Starbucks Corp*., Case No. 2:23-mc-00045-LK (U.S. Dist. Court for the District of Washington).

Starbucks opposed the Petition and moved to quash the Subpoena, arguing that the LMRDA does not require reporting by an employer of monies paid to its regular officers, supervisors and other employees for their services which Congress exempted from disclosure under Section 203(e) of the LMRDA ,29 U.S.C. Section 433 (e), and therefore OLMS could not be investigating unlawful conduct or that OLMS action constitutes a change in policy, which violates the LMRDA, the Administrative Procedures Act and the First Amendment.

The OLMS argues that Section 601 conferred broad investigatory authority and that Starbucks "put the cart before the horse" in arguing the substantive reporting requirements instead of the OLMS's investigatory powers to issue investigatory subpoenas. OLMS also argued that (i) any expenditures for travel paid to third parties, such as hotels or airlines, or payments to a third party to create a website used to communicate to employees, are not subject to the Act's limitations on employer payments to itself, or its officers, supervisors and employees. The OLMS also argued that bonus paid to managers who travelled to Buffalo were not being for their regular services and thus outside of the LMRDA exemption for such payments.

The Court enforced the OLMS Petition focusing solely on the agency's power to issue subpoenas and making short shrift of Starbucks substantive arguments, holding "If OLMS ultimately determines that Starbucks was required to produce reports, then Starbucks may argue that this requirement is a departure from previous policy. But for the purposes of enforcing a subpoena any argument that OLMS changed its reporting requirements is irrelevant."

This is not the first time that the DOL has sought to use its authority to exert pressure employers from engaging in what the DOL considers anti-union activities. As we have previously advised our readers, in 2016, the DOL issued a rule which, among other things, required employers and their advisors (including outside lawyers and consultants) for the first time to file public reports with the DOL disclosing their relationship, including amounts paid/received, for any advice that "indirectly persuades" employees regarding union organizing or collective bargaining.

In 2018, the DOL rescind its ill-advised rule, but as OLMS Director Jeffrey Freund recently foreshadowed efforts to ramp up scrutiny of employer expenditures, in a series of blogs. In a September 15, 2002 blog titled "How We're Ramping Up Our Enforcement of Surveillance Reporting" Director Freund wrote:

In an earlier blog post, I reminded everyone that there was an "M" in the LMRDA (the Labor-Management Reporting and Disclosure Act) for a reason. The statute requires reporting …on considerably more than their persuader activities. …"[A]ny expenditure, during the fiscal year, where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is **to obtain information concerning the activities of employees or a labor organization** in connection with a labor dispute involving such employer..." LMRDA employer and consultant reporting is not limited to

expenditures and activities occurring during a union organizing campaign. “Any controversy” means what it says – if there is a dispute between management and two or more employees acting together about any employment-related matter, expenditures incurred by employers to “obtain information about” employees’ activities concerning that dispute, and arrangements with consultants to do the same, are reportable. (emphasis added)

In addition to the DOL’s recent enforcement activities and blog posts, the OLMS has a work sharing agreement with the National Labor Relations Board to share information, collaborate, and coordinate on investigations of potential violations of federal labor and employment laws. *Su v. Starbucks* provides insight into this relationship, as OLMS relied on testimony elicited during an NLRB hearing to support its inquiry into Starbucks expenditures of money.

With the most recent court action and blogs, the OLMS appears to be making good on its promise to take the labor or “L” out of the LMRDA and rewrite the statute to focus on the “M” or management.

©2024 Epstein Becker & Green, P.C. All rights reserved.

National Law Review, Volumess XIII, Number 311

Source URL:https://www.natlawreview.com/article/federal-government-continues-initiatives-limit-employer-opposition-union-organizing