

Federal Court Halts the Enforcement of the Department of Labor’s “Persuader Rule”

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On June 27, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction barring enforcement of the U.S. Department of Labor’s (“DOL”) new “persuader rule,” which as of July 1 would have imposed substantial reporting obligations on labor lawyers and consultants advising employers on union matters. As a result of the injunction, enforcement of the rule’s reporting requirements will be stayed until the District Court issues a further order on the matter.

The dispute regarding the “persuader rule” stems from a change in the DOL’s interpretation of the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”). The LMRDA requires that any person who “undertakes activities” to persuade employees, directly or indirectly, whether or not to exercise their union organizing rights must report the activities undertaken, payment received, and agreements with the employer to the DOL. However, the LMRDA provides a broad exemption for “advice” given to an employer. Since 1962, the DOL had interpreted the “advice” exemption broadly, and did not require most attorneys and consultants to disclose their efforts to assist employers as long as they did not directly interact with employees. In 2011, the DOL proposed a new interpretation of the LMRDA, under which activity that the DOL previously deemed “exempt,” such as providing material to employers for dissemination to employees, conducting seminars for management, and developing policies for the employer to implement, would be considered “indirect” persuasion activity that would trigger the reporting requirement. Only “purely technical” advice would fall under the exemption. Further, where an attorney or consultant provided a mix of “persuader” advice and “technical” advice, all advice and fees would have to be reported, whether it was “persuader” advice or not.

A group of business associations and states challenged the DOL’s new rule in the District Court, arguing that the DOL lacked statutory authority to promulgate and enforce the new rule and that the rule is arbitrary and capricious, unconstitutional, and violates the Regulatory Flexibility Act. At the preliminary injunction stage, the District Court found that the plaintiffs had a substantial likelihood of success on the merits of their claims and enjoined the DOL from enforcing the rule nationwide.

With the new interpretation on hold for the foreseeable future, attorneys and consultants are free to advise employers regarding union strategy without any reporting obligations, so long as they do not have direct contact with employees. The decision, however, does not mean that the persuader rule will never take effect. The District Court issued a preliminary injunction that merely maintains the status quo until it can decide the case on its merits. At that point, the District Court will either side with the plaintiffs and impose a permanent injunction or rule in favor of the DOL, in which case the rule will go into effect. Accordingly, employers should be proactive and consult with their labor attorneys and consultants to plan how they will comply with the rule should it go into effect.

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