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Court Blocks DOL Persuader Rule from Taking Effect

A Texas District Court has issued a preliminary injunction blocking the DOL from implementing and enforcing its new “persuader” rule on July 1. Under that rule, employers as well as their labor relations advisors would have been required to publicly disclose agreements and arrangements that have long been exempt from reporting under the Labor-Management Reporting and Disclosure Act. Unless overturned by a higher court, the nationwide injunction will stay in place pending a final resolution of the case or further court order.

Background

The so-called “persuader” rule requires employers and their labor advisors (including attorneys and consultants) to publicly disclose any agreement or arrangement to have those advisors persuade employees as to their collective bargaining and union organization rights, or obtain information concerning union or employee activities in connection with a labor dispute involving the employer. The Labor-Management Reporting and Disclosure Act ([LMRDA](#)) carved out an “advice exemption” to the rule, requiring reporting of such agreements and the amount paid under them only if the employer’s labor relations consultants and attorneys communicated directly with the employer’s non-supervisory employees. Indirect communications — such as speeches and scripts for supervisors’ use in dissuading employees from unionizing — were not reportable.

On March 24, the DOL issued a final persuader [rule](#) that significantly revises its long-standing interpretation of the advice exemption. The final rule, which became effective on April 25, imposes substantial new public disclosure obligations on employers and their attorneys and consultants. Under the new rule, employers and their labor advisors must report to the DOL both direct and indirect persuader activity with respect to union organizing and collective bargaining. The expanded disclosure requirement applies to arrangements, agreements and payments made on or after July 1, 2016.

Federal Judge Enjoins Final Rule

National, state and local business groups filed legal challenges soon after the DOL released its final persuader rule. On June 28, Senior District Court Judge Sam R. Cummings of the Northern District of Texas found in *National Federation of Independent Business et al. v. Perez, et al.* that the



plaintiff trade associations have shown a substantial likelihood that they will succeed on the merits on a number of grounds, and would be irreparably harmed if the final rule took effect. Concluding that “the new rule is defective to its core because it entirely eliminates the LMRDA's Advice Exemption,” Judge Cummings issued a nationwide preliminary injunction blocking its enforcement.

Among other things, the business groups claim that the final rule is arbitrary and capricious, violates the LMRDA and ignores 50 years of legal interpretation. Moreover, they contend that the final rule violates First Amendment guarantees of free speech and association, the due process clause of the Fifth Amendment, and the Regulatory Flexibility Act.

Comment. Federal courts in Arkansas and Minnesota are currently considering similar challenges to, and requests for injunctive relief from, the persuader rule. Unlike the trade association plaintiffs in the Texas case, the plaintiffs in the Minnesota case are law firms. On June 22, 2016, the Minnesota court denied the motion for a preliminary injunction in *Labnet, Inc. v. U.S. Department of Labor*. Although the court concluded that the plaintiffs are likely to succeed on their claims when the case is decided, it determined they did not face the substantial threat of irreparable harm needed to support a temporary injunction at this stage. The Arkansas court has not yet ruled in *Associated Builders and Contractors of Arkansas v. Perez*.

In Closing

The DOL's persuader rule, which would have gone into effect on July 1, is now on hold. The DOL is expected to appeal the Texas ruling. However, unless the Court of Appeals for the 5th Circuit or the Supreme Court reverses it, the nationwide injunction will stay in place until the merits of the case are resolved or the court orders otherwise.

Authors

Nancy Vary, JD
Abe Dubin, JD

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