Texas Federal Court Orders Stop to DOL's Persuader Rule

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On June 27, 2016, a Texas federal court granted a preliminary injunction preventing the Department of Labor (DOL) from moving forward on a nationwide basis with the July 1st enforcement of its Final Rule Interpretation of the "Advice" Exemption to Section 203(c) of the Labor Management Reporting and Disclosure Act (LMRDA) (also known as the DOL's "Persuader Rule"). The court order was based on findings that plaintiffs in the case of National Federation of Independent Business, et al. v. Perez, 5:16-cv-00066-C, were likely to succeed on the merits of their claims in establishing that the DOL's Persuader Rule is inconsistent with federal law and exceeds the DOL's statutory authority.

The LMRDA requires employers and labor relations consultants (including attorneys) to report certain agreements and arrangements (and payments made pursuant to such agreements/arrangements) under which a consultant performs activities that have "an object … directly or indirectly to persuade employees concerning their rights to organize and bargain collectively." The statute expressly exempts from its reporting requirements consultant activity that involves a consultant's mere giving of "advice" to the employer. The DOL historically has interpreted this LMRDA "Advice Exemption" as not requiring employers or consultants to report "indirect" consultant persuader activity – meaning activity in which the consultant works behind-the-scenes, but never directly communicates with employees. With the publishing of its new Persuader Rule on March 24, 2016, the DOL announced its rejection of the prior Advice Exemption interpretation and directed employers and consultants to begin reporting indirect persuader activities, including activities in which a consultant drafts or revises employer policies and communications, assists management in developing coordinated responses to organizing and collective bargaining, and/or conducts seminars or management training which assists the employer in developing anti-union strategies or action plans. Under the LMRDA reporting requirements, officers of employer and consultant companies are required to maintain necessary records to support DOL filings for at least 5 years, and are subject to criminal penalties and prosecution for false or incomplete reporting, or failure to file a required report as required under the DOL's rules.

The DOL's new Persuader Rule technically went into effect on April 24, 2016, but was scheduled to apply only to consultant agreements and arrangements made after July 1, 2016. This meant that starting July 1, 2016 employers and consultants faced increased reporting obligations requiring them to report all consultant agreements/arrangements, and activities and payments made pursuant to such agreements/arrangements. Consultants (including law firms) also were required to report on an annual basis all receipts and disbursements arising in connection with *any* labor relations advice or services rendered to employers without limitation to the consultant's "persuader clients." In other words, consultants (and law firms) that engaged in persuader activity for a *single client* would be required to report labor relations advice and services for *all clients* (even when no persuader activity was involved for those other clients).

The *National Federation of Independent Business* case is just one of three federal lawsuits pending in various jurisdictions seeking to prevent the DOL's Persuader Rule from taking effect. In this case interested business groups and ten states joined together to pursue an injunction against the DOL in the United States District Court in Northern Texas. The outcome of the case was influenced by expert testimony of labor attorneys, bar association representatives and business associations regarding the anticipated economic business costs of implementing the new reporting requirements, as well as concerns regarding restrictions on employer free speech rights and opportunities to obtain adequate legal representation for labor relations matters.

Based on the evidence presented, Senior District Judge Sam R. Cummings concluded that the DOL failed adequately to explain its reasoning for abandoning the prior, longstanding interpretation of the LMRDA Advice Exemption, and thus the DOL should not be afforded the usual deference in its agency interpretations. The Court found the DOL's Persuader Rule arbitrary, capricious, and an abuse of the DOL's discretion on the basis that the rule unreasonably conflicts with state rules regarding the practice of law, including attorney duties to protect client confidentiality, exercise independent professional judgment and render candid advice. The Court found the DOL's Persuader Rule imposes content-based burdens on employer First Amendment rights to express opinions regarding union organizing, and to consult and hire attorneys to speak on an employer's behalf. The Court found substantial likelihood that the plaintiffs would succeed on claims that the Persuader Rule is "void-for-vagueness" under the Due Process Clause of the Fifth Amendment. In the words of the Court, "[h]ere DOL replaced a long-standing and easily understandable bright-line rule with one that is vague and impossible to apply." The Court found there to be "a substantial risk that associations, employers and consultants, including attorneys, will not be able to determine with reasonable certainty whether their actions require reporting." Finally, the Court found substantial likelihood that the Persuader Rule violates the Regulatory Flexibility Act (RFA), on the basis that in promulgating the new rule the DOL "artificially excluded important costs of its implementation from consideration," including significant costs incurred by consultants in having to file annual reports detailing expenditures of their individual clients. The Court granted the plaintiffs' petition for temporary injunction, finding that the plaintiffs would suffer irreparable harm in absence of injunctive relief. With this decision the DOL is enjoined on a national basis from implementing "any and all aspects" of its Persuader Rule pending full resolution of the case merits or until further Court Order. The decision calls into serious question whether the DOL's Persuader Rule can be legally enforced. At a minimum, and assuming the injunction is not lifted by an emergency appeal, it will be many months (if not years) before the DOL can move forward with its new-found interpretation of the law.

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