WINSTON & STRAWN LLP

Federal District Court Blocks Persuader Rule

JUNE 28, 2016

On June 27, 2016, the U.S. District Court for the Northern District of Texas entered a nationwide preliminary injunction prohibiting the U.S. Department of Labor (DOL) from enforcing its "persuader" rule, finding that the rule likely infringes upon employers' rights to secure legal advice about union organization. *National Federation of Independent Business et al. v. Perez et al.*, No. 5:16-cv-00066 (ND Tex. June 27, 2016).

The rule in question was published by the DOL's Office of Labor-Management Standards (OLMS) earlier this year (after having been first proposed in June 2011). The so-called "persuader rule," requires public disclosure and reporting by employers and third-party advisors (including third-party labor relations attorneys or other consultants) of agreements or arrangements involving activities that may "persuade" employees concerning unionization and collective bargaining activities. Employers and consultants have long been required to disclose "direct persuasion" activities (i.e., those involving direct contact or communication with employees in an attempt to persuade them). The new rule significantly expanded these reporting obligations, however, and would have also required disclosure of a wide-range of "indirect persuasion" activities. *See* our client briefing, *DOL Issues Final Persuader Rule*.

Shortly after the rule was published, the National Federation of Independent Business, along with other Texas-based business groups, sued to block the rule, arguing among other things, that the new rule would deter employers from obtaining counsel to advise them on exercising their free speech rights in connection with efforts to persuade employees about their rights to organize or to bargain collectively. The groups argued this irreparable injury would violate their First Amendment rights. In addition, multiple states intervened as plaintiffs in the suit, including Texas, Arkansas, Alabama, Indiana, Michigan, Oklahoma, South Carolina, Utah, West Virginia, and Wisconsin.

In a 90-page opinion and order issued on June 27 (just days before the announced effective date of the new rule), district court judge Sam Cummings determined the plaintiffs were likely to succeed on their claims that the DOL exceeded its authority in passing the new rule. Judge Cummings determined that the DOL's rule nullified the LMRDA's exemption for advice and failed to provide notice to employers, lawyers, and consultants regarding the activities relating to persuasion that remain covered by the advice exemption. The judge determined, in effect, that employers and their consultants, along with unions, employees, government investigators, and prosecutors, would be left to "guess what activities with an object to persuade fall within the LMRDA's advice exemption." As a result, protected closed-door, confidential communications between attorney and client would be stymied or altogether unavailable. As Judge Cumming concluded, the "DOL's new rule is not merely fuzzy around the edges....Rather, the

new rule is defective to its core because it entirely eliminates the LMRDA's advice exemption." Finally, finding that the DOL would suffer no harm from delaying implementation, he ordered the DOL enjoined from implementing the rule until the matter is settled by the courts.

In his order granting injunctive relief, Judge Cummings enjoins the DOL "on a national basis from implanting any and all aspects" of the new persuader rule "pending a final resolution on the merits of this case or until a further order of this Court, the United States Court of Appeals for the Fifth Circuit or the United States Supreme Court."

2 Min Read

_____

Related Locations

| Charlotte | Chicago | Houston | Los Angeles | New York | Paris | San Francisco |

| Silicon Valley | Washington, DC |

Related Topics

| Department of Labor | U.S. Department of Labor |

Related Capabilities

| Labor & Employment |

Related Regions

| North America |

Related Professionals

Derek G. Barella

Shane Blackstone

Joan Fife

Aviva Grumet-Morris

Deborah S.K. Jagoda

Scott E. Landau

Laura Petroff

Michael Roche

Stephen Sheinfeld

Cardelle Spangler

William Sunkel

Emilie Woodhead