

NOVEMBER 17, 2016 | REGULATORY & GOVERNMENT OVERSIGHT

Texas Judge Blocks DOL Persuader Rule with Nationwide Permanent Injunction

✖ On November 16, 2016, a Texas federal judge permanently blocked the U.S. Department of Labor ("DOL") from enforcing its persuader rule in *National Federation of Independent Business, et al. v. Thomas E. Perez, et al.*, Case No. 5:16-CV-066-C. As we previously reported in a [prior post](#), when the DOL published the final rule in March 2016, it imposed substantial reporting obligations on employers. The old rule required disclosure of the use of an outside consultant if the consultant engaged in direct persuader activity, such as if the consultant directly communicates with employees about union representation. The new rule, however, added reporting for indirect persuader activities; for example, providing communication materials to an employer to hand out to employees. These types of activities typically, but not exclusively, arise in the context of a union organizing drive.

The DOL's insistence on imposing stricter reporting requirements on employers stems from what the DOL perceived as a loophole in the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"). The LMRDA requires labor organizations, consultants, and employers to file reports and disclose expenditures on labor-management activities. The law was designed primarily to prevent abuse, corruption, and improper practices by labor organizations, employers, and labor relations consultants. It requires two types of reporting: (1) labor organizations have to report a wide array of financial information, including information about how much they spend on organizing campaigns; and (2) employers, who hire labor relations consultants to directly persuade employees one way or another on organizing and bargaining issues, must disclose these relationships, including the amount of money spent on these activities.

However, Section 203(c) of the LMRDA does not require employers to report when they hire a consultant simply for advice, which is commonly referred to as the advice exemption. In the past, "advice" was interpreted as including "indirect" persuasion, relieving employers from reporting guidance they received from consultants regarding what to say to employees.

As a result, the new rule was quickly challenged by several plaintiffs in the U.S. District Court for the Northern District of Texas shortly after the rule was published. The plaintiffs claimed that the DOL's regulation violated the First and Fifth amendments, the Administrative Procedure Act, the LMRDA and the Regulatory Flexibility Act. In late June 2016, U.S. District Judge Sam R. Cummings issued a 90 page opinion entering a preliminary *nationwide* injunction barring DOL enforcement of the persuader rule. Based on the same reasons stated in his opinion granting the preliminary injunction, on November 16, 2016, Judge Cummings granted summary judgment to

Texas, nine other states, and several business groups that sought to invalidate the rule, and converted the preliminary injunction he issued in June into a permanent nationwide injunction blocking the rule's implementation.

He ruled that the DOL exceeded its authority in passing the rule, which requires labor relations consultants, including attorneys, to file disclosure reports specifying the nature of "persuader activities" undertaken with employers, because it is inconsistent with the LMRDA. Specifically, the DOL interpreted Sections 203(c) of the LMRDA, commonly referred to as the "Advice Exemption," to exclude attorneys and other consultants from having to report their assistance to employers regarding union organizing campaigns, so long as the attorney had no direct contact with employees and the employer was free to accept or reject any of the recommendations. But under the rule change, private and confidential communications between attorney and client would no longer be exempt, and attorneys and consultants would have to report such communications.

In ruling that the DOL's drastic change of interpretation of the LMRDA was arbitrary, capricious, and an abuse of discretion, Judge Cummings highlighted that the rule undermined the attorney-client relationship and unreasonably conflicted with state rules governing the practice of law. Moreover, Judge Cummings held that the new advice-exemption interpretation violates First Amendment rights to free speech and association and the Fifth Amendment right to due process. Specifically, the judge ruled that the DOL's interpretation imposed a content-based burden on speech about union organizing that did not survive strict scrutiny and was overly broad. Judge Cummings also found that the rule is unconstitutionally vague in violation of the Fifth Amendment's due process clause because its prohibitions were not clearly defined, and employers, consultants, and attorneys could not determine with reasonable certainty when their action would require reporting.

Now, armed with a permanent injunction from a federal judge, employers can take comfort in their engagement and discussion with labor consultants and attorneys regarding union organizing. Essentially, the ruling maintained the status quo, and employer discussions with consultants and attorneys will not trigger additional LMRDA reporting requirements.

The DOL did appeal the court's June 27, 2016 preliminary injunction order to the U.S. Court of Appeals for the Fifth Circuit. However, the good news for employers is that the case will not likely make it before the Fifth Circuit prior to the Trump Administration taking control. The odds that the Trump Administration will back this pro-union rule are quite slim. The DOL and the Department of Justice may take action over the next two months to attempt to salvage the regulation through a reversal of Judge Cummings' ruling or otherwise. However, the Trump Administration could put an end to the rule on its first day in office by instructing the Department of Justice to no longer defend the rule, and let the district court's ruling stand.