Insights, News & Events

EMPLOYERS ENJOY FIRST ROUND VICTORY: PERSUADER RULE BLOCKED!

Insights
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Describing the federal government's controversial persuader rule as "defective to its core," the United States District Court for the Northern District of Texas today blocked the rule in its entirety. Had it not been stopped, then beginning on July 1, 2016, the new rule would have forced attorneys and their clients to report in open records the details of their confidential attorney-client relationships, making it complicated for employers to seek legal counsel in opposing and dealing with unions.

Because the United States Department of Labor (USDOL) still aims to boost union organizing efforts by any means possible, we expect the government will appeal this setback. Nevertheless, employers today can celebrate a big victory, knowing they can conduct business as usual until further notice.

We are not only pleased with the outcome. We are proud to report that a partner of Fisher Phillips in Columbus, Ohio, was designated as an expert witness by the court at the hearing whose testimony was noted repeatedly in the court's written ruling.

Background: USDOL's Persuader Rule Tried To Tip The Scales In Favor Of Unions

We summarized the persuader rule in a March 23 Alert, but for those unfamiliar with it, here is a brief summary. The Labor Management Reporting and Disclosure Act of 1959 (LMRDA) requires labor relations consultants and their clients to file reports about arrangements to persuade workers to reject unionization. However, the statute expressly carves out mere advice.

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Due to this "advice exemption," USDOL's longstanding rule interpreting the statute has required reporting only in situations where employers engage consultants to persuade rank and file workers directly. Since 1962, USDOL has not attempted to regulate lawyers who offer advice and counsel, so long as their clients remain free to accept or reject the advice and so long as lawyers do not communicate directly with workers.

After more than 50 years under the old rule, USDOL's new persuader rule would have changed all that. It would have mandated onerous reporting anytime a lawyer's advice has a direct or indirect object of persuading employees. From the outset the agency has admitted that its motive is to boost union organizing.

The government's theory is that by revealing the inner workings of the attorney-client relationship, including the amount of fees paid, unions will be able to use the information in their anti-employer propaganda and this in turn will discourage some employers from seeking legal counsel at all.

Court Injunction Stops The Rule From Taking Effect

The dire impact the rule would have had on attorney-client relationships mobilized a coalition of businesses, state attorneys general, law firms, and bar associations to seek court orders blocking implementation. While the first court to rule on the matter did not immediately block the rule from going to into effect, it did express serious doubts that the rule would survive its legal challenges in the long run. Today's ruling by the Texas court goes all the way and hands the coalition and all employers a total victory.

The court paid special attention to the concerns expressed by the American Bar Association and state bar associations, noting that the new rule would have unreasonably conflicted with state rules governing the practice of law. The court also gave weight to employers' First Amendment rights, reminding the USDOL that employers have a free speech right to express opinions regarding union organizing, and have constitutional rights to hire and consult with attorneys of their choice without undue interference.

In sum, the court said that the USDOL's new persuader rule "is far too broad and captures much activity that the LMRDA intends to exclude." "Here," the court said, "USDOL replaced a longstanding and easily understandable bright-line rule

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with one that is vague and impossible to apply." In conclusion, "USDOL's new rule is not merely fuzzy around the edges. Rather, the new rule is defective to its core because it eliminates the LMRDA's advice exemption."

What Happens Next?
Because it reached this conclusion, the court issued a nationwide injunction blocking the new persuader rule from going into effect this Friday. For now, employers and their labor attorneys can breathe a sigh of relief. The status quo will remain in place, as it has for over 50 years. July 1, 2016 will come and go with no impact on attorney-client relations. Employers can seek and rely on the advice of outside attorneys without fear of reporting, provided the attorneys' advice can be accepted or rejected, and provided the attorneys do not communicate directly with rank and file workers.

The battle is not over, however. USDOL has invested too much and believes too much is at stake to allow today's decision to go unchallenged. The government is likely to appeal, so we must expect a round two.

Fisher Phillips applauds today's court ruling. We will continue to participate in the fight, as we have done since 2011, because we believe the rule as written interferes impermissibly with our valued client relationships.

If the rule is ever revived through appellate proceedings, you can count on us to be prepared to respond immediately. We will stand with you, both in your dealings with labor unions and in whatever compliance requirements may come. Should the worst ever happen and the rule ultimately survive its challenges, we will be there to lead clients in the development of individualized compliance plans and to advise on coordinated reporting.

If you have any questions about any of this, including the latest updates or how the rule might affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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