



Employers Claim Crucial Victory In Persuader Battle

CONTROVERSIAL RULE APPEARS TO BE ALL BUT DEAD FOR FORESEEABLE FUTURE

Insights

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Today a federal court judge delivered what could be the final nail in the coffin for the controversial persuader rule, which sought to force attorneys and their clients to report in open records the details of their confidential attorney-client relationships, and which would have complicated employers' efforts to seek legal counsel in opposing and dealing with unions. District Court Judge Sam R. Cummings, sitting in the Northern District of Texas, today granted a permanent injunction that will block the rule from going into effect on a nationwide basis.

Last week's election of Donald Trump and the expected shift to a more business-friendly U.S. Department of Labor (USDOL) in the new year should resolve any doubt about the future of this rule. The new Secretary of Labor, following Trump's direction, could simply decide to cease any ongoing litigation or existing appeals, and commence administrative proceedings to reverse course. For these reasons, it seems likely that employers may have seen the last of the persuader rule for the foreseeable future.

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

By way of background, 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.

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 Ruling Permanently Blocks 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. In June 2016, a federal court in Texas issued a temporary injunction halting the rule from taking effect, noting that the new rule would have unreasonably conflicted with state rules governing the practice of law.

At the time, 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 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."

That victory was just the first, step, however. The parties continued to litigate the matter to determine whether the injunction would be permanent in nature, while the USDOL appealed the first decision to the 5th Circuit Court of Appeals. After several months of intensive legal briefing and further argument, Judge Cummings agreed with the arguments set forth by the business groups and extended his initial injunction to apply on a permanent basis.

His ruling was merely two pages long, essentially stating that he agreed with the legal arguments set forth by the business advocacy organizations and state attorneys generals who fought against the rule. "The Court is of the opinion," he said, "that the USDOL's Persuader Advice Exemption Rule should be held unlawful and set aside...and the Court's preliminary injunction preventing the implementation of that Rule should be converted into a permanent injunction with nationwide effect."

What Now?

The victory is clear and all but absolute for employers. The persuader rule is almost certainly dead, and it is hard to envision a legal landscape where it will be resurrected. Although the USDOL is continuing to litigate an appeal of the initial court ruling, that appeal will not be decided before Donald Trump takes office as president. Given his avowed interest in boosting businesses and his oft-stated animosity towards business-encumbering regulations, many analysts predict that the Trump administration will simply drop the appeal once it controls the USDOL. Under directions from Trump, the new Secretary of Labor could simply decide to withdraw the appeal and commence administrative proceedings to reverse course. Such a maneuver would effectively kill the persuader rule once and for all.

We will continue to monitor these developments and provide updates should the situation merit further consideration. For now, however, employers (and their labor counsel) can breathe a sigh of relief.

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.

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