

DOL's 'Persuader' Rule Permanently Blocked By Texas Court

November 17, 2016

As we explained in our March 24, 2016 alert, on March 23, 2016, the Department of Labor (“DOL”) finalized its “persuader” rule, which would have required that employers and legal consultants report all pay arrangements regarding attempts to persuade employees, either directly or indirectly, about their right to union representation or to bargain collectively.

The rule significantly narrowed the “advice exception” to the DOL reporting requirements, which had long held that activity relating to an attorney’s drafting of letters, speeches or other communications to employees or an attorney’s legal review of employer communications was exempt from reporting. Under the new rule, any actions, conduct, or communications on behalf of an employer that could directly or indirectly persuade workers concerning their rights to organize and bargaining collectively would have been required to be reported by employers and the attorneys providing the advice.

On June 27, 2016, a federal district court judge in Texas issued a nationwide injunction preventing the DOL from enforcing the rule. The Judge found that the persuader rule was invalid on a number of grounds. Specifically, the judge found that:

- The rule was contrary to the explicit language of the statute it was intended to interpret, holding that the NLRB lacked statutory authority to issue the new rule. Further, the court found that the rule was arbitrary and capricious since it essentially abandoned fifty years of precedent without adequately explaining the rationale for the change or conducting any study or independent analysis.
- The rule violates the First Amendment rights of employers to hire and consult with attorneys by requiring the employers report the activities. The judge also held that the rule was content based and could not survive constitutional scrutiny under the First Amendment.
- The rule violates the Fifth Amendment due process clause because it is “vague and impossible to apply.” The court found that the language was too broad and would be impossible for employers to understand what situations would require the reporting.
- The rule violated the Regulatory Flexibility Act (“RFA”), which requires all regulations to specifically describe the impact on small entities. The court held that the NLRB did not adequately address the impact of the regulations on small entities, in violation of the RFA.

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On Nov. 16, 2016, the court issued an order holding that the persuader rule was unlawful and should be set aside and converting its preliminary injunction into a permanent injunction with nationwide effect.

At this point, an appeal of the June injunction is pending in the 5th Circuit Court of Appeals. We will continue to update you with any important developments.