

Court Grants Permanent Injunction, Blocking Labor Department's New Persuader Rule

By Philip B. Rosen, Jonathan J. Spitz and Howard M. Bloom

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The U.S. District Court for the Northern District of Texas, Lubbock Division, has converted its nationwide preliminary injunction, issued on June 27, 2016, against the U.S. Department of Labor's "persuader" rule into a nationwide permanent injunction. *National Federation of Independent Business, et al. v. Perez, et al.*, No. 5:16-CV-00066-C (N.D. Tex. Nov. 16, 2016). The court found the rule "unlawful."

This means the new rule, promulgated under the Labor-Management Reporting and Disclosure Act and scheduled to be applicable to arrangements and agreements entered into on or after July 1, 2016, will continue not to be effective.

On March 24, 2016, the DOL published its final rule relating to "persuader" activity under the LMRDA. Under the DOL's new interpretation, employers/clients as well as consultants/attorneys would be required to report to the DOL all arrangements in which an "object" (directly or indirectly) of the services provided by the consultant/attorney is to persuade employees about the manner of exercising the employees' "right to organize and bargain collectively through representatives of their own choosing" under federal labor law. (The final rule took effect on April 25, 2016, but was applicable only to arrangements and agreements [and payments associated therewith] entered into on or after July 1, 2016.)

In his extensive preliminary injunction ruling, U.S. District Judge Sam R. Cummings found the plaintiffs had shown a substantial likelihood of success on the merits and a substantial threat of irreparable harm in the absence of injunctive relief if the rule went into effect.

The court also found the balance of hardships weighed in the plaintiffs' favor, because the threatened injury to the plaintiffs was substantial, whereas the Department of Labor would not suffer harm from delayed implementation. Further, the court found the issuance of the injunction would not disserve the public interest, because it would ensure the plaintiffs and other employers would continue to have access to necessary legal counsel, protect confidential relationships, and protect constitutional rights. (For a detailed discussion of the preliminary injunction ruling, see our article, [Court Halts Labor Department's New Persuader Rule](#).)

The new rule likely would have made it more difficult for employers to communicate effectively facts and opinions on labor relations matters to employees — a right provided to employers by the National Labor Relations Act — without incurring a reporting obligation. It also likely would have interfered with an employer's right to effective representation by legal counsel, particularly in obtaining legal advice and preserving the confidentiality of attorney-client communications. This advice often is necessary when employers speak to their employees to avoid unlawful or objectionable conduct under the NLRA.

The court's June 27 preliminary injunction order is on interlocutory appeal before the U.S. Court of Appeals for the Fifth Circuit. Judge Cummings' ruling does not affect that appeal.

Even if the court had refused to issue the permanent injunction, or if the court of appeals reverses Judge Cummings' ruling, it is questionable whether the new rule will survive for very long under a Trump administration Department of Labor.

Please contact Jackson Lewis with any questions about this decision and other workplace issues.



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