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Judge Declares Persuader Rule Unlawful With Permanent Nationwide Injunction

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The U.S. Department of Labor's final persuader rule was dealt yet another blow today as federal Judge Sam Cummings of the Northern District of Texas issued a permanent injunction declaring the rule unlawful. The ruling will prevent the persuader rule from being enforced anywhere in the nation.

Rule Would Have Expanded Disclosures of Union-Avoidance Activities

As we've reported before, the DOL's final persuader rule, issued this past March, would have expanded the reporting requirements of both employers and their hired labor consultants who assist with union-avoidance activities. Under the Labor-Management Reporting and Disclosure Act (LMRDA), when employers hire outside consultants, including attorneys, who are directly involved in "persuading" workers whether or not to join a union or engage in collective bargaining, they must file a report disclosing the consulting relationship as well as the fees paid to the consultant. Under the now-enjoined "new rule," the DOL expanded the scope of reportable activities to include not only those that involved the consultant making direct contact with employees, as was previously included as reportable "advice," but also those activities where the attorney or labor consultant works with the employer behind the scenes to draft or review documents, presentations, speeches, and other materials to aid the employer in opposing union organizing and other related activities.

Legal Challenge Prevailed

The DOL's expansion of the rule as to what constitutes reportable "advice" was highly controversial. The DOL was set to begin enforcing the final rule on July 1, 2016, but numerous business groups filed lawsuits claiming that the DOL overstepped its bounds and that the rule was unlawful. On June 22nd, a Minnesota federal judge declined to issue a preliminary injunction to block the rule, but less than a week later, Judge Cummings in Texas did just that. He issued a preliminary injunction blocking the DOL from enforcing the rule nationwide.

With today's order, Judge Cummings turned his preliminary injunction into a permanent block on enforcement of the rule. The result is the employers and labor consultants, including lawyers, will continue to report their persuader activities consistent with the prior rule. In other words, only those activities that meet the "advice" standard under the prior persuader rule are reportable. Such activities generally include only those that involve

direct contact between the consultant and the employees.

Is This Rule Dead Forever?

It remains to be seen whether the DOL will appeal this order, but for now, the final persuader rule appears dead. With the new GOP administration taking office in late January, it is unlikely that the DOL, under GOP leadership, would try to advance this union-friendly rule in the years to follow. We'll keep you posted on any new developments.

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