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An Uncertain Fate For DOL Persuader Rule: What's At Stake

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The fate of the U.S. Department of Labor's controversial "persuader" rule is now in question. On March 30 and 31, 2016, just one week after the DOL published the final rule, national, state and local business groups, and a number of law firms filed three lawsuits to block implementation of the new persuader rule. One suit refers to the persuader rule as "an election year favor to organized labor, a favor designed to suppress speech that opposes organized labor." A hearing on a motion for preliminary injunction is scheduled in Little Rock, Arkansas, for Monday, May 9, 2016.


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Background


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Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA) requires employers and their labor relations consultants (including attorneys) to report to the federal government any activities "undertaken with an object, directly or indirectly, to persuade employees about how to exercise their rights to union representation and collective bargaining." However, "advice" has always been exempted from this reporting requirement.

For nearly 40 years, so long as a consultant did not have direct contact with employees it was not considered "advice" and, therefore, not subject to reporting. Unfortunately for employers (and their labor consultants), the DOL determined this interpretation resulted in under-reporting, as well as an increased use of outside consultants by employers, which needed to be addressed. Praising the new rule, American Federation of Labor and Congress of Industrial Organizations President Richard Trumka stated, "Working men and women deserve to know who their employer is hiring and exactly how much they are spending to discourage workers from forming a union."

Expansion of Reportable Activities

The persuader rule greatly expands the information which will now need to be publicly disclosed. Under the new rule, the DOL requires employers and their labor consultants to make disclosures even when the consultants are only indirectly involved in organizing campaigns by providing the information to their clients for consideration and/or dissemination. This will encompass information about employers' responses to union organizing campaigns. Additionally, if a "consultant engages in both advice and persuader activities ... the entire agreement or arrangement must be reported."

Many of the required disclosures are financial in nature. For example, employers must disclose what they paid labor consultants to attempt to persuade employees about union membership and collective bargaining. Consultants who provide these services must disclose the identities of their clients, the dates they entered into contracts to provide these services, the terms and conditions of these contracts (including the amount each client paid them), and a description of the services they performed. The DOL publishes the information on its website. The new reporting requirements will apply to agreements entered into on or after July 1, 2016.

Legal Challenges to the Persuader Rule

On March 30 and 31, three different lawsuits were filed in federal courts in Arkansas, Minnesota and Texas. The lawsuits, generally, claim that the persuader rule:

- Violates the LMRDA by essentially eliminating the "advice" exemption;
- Violates First Amendment rights — freedom of speech and freedom of association by only targeting speech adverse to unions (the persuader rule "uses the term 'anti-union' 55 times" and unions and their counsel "are not required to fill out the same type of forms about their 'pro-union' speech");
- Violates the Fifth Amendment's due process clause for its vagueness;
- Violates the National Labor Relations Act's provisions upholding employers' rights to free speech;
- Violates regulatory impact laws by not properly considering the significant regulatory burdens it imposes;
- Infringes on protections for attorney-client communications and relationships;
- Exceeds the DOL's statutory authority; and
- Is arbitrary and capricious.

The plaintiffs in these lawsuits ask the courts to temporarily enjoin the persuader rule pending the courts' rulings on the lawsuits, declare the rule to be invalid, vacate the rule, and permanently enjoin the DOL from implementing the new rule.

The first suit was filed by business trade groups and is pending before Judge Kristine G. Baker in the U.S. District Court for the Eastern District of Arkansas (Little Rock). Judge Baker was appointed by President Obama. Before her appointment, she practiced at law firms that typically represent employers and was recognized by Best Lawyers in America for her work in the areas of commercial litigation, First Amendment law, and labor and employment law. Judge Baker will conduct a hearing on May 9, 2016, in Little Rock to determine whether a preliminary injunction should be granted. The U.S. Chamber of Commerce, Employment Law Alliance, and the states of Arkansas, Alabama, Arizona, Michigan, Nevada, Oklahoma, South Carolina, Texas, Utah and West Virginia have all been granted leave to file amicus briefs in support of the motion for preliminary injunction.

The second lawsuit was filed the following day, March 31, in the U.S. District Court for the District of Minnesota by an association of labor and employment law firms. Judge Patrick J. Schiltz will preside. He

clerked for the late U.S. Supreme Court Justice, Antonin Scalia, and was appointed to the bench by President George W. Bush. The third suit was filed the same day in the U.S. District Court for the Northern District of Texas (Lubbock) by business groups and a local chamber of commerce. Senior Judge Sam R. Cummings, a President Reagan appointee, is assigned to the case. Dates for hearings in these cases have not yet been set.

Companies, Labor Consultants and Employees Have a Lot at Stake

With the recent fast-track NLRB election rules (now elections are typically held within three weeks of a petition being filed), companies are already at a disadvantage, as compared to unions, when faced with a union campaign. Combating union propaganda, which has already been ingrained into and accepted as true by more than a majority of the affected employees once a petition is filed, is hard enough. But employers must also make sure that their messages and methods opposing the propaganda do not violate any laws — this is where the labor consultants come in.

Because there is a very fine line between what could be construed as legal "advice" as opposed to persuasive activity, the persuader rule doubles down on employers by leaving largely uncertain just what employers can discuss with their labor consultants without triggering the onerous reporting requirements. Further, many law firms may exit the union campaign arena altogether due to concerns over the attorney-client privilege and the financial disclosure requirements, reducing the options available to companies seeking assistance with organizing campaigns. And despite unions' self-interested arguments to the contrary, any attempt to limit lawful communication from employers to employees about the downside risks of union organizing, is really just a bid to keep employees in the dark.

Due to the fast-approaching date for compliance with the persuader rule and the potential harm to companies and labor consultants, it is likely Judge Baker will temporarily enjoin the rule pending final disposition of the case. If she does not, the judges in the two other lawsuits will have the opportunity to do so.

In the meantime, Republicans have proposed a congressional resolution (H.J. Res. 87) to block the persuader rule. Introduced by a member of the House Committee on Education and the Workforce, Bradley Byrne, R-Ala., if passed the resolution of disapproval would prevent the DOL from implementing the persuader rule without congressional authorization.

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