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Endgame Scenarios For The Persuader Rule

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Law360, New York (November 28, 2016, 5:57 PM EST) -- The U.S. Department of Labor's (DOL) "persuader rule" has been dealt a near-fatal blow. On Nov. 16, 2016, Senior Judge Sam R. Cummings in the U.S. District Court for the Northern District of Texas issued a permanent injunction blocking the rule nationwide.

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For now, the rule will not be implemented, and its only reasonable path back to life is via appeal of Judge Cummings' decision. However, the federal government's appetite to pursue an appeal will likely evaporate with the changing of the guard from President Barack Obama to President-elect Donald Trump.

Unions or pro-union groups may try to intervene to carry the appeal even without the government's support, but they would likely not be able to fight the legal and political headwinds suddenly facing the rule.

Ryan Funk

The Persuader Rule, Explained

Had it not been blocked, the persuader rule would have changed the DOL's interpretation of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). Since its inception, that law has required 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."

Many of the required disclosures are financial in nature. For example, employers must disclose payments to labor consultants hired 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.

However, “advice” has always been exempted from this reporting requirement. For nearly 40 years, so long as consultants did not have direct contact with employees, the information they imparted to employers was considered “advice” and, therefore, was not subject to reporting. The persuader rule seeks to eliminate this exception, making such activities subject to reporting.

Eleventh-Hour Temporary Injunction

On June 27, 2016, three days before rule would begin to effect employers and their consultants, Judge Cummings issued a preliminary injunction that halted it nationwide.

In that ruling, Judge Cummings found that business groups that filed the case were likely to succeed on their claims that:

- the DOL lacks authority to issue and enforce the rule;
- the rule is arbitrary and capricious;
- the rule violates First Amendment rights to free speech and association;
- the rule violates the due process clause of the Fifth Amendment because it is vague; and
- the DOL failed to follow the rules of the Regulatory Flexibility Act concerning its impact on small businesses.

Permanent Injunction and Possible Appeal

On Nov. 16, Judge Cummings issued a short order converting his preliminary injunction to a permanent one. That was a dispositive blow to the three defendants — the DOL and two of its leaders, Secretary Thomas Perez and Director Michael Hayes, all represented by the United States Department of Justice.

The defendants could appeal (they have been unusually quiet about the decision), but the matter will almost certainly remain undecided before the appellate court when the power at the White House transfers to President-elect Donald Trump. While Hillary Clinton’s administration would have been inclined to go to bat for the union-friendly regulation published by President Obama’s DOL, the Trump administration is unlikely to make preserving the persuader rule a priority.

President Trump recently announced that the DOJ will be led by Senator Jeff Sessions. In June, Senator Sessions cosponsored a joint resolution (S.J. Res. 35) that attempted to undo the persuader rule via the Congressional Review Act by formally disapproving of the rule and declaring that it would have no effect.

Assuming that President Obama’s DOJ has already appealed Judge Cummings’ decision by the time Attorney General Sessions takes the helm, that agency could seek to shift course and try to torpedo its own case. It may request a voluntary remand, which if approved by the court, would effectively withdraw the bid to keep the persuader rule alive.

Unions or pro-union groups may try to step in to fill the void created if the DOJ abandons its appeal efforts. They are not on the scene yet — the case before Judge Cummings had intervenor plaintiffs, but no intervenor defendants. By intervening in the case, pro-union groups might be able to keep the appeal alive and give the court what it would need procedurally and substantively to reinstate the rule.

If the circuit court finds that the persuader rule is lawful, the business groups that filed the case would file a petition of certiorari to put the issue before the Supreme Court. If the circuit court upholds Judge Cummings' decision and the DOJ does not file a petition for certiorari to put the issue before the Supreme Court, that task would fall to unions or pro-union groups.

The Supreme Court would be more likely to grant certiorari if the circuit courts are split on the issue, which is possible here. Two similar cases in other federal courts remain pending — one in Minnesota, the other in Arkansas. Those courts could still rule on the issue.

While Texas is in the Fifth Circuit, Minnesota and Arkansas are in the Eighth Circuit. In the slight chance this battle ends up before the Supreme Court, President Trump's Supreme Court Justice appointment to the vacancy left by the late Justice Antonin Scalia could very well be the deciding factor.

Legislation and Rulemaking

Congress and the new Department of Labor could also have a role to play. The Republican-controlled House and Senate already tried, unsuccessfully, to use the Congressional Review Act to undo the persuader rule. However, Congress still retains authority to amend the LMRDA if it so chooses (subject to presidential veto, of course).

The DOL could also change its regulations through rulemaking. That was the process that created the persuader rule in the first place. But rulemaking is painstakingly slow, and given the likelihood that the Judge Cummings' injunction is not overturned, the Trump administration would not need to resort to that process if it wants to undo the rule.

What This Means for Employers and Labor Attorneys

Smaller businesses without their own in-house labor professionals (which make up the vast majority of employers in the U.S.) and labor attorneys can now breathe a collective sigh of relief. It's business as usual with companies being able to freely seek professional, outside assistance with respect to labor relations without being required to disclose who they are working with and how much is being paid for the advice.

And for labor attorneys who have been grappling with whether to continue providing various labor-related services to clients at all under the persuader rule, including campaign assistance and collective bargaining, they can now discontinue such discussions — and raise a glass to Judge Cummings.

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