
DOL is Enjoined From Enforcing New Persuader Rule

By Thomas P. Brady / Jun 28, 2016

On June 27, 2016, the United States District Court for the Northern District of Texas enjoined the Department of Labor (DOL) from enforcing its new persuader rule (Rule) which was scheduled to go into effect on July 1, 2016. *National Federation of Independent Business, et al v Perez, et al*, Civil Action No. 5:16-cv-00066-C. The injunction enjoined the DOL enforcement of the Rule nationwide.

The new Rule requires external consultants and attorneys to report, under the Labor Management Reporting Disclosure Act (Act), if they *directly* or *indirectly* provide advice or assistance, even when there is no direct contact with employees. The new Rule also defines *indirect persuader activity* to include activities that were considered non-reportable advice under the previous persuader rule. This included training supervisors; coordinating and directing the activities of supervisors; drafting, revising or providing speeches and written materials to the employer; and helping employers plan employee meetings.

The plaintiffs in *National Federation of Independent Business* argued that the new Rule was contrary to the Act, invaded the attorney-client privilege, made professionals reluctant to provide guidance to employers facing union drives, violated the First Amendment to the United States Constitution, and made it more difficult for employers to obtain expert advice in opposing union organizing campaigns. The court found that the plaintiffs were likely to succeed on all of their arguments and issued a nationwide preliminary injunction preventing the DOL from enforcing the new Rule until a trial on the merits was held.

The DOL may seek a stay of the court's preliminary injunction or attempt to appeal the decision to the Court of Appeals. Until there is a final decision on this matter, the persuader rule, which the DOL used for 54 years remains in effect. Under that rule, DOL interpreted the "advice" exemption contained in the Act to permit assistance by outside consultants so long as the consultant did not engage in *direct contact* or *direct persuasion* of non-management employees. This interpretation allows consultants or attorneys to draft material and speeches for use during a campaign so long as the employer is free to accept or reject the speech or document. Under this interpretation, consultants and attorneys only engage in persuader activity if they prepare and directly deliver the persuasive material to the employees.

Prior to the court's ruling in *National Federation of Independent Business*, the DOL issued a statement clarifying the new Rule. *The DOL took the position that any agreement with an outside consultant entered into prior to July 1, 2016, would be covered under the former interpretation of the persuader rule.* In light of this clarification, we recommended that employers immediately consider entering into written engagement agreements with any consultant or attorney who provides labor and employment advice or services prior to July 1, 2016. Because the ruling in *National Federation of Independent Business* is not a final adjudication of the issues, we continue to recommend that employers enter into these retainer agreements.

If you would like more information about engagement agreements and the advice exemption, please contact Thomas P. Brady at (313) 965-8291 | tbrady@clarkhill.com, Daniel J. Bretz at (313) 965-8356 | dbretz@clarkhill.com or another member of Clark Hill's Labor and Employment Practice Group.