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Federal Court Refuses to Block U.S. DOL Persuader Rule but Says Rule Is Probably Invalid

By David Phippen
Washington DC Metro Office

In the first decision to be issued in the **three lawsuits challenging the U.S. Department of Labor's "Persuader Rule,"** a federal judge in Minnesota **refused the challengers' request for a preliminary injunction.** If Judge Patrick J. Schiltz had granted the injunction, it could have blocked the rule from taking effect next Friday, July 1.

Despite denying the injunction, Judge Schiltz indicated in his opinion that the rule was probably invalid because it was in conflict with the language of the statute that authorized the DOL to issue a rule. Thus, the plaintiffs in the Minnesota lawsuit, a group of employer representatives, may still ultimately succeed in striking down the rule, but they will not be able to do it in time to stop the rule from taking effect.

It is also possible that a preliminary injunction, although denied by Judge Schiltz, will be granted in one of the other cases pending in federal courts in Arkansas and Texas.

All three lawsuits challenge the DOL's new persuader regulations ostensibly issued under the authority of the Labor Management Reporting and Disclosure Act. The DOL's new regulations seek to impose new and more expansive financial reporting requirements on employers and their outside labor relations advisors and attorneys for activity that has an objective of persuading employees regarding union organizing. The new rule applies to so-called "persuader activity" that takes place pursuant to agreements between employers and their consultants or attorneys that are in place on or after July 1.

The employer representatives in the *Minnesota case, Labnet, Inc., d/b/a Worklaw Network v. U.S. Department of Labor*, sought a preliminary injunction to block enforcement of the regulation before its effective date of July 1. A preliminary injunction effectively grants immediate relief before there has been a full hearing on the merits of the case. Thus, a preliminary injunction cannot be granted unless the party seeking the injunction can show (among other things) that it would suffer "irreparable harm" if the injunction were not granted. (For example, preliminary injunctions are frequently granted in cases that involve threatened disclosure of claimed trade secrets or confidential information on the ground that once the

disclosure is made, it cannot be "undisclosed.")

In Labnet, Judge Schiltz found that the employer representatives had not established the likelihood of irreparable harm if the Persuader Rule were permitted to go into effect. Thus, he found that it was "preferable to let the regulation take effect and leave the [employer representatives] … to raise their arguments in the context of actual enforcement actions."

Although Judge Schiltz found that the employers had not shown irreparable harm, he did indicate that the employers may ultimately prevail in showing that the Persuader Rule conflicts with the language of the LMRDA and therefore may be illegal. Specifically, he criticized the DOL's position that disclosable "persuader" activity and protected "advice" are mutually exclusive under the rule, citing examples where an attorney for an employer might provide a "mix" of persuader activity and protected legal advice.

However, Judge Schiltz found that the employers might not ultimately prevail on their arguments that the new regulation was void for vagueness, arbitrary and capricious, or overbroad, or that it violated the First Amendment to the U.S. Constitution or the federal Regulatory Flexibility Act.

The parties in the Labnet case can still move for summary judgment on the merits, or go to trial, and they may ultimately succeed in getting the Persuader Rule struck down. However, denial of the preliminary injunction means that the Rule will go into effect in the meantime.

Unless . . .

As already noted, *Labnet* is only one of three actions seeking to block enforcement of the Rule. The other two actions are moving forward in federal district courts in Texas and Arkansas. It is possible that the courts in one or both of the other cases will see things differently from Judge Schiltz and will block enforcement before July 1.

Employers should stand ready to deal with the Persuader Rule in some fashion if no court enjoins its enforcement before July 1. In the meantime, employers should consider taking advantage of the "grandfathering" of agreements with their attorneys and labor consultants, which should allow the employer, its attorneys, and its labor consultants to proceed pursuant to the current, less expansive, persuader rule.

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www.constangy.com
Toll free 866.843.9555

Constangy, Brooks, Smith & Prophete, LLP

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