

JUNE 23, 2016

Minnesota District Court Denies Request to Enjoin DOL's Persuader Rule, But Signals Rule Could Be Overturned

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In a decision that sheds light on the potential viability of the Department of Labor's ("DOL") Persuader Rule,¹ a Minnesota district court on June 22, 2016, denied a request to enjoin the rule, which the DOL intends to begin enforcing on July 1, 2016.² However, the court expressly stated its view that the Persuader Rule conflicts with the advice exception to the Labor-Management Reporting and Disclosure Act ("LMRDA"). Therefore, the court found that the plaintiffs attacking the Persuader Rule had established a "strong likelihood of success on their claim" because of this conflict.

While the court's decision leaves intact the Persuader Rule with the July 1 enforcement date looming, the court's analysis regarding the conflict between the Persuader Rule and the LMRDA's advice exception provides some encouragement that the Rule could eventually be overturned.³

Background Regarding the Persuader Rule

As previously discussed,⁴ the Persuader Rule imposes upon employers and their advisors (including lawyers and consultants), for the first time, the obligation to file public reports with the DOL disclosing any advice that

1 Department of Labor's Office of Labor Management Standards, [Interpretation of the "Advice" Exemption in Section 203\(c\) of the Labor-Management Reporting and Disclosure Act](#), 81 Fed. Reg. 15923 -16051 (Mar. 24, 2016).

2 *Worklaw Network, et al. v. United States Department of Labor, et al.*, Case No. 16-CV-0844 (PJS/KMM) (D. Minn. June 22, 2016).

3 The DOL clarified that the rule will not apply to any agreement between an employer and an advisor entered into before July 1, 2016, in which the advisor agrees to provide "persuader" services on or after July 1, 2016, as long as those persuader services would not have otherwise triggered reporting obligations prior to the issuance of the new rule. See Michael G. Pedhirney and Michael J. Lotito, [Department of Labor Provides Limited Opportunity to Obtain Advice Without Triggering the New "Persuader Rule"](#), Littler ASAP (June 10, 2016).

4 See Michael J. Lotito, Maury Baskin, and Michael G. Pedhirney, [Department of Labor Issues Long-Awaited "Persuader Activity" Final Rule](#), Littler Insight (Mar. 24, 2016). On March 24, 2016, the DOL issued the Persuader Rule regarding its interpretation of the Labor-Management Reporting and Disclosure Act's ("LMRDA") "advice" exemption.

“indirectly persuades” employees regarding union organizing or collective bargaining. Prior to the Persuader Rule, such reports were required only when an advisor made direct contact with the employer’s employees, regardless of the persuasive purpose of the advice. The published Persuader Rule indicated that it would become effective on April 25, 2016, and would apply only to “persuader” arrangements and agreements, as well as payments (including reimbursed expenses) made on or after July 1, 2016.

Shortly after the Persuader Rule’s publication, several associations and other entities filed three lawsuits against the DOL, seeking to enjoin the rule.⁵ The plaintiffs in these three lawsuits argued, among other things, that the Persuader Rule is inconsistent with the LMRDA, violates the First and Fifth Amendments, and improperly interferes with attorneys’ ethical obligations not to disclose confidential client information.

The Minnesota district court is the first to issue a ruling regarding the merits of any of these lawsuits.

The Minnesota District Court’s Ruling

The judge presiding over the Minnesota lawsuit considered the following four factors in deciding whether to enjoin the Persuader Rule: (1) the likelihood that the plaintiffs would succeed on the merits of their claims that the Persuader Rule is unlawful; (2) the threat of irreparable harm to the plaintiffs if the injunction is not granted; (3) the balance between that harm and the injury that granting the injunction would inflict on the other parties; and (4) the public interest.

On the first factor, the judge agreed that the plaintiffs established a strong likelihood of success on the merits of their claim that the Persuader Rule should be overruled because it is at odds with the plain language of the LMRDA’s advice exception. The judge opined that the Persuader Rule’s interpretation of the advice exception is “problematic” because it requires the reporting of tasks that undisputedly constitute “advice.” The judge rejected the DOL’s contention that persuader activity and advice are mutually exclusive categories. He opined that the DOL’s attempt to delineate between advice and reportable persuader activity “ends up drawing lines that are simply incoherent.”⁶ Thus, the judge held that the Persuader Rule conflicts with the advice exception because it requires that some activities constituting advice nevertheless be reported to the DOL. The judge rejected the plaintiffs’ remaining grounds for asserting a likelihood of success on the merits of their arguments attacking the Rule.

Despite the court’s finding that the Persuader Rule conflicts with the LMRDA’s advice exemption, the court nevertheless denied the motion for a preliminary injunction on other grounds. Specifically, the court concluded that the plaintiffs had not established that they would suffer irreparable harm in the absence of injunctive relief. The court concluded that the mere possibility that the plaintiffs might need to submit reports to the DOL did not constitute irreparable harm. Beyond that, the court stated its preference “to let the [Persuader Rule] take effect” and allow parties who wish to challenge the Persuader Rule to raise their arguments in the context of an actual enforcement action brought by the DOL.

Impact of Decision

The court’s ruling provides some encouragement for employers and their consultants and lawyers who provide labor and employment law advice and services. At the very least, the court indicated that the Persuader Rule may be unenforceable, as written, because the Rule cannot be reconciled with the plain language of the LMRDA’s advice exception. However, the decision nevertheless permits the DOL to move forward with the Persuader Rule on July 1. Moreover, the decision places the onus on those who wish to challenge the Rule (e.g., employers and lawyers or consultants who provide labor and employment law advice) to litigate and re-raise the same arguments against the DOL in future enforcement actions.

⁵ Littler is representing the plaintiffs in one of the three lawsuits.

⁶ Notably, the court rejected the notion that the DOL has no room to interpret the advice exception.

Therefore, questions remain regarding the scope of the Rule, how the DOL will apply the Rule, and whether courts will enforce the Rule.

Further light on these questions could be shed when the courts presiding over the two pending lawsuits issue rulings, which is anticipated to occur prior to July 1.⁷ It is possible that those courts will arrive at different conclusions or rely on other rationales. Given these uncertainties and until the Persuader Rule litigation is ultimately resolved, employers who seek advice regarding labor issues should continue to consult with counsel regarding the extent to which such activities could trigger reporting obligations and determine how they wish to proceed.

⁷ Neither court is under any obligation to issue a decision before July 1. However, in light of the DOL commencing its application of the Persuader Rule on July 1, it is expected that those courts will publish their rulings by then.