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September 16, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
Washington, D.C. 20210

Re: RIN 1215-AB79 and 1245-AA03

Dear Mr. Davis:

I have been a member of the Florida Bar, and its Labor and Employment Law Section, and a practitioner in the area of labor and employment law for approximately twenty years. My law practice is focused on advice and counseling to employers with regard to a wide variety of federal, state and local employment laws. I have given advice and provided services to unionized and non-unionized employers.

I have very carefully reviewed the Proposed Rule issued by the Labor-Management Standards Office on June 21, 2011, entitled "Labor-Management Reporting and Disclosure Act; Interpretation of the 'Advice' Memorandum. I have serious concerns about the Proposed Rule in its application to the attorney-client relationship with those businesses that will be affected by the Rule in the context of a union organizing campaign.

The Proposed Rule appears to be a return to the Department of Labor's prior position that all "persuaders" must file reports with the federal government even as to matters that might otherwise be protected by the attorney-client privilege. Under the Proposed Rule, that would include any external attorney that revised a speech to be given to employees, suggested changes to a website communication, or trained management employees on their legal obligations respecting the employees who are assigned to them.

The declared purpose of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) is to ensure "that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations." 29 U.S.C. § 401(a) (2011). There is an

enormous body of law and precedent by the National Labor Relations Board that governs the conduct of an employer in its relations with its employees including, but certainly not limited to, the National Labor Relations Act generally respecting an employee's right to engage in concerted activity.

Against the field of government regulation of the employment relationship, and as good corporate citizens, our clients embrace their attorneys to assist them in navigating those rules in a variety of contexts to ensure that our actions and inactions, as the case may be, are in full compliance with the law. It is difficult to imagine that even the most sophisticated employer with its own staff of labor and employment attorneys would not, under some circumstances, be required to consult outside counsel from time to time.

We almost never give "advice" in any abstract format as envisioned by the Proposed Rule. Our advice is generally directed toward a specific issue or a request to comment on a specific action, sometimes including a speech to be given to employees. The Proposed Rule attempts to create a dichotomy between "advice" and "persuasion" such that "advice" is not reportable if given in a vacuum, but "persuasion" is reportable if tied to a communication to employees. Where advice is indistinguishable from persuasion, the entire event is reportable.

The advice/persuasion dichotomy described in the Proposed Rule is unworkable. Specific examples of "persuader" activities that would be reportable to the government include "but are not limited to: drafting, revising, or providing a persuader speech, written material, website content, an audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly; planning or conducting individual or group meetings designed to persuade employees; developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness; training supervisors or employer representatives to conduct individual or group meetings designed to persuade employees; coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees."

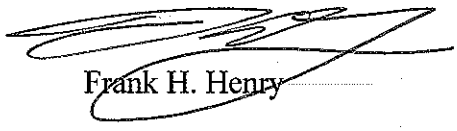
Many of these activities, characterized as "persuasive" in the Proposed Rule, are indistinguishable from the educational communications that are allowed and encouraged by the National Labor Relations Act. The Proposed Rule would require that an employer waive the attorney-client privilege every time it seeks advice on a specific communication, and every time the employer seeks assistance in training its supervisors in the requirements of the law.

In other words, the Proposed Rule purports to prevent employers from consulting their external attorneys regarding the content of their communications to employees and the general public in the absence of a public disclosure as to the content of that communication. In that sense, the Proposed Rule goes against the declared purpose of the LMRDA. The employer cannot "adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations" without consulting its attorneys on the content of employee communications and training its management employees on proper conduct in the context of a union organizing campaign.

For each of these reasons, I believe that the Proposed Rule is inconsistent with the purpose of

the LMRDA, unnecessarily invades the attorney-client privilege, is unworkable in practice, and should be withdrawn in favor of existing law.

Sincerely,



Frank H. Henry