



September 21, 2011

Mr. Andrew R. Davis  
Chief  
Division of Interpretations and Standards  
Office of Labor-Management Standards  
U.S. Department of Labor  
200 Constitution Avenue N.W., Room N-5609  
Washington, DC 20210

**Re: RIN 1215-AB79 and 1245-AA03; Comments on Proposed Rulemaking  
Regarding Persuader Activities Under The Labor-Management Reporting  
and Disclosure Act of 1959**

Dear Mr. Davis:

On behalf of the Society for Human Resource Management (“SHRM” or “Society”), we are pleased to submit these comments in response to the Division of Interpretations and Standards, Office of Labor Management Standards’ (“Division” or “OLMS”) Notice of Proposed Rulemaking (“NPRM”) published at 76 Federal Register 36178 (June 21, 2011). The proposed rules would alter the current and longstanding interpretation of the term “advice” as it appears in Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC 401 *et seq.* (“LMRDA”), as well as alter substantially what must be reported and how.

SHRM is the world’s largest organization devoted to human resource management. Representing more than 250,000 members in over 140 countries, the

Society serves the needs of human resource professionals and advances the interests of the human resource profession. Founded in 1948, the Society has more than 575 affiliated chapters within the United States and subsidiary chapters in China and India. The substantial number of SHRM's professionals work with employers that fall under the jurisdiction of the National Labor Relations Act. The Society has a strong interest in the administration of the NLRA, including the lawful and honest communication with employees with respect to their rights thereunder.

### **Threshold Issues**

Before addressing the substance of the NPRM, it is necessary to raise what we believe are two interrelated issues. The first issue involves the process, while the second involves the lack of demonstrated need for a change.

*Need for further exploration and analysis.* SHRM has very serious concerns about the manner in which the new interpretation is being contemplated. While we understand that it is the Division's position that "rulemaking is not required to revise the interpretation of the term 'advice,'" the fact remains the underlying rationale for the change is heavily disputed.<sup>1</sup> The LMRDA was passed into law 52 years ago this month, at a time when labor relations in the United States was far different than today.

Rulemaking would be the barest minimum for the change. However, SHRM believes soliciting comments from the world at large is not sufficient. In order to truly have a

---

<sup>1</sup> As the Division undoubtedly is aware, the National Labor Relations Board ("NLRB") issued its own Notice of Proposed Rulemaking at or about the same time as the NPRM here. The initial comment period closed August 22, 2011. The NLRB received approximately 66,000 comments, and also held two days of hearings. There can be no doubt the response to this NPRM will be equally contentious.

“broad consultation,” the Division should hold hearings and take appropriate evidence on the true state of affairs in the labor relations community.

The President’s Executive Order “Improving Regulation and Regulatory Revision” dated January 18, 2011 states in Section 1; the regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.” We respectfully submit that the NPRM does not measure the actual results of the proposed change because it does not take into consideration the contemporary labor relations climate.

*Lack of Demonstrated Need.* Closely related to the process chosen for this change, SHRM believes a true inquiry into the state of affairs of the labor relations climate in the United States will disclose a factual picture far different than the one portrayed in the NPRM, where it is alleged untold millions of dollars are spent in the singular purpose of eliminating organized labor. SHRM disputes the so-called contemporary research as not so contemporary; in some cases it is marred by obvious bias as well as flaws in methodology. In all cases it fails to mention, let alone consider, the actions of organized labor as a root cause of employer response. Even if there is some validity to this “research” (which seems to not be the case), it fails to take into account organized labor’s actions. Organized labor hardly has been quiescent these last decades. Employers have been subjected to the “corporate campaign” tactics, where unions undertake whatever means necessary, lawful and unlawful, to inflict enough damage to the target employer’s business so that it will accept the union without a government supervised secret ballot election. These situations demand a response and

that response is often communicated directly to employees. The Division's proposed narrowing of the exemption would further tilt the balance in favor of organized labor. In sum, the Division should undertake a more thorough assessment of the need to alter the interpretation by undertaking its own non-partisan research, including the holding of hearings.

**The Legislative History Of The LMRDA Does Not Support The Proposed Interpretation**

The NPRM issued by the Division asserts the legislative history of the LMRDA supports narrowing the interpretation of the term "advice" as it appears in Section 203(c). A careful and thorough review of the entire legislative history, however, supports an interpretation that is more in line with the current one. Congress only intended to mandate reporting for discrete types of financial conduct it deemed to be especially harmful; all types of information related to the rendering of advice was to be exempt from the reporting requirements.

One of the critical compromises that occurred in the passage of the LMRDA specifically involved the kinds of financial activities involving labor consultants that would have to be reported. The proposed interpretation would be contrary to clear congressional intent, which is that financial activities between employers and labor consultants are reportable only if the expenditures were of a type specifically noted to be the target of the legislation.

The legislative history of the LMRDA runs a total of 1927 pages. The NPRM cites to only five of the pages, all from the same Senate Committee on Labor and Public Welfare ("Labor Committee") Report Number 187 ("Senate Report No. 187") on Senate

bill 1555 (“S. 1555”). No other parts of the legislative history are referenced nor is the text of S. 1555 cited.

**1. Universal Consensus Did Not Exist on the Labor Committee**

S. 1555 was only one of many early pieces of draft legislation of what ultimately became the LMRDA; the provisions regarding persuader reporting do not resemble what was finally enacted. The flaws in the original text were outlined by the minority Senator members of the Labor Committee in Senate Report No. 187. Many of these criticisms provide crucial guidance as to what actually happened later as the LMRDA made its way through Congress. These views resonate today with equal, if not greater force. The minority Senators on the Labor Committee believed first and foremost that the language on financial reporting was so broad as to be an actual assault on free speech because it would inhibit the free exchange of ideas

It is difficult to comprehend how anyone in 1959 could seriously contend that the American worker should be legally prevented from hearing all sides of a labor-management dispute. In 1935 when the Wagner Act was passed, it may have been true that in a number of situations any statements by employers might be considered to be undue influence. But, in the last two decades the labor movement has grown by leaps and bounds. It is difficult to imagine any American industrial worker being cowed or unduly influenced by any statements on the part of his employer which do not violate section 8(c). **We believe that any worker would strongly resent the implication that he has to be protected from such statements or that he is not entitled to hear all sides of an organization question before casting his ballot.**

. . . The employer might be paying substantially higher wages and granting many more fringe benefits than the employer down the street whose employees are represented by the same union, which is promising “pie in the sky” to his employees if they only vote for the union. But he would seriously doubt the wisdom of bringing these facts to the attention of his employees who are about to vote upon the question of whether the union should represent them. **Section 103 of the committee bill has the**

**practical effect of diminishing the protection afforded by the “free speech” provision of the Taft-Hartley Act.**

Senate Report No. 187, p. 477 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (“Legislative History”), (Emphasis added). Clearly, a concern was that mandatory financial reporting for lawful communications would inhibit discourse.

The intent of the language regarding reporting in S. 1555 was very much in dispute. The minority Labor Committee members were careful to cite to the specific problems with the wording of S. 1555, including that a blanket requirement to report everything would unnecessarily hinder an employer’s ability to respond legitimately to organizing

Section 103(a)(1) requires an employer to report any expenditure in connection with an agreement with a labor relations consultant or other independent contractor whereby the consultant undertakes activities where “*an object thereof*, directly or indirectly, is to persuade employees” to exercise or not exercise their right to join a union. More sweeping language could hardly be found for effectively discouraging such a consultant from doing anything in an organizing campaign, unless the employer reported it to the Secretary of Labor. . .

There would be no objection to requiring the reporting of any action on the part of a consultant which would constitute an unfair labor practice, although the present section 8(a) of the Taft-Hartley law contains adequate safeguards and remedies against such abuses. This is the approach taken by the McClellan bill, S. 1137, and by the statute recently enacted by the State of New York by an overwhelming majority of the representatives of both parties in the legislature of that state.

*Id.* (Italics in original).

Exactly which activities should be reported was debated in the following months. It became clear that what Congress intended labor relations consultants to report actually only involved a narrow set of circumstances.

The minority Senators also pointed out that the breadth of the reporting obligation in S. 1555 would unnecessarily impinge on the attorney-client relationship even though attorneys were not mentioned in the draft legislation

Furthermore, while the term “labor relations consultant” is not defined in the bill, since it covers any independent contractor, it obviously includes attorneys. Section 103(b) uses the term “person” and Section 111 uses the words “any person who acts as a labor relations expert, adviser, or consultant” in making specified conduct of such people unlawful. Since in substantially every case, employers consult with and seek the help and guidance of attorneys, these requirements must be judged with respect to their effect upon the privileged nature of the attorney-client relationship and the attorney’s obligation under the Canons of Ethics. The American Bar Association considered this problem at its mid-winter meeting, just concluded, and a resolution was adopted by its house of delegates which reads as follows

*Resolved.* That the American Bar Association urges that in any proposed legislation in the labor-management field, the traditional confidential relationship between attorney and client be preserved, and that no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as confidential between a client and his attorney, including but not limited to the existence of the relationship of attorney and client, the financial details thereof, and any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law; be it further

*Resolved.* That the officers and councils of the sections of labor relations law and corporation, banking and business law be directed to bring the foregoing resolution to the attention of the members and proper committees of Congress in connection with any proposed legislation in this field and to oppose legislation contrary to the principles urged in said resolution.

*Id.* at 478.

Senate Report No. 187 was ordered to be printed on April 14, 1959, and the LMRDA was signed into law exactly five months later on September 14, 1959. During those five months all of the issues noted by the minority Labor Committee members were debated. It is clear from the Legislative History that Congress intended financial reporting to cover only a few particular kinds of conduct it considered inimical to the interests of harmonious labor relations.

2. **The House of Representatives Did Not Agree With the Breadth of S. 1555's Reporting Obligation**

That there was no consensus on the scope of the financial reporting obligations is clear from the draft legislation introduced during the same period as S. 1555. For example, H.R. 4473, a House of Representatives version of the LMRDA addressed the reporting in a narrower way than the Senate bill

- (3) any payment to a public or labor relations consultant or other person (except payment to an employee as compensation for or by reason of his regular services as an employee of such employer) pursuant to any understanding or agreement under which such person undertook to compensate employees of such employer for (A) interfering with, coercing or restraining any other employees of such employer in the exercise of rights guaranteed to such employees by section 7 of the National Labor Relations Act, as amended, or by the Railway Labor Act, as amended, or (B) procuring confidential information of other such employees of such employer concerning the exercise of such rights;
- (4) any payment to any person pursuant to any agreement or understanding by which such person undertook to provide such employer with the services of an individual, company, agency, or instrumentality engaged in the business of interfering with, restraining or coercing employees in the exercise of the rights guaranteed by section 7 of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended. . .

H.R. 4473, Legislative History, p. 231-232.



The same proposed legislation also addressed the issue of attorneys advising clients in labor relations issues, something missing from the Senate version

(e) Nothing contained in this section shall be construed to require an employer, in any report filed by him with the Secretary pursuant to this section, to disclose any transaction and any attorney who is a member in good standing of the bar of any State, where the relationship between such employer and such attorney with respect to such transaction or arrangement was that of client and attorney.

*Id.* at 234. H. R. 4473 was referred on February 16, 1959, prior to the American Bar Association passing the resolutions calling for exactly this kind of exemption.<sup>2</sup>

Clearly, there was no consensus within either house of Congress as to the definition of “labor consultant” or as to the scope of the activities that should be subject to financial reporting.

3. **The Actual Congressional Debate Demonstrates a Desire to Target a Narrow Set of Circumstances for Financial Reporting**

For much of 1959, Congress discussed and amended the various draft legislation. Debate over various amendments to House and Senate bills uniformly referred to certain discrete activities engaged in by Nathan Shefferman where money was paid to influence voters in certain inappropriate ways.

Secretary of Labor James P. Mitchell on February 4, 1959, made a statement in support of an administration sponsored bill

In its report, the select committee concludes that employers had violated the rights of their employees under the Taft-Hartley Act by interfering with their organization activities and their right to bargain collectively ...  
**Companies made substantial payments to this middleman and his agents which were used in establishing employee committees to**

---

<sup>2</sup> There are also other examples of draft legislation in the Legislative History demonstrating differing viewpoints on the issue. *See, e.g.*, H.R. 8400, Legislative History p. 619.

**oppose unions' organizational campaigns or in creating company unions ... All of these activities would appear to be unfair labor practices under the Taft-Hartley Act. However, the procedures provided by that act must be bolstered against these employer payments to middlemen for activities such as those found by the committee in this case.**

Remarks of Secretary of Labor James P. Mitchell, Legislative History, p. 994 (February 4, 1959) (Emphasis supplied).

Clearly, the targets of the administration bill were the specific payments to create fake employee committees or to sponsor the activities of a company dominated union.

Senator Kennedy, in support of his Kennedy-Ervin bill (another pre-cursor to the LMRDA), spoke in similar terms about the few discrete types of payments that should be reported

It [Kennedy-Ervin]<sup>3</sup> will prohibit loans by either employers or unions to union officers, so that the president of the old Bakery Workers would not again be able to borrow heavily from one of their employers to buy expensive homes in Washington and Palm Beach, and then negotiate a substandard union contract with his benefactor without consulting the local members. And it will expose and prevent the undermining of honest unionism through management collusion, middlemen and union-busting techniques of so-called consultants **like Nathan Shefferman, who promised employers he could keep out the responsible unions which could not be bought, through his various techniques of antilabor committees, company unions, payoffs and teamster collusion.**

Remarks of Senator Kennedy, Legislative History, p. 1259 (April 29, 1959)(Emphasis supplied).

Senator Kennedy continued to describe his conception of the reporting obligations in the Kennedy-Ervin bill as activities that specifically interfere with the right to organize

Requires reports of employers and persons who enter into agreements with employers to **interfere** with the right of employees to organize or bargain collectively or to provide information to the employer **about the activities**

---

<sup>3</sup> S. 505

**of the employees.** Employers are also required to report direct or indirect loans to or payments to a labor organization or officer thereof except certain legitimate payments such as for services as an employee.

*Id.* at p. 1260 (Emphasis supplied. Only discrete transactions were the target of the legislation. These discrete transactions were payments made to “interfere” with employees organizing rights and payments to obtain surveillance of employee activities.

Representative George McGovern echoed these sentiments

No reasonable person wants us to pass legislation to cripple or destroy the labor movement. Neither are we called upon to pass legislation that would interfere with the legitimate relationships of the employer to his employees.

What the nation does expect is a reasonable bill designed to end the **corruption, racketeering, and undemocratic practices that have crept into a small but highly significant portion of an otherwise honest labor-management field...**

The following is a summary of the basic provisions of the bill based on some of the remarks of Senator KENNEDY, the chief architect of the legislation ... Sixth. It puts the spotlight of publicity on **middlemen racketeers** and **unscrupulous** antiunion employers.

Remarks of Representative McGovern, Legislative History, pp. 1513-14 (July 16, 1959)(Emphasis supplied).

Representative Landrum, one of the namesakes of the LMRDA, discussed his own legislation, the House version of the bill, which reflects all of the concerns noted with S. 1555, and is a guidepost to the changes to the Senate bill.

Section 203 (reporting by employers): Same as the committee bill. This section requires certain reports to be filed by employers or labor relations consultants hired by employers. The committee revision (incorporated in the substitute) **represents an improvement over the corresponding section of the Senate bill which required reporting of activity which is both ethical and lawful under the National Labor Relations Act.** The committee bill and the substitute are **clearly aimed at conduct which is unlawful or would be an unfair labor practice.**

Section 203(a) **requires an employer report to include any payments or loans to representatives of labor organizations, payments to**

**employees or groups or committees of employees for the purpose of causing them to interfere with the exercise of the rights of other employees guaranteed by the Labor Relations Act or the Railway Labor Acts, payments to labor relations consultants who undertake to compensate employees for engaging in such activity or to engage in labor espionage, and payments to any third person for engaging to bring in the services of an individual or firm engaged in such business.**

Subsection (b) requires detailed reports from labor relations consultants **who enter into such arrangements with employers.** A saving clause in subsection (c) makes it clear this section is not to be construed as limiting or modifying the exercise of rights protected by section 8(c), the so-called free-speech provision of the Labor Relations Act.

Subsection (d) defines terms “interfere with, restrain or coerce” as having the same meaning as corresponding language in the National Labor Relations Act.

Section 204 (attorney-client relationship): **Same as committee bill. This section excludes from the reporting requirements any confidential communications between attorney and client. The provision is identical to language suggested by the American Bar Association.**

Analysis of Landrum-Griffin Reform Bill (H.R. 8400; H.R. 8401), Legislative History, p. 1520 (July 27, 1959)(Emphasis supplied).

The discrete issues raised by Senator Kennedy and Representatives McGovern and Landrum resulted in changes being made in the final legislation to narrow the reporting obligation as reported in S. 1555.

#### **4. The Compromise Reached Excludes Any Information Related to the Rendering of Advice**

The LMRDA was signed into law on September 14, 1959. That same day, Senator Goldwater entered remarks into the record reflecting the changes that were made based on the debate taking place during the preceding five months.

Sixth. Any payment-including expenses-pursuant to such agreement with a labor relations consultant.

There was one basic difference between the House-passed Landrum-Griffin bill and the Senate-passed bill in connection with employer reporting requirements. Under the Senate bill the employer was required to report any payment or expenditure for any arrangement with a labor

relations consultant an object of which was to persuade employees in connection with the exercise of their union organizing and collective bargaining rights even if such payment was completely within the law. Under the House passed Landrum-Griffin bill reports from employers with respect to expenditures in connection with employees' rights were required only if such expenditures were designed to interfere with, restrain and coerce employees in violation of the Taft-Hartley Act.

**In conference, a compromise was reached. As indicated above, the employer, under the conference report, must report such expenditures only if an object is interference, restraint or coercion**, except where he gives something of value to any of his employees in order to get them to persuade other employees with respect to their union organizing and collective bargaining rights. This type of payment constitutes interference in violation of the Taft-Hartley Act, but even so, need not be reported if disclosed to employees is being persuaded.

Section 203(c) exempts from all of the employer and consultant reporting requirements **any information with respect to services in advising employers. . .**

Remarks of Senator Goldwater on LMRDA, Legislative History, p. 1846-7 (September 14, 1959)(Emphasis supplied).

As is readily apparent from a thorough review of the Legislative History of the LMRDA, a substantial portion of both Houses of Congress was concerned about the scope of the reporting as it appeared in the Senate bill, the broad interpretation of which is reflected in the small portion of Senate Report No. 187 cited by the Division. In the ensuing five months of debate, these concerns resulted in a number of changes to what finally became the LMRDA. These amendments and changes to the bill referenced by the Division all significantly narrow the reporting requirement, while clarifying that the advice exemption exclude "any" information associated with rendering advice.

First, it is clear the debate focused on eradicating certain financial transactions, whether made to a consultant to act upon or not, that were considered to constitute actual "interference" within the meaning of Section 8(a)(1) of the National Labor Relations Act

("NLRA"). At no time did the debate go beyond those types of specific transactions. Thus, the references by the Senators and Congressmen always used qualifiers like "improper," "unlawful," "unethical," or "surreptitious" clearly indicating a much narrower interpretation than suggested in Senate Report No. 187.

Those financial transactions concerned payments for spying on employees, payments to form fake employee committees and payments made for purposes of creating sham unions. It seems clear all of these things were what Congress ultimately intended to shed light upon. Indeed, the phrase "interfere with, restrain, or coerce" was added to the final legislation narrowing the employer's obligation to report, something that did not appear in S. 1555. *See also* Section 263(g) of LMRDA defining "interfere with, restrain, or coerce" as unfair labor practices within the meaning of Section 8(a)(1) of the NLRA.

Second, allowance was made to recognize and respect the attorney-client privilege in all cases where inappropriate payments are not made. Section 204 clearly was added for that purpose.

Third, "any" information related to advice given by labor relations consultants was to be exempt from the reporting obligation. As the types of conduct required to be reported diminished the advice exemption naturally grew. The compromises above were explained by Senator Goldwater.

The Division's proposed change to narrow the advice exemption cannot be justified by the few pages of the legislative history cited in the NPRM. It is undisputed that the pages cited by the Division did not represent a consensus view even among the Labor Committee members. In fact, the Labor Committee's remarks cited by the

Division concerned an initial draft piece of legislation that was modified substantially during the ensuing legislative process. Indeed, discussion of reports during the initial phase of legislative consideration of a bill do not constitute persuasive legislative history for the bill finally enacted. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“‘legislative history’ of this sort [remarks in a conference report] cannot be viewed as controlling”). The views expressed in those pages ultimately were discarded in favor of a more rational scheme designed to eradicate certain discrete financial transactions, while making a clear bright-line exemption for all “advice” related activities.

**The Research Cited By The Division Does Not Give A Complete View Of The  
Current Labor-Relations Climate**

The research cited in the NPRM is inadequate to support the proposed change. The research cited by the Division in support of the proposed change contains flaws which support the need for independent inquiry into the current labor relations climate. For example, *No Holds Barred: The Intensification of Employer Opposition to Organizing* (“*No Holds Barred*”) is quoted extensively in the NPRM in support of the need for increased reporting. This document on its face raises serious questions as to its usefulness:

- The study itself states that it gathered information only from talking to lead union organizers, not from the employees and not from employers. The study makes the astounding claim that although it “would be preferable if scholars could interview workers in the aftermath of each organizing campaign” that it is impossible because “the same climate of

fear and intimidation that surrounds the certification election would influence how workers would respond to any survey.” *See, No Holds Barred*. p. 5. This reasoning is fallacious. It gives lead union organizers’ opinion the status of fact, and then uses that new status to justify why the researchers made no effort to gather information from either employees or employers, even anonymously.

- Based on these obviously biased sources the report concludes “an overwhelming majority of employers are engaging in at least one or more illegal behaviors. . .” but that it “would [] be next to impossible to get employers to complete surveys in which they honestly reported on illegal activity...” p. 6. This statement obviously is results-oriented. SHRM disputes that “most” employers violate the law when faced with organizing, and the fact that no employer input was sought into this study should be enough to lessen the weight, if any, given it.
- The document fails to grasp or possibly deliberately misstates basic NLRB procedure. We are told “unions are hesitant to file [unfair labor practice] charges when there is a high probability that they are going to win because the employer can indefinitely delay or block the election.” In other words, unions are fearful of pursuing their legal rights because the election might be blocked by the employer. An employer has no ability to block an election based on a charge filed by *a union*. While the NLRB obviously retains some discretion as to whether to block an election, the fact is the



union, in essentially all cases, retains a right to proceed. Thus, even if there is a probability of winning the election, there is no valid reason to *not* file a charge to vindicate rights. *See*, NLRB Casehandling Manual (Unfair Labor Practice Proceedings), Sect. 11731.1(a) (Union retains right to request to proceed with election despite lodging unfair labor practice charges).

All of the research cited by the Division suffers from similar issues. None appear to have been thoughtful, non-biased inquiries into labor relations situations. Rather, it seems apparent that they are results-oriented tracts which must be viewed as suspect.

**1. The Research Cited in the NPRM is Missing a Significant Portion of the Picture**

All of the research cited in the NPRM paints a grim picture of union organizing in the face of an unchecked assault by companies and labor relations consultants. For example, in John Logan, *The Union Avoidance Industry in the USA*, 44 British Journal of Industrial Relations 651 (2006) (“Logan, *Union Avoidance Industry*”) there is no mention of union corporate campaign tactics. Thus, while the author discusses the rise in consultancy by reference to seminars, etc., his failure to even mention the activity of organized labor is a glaring omission. The Division also cites to the same author’s tract *Trade Union Congress, U.S. Anti-Union Consultants: A Threat to the Rights of British Workers* (2008) (“Logan, *U.S. Anti-Union Consultants*”), which derides certain conduct engaged in by labor consultants while completely failing to provide any context. Logan claims that the “extreme language illuminates the attitudes that union avoidance consultants bring to organizing campaigns.” p. 15. Logan asserts such use of language by

consultants is “Bad for Workers, Bad for Employees, Bad for Labor Relations.” *Id.* The language cited by Logan as “bad” fails to acknowledge equally (if not more so) inflammatory rhetoric by the unions

Logan citation

“declarations of war”

“are you using the most powerful weapon in your arsenal”<sup>5</sup>

“union virus”

Union rhetoric

“The union needed a plan that would allow no means of escape for the “employer.”<sup>4</sup>

NJ Teachers Union comes under fire for veiled threat against governor where teachers are asked to pray for his death.<sup>6</sup>

“Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting the death of a thousand cuts rather than a single blow.”<sup>7</sup>

It is readily apparent there is plenty of rhetoric in labor relations, yet the commentary cited by the Division condemns only that alleged to have been made by consultants while ignoring statements by union officials that are equally strong in terms of the metaphorical imagery. The research’s one-sided view of the labor relations climate is suspect because it lacks essential context.

If one were to read nothing else, it is as if organized labor has been sitting still for decades absorbing blows from these attacks while watching its membership dwindle.

---

<sup>4</sup> Rogers, Ray, “*How a Corporate Campaign Defeated J.P. Stevens*,” (*The Labor Educator*, Vol. 8, No. 2, April 1999).

<sup>5</sup> Logan, Anti-Union Consultants, p. 14.

<sup>6</sup> Campanile, “*Unholy NJ Death Wishers, Fury as Teachers Pray to Slay Christie*,” *New York Post*, April 10, 2010.

<sup>7</sup> Richard Trumka (current President of the AFL-CIO) as quoted in Manheim, Jarol “THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION” (2001).

What is missing from the picture is the rise of the corporate campaign. Many unions achieved great success in the last few years by changing their tactics. The Division should consider how the corporate campaign has altered the labor relations climate in the United States before undertaking to make the changes addressed in the NPRM. A thorough, non-partisan review of the labor relations climate will demonstrate that labor relations consultants are in most, if not all cases, assisting employers in a lawful manner to respond to potentially devastating economic attacks by unions.

Besides the rhetoric by unions noted above, there are actions by unions using corporate campaign tactics that should be taken into consideration and more fully explored by the Division.

*Pichler v. Unite HERE*, 542 F.3d 380 (3<sup>rd</sup> Cir 2008). The union in this case unlawfully accessed department of motor vehicle records of employees working at an employer it was trying to organize. The purpose of obtaining the private information was to visit homes of employees so that it could question them in order find ways to sue the employer.<sup>8</sup> When it became known that the union had violated the law, the union argued in litigation that the ends justified the means. As the Third Circuit noted

UNITE advances a unique argument. It claims that its labor-organizing purpose may not be severed from its litigation purpose or its acting on behalf of the government purpose. For instance, UNITE contends

emphasis on litigation had a twofold purpose: **raising standards in the industry for the benefit of UNITE's members, whether or not employed by [the employer], and demonstrating the effectiveness and usefulness of organization.** Thus, UNITE's activity in investigating potential litigation was part and parcel of its union organizing campaign, not separate and distinct from it.

---

<sup>8</sup> The union in its defense cited the canard that it believed that employer hostility towards unions would prevent a meaningful conversations with employees away from their homes. Of course, no such evidence was ever cited.

*Id.* at 395. (Internal citations omitted; emphasis supplied). The highlighted portion of the quote comes from the union's brief filed with the court. In other words, the union justified its unlawful invasion of privacy of employees because it needed to show value to its existing membership by attacking a non-unionized employer, and to provide a selling point for potential new members.

The union's arguments were rejected, of course, but they do give insight into larger issues. The union obviously believed that it could violate the law and attack a company in the name of some sort of "higher purpose." There is no question the attacks on the employer were to promote its organizing activities. Yet, the NPRM would force the employer hiring a labor relations consultant to disclose its strategy if communications are designed by the expert to inform employees of the company's position against these attacks. Moreover, although unions are required to file LM-2 reports with the Division, one would be hard pressed to find any of the above-mentioned activities set forth in the union's reporting.

*Sutter Healthcare.* In July 2011, Unite HERE publicly apologized and paid millions of dollars to settle a defamation claim filed against it by Sutter Healthcare. The union was involved in a dispute with a linen supplier to Sutter. In a deliberate effort to damage the business relationship between Sutter and the targeted employer, the union sent out postcards claiming the linens provided to the hospital contained dangerous pathogens, a clear lie. After six years of litigation, the union finally issued an apology and agreed to pay damages. Once again, the underlying conduct, the costs spent on the defamatory mailing, are something that cannot be gleaned from the LM-2 reports.

*Contract Campaign Manual.* The Service Employees International Union has been at the forefront of corporate campaign tactics for many years. It has developed a manual for use in pressuring employees, called the “Corporate Campaign Manual.” All 88 pages of the manual are devoted to tactics to escalate pressure on the employer to make it “more willing” to negotiate. In the “Evaluating Tactics” section, the reader is asked

What purpose will the tactic serve?

Costing the employer money. Can you threaten to or actually...

Reduce productivity?

Increase costs?

Affect a private company’s relationship with sources of income, such as customers, clients, investors, or leaders?

Affect a public employer’s relationship with legislators or top government executives such as the governor or mayor? ...

Making life difficult for management. Will the tactic...

Distract management officials from work they need to do?

Embarrass them in front of their superiors, associates, families or neighbors in the community? ...

In the last several years the membership in the SEIU has grown by using these types of tactics. Again, employees would not be able to discern how much money the SEIU spent on a particular corporate campaign from the LM-2. Clearly, the Division’s contemplated detail of reporting for management would far outstrip any financial reporting required by organized labor in the last 52 years.

There is ample evidence that unions often engage in activity, lawful and unlawful, that is designed to deliberately harm the business interests of a target employer or any company doing business with the target employer. In many cases, the union is not seeking to “organize” the employees by way of secret ballot election where they might have access to information from both sides; rather, the union’s objective in many cases is unbridled access to employees while the employer remains “neutral.”<sup>9</sup> Yet, the Division seems to believe these successful tactics do not exist or, if they do, that they are somehow separate. The conduct of the unions is not separate. There is a cause and effect in all actions taken in labor relations.

The Division’s attempt to broaden the definition of reportable activities will only exacerbate the problems faced by employers. As noted above, the proposed interpretation will be at odds with congressional intent. Increased reporting necessarily forces an employer to choose between disclosing its confidential strategy to the public or responding without the assistance of an expert. The Division should understand that the disclosure rule contemplated by the NPRM will tilt the balance in favor of organized labor in ways that Congress simply did not intend. The Division should consider the full, accurate picture of the labor relations climate in the United States to determine whether the proposed changes are justified.

---

<sup>9</sup> The concept of “neutrality” is where the employer agrees to not communicate with its employees about unionization, usually, but not always, in exchange for a cessation of corporate campaign hostilities.

**The Practical Consequences Of The Proposed Interpretation Will Be Devastating  
To Businesses Big And Small**

Besides being contrary to congressional intent, as well as resting on a distorted picture of the labor relations climate as portrayed in the research cited by the NPRM, the proposed NPRM instructions will inhibit employer free speech in a number of ways. It will cause employers to think twice about seeking expert advice about their legal rights because they will have to disclose their strategy in detail. It will drive law-abiding ethical consultants from the marketplace rather than report everything they do to the Division. It will seriously hinder the attorney-client relationship by exposing privileged communications to attack by the unions.

*The proposed instruction is so broad it effectively conflates “advice” and “persuader” activity.* Under the proposed interpretation, there is no clear situation that involves only non-reportable advice. The field of labor relations is almost exclusively communication driven. Labor relations also is a highly nuanced field where the law changes frequently. Companies confronted with labor relations situations often are uncertain as to how to respond. It is natural for the employer to turn to an expert for advice, including seeking help with how to lawfully communicate with employees. The proposed instruction would now make much of what has been the consultant’s advice “persuader activity” and therefore reportable. This conflation of advice into persuader activity will inhibit an employer’s free speech as it causes the employer to wonder whether the use of an expert will become yet another “angle” used by a union to “inflict[] the death of a thousand cuts. . . .” While the NPRM says when a “lawyer or other consultant who exclusively counsels employer representatives on what they may lawfully

say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent, is providing 'advice,'" NPRM, p. 61, it goes on to say "preparation of material" which may ultimately find its way to an employee is "persuasive." The Division's proposed interpretation makes it impossible that there could ever be a purely advisory situation, because labor relations necessarily results in the communication by an employer with its own employees.

*The proposed instruction is so broad it will inhibit the seeking, and giving of, advice, which will lead to more violations of the law.* Contrary to the "research" cited in the NPRM, most companies seek advice when faced with an unfamiliar situation, not out of ideological reasons, but because they want to ensure compliance with the law. Oftentimes companies do not know how to communicate about a particular problem and seek expert guidance. Seeking advice is not something that is limited to labor relations issues; companies seek advice on myriad matters, any one of which includes some types of communication. The overbroad proposed instruction will inhibit this process as it will lay bare all strategic decisions regardless of appropriateness and lawfulness.

Many consultants who are acting totally appropriately will not want to report their dealings and will leave the field. Companies may eschew seeking counsel if the strategy is now reportable. The result can only lead to further confusion, and perhaps even more violations of the law, as employers act blindly.

*The proposed rules effectively will drive out lawyers who provide legal advice to employers regarding obligations under the NLRA respect to organizing and bargaining.* For hundreds of years the most sacrosanct privilege in existence is that of lawyer to



client. Lawyers are held to a higher standard than most, and are sworn to represent their clients according to the ethics of their profession. The proposed instruction would now mandate that lawyers violate that oath by reporting in detail not only the existence of their clients, but also the advice they give. The destruction of this privilege as proposed by the NPRM will upend the lawyer-client relationship.

There is no comparable situation in any other area of law where an attorney must report in detail the strategy conceived on behalf of a client. Yet, the NPRM would do exactly that. The NPRM pays some small attention to this problem by noting “the distinction [between advice and persuader activity] is further underscored by the deliberate disclosure . . . of materials or communications to third parties (the employees), thus waiving the attorney-client privilege that might have attached to the activity.” NPRM, p. 28. Yet, a “consultant’s revision of the employer’s material or communications to enhance the persuasive message also triggers a duty to report...” NPRM, p. 61. (Emphasis added). The latter guidance is so subjective and vague as to provide no guidance at all. What constitutes “enhanced persuasion?” Who decides whether it is enhanced? What if it is the attorney’s good faith belief that the language needs to be changed for legal reasons renders it more persuasive in the eyes of the employees? There are no solid answers to these questions and they demonstrate why the current interpretation is accurate. One simply cannot separate “advice” out of the overall consultation.

The NPRM’s reasoning also ignores the reality concerning advice received from attorneys. Advice by attorneys is inextricably intertwined with the planning and ultimate

execution of a legal strategy. Yet, under the NPRM a portion of the overall advice that may ultimately be disclosed to a third party would expose all of this advice to the public. For example, if the lawyer was to spend hours talking to a client about a situation and ultimately provides some phrasing or other material that might be used in a communication with employees, then the money spent by the client, as well as the time for this discrete aspect of the strategy, is reportable under the proposed regulation. That will not end the inquiry, however, because it reveals the very existence of what was otherwise a privileged conversation. If the union involved in the matter files a complaint<sup>10</sup> alleging that not enough was reported, the only way for the company and the attorney-consultant to prove that it was not reportable was to discuss *even more* about its confidential strategy. This slippery slope should not be entered upon by the Division.

*The NPRM proposed interpretation also would require reporting on matters far beyond the original intent of the LMRDA.* Thus, the NPRM states, “material communications, or revisions thereto, are persuasive if they, for example, explicitly or implicitly encourage employees to ... take the collective bargaining proposals, or refrain from concerted activity (such as a strike) in the workplace.” NPRM, p. 62. As the Legislative History clearly indicates, the only focus of Congress was “organizational” rights of employees as it related to labor consultants. The Division would now extend reporting to matters where the employees have union representation and requiring employers to either forego the use of a labor consultant or risk opening up another angle

---

<sup>10</sup> It is highly likely the unions, seeking leverage in all matters “great and small” against a target company will file a complaint.

of vulnerability as reporting on matters related to bargaining proposals and strikes would be required.

**Under The Division's Proposed Interpretation Any Communication That  
Concerns Whether An Employee Could Choose A Union Would Be Reportable  
Regardless Of Relationship To Actual Organizing**

SHRM is concerned that the Division's proposed interpretation will encompass activities far removed from any actual or even potential organizing. SHRM as an organization is devoted to assisting its membership in developing initiatives to improve employee retention, morale and productivity. These initiatives can, among other things, include employee surveys, policy changes, and training. Sometimes an object or a part of an object of these types of initiatives is to prevent union organizing even when there is no union activity. Improving morale of employees in particular has the side effect of reducing the possibility an employee will go outside of his or her employer to seek assistance.

Given the NPRM's stress that activities that could "indirectly" persuade an employee, then any one of these activities could be deemed to be reportable persuader activity even though unions or union organizing is never mentioned or even a current issue. The breadth of the Division's contemplated reporting is so broad as to sweep in activities, such as these, that are far removed from the intention of Congress when it enacted the LMRDA.

### **Conclusion**

The changes proposed in the NPRM should not be adopted. They are contrary to the legislative history, are not supported so-called contemporary research, and would result in several unintended consequences.

Congress did not enact a broad reporting scheme; rather, it intended to target certain discrete practices (none of which are even heard about today). Rather, it envisioned a bright line for what is reportable persuader activity and that which is not. The proposed changes in the NPRM will broaden the activities required to be reported to the point where virtually nothing involving labor relations will be exempt.

The rationale cited by the Division is incomplete, and in some cases obviously biased. The research referred to in the NPRM ignores completely the role of labor in the current labor relations climate; there is not a single mention of union corporate campaign tactics, which are widespread, in any of the tracts. The justification for such a sweeping change cannot be supported by this so-called research.

The scope of the proposed reporting scheme will inhibit employer free speech, may actually cause more violations of the law as consultants leave rather than report, and will subject employers to yet another avenue of attack through corporate campaign activities. The changes, if adopted, will only cause a further imbalance in the labor relations field.

For all the foregoing reasons, SHRM believes the proposed changes are not supported by the statute, are ill conceived, and will lead to many unintended negative consequences. SHRM urges the Division to not adopt the proposed changes. At a

Mr. Andrew R. Davis  
September 21, 2011  
Page 29 of 31

minimum, the Division should undertake its own study of the labor relations climate and seek additional stakeholder input before undertaking such sweeping changes.

Sincerely,



Michael P. Aitken  
Vice President, Government Affairs

Of Counsel:

Paul Salvatore, Esq.  
Proskauer  
Eleven Times Square  
New York, NY 10036

Ronald Meisburg, Esq.  
Proskauer  
1001 Pennsylvania Avenue N.W.  
Suite 400 South  
Washington, DC 20004

Lawrence Z. Lorber, Esq.  
Proskauer  
1001 Pennsylvania Avenue N.W.  
Suite 400 South  
Washington, DC 20004

Mark Theodore, Esq.  
Proskauer  
2049 Century Park East  
Suite 3200  
Los Angeles, CA 90067

SHRM State Council and Chapter Signatories:

Acadiana Society for Human Resource Management  
Baldwin County SHRM  
Bay Area Human Resource Executives Council  
Bayou SHRM  
Cabarrus Regional SHRM  
Carolinas Chapter of SHRM  
Carroll County SHRM  
Central Dakota Human Resource Association  
Central Maine Human Resource Association  
Eastern Iowa Human Resources Association  
Eastern Shore SHRM  
Genesee Valley  
Golden East SHRM  
Greater Madison Area SHRM

Mr. Andrew R. Davis  
September 21, 2011  
Page 30 of 31

Greater Valdosta Area SHRM  
Grundy Will Human Resource Association  
Heart of Illinois Human resource Council, SHRM Chapter 326  
Human Resource Management Association of New Mexico  
Human Resource Management Association of Rhode Island  
Human Resources Association of Central Oregon  
Illinois Fox Valley SHRM  
Lakeshore Area Human Resources Association  
Manchester Area Human Resources Association  
Michiana SHRM  
Mid Michigan Human Resources Association  
NW Georgia SHRM Chapter  
Piedmont Area Human Resource Association  
River Valley Human Resources Association  
Salina Human Resources Management Association  
San Antonio Human Resources Management Association  
Sarasota-Manatee Human Resources Association  
SHRM Appalachian Chapter of the Virginias  
SHRM Jacksonville  
SHRM Memphis  
SHRM SMA of South Florida  
Snohomish County Human Resources Association  
Southeast Indiana Human Resource Association  
Southeast Kansas Human Resources Association  
Southeast Texas Human Resource Association  
Southern New Mexico SHRM  
Springfield Area Human Resource Association  
Susquehanna HR Management Association  
Tennessee Valley Chapter of SHRM  
Tuscaloosa Human Resource Professionals  
Valley of the Sun Human Resources Association  
Western Kansas Human Resource Management Association  
Winona Area Society for Human Resource Management  
Arkansas Society for Human Resource Management  
Iowa Senior Human Resources Association  
Kansas State Council of SHRM  
Louisiana Society for Human Resource Management  
Maryland SHRM State Council  
Michigan Council of SHRM (MISHRM)  
New Hampshire State Council  
New Mexico Society for Human Resource Management  
North Carolina SHRM State Council  
North Dakota SHRM State Council  
Rhode Island State Council of the Society for Human Resource Management  
South Carolina SHRM State Council  
SHRM Alabama State Council  
SHRM Maine State Council  
SHRM Nebraska

Mr. Andrew R. Davis  
September 21, 2011  
Page 31 of 31

Tennessee SHRM State Council  
Vermont SHRM State Council  
West Virginia State Council of the Society for Human Resource Management  
Wyoming SHRM State Council