August 10, 2017

By regulations.gov.
Mr. Andrew Davis
Chief, Division of Interpretations and Standards
Office of Labor Management Standards
United States Department of Labor (DOL)
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: Rescission of Rule Interpreting 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," 29 CFR Parts 405 and 406, RIN 1245–AA07

Dear Mr. Davis:

The National Automobile Dealers Association (NADA) represents more than 16,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ some 1,000,000 people nationwide yet the majority are small businesses as defined by the Small Business Administration.

The DOL is proposing to rescind a March 2016 rule which revised Forms LM–10, *Employer Report* and LM–20, *Agreements and Activities Report*. 82 Fed. Reg. 26877 (June 12, 2017). These Forms relate to agreements or arrangements between employers and labor relations consultants ("persuaders") involving activities to educate employees on issues related to organizing and collective bargaining. The March 2016 rule significantly narrowed a long-standing exemption by narrowing the scope of activities that constitute ''advice,'' effectively expanding the universe of circumstances requiring the reporting of employer-consultant "persuader" agreements. Importantly, a rescission of the March 2016 rule would not affect any requirements currently in effect.[1]

By reversing a long-standing DOL position without any adequate justification, the March 2016 rule was issued in violation of the Administrative Procedure Act (5 U.S.C. 706(2)). Moreover, the reversal was based on a misinterpretation of the of the Labor-Management Reporting and Disclosure Act which would have led to a chilling of employer speech rights, an imposition of unnecessary and burdensome filing mandates on small businesses. See NADA's attached previous comments dated September 21, 2011 opposing the reversal of DOL's position. Thus,

[1] Enforcement of the March 2016 rule is currently the subject of a permanent court injunction. *NFIB v. Perez*, 2016 WL 8193279 (N.D. Tex., Nov. 16, 2016).

NADA supports a measured and thoughtful reconsideration of the rule to review these concerns as raised by the courts and others.

On behalf of NADA, I thank DOL for the opportunity to comment on this matter.

Lauren Bailey
Manager
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Legal & Regulatory Group

September 21, 2011

Mr. Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor (DOL)
200 Constitution Ave, NW Room N-5609
Washington, DC 20210

Re: Labor-Management Reporting and Disclosure Act, Interpretation of the ''Advice'' Exemption; 29 CFR Parts 405 and 406; RIN 1215-AB79; 1245-AA03

Dear Mr. Davis:

The National Automobile Dealers Association (NADA) represents more than 16,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ upwards of 1,000,000 people nationwide yet the majority are small businesses as defined by the Small Business Administration.

I. Introduction

Earlier this year, DOL requested comment on proposed revisions to its Form LM–10 Employer Report and Form LM–20 Agreements and Activities Report. 76 Fed. Reg. 36178, *et seq.* (June 21, 2011). These forms relate to agreements or arrangements between employers and labor relations consultants or "persuaders" involving activities to educate employees on issues related to organizing and collective bargaining. DOL specifically proposes to revise its long-standing ''advice'' exemption to such reporting by narrowing the scope of activities that constitute ''advice,'' thereby expanding those circumstances that trigger the reporting of employer-consultant "persuader" agreements. DOL also proposes to revise LM-10 and LM-20 and related instructions to require more detail and to mandate that they be filed electronically.

For almost 50 years, DOL only has required disclosure from employers using "persuaders" if and to the extent that they interact directly with or provide materials to employees. The proposal would drastically expand the definition of "persuader activity" to include any communication related to employee organizing from consultants or lawyers to employers. Since a broadening of the advice exemption could significantly impact motor vehicle dealerships; NADA offers the following comments and suggestions in opposition.

II. The "Advice" Exemption Proposal Is Too Narrow

As proposed, the scaled back "advice" exemption would unduly broaden the universe of reportable "persuader activity" in direct contravention of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) intent not to capture mundane business activity. Virtually any employer contact with attorneys or consultants on labor issues could trigger reporting. This contravenes DOL's interpretations dating to at least 1962 that only speech and materials delivered directly to employees by outside consultants or attorneys trigger reporting. In light of the DOL's failure to provide any reasonable basis or justification for revising its half-century old policy along with the LMRDA's clear-cut intent, the definition of "advice" should not be revised to expand inappropriately the universe of reportable "persuader activity."

III. The Proposal Would Undermine Attorney Client Privilege

DOL's proposal would undermine seriously the attorney-client privileges of employers and directly interfere with attorney-client relationships. Employers must not be forced to report advice and counsel from professionals to the extent doing so would disclose confidential or privileged communications. The DOL lacks the authority to compel the disclosure of information employer attorneys may not themselves reveal and, in any event, should avoid imposing a due process chill on employers. Under no circumstances should reportable "persuader activity" include an attorney's revising, editing, reviewing, or advising employers on how to communicate with employees.

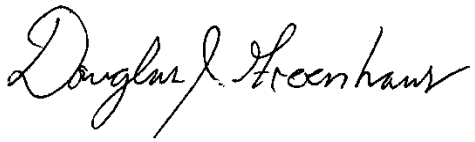
IV. The Proposal Would Unnecessarily Burden Employers

The DOL drastically underestimates the administrative and financial burdens associated with its proposal. By suggesting that only 2,601 companies will be required to file revised LM-10 and LM-20 forms, the DOL fails to recognize the degree to which its proposal would expand reportable "persuader activity" to include activities far beyond those directly related to union elections. In fact, hundreds of thousands of companies would be forced to report by virtue of simply hiring consultants or attorneys to review their labor policies. Moreover, the reporting requirement would be triggered any time a manager attends an outside training session or webinar on labor issues. Curiously, union contacts with and payments to lawyers and consultants would not have to be reported.

As noted above, a narrowed advice exemption would make it difficult for employers to retain outside counsel to assist them with labor law issues. Many law firms which today provide advice and representation on labor-related issues deliberately avoid "persuader activity" so as not to trigger the paperwork burdens associated with reporting. Removing the exemption's coverage over these general advisory relationships would create a chilling effect on the legally protected free speech rights of employers and would make it more difficult for them to retain competent outside counsel. Small businesses, including dealerships, would particularly be impacted as they lack the in-house expertise and on-going labor counsel relationships large companies often have.

On behalf of NADA, I thank DOL for the opportunity to comment on this matter.

Respectfully submitted,



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