VIA ELECTRONIC SUBMISSION

September 21, 2011

Mr. John Lund
Director
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

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

Re: Labor-Management Reporting and Disclosure Act – Interpretation of the "Advice" Exemption; RIN 1245-AA03

Dear Director Lund and Division Chief Davis:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor (Department) in response to the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* on June 21, 2011, at 76 Fed. Reg. 36178.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing more than 23,000 contractors, subcontractors, materials suppliers and construction-related firms within a network of 75 chapters throughout the United States. ABC member contractors employ nearly 2 million workers, whose training and experience span all of the more than 20 skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. ABC's membership is bound by a shared commitment to the *merit shop philosophy*. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

ABC is a member of the Coalition for a Democratic Workplace (CDW), which is filing a more detailed set of comments on the Department's proposed rulemaking. ABC supports CDW's comments and hereby incorporates them by reference. ABC is filing these comments to highlight

certain aspects of the proposed rules that are of particular concern to the merit shop construction industry.

Background

The Department's proposal purports to "revise its interpretation of the 'advice' exemption to [Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)] by limiting the definition of what activities constitute 'advice' under the exemption, and thus expanding those circumstances under which reporting is required of employer-consultant persuader agreements."[1] In addition, the Department proposes to "revise the forms and instructions ... and require more detailed reporting on employer and consultant agreements."[2] These actions threaten to upset 50 years of settled law regarding the meaning of "advice." The Department's radical proposed changes would depart from the plain language and stated intent of Congress to broadly exempt advice from being publicly reported under the LMRDA. The Department has not met its heavy burden of justifying such radical changes. The Department's actions appear on their face to be contrary to congressional intent, and the proposed rulemaking will have serious adverse consequences for small businesses and their representatives in the construction industry.

ABC's Comments in Response to the Department's Proposed Rule

As is explained in greater detail in the CDW comments, Congress intended from the inception of the LMRDA to broadly exempt advice from the reporting requirements.[3] Congress used the word "advice" without requiring a statutory definition, because it was then, and remains now, a commonly understood term. In the Department's own words, affirmed by the courts, advice has consistently been understood to mean communications "submitted orally or in written form to the employer for his use" where the employer "is free to accept or reject the oral or written material submitted to him."[4] The Department's new claim that this longstanding interpretation is somehow inconsistent with the text of the LMRDA is unsupported by the Act and its legislative history.

The Department's claim that its longstanding interpretation of the LMRDA's plain language has somehow led to a proliferation of consultants, or that such consultants have encouraged employers to violate the labor laws in order to defeat union organizing, is unsupported by credible, objective research. There is no evidence that consultant-sponsored violations of the Act have been responsible for the decline of unions in the construction industry. The causes of construction union decline are well documented and are attributable to reasons having much more to do with union failures than employer consultant abuses.[5]

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[1] 76 Fed.Reg. 36178.

[2] *Id.*

[3] H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959) ("Subsection (c) of section 203 ... grants a broad exemption from the [reporting] requirements of the section with respect to the giving of advice.").

[4] *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F. 2d 616, 617 (D.C. Cir. 1989). *See also Martin V. Power, Inc.*, 1992 WL 252264, *2 (W.D. Pa. Sept. 28, 1992); *Wirtz v. Fowler*, 372 F. 2d 315, 330-331, n.32 (5th Cir. 1966), *overruled in part on other grounds, Price v. Wirtz*, 412 F. 2d 647 (5th Cir. 1969).

[5] Herbert R. Northrup, *Open Shop Construction Revisited* (Wharton 1985).

At the same time, merit shop contractors have properly exercised their rights of free speech in response to union organizing campaigns, and they have properly sought out labor relations advice from lawyers, consultants and trade associations, including ABC. The role of such advisors, contrary to the Department's unwarranted disparagement, primarily has been to educate construction employers in how to communicate lawfully with their employees, thereby reducing the number of unfair labor practices, which would have occurred if the Department's proposed rule had been law over the past five decades.

In this regard, it is essential that employers in the construction industry, which are predominately small businesses without access to in-house labor relations advisors, retain the ability to obtain advice from labor relations experts before, during and after a union organizing campaign. Such advice cannot be effective if it is limited to answering "yes or no" questions from employers. There are so many complicated legal issues in the field of labor law that the wording of every communication to employees is fraught with legal peril. Often, the only practical method of advising employers as to what they can and cannot say to employees, as well as what they *should* say in order to communicate effectively, is to draft sets of sample talking points, letters, or similar oral or written products. These drafts are nothing more than recommendations for employers to use as they see fit, and it is up to employers to decide whether to accept or reject such recommendations in communicating the messages to its employees. As the Department has consistently held for 50 years, such drafts of speeches, letters and the like do not lose their character as advice merely because they are intended to persuade, so long as the *employer* does the persuading, not the employer's advisor.

This is not to say construction industry employers never hire consultants to persuade employees in a *non*-advisory capacity. Some employers feel unable to communicate with their own employees effectively, no matter how much advice they receive, and hence they contract with consultants that engage in true persuader activity and file the necessary reports as required by law. There is no data showing employers that hire such persuaders and file the LM reports are more or less likely to interfere with the rights of their employees than employers that communicate directly with their own employees after receiving only non-reportable advice from lawyers, trade associations or other third party consultants.

ABC itself, like most other industry trade associations, has chosen not to engage in persuader activity on behalf of its 23,000 member employers for logistical and practical reasons. But ABC is entitled to advise and educate its members on how they can and should lawfully communicate with their employees, such as conducting seminars, providing written materials and engaging in direct communications with members in need of labor relations advice. No persuader reports should be required in any of the above circumstances, regardless of whether such advice has the indirect impact of persuading member contractors' employees through the actions of the employers themselves. ABC believes that lawful advisory efforts provide value to its membership and to the free flow of debate that has been characterized by the U.S. Supreme Court as one of the primary objectives of the National Labor Relations Act[6]. Most importantly, the communications between associations and their members in the construction industry are

[6] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

protected by the Freedom of Association and Freedom of Speech clauses of the First Amendment to the U.S. Constitution.

The Department's proposed evisceration of the advice standard would cast doubt on the ability of ABC and other trade groups to provide such essential labor relations advice to their employer members, for fear of being unjustifiably deemed to be engaged in persuader activity. Under the Department's proposal, the only way to be sure to avoid the burdensome reporting requirements—for the association as well as its unsuspecting employer members—would be for the association to stop giving any advice to its members on labor relations matters. There is no justification for the Department to implement a proposed rule that would unquestionably create such a direct chilling effect on ABC and its members.

Unlike the Department's new proposal, its previous longstanding interpretation of the LMRDA has given clear guidance to the business community as to what conduct is persuader activity and what conduct is exempt advice. The Department's proposed rule would sacrifice that clarity in favor of a wholly unworkable redefinition that will leave employers and their advisors, including associations such as ABC, to guesswork regarding the crucial point at which advice becomes persuasion. In light of the criminal provisions of the LMRDA, such vagueness is totally unacceptable and is prohibited by the Fifth Amendment to the U.S. Constitution.[7]

The same vagueness in the proposed changes will effectively deprive employers in many instances of their right to legal counsel. Lawyers will be reluctant to advise employers on appropriate responses to union organizing without much clearer guidance from the Department as to what recommendations do not constitute persuader activity, keeping in mind the congressional intent to broadly exempt advice from the LMRDA's reporting requirements. Lawyers are particularly placed at risk by the proposed rule because of the related requirement that annual LM-21 reports disclose all of the lawyers' *non*-persuader clients, fees and services, even if a single persuader event is found to have occurred. If by merely suggesting or revising documents, speeches or policies, an attorney would risk being required to file government reports that include detailed information, including fee arrangements for all other labor clients, many attorneys will simply cease providing such services.

The proposed rule would thereby force businesses to either say nothing at all, or risk saying something inaccurate—or even illegal—to employees, simply because companies will no longer be able to obtain quality advice on what to say. Either way, a company's ability to communicate with its employees about a subject of vital importance will be severely restricted, and employees' right to receive balanced information will be virtually eliminated.[8]

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[7] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Parker v. Levy*, 417 U.S. 733, 775 (1974); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

[8] It must also be noted that the adverse impact of the proposed rule on employers and their advisors is not limited to the types of communications with employees that arise during a union organizing campaign. The Department's proposal apparently applies equally to advice rendered even in the absence of any known union organizing activity and purports to restrict for the first time group seminars with employers and/or their supervisors. The Department's regulatory impact analysis fails to take into account the number of possible communications that may occur between employers and their advisors—including lawyers and association staff—outside the context of known organizing campaigns, which greatly magnifies the impact of the proposed rule. The Department's regulatory impact analysis is therefore fatally flawed and should be reevaluated.

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ABC believes that the proposed rule changes require a great deal of additional study. The Department's proposed rule threatens to destabilize labor relations in the construction industry (and in other industries) at a time when the industry is already facing significant economic hardship. The regulatory burdens imposed by the expanded reporting requirements are completely unjustified and would harm small construction businesses that are barely surviving in the current economy. The proposed rule would deprive employers of their right to free speech, freedom of association and legal counsel, and would deprive employees of the right to obtain balanced and informed input from both sides as they decide whether to be represented by a union. The new rules would harm existing businesses and impair their ability to grow and create new jobs. For the reasons outlined above and in the more extensive comments filed by the CDW, ABC requests that the Department reconsider its rulemaking proposal and withdraw it without delay.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

Geoffrey Burr
Vice President, Federal Affairs