9/20/11

Dear DOL

This letter is to comment regarding your Notice of Proposed Rulemaking narrowing the "advice exception" under the Labor Management Reporting and Disclosure Act. This proposed rule is unnecessary, an extreme over-reach and a direct threat to job creation in the United States. The timing and scope of the proposed rule can only be described as political payback to labor unions at the expense of small businesses and entrepreneurs, who are the ones most likely to be harmed by these new regulations.

I object to this proposed rulemaking because there is no need for this new interpretation, the proposed rules don't really impact the supposed problems with the current reporting rules, and the potential financial impact of the rule is devastating.

Need For the Proposed Rule

There is no need for this proposed rule. Most of the "research" cited in the proposed rulemaking is based entirely on anecdotal incidents reported by unreliable or biased resources. In addition, most of the illegal activities complained about (bribing employees or organizers, spying on workers) are not affected in any way by the proposed rule. The proper way to discourage or prevent illegal activities is to investigate and punish them - this is exactly what the National Labor Relations Board does on a regular basis. Instead, your proposed rulemaking seeks to substantially increase reporting of lawful activities by millions of employers. It makes no sense.

The Substance of the Rule

The department proposes drastic expansion of the definition of "persuasion" to include numerous common human resource activities. They include activities like conducting employee surveys, drafting policies or procedures, holding employee committee meetings, or attending continuing education seminars or conferences. All these activities are legally protected and consistent with creating an engaged workforce in today's competitive global economy. Nevertheless, they are treated as somehow wrong - literally crimes if improperly reported - in the Department's proposed rule.

There are several major problems with the proposed rule. I'll summarize just a few:

1. The proposed rule abandons a "bright line" trigger for a subjective one. Virtually any positive employee relations practice provided with assistance of either an attorney or consultant could trigger the reporting requirement. The Department's current interpretation is a bright line - if an attorney or consultant meets directly with employees it is "persuasion" and therefore triggers the reporting requirement. This is a simple, easy to recognize event that creates certainty around the reporting process. Today a company knows that if it hires an attorney or consultant to talk to employees about unions that they must report the agreement and any disbursements that follow.

Under the proposed rule the bright line is blurred by using a test so subjective that it is meaningless. The list of activities that could trigger the reporting obligation are basically limitless, and many of them rely on the "intent" of the company. Companies spend $18.4 billion annually on human resources consulting each year. The amount of money spent on labor and employment legal advice is harder to determine, but is probably more than the amount spent on consulting. Many of these activities could be loosely interpreted to touch matters covered by the proposed rule.

The net effect of this proposed rule is to create potential criminal liability for the mere act of engaging the services of a consultant or attorney. Due to the serious potential consequences of improper reporting, companies will have to spend a lot of time making sure they identify all persuasion and advice activities each year. This diverts resources to compliance with a rule of questionable value that could otherwise be devoted to innovation, productivity improvements and other job-creating activities. This notion is preposterous in any economic situation; to add this huge regulatory burden to American businesses during the current tepid recovery is astounding.

2. The proposed rule interferes with long-standing attorney-client and consultant-client relationships. The underlying intent of the current reporting framework is to disclose "direct-contact" persuader activities in the hope that companies will be less likely to engage in them. By greatly expanding the types of activities that will trigger the reporting requirement, the new interpretation will interfere with tens of thousands of client relationships. It discourages clients from seeking advice and counsel from professionals and may even result in disclosure of confidential or privileged communications.

3. The reporting requirement is extremely burdensome on small and large businesses. The Department of Labor estimates that the administrative burden caused by its rule will be minimal. These estimates are completely unrealistic and dramatically understate the financial impact of these regulations on employers.

The Department estimates that only 2,601 companies will be required to file the forms required under the new rulemaking. This is a gross underestimate. The Department bases its estimate by assuming that 75% of companies hire outside attorneys or consultants during NLRB elections. But they completely ignore the fact that their interpretation covers activities far outside the scope of union elections. There are literally millions of companies who hire consultants and attorneys to conduct employee surveys, facilitate employee committees, deliver trainings, and review policies or handbooks each year. The number of managers attending conferences or outside training sessions conducted by attorneys or consultants would also number more than a million each year (more than 10,000 people attend just the SHRM annual conference each year). Each one of these companies would potentially trigger the reporting requirement.

Based on the proposed interpretation this means that each year companies will have to engage in compliance related activities like:

- Review the agenda of every conference or trade association meeting attended by every employee in the company, to make sure that none of the presentations cover "persuasion" topics;

- Review the agenda and content of every training session or employee committee meeting facilitated by an outside consultant or attorney, to make sure that none of the content triggers the reporting requirement;
- Evaluate on a case-by-case basis every communication with an outside attorney or consultant to determine whether that communication qualifies as persuasion content or advice content and whether it qualifies as a privileged conversation (the DOL takes the position that persuasion activities are by their nature not privileged);
- Examine every employee opinion survey or similar tool to make sure it does not contain any component that could be considered related to union vulnerability or proneness.

In order to fully comply with the reporting requirements this review must be ongoing - it can't just happen once a year. That means that every time a consultant or attorney is engaged, or any time anyone goes to a conference or seminar, that a review must happen to ensure that if reporting is required it occurs within 30 days of the initial "agreement or activity."

It is hard to say how many hours each year would be needed to comply with these rules. Obviously it depends on how many attorney or consulting relationships a company maintains, or how many outside conferences or training sessions employees attend. Nevertheless, literally hundreds of thousands of companies each year attend seminars or conduct opinion surveys each year. It is safe to say that at least a few hours per month per company location would be needed to ensure compliance with the proposed rule. Even if you estimated only one hour per month you are talking about a compliance burden of nearly two days per year per company.

The costs of this compliance is staggering. If you use the Department's own estimate of $87.59 per hour as the cost of compliance, the total compliance burden on employers is more than $100 million each year.[1] And remember, this is only half of the total reporting burden - each time the reporting event is triggered it requires a similar amount of reporting by the consulting firm, the law firm and then independent reporting by any subcontractors used by those firms. Using these very conservative assumptions, **the total cost of this tax on employer free speech is more than a quarter of a billion dollars.**

Conclusion

There is nothing in the text of the LMRDA or the legislative history that suggests that Congress intended employers to have to report basic HR activities as potential "persuasion" activity. The Department has overstated the need and underestimated the costs of this rule. This is due in large part to the one-sided and clearly limited investigation that went into the proposal. The Department has dramatically overstepped its regulatory authority, not to mention basic common sense, in suggesting these reporting requirements. The proposed rule is clearly driven by doing what is best for labor unions, at the expense of employers and, most important, the working people who depend on those companies for their livelihood. We strongly urge that the rule be withdrawn and that the current, common-sense and bright line interpretation remain in place.

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[1]Assuming 100,000 firms spend 14 hours per year to comply (one hour per month plus 2 hours annually to complete forms) the total burden would be $122,626,000. The actual cost is likely to exceed this because the rule will likely impact many more companies, and each report triggers at least one separate report from the consultant or attorney.