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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 DC 20210

RE: Notice of Proposed Rulemaking RIN 1215–AB79; RIN 1245–AA03; Labor Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption.

Dear Mr. Davis:

The law firm of Baker & McKenzie has approximately 400 labor and employment attorneys in its offices throughout the world, providing a variety of legal services involving employment and workplace related matters. Approximately 150 of these labor & employment attorneys practice in the United States. The undersigned attorneys have practiced together representing management for approximately 120 years. During this time, we have handled hundreds of union campaigns, NLRB proceedings, collective bargaining negotiations, as well as other employment-related legal matters such as discrimination, wage-hour litigation, and workplace counseling. Before discussing our specific comments, as a general comment we submit the proposed expansion of the definition of "persuader activity" will be confusing not only to employers, but also to attorneys and consultants (herein collectively referred to as "persuaders" if engaged in persuader activity) and will result in a long period of litigation. In addition, the proposed changes in the forms will create a tremendous administrative burden on employers.

Finally, it is paradoxical that the Department of Labor (hereinafter referred to as "DOL") would attempt to create obstacles to the dissemination of information to employees by employers at the same time it emphasizes the importance of assisting employees in developing "independent and well-informed conclusions regarding union representation and collective bargaining." (Advice Exemption, Proposed Rule, No. 76 Fed. Reg. 36182, June 21, 2011)[1].

[1] Hereinafter cited as "Fed. Reg. (page)."

SPECIFIC COMMENTS

1. Extraterritorial Application of Proposed Changes

Under well established principles of U.S. law, federal laws do not have extraterritorial effect unless Congress expresses an intention for them to apply to activities occurring outside the U.S. *See EEOC v Arabian American Oil Co.*, 499 U.S. 244 (1991). This principle is illustrated by the evolution of Title VII which was amended by the Civil Rights Act of 1991 (Pub. L. No. 102-166 at Section 109) to have extraterritorial effect. The LMRDA, like Title VII—before the 1991 amendments, does not contain any expression of an intent for it to apply outside the U.S.

The proposed changes do not make clear that they only address persuader activities involving corporations headquartered in the U.S. when the activities occur in the United States. Since many of the activities addressed by the proposed changes can and often are performed outside the U.S., we submit the revised forms should specifically exclude extraterritorial activities. It is important to consider where the employer and the persuader execute their "agreement or arrangement," where the persuader performs the persuader activities, and where payment for such activity occurs. Our Firm represents hundreds of foreign-owned and U.S. domiciled companies where each of these events could occur in a different country. The following examples of extraterritorial conduct demonstrate the need for the revised forms to clarify the jurisdictional question.

Example No. 1

An Employer incorporated and headquartered in Xenon (a hypothetical foreign country) is licensed to do business in the U.S. It directly owns and operates a facility in the U.S. In response to union organizing activities at its U.S. facility, it retains a lawyer licensed in Xenon to engage in otherwise reportable activities which occur only within Xenon. The Employer's managers take the lawyer's materials and instructions, travel to the U.S., and use them to persuade employees to reject union representation. The contract is formed in Xenon, all reportable work and services are performed in Xenon, and payment is made in Xenon.

Example No. 2

An Employer is incorporated and headquartered in Xenon. It owns a subsidiary headquartered and licensed in the U.S. The subsidiary operates a facility in the U.S. In response to union organizing activities at the U.S. facility, the Employer retains a lawyer licensed in Xenon to engage in otherwise reportable activities. The subsidiary's managers travel to Xenon, are instructed by the lawyer and are provided materials and instructions. The subsidiary's managers then return to the U.S. and use these materials to persuade employees to reject union

representation. The contract is formed in Xenon, all reportable work and services are performed in Xenon, and payment is made in Xenon.

Example No. 3

An Employer is incorporated and headquartered in Xenon. It owns a subsidiary headquartered and licensed to do business in the U.S. The subsidiary operates a facility in the U.S. In response to union organizing activities at its U.S. facility, the Employer contacts the office of a law firm in Xenon which has offices in the U.S. A lawyer licensed in the U.S. visits Xenon and engages in otherwise reportable activities. The Employer's managers take the lawyer's materials and instructions, travel to the U.S. and use them to persuade employees there to reject union representation. The contract is formed in Xenon, all reportable work and services are performed in Xenon, and payment is made in Xenon.

Example No. 4

An Employer is incorporated and headquartered in Xenon. It owns a subsidiary headquartered and licensed to do business in the U.S. The subsidiary operates a facility owned in the U.S. In response to union organizing activities at its U.S. facility, the Employer directly retains a lawyer licensed in the U.S. to visit Xenon and engage in otherwise reportable activities. The U.S. subsidiary's managers travel to Xenon, meet with the U.S. lawyer, take the materials and instructions she provides back to the U.S., and use them to persuade employees there to reject union representation. The contract is formed in Xenon, all reportable work and services are performed in Xenon, and payment is made in Xenon.

Example 5

An Employer incorporated and headquartered in the U.S. owns a subsidiary incorporated and headquartered in Xenon. In response to union activity at a facility owned by the subsidiary located in Xenon, the Employer retains a U.S. attorney to meet with Xenon management in the U.S. to engage in otherwise reportable activities. The Xenon managers then return to Xenon and use the attorney's materials and instructions to persuade employees not to join a union. The contract is formed in the U.S., all reportable work and services are performed in the U.S., and payment is made in the U.S.

Example 6

An Employer incorporated and headquartered in the U.S. owns a subsidiary incorporated and headquartered in Xenon. In response to union organizing activity at a facility owned and operated by the Xenon subsidiary in Xenon, the Xenon subsidiary retains an attorney licensed in the U.S. to meet with its Xenon

management and engage in otherwise reportable activities at the Xenon facility. The contract is formed in Xenon, all reportable work and services are performed in Xenon, and payment for the services provided is made in Xenon.

We submit there should be no reporting requirements under any of the above examples.

Quite simply, the otherwise reportable activities by the persuader (i.e., the foreign or U.S. licensed attorney training managers and preparing campaign materials) took place solely outside the U.S. or were used to persuade employees located outside the U.S. Simply because managers discuss the attorney-prepared materials at the U.S. facility with U.S. employees would not make the attorney's activities reportable.

Suggestion:

The Department should explicitly provide in forms LM-10 and LM-20 and their accompanying instructions that the reporting obligations in the statute do not apply to activities occurring outside the geographical boundaries of the United States or its territories. This can be accomplished by adding the following text in the upper left-hand corner of the LM-10 and L-20 forms immediately following the sentence "Important: This report is mandatory . . .":

"Reporting of activities occurring outside the U.S. is not required."

2. Proposed Changes to LM-10 and LM-20 Forms Impose Obligations Beyond Those Set Forth in the Statute.

Item 14(a) of the proposed LM-10 form asks an employer to select which of 12 activities are to be performed where the object is intended to "directly or indirectly persuade employees concerning their rights to organize or bargain collectively," which is similar to the statutory language in Section 203(a) of the LMRDA. But the form also includes the activity of persuading employees concerning "their right to engage in any protected concerted activity in the workplace," which is a phrase not contained in the statute. Since an agency may not expand its jurisdiction beyond that created by Congress, this language should be deleted from the proposed forms.

Suggestion:

Amend the first paragraph of item 14(a) in LM-10 and item 11(a) in LM-20 to read:

"Select each activity, performed or to be performed, if the object thereof was, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively through representatives of their own choosing."

3. Proposed Changes to LM-10 and LM-20 Forms are Unduly Burdensome and Need Clarification.

(a) Section 203(a)(b) of the LMRDA refers only to persuading employees to exercise or not exercise their rights "to organize and to bargain collectively." The proposed changes to the LM-10 form, item 14, expands the definition of persuader activity to include such activities as an attorney/consultant developing personnel policies or practices, conducting seminars for employer associations, administering employee attitude surveys and establishing or facilitating employee committees. Most employees adopt work rules such as limiting employees' access to certain work areas during non-work time or restricting their ability to solicit or distribute written material. An inexperienced employment attorney using a guide to best practices could include these work rules never realizing they could affect an employee's exercise of the right to join a union. An experienced labor attorney would likely recognize such rules would have that effect. Item 14(a) seems to require the employer to literally guess whether the drafting attorney/consultant recommended such work rules for business reasons or to keep employees from talking with each other about unionization or collective bargaining. This would be an impossible task for an employer to perform each time it revises and updates its work rules. It is especially unreasonable when the employer's officers are subject to criminal sanctions if the DOL determines, after the fact, that the employer's decision as to the attorney/consultant's state of mind was wrong.

(b) The proposed forms do not contain any reference to statutory exceptions. This omission could result in the employer or persuader providing unnecessary and/or misleading information. Item 14(a) of LM-10 and item 11(a) of LM-20 lists 12 activities the employer and persuader should report, but do not provide that the activities need not be reported if the activity involves giving "advice," as opposed to persuading employees (Section 203(c)).

(c) Likewise, items 14(a) and 11(a) of the LM-10 and LM-20 forms require the employer and persuader to select an activity whereby a consultant supplied information concerning the activities of employees or labor organization in connection with a labor dispute. There is however no stated exception, as there is in the statute, for information used "solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding." (Sections 203(a)(4), 203(b)(2)).

Suggestion:

At the end of the first sentences in items 14 of the LM-10 and 11 of the LM-20, insert the following:

"Exclude those services related exclusively to an attorney/consultant giving the employer advice or where the employer is supplied with information to be used solely and conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding."

(d) In the proposed rule's analysis of "Reporting and Recordkeeping Burden" (Fed. Reg. 36201-2), the DOL estimates that item 14(e) of the new LM-10 and item 12(a) of the LM-20 would take one minute each to complete. These items require the employer and persuader to give the "identity of the subject employees." There is no such question in the current LM-10 and the current LM-20 simply asks the persuader to "identify subject group of employees." The instructions for both proposed forms state that both the employer and the persuader must provide the following information:

> Identify the subject employee(s) who are to be persuaded or concerning whose activities information is to be supplied to the employer, including a description of the department, job classification(s), work location, and/or shift(s) of the employees targeted, as well as the location of their work.

First of all, when the report is filed, neither the employer or persuader may even know the identity of the targeted employees. In the case of potential "persuasive" statements placed in employee handbooks, employer work rules or employee attitude surveys, there most likely will be no union activity occurring at the time and in most situations, the targeted employees will be all employees. For employers of any size, providing department descriptions, all job classifications, all employees' work locations , all shifts, etc. would obviously take more than one minute! Moreover, if, after the report is filed identifying a particular group of employees as the "target," the employer and/or persuader discover that a different group of employees is engaged in union activity, will another report be required?

The current LM-10 does not require this information and the current LM-20 asks the persuader to only "identify subject groups of employees." This information could be answered by simply describing the general group of employees (e.g. warehouse employees, truck drivers, production and maintenance employees) who were engaged in union activity. Currently, this item can be completed in "one minute."

Not only is this additional information burdensome, but it doesn't serve any of the purposes given by the DOL for the proposed rule. Why do employees and the public need to know all of these details about an employer's operation? There was no explanation in the proposed rule as to why this additional information is being requested.

Suggestion.

Leave the LM-10 and LM-20 forms unchanged with respect to identifying "subject groups of employees."

(e) Section 203(a)(5)(c) of the LMRDA specifically states that nothing shall be construed to require an employer or representative to file a report covering the services of such person by representing or agreeing to represent such employer in collective bargaining with respect to negotiating wages, hours, or other terms or conditions of employment "or the negotiating of an agreement or any question arising thereunder."

The proposed rule sets forth several examples of reportable activity in connection with the collective bargaining process, such as a consultant revising the employer's material or communications to enhance the persuasive message; encouraging employees to take a certain position with respect to collective bargaining proposals; encouraging employees to refrain from striking in the workplace; or training supervisors to conduct individual group meetings designed to persuade employees (Fed. Reg. 36191 and LM-10 form, p. 5 and 6).

There are several other activities connected with representing an employer in collective bargaining that are normal, necessary and clearly should not be reportable. Such activities as an outside attorney/consultant drafting or reviewing a letter to employees about the parties' progress in negotiations; assisting in the preparation of letters to employees about why the union's proposals are unacceptable or unreasonable; encouraging employees to vote in a union ratification vote; urging the employees to support the union committee's recommendations; or assisting the employer in communicating with employees on the legal ramifications of employees striking. These activities all involve activities "arising" out of negotiations.

Suggestion:

The proposed rule should clarify what negotiation activities fall under the LMRDA term "any questions arising hereunder."

4. Reference to "Information Supplying Activities" Should Exclude Information Generally Available to the Public

Nowhere in the proposed form changes or attached instructions is there any reference to information that is generally available to the public. Such information as newspaper clippings, law review articles, LM-2 reports etc. should be specifically excluded from reportable information since it is available to the public. It should not be reportable for an attorney/consultant to make copies of such material and supply it to the employer. Neither should the employer's cost of postage or copying such material be reported as an expenditure under part D of LM-10.

Suggestion:

In items 14 of the LM-10 and 11 of the LM-20, insert after the word "information" in the first paragraph under "Information Supplying Activities" the following:

"(excluding any information generally available to the public)."

In the second box in part D of form LM-10, after the word "information" insert:

"(excluding any information generally available to the public)."

5. Reporting All Advice and Persuader Activity is Unworkable for Attorneys and Their Law Firms.

In the past, the DOL has taken the position that where a consultant's activity involves both advice and persuader activities, the advice exception will control and nothing would be reported (Fed. Reg. 36180). The proposed rule provides that if it is "impossible to separate advice from the persuader activity," both the advice and persuader activity would need to be reported (Fed. Reg. 36184).

This would mean if an attorney charges $50,000 in fees to represent an employer in handling its NLRB hearing after the filing of a union representation petition and then advises the employer during the campaign as to what is legal and illegal, but during the campaign the attorney spends 15 minutes ($100 in fees) to change one of the employer's drafted letters to employees, which the DOL determines a year later to be a "persuasive change," that the DOL would require the attorney to report on his/her LM-20 the entire $50,100 in legal fees within 30 days after the "arrangement to undertake reportable activities." Obviously, this would be impossible to do since the attorney would not be aware for a year or so that he/she needed to report anything.

Another problem is how the attorney would report the $50,000 fee on the LM-20. Would the attorney in item 10 need to "explain in detail" the "terms and conditions" of the "arrangement or agreement" to represent the employer for both the hearing and campaign? Would the attorney need to select under item 11(a) the "nature of activities" of all services performed, or just the 15 minutes spent editing the employer's letter? The form seems to be drafted for use by a typical labor consultant retained to perform only persuader activities, not by an attorney who has performed primarily legal work for the employer, but gets caught belatedly by a DOL investigator's determination that he/she spent 15 minutes performing persuader activity work.

Suggestion:

The rule should require the reporting of only "persuader" activities performed by the persuader filing the form for the employer named in the form. The rules should specifically exclude from any reporting requirement the disclosure of non-persuader services provided by the persuader for any other employer.

6. DOL Investigation Could Disclose Information Covered Under Attorney-Client Privilege.

Section 204 of the LMRDA provides that an attorney doesn't have to "include in any reports" any information "lawfully communicated to such attorney" by a client in the "course of a legitimate attorney-client relationship." (Fed. Reg. 36179) The proposed rule states:

> "Therefore, attorneys who engage in persuader activity must file the Form LM-20, which may require information about the fact of the agreement with an employer

involving persuader activity, the client's identity, the fees involved and the scope and nature of the employment. To the extent that an attorney's report about his or her agreement or arrangement with an employer may disclose privileged communications, for instance where an attorney provides an employer with both legal advice and engages in persuader activities, the privileged matters are protected from disclosure." (Fed. Reg. 36192)

However, the proposed rule does not provide guidance as to how the privilege can actually be protected. In determining whether an attorney's conduct was advice or persuader activity would require the DOL to examine the content of the attorney-client communication and the mental state of the attorney in order to ascertain the purpose for which the communication is prepared. Thus, if a union complains that an attorney *engaged* in persuader activity outside of the advice exemption, the DOL investigation would inevitably exposed otherwise privileged communications and documents. The DOL would be forced to employ a detailed audit of the lawyer's work papers to see how the lawyer edited campaign materials – did he/she make legal changes, persuader changes or just changes in grammar or spelling errors. In such situation, information would be given to third parties which should be kept between only the client and the attorney.

There is substantial federal law which holds that once privileged information is given to a federal agency, even if a confidential statement is signed, that the privilege is waived. *See Qwest Communications* international, *Inc.*, 450 F.3d 1179 (10th Cir. 2006); *Columbia/HCA Healthcare*, 293 F.3d 289 (6th Cir. 2002); *Westinghouse Elec. Corp. v. Republic of Phillippines*, 951 F2d 1414 (3d Cir. 1991).

7. Imposing Reporting Requirements on Multi-Employer Meetings is Unworkable.

The proposed rule states that an attorney/consultant giving a seminar for multi-employers on a subject which has a direct or indirect object to persuade employees concerning their representation or collective bargaining rights would be reportable. (Fed. Reg. 36183) For example, the presenter would need to report if he/she disseminated to the attendees campaigns materials "intended" for distribution to their employees; or if the consultant trained management representatives how to conduct anti-union employee meetings. (Fed. Reg. 36192) Who's going to determine if the presenter "intended" the materials to be distributed by the attendees to their employees? Maybe the presenter was simply showing the attendees the materials that had been used in another union campaign and it was the attendee who decided to distribute them to its own employees.

Regarding the training of attendees on conducting anti-union employee meetings, is there a difference between a consultant "training" attendees on what anti-union information should be disseminated to employees versus a consultant reviewing what information has been communicated between management and employees in other campaigns? Assuming persuader materials were circulated to all attendees at the multiple employer group meeting, who would the persuader name as the employer in the LM-20? What if the consultant was

volunteering his/her time at the seminar and had "no agreement or arrangement" with any of the employers in attendance? Who would file the LM-10 as an employer -- the employers present or the seminar sponsor?

Consider the following types of multi-employer seminars:

1. An attorney/consultant sponsors and presents a seminar to potential clients for no charge. Examples of "persuasive" materials are distributed, but the attorney/consultant states that they are not intended for distribution to attendees' employees, but such distribution does occur by one or two attendees.

2. An employer association sponsors a seminar and charges a registration fee. It has an attorney/consultant volunteer to speak who may present "persuasive" materials, but states that they are not intended for distribution to attendees' employees, but such distribution does occur by one or two attendees.

3. An employer association pays the attorney/consultant to make a presentation on current union activity and charges the attendees a registration fee. During that presentation the attorney/consultant discusses the shortened time period for union campaigns and presents a "campaign in a can," ready for use by an attendee.

The first two examples should definitely not be reportable because there is no arrangement between the attorney/consultant and an employer, plus there is no intent by the attorney/consultant to persuade any particular group of an employer's employees. The third hypothetical could involve reportable activity because there are "arrangements" between the association and attorney/consultant and between the association and the attendees. The question is which employer should report—the association sponsor or the employer who actually used the "campaign in a can?"

Suggestion:

In Form LM-10 and LM-20 and the rule's "General Instructions for Agreements, Arrangements, and Activities" (Fed. Reg. 36192), delete all references to potential persuaders conducting multi-employer seminars. In the alternative, specify that for reportable activity to arise from a multi-employer association meeting there would have to be a specific "arrangement or agreement" between the persuader and one or more of the employers at the seminar indicating that the persuader and such employer intended to use the seminar materials to persuade employees.

8. Other Miscellaneous Concerns Regarding Proposed Rule.

(a) Like many other employer representatives, the undersigned question the constitutionality of the proposed changes in the LMRDA interpretation and forms LM-10 and LM-20. The proposed changes add a considerable amount of vagueness and ambiguity to the LMRDA which will make it very difficult for employers, attorneys and consultants to determine whether or not their actions are covered by or in compliance with the statute. For example, foreign owned companies will not know to what extent they are covered under the proposed rule. Potential persuaders will be uncertain as to whether the objective of certain actions is to "indirectly or directly persuade employees" or what type of communications with employees will be regarded as affecting their "manner of exercising" Section 7 rights. An employer will be uncertain about whether there is an "agreement or arrangement" with its attorney to "undertake" such reportable actions, especially when the LM-10 form states that the term "agreement or arrangement should be construed broadly and does not need to be in writing" and that "a person undertakes activities not only when he/she performs the activity but also when he/she agrees to perform the activity or to have it performed." (LM-10, p. 5).

Notwithstanding the existence of these vagaries, the president and treasurer of the organization will be personally liable for (a) willfully violating the LMRDA; (b) making false statements or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, and any document, report, or other information required under the Act; or (c) making a false entry in or willfully concealing, withholding, or destroying any books, records, reports, or statements required to be kept by the Act. The penalty for each of the above stated violations is a fine of up to $10,000 or imprisonment for not more than one year, or both (LMRDA Section 239).

In order for a statute to subject a citizen to criminal penalties, it must be clear in defining the criminal act. *United States v. Santos*, 553 U.S. 507 (2008); *United States v. Bass*, 404 U.S. 336 (1971); and *Bell v. United States*, 349 U.S. 81 (1955). Under the DOL's interpretation of the LMRDA for the last 50 years, there was a bright line between activities that were reportable and those that were not. The proposed rule now raises more questions than it answers as to what is reportable activity. At the same time, it subjects to criminal sanctions corporate executives, consultants and attorneys who guess wrong as to what should be reported.

(b) The proposed rule will stifle the employer's constitutional freedom of speech and expression. It would fly in the face of the Section 8(c) free speech provision under the National Labor Relations Act, which states:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act,

> if such expression contains no threat of reprisal or force or promise of benefit."

For example, assume the president of an employer has a conversation with his retained labor attorney who tells him how the union struck a competitor in another town and eventually forced that competitor out of business. The president then tells an employee about the competitor's experience with the union and adds that in his opinion unionization "could be detrimental to the employees." Under the proposed rule, that statement would likely be considered reportable, as well as all of the other labor and employment services performed by that attorney for the employer. However, that specific statement is currently considered lawful by the Board as not being a "threat of reprisal or force or promise of benefit". This inconsistency should be resolved by giving deference to the National Labor Relations Act.

(c) The undersigned are also concerned that the increased requirements for employers to report possible persuader activities and the increased complexity of the forms will cause employers to avoid seeking needed legal advice and counsel during critical labor disputes, such as union organizing campaigns, ratification votes of collective bargaining agreements, and strike authorization votes, resulting in more unfair labor practices filed against un-counseled employers. The less employers use competent legal advice in such matters, the more litigation will occur. Moreover, the less employers communicate with employees about workplace issues, the less employees will be fully and lawfully informed prior to voting on unionization, ratification of collective bargaining agreements, and strike votes.

(d) The requirement that a law firm would have to report all labor and employment-related services for all clients if one client received persuader services would be a significant deterrent for the law firm or attorneys therein to perform any services remotely close to being considered "persuader". In other words, a law firm's client who used an attorney to do purely legal "advice" work could be required to report the nature of that legal "advice" work and the fees paid therefor simply because another attorney in that firm performed persuader activities for another of the firm's client. This would interfere with normal attorney-client relationships and attorney ethical obligations. This could easily discourage corporations from using large law firms for any type of labor and employment work. Surely, this would result in a far greater amount of union campaign and collective bargaining work being done by labor consultants or attorneys from small firms who would be willing to file reports as persuaders.

Conclusion.

The proposed changes stated that the DOL's reasons for expanding the definition of persuader activities and narrowing the "advice" exemption are because persuaders have been "under reporting" their persuader activity; that there has been a growth in the number of consultants and attorneys getting involved in union organizing campaigns; that it is

important that employees know who originated campaign information; and that the DOL wanted employees to be assisted "in developing independent and well informed conclusions regarding union representation and collective bargaining." (Fed. Reg. 36182)

There is no evidence in the record that there is any systemic "under reporting" of persuader activities. Indeed, if under reporting were a legitimate concern, the DOL should step up enforcement actions, not broaden the reporting obligation, which would only serve to exacerbate the under reporting.

The purported increase in number of consultants and attorneys in the campaign business similarly should not be a justification for the proposed rule. If no reporting or under reporting is occurring, the DOL has no way to measure the growth of attorneys or consultants in this area. It should also be noted that the number of attorneys practicing in the labor law area and the number of law students enrolled in labor law courses has plummeted, primarily because there is decreased opportunity for an attorney to do solely labor law work. This explanation is ethereal.

The greatest impact of the proposed rule is that it will, in combination with the NLRB's recent proposal to shorten union campaign periods to 10 to 25 days, preclude employees from arriving at "independent and well-informed conclusions regarding union representation and collective bargaining."(Fed. Reg. 36190) To the extent the rule results in employee decisions based on only what the union organizer presents and promises, it will not further the purposes of the National Labor Relations Act which is to give employees the right to vote by secret ballot after hearing from all parties (the union, the employer, co-workers, family and friends) the advantages and disadvantages of union representation. The proposed rule itself applauds the NLRB in this regards, where it stated:

> Similarly, the NLRB has promoted and protected the value to employees of full and accurate information during representation campaigns in its regulation and maintenance of "laboratory conditions" surrounding union elections... The Board has held that determining the "uninhibited desires of employees" is impeded by "a lack of information with respect to one of the choices available during the election." (Fed. Reg. 36189)

In referring to the Excelsior Underwear case, which requires an employer to provide the union with a list of names and home addresses of all eligible voters before an election, the proposed rule lauds the Board's efforts to "maximize the likelihood that all voters will be exposed to arguments for, as well as against, union representation; that it will permit the employees to make a more fully informed and reasoned choice." (Fed. Reg. 36189)

The DOL's timing is ironic. The NLRB recently issued a final rule that requires employers to post physically throughout its facilities (and electronically when customarily used) a

notice entitled "Employee Rights under the National Labor Relations Act". This rule reportedly was adopted for the purpose (according to the NLRB) of making employees fully aware of their rights regarding unionization. Even the National Labor Relations Act states that employers have the right to express their "views, argument, or opinion or the discussion thereof". The DOL's proposed rule is likely to restrict the employer's rights to communicate with its employees with assurance that those communications are lawful on such subjects as the pros and cons of unionization, the actual experiences of unions at other locations and the importance of employees voting in secret ballot elections if, as anticipated by the rules' proponents, law firms withdraw from this area of practice. If the employer retains the services of an attorney or consultant to help communicate this information to employees, the employer would have to file an LM-10, which is a four-part form with 10 pages of single-spaced instructions. The attorney/consultant would be required to file two reports (LM-20 and LM-21). The LM-20 form is two pages and has attached seven pages of single-spaced instructions. According to the DOL, it intends to soon issue a proposed rule regarding LM-21 with significant changes. Employers will need legal assistance to ensure these forms are completed correctly under penalty of criminal sanctions for the president and treasurer of the organization.[2]

The administrative burden, uncertainty, and potential criminal sanctions as to the legality of its conduct under the LMRDA and NLRA, will make an employer pause before communicating with its employees regarding unions, the status of bargaining, or even revising its handbook. Employers must decide whether the return on these efforts is offset by the time and effort consumed completing the LM-10 form—to explain "in detail" the terms and conditions of the agreement or arrangement with the attorney/consultant, specifying the fees for such services; to decide which services performed by the attorney/consultant are advice, non-persuader or persuader activities and then marking 12 boxes in item 14(a) of the form; to identify in item 14(b) and (c) the "period" during which the persuader activities were performed and the "extent performed"; and then to consider the potential cost of having to defend in a future DOL investigation its decisions that no persuader activities were performed by either the attorney or consultant.

The DOL's proposed LM form changes are in search of a problem it can solve. It seeks to adjust the statute to restrict employers' rights to communicate with employees about unions, collective bargaining, or even revising its handbook, and it bases such restriction on circumstances existing 50 years ago detailed in the legislative history leading up to the LMRDA, which no longer exist. The problems mentioned by the DOL at that time involved in the main "middlemen" hired to "spy on employee organizing activity," to induce employees to join "company unions," to negotiate "sweetheart contracts" and to commit acts

[2] Ironically, the rule is so broadly drawn that the attorney assisting the employer and/or persuader to complete these forms arguably would be engaging in "direct or indirect persuasion" as to the manner of employees exercising their Section 7 rights. As a result, the attorney, not otherwise engaged in any persuader activity, would be required to submit an LM-20 and LM-21 report for assisting the parties with their LM forms.

of "bribery and corruption" (Fed. Reg. 36184). These conditions no longer exist -- primarily because the LMRDA has been effective since its enactment in 1959.

The National labor policy has been that a free people can exist only when there exists a marketplace of ideas, and, thus, the free exchange of opinions was embodied in the NLRA. This policy is at its finest during union campaigns and elections -- employees currently are exposed to arguments both "for, as well as against union representation". The proposed rule's added reporting requirements for employers and attorneys designed solely to intimidate or curb this fulsome exchange of ideas is inconsistent with our foundation documents and would likely curtail employers from engaging in employee communication programs at any time, but certainly in the event of a union campaign or collective bargaining negotiations. The likely result is uninformed and unlawful communications. The risk to an employer of having an attorney/consultant assist in developing such communication programs may simply be too great.

At the same time the DOL is trying to restrict an employer's right to communicate under this proposed change, both it and the NLRB have required employers this year to post "Employee' Rights Under the NLRA" notices. The given reason for this requirement was to inform employees of their workplace rights. This reason is not supported by the facts.

Baker & McKenzie filled comments on February 22, 2011 to the NLRB's proposed rule stating that if there is a posting, it should include all of an employees' rights, not just some of them. That part of all comments was as follows:

> Thus, there are several employee rights of both union and non-union employees that should be set forth clearly in the Notice if the Board is serious about enabling employees to "exercise their statutory rights." The employee rights listed below are all important to both union and non-union employees, are necessary and informative to all employees, and not in any way "distracting." The following rights should be added to the posting:
>
> **Employee Rights That Should Be in Notice**
>
> **a.** The right to sign or refuse to sign an union authorization membership card or petition.
>
> **b.** The right to discuss the advantages and disadvantages of union representation or membership with the employer.
>
> **c.** The right to receive information from the employer regarding the advantages and disadvantages of union representation or membership.

d. The right to insist on a secret ballot election.

e. The right not to join a union under a union shop contractual provision as long as dues are tendered to the union.

f. The right to decide under a union shop contractual provision to pay union dues directly to the union or to sign a check-off authorization form to have dues deducted directly from their paycheck.

g. The right to revoke a signed check-off authorization card within one year or a shorter period pursuant to its terms.

h. The right for an employee who adheres to established and traditional teachings of a bona fide religion which has conscientious objections to joining or financially supporting labor organizations to refrain from joining or financially supporting any labor organization as a condition of employment, provided such employee pays sums equal to such dues and initiation fees to a non-religious, non-labor organization charitable fund chosen by such employee.

i. The right for each union member to insist that his/her union dues and initiation fees not be increased, or no general or special assessment shall be levied upon such employee, except by a majority vote by secret ballot by the members in good standing voting at a duly called general or special membership meeting; or by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot.

j. Before a union can obligate newly hired non-member employees to pay dues and fees under a union security clause, it must inform them of the right to be or remain non-members even under a union shop clause, and their right to obtain a reduction in dues and fees for such union activities unrelated to the union's duties as the bargaining representative. The same notice must also be given to union members if they did not receive it when they entered the bargaining unit.

k. The right for each employee in a bargaining unit to receive a copy of the collective bargaining agreement from his/her union where his/her rights are directly affected by such agreement.

l. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for nonpayment of dues,

by such organization or by any officer thereof unless such member has been served with written specific charges; given a reasonable time to prepare their defense; and afforded a full and fair hearing.

m. No employer can be forced to terminate a union member for non-payment of dues under a labor contract's union shop provision unless the employer has been given written notice of such non-payment of dues and has been requested in writing by the union to so terminate the delinquent employee.

n. No employer can be forced to terminate a union member for delinquent or non-payment of dues if the union accepts a tender of dues or agrees to a back dues payment plan before the requested discharge is effected by the employer [...]

o. Unions can adopt rules and regulations which are binding on union members; union members can be expelled from the union or fined for violations of these rules; and such fines can be collected in court.

p. The right to withdraw from the union before crossing a picket line and thereby avoid being fined for crossing the union's picket lines.

q. The right to nominate candidates, to vote in elections of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in the union's constitution and bylaws.

r. The right to meet freely with other union members and to express any views at union meetings upon candidates and election of the labor organization or upon any business properly before the meeting, subject to the union's established and reasonable rules pertaining to the conduct of meetings.

s. The right to institute an action in any court, or in a proceeding before any administrative agency against the union.

t. The right to present grievances directly to the employer, even where the employees are unionized and/or are covered by a labor contract, and to have such grievances adjusted without the intervention of a union bargaining representative.

u. The right to file a deauthorization election at any time to void the union security provision so no dues need to be paid under any circumstance.

v. The right to decertify the union at the end of a labor contract and the proper time to file such a petition.

w. The right of employees to file a NLRB representation petition within 45 days after the company gives written notice to the employees that the company and a union have agreed to voluntary recognition agreement without a secret ballot election.[3]

x. The right to sue a union for unfairly representing the employee in bargaining, contract administration, or a discrimination matter.

y. The right not to pay dues in a right-to-work state in order to keep their job.

z. The right not to have to belong to any particular union in order to become employed in any state and the right to have 30 days after employment to be covered under a union shop clause.

The NLRB responded to this proposal in its final rule dated August 30, 2011 stating:

> Baker & McKenzie suggests a list of 26 additional affirmative rights, most of which only affect employees in a unionized setting and are derived from the Labor-Management Reporting and Disclosure Act, the Labor-Management Relations Act, or other Federal labor statutes enforced by the Department of Labor. The proposed list also includes some rights covered by the NLRA such as "the right to sign or refuse to sign an authorization card," "the right to discuss the advantages and disadvantages of union representation or membership with the employer," and "the right to receive information from the employer regarding the advantages and disadvantages of union representation."
>
> The Board has determined that the inclusion of these additional items is unnecessary.

If the DOL is truly motivated by a desire to ensure that employees know all their rights, especially those enforced by the DOL, then it should require employers and unions to post

[3] This employee right was recently voided in *Lamons Gasket Co.*, 357 NLRB No. 72 (2011).

notices containing all the employees' workplace rights. Furthermore, it should promptly amend the "employee rights" notice it requires of federal contractors to include these rights as well.

It is important that the DOL consider the hardships and problems described herein and not implement those proposals that will cause the process to be more cumbersome, more inefficient, and more restrictive on the rights of employers to lawfully express their views fully and freely about the advantages and disadvantages of unionization.

We appreciate the opportunity to share our comments on this matter. Should you have any questions, please do not hesitate to contact any of us.

Sincerely,

Douglas A. Darch

Robert J. Mignin

Keith A. Reed.