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VIA ELECTRONIC FILING

Mr. Andrew R. Davis
Chief, 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: RIN 1245-AA03, Proposed Rulemaking on Interpretation of the "Advice" Exemption under the Labor-Management Reporting and Disclosure Act

Dear Mr. Davis:

This letter provides comments by Littler Mendelson, P.C., in response to the Notice of Proposed Rulemaking ("NPRM") by the Office of Labor-Management Standards of the U.S. Department of Labor ("Department") as published in the Federal Register at 76 FR 36178-36230 (June 21, 2011). The Department invited comments on any aspect of the NPRM, and later extended the time for filing such comments to September 21, 2011.

Littler Mendelson

I send this letter as Managing Director of Littler Mendelson. With over 800 attorneys, Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in labor and employment matters. We have offices in most states of the country. We have represented and advised many thousands of employers, from Fortune 100 companies to family-owned enterprises, regarding the entire range of federal, state and local laws that affect employers. Such representation and advice includes matters that arise under the federal labor laws, such as the National Labor Relations Act. The employers that our firm represents and advises are our clients. We are engaged by each and every client for the exclusive purpose of providing legal advice and legal services, which we give pursuant to an attorney-client relationship that depends on well-established principles of confidentiality, trust, and attorney-client privilege.

Overview of Comments

Our comments can be grouped into three main areas. First, the Department has failed to demonstrate any need that warrants the proposed radical departure from consistent practice and rules in place for decades ever since the Kennedy Administration. The NPRM would

eliminate the established interpretative rules that have been in place without change since 1962. Those rules have allowed employers to receive legal advice necessary for legal compliance and to exercise their protected rights to communicate with their employees. While the Department asserts there may be reason to believe an "underreporting problem" exists, it bases that belief on anecdotal hearsay reports from biased sources. The Department does not describe any actual underreporting from its experience as an administrative agency, and does not give empirical data to show that any underreporting problem is due to the current interpretative rules properly understood. In sum, the Department simply has not made the case that warrants what the Department proposes in its NPRM. The Department's failure to discuss findings from agency investigations or enforcement actions under the current rules means there is no reason to assume the so-called problem could not be fixed by applying the current interpretative rules as written.

The second area of concern is that the rule changes proposed exceed the Department's authority as an administrative agency. The proposals exceed the purpose for this rulemaking in the Department's regulatory agenda. Specifically, the proposed changes do more than simply narrow the interpretation of the advice exemption under the LMRDA. The proposed changes would make the advice exemption ineffective as meaningful protection for the giving of legal advice to employers. The Department also proposes more than just narrowing advice. It proposes to expand the definition of reportable persuader activity itself. The Department exceeds its authority by proposing changes that contravene the statute and express Congressional intent.

The third area of concern involves the impacts on employers that would result, even assuming the Department had authority to do what it proposes. The changes would interfere directly with employers' protected rights and impede protected access to competent legal counsel that is necessary for legal compliance. It would become extremely difficult to give exempt legal advice to employers in many instances. The proposed rules would severely restrict the free speech rights of employers protected under Section 8(c) of the NLRA, as employers would be under pressure to forego any speech when competent legal advice is not available. Alternatively, the risk that employers may unwittingly commit unfair labor practices would increase as employers act without competent legal advice as a result of these rule changes.

The Department has not addressed these detrimental impacts on employers or considered the associated costs. Finally, the Department has failed to consider less drastic means, such as using its investigatory authority by applying the current interpretative rules as already written, but perhaps misunderstood in practice.

Background: LMRDA Persuader Activity Arrangements & The Advice Exemption

The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401, requires reporting and disclosure by unions, union officials, employers, and labor consultants, in certain specific situations. The employer reporting requirements include any agreement or arrangement with an outside consultant under which the consultant undertakes activities to persuade employees as to the exercise of their right to organize and bargain collectively

through representatives of their own choosing. *See* 29 U.S.C. §§433(a)(4), 433(a)(5), and 433(b). If there is a reportable persuader activity arrangement, then certain reports are required, which the Department is authorized to administer.

The Employer report form, the LM-10 Form, covers persuader activity reporting. The required report discloses the nature of the arrangement and the payment to the consultant. The report must be filed within 30 days of the arrangement or agreement. The LM-10 Form currently used has been in place since 1963 without any substantive changes.

The reporting required for persuader consultants involves two reports, the LM-20 Form, which is similar in content and timing to the employer LM-10 Form, and the LM-21 Form that is unique to the consultant. The LM-21 annual report is required after the end of the year in which the consultant had engaged in any reportable persuader activity. The LM-21 requires disclosure of information about all employers for whom the consultant provided "labor relations advice or services" during that entire year, and all receipts for such labor relations advice or services. The LM-21 reports are not particularly problematic currently for labor consultants whose business entails intentionally entering into persuader activity arrangements with any employers who may request such services. The Department concedes that persuader activity arrangements are not unlawful in themselves, as long as there is reporting, and the Department acknowledges such reports continue to be filed every year under the current interpretative rules.

The LMRDA also provides an exemption from persuader activity reporting based on "giving advice" to an employer. This advice exemption is broadly worded: "Nothing contained in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer ..." 29 U.S.C. §433(c). The Section 203(c) advice exemption was intended to be broad, and the final House Conference Report on the LMRDA confirms that Section 203(c) "grants a broad exemption."[1]

The Department's longstanding interpretative guidance (the current rules) about the advice exemption guides Department actions and is consistent with the broad exemption that Congress intended. These current rules are in Section 265.005 of the Department's LMRDA Interpretative Manual ("Manual"). They have been in place continuously since 1962, and were developed by the Department during the administration of President John F. Kennedy, a leading Senator in the legislative process and sponsor of Senate bills that led to the LMRDA being enacted. The Department proposes to replace these established rules with new rules that are unprecedented, unclear, and seriously detrimental to employers.

The consequences, effects and costs of such radical change exceed the Department's authority and would impose a heavy burden on both employers and their legal counsel. The Department has not addressed or accounted for these effects in the NPRM. It is essential that

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[1] NLRB Legislative History of the LMRDA, Vol. I, at p. 937, H.R. Conference Report No. 1147 (Sept. 3, 1959). *See Donovan v. The Rose Law Firm*, 768 F.2d 964, 973-975 (8th Cir. 1985).

the established rules remain intact so that employers may continue to have a protected right of access to legal advice that remains clearly exempt from persuader reporting. This enables employers to comply with the law and to exercise protected speech rights.

There Is No Demonstrated Need For Change

The Department has not discussed any enforcement efforts in response to the perceived problem of underreporting. The Department has not demonstrated that using the current rules properly would not correct any actual problem.

With no record demonstrating that current rules and interpretative guidelines have undercut or affected the Department's ability to enforce the LMRDA, there is no rational basis for the Department to conclude that eliminating the established rules will be a solution to any perceived problem. If there is actual underreporting now, there is no rational reason to believe that those who do not report would do so as a result of narrowing the advice exemption and broadening what the Department deems reportable persuader activity. However, there is good reason to believe that those changes would seriously and adversely affect employers who are not "underreporting" and are in full compliance with the LMRDA as Congress intended. Employers and their legal counsel, who have always complied with the LMRDA and are not part of some "underreporting" problem that the "contemporary research" purports to identify, would be severely chilled and restrained in the exercise of protected speech rights and in giving legal advice.

The Department's failure to establish the need for change is demonstrated by its underestimation of the potential effectiveness of Section 265.005 in the current Manual. If used and applied as written in its entirety, the current rules would permit the Department to investigate and pursue enforcement actions that would cover the few examples it describes in the NPRM. The Department asserts the current rules should be thrown out altogether. We submit the Department should attempt first to apply the current interpretative standards to any actual problem before proposing wholesale elimination of established rules in place for 50 years. At minimum there must be an explanation why less drastic measures would not suffice to meet any actual problem shown through the agency's own experience as the administrative agency responsible for LMRDA reports.

The Department's attempt to explain the need for change is not sufficient. The Department's explanation involves repeating the same discussions under the same headings used in the January 11, 2001 Federal Register to support the only prior attempt to modify the advice interpretation. Beyond that repeat, the only additional information comes from summaries of "contemporary research" reports. None of this additional information is reliable or complete. The Department's explanation of need, therefore, is a compilation of anecdotal reports and

hearsay information that has not been independently verified.[2] The Department has not drawn from its own experience as the responsible administrative agency under the LMRDA.

The Department Lacks Authority To Make The Proposed Changes

The Department exceeds its authority in its proposed changes. Putting aside its advice exemption narrowing, the Department proposes to re-define reportable persuader activity itself. Congress defined reportable persuader activity as follows:

> . . . any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing . . .

29 U.S.C. §433(a)(4) (emphasis added). The Department proposes a very different definition:

> An employer and consultant each must file a report concerning an agreement or arrangement pursuant to which the consultant engages in activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity (such as a strike) in the workplace.

NPRM, 76 FR at 36192-93 (emphasis added).[3] There are significant differences between the statutory definition: activities that persuade employees to exercise the right to organize and

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[2] The Department repeats almost verbatim the same rationale used on January 11, 2001 (66 FR 2782) when the outgoing Department attempted to change the advice interpretation without inviting any comment (the attempt was rescinded without any change taking effect). The Department supplements that repeat of prior material only with some new references to "contemporary research" by union-supported academic writers, including Kate L. Bronfenbrenner and John Logan. That "research" provides hearsay at best. The Department provides no evidence from its own experience as an administrative agency, and has not independently verified the authenticity or reliability of any data or methodology used in the "contemporary research" cited in the NPRM.

[3] The Department's new definition is part of the proposed changes that would become both the new instructions in the reporting forms and the new interpretative rules in Manual Section 265.005. Excerpts from the complete set of proposed rules (76 FR at 36192-93) include the following:

- "If the agreement or arrangement provides for any reportable activity, the exemptions do not apply and information must be reported for the entire agreement or arrangement."
- "Reporting is ... required in any case in which the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, regardless of whether or not advice is also given."
- "With respect to persuader agreements or arrangements, 'advice' means an oral or written recommendation regarding a decision or a course of conduct."
- "An employer and consultant each must file a report concerning ... consultant ... activities that have as a direct or indirect object to ... influence the decisions of employees with

bargain collectively; and what the Department proposes: activities that influence the decisions of employees with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity.

The Department exceeds its authority by making rules that would expand reportable persuader activity beyond what the statute says and what Congress intended. The proposed new rules insert "Section 7 rights"[4] into key LMRDA provisions that focus only on the employees' right to organize and bargain collectively. Congress intentionally did not go that far. That is clear from actual proposals that were considered and debated, but never adopted by Congress in the law that was enacted. Thus, an earlier version that never became law was in Section 103 of the Kennedy-Ives bill:

> Every person engaged in providing labor relations consultant service to an employer ... pursuant to any agreement or arrangement under which such consultant undertakes – (A) to influence or affect employees in the exercise of their rights guaranteed by section 7 of the National Labor Relations Act, as amended, ... shall file annually a report with the Secretary ...

Donovan v. The Rose Law Firm, 768 F.2d 964, 970 n. 6 (8th Cir. 1985) (*citing* S. 3974 § 103(b) (the Kennedy-Ives bill) in U.S. Department of Labor, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959,* at 471). The terms "influence or affect employees" connected to exercising Section 7 rights are very similar to the Department's proposed new rule. But those terms in the Senate bill were expressly objected to in the House of Representatives. Rep. Griffin stated as follows regarding the Senate proposal to require reports for undertakings "to influence or affect employees" in the exercise of Section 7 rights:

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respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity ..."

- "[P]ersuader activities that, either alone or in combination, would trigger the reporting requirements include but are not limited to: drafting, revising, or providing a persuader speech, written material, ... or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees ..."
- "Persuader activities trigger reporting whether or not the consultant performs the activities through direct contact with any employee. ... a consultant must report ... any activities that utilize employer representatives ... such as ... providing persuader material to them for dissemination or distribution to employees, or in which the consultant drafts or implements policies for the employer that have as an object to directly or indirectly persuade employees."

[4] Section 7 provides that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. §157. LMRDA persuader activity reporting concerns employees exercising "the right to organize and bargain collectively through representatives of their own choosing." This is not synonymous with "Section 7 rights."

> But section 103(a) [of the Kennedy-Ives bill, S. 3974] goes far beyond any demonstrated need for regulation and, in broad and indefinite terms, requires employers to file detailed financial reports if they undertake "to influence or affect employees in the exercise of their rights guaranteed by section 7 of the Taft-Hartley Act."
>
> This provision would severely cripple existing free speech rights and would be almost impossible to enforce, as written. Serious criminal penalties are provided for noncompliance.
>
> Which undertakings by any employer actually "influence or affect" employees in their decision to join, or not to join, a union? How about the following: (1) giving Christmas hams; (2) providing coffee breaks; (3) publishing company newspapers; (4) providing uniforms for employee baseball teams, and so forth.
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> If there is justification for limitations on employer free speech, surely such limitations should be spelled out in more precise and meaningful language than is set forth in section 103(a) of the Kennedy-Ives bill.

Beaird, "Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure Act of 1959," 53 Georgetown Law Journal 267, 272-273 (1965) (quoting Rep. Griffin comments and citing 104 Cong. Rec. 18269 (1958)).

In addition, the use of Section 7 elsewhere in the Section 203[5] demonstrates that Congress acted intentionally and purposely by not using Section 7 (or "protected concerted activity") in Sections 203(a)(4) and 203(b) that define reportable persuader activity arrangements. *See Warshauer v. Solis*, 577 F.3d 1330, 1335-36 (11th Cir. 2009).[6]

The Department is given no deference for its proposed changes through rulemaking that directly conflict with the statute and Congressional intent.[7]

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[5] LMRDA Section 203(g) provides that "The term 'interfere with, restrain, or coerce' as used in this section means interference, restraint, and coercion which, if done with respect to the exercise of rights guaranteed in section 7 of the National Labor Relations Act, as amended, would, under section 8(a) of such Act, constitute an unfair labor practice." 29 U.S.C. §433(g).

[6] *See also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16 (1983) "[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

[7] "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 2782 n.9 (1984).

Unacceptable Effects Of Proposed Rule Changes

There are very sound and practical reasons why Congress chose to protect the giving of legal advice with a broad advice exemption. Our comments below address the most egregious and unacceptable effects that would be the probable result under the proposed changes to narrow advice to such an extent that giving common but necessary legal advice easily could be construed as reportable persuader activity when it is exclusively bona fide legal advice intended to enable legal compliance by the employer.

The following are examples of common types of legal advice that would appear to be reportable under the Department's proposed new rules.

> *Example.* The employer asks its lawyer if the employer may respond to an employee's inquiry about the potential consequences of a strike by using the following statement: "If an employee engages in a strike he may lose his job." In order to make the employer's statement lawful, the attorney advises the client to add the word "economic" before the word "strike," and to replace the words "lose his job" with the words "be replaced." Would this be reportable and not exempt advice as it arguably involves the lawyer's "revising" or "providing" "material" to the employer to "influence" employee decisions involving protected activity? While the lawyer clearly is giving bona fide legal advice as to what the employer "may lawfully say," the fact that the lawyer "revised" the statement seems to make it reportable.[8]

> *Example*: The employer asks its lawyer for legal advice about its plan to tell its employees the following in connection with a pending NLRB election: "Because the upcoming election is so important, all employees are required to vote." In order to make the statement lawful, the lawyer recommends that the client revise the statement to read: "Because the election will be decided by a majority of those who actually vote, we recommend that all employees take the opportunity to vote." Would this be exempt legal advice under the proposed new interpretative rules, when it arguably goes beyond "an oral or written recommendation regarding a decision or a course of conduct" to include "revising" or "providing" language for the employer in communicating with its employees about the vote?

There are no clear answers to these questions based on the proposed new rules. The Department thus proposes to impose new risks and confusion where there is none currently. The effect of those new risks, which many employers and their lawyers may be unwilling to accept, is that many employers will not get the competent legal advice essential for legal compliance.

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[8] It is not acceptable for the Department to respond by reciting the one part of its proposed new rules that says "No report is required concerning an agreement or arrangement to exclusively provide advice to an employer" and "a consultant who exclusively counsels employer representatives on what they may lawfully say to employees ... is providing 'advice'", when other parts of the same set of rules say that "revising" a "speech" or "material" is "reportable persuader activity," and if the "arrangement provides for any reportable activity, the exemptions do not apply."

The NPRM would severely restrict the free speech rights of employers by forcing employers to forego speech when competent legal advice is not available. Employer speech is protected by Section 8(c) of the NLRA, which provides that "The expressing of any views, argument or opinion ... shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat ... or promise of benefit." But how can this protected right be exercised at all when the employer is restricted from competent legal advice so that it does not inadvertently say something deemed to be a "threat" or "promise"?

Alternatively, if employers decide to exercise their speech rights without having competent legal advice, there is increased likelihood for inadvertent commission of unfair labor practices. More unfair labor practice charges and more litigation would follow. These concerns are not even touched upon by the Department.

Under the proposed changes, when "revising" becomes "persuading", how exactly does the Department intend to parse out "advice" from "persuasion" when it investigates alleged failures to report under such rules? The NPRM gives no weight to attorney-client privilege protections that apply to employer communications with legal counsel in connection with giving legal advice. The Department proposed changes, however, threaten new intrusions into protected and privileged communications between an employer and its legal counsel without substantiated need or justification.

Executive Order 13563 (January 18, 2011) directs the regulatory agencies to take into account the benefits and costs, both quantitative and qualitative, of regulations and to consider their impact on economic growth and job creation. The Department falls far short of meeting this directive to give accurate and complete consideration to the costs of its proposal. The Department summarily calculates that the "total cost" imposed by the proposed rule changes on Form LM-10 and Form LM-20 filers is $825,886.11, representing an increase of $801,508.11 over the most recent submission.[9] This estimate seriously underestimates the true cost, both quantitative and qualitative, of the proposal and its actual burden on employers and their legal counsel. The NPRM would impose costs and burdens far beyond the mere number of minutes it takes to complete the new LM-10 and LM-20 Forms multiplied by the number of expected new filers required to submit the forms. The Department fails to account for the "total cost" of its proposal, which includes the costs to employers, both large and small, of restricting their access to established legal counsel and the potential increases in inadvertent labor law violations by employers unable to obtain timely and reliable legal advice.

The Department's proposed changes also are impermissibly vague in view of the underlying criminal sanctions for individual officers of the employer and consultant firms subject to regulation. Laws that entail criminal penalties must be particularly clear and specific, so that those subject to possible criminal prosecution know exactly what is required. The interpretative rules in place since 1962 conform to these principles. The Department's proposed new rules do not. The proposed changes are untested and have no precedent, and on their face are vague, ambiguous and inconsistent.

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[9] 76 FR at 36196.

The Department has no authority to impose impermissibly vague rules on employers and their legal counsel who are not violating any law – indeed, just the opposite – and impose new "chilling effects" to modify or restrict their arrangement that involves protected employer rights. The Department must address and account for the "chilling effects" of ambiguous rules that threaten confidential information disclosures and criminal penalties for any violation.

Conclusion

Littler Mendelson opposes the changes proposed. There is no need that warrants replacing the long-established rules. The proposed changes, if finalized, would exceed the Department's authority and impermissibly interfere with the protected rights of our clients.

Very truly yours,

Marko J. Mrkonich