GREENVILLE CHAMBER
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July 22, 2011

Andrew C. 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: RIN 1215-AB79 and 1245-AA03; Labor-Management Reporting and Disclosure Act: Interpretation of the "Advice" Exemption

Dear Mr. Davis:

The Greenville (SC) Chamber of Commerce submits the following comments on the proposed changes by the U.S. Department of Labor to its interpretation of the "advice" exemption under the persuader regulation for the Labor-Management Reporting and Disclosure Act.

The Greenville (SC) Chamber of Commerce is the leading voice of the Upstate South Carolina business community representing 2,075 employers, including both large and small businesses, in virtually all economic sectors from manufacturing, construction, retail, hospitality, food service, health care, and professional services. Most of our members are covered by the National Labor Relations Act and by the Labor-Management Reporting and Disclosure Act.

The Department of Labor's proposal would dramatically change current law and would result in far-reaching changes in labor-management relations and national labor policy.

CURRENT LAW

- Current LMRDA persuader regulations require employers, law firms and consultants, as well as trade associations and chambers of commerce, to report and disclose fees and arrangements for services where the object is to "persuade" employees "to exercise, not exercise, or persuade

employees as to the manner of exercising" their right to organize and bargain collectively.

- Currently, the reporting requirements apply where consultants or law firms speak directly to or interact directly with the client's non-management employees.

- The current regulations require that the consultant or law firm operating as a "persuader" must report and disclose arrangements not only for the employer involved, but all arrangements and all fees for all clients for whom any labor relations advice has been provided, even legal services and advice outside of what would constitute persuader activity. The client also must report, signed by its president and treasurer.

- Failure to report or filing false or incomplete reports subjects the employer, consultant or law firm, or trade association / chamber of commerce to civil and criminal penalties.

- Current Section 203(c) of the LMRDA, which has been the law since 1962, "exempts" from disclosure any services "giving or agreeing to give advice" which has been interpreted to exclude services such as where a law firm or consultant drafts or reviews speeches or other materials that employers are free to use, not use, or modify.

PROPOSED CHANGES

- The Labor Department's Office of Labor Management Standards (OLMS) proposed changes to the current LMRDA persuader regulations virtually eliminates the "advice exemption" so that almost all services will be subject to reporting and disclosure of arrangements and fees.

- Under the proposed regulations, any activity that is directly or indirectly related to persuading employees will be considered outside the "advice exemption" and reportable "persuader activity." This includes reviewing materials for legal sufficiency to avoid unfair labor practice charges. For example, drafting or reviewing speeches delivered by management to employees on the subject of unionization, collective bargaining or concerted activity such as strikes will now be reportable. So, too, drafting or reviewing policies, letters, audio visual material, pay roll stuffers, bulletin board notices, etc. will all be reportable.

- Under the proposed regulations, supervisory training, seminars, webinars, or conferences offered by lawyers, consultants, trade associations and chambers of commerce must be reported to the extent that such communications have a direct or indirect object to persuade employees.

We are very concerned that by eviscerating the LMRDA's Section 203 (c) "advice" exemption, the Department of Labor will do a real disservice not only to small business job generators, but also to the employees they hire. As we argue below, "advice" to employers concerning union organizing campaigns – especially to small businesses without in-house legal counsel – is vital not for purposes of "persuading" employees whether or not to exercise, or the manner of exercising, the right to organize and bargain collectively. Where it is most critical is as advice to the employer whether or not communications the employer, and only the employer, intends to have with his employees is lawful, that is, whether it would violate the National Labor Relations Act and would thus constitute an unfair labor practice. By doing so, an outside law firm or legal consultant does not seek to persuade the employees either directly or indirectly. When an employer asks for the services of a lawyer to review a speech the employer intends to deliver to employees, or a letter he intends to send to employees, he is not asking for advice as to how to be more "persuasive." He is seeking legal advice, which he is free to accept or reject, as to how not to violate the law. A lawyer or consultant who counsels an employer, or trains the employer's supervisors, as to what they may lawfully say or write to employees during a union organizing campaign, performs an essential function not only for the employer, but for the employees.

It is for that reason that Section 203(c) of the National Labor Relations Act provides: "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 [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c).

It is the latter phrase "if such expression contains no threat of reprisal or force or promise of benefit" that is the advice employers seek from outside law firms and legal consultants. Yet it is just such "advice" that the Department's proposed regulations would now include within the definition of reportable persuader activity.

Lacking access to such advice, employers will inadvertently and unintentionally slip into making statements or engaging in conduct which results in unfair labor practices. If a sufficient number of such unfair labor practices occur, the Board may issue a "Gissel" bargaining order forcing the employer to recognize and bargain with the union based solely on union authorization cards, even without an

election. Increasing the number of unfair labor practices should not be the result, whether intended or not, of any regulation.

The other alternative under the proposed persuader rules would be for an employer, especially a smaller business, simply to remain neutral during a union organizing campaign for fear that if the employer says or does the wrong thing it will result in a costly unfair labor practice trial, or if the employer hires a lawyer or legal consultant it will have to report the arrangements and fees publicly under penalty of criminal prosecution.

This is simply not right. An employer should not be scared into not exercising its free speech rights.

By way of background, until recently most South Carolinians, including those from Greenville and the Upstate, have had less contact with the National Labor Relations Board perhaps than employees in many other states. Of course, the NLRB's Boeing Complaint - which seeks to have work on Boeing's Dreamliner removed from the new Boeing plant in North Charleston, SC, at the cost of thousands of jobs and the loss of billions of dollars in tax incentives and investments - certainly has acquainted virtually every South Carolinian to the National Labor Relations Board in a far from positive light.

As you also know, South Carolina is a Right to Work state. Like several of the southern and southeastern states, South Carolina has a very low rate of unionization – approximately four percent (4%) in South Carolina. The vast majority of working Americans are not represented by unions today, currently only about 6.9% of private sector employees, and most of those have never before been represented by unions. Unlike certain other parts of the country where unionization is more commonplace, and where union membership is, in some cases, almost a family tradition, the average southern worker has no personal or historical familiarity with unions, collective bargaining, or representation elections. It is a topic seldom covered by the media in these states and communities. It is not the topic of normal or routine discussion in or out of the workplace. While organized labor wants to change those figures, today those are the facts.

The reality is that the average worker in South Carolina, just as the average employer, enters a representation campaign with very little or no pre-acquired knowledge of the processes or issues of unionization. What they learn comes primarily from the campaign. They want, need, and are entitled to, access to lawful, non-coercive information from all sources – from unions and employers and others, including legal counsel. This is the reason for Section 8(c) of the National Labor Relations Act. The United States Supreme Court has characterized the Congressional policy as "favoring uninhibited, robust, and wide-open debate" of matters concerning union representation, so long as that does not include

unlawfully coercive speech or conduct. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). Limiting the reasonable *opportunity* for such uninhibited, robust and wide-open speech is the equivalent to denying it altogether.
The Department's proposal would effectively deny employees the opportunity to hear from their employer, and even their fellow employees, regarding the certain and uncertain consequences of voting in favor of, or against, unionization. At the very least, the proposal would eviscerate the provisions of section 8(c) of the Act, not by denying employers the *right* to speak, but rather by virtually eliminating the *reasonable opportunity* for them to communicate with their employees about campaign issues.

In short, the proposed changes in the "advice" exemption to LMRDA persuader activity regulations would:

- Limit employer access to advice of outside legal counsel during union organizing, collective bargaining and concerted activities such as strikes.
- Chill employer free speech and the ability to fully inform employees prior to voting in union representation elections, ratification of collective bargaining agreements, and strike authorization votes.
- Result in catching uncounseled employers, especially small businesses, in unfair labor practices under set of complicated labor laws and ever-changing, more restrictive interpretations by the NLRB.
- Give unions access to information (arrangements and costs of opposing union organizing campaigns) for use as fodder in "corporate campaigns."
- Interfere with attorney-client relationships and privileged communications (fees and arrangements) not only for individual client, but for all clients receiving labor relations services.

On behalf of our 2,075 member businesses, we respectfully request that the proposed regulatory changes to the "advice" exemption to the LMRDA's persuader regulations be withdrawn, or at the least withdrawn and reworked.

Sincerely,

F. Ben Haskew
President and CEO

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