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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, N.W., Room N5609
Washington, DC 20210

Dear Mr. Davis:

At the request of the Office of Labor-Management Standards, Department of Labor ("OLMS" or "Department") I submit the following comments on behalf of the Ohio Management Lawyers Association ("OMLA") to the Department's proposal to revise its interpretation of the "advice" exemption to LMRDA reporting.

OMLA is an Ohio non-profit corporation. As explained in its Articles of Incorporation, the purpose of OMLA is "[t]o provide an organization and forum for the exchange of information, discussion of common issues and problems, and promotion of the administration of justice with respect to employment, labor and other areas of the law affecting employers."

OMLA was formed by, and its membership consists entirely of, experienced labor and employment attorneys engaged in the private practice of law in Ohio who represent almost exclusively management interests.

BRIEF BACKGROUND

The U.S. Department of Labor, Office of Labor-Management Services, announced on June 21, 2011 a notice of proposed rule making which, if adopted, would alter the nearly fifty year understanding of "persuader" activity under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. 402-531. Employers must disclose on Form LM-10 "any agreement or arrangement" with an outside party where such party "undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or to not exercise, or persuade employees as to the manner of exercising, their right to organize and bargain collectively through representatives of their own choosing. . . ." LMRDA § 203(a) Any

payment made pursuant to an agreement or arrangement described in § 203(a) is to be disclosed on the Form LM-10.

Affected outside parties (those engaged in persuader activities) are required to complete Form LM-20 and LM-21. The LM-20 report must be completed within 30 days of entering into the reportable agreement or arrangement and the LM-21 financial report must be completed within 90 days of the end of the consultant's fiscal year.

OMLA member firms have largely been exempt from the LM-20 and LM-21 requirements and their clients generally have not been required to disclose arrangements with their legal counsel because of the statutory exclusion for "advice" (the so-called "advice exemption"). LMRDA § 203(c). Since the early 1960's DOL's interpretation of § 203(c) excluded from reporting any advice given by labor counsel, provided the client was free to accept or reject the advice, including prepared material. In practice this meant labor counsel would not communicate directly with a client's employees on subjects covered by LMRDA §203(a). Quite obviously, the employer-client was not free to accept or reject material whenever counsel communicated directly with the employees. Thus, for generations there has been a bright line test for lawyers and their clients to follow.

The proposed "reinterpretation" of the advice exemption appears to capture a host of routine attorney/client communications which have done much to ensure compliance with federal labor law. The revised interpretation would regulate as reportable persuader activities all actions, comments and communications which could have a "direct or indirect object" to persuade employees even if such communication would constitute privileged "legal advice" in all of 50 states. Preparing scripts and letters, revising such material, and training supervisors in the lawful exercise of employer free speech rights, as well as developing lawful personnel policies could now fall outside the advice exemption making legal compliance less likely.

ATTORNEY-CLIENT PRIVILEGE JEOPARDIZED

OMLA is concerned that the revised interpretation of persuader activity invades the attorney-client privilege and will dissuade employers from seeking competent legal advice. LMRDA § 204 specifically exempts attorney-client communications from reporting. Specifically, § 204 provides that "nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the Bar . . . to include in any report required to be filed . . . any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." The Department rationalizes that requiring labor counsel to disclose its clients, its fees, and to "check the box" as to broad categories of activities does not invade the attorney-client privilege. OMLA disagrees. In virtually every other context imaginable, attorneys do not have to disclose to the public at large (and these disclosures are public records) who its clients are, how much they paid for legal services and for what kinds of work. This type of information is secure from inspection.

OLMS rejects the Department's assertion that provided the attorney limits his work to "advice" and not to "persuasion" there is no issue. 76 Federal Register 119 at p. 36192. The argument is circular because the activities that the Department now seeks to cover are "advice" and have been regarded as advice for nearly 50 years.

While the Department contends that the current definition of advice is too broad, its proposed reinterpretation is far too narrow. The distinction raised by the proposed new instructions to the reporting forms creates too fine a distinction and will no doubt result in litigation and the dampening of the solicitation of legal advice. DOL's distinction between advice (which would be limited to a recommendation regarding a decision or course of conduct) and "persuader activity" (which would be any conduct "that in whole or in part, [has] the object directly or indirectly to persuade employees concerning their rights), when coupled with the requirement that conduct which qualifies both as advice and persuader activity must be reported will result in a chilling of the attorney-client relationship. This will especially be true for small employers who cannot bear the increased burden associated with paying for the advice and then completing reporting forms.

With both civil and possible criminal penalties for failure to comply, and with a new and amorphous standard, employers will be tempted to "go it alone" rather than seek legal advice in the ever-changing field of labor law. As long standing NLRB principles are altered with each new administration, employers can ill afford to forego competent advice on how to act lawfully. There is a serious question about the efficacy of any policy, rule or regulation that increases the likelihood that employers will act without competent legal advice.

Moreover, the proposed new form instructions do not recognize the reality of legal advice in the 21st century. The new instructions seem to suggest that "advice" must be limited to a recommendation regarding a decision or course of conduct. A "go-no go" kind of advice. In reality, lawyers as part of legal services covered by the attorney-client privilege routinely give this kind of advice but also draft documents for their clients which are then used by these clients in dealing with their customers, employees, the government and others. For example, it is generally understood when a sales contract or release is presented by a company in its routine business that the document has been drafted by or reviewed by its counsel to be compliant with the law. Creating and drafting legally compliant documents is legal advice under any reasonable definition.

UNINTENDED CONSEQUENCES OF THE NEW REGULATIONS

Any barrier to the flow of legal advice from counsel to clients is likely to have the unintended consequence of more violations of the law, not fewer. Employers who chose to "go it alone" for fear of violating their obligation to file a satisfactory or complete LM-10 report would, it seems, be more likely to violate arcane and ever

evolving labor principles. While these amendments may be good politics in some quarters, it is universally bad policy if compliance of the law is the cardinal objective.

EXCHANGING A CLEAR STANDARD FOR A MURKY ONE IS POOR POLICY

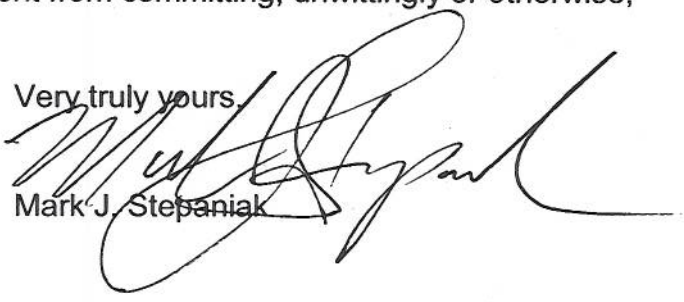
For five decades employers and their counsel have understood the clear and simple boundaries between advice and reportable persuader activity. OMLA members do not communicate directly with employees regarding their NLRA § 7 rights. Now, both employers and their lawyers will be forced to guess, possibly under threat of criminal prosecution or civil fine, whether material, communication, action, or conduct will "in whole or in part" have the "object directly or indirectly" of influencing employees. While a laundry list of activities is provided the list is specifically non-exhaustive.

THE DEPARTMENT'S RATIONALE IS UNPERSUASIVE

In part, DOL believes that the new interpretation of "advice" will provide better and more full disclosure to employees regarding the "true source" of information presented to them thereby strengthening labor management relations. In fact, the involvement of employer counsel is well known to the employees and the unions who represent them or seek to do so. In nearly every representation case before the National Labor Relations Board ("NLRB"), counsel routinely enters an appearance, physically attends contested hearings, files briefs or negotiates a stipulated election agreement. Counsel's involvement is known. It is a naïve and dubious view that employees believe their employers do not get legal advice regarding matters fraught with legal pitfalls such as conduct regulated by § 8(a) of the Act unless a Form LM-20 is filed.

The suggestion that changes are needed because of a correlation between the use of consultants and unfair labor practices is simply fallacious. Labor attorneys, bound by ethical rules and considerations of legal malpractice, do not routinely advice clients how to violate federal labor laws. To the contrary, the employer's free speech rights guaranteed by LMRA § 8(c) provides sufficient balance in the current system. It is the job of labor counsel to keep its client from committing, unwittingly or otherwise, unfair labor practices.

Very truly yours,



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MJS:srs