HAWAII EMPLOYERS COUNCIL

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor Management Standards
US Department of Labor
200 Constitution Ave., N.W. Room N-5609
Washington, D.C. 20210

September 2, 2011

Dear Mr. Davis:

On behalf of the Hawaii Employers Council ("HEC"), I am submitting the following comments to the Department's Notice of Proposed Rulemaking ("NPR") regarding changes to the "advice exception" under the Labor Management Reporting and Disclosure Act ("LMRDA"). HEC is a non-profit membership organization composed of approximately 800 member employers in Hawaii. Our employer members range from small "mom and pop" operations to larger companies with hundreds of employees. Our mission is to promote collaborative employee relations that result in skilled, engaged, and effective workforces. We provide human resources consultation and labor relations support on a wide variety of issues, including compliance with state and federal employment laws, and guidance in the negotiation and administration of collective bargaining agreements.

HEC opposes the proposed revision to the "advice" exception, for the following reasons:

- First, the restriction of the term "advice" to "legal advice" ignores the plain meaning of LMRDA Section 203(c) and is an untenable interpretation of the LMRDA, unsupported by the legislative history.
- Second, the proposed revision conflicts with public policy supporting employer speech rights in the context of collective bargaining.
- Third, the proposed revision is overbroad, and captures advice and guidance provided to employers which has no relation to "transparency" in the union election process.

HEC requests that the proposed revision to the "advice" exception be withdrawn. However, in the event that the revision goes forward, HEC also requests clarification on how the new interpretation will be applied.

I. The Proposed Revision Ignores Basic Principles of Statutory Construction

The Department's proposed revision to its interpretation of the "advice" exception ignores the plain language of LMRDA Section 203(c), and is contrary to the legislative intent behind the LMRDA's persuader rules. As noted in the Department's NPR, for almost five decades the Department has interpreted the exception as excluding from persuader reporting requirements any advice and guidance provided by attorneys and labor consultants directly to employers, so long as the attorney or consultant did not directly communicate with non-supervisory employees, and so long as the employer was free to accept or reject the advice and guidance.

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The DOL's 1962 Interpretation of the "advice" exception not only creates a bright-line rule, but is the only interpretation which gives full and logical effect to both the persuader reporting requirement in Section 203(b) and the exception for "advice" in Section 203(c). Section 203(b) provides, in pertinent part:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly – (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collective through representatives of their own choosing . . . shall file within thirty days after entering into such agreement or arrangement a report with the Secretary. . .

In order for an attorney or consultant to be engaged in persuader activity, the following criteria must be satisfied: (1) there must be an agreement or arrangement between the consultant and employer, and (2) the arrangement/agreement must concern an undertaking/activity on the part of the attorney or consultant whose "object" is to persuade employees regarding their rights to organize and bargain collectively. The persuader reporting requirement turns on the intent of the parties. So long as the intent of the arrangement or agreement is to persuade employees with regard to their rights to organize and collectively bargain, both the "persuader" and the employer must report activities undertaken to further that object.

Without the "advice" exception, the definition of "persuader" activity above would capture, without distinction, virtually all services and guidance provided by third parties to employers for the purposes of managing labor relations. Congress therefore included the "advice" exception in Section 203(c), which states that "[n]othing 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 or representative." (emphasis added). Notably, the term "advice" is not qualified or restricted in the statute.

However, the Department's new interpretation, without any support from the legislative history, and in contravention of public policy, narrowly restricts the scope of the term "advice" to "legal advice." The NPR states:

> For the purposes of the Department's interpretation of section 203(c), "advice" means an oral or written recommendation regarding a decision or course of conduct. A lawyer or other consultant who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a compliance with the law, or provides guidance on NLRB practice or precedent, is providing "advice."

Nowhere in Section 203(c), or elsewhere in the LMRDA, is there any indication that the advice exception was meant to be limited to "legal advice." The substitution of "legal advice" for the term "advice" ignores the plain meaning of the statute, and fails to give effect to the term "advice" as it is commonly and reasonably understood. BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") The NPR itself notes that the term "advice" is commonly understood as a "recommendation regarding a decision or course of conduct." Thus the "advice" exception should include any recommendation by an attorney or consultant given to an employer, regardless of whether the recommendation is intended to persuade employees regarding their collective bargaining rights. If Congress had intended to limit the advice exception to "legal advice," it would have done so explicitly. For example, where Congress intended to exclude attorney-client communications from LMRDA reporting requirements, it did so explicitly in Section 204.

The Department's new restrictive interpretation of the "advice" exception renders the exception meaningless. Legal advice is never given in a vacuum, but is always provided to support a client's desired goals. For example, an attorney who reviews an employer's speech to employees regarding a union organization drive, but only comments on the legality or illegality of its content (rather than suggesting lawful means to enhance its persuasive content), may violate his/her ethical responsibilities. *See* ABA Model R. Prof. Conduct 1.3, Comment 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.") In other words, no competent labor attorney would merely limit commentary to whether a particular phrase is legal or illegal, when ethical obligations require attorneys to zealously provide suggestions designed to achieve the client's lawful goals.

The legislative history referred to in the NPR supports the DOL's 1962 interpretation of the "advice" exception. The LMRDA's legislative history indicates Congress intended to address surreptitious and deceptive activity by labor consultants. For example, the NPR states that "among the abuses uncovered by the McClellan Committee was the employment of middlemen by management to spy on employee organizing activity or to otherwise prevent employees from forming or joining a union, or to induce them to form or join company unions through such deceptive devices as 'spontaneous' employee committees." The NPR similarly identifies conduct such as "organizing 'vote no' committees during union campaigns" and "negotiating improper 'sweetheart' contracts with union officials" as targets of the LMRDA/

Nothing in the legislative history cited by the NPR, however, indicates that Congress intended to target lawful advice provided by consultants, including guidance to employers on strategies for lawfully discussing labor relations matters. Rather, Congress evidently wanted to attack conduct which involved direct interaction between persuaders and either rank-and-file employees or their unions. Basically, the LMRDA intended to require disclosure of surreptitious and fraudulent conduct by middlemen who were directly influencing rank and file employees, or union representatives. The proposed reinterpretation ignores the legislative history, and represents an unprecedented infringement on the right of an employer to obtain advice and guidance on the lawful management of its labor relations.

Because the proposed interpretation of the advice exception ignores basic principles of statutory construction, and is unsupported by the legislative history of the LMRDA, it is likely to be deemed an *ultra vires* exercise of the Department's powers.

II. The Proposed Revision Conflicts with Public Policy Supporting Employer Speech

In 1947, the Taft-Hartley Act added the "free speech" proviso in Section 8(c), guaranteeing the right of both unions and employers to express their views, arguments, or opinions regarding unionization, so long as such expression contains no threat of reprisal or promise of benefit. The Supreme Court has ruled that 8(c) implements First Amendment speech protections. NLRB v. Gissel Packing Co., 395 US. 575, 617 (1969). Recently, the Court expanded on the right of employers to engage in open debate regarding unionization:

> From one vantage, § 8(c) "merely implements the First Amendment," NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 80–105, pt. 2, pp 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have

characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." Letter Carriers v. Austin, 418 U.S. 264, 272-273, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974).

Chamber of Commerce v. Brown, 554 US 60, 67-68 (2008).

The proposed interpretation will clearly have a chilling effect on the "uninhibited, robust, and wide-open debate" on collective bargaining matters contemplated by Congress and the courts. It will also infringe upon the right of employers to obtain guidance and information on labor relations matters, which is also protected by the First Amendment. *See* Kleindienst v. Mandel, 408 US 753, 762-63 ("the Constitution protects the right to receive information and ideas").

For example, the NPR commentary states that "creating employer policies and practices designed to prevent organizing" will constitute reportable persuader activity, as will "union-avoidance" seminars. Accordingly, if an attorney or consultant recommends that an employee handbook include a "no-solicitation/no-distribution" provision, the recommendation will evidently create a persuader reporting obligation. If an attorney or consultant conducts a "union avoidance" seminar in which the speaker recommends conducting employee satisfaction surveys, improving communications with the workforce, and taking steps to resolve employee issues and complaints, the seminar will likewise evidently constitute reportable persuader activity under the proposed interpretation.

The ambiguous definition of "persuader" activity provided by the proposed interpretation will create substantial problems for employers, as well as for attorneys and consultants. For example:

- If a consultant publishes a book on lawful strategies to avoid unionization, and the book is purchased by an employer, is that an "agreement or arrangement" constituting reportable persuader activity? If it is persuader activity, how will the book's author identify the purchaser in order to satisfy the LM-20 reporting requirement?
- If a labor consultant's email newsletter mentions a lawful strategy or tactic found to be effective in collective bargaining negotiations, must all of the employers receiving the newsletter then file LM-10 reports? (Note that the exception in 203(c) for consultants who are engaging in collective bargaining or negotiating on behalf of the employer would evidently not apply).
- A substantial number of recommended personnel policies have legitimate business objectives unrelated to collective bargaining, but may also have the effect of influencing employees in their exercise of collective bargaining rights. For example, policies prohibiting employees from loitering before or after their shifts may be intended to prevent theft or interference with business operations, but may also have the effect of inhibiting union solicitation. See *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976). Policies creating employee committees to promote safety, improve quality control, or to review discipline, generally have multiple objectives, and may or may not have a secondary objective of influencing collective bargaining rights. *See Electromation, Inc., 309 NLRB 990* (1992). Policies on employees' use of social media may be intended to avoid disclosure of confidential information, prevent copyright violations, and limit liability for defamation, but may also affect Section 7 rights. *See Sears Holdings*, Case 18-CA-19081 (2009). **How will the Department determine whether the objective of the consultant or**

the employer, in discussing or enacting such policies, was to influence employees in their exercise of collective bargaining rights?

Because of its ambiguity, the proposed interpretation will lead to absurd results. An employer's best approach to prevent unionization is to create and maintain the best possible working conditions for employees, and become the "employer of choice." Yet if attorneys and labor consultants provide guidance regarding policies designed to empower employees, improve communications between management and the workforce, and elevate morale, such activity risks being characterized as reportable "persuader" activity. The Department's proposal will prevent employers from obtaining guidance on how to improve working conditions within the limits prescribed by federal labor law, to the detriment of employees.

It should also be noted that the real administrative burden imposed by the Department's proposal is not the reporting of persuader engagements using forms LM-20 and LM-10. Rather, the crushing obligation is the requirement under LMRDA Section 203(b) that any person engaging in persuader activity must, in addition to the LM-20, file an annual LM-21 report containing a statement of all receipts and disbursements "on account of labor relations advice or services," which would include negotiation services, consultation on the administration of an agreement, representation in grievances or arbitrations, representation in NLRB proceedings, and so forth. A single persuader engagement may require a consultant to file hundreds of pages of reports under form LM-21.

If the proposed interpretation goes forward, to avoid the administrative burden posed by form LM-21, many attorneys and consultants are likely to refrain from providing any guidance or information which could potentially be construed as falling under the proposed scope of "persuader" activity. Employers, particularly smaller employers, will then be forced to participate in union elections without the benefit of an attorney or a knowledgeable labor consultant. The end result is likely to be an increase in unfair labor practices, committed by unwitting employers who are unable to obtain guidance in navigating the confusing maze of current labor law. The problem is exacerbated by the lack of a clear definition of "persuader" activity under the Department's proposal.

III. The Proposed Interpretation Is Overbroad

The only potentially legitimate goal advanced by the Department is the promotion of transparency in the union election process. Yet the Department's proposal captures guidance and human resource services provided by attorneys and consultants wholly outside of a union organizational campaign. For example, the proposed interpretation will require the reporting of seminars, management training, newsletters, handbook policy guidance, and similar labor relations advice provided to employers, regardless of whether the advice was provided after an election petition was filed. For example, if 3 years prior to a union election campaign a consultant provided training to an employer's managers on staying union-free, how does the reporting of that training in any way aid an employee in evaluating employer communications during a union election campaign?

The proposed interpretation is overbroad, and its reach extends far beyond the goal of promoting transparency in the election process. However, if the Department goes forward with the proposed interpretive change, the persuader reporting requirement should be narrowly limited to "persuader" activity occurring after an election petition has been filed.

IV. Request for Clarification Regarding Specific Matters

As noted above, we oppose the Department's proposed change regarding the "advice exception." However, in the event the Department goes forward with its proposal, we request that the following matters be clarified.

1. **What constitutes an "agreement" or "arrangement" with an employer for purposes of Section 203(b)?** The Hawaii Employers Council ("HEC") is an employer membership organization. Employers pay annual dues and receive a wide variety of human resources and labor relations advice and support in return. From time to time, we also provide guidance to employers on remaining union-free, and on responding to a union organization drive, but members generally do not incur an additional fee for obtaining such guidance. Is membership in an employer organization such as HEC an "agreement" or "arrangement" for purposes of Section 203(b), and must HEC report guidance or advice constituting "persuader" activity under the proposed interpretive change, even if no separate fee is charged for such guidance or advice?

2. **In order for particular guidance/advice to be treated as reportable persuader activity, must both the consultant and the employer intend that the object of the guidance/advice be to persuade employees regarding their collective bargaining rights**? Section 203(b) indicates that particular conduct is only characterized as "persuader" activity if both the consultant and employer agree or understand that the "object" of the activity 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."

Thus, under a "plain reading" of 203(b), if a consultant provides guidance on a topic but does not intend that the guidance be used to persuade employees regarding their collective bargaining rights, or if the employer does not solicit guidance with the intent of persuading employees, then is HEC correct in understanding that no reportable "persuader" activity has occurred?

For example, assume HEC is asked to conduct an employee opinion survey which obtains information on employees' attitudes regarding compensation and benefits, desired perks, relationships with management, and the company's effectiveness in responding to employees concerns and complaints. No mention is made of unions, unionization, or collective bargaining in the survey. HEC knows only that the company intends to use the survey to identify and address employee concerns. Assume also that the employer requests the survey, in part, because of a concern that it may be susceptible to a union organizing campaign. Are we correct in assuming that conducting the survey does not trigger persuader reporting requirements, because HEC had no knowledge of this hidden purpose on the part of the employer?

3. **Assuming HEC provides the following services to its members, do any of the following constitute reportable "persuader" activity?**

   a. HEC maintains a lending library. Included in the library are books providing advice and suggestions to employers on how to remain union-free. A member checks out a book on remaining union-free. Does the mere borrowing of a book constitute "persuader" activity?

   b. HEC also maintains a website. A members-only section of the website, which is password protected, includes white papers on an number of employment and labor law issues. Particular white papers include guidance and suggestions on how to lawfully

respond to a union election petition, such as sample speeches to be given by employers, advice on how to train supervisors to communicate the employer's message, and guidance on how to develop an overall strategy to oppose a union organizing drive. Is the mere posting of such guidance on a password-protected website reportable persuader activity, since HEC does not monitor which members access its white papers, but merely limits access to current members?

c. Same situation as in 3(b) above, but assume that HEC posts the information on how to respond to a union organizing drive on a publicly-accessible part of its website, and the information is therefore openly available to the general public.

   We assume that the posting of guidance on how to lawfully persuade employees in connection with an union organizing campaign on a publicly-accessible website is not persuader activity, since it is not made pursuant to an agreement/arrangement with any particular employer, and HEC does not intend to persuade any particular group of employees, but is merely providing information to the general public. Is that assumption correct?

d. HEC reviews a member's employee handbook, and among other revisions, suggests that the handbook include a "no-solicitation, no-distribution" provision which complies with NLRA requirements, and provides sample language. Prior to review by HEC, the member's employee handbook did not contain any policy relating to solicitations or the distribution of materials by third parties. Upon presenting the handbook revisions to the member, HEC informs the member that a properly drafted "no-solicitation, no-distribution" clause may help to prevent unwarranted interference with business operations in the event a union attempts to organize its employees. The employer did not request HEC to provide guidance on persuading employees regarding collective bargaining rights, but merely requested review of its handbook. Does HEC's conduct constitute reportable persuader activity, and if it does, can you explain why?

V. Summary

HEC appreciates the opportunity to provide the forgoing comments regarding the Department's proposed change to the "advice" exception. We believe the proposed narrowing of the "advice" exception is based on a misinterpretation of the statute, conflicts with both the legislative history of the LMRDA and well-established public policy supporting employer speech rights, and is overbroad. However, in the event that the Department proceeds with the proposed change, we request clarification on how the new persuader reporting requirements will be applied.

Sincerely,

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