



September 20, 2011

Submitted Electronically

The Hon. Hilda L. Solis
Secretary
U.S. Department of Labor
Office of Labor-Management Standards
Division of Interpretations and Standards
200 Constitution Avenue, N.W.
Room N-5609
Washington, D.C. 20210

Re: RIN 1215-AB79 and 1245-AA03; Labor-Management Reporting and Disclosure Act; Interpretation of the “Advice” Exemption; Notice of Proposed Rulemaking, 76 Fed. Reg. 36,178 (June 21, 2011).

Dear Secretary Solis:

The American Hospital Association (AHA), on behalf of its 5,000 hospitals, health systems and other health care organizations, as well as its 42,000 individual members, joins the American Society for Healthcare Human Resources Administration (ASHHRA) on behalf of its 3,400 human resource managers in hospitals and other health care facilities nationwide, to submit these comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Office of Labor-Management Standards (OLMS) of the Department of Labor (DoL or the Department) in the June 21 *Federal Register*. In the NPRM, OLMS proposes to revise its interpretation of the “advice” exemption to persuader reporting under Section 203 of the *Labor-Management Reporting and Disclosure Act* of 1959 (LMRDA), 29 U.S.C. § 433, by narrowing the definition of “advice” and thus expanding the circumstances under which reporting is required of employer-consultant persuader agreements. The AHA and ASHHRA oppose the revised interpretation of the advice exemption and request that the Department decline to adopt the NPRM.

The AHA, ASHHRA and their members have substantial interests in this rulemaking. AHA members range from large hospitals and health care systems to small rural hospitals. More than 40 percent of the nation’s hospitals are stand-alone hospitals, often the sole health care provider

in their communities. The overwhelming majority of the AHA's members are covered by the *National Labor Relations Act* (29 U.S.C. § 151 *et seq.*, NLRA) and a substantial number of ASHHRA's members work at hospitals and other health care employers covered by the NLRA. These hospitals are focused on their patient care mission and often unfamiliar with the specific and complex rules regarding the NLRA, collective bargaining and union organizing. Accordingly, when such issues arise, AHA member hospitals frequently seek labor relations advice from outside counsel and, on occasion, the AHA and ASHHRA.

The Department's revised interpretation of the advice exemption would interfere with hospitals' ability to receive labor relations advice that is needed to ensure proper compliance with all applicable laws. The NPRM would have a disproportionate impact on health care employers given that a large percentage of union-organizing drives involve health care employers. A sampling of National Labor Relations Board (NLRB) election reports since November 2010 reveals that between 20 percent and 25 percent of election petitions in a given month involve health care employers; in February 2011, 51.6 percent of closed election cases were in the health care field. For these reasons, the AHA, ASHHRA and their members have a particular interest in having the Department address our concerns about this proposed rulemaking.

As explained in attached detailed comments, there are numerous reasons why the proposed reinterpretation of the advice exemption should be discarded, each providing sufficient reason for the Department to abandon the NPRM.

- The Department's proposed standard for distinguishing between "advice" and "persuader activity" is simply unworkable and would bring hopeless ambiguity to this area of law.
- The Department's proposed reinterpretation of the advice exemption would invade the attorney-client privilege and violate attorney-client confidences.
- The Department's proposed reinterpretation of the advice exemption is not supported by the text or legislative history of Section 203 of the LMRDA.
- The Department's proposed reinterpretation of the advice exemption advances an employer neutrality policy that conflicts with the statutory policy of robust debate expressed in the NLRA.
- The Department's proposed reinterpretation of the advice exemption is an unconstitutionally vague content-based regulation.
- The "significant underreporting problem" identified in the NPRM is a direct result of the Department's new view that it is a reportable event for consultants to engage in indirect "persuader activity" by directing their activities to the employer's supervisors. If there is underreporting of activity Congress wanted reported – communications from consultants acting as clandestine "agents of management" or undercover "middlemen" between

Hilda L. Solis, Secretary

September 20, 2011

Page 3 of 15

management and employees – the appropriate agency response should be increased enforcement of the existing law and regulations.

Thank you for your consideration of our views on this important matter. If you have questions about our recommendations, please contact Lawrence Hughes, assistant general counsel, at lhughes@aha.org or (202) 626-2346.

Sincerely,

/s/

Rick Pollack

Executive Vice President

American Hospital Association

/s/

Stephanie Drake

Executive Director

American Society for Healthcare Human Resources Administration

cc: Andrew R. Davis

Chief of the Division of Interpretations and Standards

Office of Labor-Management Standards

Attachment

AHA, ASHHRA Detailed Comments on the Department's NPRM

I. THE DEPARTMENT'S PROPOSED REINTERPRETATION OF THE "ADVICE" EXEMPTION WOULD CREATE UNCERTAINTY AS TO MANY LEGITIMATE AND APPROPRIATE COMMUNICATIONS

The Department's proposed standard for distinguishing between "advice" and "persuader activity" is simply unworkable and would bring hopeless ambiguity to this whole area of law. The current standard, which has been settled for decades, draws a clear and content-neutral demarcation between "advice" and "persuader activity." By contrast, the proposed new standard – whether, "a particular consultant activity has among its purposes an object, direct or indirect, to persuade employees" (76 Fed. Reg. at 36,191) – is an entirely subjective question over which reasonable people can and will disagree. The AHA and ASHHRA submit that it is bad public policy to base a rule of law on such a subjective standard that necessarily will result in inconsistent and arbitrary outcomes.

The NPRM states that communications are "persuasive" if they, "explicitly or implicitly encourage employees to vote for or against union representation, to take a certain position with respect to collective bargaining proposals, or refrain from concerted activity (such as a strike) in the workplace" (*Id.* at 36,191). Examples of such "persuader activity" include, "[t]raining or directing supervisors and other management representatives to engage in persuader activity;" "creating employer policies and practices designed to prevent organizing;" and, holding "seminars, webinars, or conferences" at which, "guidance is offered to attendees who represent multiple employers on labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights" (*Id.*). However, supplying employers with training, guidance and/or policies about the obligations of the NLRA and other labor-relations issues is a legitimate and appropriate activity routinely offered by consultants and lawyers. Such activities are not the type of "persuader activity" that Congress intended to regulate.

The Department's proposed reinterpretation of the advice exemption results in an overly broad definition of "persuader activity" that would create uncertainty regarding many legitimate and appropriate communications. For example, if a consultant or lawyer supplies a client with a sample personnel policy that lawfully restricts employee solicitation and distribution, has it engaged in reportable "persuader activity"? What if the consultant or lawyer supplies a client with a sample access policy that lawfully restricts off-duty employee and/or union organizer access to property? Under the NPRM, those activities might be reportable because the policies are designed, at least in part, to affect the location or manner of union organizing. But creating, revising and updating employer personnel and access policies is an important component to ensuring compliance with sometimes rapidly evolving legal standards (*see, e.g., New York New York Hotel & Casino*, 356 NLRB No. 119 (Mar. 25, 2011)). Moreover, hospital settings have special rules developed through numerous NLRB and court decisions that affect labor relations activities in hospital settings (*see, e.g., Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334 (D.C.

Cir. 2003)). Hospitals, focused on their patient care mission, cannot reasonably be expected to draft such policies themselves.

The NPRM also fails to provide adequate guidance as to when particular communications might be categorized as reportable “persuader activity.” In particular, it is not clear whether there is an obligation to report after the union has been certified or in the absence of any union organizing. For example, would a consultant or lawyer be required to report guidance to a client on how to operate during a strike with replacement workers where the use of replacements might have an effect on the employees’ decision to participate in a strike? Would a consultant or lawyer be required to report guidance to a client on how to communicate with employees about collective bargaining negotiations in response to a certified union’s collective bargaining proposals? Would a consultant or lawyer be required to report guidance to a client on the process of decertification of a union or in response to a rumored employee decertification petition? These are just a few examples of how the NPRM would inject uncertainty and ambiguity into this settled area of law. This unnecessary ambiguity leads to a host of legal concerns, as explained further in these comments.

II. THE DEPARTMENT’S PROPOSED REINTERPRETATION OF THE “ADVICE” EXEMPTION WOULD INVADE THE ATTORNEY-CLIENT PRIVILEGE AND VIOLATE ATTORNEY-CLIENT CONFIDENCES

The proposed new definition of “advice” rejects the decades-old, bright line rule that has been easy to apply in practice: Lawyers need not report labor relations advice where the lawyer did not have direct contact with any of the rank-and-file employees and where the employer was free to reject the lawyer’s advice (as is the case with virtually any type of advice). Instead, the proposed new definition of “advice” unnecessarily injects a subjective intent element into the analysis that necessitates the Department undertake a case-by-case fact-finding mission of the lawyer’s mindset when communicating with a client. The Department’s new standard will create uncertainty and is likely to inhibit candid and confidential attorney-client communications. If enacted, the NPRM ultimately may impair many hospitals from getting the expert legal representation that they need, thereby effectively denying the fundamental right to counsel.

In order to determine whether a communication is simply “advice” or instead reportable “persuader activity,” the Department would have to review the lawyer’s communication itself to discern whether the communication “in whole or in part” has a “direct or indirect” purpose to persuade employees. Because the applicability of the advice exemption turns on the object of the communication, it is impossible to categorize the communication as “advice” or “persuader activity” without revealing the lawyer’s communication to the Department for review, thereby invading the attorney-client privilege and violating attorney-client confidences.

For example, a union in a labor dispute with a hospital could file a complaint against the hospital alleging that it failed to report the “persuader activity” of its outside labor counsel. The Department then would have to investigate the complaint to determine whether an object of any communication between the hospital and its outside labor counsel was to persuade employees.

To do so, the Department would need to access confidential and privileged communications between the hospital and outside labor counsel. To respond to such an investigation, the hospital or outside labor counsel would be compelled to disclose the content of attorney-client communications to establish the absence of reportable “persuader activity.” And, if the outside labor counsel had the misfortune to be prosecuted criminally for alleged failure to report or filing inaccurate reports, counsel would be required to seek the hospital’s permission to waive attorney-client privilege to disclose the content of otherwise privileged communications. This scenario is not a realistic possibility under the Department’s existing standard because the object of the advice is irrelevant, as it should be under any ordinary and common meaning of the word “advice.”

While the Department recognizes that an attorney who engages in “persuader activity” is shielded by Section 204 of the LMRDA (29 U.S.C. § 434) from disclosing the content of communications protected by the attorney-client privilege (*see* 76 Fed. Reg. at 36,192), the NPRM nonetheless requires the filing of 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” (*Id.*). The Department reasons that, “the fact of legal consultation, clients’ identities, attorney’s fees and the scope and nature of the employment are not deemed privileged” (*Id.*).

There is no statutory basis to support the wholesale invasion of client confidences that the NPRM would require. On its face Section 204 of the LMRDA exempts, “*any information* which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship,” (29 U.S.C. § 434 (emphasis added)) which plainly includes the client’s identity and terms and scope of engagement. There is no textual basis to narrowly limit “any information” to only those “communications made in confidence” that are protected by attorney-client privilege as the Department proposes (76 Fed. Reg. at 36,192). Had Congress intended a narrower exemption, it would have said “confidential communications” or “communications protected by the attorney-client privilege” and not used the broad words “any information.” The Sixth Circuit’s decision to the contrary in *Humphreys, Hutcheson and Moseley v. Donovan* (755 F.2d 1211 (6th Cir. 1985)), cited in the NPRM, failed to give effect to the plain language of the statute and erroneously relied on inconclusive excerpts from the legislative history in limiting the exemption to only confidential communications (*see id.* at 1216-19; *cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”))).

The Department also overlooks that ABA Model Rule of Professional Conduct 1.6 – titled “Confidentiality of Information” – and the overwhelming number of state bar ethical rules that closely track the ABA model rule – generally forbid lawyers from disclosing non-privileged “client secrets,” including the identity of the client, the nature of the representation and the amount of legal fees paid by the client to the lawyer (*see* Model Rules of Prof’l Conduct R. 1.6 cmt. 3 (“The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to *all information* relating to the representation, whatever its source.”))

(emphasis added)). While the ABA model rule allows a lawyer to disclose confidential client information “to comply with other law or a court order,” (*id.* at R. 1.6(b)(6)), Section 204’s broad exemption of, “any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship” is more closely analogous to the confidentiality rule’s protection of “all information relating to the representation” than it is to the attorney-client privilege’s narrower protection of “confidential communications.” This strongly suggests that in Section 204 Congress intended to shield more information than just confidential communications protected by the attorney-client privilege. Thus, the NPRM could require attorneys to violate their ethical duties in many jurisdictions including Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.¹

III. THE DEPARTMENT’S PROPOSED REINTERPRETATION OF THE ADVICE EXEMPTION IS NOT SUPPORTED BY THE TEXT OR LEGISLATIVE HISTORY OF SECTION 203 OF THE LMRDA

Section 203(c) of the LMRDA – titled “Advisory or representative services exempt from filing requirements” – provides in relevant part that, “Nothing 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 plain language of the so-called “advice exemption” covers all “advisory or representative

¹ See Ala. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); Alaska Rules of Prof’l Conduct R. 1.6; Ariz. Rules of Prof’l Conduct R. 1.6; Ark. Rules of Prof’l Conduct R. 1.6; Cal. Bus. & Prof. Code § 6068(e); Colo. Rules of Prof’l Conduct R. 1.6; Conn. Rules of Prof’l Conduct R. 1.6; Del. Lawyers’ Rules of Prof’l Conduct R. 1.6; D.C. Rules of Prof’l Conduct R. 1.6; Fla. Rules of Prof’l Conduct R. 4-1.6 (no exception for compliance with other law); Ga. Rules of Prof’l Conduct R. 1.6; Haw. Rules of Prof’l Conduct R. 1.6; Idaho Rules of Prof’l Conduct R. 1.6; Ill. Rules of Prof’l Conduct R. 1.6; Ind. Rules of Prof’l Conduct R. 1.6; Iowa Rules of Prof’l Conduct R. 32:1.6; Kan. Rules of Prof’l Conduct R. 1.6; Ky. Rules of Prof’l Conduct R. 1.6; La. Rules of Prof’l Conduct R. 1.6; Me. Rules of Prof’l Conduct R. 1.6; Md. Lawyer’s Rules of Prof’l Conduct R. 1.6; Mass. Rules of Prof’l Conduct R. 1.6; Mich. Rules of Prof’l Conduct R. 1.6; Minn. Rules of Prof’l Conduct R. 1.6; Miss. Rules of Prof’l Conduct R. 1.6; Mo. Rules of Prof’l Conduct R. 4-1.6; Mont. Rules of Prof’l conduct R. 1.6; Neb. Rules of Prof’l Conduct R. 3-501.6; Nev. Rules of Prof’l Conduct R. 1.6; N.H. Rules of Prof’l Conduct R. 1.6; N.J. Rules of Prof’l Conduct R. 1.6; N.M. Rules of Prof’l Conduct R. 16-106; N.Y. Rules of Prof’l Conduct R. 1.6; N.C. Rules of Prof’l Conduct R. 1.6; N.D. Rules of Prof’l Conduct R. 1.6; Ohio Rules of Prof’l Conduct R. 1.6; Okla. Rules of Prof’l Conduct R. 1.6; Or. Rules of Prof’l Conduct R. 1.6; Pa. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); R.I. Rules of Prof’l Conduct R. 1.6; S.C. Rules of Prof’l Conduct R. 1.6; S.D. Rules of Prof’l Conduct R. 1.6; Tenn. Rules of Prof’l Conduct R. 1.6; Tex. Disciplinary Rules of Prof’l Conduct R. 1.05; Utah Rules of Prof’l Conduct R. 1.6; Vt. Rules of Prof’l Conduct R. 1.6; Va. Rules of Prof’l Conduct R. 1.6; Wash. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); W.V. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); Wis. Rules of Prof’l Conduct SCR. 20:1.6; Wyo. Rules of Prof’l Conduct R. 1.6.

services” including “giving or agreeing to give advice” without limitation, and nowhere qualifies the word “advice” with the word “legal.” However, the Department proposes in the NPRM to rewrite the advice exemption by inserting the word “legal” before the word “advice” (*see* 76 Fed. Reg. at 36,191 (“A lawyer or other consultant who exclusively counsels employer representatives on what they may *lawfully* say to employees, ensures a client’s *compliance with the law*, or provides *guidance on NLRB practice or precedent*, is providing ‘advice’.”) (emphasis added)). To the contrary, the statute on its face exempts “advice,” and there is no basis for limiting the exemption only to the narrow definition of legal advice as the Department now proposes.

In *UAW v. Dole* (869 F.2d 616 (D.C. Cir. 1989)), Justice Ginsburg, writing for a unanimous panel of the D.C. Circuit, rejected an analogous cramped construction of the exemption found in Section 203(e) of the LMRDA. That exemption provides in relevant part that no employer, “shall be required to file a report covering expenses made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer” (29 U.S.C. § 433(e)). Like the Department’s reinterpretation in the NPRM here, the district court in that case had narrowly construed the exemption to have no application to persuader activities (*see* 869 F.2d at 620 (“In the district court’s view, all persuader activities in which supervisors engage, even entirely lawful activities, must be reported, because section 203(e) ‘exempts from the reporting requirement only compensation for regular services, not for persuader activities’.”)). In rejecting that analogous construction of the Section 203(e) exemption, the D.C. Circuit held, “The exemption, under this reading, appears to have no office. The LMRDA’s domain is persuader activities. No exemption is needed for activities that fall outside the Act’s domain” (*Id.* (Ginsburg, J.)).

Like the district court’s erroneous interpretation of Section 203(e), the Department’s reinterpretation of Section 203(c) “appears to have no office” inasmuch as “[t]he LMRDA’s domain is persuader activities” and “[n]o exemption is needed for activities that fall outside the Act’s domain” (*Id.*). No exemption is needed for counseling employers “on what they may lawfully say to employees,” ensuring “a client’s compliance with the law” or providing “guidance on NLRB practice or precedent” because those activities are not persuader activities and thus fall outside the LMRDA’s domain. By definition the advice exemption must remove from the statute’s coverage “certain activity that otherwise would have been reportable” persuader activity (*Id.* at 618). Accordingly, in the so-called “overlap area” where the activity “might be characterized both as advice to an employer and as persuasion of employees” (*id.*), the exemption must control. Were it otherwise, the advice exemption effectively would be read out of the statute and, as applied to lawyers, would be superfluous because a lawyer’s legal advice is exempt under a different provision of the LMRDA (*see* 29 U.S.C. § 434). Therefore, non-legal advice, even if such advice has a direct or indirect object of employee persuasion, necessarily must come within the exemption.

The driving force behind the Department’s reinterpretation appears to be its dissatisfaction with the fact that a consultant’s, “supply of material or communications that have an object to persuade employees” is not reportable under existing law (76 Fed. Reg. at 36,183). That result is

a function of the provisions of Section 203(b) itself, not an overly broad interpretation of the advice exemption. In Section 203(b)(2), Congress demonstrated that it knew how to make a consultant's "supplying activities" to an employer reportable (*see* 29 U.S.C. § 433(b)(2) (reportable activity "to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer")). By distinguishing between activities that have an object to persuade in Section 203(b)(1) and activities that have an object to supply in Section 203(b)(2), Congress further demonstrated that it did not intend for "persuader activities" to include "supplying activities." Indeed, if Section 203(b)(1) were broad enough to include supplying information to an employer for the employer to use in persuading employees, then there would be no need for a separate disclosure provision for the supplying activities referenced in Section 203(b)(2).

Nor has the Department explained how, "the preparation of persuasive material for dissemination or distribution to employees . . . is itself more than a recommendation regarding a course of conduct in the ordinary sense" (76 Fed. Reg. at 36,183). In *UAW v. Dole*, the D.C. Circuit cast doubt on the argument that "advice" does not "comprehend scripting an employer's anti-union campaign" (869 F.2d at 619, n.4). The court noted that, "the term 'advice,' in lawyer's parlance, may encompass, *e.g.*, the preparation of a client's answers to interrogatories, the scripting of a closing or an annual meeting" (*Id.*). Redefining "advice" to mean a "recommendation" does not narrow the exemption because preparing persuasive materials for an employer's recommended use still remains a mere recommendation that the employer is free to accept or reject. It is only by subtracting recommendations with an object of persuading employees from the ordinary definition of "advice" that the Department is able to transform an otherwise exempt recommendation into reportable "persuader activity."

The Department's proposed reinterpretation of the advice exemption also is contrary to its legislative history, which the D.C. Circuit found expresses an intent, "to grant a broad scope to the term 'advice'" (*Id.* 618. *See also* H.R. Conf. Rep. No. 86-1147, at 33 (1959) ("Subsection (c) of section 203 of the conference substitute grants a *broad exemption* from the requirements of the section with respect to the giving of advice.") (emphasis added)). As the D.C. Circuit correctly recounted in *UAW v. Dole*, the legislative history of Section 203, "confirms a prime congressional concern to uncover employer-expenditures for anti-union persuasion carried out, often surreptitiously, *not* by employers or supervisors, but by consultants or middlemen" (*Id.* at 619, n.5, (emphasis added)). The evil that the statute is designed to combat is employee deception (*see* 76 Fed. Reg. at 36,184 (acknowledging Congress's concern about "deceptive consultant activity" including inducing employees, "to form or join company unions through such deceptive devices as 'spontaneous' employee committees, essentially fronts for the employer's anti-union activity")). Thus, the Senate report accompanying the bill that became the LMRDA explains that the statute was aimed at exposing consultants acting as clandestine "agents of management" or undercover "middlemen" between management and employees (S. Rep. No. 86-187, at 10 (1959)). In other words, Congress wanted to expose "middlemen masquerading as legitimate labor relations consultants" (*Id.* at 39).

In circumstances where an employer is communicating through a middleman, reporting is required so that employees are not tricked into believing that the message is coming from a source other than “agents of management” (*Id.* at 10). However, where the message is coming directly from an employer through its supervisors or employee agents and not via an intermediary, no reporting should be required because there is no risk that employees will be deceived into believing that the employer is not the messenger (*compare* 29 U.S.C. § 433(a)(2), (no requirement to report payments made to employees to persuade other employees if the payments were disclosed to the other employees); *id.* § 433(e) (no requirement to report, “expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer”)). Accordingly, the LMRDA does not require reporting in circumstances where a labor relations consultant is not interacting directly with employees as a middleman for the employer.

The NPRM has distorted the intent of Section 203 to require reporting where an employer acts as a “middleman” between a consultant and its own employees. Under that logic, reporting is required because the employer is acting as an agent of the consultant in delivering the consultant’s message. That is a warped interpretation of Section 203, and one not contemplated by Congress (*see* S. Rep. No. 86-187, at 10 (reporting required where “middlemen have acted . . . as agents of management,” not the other way around)). Contrary to the Department’s assertion, Congress did not go so far as to give employees a general right, “to know whether employers are using consultants to run anti-union campaigns” or to know, “the underlying source of the information directed at them” (76 Fed. Reg. at 36,190). The legislative history confirms that Congress was concerned with employee deception and thus wanted employees to know whether a middleman was acting on behalf of their employer, not whether their employer had consulted with a labor relations consultant or lawyer.

The Department reasons that the proposed reinterpretation of the advice exemption would provide information that enables employees to make a more informed choice. It is difficult to comprehend how employees’ Section 7 right is aided by knowing that their employer consulted with a labor relations consultant or lawyer. In any event, that is a legislative judgment to be made by Congress, not the Department. The Department is not free to rewrite the reporting obligations in Section 203(b) under the guise of narrowing its own decades-old reading of the exemption in Section 203(c).

IV. THE DEPARTMENT’S PROPOSED REINTERPRETATION OF THE “ADVICE” EXEMPTION ADVANCES AN EMPLOYER NEUTRALITY POLICY THAT CONFLICTS WITH THE CONGRESSIONAL POLICY OF ROBUST DEBATE EXPRESSED IN THE NLRA

The apparent purpose of the NPRM is to remedy what the Department views as, “[t]he deleterious effect of labor consultant activity on industrial relations” (*Id.*). The NPRM is aimed at “consultant-led anti-union campaigns,” which the Department asserts have imported “the ‘worst features’ of political campaigns . . . into union election campaigns, resulting in confrontation and conflict that unnecessarily colors labor-management relations” (*Id.*). But what

the Department views as “confrontation and conflict” is affirmatively encouraged by federal labor policy. Therefore, the very purpose of the NPRM is impermissible (*see Chamber of Commerce v. Brown*, 554 U.S. 60, 73-74 (2008) (“it is not ‘permissible’ . . . to advance an interest that . . . frustrates the comprehensive federal scheme established by the Act”)), and if adopted, the NPRM would stand, “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (*Nash v. Florida Indus. Comm’n*, 389 U.S. 235, 240 (1967)).

The Department’s employer neutrality objective runs headlong into federal labor policy, expressed in Section 8(c) of the NLRA (29 U.S.C. § 158(c)), which the Supreme Court has held “suffuses the NLRA as whole” in “manifest[ing] a ‘congressional intent to encourage free debate on issues dividing labor and management’” and “favoring uninhibited, robust, and wide-open debate in labor disputes” (*Chamber of Commerce*, 554 U.S. at 68 (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) & *Letter Carriers v. Austin*, 418 U.S. 264 (1974))). The Court stressed that the “freewheeling use of the written and spoken word has been expressly fostered by Congress and approved by the NLRB” (*Id.* (quoting *Letter Carriers*, 418 U.S. 264)). By seeking to handicap one party to the debate, the NPRM goes beyond what Congress intended to accomplish in Section 203 of the LMRDA – lifting the veil on middlemen who, unbeknownst to employees, are acting on behalf of the employer in their dealings with employees – and conflicts with federal labor policy.

Under the originally enacted NLRA, usually referred to as the Wagner Act, the NLRB took the position that the statute, “demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees” (*Id.* at 66; *see, e.g., Letz Mfg. Co.*, 32 NLRB 563 (1941)). The Supreme Court rejected that position in *NLRB v. Virginia Electric & Power Co.* (314 U.S. 469 (1941)), holding that the NLRA does not prohibit an employer “from expressing its views on labor policies or problems” unless the speech amounts “to coercion within the meaning of the Act” (*Id.* at 477). Thereafter, in *Thomas v. Collins* (323 U.S. 516 (1945)), the Supreme Court characterized *Virginia Electric* as “recognizing the First Amendment right of employers to engage in noncoercive speech about unionization” (*Chamber of Commerce*, 554 U.S. at 67). “Notwithstanding these decisions, the NLRB continued to regulate employer speech too restrictively in the eyes of Congress” (*Id.*).

In response, Congress enacted the Taft-Hartley Act out of a, “[c]oncern[] that the Wagner Act had pushed the labor relations balance too far in favor of unions” (*Id.*). In particular, Congress added Section 8(c) to the NLRA for the purpose of ensuring that employers have, “full freedom to express their views to employees on labor matters” (S. Rep. No. 80-105, at 23-24 (1947) (emphasis added)). “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” (*Chamber of Commerce*, 554 U.S. at 67-68). Accordingly, Section 8(c) constitutes an, “explicit direction from Congress to leave noncoercive speech unregulated” in order to effectuate employees’ Section 7 right, “to receive information opposing

unionization” (*Id.* at 68). In the LMRDA, Congress expressed its intent to protect an employer’s NLRA speech rights (29 U.S.C. § 433(f)).

No consideration appears to have been given to the chilling effect that the NPRM would likely have on employer free speech or the resulting effect on employees’ Section 7 right. The implications of the NPRM, if adopted, are uncertain. It seems probable that some consultants or lawyers will decline to give advice out of fear of triggering a reporting obligation, especially given the Department’s position that the scope of the reporting obligation extends to all labor relations advice or services, not just persuader activities (*see* LMRDA Interpretive Manual § 260.300). Accordingly, the NPRM advances, “the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act” (*Chamber of Commerce*, 554 U.S. at 69).

All hospitals strive to maintain a tranquil patient care environment. Many may choose not to oppose union organizing. However, those hospitals that do wish to exercise their right to speak to employees may feel compelled to refrain, resulting in their employees being less informed about the important choice they face. To be sure, the NPRM nominally allows for employer counseling on *what* they may lawfully say to employees (*see* 76 Fed. Reg. at 36,182). However, hospitals cannot reasonably be expected to know *how* to lawfully respond to all labor relations matters, including a union organizing campaign. Hospitals are focused on their patient care mission not labor law, and many need training and guidance on how to effectively communicate their views about unionization. The practical effect of the NPRM’s overreaching is that some, perhaps many, consultants and lawyers will likely cease to provide any labor relations policies, training or guidance to their clients. As a result, in an effort to honor the law, hospitals and other employers may skew toward neutrality, thereby frustrating federal labor policy and denying their employees a range of views about unionization.

V. THE DEPARTMENT’S PROPOSED REINTERPRETATION OF THE “ADVICE” EXEMPTION IS AN UNCONSTITUTIONALLY VAGUE CONTENT-BASED REGULATION

The First Amendment, “includes the right to attempt to persuade others to change their views” (*Hill v. Colorado*, 530 U.S. 703, 716 (2000)), and protects the right, “to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them” (*Thomas v. Collins*, 323 U.S. 516, 532 (1945)). The Department’s proposed reinterpretation of the “advice” exemption unconstitutionally tramples on these First Amendment freedoms.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined” (*Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Because it is, “assume[d] that man is free to steer between lawful and unlawful conduct,” the Constitution demands that, “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” (*Id.*). “Vague laws may trap the innocent by not providing fair warning” (*Id.*). Where First Amendment freedoms are implicated, vague regulations, “inevitably lead citizens to steer far wider of the unlawful zone than if the

boundaries of the forbidden areas were clearly marked” (*Id.* at 109). Problems of vagueness are, “particularly treacherous where, as here, the violation . . . carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights” (*Buckley v. Valeo*, 424 U.S. 1, 76-77 (1976); *see* 29 U.S.C. § 439 (providing for criminal penalties for willful violations of Section 203)). Accordingly, in such circumstances, “an even greater degree of specificity is required” (*Buckley*, 424 U.S. at 77).

The Department’s proposed definition of “persuader activity” (76 Fed. Reg. at 36,192) – communications that, “in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively” – is unconstitutionally vague. That conclusion necessarily follows from the Supreme Court’s decision in *Buckley*, in which the Court, in order to save the statute from being void for vagueness, narrowly construed an analogous disclosure law applicable to expenditures spent “for the purpose of influencing” an election (*see id.* at 76-82.). The critical phrase, “have the object directly or indirectly to persuade” in the NPRM is at least as vague as the critical phrase “for the purpose of influencing” in *Buckley*.

The Supreme Court’s decision in *Thomas v. Collins* (323 U.S. 516 (1945)) is instructive. At issue was a Texas law that required labor organizers to apply for an organizer’s card, “before soliciting any members for his organization” (*Id.* at 519 n.1). In striking down the Texas law as unconstitutional, the Court reasoned:

[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism’s most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely (*Id.* at 535).

As in *Thomas*, no sharp line can securely be drawn between those communications that have an object (direct or indirect) to persuade employees and those that do not. Because the distinction between such communications puts the speaker, “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning,” no speaker, “safely could assume that anything he might say upon the general subject would not be understood by some as” persuasion (*Id.*). Accordingly, the

distinction the Department draws here between persuasion and non-persuasion, “blankets with uncertainty whatever may be said” and, “compels the speaker to hedge and trim” in violation of the Constitution (*Id.*). The vagueness problem is “particularly treacherous” here because the LMRDA, “carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights” (*Buckley*, 424 U.S. at 76-77; *see* 29 U.S.C. § 439, providing for criminal penalties for willful violations of Section 203). Given the potential for criminal prosecution, the Constitution requires the Department to draw a sharper distinction than the one proposed (*Buckley*, 424 U.S. at 77).

The Department’s proposed reinterpretation of the “advice” exemption also is contrary to black-letter law that the government, consistent with the First Amendment, may not draw a distinction between what is permissible and what is impermissible based on the message, content or subject matter of protected speech (*see Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991)). Because, “the government’s ability to place content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace[.] . . . [t]he First Amendment presumptively places this sort of discrimination beyond the power of the government” (*Id.* at 116.).

For example, in *Police Department of the City of Chicago v. Mosley* (408 U.S. 92 (1972)), the Supreme Court struck down an ordinance prohibiting only non-labor picketing within 150 feet of a school. The Court found that, “[t]he central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter” and, “[t]he operative distinction is the message on a picket sign” (*Id.* at 95). The Court explained that, “[a]ny restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” (*Id.* at 96). Accordingly, “above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” (*Id.* at 95. *See also Carey v. Brown*, 447 U.S. 455, (1980) (unconstitutional for government to use “the content of the speech” to determine “whether it is within or without” government regulation); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”)).

The proposed new instructions to Form LM-20 provide that “advice,” “means an oral or written recommendation regarding a decision or course of conduct” *unless* the recommendation “in whole or in part” has, “the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively,” in which case the recommendation somehow ceases to be a “recommendation” and morphs into “persuader activity” (76 Fed. Reg. at 36,182). By carving-out recommendations with an object of persuading employees from the definition of “advice,” the NPRM unconstitutionally draws a distinction based on the recommendation’s message, content and/or subject matter, and singles out recommendations with an object of persuading employees for unfavorable treatment. Such content-based discrimination against one subject of protected speech is prohibited by the Constitution.

**VI. THE DEPARTMENT HAS NOT SHOWN THAT THERE IS
UNDERREPORTING OR THAT IT IS NECESSARY TO
NARROW THE “ADVICE” EXEMPTION**

The Department contends that there is underreporting because it received an average of 192.4 LM-20's annually when it expected 2,601, only 7.4% of those expected (*Id.* at 36,186). It therefore concludes that, “only a small fraction of the organizing campaigns in which consultants were utilized resulted in the filing of a Form LM-20” (*Id.*). However, the “significant underreporting problem” is a direct result of the Department’s new view that it is a reportable event for consultants to engage in, “indirect persuader activity by directing their activities to the employer’s supervisors” (*Id.* at 36,187). As already explained in these comments, that is not the type of activity that Congress intended to be regulated.

If there is underreporting of the type of activity that Congress wanted reported, the appropriate agency response should be increased enforcement of the existing law and regulations. The Department has not identified any initiatives it has undertaken to improve reporting under current law, including increased enforcement actions against employers and consultants, to address its perceived “significant underreporting problem.” The AHA and ASHHRA submit that it is better policy to attempt to cure a problem under current law before seeking a change in a decades-old, content-neutral standard that gives clear guidance to consultants and employers. If such attempts failed to correct the problem, then the Department could insist that a change in law is necessary. Without attempting to utilize the tools it already has, the Department’s issuance of this NPRM is premature. It is not necessary to narrow the advice exemption in order to fix the alleged underreporting problem.

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For all of the foregoing reasons, the AHA and ASHHRA request that the Department decline to adopt the NPRM.