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PLEASE RESPOND TO ST. LOUIS OFFICE

September 21, 2011

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

Dear Mr. Davis:

I am General Counsel for the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers ("International Association").

This comment is submitted on behalf of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (the "Iron Workers"). The Iron Workers is a proud trade union that has been working for employment opportunities, fair pay, health and welfare benefits, and other workplace rights since our beginning in 1896. Our membership has contributed to many of America's most historic construction projects, including the Golden Gate Bridge, Sears Tower, St. Louis Arch, the original construction of the World Trade Center and the clean-up and re-development of Ground Zero following the terrorist attacks of September 11, 2001. The Iron Workers support the Department of Labor's proposed changes to the Form LM-10 Employer Report and the Form LM-20 Agreements and Activities Report, as set forth in the June 21, 2011 Notice of Proposed Rule Making. The narrowing of the "advice" exemption under section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA") will help to ensure that workers are provided with the information they need to make a well-informed decision when exercising their rights to form a union and bargain collectively.

The Iron Workers would like to take this opportunity to respond to the argument that the proposed rule should not be finalized because its application to attorneys performing persuader work would violate the attorney-client privilege rules governing lawyers in various states. As

articulated by the American Bar Association (see attached *ABA Action Alert*) and other organizations and various management-side law firms, this argument is grounded in a faulty premise that has already been discredited as a legal argument. The faulty premise is that in relation to issues arising under Federal law, such as LMRDA reporting obligations, the scope of attorney-client privilege must be assessed under the various state rules of attorney-client privilege rather than the Federal common law of attorney-client privilege.

Federal Rule of Evidence 501 mandates that evidentiary privileges, including attorney-client privilege, "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States."The Federal courts have long recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law," *Upjohn v. United States,* 449 U.S. 383, 389 (1981), and have developed a Federal common law defining this privilege by engaging "in the sort of case-by-case analysis that is central to common-law adjudication." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 230 (3rd Cir. 2007). Federal courts "have no difficulty" in concluding that this "federal common law of attorney-client privilege governs" the scope and application of the privilege in relation to matters that "arise under federal law." *Willy v. Administrative Review Board, United States Department of Labor*, 423 F.3d 483, 495 (5th Cir. 2005). It is well-established that when claims arise under Federal law and are before a court on Federal question jurisdiction, which is how issues of persuader reporting under the LMRDA would arise, the Federal common law of attorney-client privilege controls. *Id.; see also, In Re: Equal Employment Opportunity Commission*, 207 Fed. Appx. 426, 431 (5th Cir. 2006)(reasoning that "[w]ith respect to the attorney-client privilege, we note that because this case concerns the adjudication of federal rights, the federal common law of attorney-client privilege applies"); *U.S. v. Rakes*, 136 F.3d 1, 3 (1st Cir. 1998)(reasoning that in federal criminal cases, privileges take their content from the federal common law); *In Re: Bieter Company*, 16 F.3d 929, 935 (8th Cir. 1994)(reasoning that "[t]he federal common law of attorney-client privilege applies in this civil RICO action."). This reasoning is also wholly consistent with well-established notions of comity and judicial economy. *See, e.g.,* 28 U.S.C. § 1367.

Thus, it is not surprising that in the specific context of the attorney-client communication exception found in Section 204 of the LMRDA, which exempts attorneys from disclosing in any LMRDA persuader report information protected by the attorney-client privilege, the exception is defined by reference to the Federal common law of attorney-client privilege. The exception is not defined by the attorney-client privilege doctrines applicable in the several states. Such an interpretation would make this exception to a Federal disclosure regime an unpredictable provision varying markedly in the scope of what it protects from disclosure based on the jurisdiction an attorney happens to be in and its attorney-client privilege doctrine. This would be an absurd result. It could permit self-policing state bar associations to exculpate themselves from a Federal disclosure mandate for which Congress found a compelling purpose. Such reasoning could be used to undermine Federal disclosure laws other than the LMRDA.

The Sixth Circuit applied this well-settled and well-reasoned jurisprudence in *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985). The court properly rejected the argument that the LMRDA's attorney-client communication exemption should be interpreted based on the state of Tennessee's doctrine of attorney-client privilege. Instead, the

Court noted "that the federal common-law of attorney-client privilege governs the instant dispute" of adjudication of Federal reporting obligations under the LMRDA. *Id.* at n.12. In reciting the Federal common law of attorney-client privilege, the Sixth Circuit explained that it only precludes disclosure of communications. It made clear that the facts of legal consultation, clients' identities, attorney's fees and the scope and nature of the retention required to be disclosed on LMRDA persuader reports are not protected from disclosure under the Federal common law of attorney-client privilege. *Id.* at 1219. Simply put, "none of the information that LMRDA section 203(b) requires to be reported runs counter to the [Federal] common-law attorney-client privilege." *Id.* The Court reasoned that "[a]ny other interpretation of the privilege created by section 204 would render section 203(b) nugatory as to persuader lawyers." *Id.*

It is also interesting that these concerns about the sanctity of the attorney-client privilege in the context of LMRDA reporting are only arising now that the reporting regime is being amended to require more information from employers and their attorneys and consultants. In 2005, DOL expanded the Form LM-10 to apply to a labor organization's designated legal counsels who are placed on a list of firms available to handle compensation claims for members at a below-market rate. The Department insisted that such attorneys were subject to LM-10 Employer Reports under the LMRDA even if they had no commercial dealings with the labor organization, its representatives, or its related trust funds. *Warshauer v. Chao,* 2008 WL 2622799, *4 (May 7, 2008 N.D.Ga.). This extended to requiring disclosure of the identity and fees paid to union officials that designated legal counsel sometimes retained as consultants or experts to assist with the development of a worker's compensation claim or litigation strategy, even if the information is not otherwise subject to discovery. *Id.* at *5. While as a matter of law there is no merit to the argument that the attorney-client privilege shields from disclosure information required by the LMRDA, DOL may decide as a matter of policy that it should not require the disclosure of certain facts that might inhibit the attorney-client relationship. If it does make such a policy judgment, DOL must apply similar prophylactic policies to attorneys representing labor organizations or their members who are currently required to disclose a great deal of sensitive information under the Form LM-10.

Thank you for your consideration of our comments.

Respectfully,

Ronald C. Gladney
General Counsel