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LEGAL DEPARTMENT

Nicholas W. Clark
General Counsel

Via Electronic Filing

September 20, 2011

Andrew R. Davis, Chief
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

Dear Mr. Davis:

In response to the U.S. Department of Labor's (DOL) notice of proposed rulemaking (NPR) and request for comments published on June 21, 2011, the United Food and Commercial Workers International Union (UFCW), a labor organization with approximately 1.3 million members and 480 affiliates throughout North America, hereby submits its comments in support of the DOL's Proposed Interpretation of the Labor-Management Reporting and Disclosure Act (LMRDA) "Advice" Exemption.

The LMRDA states that:

> 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 collectively through representatives of their own choosing . . . shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing . . . a detailed statement of the terms and conditions of such agreement or arrangement.

29 U.S.C. § 433(b). However, the LMRDA also 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. . ." 29 U.S.C. § 433(b).

The DOL historically has used an overbroad interpretation of what constitutes "advice," which has resulted in significant underreporting of persuader activity. For example, the DOL presently views as advice virtually all agreements, arrangements, or activities that do not involve direct contact between

the consultant and the employees. Accordingly, if a consultant drafts or reviews communications such as a letter or speech that the employer presents to the workers during an organizing campaign or in anticipation of an National Labor Relations Board (NLRB) election, the DOL deems this to be "advice" and does not require it to be reported. In addition, the DOL presently labels as "advice" hybrid situations where a consultant both provides an employer with advice and engages in efforts to persuade employees. The DOL's present interpretation is that, if an employer may accept or reject material, then the fact that a consultant drafted the material does not generally trigger a duty to file a report.

The Proposed Interpretation would appropriately limit the breadth of what constitutes "advice":

> With respect to persuader agreements or arrangements, "advice" means an oral or written recommendation regarding a decision or a course of conduct. In contrast to advice, "persuader activity" refers to a consultant's providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively. Reporting is thus required in any case in which the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, regardless of whether or not advice is also given.

Under this interpretation, exempt advice would include only activities where a consultant counsels employers on what they may lawfully say to workers, ensures employer compliance with the law, or provides guidance on NLRB practice or precedent.

Moreover, a consulting agreement would be reportable any time a consultant is engaged to provide, or provides, services that go beyond advice. This would include persuader activities even if the consultant has no direct contact with the workers. Consulting agreements would also be reportable in hybrid situations where the consultant both gives advice and engages in activity intended to persuade workers.

The UFCW supports the DOL's effort to utilize this common-sense interpretation of "advice." If the goal of a speech or a handbill drafted by a consultant is to encourage workers to vote against union representation, then this should be viewed as reportable persuader activity, regardless of whether it is the consultant or the employer who makes the actual contact with the workers. Similarly, when a consultant teaches management how to engage in persuader activity, set up an anti-union worker committee, or plan worker meetings, the consultant has gone beyond simply advising the employer regarding legal compliance. In such situations, the consultant has assisted the employer in persuading workers not to support the union. In short, if a consultant prepares or revises remarks, or assists an employer in developing an anti-union strategy, then this is clearly the kind of reportable persuader activity that the LMRDA requires employers and consultants to report.

Contrary to the claims of employers, disclosure of consultant persuader activity will not infringe on the attorney-client privilege. Under the DOL's Proposed Interpretation, employers and consultants would not have to disclose any information that is appropriately considered an attorney-client communication.

Consultants frequently engage in activity on behalf of employers that results in the creation of handbills, posters, videos, and other materials that constitute persuader activity. For example, in March of this year, consultants hired by Buckhead Beef, located in Edison, New Jersey, created a handbill for the company to distribute that "guaranteed" workers their Section 8(a)(1) rights to be free from "mistreatment," "reprisals," or "termination" if the UFCW lost the election. The flyer concluded by exhorting workers to "vote for a sure thing!" (Copy attached.) Similarly, in a 2009 UFCW campaign at the 2 Sisters Food Group located in Riverside, California, consultants created posters urging workers to vote against the UFCW allegedly because the union's organizing activity at 2 Sisters and a related company was intended to "harm" both employers. On the day before the election, 2 Sisters hung these posters in strategic places, such as the employee changing room, the time clock area, and hallways that workers passed through on the way to the polling area. Moreover, it is not uncommon for employers to force their workers to watch consultant-prepared videos that severely distort the UFCW's activities and history. Consultants that generate these types of materials are clearly engaging in persuader activity and should not be exempt from filing LM-20s with the DOL covering these services because the DOL employs an overbroad interpretation of the advice exemption.

The Proposed Interpretation of "advice" is a sound step in the right direction. And while it is commendable that the DOL makes the LM-20 reports available on-line, the UFCW urges the DOL to post these reports as quickly as possible. Although consultants are required to file LM-20 reports within thirty days of entering into an agreement with an employer, in many instances, the DOL does not make the reports available on-line for six months or more. Therefore, workers often cannot obtain information regarding the employer's consultants until well after the organizing campaign has concluded. In order to give workers access to as much information as possible so they can make an informed decision, it is crucial that the DOL post LM-20 reports on-line as soon as possible after the DOL receives them.

For the foregoing reasons, the UFCW supports the DOL's Proposed Interpretation of the LMRDA "advice" exemption.

Respectfully submitted,

Nicholas W. Clark
General Counsel

Deborah J. Gaydos
Assistant General Counsel

Enclosures

BUCKHEAD BEEF GUARANTEES

A lot of you have asked repeatedly what can the company Guarantee it's employees:

- We **GUARANTEE** that no one will lose their job because the Union loses the election.
- We **GUARANTEE** that the Supervisors will not mistreat you because the Union loses the election.
- We **GUARANTEE** that there will be no reprisals because the Union loses the election.

VOTE FOR A SURE THING!
VOTE NO! MARCH 18, 2011

Date 3-16-2011

Andy Malcolm, Vice President Sysco Corp.
Chairman Specialty Meat Companies

Jon Zdatny, President & CEO

Gary Szura, Sr. VP Operations & GM

Joe Dickinson, VP Production

Victor Prieto, Production Manager

Nella Catarino, Sr. VP Administration

Signed in front of Notary Public

3/16/2011
Date & Seal

WARREN N. TAMAROFF
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires August 6, 2011

GARANTIAS DE **BUCKHEAD BEEF**

Muchos de ustedes han preguntado en varias ocaciones que puede garantizar la compania a los empleados:

- Nosotros **GARANTIZAMOS** que nadie perdera su empleo porque la union pierde las elecciones.
- Nosotros **GARANTIZAMOS** que los Supervisores no los maltrataran porque la union pierde las elecciones.
- Nosotros **GARANTIZAMOS** que no Habra ninguna represaria porque la union pierde las elecciones.

VOTE POR ALGO SEGURO!
VOTE NO! 18 de MARZO 2011

Fecha 3-16-2011

Andy Malcolm, Vice President Sysco Corp.
Chairman Specialty Meat Companies

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