WORKFORCE FAIRNESS
INSTITUTE
STOP BIG LABOR BAILOUT!

September 19, 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: Comment of Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption

Dear Mr. Davis,

The Workforce Fairness Institute is an organization committed to educating workers, their employers and citizens in general on important issues affecting the workplace. One such issue is the Notice of Proposed Rulemaking (NPRM) issued by the Labor-Management Standards Office of the Department of Labor (Department or DoL) on June 21, 2011. The proposed rule expands the number of persons subject to the reporting requirements of the "persuader rule" in the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 433). It achieves this result by rejecting a long-standing interpretation of the "advice exemption" to the rule.

We respectfully submit this comment in strong opposition to the proposed rule which will have a substantial impact on the substance and extent of an employer's communications with its employees on the important issue of union representation.

Preliminary Statement

No predicate has been established by the DoL for the sweeping change it is proposing in its interpretation of the "advice exemption" to the persuader rule. The arguments the Department advances in its NPRM do not justify such a bold intrusion into an area protected by the First Amendment, private property rights and the National Labor Relations Act.

If implemented, the rule will burden the First Amendment right of employers to non-coercively express their views on the question of union representation – a right expressly protected by the NLRA. To the extent it unnecessarily burdens an employer's right to express it views on unionization, the proposed rule interferes with the right of employees under Section 7 of the NLRA to hear their employer's views and make a free and informed choice for or against unionization.

The Persuader Rule & Its Advice Exemption

Union's are in the business of organizing employers. They are familiar with the applicable law and have developed an expertise in how to persuade employees to vote for the union. As a result, unions have little need for the assistance of outside labor consultants. Employers, on the other hand, are in the business of running a financially-successful enterprise. Few employers are familiar with the complex, sometimes arcane, provisions of labor law that govern union representation elections nor are they necessarily familiar with the arguments for and against unionization. Consequently, it is not unreasonable for an employer to retain labor consultants, including attorneys, for assistance when confronted with a union organizing campaign.

The LMRDA requires public disclosure of arrangements and agreements between an employer and its labor consultants pursuant to which the consultant engages in activities to persuade employees whether and how to exercise their right to organize and bargain collectively through representatives of their own choosing (29 U.S.C. 433 (a)). The Senate Committee on Labor and Public Welfare explained that reports "from middlemen masquerading as legitimate labor consultants" was necessary and since unions must file reports of their expenditures, "reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representative by employees" (S. Rep. 187 at 39040, LMRDA Leg. Hist. at 435-436).

The LMRDA, however, drew an exemption for persons giving "advice" to the employer (29 U.S.C. 433 (c)). Consistent with the LMRDA's legislative history, this "advice exemption" has been interpreted since 1962 (subject to a brief period in 2001) to include advice that can be accepted or rejected by the employer and that is contained in a prepared speech or other written material provided the employer, not the consultant, is the persuader. The consultant in such a circumstance is not a "middleman" as that term was used in the legislative history. The consultant does not persuade employees; it meets with the employer to advise the employer how to persuade the employer's employees on the issue of unionization.

Redefining "Advice"

The proposed rule rejects this long-standing interpretation of "advice." It adopts a dictionary definition of the word and proposes that "advice" mean an "oral or written recommendation regarding a decision or course of conduct" (NPRM, FR, June 21, 2011). Any persuader activity falling outside this definition would be subject to the disclosure requirements of the persuader rule.

The Department interprets "advice" narrowly so that the following activities, and others, would fall outside the statutory exemption: producing or revising written materials for speeches by the employer to its employees, the preparing employee surveys and training materials, coordinating the activities and the training of supervisors and managers, drafting or revising audio-visual materials or web-sites and developing personnel policies or practices. The distinction heretofore drawn between the persuader activities of third-party middlemen who meet with employees and persuader activities of the employer based on advice received from labor consultants is rejected.

The Proposed Rule Is Inconsistent With The Intent Of The Statute

The dictionary definitions of the word "advice" are as broad as the word suggests and unquestionably include activities the Department proposes to exclude. The proposed rule adopts one such definition,

but it then narrows it by excluding some of the vehicles used to communicate advice. For example, a written recommendation on a "course of conduct" could reasonably include a draft speech for the employer to deliver to its employees. Advice in the form of an oral "course of conduct" could be a training seminar for supervisors on how to persuade employees on the issue of unionization. The result of this emasculation is to drastically broaden the disclosure requirements under the persuader rule reaching into the private communications of an employer in a manner never intended by Congress.

Obviously recognizing the burden the proposed rule places on employer free speech, the Department analogizes its disclosure requirements to those of the Federal Election Campaign Act (FECA). FECA, however, grew out of concerns over voter inequality and the undue influence special interests could have on the political process through their political contributions. Requiring the disclosure of political donors' identity and the amount of their donations gives voters information on the interests supporting the candidate which can shed light on the candidate's views. The receipt of advice by an employer from labor consultants and attorneys to ensure that the employer engages in lawful speech during a union organizing campaign is hardly analogous.

The Department seeks to justify its increased disclosure requirements on the grounds that "there is strong evidence today that the undisclosed activities of labor relations consultants are interfering with worker's protected rights" and studies "show that accompanying the proliferation of employers' use of labor relations consultants is the substantial utilization of anti-union tactics that are unlawful under the NLRA" (NPRM, FR, June 21, 2011). The studies the Department relies upon for these conclusions are both lacking in credibility and analytically unsound.

For example, the research findings of Kate Bronfenbrenner published in *No Holes Barred* (Economic Policy Institute Briefing Paper No. 235, 5/20/09) was conducted for the Economic Policy Institute and American Rights at Work. While misleadingly described as "non-partisan" in her briefing paper, each of these organizations is overwhelmingly dominated by labor unions that have an interest in the research being funded supporting their goals. Apart from the partisan nature of the organizations that paid for Bronfenbrenner's research, it is inherently flawed. She relies on data and sources that support her pre-conceived conclusions and repeatedly dismisses or ignores studies that undermine them. Her primary source is "in depth surveys with lead [union] organizers." Lead union organizers can hardly be considered unbiased sources. Nevertheless she fails to consider even the possibility of the organizer's bias, but dismisses out of hand conducting similar surveys of employers. Employers, unlike union organizers, she contends would likely falsify any information they provided because "the overwhelming majority of employers are engaged in at least one or more illegal behaviors" (*No Holes Barred*, p. 5-6).

New Onerous Reporting Requirements

In addition to substantially narrowing the advice exemption, the proposal includes new and onerous reporting requirements. Apart from the more detailed reports it requires on the terms and conditions of any agreement or arrangement with a labor consultant for persuader activities, attorneys who have engaged in any persuader activity will be required to identify all the clients for whom they have provided labor relations counsel, whether or not it was for persuader activity, and the amount paid by each client.

Employers will also have vastly expanded reporting requirements. The rule requires employers to report internal costs, including wages paid, for any internal matter that has the potential to persuade

employees regarding union representation. This will include anything from planning and hosting an employee meeting to preparing an employee handbook. The standard proposed is so broad and vague; it could include most of what an employer does with its employees during a union organizing campaign. For example, if the employer considers at the same time each year whether to grant a bonus and the union organizing campaign occurs during this time of the year, whether or not the employer grants the annual bonus could be considered as "having the potential to persuade employees regarding union representation."

Eviscerating Discussion & Debate On Unionization

It is unsurprising that some have described these proposed regulatory changes as a "gag rule." Many small business owners may simply avoid communicating with their employees on the issue of unionization because of the time and the costs involved to comply with the Department's reporting requirements or risk criminal sanctions for failing to do so. This will eviscerate the open and robust debate that Congress intended to take place during a union organizing campaign. As a consequence, it will interfere with the ability of employees to exercise their Section 7 right to make a free, informed and un-coerced choice for or against unionization.

The rule will have a significant adverse impact on the availability of knowledgeable legal counsel for employers, particularly small employers. It is a violation of the attorney-client privilege for a lawyer to disclose the identity of his clients and the fees they paid. Because the proposed rule requires lawyers and law firms to publicly disclose that information, it is widely anticipated that the rule will cause many lawyers and law firms in this highly-specialized area of the law to stop providing this needed legal advice.

Some business owners may opt to communicate with their employees on the issue of unionization but without the advice of a consultant or attorney. The employer may proceed in this fashion either because it could not find a consultant or attorney willing to engage in what will have become a reportable persuader activity or to avoid some of the time and costs involved complying with the proposed rule. It is also reasonable to surmise that the proposed rule will increase legal or consultant costs making it even more remote businesses struggling in a down economy will be able to receive professional counsel. In the end, this will result in an increase in the number of inadvertent or unintentional violations of the law resulting in elections being set-aside and re-run wasting the government's and the parties' time and money.

Unfair Burden On Small Business

The businesses that will suffer the greatest adverse impact will be small business owners. Larger companies often have legal counsel on their payroll or on retainer to help them navigate the conflicting currents of ever-changing labor law. Small business owners, however, usually do not have similar access.

As our economy continues to be stagnate and business owners face mounting economic difficulties, it makes little sense to increase their regulatory burden. The DoL has not built a case that this new rule reversing a long-standing interpretation of the "advice exemption" is necessary. Absent that, the expense of time and scarce funds for business owners is unjustified.

Summary

In sum, the proposed rule adopts an interpretation of the word "advice" as is used in the LMRDA that is far narrower than the plain meaning of the word allows and inconsistent with the intent of Congress. The rule will limit the ability of employers to obtain needed legal advice to safely exercise their right to express their views on unionization to their employees. It will, as a result, limit the ability of employees to make a free, informed and un-coerced choice for or against the union. In addition, the rule will impose an increased regulatory burden on business when employers can least afford it.

The DoL's failure to establish a necessary predicate for such a sweeping change in the law leads inescapably to the conclusion that it is an effort to enhance union power by burdening the free speech rights of employers by requiring public disclosure of privileged relationships and communications.

Sincerely,

Fred Wszolek
Workforce Fairness Institute

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