COMMENTS ON THE PROPOSED INTERPRETATION OF THE LMRDA ADVICE EXEMPTION

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Submitted by

THE COUNCIL ON LABOR LAW EQUALITY

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SUMMARY OF COMMENTS

When Congress passed the Labor-Management Reporting and Disclosure Act ("LMRDA") in 1959, it was concerned with bribery, corruption, and improper influence by outside consultants hired by employers to persuade employees in their rights to organize and bargain collectively. The Senate report on the LMRDA explains that the consultant reporting obligations were designed to target "middleman flitting about the country" in order to "work directly with employees or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts."

There is no evidence anywhere in the legislative history that Congress intended to impose these same intrusive reporting obligations on attorneys hired by employers to advise on a broad range of labor and employment law issues. To the contrary, Congress created an express statutory exemption for "advice" from outside counsel, whereby no reporting would be required even if the advice related to the employer's efforts to persuade employees. For some five decades after the LMRDA became law, the Department of Labor ("DOL"), through its Office of Labor-Management Standards ("OLMS"), has properly limited the reach of federal reporting to the "middlemen" targeted by Congress while allowing employers to obtain legal advice from outside counsel without triggering a reporting obligation. Under this longstanding interpretation of the advice exemption, reporting only has been required when the outside attorney engages directly with employees or in connection with some limited forms of information-gathering activity.

DOL's proposed new interpretation of the advice exemption is contrary to the plain language of the LMRDA, the legislative history, and DOL's longstanding interpretation of the statutory language. The proposed rule would require the reporting of activities that bear no relation to the evils that Congress intended to prevent with the passage of the LMRDA. Reporting would be required not only when an employer engages an attorney or consultant to act as a "middleman" and deal directly with employees, but also when an employer retains outside counsel to advise on how the employer may effectively persuade employees during a union organizing campaign or collective bargaining negotiations. Derivatively, the financial reporting obligation would extend to outside counsel's advice and services on a broad range of labor and employment laws, many of which did not even exist when the LMRDA was enacted – laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), the Occupational Safety and Health Act ("OSHA"), the Employee Retirement Income Security Act ("ERISA"), the Americans with Disabilities Act ("ADA"), and the Family and Medical Leave Act ("FMLA").

The proposed rule is not only contrary to the language, intent, and longstanding interpretation of the LMRDA, it is also in conflict with common law definitions of the scope of legal advice protected by the attorney-client privilege as well as the ethical obligations of attorneys who are hired by an employer to provide advice on a confidential basis.

Ultimately, the proposed rule, if adopted, would be contrary to the national labor policy favoring the peaceful resolution of labor disputes through collective bargaining. By subjecting routine advice on collective bargaining matters, as well as union organizing matters, to the LMRDA's intrusive reporting obligations, the proposed rule would discourage employers from seeking advice on these matters, and would provide a strong disincentive for law firms and consultants to provide such advice – advice that, in many cases, would help employers comply with their obligations under the National Labor Relations Act ("NLRA") and successfully resolve their collective bargaining negotiations without a disruption of commerce.

For all of these reasons, the Council on Labor Law Equality ("COLLE") urges OLMS to withdraw the new proposed interpretation of the advice exemption set forth in the June 21, 2011 Notice of Proposed Rulemaking ("NPRM").

THE COUNCIL ON LABOR LAW EQUALITY

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the NLRA and related statutes, including the LMRDA. COLLE's purpose is to follow the activities of the National Labor Relations Board, the Department of Labor, and the courts as they relate to federal labor law for private-sector employers. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry.

EXPLANATION OF COLLE'S COMMENTS

I. The Proposed Rule Conflicts with the Plain Language of the LMRDA, the Legislative History, and DOL's Longstanding Interpretation of the Advice Exemption.

The LMRDA requires employers, as well as their outside attorneys and labor relations consultants, to report to the DOL any agreement or arrangement to engage in activity that has a direct or indirect object of: (1) persuading employees with respect to the exercise of their rights to organize and bargain collectively; or (2) supplying an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer. 29 U.S.C. § 433(b). Employers that enter into a reportable arrangement with an outside attorney or consultant are required to file an LM-10 report within 90 days of the close of the employer's fiscal year. 29 U.S.C. § 433(a)(4)-(5). The LM-10 report must be signed by the employer's chief executive and financial officers under penalty of perjury, and the report is made publicly available on DOL's website. Employers are subject to monetary and criminal penalties

for failing to report or false reporting. *Id.* at § 439. The attorney or consultant must file an LM-20 report (within 30 days) and an LM-21 report (annually) based on the agreement or arrangement to engage in persuader activity. 29 U.S.C. § 433(b).

The advice exemption, codified in Section 203(c) of the LMRDA, provides that employers and their outside attorneys and consultants are *not* required to file any report covering services which are provided "by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms and conditions of employment or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 433(c). In addition, Section 204 of the LMRDA protects from disclosure "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.

DOL's longstanding interpretation of the advice exemption, in effect since the early 1960s, rightfully protects a wide range of consulting or advisory services provided to employers by labor relations consultants, law firms, and similar organizations. *See* DOL LMRDA Interpretative Manual § 265.005 ("Manual"). Courts have upheld DOL's longstanding interpretation even though it limits reportable "persuader" activity to *direct* communications between outside consultants and lawyers and non-management employees. *United Auto., Aerospace., & Agric. Implement Workers of Am. v. Dole*, 869 F.2d 616 (D.C. Cir. 1989). *See also Martin v. Power, Inc.*, 141 LRRM 2663 (W.D. Pa. 1992) (finding attorney consultant's preparation of letters and related materials for the employer were covered by "advice" exemption because consultant had no direct contact with employees to persuade them).

This interpretation of the advice exemption is fully consistent with the legislative history of the LMRDA. The Senate report explains that the LMRDA was designed to target "middlemen flitting about the country" in order to "*work directly on employees* or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts." S. Rep. No. 86-187, at 10 (1959) (emphasis added). Congress targeted these "middlemen" not because they were providing advice to employers on these matters, but because they were involved in "bribery and corruption as well as unfair labor practices." *Id*. "The committee in drafting section [203(b)] was particularly desirous of requiring reports from middlemen *masquerading as legitimate labor relations consultants*." *Id.* at 39 (emphasis added).

The 1959 Senate report goes on to state that "[t]he committee *did not intend* to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations . . . ." S. Rep. No. 86-187, at 40 (emphasis added). Similarly, the Conference Report states that the advice exemption was intended to be a "*broad exemption* from the requirements of the section . . . ." H.R. Rep. No. 86-1147, at 33 (1959) (Conf. Rep.) (emphasis added).

An earlier Senate report explains the important distinction between reportable persuader activity by "middlemen" and the advice and related services supplied by "legitimate" outside counsel and consultants:

> Since attorneys at law and other responsible labor-relations advisers *do not themselves engage in influencing or affecting employees* in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice [would not] be required to report.

S. Rep. No. 85-1684, at 8-9 (1958) (emphasis added).

This same distinction was articulated by Professor Archibald Cox when he testified before the Senate Subcommittee prior to the LMRDA's passage:

> *Payments for advice are proper. If the employer acts on the advice it may influence the employees.* But when an employer hires an independent firm to exert the influence, the likelihood of coercion, bribery, espionage, and other forms of interference is so great that the furnishing of a factual report showing the character of the expenditure may fairly be required.

Wirtz v. Fowler, 372 F.2d 315, 327 n.25 (5th Cir. 1966) (citing legislative history) (emphasis added).

In *Wirtz v. Fowler*, issued seven years after the LMRDA's passage, the Fifth Circuit reviewed the legislative history in detail and found that "[g]enerally it was felt that the giving of legal advice to employers was something *inherently different* from the exertion of persuasion on employees…." *Id.* at 330 (emphasis added). Similarly, the Sixth Circuit found that "Congress recognized that the ordinary practice of labor law does not encompass persuasive activities." *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1216 n.9 (6th Cir. 1985). *See also Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965) ("Primarily, as the legislative history records, the [disclosure] requirement is directed to labor consultants. Their work is not necessarily a lawyer's. Indeed, for a legal adviser it would be extracurricular. True, a client may desire such extra-professional services, but, if so, the attorney must balance the benefits with the obligations incident to the undertaking.").

In the face of the plain language and clear legislative history concerning the broad scope of the advice exemption, DOL's new proposed interpretation would dramatically narrow the exemption and trigger federal reporting for a broad range of labor relations advice provided by outside attorneys and consultants. 76 Fed. Reg. 36,178. Under this interpretation, DOL would consider a wide variety of lawyer or consultant activity to be reportable even if the lawyer or consultant does not communicate directly with employees. DOL's position is that the duty to report "can be triggered even without direct contact between a lawyer … and employees, if persuading employees is an object, direct or indirect, of the [lawyer's] activity pursuant to an

agreement or an arrangement with an employer." 76 Fed. Reg. at 36,191. The NPRM provides the following examples of activities that would be reportable:

- Drafting persuasive material, including videotapes or electronic and digital media, for consideration and use by an employer in communicating with employees. 76 Fed. Reg. at 36,191.
- Revision of the employer's own material or communications "to enhance the persuasive message" unless the revisions "exclusively involve advice and counsel regarding the exercise of the employer's legal rights." *Id.*
- Training supervisors and other management representatives to conduct individual or group employee meetings. *Id.*
- Conducting seminars or webinars which have "a direct or indirect object to persuade employees concerning their representation or collective bargaining rights." *Id.*
- Developing employer policies designed to prevent union organizing. *Id.*
- Determining the timing and sequence of persuader tactics and strategies for the employer. *Id.*
- Coordinating or directing the activities of supervisors or other managerial employees to engage in the persuasion of employees. *Id.* at 36,192.[1]

The proposed rule would require reporting of persuader activity even if it is "intertwined with" exempt advice. *Id.* at 36,191. The proposed rule cites the example of a lawyer who drafts a captive audience speech for an employer: "neither the lawyer's work to ensure its legal sufficiency or implications nor a characterization of the work product as legal advice would alter the reportability of the speech as persuader activity." *Id.* at 36,192.

It appears that the only activities that would fall within the new interpretation of the advice exemption would be the following:

[1] Notably, this interpretation is even narrower than the interpretation proposed by the outgoing Clinton administration in January 2001, which was rescinded by the Bush administration in April 2001. 66 Fed. Reg. 18,864 (Apr. 11, 2001). For example, the following activities would not have been reportable under the Clinton administration interpretation, but apparently would be reportable under the current proposed interpretation:

- Edits or revisions to persuasive materials and communications initially prepared by an employer in order to enhance their persuasive value. 66 Fed. Reg. at 2788.
- Training of the employer's managers or supervisors with respect to lawful communication boundaries or strategies during a campaign. *Id.*
- Advice to the employer regarding the timing and the general content of persuasive communications. *Id.*

- Advising employer representatives about what they may lawfully say to employees. 76 Fed. Reg. at 36,191.
- Ensuring compliance with the law. *Id.*
- Providing guidance to an employer on NLRB practice and precedent. *Id.*

This exceedingly narrow interpretation would effectively eviscerate the advice exemption and would severely inhibit the "important and useful function" that outside counsel provide in contemporary labor relations. S. Rep. No. 86-187, at 40 (1959). It will be virtually impossible for outside counsel to provide any form of useful advice within the narrow confines of this proposed interpretation. Rather than risk the civil and criminal penalties that could be imposed for failing to report the agreement or arrangement with outside counsel, employers may simply refrain from seeking advice from outside counsel on union organizing or collective bargaining matters. And some law firms may decline to provide such advice, for fear of triggering the onerous LM-21 financial reporting obligations for all clients for whom the firm provides "labor relations advice and services" – a term that DOL presently interprets to include virtually any federal or state law dealing with the employer-employee relationship. *See* 29 U.S.C. § 433(b); Manual § 269.520.[2] Discouraging employers from seeking legal advice, and lawyers from providing it, clearly is not an outcome that Congress intended.

II. The Proposed Interpretation Is Inconsistent with the Common Law Definition of "Advice" Protected by the Attorney-Client Privilege.

The proposed rule's narrow interpretation of the statutory term "advice" also conflicts with the normal, common law definition of legal advice for purposes of the attorney-client privilege. The common law definition of "advice" is relevant and significant because Congress is presumed to have understood and adopted the common law definition of terms used in legislation, absent any contrary legislative history. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal citations omitted); *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 763 (10th Cir. 2005) ("When Congress legislates against a backdrop of common law, without any indication of intention to depart from or change common law rules, the statutory terms must be read as embodying their common law meaning.") (internal citations omitted).

In the case of the LMRDA, it is clear that Congress understood and adopted the common law meaning of the term "advice" for purposes of the attorney-client relationship. Indeed, the

[2] While we understand that DOL is considering a proposed revision to the LM-21 form later this year, the existing obligations under the LM-21 are extremely intrusive and burdensome. Any attorney or consultant who files at least one LM-20 report also must annually file the LM-21 "Receipts and Disbursements" report, which contains additional financial information for the relevant fiscal year. 29 U.S.C. § 433(b). This additional information includes receipts and disbursements not only for the employer for whom the attorney or consultant engaged in persuader activities, but also for all other employers for whom the attorney or consultant supplied "labor relations advice or services." 29 U.S.C. § 433(b); Manual § 260.300.

proposed rule recognizes that "Congress intended to afford to attorneys the same protection as that provided in the common-law attorney-client privilege…." 76 Fed. Reg. at 36,192. Yet, other than citing a few terse dictionary definitions, *see* 76 Fed. Reg. at 36,183, the NPRM disregards the case law that defines the scope of an attorney's "advice" at common law. In particular, the proposed rule is in conflict with the common law insofar as DOL would not apply the advice exemption to legal advice that is "intertwined" with persuader activity. *Id.* at 36,191.

The common law definition of "advice", as established at the time the LMRDA was enacted, clearly encompasses legal advice that is intertwined with non-legal advice, such as the "economic or policy or public relations aspect" of the matter about which the client seeks the lawyer's advice. *See United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950), cited as a leading opinion in Attorney-Corporate Client Privilege, § 3:28, at 201 (John W. Gergacz, ed., 3d ed. 2011). Indeed, courts recognize that there is a public interest in the lawyer being more than just a "predictor of legal consequences":

> His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

United Shoe, 89 F. Supp. at 359.

This common law definition has endured throughout the LMRDA's existence. *See, e.g.*, *Note Funding Corp. v. Bobian Investment Co., N.V.*, No. 93-Civ.-7427 (DAS), 1995 WL 662402, at *2 (S.D.N.Y. Nov. 9, 1995) ("When providing this [legal] assistance, counsel are not limited to offering their client purely abstract advice as to the rules of law that may apply to their situation . . . counsel will often be required to assess specific tactics . . . and their evaluation of alternative approaches may well take into account not only the potential impact of applicable legal norms, but also the . . . benefits or risks of these alternative strategies.").

The NPRM mischaracterizes the scope of the common law definition of "legal advice" by stating that "the deliberate disclosure [] of material or communications to third parties (the employees)" waives the attorney-client privilege for the advice rendered. 76 Fed. Reg. 36,183. But the common law recognizes that preparing or commenting on drafts of such communications fall within the lawyer's role of providing advice to the client, even if the client ultimately presents the final version to a third party. *See, e.g.*, *Huston v. Imperial Credit Commercial Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, 1181 (C.D. Cal. 2001) ("All of the advice given to a client as to what provisions to include, or not include, in a document, and how those provision [sic] should be drafted are not stripped of any attorney-client privilege or confidentiality."); *S.E. Penn. Transp. Auth. v. CareMarkPCS Health, L.P.*, 254 F.R.D. 253, 265 (E.D. Pa. 2008) ("Preliminary drafts of [documents] are generally protected by attorney/client privilege, since they may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.") (internal quotations omitted); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000) ("Although the final executed [document] is not privileged because it is communicated with an outside party, all previous

drafts prepared by or commented upon by an attorney necessarily contain legal advice from the attorney as to the wording of the [documents] for the benefit of the client, and thus are privileged.").

DOL's longstanding interpretation of the advice exemption, which has been endorsed by the D.C. Circuit, is consistent with the common law definition of "advice" because it protects advice that overlaps with persuasive activity, such as providing persuasive materials, document drafts, and strategies for use by the employer. *See Dole*, 869 F.2d at 618. In the NPRM, DOL asserts that it has "administrative authority and discretion" to change this longstanding position and require the reporting of advice that is "intertwined" with persuader activities. *See* 78 Fed. Reg. 36,191. DOL, however, does not have authority or discretion to interpret the advice exemption in a way that conflicts with the common law that existed at the time the LMRDA was enacted. Plainly, DOL's new interpretation conflicts with the common law definition of advice – a definition that privileges from disclosure communications that include "relevant nonlegal considerations" along with the lawyer's advice. *United Shoe*, 89 F. Supp. at 359.

Furthermore, the proposed rule conflicts with ethical rules, such as ABA Model Rule of Professional Conduct 1.6, that obligate attorneys in some situations to maintain the confidentiality of a client's representation and fee arrangement with a firm. The proposed rule asserts that "[i]n general, the fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged." 76 Fed. Reg. 36,192. However, there are important exceptions to this general rule, and those exceptions present a direct ethical conflict with an LMRDA reporting obligation. *See United States v. Monnat*, 853 F. Supp. 1301 (D. Kan. 1994) (finding that IRS reporting obligation conflicted with attorney's ethical obligations); ABA Model Rule 1.6, Comment [13] ("Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."). The proposed rule fails to resolve this conflict.

III. The Proposed Rule Would Inhibit the Peaceful Resolution of Collective Bargaining Negotiations in Many Unionized Industries.

As justification for a dramatic narrowing of the advice exemption, the NPRM cites studies concerning the "proliferation" of labor relations consultants in union organizing campaigns and alleged abuses by these consultants in union organizing campaigns and first contract negotiations. *See* 76 Fed. Reg. 36,189-90.[3] However, the NPRM cites no studies or

[3] DOL's stated desire to expose persuader activity during union organizing campaigns – presumably to educate employees *before* they vote – would be effectively undermined by the National Labor Relation Board's proposed rule to expedite the union election process so that elections would be held within 10 to 21 days of the petition being filed with the Board. 76 Fed. Reg. 36,812 (June 22, 2011). Because many employers only engage outside counsel or consultants for reportable "persuader" activities *after* the representation petition is filed, and because the LM-20 report may be filed up to 30 days after the arrangement is made, most employees subject to future elections under the proposed NLRB regulations will never learn of the outside consultant arrangement prior to voting on union representation. Thus, the expanded LM-20 reporting obligation will be of no use to employees in these elections.

other evidence of "abuses" by outside counsel or consultants during collective bargaining negotiations in industries where unions are well-established, and provides no other rationale for expanding the LMRDA reporting obligation in these circumstances. Indeed, the NPRM admits that "there is no ready proxy for estimating the use of employer consultants in contexts other than in election cases, such as employer efforts to persuade employees during collective bargaining, a strike, or other labor dispute." *Id.* at 36,199.

COLLE's membership is composed of companies that have longstanding collective bargaining relationships with many unions, and therefore COLLE is especially concerned about the effect of the proposed rule on the use of outside counsel in its negotiations with these unions. It appears that the proposed rule would impose a reporting obligation if outside counsel is retained to provide advice regarding bargaining proposals or communications to employees that explain the company's proposals in a way that would directly or indirectly "persuade" employees about the merits of the proposals. *See* 76 Fed. Reg. at 36,182 (explaining that "[r]eportable agreements include those in which a consultant agrees to plan or orchestrate a campaign or program on behalf of an employer to avoid or counter a union organizing *or collective bargaining effort*") (emphasis added); 76 Fed. Reg. at 36,191 (stating that "material or communications, or revisions thereto, are persuasive if they explicitly or implicitly encourage employees … to take a certain position *with respect to collective bargaining proposals*") (emphasis added). The proposed rule also would impose a reporting obligation for seminars, webinars, or conferences hosted by outside counsel, if those conferences or events "involve actions, conduct, or communications that have a direct or indirect object to persuade employees concerning their representation or collective bargaining rights." *Id*.

The legislative history of the LMRDA provides no basis to conclude that Congress intended to impose burdensome federal reporting obligations on outside counsel and consultants who advise employers on both the legal and labor relations aspects of successfully negotiating a collective bargaining agreement with an established union representative. Advice concerning an employer's bargaining obligations under the NLRA is inextricably intertwined with the goal of obtaining, through peaceful negotiations, an agreement that can be ratified by a majority of the bargaining unit employees. Achieving a ratified contract necessarily involves efforts by the employer and union to "persuade" employees to accept the new agreement. Likewise, seminars or conferences where employers and their counsel discuss best practices and strategies for collective bargaining on topics such as health care and retirement benefits – topics that are the focal point of negotiations in many industries – are a useful way to promote successful collective bargaining, consistent with the public policy of the LMRDA and the NLRA. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining . . . and thereby to minimize industrial strife.").

The advice exemption expressly applies to attorneys or consultants who "engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising

thereunder." 29 U.S.C. § 433(c). There is no logical reason to impose a reporting obligation on attorneys and consultants who, without actually appearing at the bargaining table, provide advice on the collective bargaining negotiations, when those very same activities are expressly exempted if the attorney or consultant were present at the bargaining table. Imposing a reporting obligation when outside counsel do not actually represent the employer at the bargaining table (often for good labor relations reasons) would not in any way advance the public policy goal of promoting peaceful labor relations. To the contrary, requiring that such advice be reported on an LM-10 and LM-20 form, and the even more intrusive LM-21 financial report, would provide a strong disincentive for employers to seek advice during collective bargaining negotiations and for outside counsel or consultants to provide it. This ultimately would hinder, rather than promote, the peaceful resolution of collective bargaining disputes in many industries.

IV. The Proposed Rule Seems to Expand, Without Explanation, the Scope of Reportable Information Supplying Activities.

In addition to expanding the scope of reportable "persuader" activity under Section 203(b)(1) of the LMRDA, it appears that DOL intends to expand the scope of reportable "information supplying" activity under Section 203(b)(2). Section 203(b)(2) requires outside attorneys and consultants to report an agreement or arrangement "to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding." 29 U.S.C. § 433(b)(2). DOL's new proposed LM-20 form, unlike the existing LM-20 form, specifically includes the following broadly defined categories of reportable information supplying activities and sources:

- Research or investigation concerning employees or labor organizations
- Supervisors or employer representatives
- Employees, employee representatives, or union meetings
- Surveillance of employees or union representatives (video, audio, Internet, or in person)

76 Fed. Reg. at 36,208. The NPRM does not explain whether these categories are intended to expand DOL's five decades-old interpretation of reportable "information supplying" activity. In fact, the NPRM provides little to no guidance on whether DOL intends to alter the existing scope of the duty to report Section 203(b)(2) arrangements, which are distinct from "persuader" arrangements under Section 203(b)(1). To the extent that DOL is seeking to expand the reporting obligation to encompass a broad range of general research services, including research within publicly available sources and databases, such an obligation is not supported by the LMRDA, its legislative history, or DOL's longstanding interpretation.

Nowhere in the legislative history or DOL's Interpretative Manual is there any indication that reportable "information supplying" activity should encompass research from publicly available sources. Rather, the purpose of the LMRDA is to expose "labor spies" and covert surveillance of in-person union activities, meetings, and communications. *See Wirtz v. Fowler*, 372 F.2d 315, 324 (5th Cir. 1966) ("It is true, of course, that the McClellan Committee, in which the LMRDA had its genesis, was primarily concerned with management-hired labor spies and

undisclosed middlemen who engaged in espionage and deceptive persuasion."). Consistent with this specific legislative purpose, the Interpretative Manual's examples of reportable "information supplying" include engaging a consultant to "sit outside the place where the union organizers are meeting with other employees . . . and record the names of the employees who are going in and coming out." Manual § 256.100. Other examples include "planting" a consultant's employee in the union to supply information on the organizing strategy, or hiring a detective agency to follow union organizers and supporters. *See* Manual §§ 257.205; 257.210.

DOL is obligated to explain what it is attempting to achieve through the proposed revision to the LM-20 form. The NPRM's silence concerning the intended scope of reportable information supplying activity suggests that it remains as it has been for decades – limited to direct surveillance and spying by outside consultants.

CONCLUSION

For all of the foregoing reasons, COLLE urges DOL to withdraw the NPRM and adhere to its longstanding interpretation of the advice exemption.

Respectfully submitted,

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