INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO

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

Dear Mr. Davis:

Please accept these comments by the International Union of Painters and Allied Trades ("IUPAT") in response to the Department of Labor ("DOL" or "Department"), Office of Labor-Management Standards' ("OLMS") notice of proposed rulemaking regarding the interpretation of the "advice" exemption.[1] IUPAT represents highly skilled, hard working men and women employed in the finishing trades as painters, drywall finishers, wall coverers, glaziers, glass workers, floor covering installers, sign makers, display workers, convention and show decorators, and many other occupations. Our diverse International Union consists of [insert number] members in 34 District Councils, and over 400 local unions throughout the United States and Canada.

Our union routinely files comments on rulemakings concerning the Labor-Management Reporting and Disclosure Act ("LMRDA"), including the recently proposed rule related to the Form LM-30[2] Labor Organization Officer and Employee Reports. IUPAT appreciates the careful review DOL has undertaken of its LMRDA regulations and enforcement policies to ensure that the statute is being administered consistent with its clear purpose to provide useful information to workers. We view the current rulemaking to more rationally define the scope of the "advice" exemption as a critical part of this process and fully support the proposed rule.

The proposed rule will restore the flow of information about management efforts to influence workers.

Section 203 of the LMRDA requires employers on the Form LM-10 and labor relations consultants on the Form LM-20 to report any arrangements or agreements that have as an object, "directly or indirectly, to persuade employees to exercise or not exercise," their right to organize and bargain

[1] Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, 76 Fed. Reg. 36178 (proposed June 21, 2011).
[2] Labor Organization Officer and Employee Reports, 75 Fed. Reg. 48416 (proposed August 10, 2010).

collectively.[3] The LMRDA carves out an exemption from reporting agreements "to give advice to such employer . . . before any court, administrative agency, or tribunal of arbitration."[4]

Under the Department's current construction, a management attorney or consultant falls within the advice exemption if he simply avoids directly communicating directly with employees. provided that the employer is free to accept, reject or modify the work product before it goes to his employees.[5] This effectively reads the phrase "directly or indirectly" out of the statute, as high-priced consultants who are hired to conduct anti-union campaigns avoid reporting simply by funneling their work through others. The ease with which management attorneys and consultants can avoid reporting their efforts to dissuade workers from forming a union has resulted in exponential growth of such agents being engaged to defeat union organizing efforts.[6] Outside consultants have become commonplace in representation elections. They employ sophisticated tactics to communicate an anti-union message. These include, for example, anti-union videos an employer can play for a captive audience meeting or disseminate over the Internet, the aggregation and dissemination of anti-union media content with targeted editorial comments, and the tailoring of persuader communications employers can disseminate to their workers via email blasts, text messages, or social networking sites. The current interpretation of the "advice" exemption allows all of these obviously persuasive activities to go unreported. The Department is clearly right that underreporting is a significant problem as almost all consultants are currently able to hide behind the "advice" exemption.[7] The Department is also correct that this state of affairs is inconsistent with the clear statutory text and well-documented Congressional intent to ensure prompt public disclosure of persuader agreements so that workers are able to discern the voice behind the communications they see and/or hear when exercising their right to consider having a collective bargaining representative.[8]

In passing the LMRDA's provisions on persuader reporting, Congress was particularly concerned with employers engaging agents to use deceptive and nefarious tactics to persuade employees who had no way of knowing that the messages they were hearing were coming from a paid agent hired specifically to discourage unionization.[9] Congress understood that consultants employ such deceitful practices as infiltrating the rank-and-file workforce with spies and informants to lobby against the union, report on union meetings, and generally help to disrupt an organizing drive.[10] From behind the scenes, other consultants coach employers on facilitating the "spontaneous" formation of employee committees, which actually serve as fronts for the employer's anti-union activity. Still other consultants design tests and surveys to assist employers in identifying pro-union workers. When it enacted the LMRDA,

[3] 29 U.S.C. § 433(a)(4); 29 U.S.C. § 433(b).
[4] 29 U.S.C. § 433(c).
[5] OLMS Interpretive Manual Section 265.005, Scope of "Advice" Exemption.
[6] *Supra* note 1, at 36186.
[7] *Supra* note 1, at 36186.
[8] *Supra* note 1, at 36184.
[9] *Supra* note 1, at 36184.
[10] *See generally* Martin Jay Levitt with Terry Conrow, *Confessions of a Union Buster* 181 (New York: Crown Publishers, Inc. 1993).

Congress intended agreements for such persuasive activities to trigger reporting so that employees would know who is being engaged and in what manner to encourage them to reject having a collective bargaining agent. Such disclosure allows workers to have information important to assessing the credibility and motivations behind what they are seeing and hearing and thereby facilitates informed decision making within the context of exercising fundamental labor rights. Narrowing the "advice" exemption will facilitate these disclosures and the informed decision making they promote.

The proposed electronic filing requirement is critical to ensuring timely information for workers.

The proposed rule calls for electronic filing of both the employer's Form LM-10 and the consultant's Form LM-20, similar to the electronic filing unions are required to make of their Form LM-2 reports.[11] This is a significant improvement over the current filing process. It will be more efficient for reporting entities because if the software is similar to that used for LM-2 reporting, it will inform a filer of any errors or omissions prior to submission. It will also conserve government resources by allowing the Department to quickly process and upload reports. Most importantly, it will result in more immediate availability of the reports on the Department's public disclosure website. Like labor organizations, employers and consultants have the information technology resources and capacity to file electronically.

The current paper reports must be mailed to the Department, reviewed, and then scanned in to the system before being available for public review. This is a lengthy process. It often takes months for reports to be uploaded and the scanning process does not appear to include any kind of quality control that catches patently inaccurate or incomplete reports. This results in employees not having the opportunity to determine who is running an employer's anti-union campaign and which messages are heartfelt expressions versus paid propaganda. Electronic filing promotes the goals of the LMRDA by providing workers timely and accurate information. It conserves government resources. And it simplifies reporting for filers.

IUPAT requests that with the transition to electronic filing, OLMS consider enhancing the usefulness of its electronic database for workers seeking information on employer efforts to persuade them. Currently, a worker can only search these databases by selecting from a drop down box the name of a Form LM-20 filer. While this option is obviously helpful if a worker knows the name of an attorney or consultant his or her employer may have engaged, we believe the database would be of more practical use if it added an option where employees can enter the name of their employer and obtain all of the filings of attorneys and consultants (and all subcontractors/sub consultants) engaged by their employer to persuade them as well as the employer's corresponding LM-10 reports. This would enable workers who just know the name of their employer to discern if persuaders have been engaged to influence them. The fact that employers file LM-10 reports disclosing such arrangements at the end of their fiscal year may have little value to a campaign that takes place early in the fiscal year or where the employer's consultant is able to

[11] *Supra* note 1, at 36193.

operate without revealing its identity. Without such changes, the current structure of OLMS' disclosure database for LM-20 reports makes the information of little value to most workers in the real-time context of an organizing campaign.

Proposed changes to the forms LM-10 and LM-20 will facilitate compliance.

In addition to ensuring that workers receive more timely information, the proposed rule has features that will facilitate the Department's ability to ensure compliance with LM-20 and LM-10 reporting obligations. For example, the proposed rule requires that a law or consulting firm undertaking persuader activity provide on its Form LM-20 the Employer Identification Number ("EIN") of the organization that engaged its services.[12] This will help the Department ensure employers are meeting their corresponding filing requirements. Employers must also provide their EINs on their Form LM-10, which will facilitate the tracking of employers that may change over time the name under which they do business.[13]

More importantly, the proposed rule amends the Form LM-20 to require law or consulting firms engaged to perform persuader activity to identify in Item 11.d if the person who performed the persuader activities is their employee or is a subcontractor/sub consultant whose work triggers reporting for the entity employing him. [14] Equally important, such subcontractors/sub consultants to an employer-consultant agreement must identify the primary consultant who engaged them to assist in implementing the reportable arrangement.[15] Requiring subcontractors/sub consultants to file their own Form LM-20 reports is not a new mandate,[16] but the proposed rule makes the requirement clearer. Requiring subcontractors/sub consultants to identify the primary consultant is a new requirement. It will prevent law firms, public relations firms and other persuaders from evading their own LMRDA reporting obligations by having subcontractors/sub consultants perform the work and file LMRDA reports naming only the ultimate employer-client while leaving out any reference to them and thereby making it difficult for DOL to follow up if they fail to file their own reports. Ensuring that each entity in the chain of firms engaged to persuade an employer's workforce files the required reports makes it easier for employees to understand all of the activities directed at them. DOL can also use this data to audit whether anti-union consultants are properly classifying the parties who perform persuader activities as their own employees versus independent contractors, which will ensure compliance with the Fair Labor Standards Act and other laws implicated by the misclassification of people as independent contractors.

The IUPAT also finds merit in the proposed rule's addition to both the Form LM-10 and the Form LM-20 of a detailed, but non-exhaustive, checklist of persuader activities.[17] We believe this checklist will facilitate more thorough and accurate disclosure of the types of persuader activities consultants are engaged to perform under a reportable agreement. This is a significant improvement over the current

[12] *Supra* note 1, at 36194.
[13] *Supra* note 1, at 36195.
[14] *Supra* note 1, at 36195.
[15] *Supra* note 1, at 36194.
[16] *Supra* note 1, at 36195.
[17] *Supra* note 1, at 36193.

Forms LM-10 and LM-20 on which filers have immense latitude to describe as they see fit the nature of activities undertaken pursuant to a reportable agreement. It has been our experience that under the current forms filers usually provide descriptions of persuader activities that are often so vague as to be of little use or actually misleading. The proposed checklist will provide much more information to employees than they currently receive and help guide well-intentioned filers in properly disclosing the nature of persuader activities.

The proposed rule does not undermine traditional notions of the attorney-client privilege.

Section 204 of the LMRDA exempts attorneys from disclosing in any report mandated under the statute information protected by the attorney-client privilege. This privilege protects from disclosure communications made in confidence between a client and his or her attorney.[18] But it only applies if the attorney is representing the employer "before any court, administrative agency or tribunal of arbitration." This makes clear that in enacting this provision, Congress intended to afford attorneys the same protection when reporting under the LMRDA as that provided to them by the federal common law of attorney-client privilege, and nothing more.[19] Like the privilege, the exemption does not prevent disclosure of the fact of legal consultation, clients' identities, attorney's fees, or the scope and nature of the relationship.[20]

In *Humphreys, Hutcheson and Moseley v. Donovan*, the Sixth Circuit Court of Appeals rejected a management law firm's argument that the state of Tennessee's rule regarding attorney-client privilege exempted their persuader activity from LMRDA reporting.[21] It reasoned that just as federal courts do not rely on each separate state's law regarding evidentiary privileges in general but rather the federal common law of privileges; the federal courts interpret assertions of attorney-client privilege under the federal common law of attorney-client privilege and not the common law of the several states on attorney-client privilege.[22] This makes sense as a matter of judicial process and because, as the Sixth Circuit noted, any other interpretation would render the LMRDA's consultant reporting provisions "nugatory as to persuader lawyers."[23]

The Department must also consider the implications of adopting the view that reporting mandates for which Congress has found a compelling purpose and narrowly tailored to address that purpose can be defeated if under the rules of a single state bar association the disclosures violate the attorney-client privilege. For instance, the federal Lobbying Disclosure Act ("LDA") requires attorneys with a legislative practice to

[18] 29 U.S.C. § 434.
[19] *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985).
[20] *Id*.
[21] *Id*.
[22] *Id*. at n.12.
[23] *Id*. at 1219.

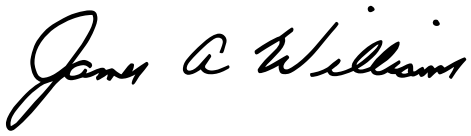
disclose much more than the names of their clients and the fees paid by them.[24] The LDA requires law firms to provide much more detail concerning the activities undertaken on behalf of a client, as well as disclosures about parties beyond just the actual client and the legal or equitable interest these related parties may hold in the client.[25] Despite this, to our knowledge, the American Bar Association and no state bar association has ever asserted that requiring a law firm to comply with the Lobbying Disclosure Act (or analogous state disclosure laws) violates attorney-client privilege such that attorneys are exempt from reporting their lobbying activity.

Conclusion

Congress crafted section 203 of the LMRDA to ensure that employees could receive all the information necessary to make an educated decision when considering whether and how to exercise their rights to form a union and bargain collectively. The current interpretation of the "advice" exemption, however, deprives them of relevant information Congress intended for them to have by allowing vast amounts of persuader activity to go unreported. We applaud the Department's proposal to scale back this exemption and craft an interpretation of section 203 that provides greater protection for workers and gives meaning to the plain language and Congressional intent behind the reporting provisions of the LMRDA.

Thank you for your consideration of our comments.

Sincerely and fraternally,



James A. Williams
General President

[24] 2 U.S.C. § 1603(b)(mandating the contents of a lobbying registration); 2 U.S.C. § 1604(b)(mandating the contents of a quarterly lobbying report).
[25] *Id.*