Motor & Equipment Manufacturers Association

Response to the

Department of Labor, Office of Labor-Management Standards

Notice of Proposed Rulemaking; Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption

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Introduction

The Motor & Equipment Manufacturers Association (MEMA) represents over 700 companies that manufacture motor vehicle parts for use in the light vehicle and heavy-duty original equipment and aftermarket industries. MEMA represents its members through four affiliate associations: Automotive Aftermarket Suppliers Association (AASA); Heavy Duty Manufacturers Association (HDMA); Motor & Equipment Remanufacturers Association (MERA); and, Original Equipment Suppliers Association (OESA). Motor vehicle parts suppliers are the nation's largest manufacturing sector, directly employing over 685,000 U.S. workers and contributing to over 3.2 million jobs across the country. Without the contributions of the nation's parts suppliers, domestic vehicle manufacturing and maintenance would almost certainly grind to a halt, adversely affecting the way we drive and go about our daily lives.

MEMA members employ thousands of workers, some of whom are represented by unions and many others who are not. These employees and the companies they work for have always operated under laws and rules established by the National Labor Relations Board (NLRB) and the U.S. Department of Labor (Department). From time to time, the employees of MEMA members file petitions requesting the NLRB to conduct a representation election to determine whether that unit of employees will be represented by a union that has undertaken an organizing campaign. MEMA's members vary widely in size and have a wide range of exposure to unions, union organizing, collective bargaining, and the purpose and procedures of the NLRB. When a MEMA member is served with a representation petition that is often the company's initiation into the arcane administrative procedures and substantive rights and responsibilities enforced by the NLRB.

MEMA Members are Entitled to Receive Legal Advice during Union Organizing without Making Public Disclosures of Their Relationships with Lawyers

When our members find themselves involved in a union organizing campaign, they want to be sure that their employees understand the seriousness of the issues presented in a representation

election. They want their employees to be aware of their Company's position regarding union raise during the union's campaign. Ensuring that our members can communicate effectively and lawfully with their employees and answer the multitude of questions that arise about the extraordinary decision they must make on union representation is of critical importance. Our members realize that engaging legal counsel during a union organizing campaign is essential to comply with the complicated and often counterintuitive rules governing what the executives of our member companies can and cannot say to their employees during an organizing campaign.

In order to comply with their legal obligations while exercising the right to speak to their employees, our members regularly discuss campaign issues with legal counsel. Company executives will review with counsel the questions that employees have raised and how the company wants to respond to those questions. Sometimes members request counsel to review written materials or outlines of oral presentations that company executives have prepared. Other times, after presenting counsel with the issues a member company needs to address during a campaign and how the company wants to respond, a member may ask counsel to prepare a draft of written material, or an outline of an oral presentation that covers the topic in a way that is not only responsive, but also in compliance with applicable legal standards.

The role of legal counsel in guiding our members through the maze of rules that govern the exercise by employers of their free speech rights– including assistance in preparing written materials and oral presentations– is the essence of legal advice in the context of union organizing. The role of legal counsel as an advisor to business executives in preparing correspondence or guiding oral presentations in transactions where there are liability exposures to avoid and/or compliance obligations to meet is typical in every field of endeavor in which business clients retain counsel. In such situations, business executives obtain the advice of legal counsel regarding their presentations or correspondence, and then the executives decide how to conduct their business, taking into account the legal guidance. Such a role for counsel is entirely routine in modern business, and that role is properly characterized as "providing advice."

Employers would be exceedingly cautious if attorneys were to be required to make public filings reporting that a client sought legal advice, or how much the client paid for it. MEMA strenuously protests the Department's proposal to impose such an intrusive regulation on the attorney-client relationships of its members. MEMA also submits that the imposition of such disclosure requirements would not only improperly intrude on attorney-client communications, but would also result in more violations of the laws applicable to union organizing campaigns, because knowledgeable lawyers who advise employers would withdraw from this area of practice rather than comply with the disclosure requirements, and some employers will refrain from obtaining legal advice that would be subject to public disclosure.

The NPRM Proposed Interpretation is Arbitrary and Capricious

The Notice of Proposed Rulemaking (NPRM) proposes to change the interpretation of the "Advice Exception" to the persuader reporting requirements of the Labor-Management Reporting

and Disclosure Act of 1959, 29 U.S.C. §401 *et seq.* (LMRDA), which provides in Section 203(c) in pertinent part that:

> Nothing 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(c). The interpretation that the NPRM plans to change has been applied by the Department of Labor with great consistency for nearly 50 years.

MEMA submits that when the role of Senator and President John F. Kennedy is considered in adoption of the LMRDA and the interpretation of the Advice Exception, it is clear that the NPRM is wrong in asserting that the new interpretation better reflects the intent of the law. Senator Kennedy was one of the original authors of the legislation that would become the LMRDA. Senator Kennedy played a central role in the original drafting, negotiating the legislative compromises to the Senate bill, advocating its enactment, and ultimately, as President, appointing the officials at the Department of Labor who would interpret the bill. President Kennedy was obviously well aware of the purpose and intent of the Advice Exception. When his Secretary of Labor, Arthur Goldberg (former legal counsel of the AFL-CIO, general counsel of the Steelworkers Union, and future Supreme Court Justice), and his Solicitor of Labor, Charles Donahue, were presented with the duty to interpret the Advice Exception, it is unlikely that they or the President would countenance a subversion of the legislation that President Kennedy had worked on for a number of years. Indeed, during the floor debates, Senator Kennedy remarked with respect to the exception, that this provision "takes care of lawyers." 105 CONG. REC. 5889 (1959). He was clearly attuned to the issue of the meaning of the Advice Exception.

As the NPRM explains, shortly after enactment of the LMRDA, Solicitor Donahue established the very interpretation that the Department now proposes to reverse. Thus, the analysis that the NPRM describes as insufficiently faithful to the purpose of the LMRDA was adopted by Department officials in an administration that was very close to the legislative process and uniquely positioned to understand the purpose of the Advice Exception.

The NPRM correctly presents Solicitor Donahue's clear explanation in 1962 that when an advisor to an employer prepares persuasive material for the employer, or reviews and comments on such material prepared by an employer, these activities are regarded as advice, and such activities will not ordinarily require reporting. The NPRM acknowledges that Solicitor Donahue's 1962 analysis established the principle that where the employer is free to accept or reject the written material prepared by the advisor, and if there is no indication that the advisor is operating under a deceptive arrangement with the employer, the fact that the advisor drafts the material in part or in its entirety will not in itself generally be sufficient to require a report. Solicitor Donahue explained that congressional intent revealed "no apparent attempt to curb labor relations advice, and even where advice was embedded in a speech or statement prepared by the advisor to

persuade, it is nevertheless advice and must be fairly treated as advice. The employer, and not the advisor, is the persuader."

The contemporaneous interpretation of the Advice Exception during the Kennedy Administration deserves great deference by the Department. The NPRM would depart from Solicitor Donahue's observation that Congress never intended to curb labor relations advice, and adopt an interpretation that would discourage clients from seeking, and lawyers from providing, labor relations advice.

The Proposed Interpretation would Arbitrarily Depart from a Consistently Applied Construction of the Advice Exception

Twenty-seven years after Solicitor Donahue's announcement of the Department's interpretation of the Advice Exception, the Kennedy Administration's interpretation was still being followed and advocated by the Department. The interpretation was examined and upheld in an opinion by future Supreme Court Justice Ruth Bader Ginsburg and the United States Court of Appeals for the District of Columbia Circuit in *UAW v. Dole*, 869 F.2d 616 (1989). Judge Ginsburg explained the Secretary of Labor's view that a law firm does not engage in reportable activity under the LMRDA when it devises personnel policies to discourage unionization, so long as the work product, whether written or oral, is submitted to the employer for his use, and the employer is free to accept or reject it. This contrasts with activity where the attorney-consultant has direct contact with employees, or himself engages in persuader activity, which would not constitute advice and would be reportable. The court's opinion observed that although there is a tension between the coverage provisions of the LMRDA and the Advice Exemption, it must be acknowledged that "Congress intended to grant broad scope to the term 'advice,'" noting that the term "advice," in lawyers' parlance, may encompass the preparation of documents to be signed and oral statements to be read by the client – such as answers to interrogatories, or the scripting of a closing or an annual meeting. The court affirmed the Department's policy that where the employer is free to accept or reject the written material prepared for him, and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.

The NPRM presents a complete turnabout from the interpretation presented to the Court of Appeals and followed since the Kennedy Administration. MEMA submits that changes in agency legal strategies undermine public faith in the Department and the rule of law. Where the agency's reversal is the result of new evidence that has come to light or a decisive intervening event such as a recent Supreme Court decision, a radical change may be appropriate. Where the agency merely announces a decision to change directions after 50 years, in the absence of any watershed event or new data, the new rule is vulnerable to a finding that the changed interpretation is arbitrary and capricious.

The Supreme Court has explained the importance of an agency's consistency in its interpretation of the law. In *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981), the Court reviewed an agency's revised interpretation of legislation after ten years of following its original interpretation. The Court declared that an agency's construction of legislation contemporaneous with its enactment carries persuasive weight, while a revised interpretation in conflict with the initial position is entitled to considerably less deference. Courts are not inclined to defer to an agency's position that is at odds with the agency's contemporaneous construction of the law and which represents a change from the view enunciated contemporaneously when the statutory machinery was being put into motion. *See Udall v. Tallman*, 380 U.S. 1, 16 (1985). An agency's interpretation must be "fair and considered." In large measure, this depends on whether the agency has ever adopted a different interpretation of the regulation; deference by federal courts is not assured when the agency has previously adopted a different interpretation. *See, e.g.*, *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 & n.15 (D.C. Cir. 2002) (refusing to defer to an agency's interpretation because the interpretation might not have been fair and considered).

The Department should recognize that ten administrations representing Democrats and Republicans have followed the interpretation of the Advice Exception adopted by the Kennedy Administration. A dramatic change in the interpretation of the LMRDA 50 years after its adoption would be viewed for good reason as arbitrary.

The Proposed Interpretation is Not Supported by Substantial Evidence

MEMA submits that the basis offered in the NPRM for revising the interpretation of the Advice Exception is not current, credible, or convincing. It offers no legitimate basis for overturning a regulatory policy that has stood for 50 years. The Administrative Procedure Act ("APA"), 5 U.S.C. § 706, proscribes any regulation that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is promulgated "without observance of procedure required by law." An agency's factual findings must be supported by substantial evidence. If an agency bases a rulemaking decision on unreliable evidence, that reliance is an "abuse of discretion" under the APA and should require the agency's action to be set aside.

For evidence to be adequate to support a decision, it must be "knowledge," as distinguished from mere "speculation." A decision based on speculation is not supported by substantial evidence. *See White Ex Rel. Smith v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999). Thus, were an agency to premise a rule solely on unreliable information, the APA would require reversal of that rule.

The NPRM argues that the new interpretation is supported by contemporary academic research in the industrial relations and labor-management fields that clearly demonstrates that: the labor consultant industry has proliferated since the passage of the LMRDA; employers mount sophisticated responses to the presence of union-related activity among their employees; and, employers rely to a great extent on consultants to assist with those sophisticated responses. The sources on which the NPRM relies for these conclusions, however, are decades old, unmitigated hearsay-based one-sided advocacy pieces. The sources referenced in the NPRM

might be sufficient to comprise an unrepresentative bibliography of publications critiquing public policy on collective bargaining, but they are not evidence and do not support the adoption of a new interpretation of the Advice Exception at this time. MEMA protests the Department's rush to promulgate a new interpretation without more current data. The NPRM relies upon obsolete references to the 1980 and 1984 reports of the Subcommittee on Labor Management Relations of the House Committee on Education and Labor; the dated 1994 report of the Commission on the Future of Worker-Management Relations; the 1990s writings of a former union organizer, now professor of labor relations; and, other articles and books that are mostly decades old. As if statements written in these outdated books and articles provide a sufficient record to support the proposed rulemaking, the NPRM contains citations to various assertions in these books and articles regarding the number of organizing campaigns in which consultants or lawyers were hired; the cost of such consultants or lawyers; the impact of consultants or lawyers on outcomes, unlawful behavior, and collective bargaining results; and the appropriateness of the participation of consultants or lawyers. The NPRM then magnifies the unfounded reliance on these sources by extrapolating from the speculations contained there to produce groundless conclusions that profess to rationalize the proposed rulemaking. In effect, the NPRM reviews a tiny niche of labor relations literature and professes to reach conclusions based on the extracted quotes while presenting no current data and no urgent circumstances that warrant any change to the interpretation of the Advice Exception.

Significantly, even if any of these references pertained to credible accounts concerning the persuader activities of legal counsel, the NPRM contains no support for a conclusion that evidence exists of contemporary misconduct by legal counsel engaged in the types of activities to which the LMRDA was intended to apply and deter. According to the NPRM, the conduct uncovered in the hearings leading to the passage of the LMRDA included employment of middlemen to:

- spy on employee organizing activity;
- prevent employees from forming or joining a union;
- induce employees to form or join company unions;
- create deceptive devices such as "spontaneous" employee committees;
- organize "vote no" committees during union campaigns;
- design psychometric employee tests to weed out pro-union workers; and,
- negotiate improper "sweetheart" contracts with union officials.

Although the NPRM asserts that these strategies continue to dominate the field of consultants' responses to union organizing, there is no evidence offered for this statement, and absolutely no basis for concluding that in contemporary experience, advice provided by legal counsel regarding oral or written statements to be made by employers to their employees ever produces the forms of misconduct identified in the hearings leading to passage of the LMRDA. Accordingly, there is no substantial evidence to support a change in the interpretation of the Advice Exception.

Conclusion

In the face of the reasoned analysis applied and defended by the Department for a half century, the decision to change the interpretation of the Advice Exception is arbitrary and capricious. It is unsupported by any new circumstances or substantial evidence supporting a new interpretation of the statute. The NPRM mistakenly asserts that the new interpretation would better effectuate the purpose of Section 203 of the LMRDA. Despite the fair and considered contrary interpretation that the Department adopted during the Kennedy Administration, the NPRM misleadingly contends that its revised interpretation has been suggested for decades by various Department agency heads and Executive Branch and congressional observers, ignoring that final decision-makers in the agency and in Congress throughout the years have consistently rejected these radical suggestions, favoring the interpretation initially adopted by the Department of Labor officials who were responsible for construing the LMRDA when its machinery was originally installed.

For all of these reasons, MEMA submits that the Department should not revise its interpretation of the Advice Exception.

Please feel free to contact Ann Wilson, MEMA Senior Vice President of Government Affairs at (202) 312-9246, with any questions related to our comments.

Respectfully submitted,

Robert E. McKenna
President and CEO