

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF LABOR-MANAGEMENT STANDARDS

LMRDA: Interpretation of  
the “Advice” Exemption

RIN 1215-AB79  
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**Comments of American Rights at Work for Proposed Rule on Advice**

American Rights at Work submits the following comment in response to the Department of Labor’s notice of proposed rulemaking with regard to the “advice” exemption to the reporting requirements stated in the Labor-Management Reporting and Disclosure Act (76 Fed. Reg. 36178). American Rights at Work urges that the proposed rule be adopted. The current reporting requirements fail to capture the massive scope and influence of the union avoidance industry, and in doing so, deprive employees, taxpayers, and policymakers with vital information about how employers are spending critical resources, and how consultants are influencing efforts by employees to form unions.

**1. Pervasiveness of union avoidance industry**

The use of union avoidance consultants is pervasive. San Francisco State University professor John Logan noted the precipitous rise of the industry since the 1970s.<sup>1</sup> According to a recent study by Cornell University researcher Kate Bronfenbrenner, 75% of employers hire consultants when faced with a National Labor Relations Board (NLRB) election effort.<sup>2</sup> It’s easy to see the results of the widespread use of consultants. Employers are clearly utilizing the same playbook, which involves saturating employees with multiple forms of repetitive communication. Bronfenbrenner’s study found that when faced with an NLRB election:

- 89% of employers held captive audience meetings (an average of 10.4 meetings)
- 77% of employers held supervisor one-on-one meetings
- 74% of employers distributed anti-union leaflets (an average of 16 leaflets)
- 70% of employers mailed anti-union letters (an average of 6.5 letters)

Major consultant firm Jackson Lewis advises employers to do the following in just the first four weeks the campaign: send nine letters to employees’ homes, four notices on bulletin boards, six leaflets passed out to employees in the workplace, three anti-union speeches in mandatory all staff meetings, one vote demonstration, and five days of small group meetings where immediate supervisors tell employees that unions are bad.<sup>3</sup> Another consultant encourages a “‘Vote No’ saturation carnival,” which involves all supervisors wearing “Vote No” buttons, shirts, etc, and distributing them to all employees.<sup>4</sup> These strategies do not appear to involve the introduction of new

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<sup>1</sup> Logan, John, “The Union Avoidance Industry in the USA,” *British Journal of Industrial Relations* 44 (December 2006): 660.

<sup>2</sup> Kate Bronfenbrenner (May 2009). *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Washington, D.C., Economic Policy Institute and American Rights at Work Education Fund.

<sup>3</sup> Jackson Lewis advice, cited in Gordon Lafer (2007). *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Election*. Washington, DC: American Rights at Work

<sup>4</sup> Ibid.

information for employees to make an informed vote, but rather a repetition of core messages through different means of communication.

The use of the anti-union consultants is so widespread that in addition to the above communication tactics, anti-union messages have become standardized. According to a survey by researchers at the University of Illinois at Chicago, 70% of employers faced with NLRB organizing efforts use the following anti-union selling points with their employees: “give the employer another chance; the union will take you out on strike; unions charge dues, fines and assessments; unions cannot guarantee anything; the union is a third party that interferes in the employment relationship; unions need your money to survive; and the employer will never agree to union demands.”<sup>5</sup>

## **2. Current reporting requirements fail to capture use of consultants**

The current requirements for reporting advice fails to capture the extensive use of consultants in anti-union efforts. In fiscal year 2008, employees filed 3,158 petitions to hold union representation elections with the NLRB.<sup>6</sup> Applying Bronfenbrenner’s 2009 results, you would expect that about 2,368 employers (75% of those faced with an NLRB organizing effort) hired a management consultant to advise them on the campaign. Employers also hire consultants to avoid organizing efforts well before employees file an NLRB petition.<sup>7</sup> So, even if the 2,368 figure underestimates the actual number of employers who hire consultants, it still vastly exceeds the 862 employers who filed LM-10 forms with OLMS in fiscal year 2009 (many of which were not hiring consultants to prevent unionization, such as the union-managed pension funds that must file).

In his 2007 report of the unionbusting industry, Gordon Lafer found a statement on the website of the Burke Group, an established anti-union firm, that they have helped businesses avoid an election over 70 times.<sup>8</sup> Yet in our review of the OLMS LM-20 database, we found reports for only five employers submitted by the Burke Group since 2000. Similarly, in 2008, employees at Helpmates, a home care agency in Pennsylvania, attempted to form a union with the Service Employees International Union (SEIU). According to SEIU staff involved with the effort, managers called workers at home days after learning of the effort, and turned supposed training seminars into anti-union captive audience meetings.<sup>9</sup> Though the organizers were told by employees that Jackson Lewis was involved in the campaign and even conducted some of the direct persuasion, there are no LM-10s or LM-20s on record for the firm and Helpmates.

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<sup>5</sup> Mehta, Chirag & Theodore, Nik (2005). *Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns*. Washington, DC: American Rights At Work

<sup>6</sup> Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 2008. <<http://www.nlr.gov/sites/default/files/documents/119/nlr2008.pdf>>

<sup>7</sup> “Employer Communications on Unions Are Early and Ongoing,” American Rights at Work, June 2011. [http://www.americanrightsatwork.org/dmdocuments/NLRB/employer\\_communication\\_on\\_unions.pdf](http://www.americanrightsatwork.org/dmdocuments/NLRB/employer_communication_on_unions.pdf)

<sup>8</sup> Gordon Lafer (2007). *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Election*. Washington, DC: American Rights at Work

<sup>9</sup> Email communications between John Lacny, Researcher of SEIU Healthcare Pennsylvania, and Erin Johansson, American Rights at Work, September 2011.

Durham School Services, which operates school buses throughout the country, has for years hired the law firm McMahon Berger to fight efforts by its bus drivers to form a union with the Teamsters.<sup>10</sup> While organizers with the Teamsters union have seen an attorney from the firm present at vote counts and NLRB proceedings, they are convinced that the firm is also behind anti-union literature circulated, along with a calendar of anti-union events that a manager accidentally posted [submitted in addition to this comment]. The calendar indicates that managers should call “the law firm” in the event the NLRB election notices are not received by a certain date. But, since McMahon attorneys never directly spoke to employees during the course of these campaigns, neither Durham nor McMahon reported any consultant agreements in an LM-10 or LM-20.

### **A mysterious multi-billion dollar industry**

Despite the widespread use of union avoidance consultants, there is little we know about the amount of money spent on them given the current narrow scope of reporting requirements. University of Oregon professor Gordon Lafer estimates that in 1990, the anti-union industry was a \$1 billion industry, which has likely increased in the past 20 years.<sup>11</sup> The case of EnerSys, an industrial battery producer in South Carolina, illustrates the massive amount of resources employers are willing to spend on these firms.<sup>12</sup> From 1994 to 2005, EnerSys relied on the services of Jackson Lewis for what the company later called “a relentless and unlawful campaign to oust the union.”<sup>13</sup> EnerSys later filed a malpractice lawsuit against the firm for instructing the company to break the law; EnerSys was charged with 120 violations of federal law which included obstructing the organizing campaign, harassing and intimidating employees, and failing to bargain in good faith. In total, Jackson Lewis’s services for EnerSys allegedly cost the company \$2.7 million, on top of the \$7.75 million in lawsuits the company settled. Were it not for this unusual malpractice suit against Jackson Lewis, we would not know the full extent of the resources spent on the firm and the influence it had on the campaign.

Even employers that cannot afford to waste money hire union avoidance consultants. The aforementioned University of Illinois at Chicago study noted how one employer hired could someone at \$500 an hour to run his anti-union campaign and ended up taking out a \$100,000 loan to ensure his employees did not vote for the union.<sup>14</sup> Further, not all employers who hire consultants are for-profit businesses. According to our review of employers who filed LM-10s with OLMS, many of them are nonprofits or government contractors, including: Durham School Services, Lakeside Community Hospital, Catholic Charities Neighborhood Services, Inc., and Guide Dogs for the Blind.

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<sup>10</sup> Email communications between Kim Keller, Deputy Organizing Director for the International Brotherhood of Teamsters, and Erin Johansson of American Rights at Work, September 2011.

<sup>11</sup> Lafer, 2007.

<sup>12</sup> See the American Rights at Work website for information on the EnerSys case:  
<http://www.americanrightsatwork.org/press-center/press-kits/press-kit-for-malpractice-case-against-workplace-law-giant-jackson-lewis-20041213-312-197-197.html>

<sup>13</sup> Quote taken from complaint filed by EnerSys in the Court of Common Pleas, Thirteenth Judicial Circuit, State of South Carolina, *EnerSys Delaware Inc. v. Jackson Lewis LLP*, Civil Action No. 2004-CP-23-2685 (filed April 23, 2004).

<sup>14</sup> Mehta, Chirag & Theodore, Nik (2005). *Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns*. Washington, DC: American Rights At Work

In 2006 and 2007, the nonprofit Altoona Regional Health System hired LRI Consulting Services to combat organizing efforts by its employees. Because Altoona followed the law and reported this expense in an LM-10 form, we know that they paid union avoidance firm LRI over half a million dollars. The consultants advised the managers to pull nurses away from work to attend mandatory union avoidance meetings, which resulted in many nurses filing “incident forms” in which they reported that management’s activity disrupted patient care.<sup>15</sup> Mandatory meetings were also used to educate members of management and how they should deal with the campaign and the effects unionization would have on their department.

By revising the interpretation of “advice,” the proposed rule would shed more light on the practice of hiring consultants, and the general public would benefit from knowing how money was being diverted from the missions of nonprofit organizations to the union avoidance industry. Additionally, where healthcare providers and government contractors are concerned, taxpayers should know that these employers are appropriating the large amount of public funding they receive away from their core missions.

### **Consultant tactics do not center on direct persuasion of employees**

To limit the current reporting requirements to direct persuasion misses the fact that consultants view supervisors, not themselves, as critical messengers during an anti-union effort. Lafer notes how consultants train supervisors on how to determine whether an employee is for the union or not, and if he/she is pro-union, how to get the employee on management’s side.<sup>16</sup> Supervisors cannot directly ask their employees how they will vote, but consultants teach supervisors how to interpret the verbal and non-verbal reactions of workers. The union sentiments of each employee are tracked and if the opinion of an employee is unclear, the consultants recommend the supervisors have reoccurring conversations until the employee’s preferences are known.

One consultant, cited by Lafer, held a pool in which members of management would predict the number of anti-union votes, and given the close contact supervisors have with employees during a campaign, they were always correct in predicting how the vote turned out.<sup>17</sup> Knowing the power supervisors hold over employees, consultants need only speak to managers, and not directly to employees, to communicate union avoidance strategies and messages. This tactic is certainly evident in Bronfenbrenner’s 2009 study, which found that 77% of employers have supervisors conduct one-on-one meetings with employees to communicate anti-union messages.<sup>18</sup>

On June 27, 2001, a confidential memo was sent out at God’s Love We Deliver, a New York based organization, instructing managers to attend a mandatory meeting to hear a labor attorney speak about “preventative labor relations” since there was the possibility of union organizing within the company.<sup>19</sup> In 2003, Adams, Nash, Haskell and

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<sup>15</sup> Taken from documentation on file at American Rights at Work

<sup>16</sup> Lafer, 2007.

<sup>17</sup> Ibid.

<sup>18</sup> Bronfenbrenner, 2009.

<sup>19</sup> On file with American Rights at Work

Sheridan produced a manual for T-Mobile to fight their employees' efforts to form a union. The manual states, "As a supervisor or manager, your role in an organizing attempt is a key one. You are in the best position to communicate the message to employees that unionization is not in the best interest of the individual employees, the organization, or the community."<sup>20</sup>

To conclude our comment, the union avoidance industry captures massive resources from employers at a time when job creation is scarce and fiscal crises are common at all levels of government. Yet given the narrow scope of reporting requirements, we know very little about the amount of money (some of it taxpayer money) that is diverted from the core missions of these businesses and nonprofits and spent on these consultants. And while we know the union avoidance industry has had a large influence on the conduct of employer anti-union campaigns, employees at individual firms are not generally privy to how a consultant might be involved in their particular effort. Thus, to shed more light on the union avoidance industry, American Rights at Work urges the Department of Labor to adopt the proposed rule, 76 Fed. Reg. 36178.

Respectfully submitted,

Kimberly Freeman Brown  
Executive Director  
American Rights at Work  
1616 P St. NW Ste 150  
Washington, DC 20036

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<sup>20</sup> Adams, Nash, Haskell, & Sheridan, "For Your Information: Prepared for T-Mobile" (2003) On file with American Rights at Work