VIGILANT℠
counsel for employers

We're in this together.

September 21, 2011

Mr. 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

Sent via the Federal eRulemaking Portal: http://www.regulations.gov

Re: RIN 1215-AB79 and 1245-AA03 (Proposed expansion of reporting for labor relations persuader activity (76 *Fed Reg* 36178-36230), June 21, 2011)

Dear Mr. Davis:

We are writing to you in response to the proposed rules under the National Labor Relations Act (NLRA), published in the *Federal Register* on June 21, 2011, which would expand the circumstances in which reporting is required when labor relations consultants advise employers.

At Vigilant, we counsel companies on employment issues across the Northwest and California. We advise employers of all kinds and help them navigate the complexities of HR compliance, employee relations, employment and labor law, workplace safety and more. During a union organizing campaign, we advise our members, but we do not communicate directly with their employees, so we have never been required to report as a "persuader." We understand that if this proposal goes forward, both we and our members would have to file reports with the DOL anytime that we provide advice on a communication to employees "to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing" (29 U.S.C. 433(a) and (b)).

We believe the proposed changes not only are unnecessary and highly burdensome, but also are ultimately harmful to employees because they effectively discourage employers from seeking competent advice on compliance with the NLRA in their workplace communications. On behalf of Vigilant, our member companies, and their employees, please accept the following comments in response to these proposed changes.

6825 SW Sandburg St
Tigard OR 97223
main 503.620.1710
fax 503.620.3935

www.vigilantcounsel.org

Reasons for expanding reporting are based on unsupported conclusions

When changing a regulation, especially one that requires increased expenditure of time and resources by employers, labor relations consultants, and government staff, it is critical to have a firm foundation demonstrating the need to do so. In its explanation of the reasons behind this proposed regulation, the DOL leaps to conclusions that are highly speculative. Here are two examples:

1. First, the DOL provides statistics on the number of consultants currently filing LM-20 Reports (an average of 192.4 reports per year in comparison to a total of 3,468 representation cases per year from FY 2005-2009). The agency's commentary then states, "It appears clear that only a small fraction of the organizing campaigns in which consultants were utilized resulted in the filing of a Form LM-20. When such a small proportion of persuader consulting activity is reported, employees are not receiving the information that Congress intended they receive." (p. 36186, c. 3.)

   We must point out that the lack of reporting does not necessarily reflect on Congress's legislative intent. Just because an employer works with a labor relations consultant during an organizing campaign doesn't automatically mean that such activity is reportable (under the current interpretation) or should be reported (under the proposal). Also, since the current exemption for "advice" has been in place since 1962 (other than a two-month reversal in 2001), Congress has had ample opportunity to correct any misapplication of this rule. If anything Congress's willingness to leave the DOL's interpretation intact for almost 50 years indicates Congressional support for the status quo.

2. Second, the DOL writes, "there is strong evidence today that the undisclosed activities of labor relations consultants are interfering with worker's [*sic*] protected rights and that this interference is disruptive to effective and harmonious labor relations. For instance, research in the industrial relations arena shows that newly certified unions are much less likely to secure a first contract in cases in which the employer has hired a consultant." (p. 36189, c. 3)

   Again, the DOL's conclusion is unsupported by the example it presents. The fact that a union and employer are less likely to agree on an initial contract when a consultant is involved could be due to any number of reasons. By hiring a consultant, the employer is likely better informed of its rights under the NLRA, which includes the right to refuse to agree to the union's position. Employers who are aided by a consultant may be less likely to be bullied into capitulating to a newly elected union's demands. The DOL seems to be making an extraordinary leap of logic: that failing to reach agreement on a labor contract is equivalent to interfering with workers' protected rights. The DOL's position is clearly inconsistent with long-established principles under the NLRA.

The DOL has failed to accurately and objectively articulate compelling reasons for its proposal to dramatically increase the number of reports filed. In the absence of a demonstrated need to impose this expanded obligation, the proposal should be withdrawn.

Procedures are already in place for addressing unfair labor practices

As one of the justifications for the proposed rule, the DOL alleges that some consultants have encouraged unfair labor practices by their employer clients (p. 36190). The DOL ignores the fact, however, that the NLRA already contains ample remedies for addressing unfair labor practices. Regardless of whether an employer decides to fire a union sympathizer for union activity on its own or is advised to do so by an unethical consultant, such conduct is illegal and any union worth its salt (no pun intended!) will see that a charge is filed with the Board.

The real problem, it seems, is that the DOL simply does not like the idea of consultants advising employers how to effectively present their case against unions. The DOL's commentary goes so far as to describe certain anti-union tactics as "offensive" (such as equating a union to a virus) even though the tactics are completely lawful (p. 36190, c. 1). Neither the DOL nor the Board has been tapped as the Politeness Police. Their role is to enforce the law. Personal opinions as to whether lawful tactics are sufficiently genteel have no business serving as justification to impose a greatly expanded regulatory scheme.

Professional consultants can reduce unfair labor practices

The DOL's commentary seems to advance the perspective that labor relations consultants routinely encourage their clients to violate employees' rights under the NLRA. Our organization has been advising employers on labor relations issues since our founding in 1960. Some of our staff have more than 30 years' experience in union negotiations and campaigns. In our experience, when we become involved in a union organizing campaign, we fill a much-needed role for ensuring that our members don't unwittingly commit an unfair labor practice in the heat of the moment.

Union organizing drives are almost always highly emotionally charged, on both sides. By encouraging our members to talk to us before taking action, we help them craft their messages without straying into unlawful statements. To an inexperienced employer, it is totally natural to want to say "You're right, we will take care of that problem you have brought up" or "We would have to shut down if we had to pay for all of the benefits and wage increases that the union is saying it would get you." Fortunately, when our members seek our help in a union organizing drive, it allows us to explain that these statements constitute unlawful promises and threats under the NLRA, and that there are other ways to make their case without crossing that line.

Similarly, when a union supporter and a supervisor get into a heated argument about an organizing drive, an inexperienced employer is very likely to deem the individual to be insubordinate and subject to termination. Here is another situation where the advice and assistance of a professional labor relations consultant is invaluable. We can explain this may be protected concerted activity under the NLRA, and coach the supervisor and management on how to respond to such statements in the future. Even in organizations with long-standing labor agreements, there is always turnover, and therefore inexperienced leadership that needs guidance on NLRA compliance.

Does the DOL really want to discourage employers from obtaining advice on how to comply with the NLRA in communicating with employees? Good, professional communications advice from experienced consultants ultimately protects workers from the effects of unfair labor practices, including unlawful discharge. The proposed expanded reporting requirements will discourage consultants from continuing to provide this beneficial service, due to concerns of recordkeeping burden and the fear of potential criminal prosecution for failure to properly disclose. Such a result would not be good for anyone, including employees.

Application of disclosure to employer training is bad policy

The DOL asked for specific comment on the applicability of the reporting requirements to seminars, stating that the DOL "generally views so-called 'union-avoidance' seminars and conferences offered by lawyers or labor consultants to employers to involve reportable persuader activity" (p. 36191, c. 3). It is good public policy to encourage employers to understand their legal rights and responsibilities under the NLRA. Requiring reporting of such training activities essentially imposes a penalty on the employer for attending such a session, because the employer must then devote additional staff time to understanding, completing, and filing Form LM-10. The DOL seems to be taking the position that it is preferable for the employer to remain ignorant, and yet it is this very ignorance that lands inexperienced employers in hot water with unfair labor practice charges.

Scope of proposed disclosure is incredibly broad and impractical

The breadth of activities covered by the proposal is truly astonishing and unwarranted. For example, one of Vigilant's core services is reviewing and updating our members' employee handbooks. Such handbooks obviously are intended "for presentation, dissemination or distribution to employees" (p.36211, c. 2). When we review the handbook, we try to assist the employer in crafting language that casts the company's policies in a positive light, sending a message that the company takes care of its employees and thus indirectly persuading employees that bringing in a union would be unnecessary. It appears that under the terms of the proposal, this entire handbook review would need to be disclosed. On occasion, a member may also ask us to include a "union-free" statement that the employer believes unions are not good for employee relations, although it will respect employees' rights under the NLRA.

A typical handbook is between 25 and 50 pages in length, and a "union-free" statement such as that described above would typically be only one paragraph. How would the financial arrangements behind this review be disclosed? The proposed instructions for the LM-20 state, "[i]f the agreement or arrangement provides for *any* reportable activity, the exemptions do not apply and information must be reported for the entire agreement or arrangement" (p. 36211, c. 2). Does this mean that because one paragraph expressing the employer's views on unions was included in the handbook, the report would be based on the fee (if applicable) for reviewing the entire handbook? What if there is no separate fee for the handbook?

In return for paying monthly membership dues, members of Vigilant are entitled to unlimited consultation with our attorneys, HR advisers, and safety professionals. We do not have a system for tracking billable hours when answering questions or reviewing handbooks or policies. Would we be required to calculate what fraction of our staff person's time was spent on reviewing or discussing that particular paragraph? Or reviewing the entire handbook? Would we be required to calculate what portion of a member's dues was allocable to reportable activities under this proposal? Given the variety of services we provide, it would be prohibitively expensive for us to allocate membership dues to a specified project of reviewing a handbook, drafting a letter to an employee, or outlining an employee meeting agenda for an employer.

Also, at what point would it be determined that we entered into a "financial arrangement" with a member company, since they pay dues to us every month? For example, if we review a member's handbook in January and comment on a letter to their employees in March, would we have to submit a separate Form LM-20 after each project? Our accounting manager is already cringing at the thought of the amount of paperwork this would generate, especially since the LM-20 needs to be submitted within 30 days after each new financial arrangement. We have several hundred member companies, so when we think of the multiple reports this proposal would require, we are deeply concerned. Now multiply those numbers times all of the other associations, labor relations specialists, and law firms that assist employers with union-related communications to employees, and these numbers become seriously daunting when considered on a nation-wide basis.

With potential criminal penalties at stake, consultants and employers will be highly motivated to comply, but going through these calculations and filing all of this paperwork seems far out of proportion to any benefits to be gained. Under the proposal, our member who requested the handbook review would have to file an LM-10 (employer report, due within 90 days after the end of the employer's fiscal year) and Vigilant would have to file an LM-20 (consultant agreement and activities report, due within 30 days after entering into an arrangement) as well as an LM-21 (consultant receipts and disbursements report, due within 90 days after the end of the consultant's fiscal year). The DOL is going to find itself buried in paperwork, and to what end?

Furthermore, in any organizing campaign, there is a flurry of both written and verbal statements as each side attempts to persuade employees. With this proposed rule, if a union isn't successful in its election campaign, it will have every motivation to file a charge alleging that the employer's communications to employees were influenced by a labor consultant, and the financial arrangements weren't reported. It seems highly unlikely that the DOL will have the staff or the time to investigate and review individual documents and verbal statements to determine whether a labor relations consultant contributed to any part of them. Under the current system, the DOL's inquiry is a simple matter because it focuses on consultants who directly communicate with employees. Under the proposed system, every remark, every email, and every flyer would be open for challenge, even though every communication was completely lawful and compliant with the NLRA. This seems a massive waste of government time and resources.

Most consultants' identities and financial arrangements are irrelevant

The current interpretation that reporting is required when labor relations consultants directly communicate with employees is understandable, because employees may want to know the background on so-called "experts" who are brought in to describe the downside of life under a union contract. When a message is being delivered by the employer's management team, however, the employees have no reason to attach any special level of expertise or knowledge to their statements. Employees are already familiar with these executives/managers/supervisors, even if only by sight or reputation, and can make their own assessment of these individuals' credibility without having to resort to reviewing the DOL's financial disclosure forms.

Regardless of whether a labor relations consultant has worked in the background to help the employer get its message across, it is the management team's reputation, demeanor, and actions that will make or break the campaign. There is little reason for employees to care whether their management team's communications are influenced by divine inspiration, a labor relations consultant, or a Magic 8 Ball®. The important thing is the credibility of the person delivering the message.

The commentary to the proposal states that requiring expanded disclosure "promotes the same goals the Department has advanced in regulating unions' financial disclosure, and furthers parity between the two reporting regimes" (p. 36188, c. 1). This argument confuses parity with relevance. The reason that Congress required financial reporting by unions was to address serious, documented financial abuses and mismanagement of employee-paid funds by unions. The DOL has failed, however, to identify an equivalent *financial* abuse on the part of employers or labor relations consultants. In the absence of such evidence, it does not make sense to impose a greatly expanded reporting requirement on employers and labor relations consultants.

We speculate that the DOL may feel that employees should know the amount of money that employers are spending on labor relations consultants, on the theory that if the employer kept the money they could instead funnel it into employee wages. The problem with this theory is that saving money on one end can have very negative personal financial consequences for individual employees on the other end. An employer who decides to handle a union organizing campaign on its own is much more vulnerable to making mistakes and violating the NLRA. Without the benefit of experienced labor relations advice, it wouldn't be unusual for an employer to believe it has legitimate reasons to discharge an employee for insubordination when in fact the employee's actions are protected under the NLRA. Although an employee who loses his or her job in such a case will eventually receive back pay upon successfully filing a charge with the Board, the financial and emotional toll of making it to that payday can be severe. It would be far better for the employer to invest the money in obtaining proper counsel from the outset.

Attorney-client privilege must be noted as an exception

Although the commentary states that matters subject to attorney-client privilege are exempt from disclosure (p. 36192, c. 1, 2), the proposed instructions fail to include any mention of this exception. It is important that the instructions include this information to ensure there is no confusion.

We have several attorneys on staff, whose job is advising member companies. We share the concerns expressed by numerous management law firms and other employer advocates, that the proposed disclosures may infringe on the attorney-client privilege. It is common for an attorney's legal advice to be intertwined with the review of communications that will be made to employees. Even though the DOL's commentary states that privileged material need not be disclosed, in reality if there was an investigation, the DOL would have to delve into the nuances of the discussions between the employer and the attorney to determine what parts were unprotected by the privilege. The DOL shouldn't put itself in the position of analyzing advice from attorneys to their employer clients. Such a role is entirely inappropriate, especially when the resulting communications to employees are lawful under the NLRA.

Checklist format okay but list should be reduced

The DOL asked for comment on the proposed checklists of items that constitute reportable persuader activity on the forms. We have no objection to the checklist concept but believe that the items on the lists should be reduced to reflect the activities that are currently considered to be persuader activities.

Associations should be exempt from reporting

If the DOL decides to proceed with the proposal to expand reporting requirements, then we respectfully request that an exception be made for employer associations. Associations are structured differently from traditional labor relations consultants or even law firms. Many associations have a non-profit arm. Also, unlike labor relations consultants, our mission is much broader than simply assisting employers with union organizing drives. Employer associations offer a variety of services to help members meet a variety of employment-related challenges. As explained above, the association dues model does not easily lend itself to the proposed financial reporting requirements. Vigilant is a member of the Employer Associations of America (EAA) and we also support the concerns expressed in their comments.

Conclusion

The proposed expanded disclosure obligation imposes significant burdens and yet is not supported by logical, compelling reasons to proceed. The proposal is contrary to the NLRA goal of protecting employee rights, as it discourages employers from seeking experienced counsel on how to lawfully communicate with employees about their rights to organize and bargain collectively. Without competent guidance, inexperienced employers are much more likely to unwittingly violate workers' NLRA rights.

Implementing the proposal would result in a flood of unnecessary reports to the DOL. Also, unions would be able to challenge every employer communication to employees related to a union organizing drive and allege that the communication was influenced by an outside consultant. Surely the DOL does not want to be in the position of investigating every such communication, especially when those communications are clearly lawful under the NLRA.

Also, it is the history of union financial abuses and mismanagement of the money contributed by their membership that compels the need for detailed financial disclosures by unions. Employees contributed their hard-earned money to the unions, so it makes sense that employees are entitled to know where their money went. In the context of labor relations advice, there is no equivalent financial temptation for employers or labor relations consultants to defraud employees, and therefore no need to make their financial reporting on a par with that of unions.

We sincerely hope that the DOL takes these comments into account and withdraws the proposal. If the DOL ultimately decides to proceed, however, we respectfully request that an exception be made for employer associations, which have a unique, ongoing relationship with their member companies to provide a wide variety of services. On behalf of our members and their employees, thank you for considering these comments.

Sincerely,

Karen E. Davis

Karen E. Davis
Senior Employment Attorney
Vigilant