Congress of the United States
Washington, DC 20515

September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210

RE: Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption

Dear Chief Davis:

We are writing to express our strong support for the Department of Labor's ("DOL" or "Department") proposed revised interpretation of the "advice" exemption in section 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA" or "Act"). After more than a half-century of uneven and ineffective enforcement, the revised interpretation finally aligns section 203 with congressional intent and will restore common sense to the LMRDA's reporting requirements.

Section 203 was enacted to increase transparency of the union avoidance business and provide workers with information about who is behind the anti-union messages they receive prior to an election on union representation. Congress created an exception whereby anti-union consultants were not required to report activities that were limited to solely providing advice. DOL's existing interpretation of that exception—that advice equals all conduct other than direct interaction with employees—is overbroad and allows employers to avoid reporting persuader activity that Congress intended to cover in the LMRDA.

The revised interpretation would shift the focus of the advice exemption away from the "direct contact" test to a more common sense assessment of whether the activity in question goes beyond mere recommendation and is intended to persuade employees. This approach will finally bring transparency to labor-management relations and will help ensure that employees are fully informed when they make a decision to exercise or not to exercise their rights.

I. The purpose of Section 203 of the LMRDA is to ensure transparency in the use of labor relations consultants.

In 1958, Congress convened the Senate Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee. The committee identified a host of abuses in the labor and management fields that were disrupting commerce and undermining labor-management relations. S. Rep. No. 187, at 5 (1959), *reprinted in* 1 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 397, 401 (1959) [hereinafter LMRDA Leg. Hist.]. The LMRDA was Congress' response to the McClellan report. Recognizing that the problems

facing labor unions were bound up with a "substantial public interest," the LMRDA adopted the recommendations of the McClellan report to correct these abuses. *Id.* at 6.

Among the McClellan committee's five legislative recommendations was "to curb activities of middlemen in labor-management disputes." *Id.* at 2.[1] Congress cited the committee's hearings when it summarized the problem prior to passage of the LMRDA:

> [Employers] have employed so-called middlemen to organize 'no-union committees' and engage in other activities to prevent union organization among their employees. They have financed community campaigns to defeat union organization. They have employed investigators and informers to report on the organizing activities of employees and unions. It is essential that any legislation which purports to drive corruption and improper activities out of labor-management relations contain provisions dealing effectively with these problems.

Id. at 6.

Section 203 was Congress's response to these concerns. The House explained that section 203 requires the reporting of activity in which a contractor "undertakes to persuade employees to exercise or not to exercise, or as to the manner of exercising, their statutory right to organize and to bargain collectively, or undertakes to supply the employer with information concerning activities of employees, or a union, in connection with a labor dispute involving such employer." H.R. Rep. No. 1147, at 32 (1959), *reprinted in* LMRDA Leg. Hist., at 934, 936 (1959).

The Senate was equally clear in describing the type of activity it intended to reach with section 203's reporting requirements. It stated: "the committee believes that employers should be required to report their arrangements with these union-busting middlemen" who are paid by employers to "interfer[e] with the right of employees to join or not to join a labor organization of their choice." S. Rep. No. 187, at 10. Congress concluded that even if a consultant's conduct was not unlawful or otherwise constituted an unfair labor practice under the NLRA, such activities "should be exposed to public view," *id.* at 11, because they are "disruptive of harmonious labor relations and fall into a gray area." *Id.* at 12.

Congress determined that sunlight was the best medicine for these practices within the labor-relations field. Therefore, Section 203 of the LMRDA requires employers and labor relations consultants to disclose to DOL "any agreement or arrangement...pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise...the right to organize and bargain collectively." 29 U.S.C. 433(a)(4). Notably, the statute does not prevent employers from continuing to enter into relationships with labor relations consultants. It merely requires that these relationships be exposed to public view.

II. The DOL's old "Direct Contact" limitation on reportable activity decreased transparency and contributed to an explosion of non-reported persuasion activities, eviscerating the statutory purpose of Section 203.

[1] Congress clarified section 203 by providing a vivid example of the type of abuse that led to the creation of reporting requirements in the first place. In the 1950s, an independent contractor named Nathan Shefferman had become prominent in the labor-management consultant field. His firm specialized in union avoidance, and in addition to engaging in such illegal activities as bribery, coercion of employees and racketeering, also pioneered the creation of employee 'vote no' committees as a way of influencing employee opinion while operating below the radar. John Logan, *The Union Avoidance Industry in the United* States, 44:4 British Journal of Industrial Relations 651, 653 (2006). The House of Representatives and Senate both specifically identified Shefferman as the motivation for the disclosure requirements in section 203 of the LMRDA.

Section 203 includes an exemption to its reporting requirements. Subsection 203(c) provides 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). Unfortunately, DOL's previous construction of this provision – the 'advice' exemption – has been overbroad and has undermined the reporting requirements of section 203 and deviates from congressional intent.

The Department currently interprets the advice exemption in such a way as to make contact with employees a litmus test for disclosure. This interpretation has punched a huge hole through section 203's reporting requirements. As the Department of Labor correctly points out, the current interpretation exempts from reporting the very agreements and arrangements at the heart of section 203. *Id.* at 36, 183. It permits labor relations consultants to engage in many of the persuader activities Congress targeted in the LMRDA, but to avoid disclosure as long as the consultants avoid direct contact with employees.[2]

The current interpretation of the advice exemption has undermined the purpose of LMRDA's disclosure requirements. Despite extraordinary growth in the labor relations industry over the past several decades, reporting under the Act has been negligible. One witness during a 1982 hearing of a House subcommittee stated that the current interpretation, "stretched to its extreme...permits a consultant to prepare and orchestrate the dissemination of an entire package of persuader material while sidestepping the reporting requirement merely by using the employer's name and letterhead or avoiding making direct contact with employees." Interpretation of the "Advice" Exemption, 76 Fed. Reg. at 36,181.

When Congress passed the LMRDA in 1959, there was one prominent firm that specialized in union avoidance. By the mid-1980s, there were over a thousand. Logan, *supra*, at 652-53. Today, it is estimated that between 71 and 87 percent of employers utilize labor relations consultants when faced with a union drive. Interpretation of the "Advice" Exemption, 76 Fed. Reg. at 36,186. Based on these numbers, DOL estimates that it should be receiving approximately 2,600 employer and consultant disclosures annually. Under the current rule, it only receives about 192 disclosures annually. *Id.*

Many of these firms engage in practices that trace their roots to the union-busting activities pioneered by Nathan Sheffermann that were the basis of section 203's reporting requirements: they attempt to operate beneath the radar, using local management and supervisors to implement their tactics, Logan, *supra*, at 657; they run union avoidance campaigns, *id.* at 663; and they use both subtle and blunt forms of manipulation and intimidation to ensure that employees are prevented from organizing. *Id.* at 664. Anti-union consultants frequently became a shadow management at a facility, making disciplinary decisions and drafting scripts for mid-level managers to read. Even when this conduct is lawful, Congress determined that workers were entitled to information about the source of the anti-union campaign. The purpose of the LMRDA is to increase the transparency of these activities, yet today they are less transparent than ever.

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[2] Nowhere in the legislative history does Congress suggest that section 203 applies only when there is direct contact between a labor relations consultant and employees. In fact, Congress expresses the opposite intent in a 1959 Senate Report. The report states that disclosure is required when a consultant acts "directly or indirectly *through employees, groups or committees of employees, or other persons...* to persuade employees" whether to exercise their right to join a union and bargain collectively. *Id.* at 38-39. (emphasis added) Thus, even when a consultant acts through a person other than an employee, such as an employer, the activity is still subject to section 203's reporting requirements.

Voters need to know the source of information in order to evaluate its credibility. The current rule deprives workers of this information, which disempowers workers and results in a less informed electorate. By law, many political advertisements require disclosure of who paid for the information in the advertisement. Section 203 of the LMRDA is analogous. It is based on Congress's determination that employees deserve to know who these consultants are in order to assess the credibility of their arguments against unionizing.

In addition, the amount of money paid to anti-union consultants would stun most employees and likely influence their views on whether the employees should unionize. One frequent reason workers want to organize a union is because they feel that management is denying them a fair share of the profits of their labor. In that case, they would surely be interested to learn that management is paying lavish fees for consultants to run a campaign opposing the workers' unionization drive. While the fees paid are usually shrouded in secrecy (because of DOL's loophole), litigation documents revealed that a battery company called EnerSys paid Jackson Lewis, a leading anti-union consultant firm, $2.7 million dollars for assistance in union avoidance. Logan, *supra*, at 661. It is entirely conceivable that employees would change their vote on unionizing if they knew management was paying $2.7 million for consultation on how to prevent employees from unionizing. Likewise, a common talking point from anti-union consultants is that the company lacks the resources to offer raises or, even more fatalistically, that unionization may drive the company into bankruptcy. A relevant factor in assessing the probability of that outcome is the amount of money being paid to the consultant.

DOL's revised interpretation of the advice exemption would restore a common-sense understanding to the term 'advice' as used in section 203(c). It would close the loophole that allows employers and consultants to engage in the conduct that is at the heart of the LMRDA's reporting requirements, and it would ensure that persuader activities are subject to the public disclosure that Congress intended.

III. The revised interpretation better implements Congressional intent while maintaining adequate protections for employers' ability to obtain legal advice.

Congress was clear when it passed the LMRDA that section 203 does not in any way infringe upon the ability of employers to obtain legal advice. But Congress was equally clear that it did not intend for an entire industry to skirt the law by slapping a law firm's imprimatur on activity that otherwise should be reported. Lawyers who engage in persuader activity should be required to report such activity. Section 203(c) exempts from reporting "expenditures made to obtain information for use solely in a judicial administrative or arbitration proceeding," as well as "expenditures to obtain legal advice." S. Rep. No. 187, at 11. Under its previous rules, the DOL incorrectly transformed that limited exception for attorneys into a blanket exoneration from reporting requirements. The new proposed rules strike a more appropriate balance.

Claims that the new rules jeopardize the attorney client privilege are baseless. First, the information that would be reportable has traditionally not been covered by privilege, such as the fact of legal consultation, clients' identities, attorney's fees, and the scope and nature of the employment. Interpretation of the "Advice" Exemption, 76 Fed. Reg. at 36,192. In addition, Section 204 of the LMRDA, which is still in force, maintains sufficient protections for the attorney-client relationship. Section 204 explicitly exempts any privileged material under the attorney-client relationship from the disclosure requirements of the LMRDA. The LMRDA does not require persuaders to report any information that would be subject to the common law attorney-client privilege. Thus, if an attorney is required to file a disclosure because he or she engages in persuader activity in addition to providing legal advice, the attorney is required to report only such information not subject to privilege.

Rather than threatening attorney-client privilege, DOL's revised interpretation of the advice exemption will restore section 203(c) to its original, narrower purpose of protecting attorney-client privilege and the ability of employers to obtain legal advice.

The reporting requirements in section 203 of the Labor-Management Reporting and Disclosure Act were a sensible solution to a clear problem. Under the National Labor Relations Act, it is the policy of the United States to protect the rights of workers to organize labor unions and bargain collectively. Abusive practices by some labor relations consultants undermined that policy, and unfortunately, the existing interpretation of the advice exemption has frustrated Congress' attempt to address the problem. After more than a half century of ineffective enforcement of the LMRDA, the Department of Labor's revised interpretation of the advice exemption will restore the Act to its intended meaning. For these reasons, we strongly support the Department of Labor's proposal.

Sincerely,

Senator Tom Harkin
Chairman, Committee on
Health, Education, Labor and Pensions

Rep. George Miller
Ranking Member, Committee on
Education and the Workforce