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LiUNA!

September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretation and Standards
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U.S. Department of Labor
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RE: RIN 1215-AB79; RIN 1245-AA03; Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption

Mr. Davis:

Below please find the comments of the Laborers' International Union of North America ("LIUNA") concerning the U.S. Department of Labor's ("Department") June 21, 2011 Notice of Proposed Rulemaking ("NPRM"). The NPRM proposes to revise the Department's interpretation of the advice exemption under the Labor-Management Reporting and Disclosure Act ("LMRDA").[1] LIUNA is one of the nation's largest and oldest labor organizations, and we have been consistently engaged in the rulemakings of the last decade that increased the reporting required of labor organizations on the Form LM-2 and union officials on the Form LM-30.

Our knowledge of the LMRDA combined with our experience acquired from organizing efforts over the years, in which we frequently encounter the direct and indirect influence of labor relations consultants, permits LIUNA to make broad and well-informed observations on this NPRM. We view this NPRM as an important first step in the process of providing workers some degree of meaningful information about arrangements and agreements between employers and consultants to influence their decisions regarding the exercise of rights protected under the National Labor Relations Act. This is essential to the LMRDA's goal of ensuring workers can make an informed decision about the exercise of these rights.

[1] Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, 76 Fed. Reg. 36178 (proposed June 21, 2011).

I. LIUNA Supports Returning to the Original Understanding of Section 203(c) as an Exemption to a General Rule of Disclosure Instead of Interpreting Section 203(c) as a General Rule Making Disclosure the Exception.

Section 203 of the LMRDA requires employers and labor relations consultants to each disclose the agreements or arrangements they enter into when a direct or indirect object is for the consultant to undertake activities intended to persuade employees as to their decision to exercise or not to exercise, or the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.[2] Employers comply with this requirement by disclosing such agreements and related payments on a Form LM-10. Labor relations consultants comply with this requirement by disclosing the agreement or arrangement on a Form LM-20 and then reporting receipts for all of their labor relations services on the Form LM-21. Section 203(c), however, exempts from reporting agreements or arrangements to provide "advice" or representational services before a court, agency, tribunal, or in collective bargaining negotiations.[3] A clear example of an agreement Congress intended to exempt under this provision is when an employer drafts materials it intends to deliver or disseminate to its employees to persuade them to reject a union and the employer has a lawyer review the materials solely for the purpose of assessing whether they are legal under applicable labor laws.[4] For most of the past 50 years, however, the Department has interpreted the advice exemption in a very broad manner that encompasses much more than this narrow subset of arrangements.

Instead, the advice exemption has grown to the point where only very narrow and discrete activities trigger reporting by labor relations consultants. Almost any agreement or arrangement between an employer and a labor relations consultant is exempt unless it entails the consultant delivering or disseminating information or materials directly to employees for the purpose of persuading them as to their organizational or bargaining rights.[5] The Department currently maintains that revising the persuader materials drafted by an employer and even a consultant's preparation of such materials in the first instance can both be deemed "advice" that does not necessitate reporting.[6] Consequently, the current interpretation allows a labor relations consultant to prepare in its entirety and orchestrate the dissemination to employees through a company's managers and supervisors a complete package of persuader materials without triggering any reporting requirements. This has resulted in many employers utilizing "union-busting" consultants to thwart organizing efforts without the workers ever knowing of the presence of such consultants or their involvement in what employees are seeing, hearing and experiencing during an organizing campaign. To the extent that the current interpretation of the advice exemption has made section 203(c) a wall behind which consultants can hide while

[2] 29 U.S.C. § 433(a)(4); 29 U.S.C. § 433(b).
[3] 29 U.S.C. § 433(c).
[4] OLMS Interpretive Manual § 265.005, Scope of the Advice Exemption.
[5] *Id.*
[6] *Id.*

orchestrating an anti-union campaign, it defies both the language and the legislative intent of the LMRDA.

The NPRM dismantles this wall while protecting the core concerns justifying the advice exemption. What the NPRM proposes is not a novel approach. It is grounded in the plain meaning of the text of section 203(c), as noted in DOL's initial interpretation of the exemption in 1960. This interpretation required reporting of any arrangement with a labor relations consultant or other third party to draft speeches or written material to be delivered or disseminated to employees for the purpose of persuading them as to their right to organize and bargain collectively.[7] Under this original interpretation, a labor relations consultant's revision of a document prepared by an employer was a reportable arrangement unless the consultant's efforts were limited solely to providing advice on matters such as whether the materials violated federal labor laws.[8] The Department maintained that reporting was required in any situation where the consultant's activity went beyond the mere providing of such advice or where it was impossible to separate advice from persuader activity.[9] Unfortunately, two years later, in 1962, the Department changed its initial view of the advice exemption and adopted what has generally remained the current, broad interpretation for the past 50 years, except for a brief period in 2001.

In 2001, the Department attempted to return the advice exemption to its 1960 contours so that it only applied to situations where an activity can be considered actual "advice," meaning an oral or written recommendation regarding a decision or course of conduct.[10] But this narrower interpretation was never implemented; and it was ultimately rescinded.[11] The Department then readopted the 1962 interpretation that is currently in effect. The Department now proposes to return to the approach of the advice exemption as set forth initially in 1960 and again in 2001. This is a necessary step to give meaning to the plain language of the LMRDA and to comport with the law's general structure and the legislative intent behind section 203.

II. The Proposed Definition of "Advice" is Practical and Consistent with the Plain Meaning of the LMRDA as well as Congressional Intent.

In enacting the LMRDA, "Congress determined that persuasion itself was a suspect activity and concluded that possible evil could best be remedied through disclosure."[12] Accordingly, the Andrew R. Davis

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[7] *Supra* note 1, at 36180; *see also* Department of Labor, Bureau of Labor-Management Reports, Technical Assistance Aid No. 4: Guide for Employer Reporting 18 (1960).
[8] *Supra* note 1, at 36180.
[9] *Supra* note 1, 36180; *see also* Benjamin Naumoff, Reporting Requirements under the Labor-Management Reporting and Disclosure Act, in Fourteenth Annual Proceedings of the New York University Conference on Labor 129, 140-141 (1961).
[10] Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. 2782 (January 11, 2001).
[11] Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. 18864 (April 11, 2001).
[12] *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985).

statute mandates disclosure of persuader agreements and arrangements so that employees can cast an educated vote on whether or not to unionize. Unfortunately, much of the transparency the law was intended to create is frustrated by the current interpretation of the advice exemption.

The problem with the current interpretation is that it is not grounded in the common and ordinary understanding of the word "advice"as Congress intended. Classifying an activity as "advice" if it is submitted orally or in written form to the employer and he is free to accept, reject, or modify the materials provides no principled distinction between exempt advice and reportable persuader activity. The inquiry Congress deemed relevant centered on the nature and object of the consultant's activities—not the employer's discretion to accept, reject or modify their work product. The NPRM addresses this anomaly by defining "advice" as it is commonly understood to mean a recommendation from a consultant regarding a decision or course of conduct.[13] Providing "advice," as the NPRM defines the term, means there is no intent or object to persuade employees. Therefore, the NPRM wisely proposes that reporting is required anytime a labor relations consultant engages in persuader activity, even if it is mixed with giving "advice."[14]

This practical definition of "advice" proposed by the NPRM is also consistent with the Congressional intent of the LMRDA. As the NPRM notes, the legislative history makes clear that the primary purpose behind the enactment of section 203 was to promote an employee's freedom of choice by revealing the real source of persuader activity so that the content could be evaluated based on the source and his or her motivations and incentives.[15] Congress was most concerned with the disclosure of middlemen persuading employees either directly or indirectly. The Senate Select Committee on Improper Activities in the Labor or Management Field uncovered many abuses by middlemen, including spying on employee organizing activity, establishing "spontaneous" employee committees which actually served as fronts for employers' anti-union activity, and designing psychometric employee tests to identify pro-union employees.[16] Congress envisioned that all affirmative acts that have as a direct or indirect object persuading employees would be disclosed under section 203. The practical definition of "advice" proposed in the NPRM does not exempt these activities Congress wanted disclosed, but the current interpretation often does exempt such conduct from reporting.

III. There is a Need for and Value to the Increased Detail Proposed on the Form LM-20 and Form LM-10.

The Department has not materially revised the substance of the Form LM-20 consultant report or the Form LM-10 employer report since the forms were first published in 1963. The NPRM proposes to mandate electronic filing for each form, add a detailed checklist to each that discloses the scope of activities engaged in by consultants, and require filers to disclose

[13] *Supra* note 1, at 36211.
[14] *Supra* note 1, at 36211.
[15] *Supra* note 1, at 36184.
[16] *Supra* note 1, at 36184.

information that will help ensure compliance by all parties to a reportable agreement or arrangement.[17] LIUNA supports these proposed changes.

Electronic filing has several benefits. As we have seen in the context of the Form LM-2, it is more efficient for those filing reports. Electronic filing can incorporate safeguards that preclude common errors in reports ranging from bad math to inadvertently leaving blank a required item. It facilitates prompt uploading of reports on the Department's website so that employees can quickly benefit from the information the reports contain. Electronic filing should also improve the Department's efficiency in processing the reports and reviewing them for compliance. It should also reduce the cost of the data collection for the government.

Adding a detailed checklist of activities undertaken allows employees and the public to know the specific types of persuasion consultants have been engaged to perform in relation to an organizing campaign. Modern-day labor relations consultants employ a wide array of diverse tactics, such as selecting which employees to target for persuader activity, preparing anti-union speeches and materials, making anti-union films, and training supervisors to influence rank-and-file employees to reject union representation. Currently the Form LM-20 allows for vague and brief narrative descriptions of persuader activity that leave consultants considerable discretion as to how to describe their services. These descriptions usually provide little useful information. A detailed checklist of activities ensures more detailed and informative reporting.

The NPRM will also facilitate disclosure and ensure compliance with LMRDA reporting by all parties to a persuader agreement. Under the NPRM, a consultant must provide the EIN of the employer engaging his or her services. This will assist the public and the Department in analyzing whether employers are meeting their corollary filing commitments. Additionally, the NPRM proposes to require reporting on the Form LM-20 of the identity of the primary consultant when he brings into an employer-consultant agreement an indirect party, or "sub-consultant," for assistance.[18] Having indirect parties to employer-consultant agreements file their own Form LM-20 is not a new requirement.[19] But having them, for the first time, disclose the primary consultant who engaged them will enable the Department to more easily determine if additional reports are owed. It will also permit the Department to inquire whether consultants are properly classifying their subconsultants as independent contractors as opposed to employees for purposes of ensuring that consultants comply with the Fair Labor Standards Act, as all employers are required to do.

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[17] *Supra* note 1, at 36193.
[18] *Supra* note 1, at 36194.
[19] *Supra* note 1, at 36195.

IV. *Conclusion*

Over the last decade, the Department has increased considerably the information workers have about labor organizations seeking to be their collective bargaining representative. But there has been no corresponding increase in the information available about consultants employers hire to persuade them to reject union representation. The proposed NPRM is important because it will finally give employees at least the degree of information Congress intended for them to have about such consultants and their activities when it enacted the LMRDA. The current reading of the advice exemption is indefensible insofar as it transforms an exception to a reporting regime into a general rule making disclosure the exception. We applaud the Department for recognizing this absurdity, the lack of support for it in the law, and the harm it does to workers seeking to make an informed decision about the exercise of fundamental workplace rights.

Thank you for your consideration of our comments,

Very truly yours,

TERRY O'SULLIVAN
General President

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