These comments are respectfully submitted as related to the Department of Labor's consideration of rulemaking that would amend the "advice exception" under the Labor Management Reporting and Disclosure Act (LMRDA).

INTRODUCTION

The LMRDA was passed in 1959 and has required employers and labor consultants to file reports with OLMS whenever they enter into an agreement or arrangement whereby the consultant will undertake activities to persuade employees about exercising their rights to organize or bargain collectively or to supply an employer with certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving an employer.

The rule proposed by the Department of Labor zeroes in on "advice" provided by a consultant, including attorneys, and would trigger the reporting of an agreement in any case where the consultant engages in persuader activities that go beyond the plain meaning of the word. Except for the first few years after the law was passed, the Department of Labor has interpreted "advice" as excluding activities in which a consultant worked with the employer and the employer's managers and supervisors in training, preparing documents or speech materials for supervisors to use in communication with employees, and developing policies or practices designed to persuade employees that a union was unnecessary. A filing requirement was triggered only in those instances where a consultant communicated directly with employees with the purpose of persuading them to reject union representation.

Under the proposed amendment, reportable persuader activities would include those in which a consultant engages in any action, conduct or communications on behalf of an employer that would directly or indirectly persuade employees concerning their rights to organize and bargain collectively, regardless of whether or not the consultant has direct contact with non-supervisory workers. Neither the current interpretation of the law or the proposed rulemaking involves regulating the actual persuader activities or statements. The proposed rule only focuses on whether the activities would trigger reporting and thus public disclosure. It would be a criminal act for an employer or consultant not to file regarding persuader activities when required.

OLMS would provide forms to be filed by the employer and its consultant when the consultant has engaged in persuader activities beyond mere advice related to compliance with the law or labor law precedent cases. The proposed rule would also require filing if the consultant both provided advice and engaged in persuader activities – "mixed" activities. We interpret the rule to require a filing for both the covered and non-covered labor relations activities once the consultant or attorney has provided persuader activities.

The list of "persuader" activities under the proposal includes the following:

- Training of supervisors, which would support the supervisors' communications to persuade employees in their opinion on union representation.
- Preparation/drafting of materials, speeches or website content to be distributed or spoken to by the employer and its supervisors.
- Planning, preparing a campaign calendar, coordinating or directing the activities of the supervisors of the employer during a campaign.
- Developing an employer's policies and procedures to persuade employees to reject union representation. Examples of such policies could include dispute resolution procedures, no solicitation/no distribution rules, and a "union-free" policy.
- Seminars and conferences for multi-employer groups discussing union-free topics.
- Planning or holding one-on-one meetings or group meetings with employees.

OPPOSITION TO THE PROPOSED RULE

I am opposed to the proposed rule for several reasons. My firm, my associates in the firm and I have observed the current interpretation of the law and have refrained from engaging in direct persuader activities that would trigger a filing requirement. The firm has always worked under the premise that communication with employees works best when it is a supervisory, rather than a consultant, responsibility. An adjunct of this premise is that employees' and employers' best interests are served by "direct" communication. As a result, neither the firm nor its clients have found it necessary to file persuader reports as a result of our firm's engagement or activities. However, if the Department of Labor implements its proposed rule which significantly narrows the definition of advice and, thereby, expands the definition of direct and indirect persuader activities, the firm would be required to follow the law if it wanted to continue to work with its clients as it has in the past in various areas of human resources, employee relations and positive personnel practices.

1. The Proposed Rule Is Based Upon Wrong Assumptions. As a management consultant working in the area of human resource practices, labor relations, communications and positive employee relationships, I am personally offended by the proposed rule. It appears to me the rule is based on a belief that the work of a consultant as myself is wrong, disreputable or unfair and that it necessitates additional governmental control so as to enable the Department of Labor, unions and the general public to review and

investigate consultant activities, services and the costs associated with the services. Under the proposed rule one must assume that the dealings we have with our clients must be monitored for the good of the public regardless of privacy and confidentiality considerations. In fact, failure to file the required documents may be treated as a criminal offense.

2. The Proposed Rule Interferes With Client Relationships. Because the proposed rule begins with the wrong assumptions, it has the real potential of interfering with private consultant/attorney and client relationships. Hiring a management or attorney given the overly broad scope of "advice" interferes with relationships because it forces the filing of private and potentially confidential information without cause. The activities that fall under the definition of advice could be absolutely legal, moral and advantageous to business and employer-employee relationships and still demand filings.

   Employers may be dissuaded from hiring employing consultants and attorneys because the engagement may result in filing requirements. For example, employers could forego support of their own free speech rights for fear that advice provided by drafts of employee communication material provided by an attorney or consultant would trigger a filing requirement.

3. Evening The Playing Field For Unions Is Not Necessary. If the proposed rule intends to even the playing field between employers and unions, it is not necessary. Unions have won more than one-half of all representation cases in each of the last fourteen years. In the last four years, the percentage of union wins in union elections has climbed to nearly seventy percent (70%). The proposed rule appears to be an attempt to provide unions with additional opportunity to expand their shrinking membership as a percentage of the U.S. workforce.

   In addition, processes exist under the National Labor Relations Act to raise, investigate and resolve illegal/unfair labor practice. The NLRB can bring a matter to federal court to enjoin illegal practices or to enforce its orders resolving unfair labor practices.

4. The Proposed Rule Would Be Difficult To Interpret For Employers. Currently there is a bright line that focuses on recordable persuader activities - has the attorney or consultant engaged in direct communications with employees? Under the proposed rule it would be extremely difficult for an employer to discern what activities performed by an attorney or consultant would be reportable. This is particularly true because the proposed rule has broadened to the extent that training, attitude surveys, and other human resource management activities are included in reportable activities. As a result of the proposed rule, the Department of Labor could find itself burdened by the need to

define an employer's intention with regard to conducting an attitude survey or engaging in general human resource management activities. Was the survey or activity supported by attorney or consultant intended to persuade employees on union matters?

5. The Proposed Rule Would Be A Financial Burden to Employers. Employers would be forced to utilize staff and work time to determine if the engagement of attorneys or consultants would trigger filing requirements, even if the engagement did not directly deal with union or collective bargaining issues. Such expenditures could be better directed in creating new employment opportunities to support our suffering economy.

Conclusion. In view of the reasons cited above, I urge the Department to withdraw the proposed rule and allow the current interpretation of "advice" to remain in place. The current rule with its focus on direct persuasive communication with employees by attorneys and consultants related to union issues provides a reasonable and identifiable standard upon which to rely as to LMRDA filing requirements.

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