STEWART WEINBERG
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LINDA BALDWIN JONES
PATRICIA A. DAVIS
ALAN G. CROWLEY
KRISTINA L. HILLMAN •••
EMILY P. RICH
BRUCE A. HARLAND
CONCEPCIÓN E. LOZANO-BATISTA
CAREN P. SENCER
ANNE I. YEN

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
TELEPHONE 510.337.1001
FAX 510.337.1023

LORI K. AQUINO ••
KRISTINA M. ZINNEN
JANNAH V. MANANSALA
MANUEL A. BOÍGUES ••••
KERIANNE R. STEELE •••
GARY P. PROVENCHER
LISL R. DUNCAN
JORDAN D. MAZUR
JACOB J. WHITE
SHARON A. SEIDENSTEIN
LESLIE V. FREEMAN •••••
EZEKIEL D. CARDER ••••••
YURI Y. GOTTESMAN
ADAM J. LUETTO
MONICA T. GUIZAR
SARAH R. WRIGHT-SCHREIBERG
RUSSELL NAYMARK

PATRICIA M. GATES, Of Counsel
ROBERTA D. PERKINS, Of Counsel
RICHARD T. DRURY, Of Counsel
NINA FENDEL, Of Counsel
ANA M. GALLEGOS, Of Counsel

• Also admitted in Arizona
•• Admitted in Hawaii
••• Also admitted in Nevada
•••• Also admitted in Illinois
••••• Also admitted in Missouri
•••••• Also admitted in New York

September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards,
Office of Labor-Management Standards,
United States Department of Labor
200 Constitution Avenue N.W., Room N-5609
Washington, D.C. 20210

Re: Labor -Management Reporting and Disclosure Act;
Interpretation of the "Advice" Exemption
RIN 1215-AB79 and 1245-AA03

Dear Mr. Davis:

These comments are submitted with respect to the above captioned Notice of Proposed Rule Making. These comments are submitted on behalf of our law firm, Weinberg, Roger and Rosenfeld.

Our law firm has been representing labor organizations for over 50 years. With four offices and approximately 45 lawyers in the firm, we are one of the largest union side law firms in the country. We estimate that our clients, directly and through affiliates, have a membership in excess of a million members throughout California and various other parts of the Western states. Although presently known as Weinberg, Roger and Rosenfeld, our firm has had various other names throughout its more than 50 years of history but remains essentially the same firm with the same mission of vigorously representing labor organizations in order to better the lives of working people.

We submit these comments because of our extensive history with respect to the activities of consultants. Although our firm came into existence shortly after the enactment of the reporting requirements in 1959, we have seen how the consultant and employer reporting requirements have been largely ignored because of the "advice" exemption. The effort by the Department of Labor to correct the application of the "advice" exemption by this proposed rule making is a very welcome advance. More importantly the new forms proposed by the Department of Labor are consistent with the original intention of Congress in requiring these reports in 1959. The expansion of the "advice" exemption to include all indirect persuader activity violated the clear language as well as the intent of Congress which required the reporting of activity under the statute.

Our experience is consistent with the rationale supporting the Notice of Proposed Rule Making, the experience of labor organizations generally and the statements of other persons and organizations who support of the proposed rule making.

Our experience is that a relatively small percentage of organizing events or activities and Board conducted elections involve direct consultant activity. Unfortunately, the majority of the organizing efforts involved activity which is indirect persuasion and the kind that is presently exempt from reporting by the current interpretation of the "advice" exemption.

The NPRM accurately points out that there are an extremely small number of LM-20s filed each year in comparison to the number of representation matters.[1] There are also many overt organizing efforts which are halted once consultants have become involved and no reports have been filed where there is no NLRB or NMB filing.

These comparisons demonstrate that the great majority of consultant activity is the indirect kind which is subject to the Department's current "advice" exemption and thus not reported. Thus, the "advice" exemption has effectively swallowed up the rule.

The indirect persuader activity the Department has identified and which we experienced on many includes the following:

- Captive audience meetings, including captive audience meetings where prepared speeches are read or where outlines of speeches are used by corporate officials. Some are during normal work hours, some are during extended work hours.
- Group meetings.
- Picnics, barbecues and voluntarily after hours meetings
- Literature which is handed out to employees regarding the organizing or representation process.
- Employee handbooks which expressly refer to the anti-union stance of the employer.
- Videos depicting anti-union messages.
- Banners and posters in the work site.
- Scripted or prepared one-on-one meetings with workers.
- Scripted or prepared one-on-one contacts with workers on the shop floor.
- Ride-alongs and other direct contact with employees while working.
- Email, twitter and other electronic messages to employees.
- Preparation of campaign paraphernalia such as anti-union buttons, anti-union hats and anti-union t-shirts.

These are kinds of indirect consultant activity engaged in by management that is regularly orchestrated, scripted and prepared by consultants.

[1] Some large corporations have internally developed persuader activity which may not be subject to the reporting requirements even as proposed. We assume that much of this material was developed by consultants but is promulgated and used by an internal corporate office.

In addition to this conduct, managers are taught many other activities which are designed to be part of the anti-union campaign during any organizing effort including an election campaign. Supervisors are taught to engage in surveillance of union activity, to correct or change situations in order to encourage employees to think that management will correct problems which have arisen in the workplace, to promote union supporters out of the bargaining unit, to encourage anti-union supporters to campaign against union and many other tactics, some of which are unlawful under the National Labor Relations Act and others which are not.

Much of the activity which is engaged in by employers is unlawful. It is either unlawful because it violates Section 8(a) (1), Section 8(a)(3) or even sometimes Section 8(a)(4) of the Act. Currently such activity is reportable under 29 U.S.C. § 411(a)(3). Virtually none of it is reported. The Department can determine that very little is reported by simply looking at all of the reported NLRB cases as well as the settlements entered into with the Board regarding such conduct where there is no parallel report filed. The new reporting forms will make it easier for employers to report this activity as well as make it easier for the Department to determine whether such reports have been filed. Hopefully the Department of Labor and the National Labor Relations Board will coordinate on these issues so that where the National Labor Relations Board determines that such reportable activity has occurred, coordination and communication will occur so that the Department of Labor can enforce the reporting requirements. Coordination with the National Labor Relations Board is necessary in order to ensure enforcement.

With respect to the proposed forms and instruction, we have the following very specific comments:

A. The Instructions and Forms Should Make It Clear that the Reporting Requirement of Section 433(a)(4) Involving a Labor Dispute is Separately and Broadly Construed

The second comment is that 29 U.S.C. Section 433(a)(4) is broader than the other subsections because it requires reporting where a consultant "undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer…" This is broader than the reporting requirement of Section 433(a)(3) because it requires reporting not only of supplying information concerning "the activities of a labor organization" but also "the activities of employees…in connection with a labor dispute." Because the definition of labor dispute is extremely broad and "includes any controversy concerning terms, tenure or conditions of employment," even if unrelated to union activity, this particular reporting requirement is broader than simply reporting on labor organizations or activity involving organizing. This reporting requirement would then encompass some protected concerted activity where there is no organizing but only where consultants are ask to report on such "labor disputes."

In making this comment we note that this is different than the first comment dealing with activity protected by Section 7 of the Act. This relates to information regarding "any controversy

concerning terms, tenure or conditions of employment" which is broader then the reporting requirements of Section 433(a)(3).

Because of the statutory reporting requirement for information supplied "concerning activities of employees… in connection with the labor dispute," the reporting form should separate out the reports required for this particular conduct to make it plain that this is different from both reporting about the activities of "a labor organization" and from reporting about the activities of "employees." Second, this will also help distinguish it from the reporting requirements in Sections 411(a)(2) and (3) with respect to "the right to organize and bargain collectively" which is, as we pointed out, is narrower than the broadly defined Section 7 rights.

In summary we suggest that the forms distinguish between these reporting requirements in order to clarify that reporting regarding "the activities of employees…in connection with the labor dispute" is different then from reporting with respect to "the activities of…a labor organization in connection with the labor dispute."[2] The Instructions should similarly emphasize this difference.

B. Additional Information Should Be Provided with Respect to Information-Gathering Activity

An additional box needs to be added to the LM-10 and other appropriate forms with respect to information-supplying activity. The third box should include "research in public or other sources outside the employer concerning the employees or labor organizations." The reason for this addition is that much of the research done by consultants by reference to the public record and private sources regarding the labor organization is separate and apart from the research done with respect to the activities of the employees of a labor organization at the employer's worksite. It should be clear that this is a different kind of activity.

C. Employers Should Be Required to Disclose the Nature of the Activities Which Interfere with Employees' Organizing Activities

The third point is that with respect to part D, box 17D of the LM-10, the report should require a statement of how the expenditure interfered with the rights specified in this statute. That is, the employer should disclose how the expenditure had the object of "to interfere with, restrain or coerce employees in the right to organize and bargain collectively through representatives of their own choosing.[3] Absent discussion or statement of the purpose or object, the reporting will be far less meaningful.

[2] One place for example where to clarify this is in part D of the LM-10 report. The second box should be split into 2 boxes so that one box regards reporting information "concerning activities and employees" while the third box to check would be for the purpose was "to obtain information concerning…a labor organization."
[3] The "and" perhaps should be "and/or".

D. The Reporting Requirements Do Not Need to Be Extended to Activities Involving Protected Concerted Activity Where There is No Union Activity

We do not believe it is necessary nor do we believe that it is authorized by the statute to require reporting on an LM-10, 20 or 21 of consultant activities where "the object thereof was directly or indirectly, to persuade employees concerning … *their right to engage in any protected concerted activity in the work place.*" This phrase "*their right to engage in any protected concerted activity in the work place"* appears several places in the forms and we believe it is unnecessary and probably not authorize by the statute.

Section 7 of the National Labor Relations Act defines the conduct which is protected by the Act. And Section 8(a)(1) prohibits employers from interfering with the right contained in Section 7 "to engage in other concerted activities for the purpose of …other mutual aid or protection…" This conduct does not always encompass conduct meant "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing…" The distinction here is well understood. There is some activity which is described as protected concerted activity which does not involve any either union organizing or collective bargaining. The principal case illustrating this is, of course, *NLRB v. Washington Aluminum, Co.*, 370 U.S. 9 (1962). Since *Washington Aluminum*, there have been numerous cases in which employees have engaged in protected concerted activity where there has been no union organizing involved. Nonetheless, *Washington Aluminum* illustrates that there is a wide range of activity which is concerted and protected but which does not involve union organizing.

We do not believe that it is necessary to extend the reporting requirements to such protected concerted activity where there is no union organizing involved. There are two reasons. First, consultants are not often involved in handling those kinds of situations because many of them arise and are resolved promptly. Secondly, we do not believe the statute authorizes the Department to require reporting where there simply is protected concerted activity involved and no organizing or collective bargaining involved. We submit that the references in the new forms and instructions to require reporting of such conduct be removed.

E. Additional Comments

Undoubtedly employers are concerned that these reporting requirements will extend to much of the advice which management lawyers and some consultants provide to employers with respect to training of employees, preparation of employee handbooks, monitoring of employment practices and similar conduct. We recognize that much of this goes on and we believe that much of it is designed to ensure compliance with state and federal laws. This is particularly true in states which have extensive regulation of the employment relationship such as California. It is, however, true that compliance activity occurs throughout the country where employer representatives are trained with respect to the handling of FMLA problems, wage payments, sexual harassment and the like conduct. We believe that training is helpful. Indeed, California

and other states have mandated such training. We do not believe that should be included in any reporting requirement

Finally we address some employer and consultant issues. We recognize as part of this that employers often provide employee handbooks and impose work site rules. I have personally examined personally, hundreds of handbooks over the last 15 to 20 years. Many of those handbooks contain rules that interfere with Section 7 conduct. That is the rules limit solicitation, prohibit disclosure of confidential information which by law employers may disclose and similar rules which are overbroad. See generally *Martin Luther Memorial Home*, 343 NLRB 646 (2004). Most of these handbooks however do not have any specific reference to being "union-free" or avoiding unions.

We do not believe that preparation of these handbooks even though they may contain overbroad rules that violate Section 7 is reportable activity. Where the handbook expressly refers to union avoidance or a union-free environment this should be reportable activity. Our experience, however, is that very few handbooks have such a specific reference. The reason we believe is because most employers don't want to call attention to the possibilities of unions in the handbook and deal with the issue. As a result, most handbooks have no such reference. We do not believe that any reporting requirement is necessary even though the effect of the rules may be in some cases to limit Section 7 activity prior to any organizing effort. If however those handbooks are prepared and promulgated in response to such union activity, they would be reportable. That would likely be an unfair labor practice and reportable under section 411(a)(3).

Similarly, we do not believe it is necessary to report seminars unless the purpose is union avoidance or to maintain a union-free workplace. To the extent that seminars or presentations are done to assist employers in maintaining a legally compliant workplace or to maintain a workplace that is better for employees, no reportable activity is necessary or occurs. We note that many consultants (lawyers and non-lawyers) provide this valuable service to employers and we do not believe it should trigger any reporting requirement.

We also recognize that it is sometimes difficult to understand the impact of consultant activity. In order to support this rule making activity, we have attached some documents which we think illustrate the kind of indirect consultant activity which has occurred and should be reportable. Some of this material is old because I have saved it over the years for exactly this kind of purpose. We submit it however in support of this rule making activity.

The following documents are submitted:

A. Exhibit A is a document entitled: "Positive Employee Relations" prepared by one of the partners of Jackson, Lewis, Schnitzler & Krupman, now known as Jackson Lewis, one of the largest management side law firms. This document was provided to the employer in an election in 1999. This illustrates the kind of indirect persuader activity where Jackson Lewis specifically provided training and campaign strategies in a union election.

B. Exhibit B is a speech prepared by Fisher & Phillips, another management law firm for an NLRB election campaign in 1999. This is the kind of direct persuader activity reflected in the preparation of anti-union speeches.

C. Exhibits C1-C4 is a series of presentations including captive audience speeches, prepared by the management lawyer in the course of a union organizing drive in 1997. The strikeouts indicate language which was not read. These were all exhibits provided by Ruiz Foods in an NLRB hearing. Ruiz Foods was assisted throughout this by Jackson Lewis.

D. Exhibit D is a document prepared by a well known consulting outfit known as "the American Consulting Group, Inc. entitled "Maintaining Your Union Free Status." Once again it was an effort to educate supervisors of what they could do in an organizing campaign. It goes beyond mere advice.

E. Exhibit E is a document that a Labor Relations Consultant named Sanford Rudnick had sent out to employers where he has discovered through checking NLRB records that an election petition has been filed. As noted, this is a direct effort to encourage persuader activity and to encourage hiring him to engage in indirect persuader activity.

F. Exhibit F is an example of some of the campaign literature prepared by a consultant in an election in 1997.

G. Exhibit G is an internal company memorandum from May of 2010. It is a campaign strategy prepared by a Ogletree Deakins a management law firm with respect to a campaign at a grocery store in Berkeley California.

H. Exhibit H is the Decision of the Administrative Law Judge in the 2 Sisters case. As noted, the employer illegally fired Xonia Trespalacios. The Judge found that the employer had made a captive audience speech to the employees a few days before the election talking about the immediate termination of Ms. Trespalacios. That captive audience speech was reviewed and corrected by the employer consultant. This of course illustrates the kind of persuader activity which should be reportable. We also note that the employer ultimately filed an LM-10 because the consultant did engage in direct persuader activity throughout the campaign. However the report did not reference this indirect activity of helping the employer to write the speech which ended up being critical in defeating the organizing drive. This matter is still pending before the Board on exemptions filed by both parties.

We recognize that some of this material is 20 years old and older. We thought however it would be persuasive with respect to this rule making activity to show that this activity has been going on for more than 20 years and continues unabated. All of this kind of persuader activity which should be the subject of a reporting requirement. The material should not bee an exemption to an overbroad "advice" exemption.

Finally we note that the reporting requirement for consultants is not overbroad. These consultants fear divulging both their involvement in campaigns and the amount they charge for such conduct. Employers fear divulging that they paid consultants to convince employees. But the huge amounts they charge and that employers are willing to pay is precisely the disclosure the Act contemplates.

Attached as Exhibit I is precisely one of these agreements. It was attached to an LM-20 filing by Mr. Sanford Rudnick, JD, a consultant. Mr. Rudnick charged $350 an hour for such activities. The workers are entitled to know this.

Our office fully supports the Department of Labor's effort to narrow the "Advice" Exemption to be consistent with the statute.

We hope these comments are useful and we look forward to the prompt issuance of final rule.

Sincerely,

/s/David A. Rosenfeld
David A. Rosenfeld

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Attachments: Exhibits A - I