HR POLICY ASSOCIATION
The Association of Chief Human Resource Officers

September 21, 2011

Submitted Via Federal Rulemaking Portal: http://www.regulations.gov

Andrew R. Davis
Chief, 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
RE:

Re: Comment on Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption (76 Fed. Reg. 36178; RIN 1245-AA03)

Dear Mr. Davis:

The HR Policy Association ("HR Policy" or the "Association") welcomes the opportunity to provide comments to the Department of Labor (DOL or "the Department) regarding its revision of the "advice" exemption under § 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA, or "the Act") as published in the Notice of Proposed Rulemaking (NPRM) in the *Federal Register* on June 21, 2011.[1]

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. A number of their companies have large franchising business relationships that involve a wide variety of advisory services including employment and labor relations policies. Collectively, their companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide.

The Association is filing these comments in response to the Agencies' request for comments on the NPRM. These comments are in addition to the comments that the Association jointly submitted with the Coalition for a Democratic Workplace et al.

LMRDA's Persuader Reporting Requirement

Under § 203(c) of the LMRDA, every employer who in any fiscal year has made any agreement or arrangement with, or any payment, loan, or promise to, "a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is 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, or 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 . . .” is required to file an annual report, Form LM-10, with the Department.[2]

Section 203(c) of the statute, however, contains the following broad “advice” exemption:

> Nothing contained 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 or … or engaging or agreeing to engage in collective bargaining on behalf of such employer…[3]

The current LM-10 report requires employers to disclose the full name and address of all consultants and lawyers; whether the agreement with the consultant or lawyer was oral, written, or both; the dates and amounts of all payments; the conditions and terms of all agreements; a detailed account of services rendered; and a full explanation identifying the purpose and circumstances of the payments.

Consultants have a similar/mirrored reporting requirement (LM-20 and LM-21) of the agreements they make, and the payments they receive from employers.

The LMRDA provides for both civil and criminal penalties for failing to file a LM-10 report or knowingly providing false information on the report, and the reports must be signed by the employer’s president, treasurer, or other corresponding principal officer. The signatory is personally responsible for the form’s filing and accuracy. If the employer fails to file a report, keep the necessary records, willfully provides false information, or knowingly fails to disclose a material fact, the relevant officers are subject to a maximum fine of $10,000 and imprisonment of not more than 1 year.

Current LMRDA “Advice” Exemption

As noted above, 29 U.S.C. 433(c) provides what is commonly called the “advice exemption” that excludes from reporting requirements services where the consultant is “giving or agreeing to give advice” to the employer. Since 1962,[4] the Department has identified two bright-line tests for determining what activities fall within the advice exemption: 1) where an employer drafts communications materials to be used with its employees and receives oral or written advice from a lawyer on the legality of the materials; and 2) where a consultant or lawyer prepares an entire speech or document, an employer has the ability to decide whether or not to use the materials, and the materials are delivered entirely by the employer.[5] Under the current bright-line interpretation, the exemption does *not* apply if the lawyer or consultant also delivers the communications to the employees.

Proposed Changes to the “Advice” Exemption

The Department is proposing that persuader activity “reporting is required in *any* situation where it is impossible to separate advice from activity that goes beyond advice.”[6] Reporting will

be required in any case in which an agreement or arrangement, in whole or part, results in a consultant engaging in persuader activities, regardless of whether or not they also provide advice.[7]

Under the NPRM, the advice exemption will no longer apply when:

- A person prepares or provides a persuasive script, letter, videotape, or other material or communication, including electronic and digital media, for use by an employer in communicating with employees;[8] or
- A consultant revises an employer's material or communications to enhance the persuasive message, *unless the revisions exclusively involve advice and counsel regarding the exercise of the employer's legal rights.* Material or communications, or revisions thereto, are persuasive if they explicitly *or implicitly* encourage employees to vote for or against union representation, to take a certain position with respect to collective bargaining proposals, or refrain from concerted activity (such as a strike) in the workplace.[9]

Under the NPRM, the duty to report can be triggered even without direct contact between a lawyer or other consultant and employees; a consultant or attorney simply has to prepare an entire speech or document regardless of who delivers it.

Comments On the Proposed Regulation

There are several reasons the Department should clarify and revise the proposed changes. Moreover, there is one substantive issue directly related to the persuader reporting requirements and the advice exemption that DOL did not discuss nor consider in the NPRM. *First*, there is no basis for the Department's reinterpretation of the advice exemption in either the statutory text or legislative history of the LMRDA and the NPRM, therefore, inappropriately nullifies the LMRDA advice exemption. *Second*, the NPRM's significant narrowing of the "advice" exemption combined with the overly broad and subjective definition of what activities constitute indirect persuader activity creates an impracticable standard that would result in ambiguity and uncertainty with regard to whether many lawful and appropriate activities must be reported. Specifically, the Department failed to discuss or address in the NPRM whether common franchisor activities such as providing materials, guidance, videos, webinars and seminars to franchisees on a wide variety of employee policies and employee relations issues could be subject to reporting. *Third*, the nexus to the reporting requirement for "persuader activity" in the NPRM should be defined to create a reasonable workable standard, consistent with congressional intent, which does not include employee relations issues in the absence of any union organizing or collective bargaining agreement.

To the extent that the Department is concerned about underreporting of the types of activities Congress intended to regulate, the appropriate response is increased enforcement of the current regulation and not the adoption of a vague standard, which could subject individuals to criminal penalties. Each of these reasons independently constitutes a sufficient ground for the Department to decline adoption of the NPRM; each will be discussed in turn.

There Is No Basis For DOL's Reinterpretation of the Advice Exemption in Either the Statutory Text or Legislative History

Section 203(c) of the LMRDA – titled "Advisory or representative services exempt from filing requirements" – 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…[10]

The statutory term "advice" is in no way qualified and the intent of § 203(c) is, according to the U.S. Court of Appeals for the District of Columbia Circuit, "to grant broad scope to the term 'advice'."[11] However the NPRM significantly narrows the advice exemption in ways that are contrary the D.C. Circuit Court decision and the plain language of the LMRDA.

The Department's proposed reinterpretation of the advice exemption is also contrary to the legislative history of the LMRDA. "Subsection (c) of section 203 of the [LMRDA] conference substitute grants a *broad exemption* from the requirements of the section with respect to the giving of advice."[12] Moreover, section 203 of the LMRDA is aimed at preventing employee deception, and exposing consultants acting as clandestine "agents of management" or undercover "middlemen" between management and employees.[13] It was never intended to regulate situations where an employer accepts advice and materials prepared for them, applies that advice it received on its own behalf, adopts that advice and materials as its own, and itself delivers the message to its employees. Rather, the "prime congressional concern [was] to uncover employer-expenditures for anti-union persuasion carried out, often surreptitiously, not by employers or supervisors, but by consultants or middlemen."[14] Where a consultant or middleman undertakes activities meant to directly or indirectly persuade employees through direct contact with rank-and-file employees, those employees may not be aware that the source of the message being delivered to them is their employer. It is these middlemen acting, unbeknownst to employees, "as agents of management" with whom Congress was concerned when it enacted § 203.[15] The legislative history of the LMRDA makes clear that reporting is not required in instances where a labor relations consultant is not interacting directly with employees as a middleman for the employer.

The NPRM's Overly Broad and Subjective Definition of What Constitutes Persuader Activity Creates an Impracticable Standard

The lack of any definition or specific examples of what constitutes "indirect" persuader activities in the NPRM has broaden the reporting requirement to include virtually every form of advice, counsel, and assistance in the personnel and employee relations field.[16] This is particularly problematic given the lack of any explicit nexus for the reporting requirement, such as a union organizing campaign, and the potential criminal penalties for noncompliance.

Specific examples of persuader activities under the proposed advice exemption that either alone or in combination would trigger the reporting requirements include but are not limited to:

- Drafting, revising, or providing a speech, written material, website content, an audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees;
- Planning or conducting individual or group meetings;
- Developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness;
- Training supervisors or employer representatives to conduct individual or group meetings;
- Establishing or facilitating employee committees; and
- Developing employer personnel policies or practices.[17]

Under the NPRM, persuader activities *may* additionally include:

- Training or directing supervisors and other management representatives; and
- Planning employee meetings.[18]

Under the proposed reinterpretation, relying on counsel, consultants, another employer, or franchisor to assist in developing a personnel policy may be deemed an activity where the object thereof, directly or *indirectly*, is to persuade employees. Similarly, relying on third parties to assist with supervisor training on how to comply with the NLRA may constitute *indirect* "persuader" activity. In both of these examples, it appears to make no difference under the proposal if the assistance is provided at a time when organizing activity is occurring or not.

Of particular concern is the fact that the Department failed to discuss or address in the NPRM whether common franchisor activities such as providing materials, guidance, videos, webinars and seminars to franchisees on a wide variety of employee policies and employee relations issues could be subject to reporting. Under the proposed changes, common franchisor/ franchisee related activities such as providing positive employee relations videos, webinars and seminars could be subject to reporting, as could materials and newsletters intended to advise member companies how to lawfully respond to union organizing. Moreover, if a franchisor has to report as a "persuader" for a single franchisee, it would have to report all labor relations services for all of its franchisees. This type of advice could not possibly be what Congress ever envisioned or intended to cover as reportable under the LMRDA yet the NPRM does not provide clear guidance on this important issue.

No Union Organizing or Collective Bargaining Nexus for the Persuader Reporting Requirement

As noted above, one of the reasons the proposed reinterpretation of the advice exemption is vague, ambiguous, and overly broad is the lack of any explicit nexus for the persuader reporting requirement, such as a union organizing campaign. The lack of any nexus combined with the

statutory description of persuader activity as any "*activity where the object thereof*, directly or *indirectly*, is to persuade employees"[19] coupled with the lack of any regulatory definition or examples for that term results in a reporting requirement that could include various employer activities that have nothing to do with traditional persuader activities, such as employee satisfaction, productivity, efficiency activities and almost any form of advice, counsel, and assistance in the personnel and employee relations field. In fact, the lack of any reporting nexus in the NPRM and failure to define what constitutes activity where the object thereof, directly or indirectly, is to persuade employees, results in a reporting requirement that arguably exceeds the Department's statutory authority.

* * *

The proposed regulations are so overly broad and they would cover various activities that have nothing to do with traditional "persuader" activities, such as employee surveys, supervisor training, seminars, handbook and policies; surely, this is not what Congress intended and goes far beyond well established interpretations of the relevant provisions of the LMRDA. Not only is this an unwarranted expansion of LMRDA coverage, it intrudes on and threatens to complicate a host of business functions unrelated to persuader activities that are designed to improve employee and customer satisfaction, productivity, efficiency, and compliance with other laws.

It is incumbent upon the Department to re-propose the NPRM (with a new public comment period) that at the very least includes a definition and examples of activities where the object thereof is to indirectly persuade employees. Moreover, this is critically important given there are criminal penalties associated with the reporting requirement.

Thank you for the opportunity to comment on the NPRM and for considering our suggested recommendations. If the Association can be of further assistance, please contact Michael Peterson at 202-789-8659 or mpeterson@hrpolicy.org.

Sincerely,

Michael Peterson
Vice President, Benefits & Employment Policy
Associate General Counsel
HR Policy Association

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

[2] 29 U.S.C. 433(a)(4) and 29 C.F.R. 405.2 and 405.3.

[3] 29 U.S.C. 433(c).

[4] Although the Department of Labor, on January 11, 2001 (less than two weeks before the end of the Clinton administration), announced a reinterpretation of the advice exemption without public comment, the incoming Bush administration first delayed the effective date of the reinterpretation to review it, and then rescinded the reinterpretation before it took effect.

[5] Under the second area, the preparation of an entire document ''can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer.'' In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the consultant is operating under a deceptive arrangement with the employer, the fact that the consultant drafts the material in its entirety will not in itself generally be sufficient to require a report. See February 19, 1962 memorandum from then Solicitor of Labor Charles Donahue to John L. Holcombe, then Commissioner of the Bureau of Labor-Management Reports, in response to a November 17, 1961 memorandum from Commissioner Holcombe that sought guidance on the advice exemption; and 76 Fed. Reg. 36179.

[6] 76 Fed. Reg. 36191.

[7] 76 Fed. Reg. 36182.

[8] 76 Fed. Reg. 36191.

[9] 76 Fed. Reg 36191.

[10] 29 U.S.C. 433(c).

[11] *UAW v. Dole* (869 F.2d 616, 620 (D.C. Cir. 1989)).

[12] U.S. House of Representatives, Conference Report No. 86-1147, at 33 (1959), emphasis added.

[13] U.S. Senate, Report No. 86-187, at 10 (1959).

[14] *Ibid.*

[15] *Ibid.*

[16] At one point in the NPRM, the Department appears to implicitly define "indirect persuader activity" as persuader activity directed at the employer's supervisors ("The evidence suggests that consultants, in order to avoid reporting under the LMRDA, engage predominantly in indirect persuader activity by directing their activities to the employer's supervisors.") 76 Fed. Reg. 36187 However, the LMRDA describes persuader activities as those "activities where an object thereof, directly or indirectly, is to persuade employees…" 29 U.S.C. 433(a)(4).

[17] 76 Fed. Reg. 36192.

[18] 76 Fed. Reg. 36191.

[19] 29 U.S.C. 433(a)(4).