ARGENTUM
EXPANDING SENIOR LIVING

August 10, 2017

Mr. Andrew Auerbach
Deputy Director
Mr. 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, D.C. 20210

Re: Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; RIN 1245-AA07

Dear Deputy Director Auerbach and Division Chief Davis:

Argentum submits the following comments to the U.S. Department of Labor (Department) in response to the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* on June 12, 2017, at 82 Fed. Reg. 26877.

About Argentum

Argentum is the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Argentum member companies operate senior living communities offering assisted living, independent living, continuing care, and memory care services to older adults and their families. Since 1990, Argentum has advocated for choice, independence, dignity, and quality of life for all older adults.

Argentum is a member of the Coalition for a Democratic Workplace (CDW), which is filing a more detailed set of comments on the Department's proposed rulemaking. Argentum supports CDW's comments and hereby incorporates them by reference.

Background

On March 24, 2016, the Department issued a final rule entitled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and

Disclosure Act" (LMRDA)[1], which is the subject of the present NPRM to rescind the regulations established in the new rule. Argentum, participated in the rulemaking process that preceded the final rule, joining in the extensive comments filed by the CDW in response to the Department's June 21, 2011 proposed rule and urging the Department to withdraw the proposed rule.

Nevertheless, the previous administration issued the final rule, and on March 30, 2016, CDW and many other business groups filed a lawsuit challenging the legality of the rule under the Administrative Procedure Act.[2] In addition, two other legal challenges were filed against the Department's new rule.[3] Argentum hereby incorporates by reference the complaints, motions and briefs filed by the plaintiffs in those cases, which sought preliminary injunctions and/or summary judgment vacating the new persuader advice rule.[4]

On Nov. 16, 2016, the district court in the *NFIB* case[5] issued an order permanently enjoining the new rule on a nationwide basis. The district court held that the new rule is "defective to its core" and effectively nullifies the advice exemption spelled out in the LMRDA. Another district judge, in the *Labnet* case, found that the rule was "simply incoherent."[6]

Argentum's Comments in Response to the Department's Proposed Rule

As is explained in greater detail in the CDW comments and in the briefs and affidavits filed by the plaintiffs in all three federal court challenges, the new persuader rule should be rescinded. Argentum strongly supports the Department's proposal to do so for the reasons discussed below and for the additional reasons set forth in the CDW comments.

1. **The Department Is Authorized by Law To Rescind the Rule.**

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[1] 81 Fed.Reg. 15924

[2] *Associated Builders and Contractors of Arkansas v. Perez*, Case No. 4:16-cv-169 (E.D. Ark.)

[3] *National Fed'n of Indep. Bus. v. Perez* (hereafter *"NFIB"*), Case No. 5:16-cv-00066-C (N.D. Tex.) and *Labnet v. United States Department of Labor (hereafter "Labnet")*, Case No. 16-CV-0844 (D. Minn.)

[4] All of the filings incorporated by reference above are publicly available in the electronic court dockets at pacer.gov.

[5] *NFIB,* 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016), *incorporating by reference* 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016), *appeal placed in abeyance pending the present rulemaking,* Docket No. 17-10054 (5th Cir. June 15, 2017).

[6] *Labnet*, 197 F.Supp.3d 1159, 1168 (D. MN. 2016)

As the Department itself recognized in the preamble to the new rule,[7] the agency is entitled to revise its interpretation of statutory terms at any time, so long as certain basic criteria under the APA are complied with. These criteria include the need to show that the new policy is "permissible under the statute," that there are "good reasons" for the change in policy, and that the Department believes the change in policy is "better."[8]

It is undisputed that restoring the interpretation of "advice" that was in place for 55 years before the new rule took effect is "permissible under the statute." The D.C. Circuit explicitly so held in *UAW v. Dole*.[9] As to the existence of "good reasons," the district court's vacatur of the new rule in *NFIB* constitutes sufficient grounds alone to rescind the rule. But in addition, the factual findings of the court, as the NPRM rightly points out, call for rescission at a minimum in order to analyze the court's holdings, and those of other courts cited in these comments, which cast serious doubt on the legality of the new rule under the LMRDA, the Constitution, and the APA.

Further supporting the NPRM's stated grounds for rescission, the public record of testimony occurring after the issuance of the new rule in the courts and in Congress, gives strong reason to believe that the adverse impact of the new rule would be significantly greater than was estimated prior to the rule's publication in 2016. For this reason as well, as stated in the NPRM, the Department is justified in rescinding the rule to study this new information and restore the previous "bright line" reporting standard. As further asserted in the NPRM, the Department should consider any changes to the LM-20 forms together with possible changes to the LM-21 form, because the latter form greatly magnifies the reporting obligation of any consultant who is found to be a persuader, no matter how minimal the persuader activity. Finally, the shifting priorities and resource constraints since the publication of the new rule strongly justify the rescission of that rule and a return to the well understood standard that was in place for the previous 55 years.

2. **The New Rule Violates The Plain Language Of The "Advice" Exemption Of The LMRDA**

Argentum supports each of the reasons listed in the NPRM for rescinding the new rule. But the most obvious reason for rescinding the new rule is that a district court has enjoined the rule on a nationwide basis. The *NFIB* decision properly found that the rule violates the LMRDA. This reason alone is sufficient justification for rescinding the new rule.

The LMRDA broadly exempts advice from the reporting requirements of Section 203.[10] For 55 years prior to 2016, affirmed by the courts and ratified by Congress, the Department consistently defined the word "advice" as referring to communications

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[7] 81 Fed. Reg. at 15947, citing *Home Care Ass'n of America v. Weil*, 799 F.3d 1084, 1094-95 (D.C. Cir. 2015).

[8] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

[9] 869 F.2d 616 (D.C. Cir. 1989).

[10] H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959) ("Subsection (c) of section 203 … grants a broad exemption from the [reporting] requirements of the section with respect to the giving of advice.").

"submitted orally or in written form to the employer for his use" where the employer "is free to accept or reject the oral or written material submitted to him."[11] Without any rational justification, the new rule departs from this established enforcement policy, a policy that Argentum members have long relied upon in dealing with labor issues.

The preamble to the new rule mistakenly claimed that the previous enforcement policy had somehow led to the involvement of too many consultants in union organizing campaigns, or that such consultants have encouraged employers to violate the labor laws in order to defeat union organizing. There is no credible, objective research supporting either proposition. There is also no evidence that consultant-sponsored violations of the Act have been responsible for the decline of unions in the health care industry. The causes of union decline are due to union failures, not employer consultant abuses.

In any event, the new rule redefines "advice" in a way that is internally inconsistent – first acknowledging that advice is a form of "recommendation," and then declaring that advice that constitutes "indirect persuasion" will have to be reported regardless of an employer's ability to reject the advice. As both the *NFIB* and *Labnet* cases found, the ability to reject advice is what makes it merely a recommendation, however. And the artificial construct of advice that is merely a legal opinion (nonreportable) versus reportable advice that is "indirectly persuasive" renders the new rule impossible to comply with. Contrary to the new rule, the statute does not merely exempt "legal advice" or "non-persuasive advice;" rather, the LMRDA broadly exempts *all* advice from any reporting requirement.

The new rule must be rescinded in order to restore the Department's lawful definition of exempt advice that was in effect and well understood by employers for decades.

3. The New Rule Is Overbroad Under The First Amendment

The *NFIB* court further held that the new rule is unconstitutionally overbroad, burdening the right of employers to speak out on the subject of unionization and to obtain advice on what they can or should say to their employees.[12] The court properly found a constitutional violation under both the "strict scrutiny" and "exacting scrutiny" standards.[13] In addition, the new rule unconstitutionally compels attorneys and consultants to identify themselves as "persuaders," a highly controversial label in the labor relations field, and forces such advisors and their client employers to publicly

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[11] *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F. 2d 616, 617 (D.C. Cir. 1989). *See also Martin V. Power, Inc.*, 1992 WL 252264, *2 (W.D. Pa. Sept. 28, 1992); *Wirtz v. Fowler*, 372 F. 2d 315, 330-331, n.32 (5th Cir. 1966), *overruled in part on other grounds, Price v. Wirtz*, 412 F. 2d 647 (5th Cir. 1969).

[12] *Citing Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *McCullen v. Coakley*, 135 S. Ct. 2518, 2531 (2014); *U.S. v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012); *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000).

[13] *NFIB*, 2016 U.S. Dist. LEXIS 89694, at **89-97.

stigmatize themselves in violation of the First Amendment.[14] Argentum is particularly concerned that its members' rights would be infringed by the new rule due to the forced disclosure of Argentum members resulting from the combined effect of the expanded LM-20 requirements together with the already overbroad disclosures of the new LM-21's. These infringements of First Amendment rights also justify the Department's rescission of the rule.

4. The New Rule Is Unconstitutionally Vague Under The Fifth Amendment

As the *NFIB* court further held,[15] the new rule is vague and confusing to employers and their advisors, a situation made worse by the illogical and arbitrary exceptions discussed above. This unconstitutional vagueness can only be remedied by rescinding the new rule and returning to the Department's previous longstanding interpretation of the LMRDA, which gave clear guidance to the business community as to what conduct is persuader activity and what conduct is exempt advice. Among many inconsistencies are the following:

- The new rule does not explain why a trade association should lose the "advice" exemption if the association staff advise an employer member how to tailor "off the shelf" material to the employer's particular needs. The act of giving advice somehow deprives the association of the "advice" exemption.[16]

- The new rule does not explain why trade associations can sponsor union avoidance seminars under the new rule without reporting, but if the associations' own staff presents the same advice as the consultants, then reporting will be required.[17]

- DOL also fails to justify the requirement that consultants, including trade associations, file reports if they develop or implement personnel policies or actions with the object to persuade employees. The new rule states that no reporting is required if the policies only "subtly" affect or influence the attitudes or views of the employees. There is no logical difference between these two situations.[18]

- Employers and consultants alike, and especially labor attorneys, have received no clear guidance as to the line arbitrarily drawn in the new rule between advice that is "indirectly" persuasive and therefore reportable and advice that is not. The only way for consultants and attorneys to avoid crossing this line is to not give labor relations

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[14] *See National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015, *rehearing en banc denied*, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015); *see also Associated Builders and Contractors of Southeast Texas v. Rung,* 2016 U.S. Dist. LEXIS 155232, at **28-30 (E.D. Tex. Oct. 24, 2016).

[15] *NFIB*, 2016 U.S. Dist. LEXIS 89694, at **98-103.

[16] Id.

[17] Id.

[18] Id. at 15939

advice at all, to the severe detriment of Argentum members and many other employers.

The LMRDA is a criminal statute, and the Supreme Court has repeatedly held that criminal laws must be strictly construed to be clear in their terms and not unduly vague. For the reasons stated by the *NFIB* court, the new rule is unconstitutionally vague and should be rescinded on this additional ground. [19]

5. The New Rule Will Harm Employers And Their Consultant Advisors, With No Benefits To The Public Interest

The effective elimination of the advice exemption will as a practical matter deprive employers in the health care industry of their right to legal counsel. As established by sworn testimony in the lawsuits challenging the rule, many lawyers will be unable or unwilling to advise employers on the best responses to union organizing without much clearer guidance from the Department as to what recommendations do and do not constitute persuader activity.[20] In light of the sworn affidavits and trial testimony in the lawsuits from representatives of large and small labor law firms all over the country, as well as the continued opposition to the new rule by the American Bar Association, the Department can no longer ignore the chilling effect of the new rule on the ability of employers to obtain counsel. For this reason as well, as stated in the NPRM, the new rule must be rescinded.

The proposed rule would otherwise force businesses to either say nothing at all, or risk saying something inaccurate—or even illegal—to employees, simply because companies will no longer be able to obtain quality advice on what to say. Employers' ability to communicate with their employees about a subject of vital importance will be severely restricted unless the rule is rescinded, and employees' right to receive balanced information on labor issues will be virtually eliminated.

The adverse impact of the new rule on employers and their advisors is not limited to the types of communications with employees that arise during a union organizing campaign. The new rule plainly applies with equal force to advice rendered even in the absence of any known union organizing activity. For example, the rule purports to restrict group seminars with employers and/or their supervisors, regardless of any ongoing union organizing.

The Department's regulatory impact analysis fails to take into account the number of possible communications that may occur between employers and their advisors—including lawyers and association staff—outside the context of known organizing campaigns, which greatly magnifies the impact of the proposed rule. The *NFIB* court found that the actual costs of compliance with the new rule would be between $7.5-$10

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[19] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Parker v. Levy*, 417 U.S. 733, 775 (1974); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

[20] *ALFA v. Perez*, Docket No. 16-cv-00169 (E.D. Ark.), exhibits A-H to Reply Memorandum, Doc. 41 (May 5, 2016); *Id.* at Doc. 3, Attachments 1-3 (Apr. 2, 2016); *see also NFIB*, at **27-29, 32-33.

billion dollars, far exceeding the Department's previous estimates. For this reason as well, the Department should rescind the new rule, in order to conduct a more thorough economic analysis.

Conclusion

If allowed to take effect, the Department's new rule redefining "advice" under the LMRDA would deprive employers in the healthcare industry of their right to free speech, freedom of association and legal counsel. The rule would also deprive employees of the right to obtain balanced and informed input from both sides as they decide whether to be represented by a union. The final rule would harm many small businesses and impair their ability to grow and create new jobs. For the reasons set forth above and in the comments filed by the CDW, Argentum supports the Department's proposal to rescind the unlawful "persuader advice" rule.

Thank you for the opportunity to submit comments on this matter.

Respectfully Submitted,

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Argentum