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The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attn: Andrew Davis, Chief
Division of Interpretations and Standards
Office of Labor-Management Standards

RE: ***Proposed Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act***,
RIN 1245-AA07, 82 Fed. Reg. 26877 (June 12, 2017)

Dear Mr. Secretary:

The Employment Law Alliance ("ELA") submits this comment in support of the U.S. Department of Labor ("DOL"), Office of Labor-Management Standards' proposed rescission of the Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA").

The Employment Law Alliance ("ELA") is an integrated, global practice network whose independent law firm members are well known and well respected for their employment and labor law practices. With more than 3,000 lawyers practicing in more than 120 countries, including all 50 U.S. states, the ELA is the world's largest such network. Collectively, ELA member law firms represent hundreds of employers that will be adversely impacted by the final rule entitled "Labor-Management Reporting and Disclosure Act, Interpretation of the Advice Exemption" ("New Rule"). Additionally, to the extent that their legal advice pertaining to labor relations would fall within the broad ambit of the New Rule, ELA firms and their lawyers would likely be subject themselves to the disclosure requirements of the New Rule, rendering them at odds with their obligations under state law.

I. INTRODUCTION

For 54 years, practicing attorneys like those in the ELA have been exempt from the LMRDA's disclosure requirements based on the "Advice Exemption" - an exemption premised on both the sanctity of attorney-client confidentiality and the common sense notion that legal advice is not the proper target of the LMRDA's existing disclosure requirements. The U.S. Supreme Court has consistently upheld this principle, and held most recently that Section 8(c) of the National Labor Relations Act (NLRA) precludes all regulation of non-coercive speech about unionization. *See, Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

This longstanding principle will change with the implementation of the New Rule and attorneys in ELA law firms[1] would be presented with an ethical dilemma: violate their ethical duty to maintain client confidentiality by disclosing information deemed confidential under the various Rules of Professional Conduct adopted in each state, ***or risk criminal prosecution.*** As discussed below, the New Rule violates the rights of employers and their attorneys without actually advancing the stated policy goals of the DOL. Accordingly, the ELA supports the DOL's proposal to rescind the New Rule.

II. OVERVIEW OF THE LMRDA AND ITS REPORTING REQUIREMENTS

The purpose of the LMDRA is to, in relevant part, "eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act." 29 U.S.C. §401 (2015).[2]

Section 203(a) of the LMRDA requires employers, including clients of ELA law firms, to report to the DOL:

- ''[A]ny agreement or arrangement with a labor relations consultant or other independent contractor or organization'' under which such person ''undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise,'' or how to exercise, their rights to union representation and collective bargaining, 29 U.S.C. §433(a)(4)(2015); and

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1 The New Rule does not apply to in-house counsel, thereby creating a disparity between those large companies with access to in-house legal services and smaller companies who often rely on outside counsel such as the ELA firms.

2 Notably, under the National Labor Relations Board's new "Quickie Election" procedures, the disclosures required under the New Rule would likely occur well after the campaign and election. Thus, the timing does not even support the DOL's stated goals.

- ''[A]ny payment (including reimbursed expenses) pursuant to such an agreement or arrangement must also be reported.

29 U.S.C. §433(a)(5) (2015).

Section 203(b) of the LMRDA imposes a similar reporting requirement on labor relations consultants and other persons, including those attorneys who provide advice. Section 203(b) requires that:

- Every person who enters into an agreement or arrangement with an employer and undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or how to exercise, their rights to union representation and collective bargaining ''shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing . . . ***a detailed statement of the terms and conditions of such agreement or arrangement***''; and

- Persons subject to this requirement to report receipts and disbursements of any kind ''on account of labor relations advice and services.''

29 U.S.C. §433(b) (emphasis added).

However, Section 203(c) of the LMRDA specifies that information communicated "in the course of a legitimate attorney-client relationship" is exempt from disclosure. 29 U.S.C. § 434 (2015). The DOL's rules have long stated, in relevant part that:

> Nothing contained in this part shall be construed to require
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> . . .
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> (b) Any person to file a report covering the services of such person by reason of his
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> (1) giving or agreeing ***to give advice to an employer***; or
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> (2) representing or agreeing ***to represent an employer before any court, administrative agency, or tribunal of arbitration***; or
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> (3) ***engaging or agreeing to engage in collective bargaining*** on behalf of an employer with respect to wages, hours, or other terms

> or conditions of employment or the negotiation of an agreement or any question arising thereunder;
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> . . .
>
> (d) An attorney who is a **member in good standing of the bar of any State**, to include in any report required to be filed pursuant to the provisions of this part any information which was lawfully communicated to such attorney by any of his clients **in the course of a legitimate attorney-client relationship**.

29 C.F.R. §406.5 (2012) (emphasis added).

From 1962 until the issuance of the New Rule, the DOL utilized a "bright-line" test to determine whether particular activities were exempt from reporting obligations because of the "Advice Exemption." Under the "bright-line" test an employer and attorney do not incur any reporting obligations so long as: (1) the attorney providing advice does not directly deliver or disseminate persuasive material to employees; (2) the employer has the ability to reject or modify persuasive material prepared by the attorney providing the advice; and (3) there is no deceptive arrangement between the employer and the attorney providing the advice. *See Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985).

III. THE NEW RULE EFFECTIVELY ELIMINATES THE ADVICE EXEMPTION

The DOL's New Rule rejects this 54-year interpretation of the Advice Exemption and replaces the "bright-line" test with a murky New Rule under which any advice intertwined with other activities triggers the reporting obligations for both the employer and the attorney providing the advice. As a result, the New Rule effectively eliminates the Advice Exemption and places employers and attorneys in an untenable position.

In order to understand the impact of this change, it is important to understand the broad range of legal activities that are implicated. Consider the following activities:

- Indirect Persuasion - Reporting is required if the attorney – with an object to persuade – plans, directs, or coordinates activities undertaken by supervisors or other employer representatives. *See* Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15,970 (March 24, 2016)

- Materials/Communications - Reporting is required if the attorney provides – with an object to persuade – material or communications to the employer, in oral, electronic (including, *e.g.*, email, Internet, or video documents or images), or written form, for dissemination or distribution to employees. Thus, an attorney "revising employer-created materials, including edits, additions, and translations" with "an object" to "enhance persuasion, as opposed to ensuring legality" would have a reporting obligation. *Id.* at 15,971. But how does one distinguish revisions to "enhance persuasion" from revisions to "ensure legality" when an attorney reviews a persuasive communication to ensure that the employer has avoided statements that could be construed as unlawful threats, interrogation, promises or surveillance under the NLRA?

- Seminars – Attorneys and employees will be required to report seminar agreements if the attorney develops, or assists the attending employers in developing, anti-union tactics and strategies for use by the employer, the employers' supervisors or other representatives. *Id.* at 15,791-15,792. While this may sound like a bright-line test, it is often the case that the union and the employer do not define "anti-union" in the same manner. Thus, training intended to provide the employer's managers with an understanding of the election process and the permissible scope of speech during a union campaign is often construed as "anti-union" even when such training is primarily educational in nature.

- Personnel Policies/Actions – Attorneys frequently assist in the development and/or review of personnel policies and activities. Such activities are not reportable merely because they improve the pay, benefits, or working conditions of employees. However, if the policies or activities subtly affect or influence the attitudes or views of the employees, they could be reportable if the agreement, any accompanying communication, the timing, or other circumstances suggest the attorney undertook the activities with an object to persuade employees. *Id.* at 15,793-15,794.

Thus, while the DOL continues to state that no report is required with respect to an agreement or arrangement to "exclusively" provide advice to an employer, the New Rule makes this exclusion illusory and unrealistic given the actual nature of providing legal advice to employers involved in labor relations matters. In fact, the DOL's regulations specify that:

> Every person required to file any report under this part shall ***maintain records*** on the matters required to be reported which will provide ***in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified,***

> ***and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions***, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

29 C.F.R. §406.9 (2015) (emphasis added).

Practically, this means that the DOL may review an attorney's records to determine if: (a) the services provided by that attorney to an employer qualify as "advice," "representation" or "collective bargaining;" and (b) are consistent with a "legitimate" attorney-client relationship under the "bar of any State." *See* 29 C.F.R. §406.5 (2012).

IV. THE NEW RULE CONFLICTS WITH THE DUTY TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND UNCONSTITUTIONALLY PREEMPTS STATE LAWS GOVERNING THE PRIVILEGE

The DOL's New Rule also should be rescinded because it ignores the complex regulatory environment governing the practice of law, and attempts to create a single definition of the "practice of law," which unconstitutionally preempts state law and is outside of the DOL's statutory mandate.

The New Rule now characterizes information such as the identity of the attorney and the client, the scope, nature, terms and conditions of the agreement, the fee arrangement and specific persuader activities undertaken, as ***outside the scope of the attorney-client privilege***, and thus subject to reporting and disclosure. However, the definitions of "privileged information" and the "practice of law" are determined and administered by each state. *See* Model Rules of Prof'l Conduct R. 1.6 (2015); American Bar Association, *State Definitions of the Practice of Law* (April 8, 2016), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

Generally, it is within each State's sovereign power to make and enforce the laws for the benefit of its citizens. *See, Chicago, B. & Q. Ry. Co. v. People of State of Ill.*, 200 U.S. 561, 592, 26 S. Ct. 341, 349, 50 L. Ed. 596 (1906) (holding that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety).

Regulatory power over the practice of law within a state is explicitly reserved to the states:

> [T]he right to practice law in the state courts [is] not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practice law in the courts of

> a state is one of those powers that was not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

Ex parte Lockwood, 154 U.S. 116, 117, 14 S. Ct. 1082, 1083, 38 L. Ed. 929 (1894) (*citing Bradwell v. People of State of Ill.*, 83 U.S. 130, 133, 21 L. Ed. 442 (1872)).

The power of each state to independently regulate lawyers acting within its jurisdiction has been consistently upheld. As the Supreme Court of the United States noted in *Leis v. Flynt*, there exists no federal or Constitutional basis to require one state to allow an attorney barred in another state to practice law within its jurisdiction. *Leis v. Flynt*, 439 U.S. 438, 443, 99 S. Ct. 698, 701, 58 L. Ed. 2d 717 (1979) (*citing Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (1958). Thus, any attempt by the DOL to impose a single definition of the "practice of law" – such as defining what types of information fall *outside of the attorney-client privilege* – would be an unconstitutional abrogation of rights explicitly reserved to the States.

The LMRDA specifies that information communicated "in the course of a legitimate attorney-client relationship" is exempt from disclosure. 29 U.S.C. §434 (2015). However, under the New Rule, information such as the identity of the attorney and the client, scope, nature, terms and conditions of the agreement, the fee arrangement and specific persuader activities undertaken are considered outside of the attorney-client privilege, and thus subject to disclosure. United States Department of Labor, *Persuader Final Rule Questions &and Answers* (April 8, 2016), http://www.dol.gov/olms/regs/compliance/ecr/Persuader_QA_508.pdf; United States Department of Labor, *Persuader Agreements: Ensuring Transparency in Reporting for Employers and Labor Relations Consultants* (April 8, 2016), http://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf. Given the fact that such information is privileged under the laws of the states, the DOL's approach forces employers and their attorneys to choose between compliance with the New Rule or compliance with state law and professional ethical obligations.

In summary, the DOL cannot reconcile its New Rule with the state laws governing the attorney-client relationships. The New Rule requires the DOL to review privileged documentation without the proper expertise, and then determine what constitutes the "practice of law" based on multiple state law definitions. By making determinations on the "practice of law," the DOL engages in *ultra vires* acts and unconstitutionally preempts state law.

V. CONCLUSION

For the foregoing reasons, the ELA supports the DOL's proposed rescission of the Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act. The ELA appreciates the opportunity to comment on this matter.

Very truly yours,

Stephen J. Hirschfeld
Chief Executive Officer

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