HAWAII EMPLOYERS COUNCIL

Mr. R. Alexander Acosta
Secretary of Labor
Attn: Andrew Davis
Chief, Division of Interpretations and Standards
Office of Labor Management Standards
US Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking on Rescission of Advice Exemption in Section 203(c) of the LMRDA, RIN 1245-AA

July 24, 2017

Dear Secretary Acosta:

On behalf of the Hawaii Employers Council ("HEC"), I am submitting the following comments supporting the Department of Labor's proposal to rescind the rule interpreting the "Advice Exemption" in Section 203(c) of the Labor-Management Reporting and Disclosure Act. We fully support the DOL's proposal to rescind the March 24, 2016 rule.

HEC is a non-profit 501(c)(6) membership organization with more than 800 member employers in Hawaii. Our employer members range from small "mom and pop" operations to larger companies with hundreds of employees. Our mission is to promote collaborative employee relations that result in skilled, engaged, and effective workforces. We provide human resources education and labor relations support on a wide variety of issues, including compliance with state and federal employment laws, and guidance in the negotiation and administration of collective bargaining agreements.

HEC supports the Department's proposal to rescind the March 24, 2016 on the "Advice Exemption" for the following reasons:

- First, the March 24, 2016 rule's restriction of the term "advice" exceeds the Department of Labor's authority by ignoring the plain meaning of the term "advice" in the context of LMRDA Section 203(c).
- Second, the rule conflicts with constitutional speech rights in the context of collective bargaining.
- Third, the rule imposes a crushing reporting obligation on employers and consultants for non-persuader activities.

I. The March 24, 2016 Rule Exceeded the Agency's Authority By Nullifying the "Advice" Exception

In promulgating the March 24, 2016 rule, the Department exceeded its authority to interpret Section 203(c) of the LMRDA, because the rule's interpretation of the "advice" exception essentially nullifies the exception.

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persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collective through representatives of their own choosing." 29 USC 433(b). However, this reporting obligation is subject to the "advice" exception in Section 203(c), which provides "[n]othing 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." 29 USC 433(c).

In the NPRM dated June 21, 2011, the DOL conceded that for almost five decades the agency has interpreted the exception as excluding from persuader reporting requirements any advice and guidance provided by attorneys and labor consultants directly to employers, so long as the attorney or consultant did not directly communicate with non-supervisory employees, and so long as the employer was free to accept or reject the advice and guidance. 76 Fed. Reg. 36180. This interpretation is the only interpretation which gives full and logical effect to both the persuader reporting requirement in Sections 203(a) and (b), as well as the exemption for "advice" in Section 203(c).

Section 203 first broadly requires reporting of any activities by third parties whose object is to persuade employees regarding their collective bargaining rights. At subsection (c), entitled "Advisory or Representative Services Exempt from Filing Requirements," the statute then exempts from reporting requirements (1) advice provided to employers, and (2) services provided in representing employers before courts, administrative agencies, or tribunals, or in representing employers in collective bargaining negotiations. The dictionary definition of "exempt" is "not subject to or bound by a rule, obligation, etc. applying to others." Webster's New World Dictionary (3rd College Ed. 1988). An item is "exempt" from a rule only if the rule would otherwise apply to it. The clear purpose of 203(c) is to exempt advice which would otherwise be subject to reporting requirements.

The March 24, 2016 rule is based on an extremely contorted interpretation of the allowable scope of "advice." In the comments to the March 24, 2016 rule, the Department essentially defined the term "advice" for purposes of the exemption as any advice that does not have an object to persuade employees. See 81 Fed. Reg. 15927-15928. As the federal district court observed in National Federation of Independent Businesses v. Perez,), the "DOL's attempt in its New Rule to treat 'advice' under Section 203(c) and 'activities where an object thereof, directly or indirectly, is to persuade' under Sections 203(a) & (b) as mutually exclusive concepts is **contrary to the statute and ordinary language**." 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. 2016) (emphasis supplied).

The Texas federal district court recognized that the "advice" exception was clearly designed to exempt from reporting requirements activities which could otherwise be characterized as reportable "persuasive" activity. Section 203(c) does not specify any limitation on the term "advice," and there is no indication in the legislative history that Congress intended to limit the term "advice" to consultation that does not have the object of persuading employees. Without the "advice" exception, the March 24, 2016 rule's definition of "persuader" activity would capture, without distinction, virtually all consultation and guidance provided by third parties to employers for the purposes of managing labor relations. The March 24, 2016 rule essentially nullifies the "advice" exemption created by Congress.

II. The Proposed Revision Conflicts with Public Policy Supporting Employer Speech

In 1947, the Taft-Hartley Act added the "free speech" proviso in Section 8(c), guaranteeing the right of both unions and employers to express their views, arguments, or opinions regarding unionization, so long as such expression contains no threat of reprisal or promise of benefit. The Supreme Court has ruled that 8(c) implements First Amendment speech protections. NLRB v. Gissel Packing Co., 395 US. 575, 617

(1969). In Chamber of Commerce v. Brown, the Court explained that Section 8(c) protects the right of employers to engage in open and debate regarding unionization:

> From one vantage, § 8(c) "merely implements the First Amendment," NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 80–105, pt. 2, pp 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." Letter Carriers v. Austin, 418 U.S. 264, 272-273, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974).

554 US 60, 67-68 (2008).

The March 24, 2016 rule imposes a chilling effect on the "uninhibited, robust, and wide-open debate" on collective bargaining matters protected by the Taft-Hartley Act at Section 8(c). It will also infringe upon the right of employers to obtain guidance and information on labor relations matters, which is also protected by the First Amendment. *See* Kleindienst v. Mandel, 408 US 753, 762-63 (1972) ("the Constitution protects the right to receive information and ideas").

III. The NPRM Correctly Recognizes the Crushing and Overbroad Reporting Obligation Created by the March 24, 2016 Rule

As the June 12, 2017 NPRM recognizes, because the March 24, 2016 rule eliminates the "advice exemption" to the persuader reporting requirements, it imposes broad new reporting obligations on attorneys and consultants who previously were not subject to LM-20 and LM-21 reporting. Under LMRDA Section 203(b), any person engaging in persuader activity must, in addition to filing an LM-20 report concerning persuader activity, file an annual LM-21 report containing a statement of all receipts and disbursements "on account of labor relations advice or services," which would include negotiation services, consultation on the administration of an agreement, representation in grievances or arbitrations, representation in NLRB proceedings, and so forth. Therefore, if an attorney or consultant engages in a single instance of persuader activity during a year for an employer, it must file a report on all services provided to any employer regarding labor relations, and must identify the employers served and detail disbursements related to the engagements. A single persuader engagement may require a consultant to file LM-21 reports relating to dozens of client engagements, none of which involved persuader activity.

If the proposed interpretation goes forward, to avoid the administrative burden posed by form LM-21, many attorneys and consultants are likely to refrain from providing any guidance or information which could potentially be construed as falling under the proposed scope of "persuader" activity. Employers, particularly smaller employers, will then be forced to participate in union elections without the benefit of an attorney or a knowledgeable labor consultant. The end result is likely to be an increase in unfair labor practices, committed by unwitting employers who are unable to obtain guidance in navigating the confusing maze of current labor law. The problem is exacerbated by the lack of a clear definition of "persuader" activity under the March 24, 2016 Rule.

V. Summary

HEC appreciates the opportunity to provide the forgoing comments supporting the Department's proposal to rescind the March 24, 2016 rule on the "advice" exemption. We believe rescission is necessary because the March 24, 2016 rule is based on a misinterpretation of the statute, conflicts with well-established public policy supporting employer speech rights, and results in burdensome and unnecessary filings by attorneys, consultants, and employers.

Sincerely,

Clayton A. Kamida
President
Hawaii Employers Council