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Andrew R. Davis  
Chief of the Division of Interpretation and Standards  
Office of Labor-Management Standards  
U.S. Department of Labor  
200 Constitution Avenue, NW, Room N-5609  
Washington, DC 20210

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

Dear Mr. Davis:

Independent Electrical Contractors (IEC) is pleased to submit these comments in response to the Department of Labor’s (Department’s) proposal to rescind its recent rule interpreting the “advice” exemption in Section 203(c) of the Labor Management Reporting and Disclosure Act (LMRDA) (“2016 Rule”) as published in the Federal Register on June 12, 2017.<sup>1</sup>

### **IEC**

IEC National is a nonprofit trade association federation with influential 50-chapter associations across the country. IEC represents over 3,300 member businesses with over 80,000 electrical workers throughout the United States and educates over 10,000 electricians and systems professionals each year through its world-class registered apprenticeship program. IEC contractor member companies handle over \$8.5B in gross revenue annually and are composed of some of the premier firms in the industry.

The mission of IEC is to enhance the independent electrical contractor’s success by developing a professional workforce, communicating with government, promoting ethical business practices, and providing leadership for the electrical industry. Its vision is to be recognized as the source of innovative education, products and services to enhance member productivity, profitability and competitiveness through delivery channels, such as chapters, strategic partners and various technologies.

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<sup>1</sup> 82 Fed. Reg. 26,877.

## IEC's Position

IEC strongly supports the Department's proposal to rescind the 2016 Rule. As an initial matter, we note the United States District Court for the Northern District of Texas has already set aside that rule under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). *See Nat'l Fedn. of Indep. Bus. ("NFIB") v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016); *NFIB v. Perez*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016). We further understand the Department filed a notice of appeal from the district court's decision enjoining the 2016 Rule and that appeal is currently being held in abeyance by the United States Court of Appeals for the Fifth Circuit at the Department's request. IEC believes the Department should withdraw its appeal from the order setting aside the 2016 Rule, which was thoughtful, comprehensive, and correct in its analysis of the rule's many defects. Although it appears unnecessary to rescind a rule that has already been set aside under the APA, the Department has taken the further step of proposing to rescind the already-enjoined 2016 Rule. IEC submits these comments to support that proposal, which would demonstrate the Department has reformed its stated policy preferences consistent with the district court's judgment rejecting the 2016 Rule.

Many IEC contractor members are small businesses. They are not legal experts and do not have the resources to maintain full-time legal counsel to advise them on complex labor laws. If they are confronted with the possibility of a union organizing campaign, they must hire outside counsel or a consultant to advise them of their rights and help them stay within the confines of the law. If the 2016 rule took effect, their private businesses and the advisors or consultants they hire would be subject to costly and onerous reporting requirements, even if the outside counsel had no contact with their employees.

For decades, employers and the experts they hire, including attorneys, have had to disclose any arrangements where an expert is hired specifically to communicate directly with employees about their decision to unionize. This was to ensure employees knew the expert was acting on behalf of the employer and was not a neutral third party. If the attorneys or other hired experts did not communicate directly with employees, but instead simply provided "advice" to the employer about how to best or legally communicate with employees, then no disclosure was required. This made sense, because if the employer is the one communicating with the employees, they are already aware the employer is the source of the information they are receiving. Most employers, attorneys, and experts have said this bright-line rule was easy to interpret and apply usually.

By eliminating the advice exemption and expanding what constitutes persuader activity, attorneys will find it very difficult to maintain client confidentiality. In its comments opposing the regulation, the American Bar Association warned against this potential infringement into the attorney-client relationship. The safest way for these firms to avoid violating client confidences and/or the attorney-client privilege is to cease offering any legal advice on employee or labor related issues.

Under the 2016 rule, small businesses, like many IEC contractor members, would have a much harder time finding competent counsel to represent them, and unsuspecting employers will mistakenly run afoul of complicated labor and employment laws. Many small businesses will be

less likely to exercise their federally protected free speech rights to discuss the pros and cons of unionization with employees. This is bad for employees who will have to decide on whether or not to vote for a particular union based only on the union rhetoric and promises. The 2016 rule is so vague and expansive that employers and the experts they hire could inadvertently and unwittingly violate the law and face criminal charges for activities not at all or only tangentially related to labor relations and union organizing.

## **Background**

On June 21, 2011, the Department published a proposal to change its settled, nearly five-decade-old, easily understood and applied interpretation of the LMRDA's "advice" exemption.<sup>2</sup> The Department did not explain why it proposed this change at this time.

Regrettably, the Department failed to give adequate consideration to the comments of other associations and small business advocates who opposed the rule changes, including the American Bar Association (ABA), employers, trade associations, lawyers, law firms, and others. The Department instead largely adhered to its 2011 proposal in promulgating a final version of the rule on March 24, 2016.<sup>3</sup>

Further experience has confirmed the 2016 Rule was deeply flawed on legal, policy, and practical grounds. Most notably, the United States District Court for the Northern District of Texas, on June 27, 2016, issued a preliminary injunction enjoining the Department on a nationwide basis from implementing all aspects of the 2016 Rule pending a final resolution on the merits. The court lambasted the rule as "defective to its core" because it "entirely eliminate[d] the LMRDA's Advice Exemption" contrary to the plain text and intent of the statute, among its many other failings. Besides analyzing the LMRDA, the court based its preliminary injunction decision in part on evidence presented at a hearing during which witnesses – including employers, trade association representatives, lawyers, and legal ethics experts – demonstrated the detrimental effects that the 2016 Rule would have on employers' access to necessary legal advice and employers' free speech rights. According to the court, that evidence established employers and others would suffer irreparable injury under the rule, requiring an immediate injunction against the Department's implementing it. The court subsequently entered summary judgment against the Department and made its preliminary injunction permanent. *NFIB*, 2016 U.S. Dist. LEXIS 183750.

Based on this further experience, IEC urges the Department to agree the now-enjoined 2016 Rule should be abandoned and the Department's prior, long-standing, and effective interpretation of the advice exception, which follows LMRDA's text and purpose, should be left in place undisturbed.

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<sup>2</sup> 76 Fed. Reg. 36,178.

<sup>3</sup> See "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Final Rule," 81 Fed. Reg. 15,924 (Mar. 24, 2016).

**1. The 2016 Rule is contrary to the LMRDA’s express exemption for “advice.”**

Following the 2016 Rule’s promulgation, two United States district courts reviewed the new rule: the District of Minnesota in *Labnet Inc. v. United States Dep’t of Labor*, 197 F. Supp. 3d 1159 (D. Minn. 2016) and the Northern District of Texas as noted above.<sup>4</sup> Both courts found, consistent with IEC’s and other commenters’ objections, that the 2016 Rule was contrary to the LMRDA’s text and purpose and prior authority interpreting the LMRDA’s “advice” exemption.

The central error that both courts identified was the 2016 Rule’s novel treatment of “advice” and “persuader activity” as mutually exclusive concepts under the LMRDA rather than potentially overlapping activities. This new, categorical distinction effectively eliminated the statute’s “advice” exemption by rendering it meaningless because it led the Department to require reporting based on consultants’ advising to employers when that advice had an object to persuade.

To illustrate the 2016 Rule’s root problem, the Minnesota court explored several hypotheticals with Department of Justice attorneys during a hearing in that case. Contrary to the Department’s assertion that the new rule “establishes a clear test for attorneys and others to know what activities will trigger reporting,” 81 Fed. Reg. at 15, 999, the *Labnet* Court found that the Department’s own legal representatives had trouble applying the 2016 Rule’s new standards to determine whether certain activities would trigger reporting. For example, the *Labnet* court asked:

Court: Here’s hypothetical one: I advise you to implement a more generous policy on lunch breaks and post it as soon as possible period. It’s a letter to me from my client. [Sic] Okay? Hypothetical two: I advise you to adopt a new policy similar to the attached and get it posted right away, Sincerely, me. Both advice? Neither advice? See. So the record will reflect – I’m not saying this to be mean. The record will reflect a long pause, which is kind of the problem, right, with the vagueness challenge. I have the world’s leading expert on this new regulation standing before me --

*Labnet*, Case No. 16-CV-0844 (D. Minn. May 26, 2016), Tr. Hearing at 54.

The *Labnet* court concluded:

DOL contends that its interpretation of § 203(c) is sound notwithstanding the fact that it has difficulty applying that interpretation to certain hypothetical scenarios. But the Court’s questions did not involve exotic scenarios or outlier cases; the Court asked DOL about the sort of bread-and-butter work that lawyers perform for clients every single day. DOL’s difficulty answering the Court’s questions reflects not the inevitable ambiguities that arise when applying a reasonably clear principle to marginal cases, but rather the untenability of DOL’s central position

that persuader activity can never be advice, and advice can never be persuader activity.

Proceeding from that flawed premise, DOL categorizes conduct that clearly constitutes advice as reportable persuader activity. For example, a lawyer who merely advises a client to adopt a new policy—or merely advises a client to add a sentence to a memorandum to its employees—has done one thing and one thing only: given the client *advice*. Under § 203(c), the giving of advice to an employer cannot, by itself, trigger the reporting requirement. But under DOL’s new interpretation, the giving of what any reasonable person would define as “advice” does, by itself, trigger the reporting requirement. The Court therefore concludes that plaintiffs have a strong likelihood of success on their claim that the new rule conflicts with the plain language of the statute.

*Labnet*, 197 F. Supp. 3d at 1170.

The *NFIB* court agreed with the *Labnet* court’s conclusions on this point and held the 2016 Rule was invalid under *Chevron*’s first step. *NFIB*, 2016 U.S. Dist. LEXIS 89694, at \*71-\*79. (N.D. Tex. June 27, 2016).<sup>5</sup> The *NFIB* court held:

In whatever manner DOL defines “advice,” it must do so consistent with the statute and therefore must actually exempt advice, including advice that has an object to persuade. The New Rule not only fails to do that, it does the exact opposite: it nullifies the exemption for advice that relates to persuasion.

*Id.* at \*124.<sup>6</sup>

The 2016 Rule should thus be rescinded in the first instance because its attempted nullification of the LMRDA’s express exemption for “advice” is well beyond the Department’s authority.

## **2. The 2016 Rule is contrary to the attorney-client privilege and attorneys’ general duty of confidentiality.**

This defect in the 2016 Rule has been explored at length in comments submitted by the ABA, a non-partisan professional association focused on developing model rules of professional conduct for attorneys. Unfortunately, in promulgating the 2016 Rule, the Department continued to give inadequate attention to these issues. The Department’s new interpretation of the “advice”

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<sup>5</sup> See *NFIB*, Case No. 5:16-cv-00066 (E.D. Tex.), ECF No. 33-1, U.S. Chamber *Amicus* Br. at 5-22.

<sup>6</sup> The *Labnet* court ultimately declined to preliminarily enjoin the rule based on the record in that case. But there, the plaintiffs were attorneys rather than employers, and the question presented was whether those attorneys were threatened by irreparable harm. On the other hand, in *NFIB*, the plaintiffs were trade associations, and that court found they and their employer-members were threaten with irreparable harm under the 2016 Rule. Additionally, the *NFIB* court, unlike the *Labnet* court, heard testimony from numerous witnesses, including representatives of trade associations, an employer, and multiple attorneys and experts.

exemption would negatively affect potential clients' access to needed legal counsel, the Department has largely side-stepped the issue.

First, the Department has continued to reject that its new interpretation would require employers and lawyers to file disclosure reports because of giving and receiving legal advice. The Department, applying its new and categorical distinction between “advice” and persuader activity, refused to acknowledge that confidential legal advice can, have an object to persuade. By claiming that advice, including legal advice, simply cannot have an object to persuade, the Department failed to acknowledge that under its new interpretation, providing legal advice would trigger reporting for the first time. On this point, the *NFIB* court correctly observed:

[I]n the Final Rule, DOL states that attorneys who have ethical reservations about reporting confidential information “always have the option to choose to decline to provide persuader services ... and limit services to legal services.” 81 Fed. Reg. 15,998. The problem with DOL’s approach, however, is that some “persuader services” are legal services. Thus an attorney can only avoid the New Rule’s disclosure requirements by also declining to provide some legal services, which severely burdens those clients who need such services.

*NFIB*, 2016 U.S. Dist. LEXIS 89694, at \*120-121.

Second, the Department has failed to acknowledge the detrimental chilling effects of applying the LMRDA’s disclosure requirements to legal advice. Those chilling effects flow in part from the extremely broad disclosures required under Section 203(b) of the LMRDA and on Form LM-21, which would extend not only to “persuader” clients but to all of a lawyer’s clients for any labor relations advice and services. Since the 1960s, beginning with the enactment of the Equal Pay Act of 1963 and the Civil Rights Act of 1964, the amount of regulation relating to employment has grown substantially, and today’s employment lawyers and law firms typically dedicate much of their practice to employment-related compliance and advice that is unrelated to “traditional labor” matters. Under the 2016 Rule, Form LM-21 would require lawyers and law firms who have provided any advice with an object to persuader to some clients also to disclose confidential information about a significant portion of their clients who have not sought or received such advice. The potential conflict between a law firm’s clients who receive triggering advice and those who do not is obvious, and the interests of the latter could often lead a lawyer or law firm to decline to provide potentially triggering advice at all.<sup>7</sup>

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<sup>7</sup> Shortly after the 2016 Rule was published, one prominent law firm announced:

In response to the persuader regulations, Morgan Lewis has decided that it will not provide services that would trigger reporting under the new requirements. This decision is intended to protect the confidentiality and integrity of the attorney-client relationship for all clients that engage Morgan Lewis to provide services in labor and employment matters, including matters that have nothing to do with union organizing or collective bargaining.

<https://www.morganlewis.com/pubs/dol-persuader-regulations-expose-every-employer-to-reporting-requirements-and-disclosures#sthash.2GNqtvSa.dpuf>.

The Department avoided considering these effects of its new rule on the ground that Form LM-21 was not the subject of its rulemaking. *See, e.g.*, 81 Fed. Reg. 16,000 (“[I]ssues arising from the reporting requirements of the LM-21 are not appropriate for consideration under this rule.”). The Department’s refusal to consider how Form LM-21’s disclosure requirements would affect potential filers under its new interpretation of the “advice” exemption was arbitrary and led it to ignore the rule’s chilling effect on lawyers’ providing, and employers’ seeking and receiving, certain legal advice.

Finally, the Department also brushed aside concerns about the 2016 Rule’s creating conflicts with attorneys’ long-standing ethical obligations by reasoning that state ethical rules would be preempted by federal law. 81 Fed. Reg. 15,997-15-998. The *NFIB* court was correctly unpersuaded by the Department’s reasoning, holding:

DOL asserts that the conflicts its new Advice Exemption Interpretation will create with state ethical requirements can simply be overcome by federal preemption. 81 Fed. Reg. 15,997–15,998. But the question here is whether it would be arbitrary and capricious of DOL to create those conflicts in the first place by adopting its new Advice Exemption Interpretation. Given the historic importance of attorneys’ duty of confidentiality, duty of loyalty, the attorney-client privilege and other ethical obligations, there is nothing in the text of the LMRDA that suggests Congress authorized DOL to nullify those duties at its discretion.

*NFIB*, 2016 U.S. Dist. LEXIS 89694, at \*85-86.

### **3. The 2016 Rule is based on a flawed rationale and contradicts the free speech provisions of the NLRA and LMRDA.**

In response to other critical comments, the Department has claimed it was not primarily relying on criticized studies and declared that instead “the foundation for this rule is the statutory language chosen by Congress to require the disclosure and reporting of agreements between employers and labor relations consultants to persuade employees about the exercise of their union representation and collective bargaining rights.” 81 Fed. Reg. at 15, 962. But as shown above and as concluded by the *Labnet* and *NFIB* courts, that was not the case: the 2016 Rule was contrary to the “statutory language chosen by Congress,” which exempts “advice” from the LMRDA’s disclosure requirements. The Department further asserted in the 2016 Rule that the “chief value in the research findings” that many commenters criticized was “to show that the conduct that Congress intended to address by requiring disclosure and reporting persists.” *Id.* But that reasoning ignored the very point made in criticisms of those studies: due to their bias and defective methodology, they could not be relied upon to conclude that the problematic conduct targeted by Congress in the late 1950s persisted. Instead, those studies assumed without evidence that employers were engaging in unlawful conduct interfering with employees’ rights and mischaracterized employers’ exercising their own Constitutionally and statutorily protected free speech rights as wrongful, which was contrary to the law.

Upon reconsideration of these issues, the Department may note the fact that the rate of unionization in the private sector has declined in recent decades. Today, union membership has

dropped to less than 7% of the private sector workforce in the United States.<sup>8</sup> However, the Department should also know that organized labor and pro-union advocates offer a narrative to explain this decline that shifts any responsibility from themselves and instead blames employers. This narrative accuses today's employers—without evidence—of widely using underhanded tactics to interfere with employees' right to organize in the same manner as the Nathan Shefferman-like "middlemen" who sought to sabotage employees' collective bargaining activities in the 1950s and earlier. The Department should cautiously treat this narrative for what it is: a self-serving account offered by organized labor's partisans.

The Department should also recognize that in contrast to the propagandistic narrative put forward by unions and their allies, neutral observers identify multiple causes for the decline in unionization in many western countries that have nothing to do with any alleged employer misconduct. These causes include a decrease in the number of manufacturing jobs, increased globalization, increased prevalence of wage and anti-discrimination laws that may reduce employees' need for unions, and unions' failure to adapt to change. *See, e.g.* E.H. "Why Trade Unions are declining," *The Economist* (Sept. 28, 2015), available at <http://www.economist.com/blogs/economist-explains/2015/09/economist-explains-19>. The mere fact that unionization rates have decreased cannot support an inference that employers are interfering with employees' rights to unionize, that employers are evading the LMRDA's disclosure requirements, or that the Department's longstanding interpretation of exempt "advice" was inadequate.

In promulgating the 2016 Rule, the Department appears to have uncritically accepted the narrative of organized labor and its advocates, including their assumption that the decline in union membership is inherently bad and should be reversed and their attributing the general decline in unionization to presumed, but unproven, misconduct by employers. The Department also appeared wrongly to have believed that its mission is to reverse the decline in unionization rather than to ensure the LMRDA's provisions are enforced according to the statute's requirements. In its *Weekly Newsletter* of February 4, 2016, the Department proclaimed it to be beyond debate that "union membership boosts the incomes of workers . . . and helps people punch their tickets to the middle class." U.S. Dept. of Labor, Tom Perez, *Unions Matter* (2016) <https://medium.com/@LaborSec/unions-matter-2ca77cdc5559>. According to the Department, "when folks make it harder for unions to organize . . . it weakens the middle class." *Id.* The Department further stated that supporting labor unions is "one surefire way" to build a strong middle class. *Id.* However, these are debatable propositions and not the law under the LMRDA.

Against the backdrop of the Department's acceptance of these pro-union assumptions, the 2016 Rule apparently should offer campaign assistance to union organizers by creating barriers

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<sup>8</sup> Union membership has steadily fallen for decades. In 1945, more than a third of non-agricultural workers were union members. Gerald Mayer, "Union Membership Trends in the United States" (CRS [Congressional Research Service] Report for Congress, August 31, 2004) at CRS-12, available at [http://www.digitalcommons.ilr.cornell.edu/key\\_workplace/174/](http://www.digitalcommons.ilr.cornell.edu/key_workplace/174/). In 1983, union membership was 20.1 percent. Bureau of Labor Statics, Economic News Release. Union Members-2015 (Jan. 28, 2015), available at <http://www.bls.gov/news.release/union2.nr0.htm>. By 2015, the rate of union membership had declined to 11.1 percent as a whole and within the private sector stood at 6.7 percent. *Id.*

to lawyers performing labor-relations work and by attempting to discredit information supplied by employers during union campaigns. The Department stated:

[T]he premise of the rule is that with knowledge that the source of the information received is an anti-union campaign managed by an outsider, workers will be better able to assess the merits of the arguments directed at them . . . With this information, they will be able to better discern whether the views and specific arguments of their supervisors . . . reflect a scripted . . . antipathy towards union representation and collective bargaining.

*Id.* at 15926-27 (March 24, 2016).

The Department glaringly omitted from its analysis any description of what occurs during a typical modern union organizing campaign. Employers today find that the most effective way to respond to a union campaign is to provide *more* information to employees about unions and unionization that the unions and their allies fail to provide. Because most employers who respond to an organizing campaign have little experience with unions or labor law, they typically must rely on their employment attorneys to advise them regarding lawful, effective methods for sharing their position and viewpoint with employees. During a typical modern union campaign, an attorney or other consultant might advise an employer to share with employees handouts with information such as the following:

Question: I was told I should vote for the union to give it a chance and, if we don't like it, we can just get rid of the union. Is that true?

Answer: No, you cannot just get rid of a union at any time if you don't like it.

Fact: If the union is voted in, you must live with it for a minimum of 1 year. That is the law.

Fact: To get rid of a union after the 1 year period, employees must submit a Decertification Petition to the National Labor Relations Board (NLRB) that meets all its rules and requirements. Here are a few things to know about that process:

- If employees need a lawyer for the NLRB process, they have to hire one themselves.
- The NLRB only considers a petition to remove a union at certain times:
  - One year after the election date if no labor contract is signed, or
  - 60 to 90 days before the end of any contract of 3 years or less, or
  - Upon expiration of any contract, or
  - Any time after 3 years for a contract with a longer term.

Because most initial contracts are for a term of 3 years, if the union wins the election and a contract is signed, it could easily take 4 years to get rid of the union if you don't like it.

Fact: The union could file legal charges with the NLRB when a Decertification Petition is pending, and you can't get rid of the union until those legal charges are resolved. These legal cases often take years.

Fact: Unions have disciplined members for trying to kick out the union when workers decided they no longer wanted it.

An employer providing such information does not convey a “scripted antipathy” to unions, nor does it interfere with employees’ rights in any way. Rather, it does one thing: it makes employees better informed about the consequences of their choices. Many employers may believe that having such information will increase the likelihood that some employees will exercise their right to vote against unionization—which is why some employers provide it and why unions and their advocates want to prevent employers from providing it—but there can be no dispute that such information is true, accurate, and relevant. Withholding such information would make employees’ decision making *less* informed, not more so.

Although the Department’s ostensible rationale for adopting the 2016 Rule was to insure that employee-voters in union representation elections are better informed, the rule’s effect would have been the very opposite. On one hand, the 2016 Rule would do nothing to insure that employees voting in union representation elections would be better informed about the fact that their employers may receive advice from lawyers and other consultants (a fact that the Department merely assumed but failed to show would relate to employee decision making in any event). The LM disclosure forms required to be filed under the 2016 Rule would not normally be filed and available for inspection until *after* employees have voted in a union representation election.<sup>9</sup> By deterring experienced attorneys from providing labor-relations advice and employers from seeking assistance in responding to the union campaigns, the 2016 Rule would inevitably result in employees receiving *less* accurate and relevant information such as that identified above. If employers, assisted by experienced attorneys and consultants, do not provide such information to employees about the potential downsides of voting for a union no one else will.

In finalizing the 2016 Rule, the Department plainly accepted the pro-union and anti-employer narrative offer by organized labor and its advocates, including the “studies” criticized by comments. For instance, the Department explained:

The Department concludes that, as was true in the 1950s, the *undisclosed* use of labor relations consultants—even where their activities are undertaken in strict accordance with

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<sup>9</sup> See *NFIB*, 2016 U.S. Dist. LEXIS 89694, at \*91-92 (“DOL fails to show that the information disclosed in the LM reports will typically be ‘known to employees’ when they cast their votes” because union elections are now typically held about 21 days after the employer receives the Notice of Hearing on the union’s election petition, but an attorney’s or other consultant’s LM-20 report is not due until 30 days after being retained by the targeted employer).

the law—impedes employees’ exercise of their protected rights to organize and bargain collectively and disrupts labor-management relations.

81 Fed. Reg. at 15,935. The Department further reasoned that “law firms have engaged in the same kinds of activities as other consultant firms, providing services similar to practices advocated by Nathan Shefferman, the face of the ‘middlemen,’ mentioned in the McClellan hearings and the LMRDA’s legislative history.” 81 Fed. Reg. at 15, 992.

These were astounding and unfounded conclusions. The Department’s analogizing current employers’ practice of retaining reputable and ethical attorneys and consultants to assist them in providing accurate information to employees regarding reasons they might prefer not to unionize to the underhanded deceit and sabotage engaged in by Nathan Shefferman-type “middlemen” in the 1950s is a gross distortion of contemporary labor relations. The Department must reject this biased and unfounded narrative and ensure that the Department’s regulatory decision making is based only on facts, not propaganda.

The rationale offered by the Department for the 2016 Rule was so weak and unsupported by evidence as to be arbitrary, capricious, and an abuse of discretion. The real concern motivating many supporters of the 2016 Rule is not that employees need more information but that they are already receiving too much information that causes them to question the value of unionizing.<sup>10</sup> The Department should reject such logic, which is contrary to the law and to the interests of employees in being fully informed in their decision-making.

Finally, it is also significant that the Department has no jurisdiction regarding union organizing campaigns or NLRB elections. Those matters are regulated solely by the NLRB, a separate and independent agency. 29 U.S.C. § 153 *et. seq.* The Department’s apparent goal underlying the 2016 Rule of increasing unionization was well outside the bounds of the Department’s authority and mission.

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<sup>10</sup> There are also reasons to be concerned that the Department’s adopting the 2016 Rule was influenced by political considerations. The Department itself observed that “[t]he sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” 81 Fed. Reg. 15,985 (citation omitted). Here, the political party of the administration that adopted the 2016 Rule has been the beneficiary of substantial financial contributions from labor unions. *See New Analysis: Dues Money Goes to Causes that Union Members Don’t Support*, LaborPains (Nov. 13, 2015), <http://laborpains.org/2015/11/13/new-analysis-dues-money-goes-to-causes-that-union-members-dont-support/> (based on analysis of union disclosure reports filed with Department, finding that in 2014, union political contributions to the party of the administration adopting the 2016 Rule and aligned groups amounted to nearly \$75 million). Moreover, the Secretary of Labor who was responsible for overseeing the Department’s adoption of the 2016 Rule immediately became chair of the national committee of his political party following the expiration of his term as Secretary. In his new role, the former Secretary is responsible for raising funds for his political party, which continues to be supported in significant part by union contributions.

**4. The 2016 Rule imposes extraordinary but unjustified costs that the Department failed to consider.**

Finally, the *NFIB* court found that the Department “understated the economic impact of its New Rule,” “failed to provide an adequate factual basis for its cost estimates,” and “failed to meaningfully consider and address the weight of the comments and cost estimates submitted in response to proposed rulemaking.” *NFIB*, 2016 U.S. Dist. LEXIS 89694, at \*105.

**5. Conclusion**

For all of these reasons and those given by the *NFIB* and *Labnet* courts, the 2016 Rule should be rescinded, the Department should withdraw its appeal from the *NFIB* court’s order setting aside the 2016 Rule, and the prior, longstanding interpretation of the LMRDA’s “advice” exemption should be left in place.

Sincerely,

Jason E. Todd  
Vice President, Government Affairs  
Independent Electrical Contractors