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August 11, 2017

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:

The National Association of Home Builders (NAHB) in 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) (hereafter, "2016 Rule") as published in the Federal Register on June 12, 2017.[1]

Introduction

NAHB is a Washington, DC-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's missions is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's 140,000 members are home builders or remodelers and its builder members construct about 80 percent of the new homes built each year in the United States. NAHB and its members work for the American dream of home ownership, as well as for the development of housing that creates vibrant and affordable communities. NAHB is a vigilant advocate on behalf of its members' interests, both before regulatory agencies and in the Nation's courts. NAHB, along with its affiliated state and local home builders associations, serve their members through issue advocacy, education programs, and distribution of relevant informational materials.

NAHB's members include individuals and firms that construct single-family homes, apartments, condominiums, and commercial and industrial projects, as well as land developers and remodelers. Of particular significance, the overwhelming majority of NAHB members are small businesses. The majority of NAHB's membership also are employers as defined by the LMRDA and National Labor Relations Act (NLRA).

NAHB strongly supports the Department's proposal to rescind the 2016 Rule. Indeed, NAHB was so concerned about the detrimental effects that the 2016 Rule would have on its members that it joined several other trade associations to file suit challenging the rule shortly after it was published. That lawsuit, filed as *National Federation of Independent Business et al.* (hereafter "*NFIB*") *v. Perez*,

[1] 82 Fed. Reg. 26,877.

Case No. 5:16-cv-00066-C (N.D. Tex. Mar. 31, 2016), resulted in a preliminary injunction prohibiting the Department from implementing the 2016 Rule. *See Nat'l Fedn. of Indep. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016). The Court subsequently entered summary judgment in favor of NAHB and its co-plaintiffs, converted its preliminary into a permanent injunction, and set aside the rule pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). *See NFIB v. Perez*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016).

NAHB is presently defending the district court's judgment on appeal. *See NFIB et al. v. Acosta*, Case No. 17-10054 (5th Cir.). That appeal is being held in abeyance at the Department's request. *See* Order dated June 15, 2017. As an initial matter, NAHB urges the Department to withdraw its appeal from the district court's order setting aside the 2016 Rule for all of the same reasons the Department should rescind the rule. The district court's judgment was well reasoned and correct, and there is no reasonable basis for the Department to continue prosecuting an appeal from that order. The Department's withdrawal of its appeal would not only be consistent with the LMRDA's requirements, but also better conserve the resources of the Department, the courts, and the parties.[2]

NAHB's Lawsuit Challenging the 2016 Rule

NAHB respectfully incorporates herein and endorses the reasoning provided by the Northern District of Texas for enjoining and setting aside the 2016 Rule. That reasoning provides ample grounds for the Department to rescind the rule. The Department should give that Court's decision close attention and assign it significant weight. As a party to that litigation, NAHB is well familiar with the extensive legal briefing conducted by the parties and the substantial evidentiary record compiled and considered by the court. The court carefully weighed the parties' arguments and reviewed evidence of the substantial harm the rule would have imposed on trade associations and employers like NAHB and its members.

1. The parties to NAHB's litigation

NAHB, joined by NFIB, the Texas Association of Business ("TAB"), the Lubbock Chamber of Commerce ("Lubbock Chamber" or "Chamber"), and the Texas Association of Builders ("Texas Builders") (collectively, the "Plaintiffs"), filed their Complaint on March 31, 2016 in the Northern District of Texas. NAHB and its co-plaintiffs sought declaratory and injunctive relief with respect to the 2016 Rule.[3] Specifically, we challenged the 2016 Rule based on the APA on the grounds that the new rule was in excess of the Department's statutory authority, was contrary to the plain wording of the LMRDA, and was arbitrary and capricious. We also challenged the 2016 Rule based on the First Amendment to the United States Constitution on the grounds that the new rule violated our and our members' free speech rights and was preempted by Section 8(c) of the NLRA, 29 U.S.C. § 158(c). We

[2] Indeed, in light of the *NFIB* court's order setting aside the 2016 Rule, it is also unnecessary for the Department to rescind the rule. The Department could achieve the same result simply by abiding by the district court's decision.

[3] "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).

also alleged a claim based on the Fifth Amendment to the United States Constitution on the ground that the new rule imposed criminal sanctions, but failed to define with necessary clarity what conduct was outlawed. Finally, we challenged the 2016 Rule based on the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 *et seq*. (2012), on the ground that the Department failed to properly account for the costs of the new rule.

We were joined in our lawsuit by a number of states as intervenors. Specifically, the State of Texas, State of Arkansas, State of Alabama, State of Indiana, Attorney General Bill Schuette on behalf of the People of Michigan, State of Oklahoma, State of South Carolina, State of Utah, State of West Virginia, and State of Wisconsin (the States) filed their Complaint in Intervention on May 19, 2016. The States joined us in seeking preliminary injunctive relief.

2. The court's evidentiary hearing

On June 20, 2016, the Court conducted an evidentiary hearing on the Plaintiffs' and States' motions for injunctive relief. The Court heard evidence from eight (8) witnesses and admitted numerous documentary exhibits into the record. Specifically, the Court heard testimony from the following:

- Steven L. Massengale, a small business owner based in Lubbock, Texas, whose businesses employ between 35 and 50 employees depending on the season.

- Norma Ritz Johnson, Executive Vice-President of the Lubbock Chamber of Commerce.

- Johanna (Annie) Spilman, the Texas State Legislative Director for NFIB.

- Don Graf, a partner of the law firm McCleskey, Harriger, Brazill & Graf, LLP located in Lubbock, Texas. Admitted to the Texas bar in 1962, Mr. Graf's legal practice is based in Lubbock, Texas, where he focuses on labor and employment law, including advising employers in responding to union election campaigns. Since 1962, Mr. Graf has participated in 15-20 union election campaigns advising employers. Mr. Graf testified as an expert witness regarding the practice of labor law, particularly in the West Texas region, including employer and lawyer practices in responding to union organizing campaigns and the effect of the Department's new disclosure requirements on those practices.

- David P. Hiller, a partner at the law firm Fisher & Phillips, LLP. Since 1983, Mr. Hiller's law practice has been devoted to representing management in labor relations matters, including responding to union election campaigns, negotiating collective bargaining agreements, defending unfair labor practice charges, advising regarding plant closures or relocations, and advising regarding the purchase of unionized facilities. Mr. Hiller testified as an expert witness regarding the practice of labor law, including employer and lawyer practices in responding to union organizing campaigns and the effect of the Department's new disclosure requirements on those practices.

- William T. Robinson, formerly a partner with the law firm Frost Brown Todd.[4] Mr. Robinson had practiced law since 1971, with his legal practice focused on commercial and civil litigation. Mr. Robinson had been closely involved with the American Bar Association ("ABA") and regional bar associations. He served in various capacities with the bar associations, including as President of the Kentucky Bar Association and on the ABA House of Delegates, on the ABA Board of Governors, and as ABA Treasurer. Mr. Robinson also served on the adjunct faculty of the Salmon P. Chase College of Law. In addition, from 2011 to 2012, Mr. Robinson served as the President of the ABA. Mr. Robinson testified as an expert witness regarding the ABA's position on the ethical implications of the Department's New Rule, including in light of the ABA's Model Rules of Professional Conduct.

- Ronald Meisburg, Senior Counsel at the law firm Hunton & Williams LLP. Over his career, Mr. Meisburg has focused his law practice on labor law. Mr. Meisburg began his career with the Office of the Solicitor of the U.S. Department of Labor. Following a period in private practice, Mr. Meisburg was appointed by President George W. Bush in 2004 to the NLRB. Two years later, President Bush appointed Mr. Meisburg to a four-year term as the NLRB's General Counsel. In that role, Mr. Meisburg served as the chief prosecutor under the NLRA and as chief administrator of the NLRB's 32 regional offices. Mr. Meisburg testified as an expert witness regarding the practices and function of the NLRB, including union organizing campaigns, union elections, and employer and consultant practices during union elections.

- Dennis Duffy, a partner at the law firm of BakerHostetler. Mr. Duffy is Board Certified by the Texas Board of Legal Specialization in the area of labor and employment law and a recognized expert in attorney ethics, particularly in labor and employment matters. Mr. Duffy is the author of *Ethics and Professionalism Handbook for Labor and Employment Lawyers*, 14th Ed. (2016). Over his career, Mr. Duffy had served in positions at multiple law firms, as in-house counsel, and as a law professor, including Vice President and Associate General Counsel and Chief Counsel for Time Warner, Inc., General Counsel for the University of Houston, Professor of Law at the University of Houston, and Visiting Professor of Law at the University of Virginia. Mr. Duffy testified as an expert witness regarding legal ethics, the interpretation and operation of the rules of professional conduct, and the impact of the Department's 2016 Rule on the ethical obligations of attorneys promulgated by the States.

3. Key testimony from the evidentiary hearing

NAHB respectfully attaches hereto and submits a copy of the transcript from the evidentiary hearing conducted in its lawsuit. The witness testimony from that hearing demonstrates the variety of harms that the 2016 Rule would have imposed without justification on employers and particularly on small businesses like NAHB's members. The Department, in promulgating the 2016 Rule, either failed to gather and consider such evidence or improperly discounted it.

[4] Regrettably, Mr. Robinson passed away on May 9, 2017.

In particular, NAHB draws the Department's attention to the following testimony:

- Mr. Hiller's, Mr. Graf's, and Mr. Meisberg's descriptions of how the NLRB's election process works in practice, the numerous filing deadlines and legal requirements that an employer responding to an election petition must meet, and the types of legal advice that employers typically require. (Tr. at 29-94; 175-196; 197-212.) NAHB notes that Mr. Hiller's account of employers' need for legal advice in this process, usually on a highly expedited basis as a result of the NLRB's new accelerated election rules, is particularly true with respect to small businesses like many of NAHB's members. Small businesses usually do not have in-house legal staff, and many do not even have dedicated human resources staff. Small businesses like many of NAHB's members often have little or no experience with unions, the NLRB, or the National Labor Relations Act. If they are targeted in a union campaign, they typically must quickly find a labor lawyer to advise them to ensure they do not miss critical deadlines and can adequately protect their interests.

- Mr. Meisberg's testimony that the 2016 Rule's attempt to distinguish non-reportable legal advice from "persuader" activity wrongly attempts to "segment a process that's really not segmentable." (Tr. at 205.)

- Ms. Johnson's and Ms. Spilman's testimony regarding the negative impact the 2016 Rule would have on their associations' ability to provide educational seminars to their members on labor and employment topics. (Tr. at 213-236; 243-266.) As Ms. Johnson and Ms. Spilman both testified with regard to the Lubbock Chamber and NFIB, respectively, their organizations regularly conduct union awareness and union avoidance seminars for their members and prospective members, where they generally rely on outside speakers. They also occasionally rely on in-house speakers who are employees of their associations. The 2016 Rule would have negatively affected their ability to put on such seminars, because association members who attend union-avoidance seminars do not want their names publicly disclosed, in part, because they fear becoming targets of union campaigns. Under the rule, associations (including NAHB) would be required to inform potential attendees that their attendance would be disclosed to the Department and the general public, which would discourage them from attending those seminars. As a result, the 2016 Rule would have made it less likely that association members would attend such seminars, and association members would therefore have less information on how to deal legally and effectively with unions. Seminar attendance would decrease because of members' fear of publicity due to required disclosures and fear of later targeting by unions for organizing drives. In addition, because some associations have strict internal rules to protect the confidentiality of their members, if the 2016 Rule went into effect, those associations would likely not offer seminars at all because doing so would require the disclosure of attendees. Some associations also offer other services to their members who have questions regarding union organizing issues. For example, some associations have call centers that field calls from members on union organizing issues. Members call to receive advice regarding lawful responses to union organizing. Many associations also provide newsletter articles, webinars, employer handbooks, and referrals to outside consultants or lawyers regarding union

avoidance matters. And when an association's members need a labor lawyer to assist with a union organizing drive, the association may refer them to outside counsel. There would be harm to these associations and their members if lawyers declined to represent employers in union organizing matters as a result of the 2016 Rule, because small business owners are not experts in labor law and generally do not have in-house legal counsel. They need competent legal advice to prevent non-compliance with federal labor laws related to union organizing. If there were fewer options for obtaining such legal advice, it would be nearly impossible for small business employers, which do not have in-house counsel or in-house human resources staff, to comply.

This testimony is equally applicable to NAHB, state and local home builders associations, and the many other trade associations nationwide who seek to support their members (many of whom are small businesses) with educational seminars, prepared materials, and referrals.

- Mr. Massengale's testimony about his experiences and needs as a small business owner. (Tr. at 237-242.) Mr. Massengale described how he owns two businesses, Advanced Graphix, a screen and promotional printing company, and The Matador, a retail clothing store with two locations. His businesses employ between 35 to 50 full-time employees. Mr. Massengale testified that he has attended educational programs in the past dealing with regulatory matters sponsored by the Lubbock Chamber. Mr. Massengale testified he was aware of the 2016 Rule and understood that under the rule, if his lawyer were to provide him any labor law advice that might persuade his employees not to join a union, or if he attended a trade group seminar about that subject, his businesses would be reported to the Department as having received that advice. Additionally, his lawyer will have to report how much he was paid, and what advice was given regarding union avoidance matters. All of this information would be made available to the public. Ms. Massengale testified that if the Lubbock Chamber offered a program on union organizing, the fact that the speaker would report Mr. Massengale's attendance under the 2016 Rule would make it less likely for Mr. Massengale to want to attend such seminars. The fact that the Department's disclosure forms (that is, Forms LM 10 and LM 20) are publicly available makes Mr. Massengale disinclined to attend such seminars because of his desire not to divulge attorney-client privileged or confidential information, because of the negative publicity attendant to such disclosure, and because of his fear of being targeted for union organizing once unions have access to this information. If Mr. Massengale were to ask the Lubbock Chamber of Commerce for literature on union organizing and they had to report having given it to Mr. Massengale, that fact would make Mr. Massengale less likely to ask for it due to the same fears. Tr. (Massengale) at p. 240, lines 6-10.

  Mr. Massengale testified that if a union targeted employees at one of his companies, he would oppose unionization. In such an event, he would want to hire a labor lawyer to represent his companies in his efforts to oppose unionization. However, Mr. Massengale would be less likely to hire a lawyer if he knew that his lawyer would have to report to the Department, on publicly available forms, the retention agreement, and the fees paid, to

give advice on opposing unionization. Again, this reluctance would be due to his desire not to divulge attorney-client privileged or confidential information, the negative publicity attendant to such disclosure, and for fear of being targeted for union organizing.

Mr. Massengale testified that he consults with a local lawyer from time to time about employment matters not related to unions. If his lawyer helped other employers oppose unionization and, as a result, had to report his agreement or arrangement with that other employer to the Department, along with the names of all employers (including Mr. Massengale's companies), and the fees received from such other companies (including Mr. Massengale's), for "labor relations advice or services," even if not related to union organizing, with such information being made publicly available, then Mr. Massengale would be less likely to consult with his employment lawyer. Again, this reluctance stems from his desire not to divulge attorney-client privileged or confidential information, concern over the negative publicity attendant to such disclosure, and his fear of being targeted for union organizing.

Mr. Massengale's experience is representative of that of many small business owners, including many of NAHB's own members.

- Mr. Graf's testimony about his experience as a labor and employment attorney in Lubbock, Texas. (Tr. at 175-196.) Mr. Graf testified that his legal practice includes advising employers in responding to union election campaigns. Since 1962, Mr. Graf has participated in 15-20 union election campaigns advising employers. Mr. Graf also noted that he is not aware of any other attorney in Lubbock, Texas, or in Northern Texas between El Paso and Dallas, who represents and advises employers in responding to union election campaigns. Mr. Graf testified that under the 2016 Rule, he would be unwilling to provide seminars on union avoidance issues because it would require him to publicly report the identities of attendees. Moreover, employers would not want to attend such seminars if their identities were so reported. Mr. Graf and his firm will cease representing employers in union organization matters if the 2016 Rule became effective and enforceable. Employers in Lubbock who seek representation regarding union organizing matters would therefore likely be required to try to find attorneys elsewhere, such as Dallas, Houston, or El Paso at considerably higher expense. Mr. Graf was aware that other law firms around the country were announcing their decisions to cease providing advice and representations that would trigger reporting under the 2016 Rule, including Morgan Lewis, which is one of the largest law firms in the U.S.

The above-referenced testimony, in addition to the expert opinions of Mr. Duffy and Mr. Robinson regarding attorneys' ethical duties and the conflicts the 2016 Rule would create with those duties, demonstrated that the Department's 2016 Rule would reduce employers' access to legal advice that they need and reduce employers' ability to exercise their own free speech rights.

4. Rescission of the 2016 Rule

NAHB fully agrees with the district court's conclusion that the 2016 Rule exceeds the Department's authority under the LMRDA because the rule effectively reads the "advice" exemption out of the statute. NAHB also agrees with the court's holding that the 2016 Rule is arbitrary and capricious, violates employers' free speech rights, is unconstitutionally vague, and violates the RFA.

NAHB submits this comment and the attached transcript to register its profound concerns about the 2016 Rule's negative practical effects. As the testimony during the litigation showed, the 2016 Rule would have grave and perhaps unintended consequences for employers like NAHB's members. NAHB well knows the challenges that today's employers, especially small businesses, face as they seek to identify, understand, and comply with the many federal, state, and local laws and regulations that cover them. Employers, especially small businesses, often need ready access to legal advice to deal effectively with the numerous employment issues that can arise day to day in the workplace. And employers, especially small businesses, often desperately need such advice when responding to a union campaign, both to ensure that the employer complies with the NLRB's rules and the NLRA and that the employer effectively exercises its own rights.

At a time when employers' need for legal advice is increasing because employment law continues to become more complex and demanding, the 2016 Rule would have created completely unnecessary barriers to employers' accessing such advice. NAHB is concerned that under the 2016 Rule, employers would be confused about what advice would and would not trigger public disclosures and would generally be less inclined to seek needed labor and employment advice. NAHB is also very concerned that experienced labor and employment attorneys would be deterred from providing any advice that might trigger reporting under the 2016 Rule.

5. Conclusion

The Department should be helping employers to comply with the law, not creating barriers to such compliance. For all of the above reasons and those given by the district court in granting NAHB's request to enjoin the 2016 Rule, the 2016 Rule should be rescinded. In addition, the Department should withdraw its appeal from the court's order setting aside the 2016 Rule. Instead, the existing, effective, and easily understood interpretation of the LMRDA's "advice" exemption should be left in place.

Sincerely,

Amy C. Chai