UNITED STATES OF AMERICA

BEFORE THE DEPARTMENT OF LABOR

OFFICE OF LABOR MANAGEMENT STANDARDS

In the Matter of:	)	**RIN 1215-AB79**
	)	**1245-AA03**
	)	
	)	
NOTICE OF PROPOSED	)	**(76 Fed. Reg. 36178**
	)	**[June 21, 2011])**
RULEMAKING	)	
	)	
	)	

Comments of the National Association of Manufacturers to the Rules Proposed By the Department of Labor's Office of Labor Management Standards Regarding Interpretation of "Persuader Activities" and the "Advisor" Exemption

I. INTEREST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS.

The National Association of Manufacturers ("NAM") is the preeminent manufacturing association in the United States, as well as the nation's largest industrial trade association representing small and large manufacturers in every industrial sector in all 50 states. Manufacturing is the largest driver of economic growth in the nation—contributing $1.6 Million to the economy. The more than 12,000 manufacturing companies represented by the NAM have a distinct interest in the proposed rulemaking. The NAM, and most of its members, are employers that from time-to-time seek legal advice in the area of labor-employment relations and compliance with labor and employment legal requirements. The NAM and its members have a

significant interest in the rules proposed by the Department of Labor's Office of Labor Management Standards ("Office") regarding employer and attorney reporting requirements related to "persuader activities" ("Proposed Rules").

II. SUMMARY OF COMMENTS.

The Proposed Rules significantly impair the ability of employers to obtain essential legal counsel and advice from experienced labor and employment attorneys regarding a broad range of critical workplace issues, including but not limited to, union organizing campaigns, collective bargaining, corporate campaigns, day-to-day labor relations, strikes, the labor relations implications of corporate transactions and asset purchases, successorship issues, supervisor and employee education, disciplinary proceedings and the promulgation of personnel policies and practices.

The Proposed Rules' requirement that employers and their counsel publically disclose highly confidential financial and relationship information will compromise business operations and competitiveness and chill employers from engaging legal counsel on a broad spectrum of labor-employment issues. Thus, contrary to the ostensible purposes of the Proposed Rules, employers who must navigate a labyrinth of labor and employment laws and regulations without the guidance of experienced counsel will be subject to greater risk and liability. Employers will be more, rather than less, likely to violate a host of labor and employment relations laws.

There is no demonstrable need for the Proposed Rules and their promulgation will have a profoundly negative effect on employers, employees and workplace stability. Therefore, the National Association of Manufacturers respectfully urges the Office to withdraw the Proposed Rules in their entirety.

III. THE CUMULATIVE EFFECT OF THE PROPOSED RULES WILL DEPRIVE EMPLOYERS OF THE EFFECTIVE RIGHT TO COUNSEL ON CRITICAL LABOR AND EMPLOYMENT ISSUES.

Employers rely upon attorneys for counsel and advice on a variety of labor relations matters. Currently, neither employers nor their attorneys need to report to the Office any such advice—or the fees associated with it—unless the attorney engages in direct "persuader activity."

Since sensitive reporting requirements usually are not required by the Office, employers and attorneys have no reluctance in freely engaging in an interactive process to determine the lawful activities an employer may apply in communicating with employees regarding labor and employment matters.

Unfortunately, because the Proposed Rules significantly expand the disclosure requirements, they will deter employers from engaging competent legal counsel in the following activities not currently covered by such requirements:

- Training supervisors to conduct individual or group meetings with employees in the context of a union organizing campaign;
- Preparing and revising employer speeches regarding the benefits/detriments of unionization;
- Preparing leaflets, handouts, PowerPoint presentations or any other communication device related to the subject of union organizing;
- Preparing employee climate/attitude surveys;
- Drafting personnel policy handbooks;
- Structuring an employer response to a union organizing campaign;
- Providing counsel on disciplinary actions that may affect the union campaign;
- Providing counsel on certain strike-related issues;

- Providing counsel on employee issues related to the purchase of a company or its assets.

Presently, the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. Sections 401 *et seq.* requires employers and labor consultants to make financial disclosures to the Department of Labor regarding agreements or arrangements to engage in activity that has a direct or indirect object of persuading employees with respect to the exercise of their rights to organize and bargain collectively. The LMRDA requires consultants who engage in persuader activity to file a Form LM-20 disclosing the existence of an agreement to perform "persuader activities" within thirty days of the date the consultant enters into an agreement with an employer. The consultant must also file an annual LM-21 report requiring anyone who performs persuader activities for one client to disclose the identity, fees and the labor activities performed for all of the consultant's *other* labor clients, regardless of whether persuader activities were performed for such clients.[1]

For the last 50 years the Department of Labor has exempted from disclosure requirements any advice or materials that lawyers may provide to clients for use in persuading employees, provided the lawyers have no direct contact with the employees. .

The Proposed Rules, however, both expand the definition of "persuader activities" and narrow the "advice" exemption. The new rules include in the reporting requirement actions, conduct or communications that have, *in whole or in part*, a direct *or indirect* object to persuade

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1 Form LM-21 requires law firms to "[i]temize all salaries and allowances, and other disbursements . . . to all officers and employees of the reporting organization." If an attorney engages in activity considered to be "persuader activity" for just one employer, his firm would have to report the services rendered and the fees for all attorneys in the firm who provide labor relations advice for all clients and fees therefrom, even if the client receives non-persuader advice. The disclosure of client names, fees and lawyers' incomes would be publicly reported on the Department of Labor's website. Failure to report would subject lawyers to civil and criminal penalty. Thus, many attorneys will simply cease performing such work on behalf of clients to avoid the possibility of sanctions.

employees. This includes all of the activities itemized above. The only counsel that would *not* trigger a reporting requirement would include:

- Providing guidance on National Labor Relations Board practice or procedure;
- Ensuring compliance with the law;
- Advising the employer as to what it may lawfully say to employees.

Thus, where an attorney prepares written or other material for an employer to communicate to its employees, an expansive reporting requirement including extremely sensitive information is triggered.

The inevitable effect of the Proposed Rules would be to cause many experienced labor lawyers to cease performing the above activities that do not fall within the exemption, thereby depriving employers of essential legal advice.

IV. THE PROPOSED RULES WILL RESULT IN MORE VIOLATIONS OF LABOR AND EMPLOYMENT LAWS.

The Proposed Rules will deter a sizable percentage of experienced and competent labor and employment lawyers from providing services that may be arguably related to "persuader activities." Consequently, employers will be less likely to receive necessary counsel on compliance with labor laws.

Absent competent labor advice, employers who in good faith attempt to comply with the complex labor and employment laws governing their respective workplaces will innocently commit more labor law violations. The result is that the Proposed Rules will increase, rather than decrease, violations of the law and increase, rather than decrease, stable labor management relations.

V. THE PROPOSED RULES WILL SEVERELY IMPAIR EMPLOYERS' RIGHTS TO COMMUNICATE WITH THEIR EMPLOYEES.

Section 8(c) of the National Labor Relations Act protects employers' rights to communicate their positions regarding unionization to their employees. By depriving employers of the effective right to counsel on speech-related issues, the Proposed Rules severely compromise employers' Section 8(c) rights.

Many employers rely on counsel to prepare lawful informational literature to employees regarding the benefits and detriments of unionization. Many employers will be reluctant to communicate their positions regarding unionization without counsel for fear of committing an unfair labor practice. Consequently, the Proposed Rule will essentially abrogate employer's Section 8(c) rights.

VI. THE PROPOSED RULES SEVERELY RESTRICT EMPLOYEES' RIGHTS TO INFORMATION.

Section 7 of the National Labor Relations Act ensures that employees have information to make an informed choice regarding the right to join a union or refrain from doing so. As set forth in Section V above, the Proposed Rules will chill employer's Section 8(c) rights to communicate their positions regarding unionization to their employees. Many employers will be reluctant to provide information, whether in writing or orally, to employees regarding one of the most critical decisions an employee may make—the decision to unionize. But as noted in the previous sections, the Proposed Rules will drive a sizable cohort of competent labor counsel to discontinue providing services arguably within the definition of "persuader activities." Thus, the Proposed Rules will deprive employees of information they would otherwise receive from their employers to assist them in making the critical choice of whether to join a union or not join a union.

VII. THE PROPOSED RULES WOULD PREVENT EMPLOYERS FROM PREPARING A STATEMENT OF POSITION UNDER THE NLRB'S PROPOSED RULES.

The National Labor Relations Board ("NLRB") issued proposed rules regarding representation case procedures (RIN 3142-AA08, 76 Fed. Reg. 15037 and 76 Fed. Reg. 37291) that require an employer to submit a statement of position on a variety of complex representation matters within 7 days of receiving a representation petition. To comply with the NLRB's proposed rules an employer must rapidly engage competent labor counsel to analyze the various issues implicated in the statement of position. The Proposed Rules would, therefore, make engagement of competent labor counsel to prepare the statement of position within 7 day timeframe extremely difficult, if not impossible.

VIII. SINCE THERE IS NO DEMONSTRABLE NEED FOR THE PROPOSED RULES, THEIR PROMULGATION AND ENACTMENT VIOLATES SECTION 706(2)(A) AND (C) OF THE ADMINISTRATIVE PROCEDURE ACT.

The current rules regarding persuader activity disclosures are straightforward, sensible, and have presented no public concerns for decades. Nothing has changed in the last few years that requires alteration of the current rules.

Under 5 U.S.C. § 706(2)(A) a court will strike down agency rules that are arbitrary and capricious. Rules are arbitrary and capricious where they are unsupported by relevant data or are contrary to the evidence before the agency. Since there is no empirical need for changing the current "persuader rules," the Proposed Rules are unnecessary and, therefore, arbitrary and capricious.

The Proposed Rules are, paradoxically, overbroad, restrictive and ambiguous. Moreover they are excessively burdensome and punitive. The Proposed Rules will unnecessarily impair employer-employee relations as well as employer competiveness. For the foregoing reasons the National Association of Manufacturers respectfully submits that the Proposed Rules should be withdrawn in their entirety.

Respectfully submitted,

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