



August 10, 2017

Department of Labor
1500 Pennsylvania Ave., NW
Washington, DC 20220

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

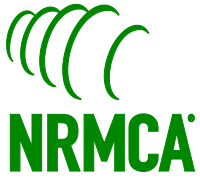
On behalf of the National Ready Mixed Concrete Association (NRMCA), I am writing to submit comments regarding the June 12, 2017 Department of Labor (DOL) notice of proposed rulemaking and request for comments titled “Rescission of Rule Interpreting “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act” (82 *Fed. Reg.* 26877).

NRMCA was founded on December 26, 1930, and today represents an industry with more than 2,250 companies and subsidiaries that employ more than 135,000 American workers who manufacture and deliver ready mixed concrete. The Association represents both national and multinational companies that operate in every congressional district in the United States. The industry includes more than 70,000 ready mixed concrete trucks and 6,000 ready mixed concrete plants. Roughly 85% of all U.S. ready mixed concrete companies are small family-owned/operated businesses.

The ready mixed concrete industry manufactures a construction material vital for constructing our built environment. From roads and bridges, to homes and high-rises, our built environment could not be realized without the use of ready mixed concrete. This important building material is created by combining fine and coarse aggregates, cement and water. In 2016 alone, the industry is estimated to have produced more than 340 million cubic yards of ready mixed concrete, representing a value in excess of \$35 billion. Virtually every construction project in America uses at least some ready mixed concrete.

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NRMCA supports rescinding the DOL’s final rule titled “‘Interpretation of the ‘Advice’ Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA),” which was slated to become effective April 15, 2016. As explained below, NRMCA believes that the DOL’s revisions to the LMRDA Section 203(c) represent an unwarranted intrusion into the employer’s rights under Section 8(c) of the Labor Management Relations Act, 29 U.S.C. § 158(c), as well as under the First Amendment to the United States Constitution, and that the revisions are overly-broad in scope.

I. The Interest of The National Ready Mixed Concrete Association

The NRMCA believes the DOL’s rule denies its member companies the opportunity to secure legal advice and guidance on many issues which arise in the workplace and which advice is sought in order to ensure that the workplace is one where employees can advance and develop in their line of work. Equally important, NRMCA believes that the DOL rule, while originally being lauded by the DOL as providing employees with “essential information regarding the underlying source of the views” presented by their employers, effectively denies employees access to critical and factual information about unions and allows only a one-sided and self-serving presentation of union representation as presented by the unions themselves. Clearly, such a result will not result in an enlightened employee electorate when it comes time to vote in a representation election.

II. Specific Comments on the Revisions

Sections 203(a) and (b) of the LMRDA require employers and their labor relations consultants and attorneys to report any agreement or arrangement between the consultants and attorneys that will

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undertake activities, directly or indirectly, to persuade employees to exercise or not exercise their right to organize and bargain collectively. However, Section 203(c) exempts from these reporting requirements “the services of such [consultant] by reason of [his/her] giving or agreeing to give advice to such employer. Section 204 also exempts certain attorney-client communications from reporting, which is defined as, “information which was lawfully communicated to [an]...attorney by any of its clients in the course of a legitimate attorney-client relationship.”

In addition, Section 203(f) of the LMRDA specifically protects the free speech rights of employers. This Section states: “Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 158 (c) of this title.” Section 8 (c) of the Labor Management Relations Act, 29 U.S.C. § 158 (c), protects “the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form” by employers.

Historically, therefore, the DOL’s “persuader” regulations focused on employer arrangements with outside consultants and attorneys where the outside consultant or attorney dealt directly with or directly contacted potential “bargaining unit” employees and those individuals attempted, through persuasive communication, to influence the employees’ voting decision. With only minor deviation, since 1962, the DOL interpretation of the “advice” exemption has excluded from disclosure activities where an outside consultant or attorney does not deal directly with employees and limits his/her activities to providing the employer with advice or materials which the employer is free to accept or reject. Under this exemption, therefore, employers have not had to disclose the work of consultants or attorneys who prepare draft materials, including speeches, letters, or other documents, so long as the consultant or attorney does not provide the materials directly to the employees.



Under the revisions, the DOL's long-standing interpretation of the "advice" exemption, which has almost consistently been followed since 1962, is tossed aside. In its place, the DOL created a sweeping interpretation of what activities constitute "persuader activity", including activities that do not involve any direct employee contact by the outside consultants or attorneys. There is no justification for the DOL's rule and both employers and employees are greatly disadvantaged.

Due to the expansive view of the term "persuader activity" as outlined in the new DOL regulations and the burdensome reporting requirements that follow from the interpretation, an inevitable result is that employers are discouraged from engaging the services of legal counsel to render advice to them when facing a well-orchestrated union organizing campaign. This has a chilling effect on the employer's Section 8(c) rights. The Supreme Court has said the enactment of Section 8 (c) "manifested a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 68 (2008) *quoting from Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). The DOL revision tramples the value of the "free debate" that the Supreme Court recognized. The DOL revisions have the purpose of silencing employers and permitting only a one-sided presentation during a union campaign.

Most employers are not well-informed about unions, in general, or one union in particular, or with the law under the National Labor Relations Act ("NLRA"). Without the assistance of labor attorneys to provide legal counsel during an organizing campaign (which under the proposed National Labor Relations Board's rules will be greatly condensed), employers find themselves wading alone through a complicated election process under the NLRA, and are likely be forced to forego certain rights that would otherwise be available to them with the guidance of legal counsel.



Employers seek the advice of legal counsel to guide them through an organizing campaign to ensure that their actions and language are not found to be coercive in nature or illegal. The rules of the National Labor Relations Board that govern what an employer can and cannot say to employees, and what employer conduct is and is not permissible, are complicated and often very confusing to the inexperienced layperson. Most employers are completely unfamiliar with legal parameters that govern lawful behavior during an organizing campaign. Furthermore, because long-standing Board principles are frequently altered with each new administration, employers can ill afford to forego legal advice.

Numerous examples can be found of the highly-nuanced nature of the interpretations of the NLRA. An employer's solicitation policy prohibiting employee solicitation during "working hours" is unlawful, but the same policy applying to "working time" is enforceable. *Essex International, Inc.*, 211 NLRB 749 (1974). Employers may prohibit the distribution of literature during working time and in working areas, but the statute contains no definition of either "working time" or "working areas". Board law allows a union to promise increases in wages and benefits if employees choose to unionize, but prohibits employers from making the same promises if the employees refrain from organizing. An employer may prohibit non-employee access to its premises, but must permit, in most cases, access by off-duty employees. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Board law prohibits surveillance of employees engaging in organizing activity, but permits the observation of picketing or demonstrations that occur on company property if necessary for legitimate purposes, such as security reasons. *Cintas Corp.*, 353 NLRB 752 (2009). These examples are illustrative, but not exhaustive, of the pitfalls which await the unsuspecting employer during a union campaign.

Without the guidance of legal counsel to provide direction during an organizing campaign, employers will inadvertently engage in conduct or make statements that will result in unfair labor



practice charges. There will likely be a significant increase in such unfair labor practice charges because employers are not aware that their conduct runs afoul of Board law. Clearly, an increase in unfair labor practice charges is not a result that the DOL should seek to achieve from these regulatory revisions.

In order to avoid the multitude of legal pitfalls that may arise, employers are forced to take the line of least resistance and remain silent during an organizing campaign. Out of fear that an innocent or innocuous comment will result in an unfair labor practice charge, employers do not express their views on unionization. As a result, employees only hear one side, and a very slanted, one-sided view, of what it means to be represented by a union. The only voice that employees hear during an organizing campaign is the union's voice. The revisions completely eviscerate employer Section 8(c) rights and stifles the "congressional intent to encourage free debate on issues dividing labor and management." *Chamber of Commerce of the United States v. Brown, supra.*

Furthermore, the DOL's revision to its interpretation of the "advice" exemption and what constitutes persuader activity go beyond the scope of organizing and the bargaining context. Under the rule, persuader activity is expanded to include: "providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their right to organize or bargain collectively."

Under this expanded definition of persuader activity, even such things as the cost of union-free training seminars, the development of personnel policies, and design of personnel systems at times when there is no active union organizing would be reportable as programs to avoid union organizing. Material that is distributed during new employee orientation and which may represent an employer's



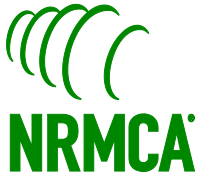
opinion on unions is subject to reporting if outside legal counsel provided advice on or assisted in the drafting of the documents.

Employer personnel policies and procedures concern a multitude of employment-related materials that are unrelated to collective bargaining, but may have the effect of influencing employees in their exercise of collective bargaining rights. For example, in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court encouraged employers to adopt policies that allow employees to report incidents of sexual harassment so that the employer may take immediate corrective action. Seeking legal assistance in the drafting of such a policy and reporting procedure would constitute persuader activity under the new regulations.

Clearly, Congress never intended that changes or revisions to personnel policies and procedures to ensure on-going compliance with applicable laws would constitute reportable conduct. The congressional prohibition on persuader activity was certainly never intended to reach every corner of the workplace, as the DOL revisions do. The scope and coverage of the revisions are completely overbroad and unreasonable.

III. Conclusion

These regulations issued by the DOL serve to discourage employers from seeking competent legal advice during union organizing campaigns. Small employers who have no expertise in the processes and procedures of union campaigns will be given a Hobson's choice: either they give up their free speech rights and remain silent, or they express their opinions and risk the commission of unfair labor practices. Employees are denied information which is relevant and necessary to their decision whether or not to be represented by a union for purposes of collective bargaining. The only



clear beneficiaries of the revisions are the unions themselves who have a dramatically easier opportunity to mislead and misinform employees. Finally, the new regulation is overbroad, and limits legitimate human resource activities that are tangentially, if at all, related to union organizing. For all the foregoing reasons, the NRMCA respectfully supports and requests the DOL rescind its final rule titled “‘Interpretation of the ‘Advice’ Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act.’”

NRMCA appreciates the opportunity to comment on this request. Should you have any questions or need more information please contact NRMCA’s Kevin Walgenbach at (240) 485-1157 or kwalgenbach@nmca.org.

Sincerely,

Robert A. Garbini, P.E.
President
National Ready Mixed Concrete Association