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August 10, 2017

VIA ELECTRONIC FILING & OVERNIGHT DELIVERY

Andrew R. Davis
Chief of the Division of Interpretations and Standards
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U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

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

Dear Mr. Davis:

This letter responds to the Department of Labor, Office of Labor-Management Standards' ("Department") request for comments on Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, Notice of Proposed Rulemaking, 82 Fed. Reg. 26877 (June 12, 2017) ("NPRM"). These comments are submitted on behalf of Seyfarth Shaw LLP, an international law firm with over 700 lawyers in our domestic U.S. offices in Chicago, New York, Los Angeles, Washington, D.C., Boston, San Francisco, Sacramento, Atlanta and Houston.

With approximately 350 labor and employment lawyers, Seyfarth Shaw has to our knowledge the largest U.S. labor and employment practice of any full service law firm. For over 70 years, Seyfarth Shaw has represented employers – both publicly and privately held, from very large to very small, in almost every sector of the economy and across the entire United States – in virtually every possible scenario involving the provision of employment-related legal advice. Our attorneys have served in the Department of Labor and as Members, the Executive Secretary and Staff Attorneys of the National Labor Relations Board ("NLRB"). We respectfully bring this extensive collective experience to our comments on the NPRM.

Please note that our counsel, Dentons US LLP, also submitted extensive comments regarding the NPRM on our and several other law firms' behalf yesterday. We fully agree with and support those comments and are not attempting to duplicate them here. However, we had provided

extensive comments to the Department (see Attachment A) before it issued its March 24, 2016 Rule ("2016 Rule") reinterpreting Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* (1976) ("LMRDA"). And while most of our earlier comments were either not addressed or dismissed in the 2016 Rule, these very same points and concerns later formed much of the basis for the U.S. District Court's final judgment on December 12, 2016 that the 2016 Rule "as published in 81 Fed. Reg. 15,924, *et seq.* is held unlawful and set aside." *National Federation of Independent Business et al.* v. *Perez*, No. 5:16–cv–00066–c (N.D. Tex.) ("*NFIB v. Perez*"). Accordingly, and while also attempting not to duplicate the comments we raised in 2011, we do wish to reemphasize certain issues for the Department's consideration.

First, we believe that the Department should rescind its 2016 Rule, which was contrary to the statute, ill-advised, and – as the Court found in *NFIB v. Perez* – "defective to its core." As noted in both our earlier comments and the current comments from our counsel, Dentons US LLP, any such reinterpretation of the LMRDA, we submit, would adversely affect labor and employment relations between employers and employees, impermissibly interfere in the attorney-client relationship and privileges, and violate fundamental and longstanding tenets of the United States Constitution and federal labor, employment, and administrative law. Rather, we believe the Department should revert to the clear and consistent test that has been the reporting standard for well over 50 years.

Second, and as we discussed at length in our comments to the Department in 2011, the Department's prior and consistent interpretation of the advice exemption effectively balances the competing needs of employers who seek legal advice on numerous labor matters on one hand, with the LMRDA's pursuit of transparency in labor and management relations on the other. Previously, employers and their lawyers have been able to identify a bright-line distinction between providing legal advice behind the scenes pursuant to the ordinary practice of law, and interacting directly with employees in an attempt to persuade them with respect to unionization. Not only did the 2016 Rule erase this longstanding and well-founded distinction, it did so without any justifiable rationale.

Third, once a law firm is forced to begin revealing information about its relationships with its clients, any number of confidential – and likely privileged – items of legal advice inevitably would be made public. Despite the 2016 Rule's supposed recognition that LMRDA Section 204(d) does not require disclosure of "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship," restricting the advice exception will make sequestering privileged material impossible in a "forced disclosure" to defend against an allegation that a lawyer engaged in reportable persuader activity.

Thus, requiring disclosure of the "nature of the engagement" between a lawyer and her client, including among other things "the agreement, [and] any other communications," would commonly extend far beyond pure persuader activities and may include information protected by both confidentiality and privilege. If both attorneys and employers must report on the reasons and purposes behind every legal engagement that includes even an indirect relation to persuader activities, competitors, employees and the public could become privy to confidential business decisions, sensitive strategic planning information and other private employer information that could have a material adverse impact on the employer's business. Thus, an employer may seek

advice in connection with both the decisions and employee communications about outsourcing, relocating, or subcontracting aspects of its business, implementing employment policies, modifying wages or benefits, or a variety of other issues that affect its employees. Whether the affected employees are unionized or not, the legal advice regarding decisions, strategies, potential announcements to employees and other stakeholders, and terms under which the employer does so will frequently have a persuader element in whole or in part, directly or indirectly. If a lawyer were required (within 30 days of the engagement on a Form LM-10) to disclose these confidential considerations – which may eventually never result in any actual decisions that affect employees – the mere fact of this disclosure could have a significant adverse impact on the employer's business.

Fourth, the 2016 Rule does not fulfill its supposed justification. Indeed, it fails to provide employees with relevant knowledge of an employer's persuader efforts at the time when they are occurring. An employer's Form LM-10 is only due after its fiscal year has ended; a consultant's Form LM-20 is only due within 30 days of his engagement. Both reports may be filed and first made publicly available long after the consultant's work, and any union organizing or collective bargaining, have concluded. Thus, despite the claimed result of providing employees with contemporaneous information to make better informed decisions, the additional Form LM-10 and LM-20 reporting under the 2016 Rule provides employees with no additional information at the time when the persuasion and employees' decisions are in fact taking place.

Even if employees were to receive such information in a timely manner, however, the expanded reporting provides them with no *relevant* information. Under the longstanding former standards, persuaders reported their activities because *they* were communicating directly with employees. Thus, employees deserved to know who was speaking to them and what relationship that speaker had to their employer. But employees have no doubt who is speaking to them and on whose behalf when one of their employer's managers or supervisors – the employer's agents under Section 2(2) of the National Labor Relations Act, 29 USC § 152(2) (1935) ("NLRA") – communicates directly with them, irrespective of who advised on the message being delivered. Employees already understand that any communication is the employer's on its own behalf. Simply put, there is no greater transparency for employees to know that their employer received advice in crafting the messages that it and its managers and supervisors deliver. By analogy, television viewers, radio listeners and newspaper readers would not make more informed decisions as to which products or services to buy because they knew which ad agency helped prepare the seller's advertisement or commercial or how much the seller paid for those services. No matter who wrote and produced them or how much they cost, we all understand that Ford truck commercials are on Ford's behalf. Diet Coke ads are on behalf of Coca-Cola.

Fifth, the 2016 Rule ignores the reality of the legal profession: lawyers are not merely asked whether a course of conduct is lawful or unlawful, but instead are asked to assist in developing and advising on effective and best practice solutions to their clients' legal issues. Employers invariably look to their lawyers not only to define the parameters of the law, but also to draft documents and suggest optimal approaches to issues. Thus, rather than seeking their lawyers' opinion as to the legality of documents initially prepared by the clients, clients instead request that their lawyers draft these legally compliant documents *that best accomplish the clients' stated purposes* – whether a real estate contract, an agreement related to the purchase and sale or merger of a business, articles of

incorporation, employment policies, or other employee communications. Doing so invariably extends beyond ensuring mere legal compliance and correcting typographical or grammatical errors – the only way to avoid reporting and therefore disclosing client confidential information under the 2016 Rule. Any drafting or suggested edits by a lawyer will invariably also be intended to make the document *better*, which often means more clear, less ambiguous, and more persuasive. Thus, a lawyer representing a client injured in an auto accident is giving legal advice when drafting a demand letter designed to persuade the potential defendant and thereby obtain the maximum settlement for her client. Likewise, employers make and communicate decisions about hiring, compensating, providing benefits to, implementing and modifying their workplace practices for, and even terminating the employment of individuals with an almost universal goal of promoting employee engagement, productivity, and retention. These universal objectives and any sort of employer communication that advances them inextricably involve some degree of persuasion, which arguably renders any action the employer takes as one having an object in whole or in part to persuade employees about choosing to act or not act collectively. Despite claims to the contrary with its promulgation, under the 2016 Rule the persuader aspect invariably may be applied to any issue that touches upon the employment relationship – and therefore will effectively eliminate the advice exemption and have a "chilling" effect on lawyers' willingness to do the work and the availability of legal advice. As our counsel, Dentons US LLP, noted in its comments on our behalf yesterday, many other law firms have indicated that they would no longer advise employers in newly reportable matters under the 2016 Rule.

Sixth, the 2016 Rule is both unclear and unworkable in practice. Without clear definitions about what conduct triggers the reporting requirements, employers, consultants and attorneys will be unable to tailor their conduct accordingly. While we will not repeat them here, most of the questions we first raised in our comments to the Department in 2011 remain unanswered with the 2016 Rule. As we noted then, clients frequently do not inform their attorneys or other consultants of the multiple different reasons – some primary and others ancillary – why they are requesting a specific instance of legal or human resources advice. Unless the employer affirmatively states *all* of the reasons why it is seeking the advice, the lawyer or consultant must guess as to whether the client's object, in whole or in part, directly or indirectly, was to persuade or influence employees.

If an attorney is uncertain, one can imagine the lawyer's dilemma. She may err on the side of caution and report the services. If it turns out that the attorney was not required to report, the employer-client may claim a breach of confidentiality and a violation of the lawyer's state bar ethics requirements. Even if an employer assures its attorneys that it does not intend to use the advice for persuasive purposes, many lawyers, faced with the threat of sanctions for non-compliance, may out of an abundance of caution nevertheless report activity that is truly unrelated to persuasion. And yet doing so threatens to alienate the client, who suddenly finds its confidential information, including the fact that it engaged legal counsel to assist with any number of labor matters, made public.

Conversely, if the employer – only at the end of its fiscal year – reconsiders its objectives and files a Form LM-10 and for the first time reports its previously undisclosed object of persuading employees, can a consultant be held responsible for violating its legal requirement to have previously filed either a Form LM-20 within 30 days of the engagement or a Form LM-21 (in the event the consultant's fiscal year and filing deadline ended long before the client's Form LM-10

was due)? What happens if neither the employer nor the consultant has filed a report (because neither believed the actions were in fact reportable), but a third party challenges their failure to file the required reports? How do employers and their consultants prove a negative – that they did not have an object, in whole or in part, directly or indirectly, to persuade? How will the Department assess not only the attorney-client privileged "agreement" and "any accompanying communications," but the "timing" or other unknown "circumstances" described in the 2016 Rule to second guess whether "a" purpose – in whole or in part, directly or indirectly – was persuasion. Attorneys, other consultants and their employer-clients should not be put in any of these untenable positions where they do not know in advance where they stand with regard to compliance.

Absent clear and specific guidance, employers and their consultants will have no way of knowing how the Department may assess the employer's object in taking an action in any of countless different circumstances, either individually or in combination with others. Any test claiming to rely on a "case-by-case," "reasonable person," "we'll know it when we see it," or other purportedly measurable assessment of the individual facts and circumstances would be hopelessly vague and subject employers, their attorneys, and other consultants to an after-the-fact interpretation as to undisclosed motivations. To avoid such second-guessing, employers and their attorneys would avoid conferring, with a reduction in legal compliance being a predictable result.

Thus, there is simply no way for a law firm or client to defend against a charge of violating the reporting requirements without revealing the content of attorney-client privileged information and its attorneys' thought processes, both of which are protected from disclosure by every state jurisdiction in the country as well as federal common law. For example, suppose a union that has lost a representation election asserts that it observed a member of a particular law firm at the employer's facility during the union organizing campaign and asks the Department to investigate the law firm's non-reporting of that activity. Assume, however, that the attorney was there to discuss the enforcement of a non-compete agreement signed by a former CEO, a potential hostile takeover or tender offer, or a forthcoming securities offering – and that the attorney and her firm had nothing whatsoever to do with any union campaign. In order to defend itself during the potential criminal investigation, the law firm would be caught in a Catch-22. To rebut the failure to report charges, it would necessarily be compelled to reveal attorney-client privileged information as to the content of the communications, and the intent and knowledge of the attorneys involved (whether the attorney knew that a purpose was to persuade employees). The firm may also need to reveal what the client's agents communicated and what the attorneys thought of such representations, in order to determine whether the requisite intent to persuade existed under the 2016 revised interpretation.

An attorney cannot ethically reveal such information without the permission of the client, however, and so would either have to ask the client to give up the attorney-client privilege and work product protections, or proceed in attempting to defend itself in the criminal investigation over its failure to report without being able to reveal the nature of the communications. In simple terms, there is no way the 2016 Rule can ever be enforced, or that law firms and clients can ever defend themselves, without clients potentially giving up the attorney-client privilege or law firms facing criminal liability as to a wide range of subject of legal representation, regardless of whether it has anything to do with labor law. As the American Bar Association has noted in its comments to the

Department, the 2016 Rule reflects a massive and sweeping rollback of the longstanding protections provided to attorney-client communications and work product (including attorney thought processes).

The above examples, which reflect but a few of the almost infinite number of complex and nuanced fact patterns that are likely to arise, demonstrate the difficulty in knowing when an action has an object, directly or indirectly in whole or in part, of persuasion. Employers and their consultants need to understand exactly how the Department will assess the advice exemption under all of these situations. The Department's 2016 Rule and effective elimination of the advice exemption creates countless questions about how to comply with the LMRDA's reporting requirements. Absent clear answers that can result in effective compliance on the part of both employers and their consultants, the Department's 2016 Rule inevitably will result in unnecessary problems.

CONCLUSION

For over 50 years, the previous consistent definition of the advice exemption under Section 203(c) has provided a bright line that has worked well in effectuating the purposes of the LMRDA, and has also served to ensure compliance with not only the NLRA and Railway Labor Act, but a host of other federal, state, and local labor and employment laws. Contrary to the purpose and express terms of the LMRDA, the 2016 Rule effectively eviscerated the "broad" advice exemption in Section 203(c). For all of the reasons contained here, in our earlier comments contained in Attachment A, and in the comments submitted on our and other law firms' behalf by our counsel, Dentons US LLP, the Department should abandon its 2016 Rule and continue to apply the preexisting rules. As we said in 2011, the former system was not broken and did not need fixing.

Very truly yours,

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September 20, 2011

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Re: Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption (RIN 1245-AA03)

Dear Mr. Davis:

This letter responds to the Department of Labor, Office of Labor-Management Standards' ("Department") request for comments on Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, Notice of Proposed Rulemaking, 76 Fed. Reg. 36178 (June 21, 2011). It is submitted on behalf of Seyfarth Shaw LLP, an international law firm with over 700 lawyers in our domestic U.S. offices in Chicago, New York, Los Angeles, Washington, D.C., Boston, San Francisco, Sacramento, Atlanta and Houston.

With approximately 350 labor and employment lawyers, Seyfarth Shaw has to our knowledge the largest U.S. labor and employment practice of any full service law firm. For over 65 years, Seyfarth Shaw has represented employers – both publicly and privately held, from very large to very small, in almost every sector of the economy and across the entire United States – in virtually every possible scenario involving the provision of employment-related legal advice. Our attorneys have served in the Department of Labor and as Members, the Executive Secretary and Staff Attorneys of the National Labor Relations Board ("NLRB"). We respectfully bring this extensive collective experience to our comments on the Department's proposed rules.

For the reasons that follow, we believe these proposed rules are both contrary to the statute and ill-advised. To implement these rules, we submit, would adversely affect labor and employment relations between employers and employees, impermissibly interfere in the attorney-client relationship and privileges, and violate fundamental and longstanding tenets of the United States Constitution and federal labor, employment, and administrative law.

Attachment A

I. The Department's Proposal Conflicts with the LMRDA's Plain Meaning

The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* (1976) ("LMRDA"), commonly known as the Landrum-Griffin Act, contains public reporting requirements for labor relations consultants, including attorneys, who engage in certain persuader or information gathering activities. Section 203(b) of the LMRDA provides that reports are required from:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly
>
> (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or
>
> (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.

29 U.S.C. § 433(b).

Within that same section, however, is a critical exception to the LMRDA's reporting requirements, commonly referred to as the "advice exemption," which states:

> Nothing 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 or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any questions arising thereunder.

LMRDA § 203(c), 29 U.S.C. § 433(c).

The Department is now proposing to change the interpretation of the advice exemption that has been in effect without interruption since 1962.[1] That interpretation is set forth in a February 19,

[1] On January 11, 2001, the Department published a Notice in the Federal Register, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. 2782 (Jan. 11, 2001), of its intent to revise and narrow its interpretation of the categories of information that would be exempt from reporting. Before it could become effective, however, the Department rescinded the proposed new interpretation and returned to its longstanding interpretation. See Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed.

1962 memorandum (the "Donahue Memorandum") from then Solicitor of Labor Charles Donahue to John L. Holcombe, then Commissioner of the Bureau of Labor Management Reports, in response to the latter's request for guidance concerning the scope of the advice exemption as it related to the drafting and editing of communications that are intended to persuade employees.

The Donahue Memorandum analyzed three situations: first, where persuasive material is prepared and delivered directly to employees by a lawyer or consultant, which the Donahue Memorandum concluded was reportable; second, where an employer drafts and intends to deliver materials to its own employees and a lawyer or other person provides advice on its legality, which was held to be non-reportable; and, third, where a lawyer or consultant prepares an entire speech or document for the employer to deliver to its employees, which the Donahue Memorandum concluded could reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer.

In discussing this third situation, the Donahue Memorandum observed:

> [S]uch activity will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, that [sic] fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.

Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 Fed. Reg. 2782, 2784.

The conclusions and language of the Donahue Memorandum appear as current guidance in Section 265.005 of the LMRDA Interpretative Manual, which recognizes that in cases in which a particular activity by a lawyer or consultant involves both advice to the employer and persuasion of employees, the advice exemption controls. *See, e.g., Int'l Union, United Auto Workers v. Dole,* 869 F.2d 616 (D.C. Cir. 1989) ("*Kawasaki*").

The Department is now proposing "to adopt its initial 1960 interpretation, which held that 'reporting is required in any situation where it is impossible to separate advice from activity that goes beyond advice'" *Interpretation of "Advice" Exemption*, 76 Fed. Reg. at 36191.[2] With respect to consultants, the Department states that "if a consultant engages in activities constituting persuader services, then the exemption would not apply even if activities constituting 'advice' were also performed or intertwined with the persuader activities" *Id.* The Department takes essentially the same position with respect to activities engaged in by attorneys who represent employers,

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Reg. 18864 (Apr. 11, 2001). The Department, in the instant rulemaking, now proposes to adopt much of the approach regarding the advice exemption that was set forth in its January 11, 2001 proposal.

[2] The Department, however, quickly abandoned that initial interpretation and no court has ever held that the "initial 1960 interpretation" is a permissible interpretation of the statute.

stating that "if a lawyer drafts a speech for a company's top manager to give to workers in a captive audience setting, neither the lawyers' [sic] work to ensure its legal sufficiency or implications nor a characterization of the work product as legal advice would alter the reportability of the speech as persuader activity." *Id*. at 36192.

In rejecting the current interpretation of the advice exemption and advancing its proposed revision, the Department asserts that "the current scope of the 'advice' exemption is overbroad and ultimately does not appear to be the best approach in making the statutory distinctions [between non-reportable advice and reportable persuader activity] called for." *Id*. at 36183. The Department essentially argues that while the current definition of advice may be one of a number of permissible interpretations,[3] its revised interpretation is both permissible and superior. We respectfully disagree: the proposed interpretation is neither consistent with the LMRDA nor is it superior to the longstanding, clear, and workable interpretation that has existed for nearly 50 years.

While there may be alternative interpretations of the advice exemption, one thing is indisputable: Congress intended that the exemption be a broad one. As the Court of Appeals noted with approval in *Kawasaki*:

> The district court acknowledged that "Congress intended to grant a broad scope to the term 'advice'" *678 F. Supp. at 6* (citing H.R. CONF. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959), *reprinted in* 1 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act* 937, 1959 U.S. CODE CONG. & ADMIN. NEWS, 2503, 2505).

Kawasaki, 869 F.2d at 618; *footnote omitted*. In this regard, the Conference Report cited by the District Court could not have been any clearer, stating that: "Subsection (c) of section 203 … grants a *broad* exemption from the [reporting] requirements of the section with respect to the giving of advice." *Id.* at 618 n.2 (*emphasis added*).

Thus, whatever discretion the Department may have in interpreting the advice exemption, the Congressional mandate is that the exemption be interpreted broadly. The fatal flaw with the revised interpretation being offered by the Department is that it grants what is probably the *narrowest possible* exemption from the reporting requirements of Section 203(c) with respect to the giving of advice. Under this proposed reinterpretation, in any "mixed" advice/persuasion analysis where an object directly or indirectly in whole or in part is to persuade, the broad advice exemption would never apply.

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[3] The Department asserts that it "has employed various interpretations of the term [advice] over the past five decades." *Interpretation of "Advice" Exemption*, 76 Fed. Reg. at 36183. While this may be literally true for very brief and isolated periods, the only interpretation advanced and enforced by the Department in litigation, and the only interpretation approved by the courts is the interpretation set forth in the Donahue Memorandum that has applied for almost 50 years.

In support of its proposed interpretation, the Department opines that "'[a]dvice' ordinarily is understood to mean a recommendation regarding a decision or a course of conduct." *Interpretation of "Advice" Exemption,* 76 Fed. Reg. at 36183 (*citations omitted*) and goes on to assert:

> [T]he common understanding of 'advice' noted above would not include, for example, the preparation of persuasive material for dissemination or distribution to employees because undertaking such activity is itself more than a recommendation regarding a course of conduct in the ordinary sense.

Id. While the Department is attempting to bolster the purported reasonableness of its interpretation by characterizing it as using the term "advice as it ordinarily understood," the court expressly rejected just such an approach in *Kawasaki*:

> The Union distinguishes doing a task for someone (not advice) and providing advice on how the task should be done. Joint Brief for Plaintiff-Appellees and Amicus Curiae AFL at 16. "Advice" as the UAW defines it, could under no circumstances comprehend scripting an employer's anti-union campaign. But the term "advice", [sic] in lawyers' parlance, may encompass, *e.g.*, the preparation of a client's answer to interrogatories, *see FED. R. CIV. P. 33*, the scripting of a closing or an annual meeting.

Kawasaki, 869 F.2d at 619 n.4.

The critical point here, however, is not merely that "the scripting [of] an employer's anti-union campaign" may constitute advice "in lawyers' parlance." Rather, the error with the current proposal is that when an attorney reviews, edits, or drafts legally permissible statements for inclusion within an employer's communications, the Department would apply perhaps the narrowest possible interpretation of the term advice under Section 203(c), whereas the stated Congressional intent was for a broad exemption from the reporting requirements with respect to the giving of such advice. Indeed, by requiring reporting *whenever* advice "overlaps" with persuader activity, the Department's revised interpretation renders the "broad" exemption under Section 203(c) a nullity.

The fallacy in the Department's proposed approach regarding "advice" under Section 203(c) is apparent when contrasted with its interpretation of LMRDA Section 203(b), which requires persons who file even a single Form LM-20 to also file a publicly available Form LM-21 (Receipts and Disbursements Report) within 90 days of the end of the firm's fiscal year.[4] Form LM-21 requires filers to report receipts and disbursements for "labor relations advice or services *regardless of the purpose of the advice or service*s." (emphasis added).[5] According to section 269.520 of the

[4] The Department of Labor's June 21 proposal does not include any changes to Form LM-21, although it has indicated its intent to propose changes to the form at a later date.

[5] *See* Form LM-21 Part B.

LMRDA Interpretive Manual, this much more expansive reporting on Form LM-21 includes the following definition of advice:

> "Labor relations advice or services" as that term is used in section 203(b) of the [LMRDA] would include all advice and services on matters having a bearing on the relations between an employer and his employees, including advice which is informally given as part of a service where a retainer fee is paid. Advice on contract negotiations, employee training programs, development of vacation, overtime, and job evaluation policies, and employee education programs, for example, would fall within this definition as would advice on the various Federal and state laws bearing on the employer-employee relationship.[6]

Because the Department itself defines "advice" so broadly under its own interpretive regulations, it is inexplicable that this same "advice" would generally not be exempt from reporting under Section 203(c). This well-recognized definition of exempt advice under Interpretive Manual section 269.520 becomes reportable on a Form LM-21 only when a consultant engages in separate, distinct, and more narrowly-defined persuader activities. The Department ignores this important distinction and makes reportable on Form LM-20 the very "advice" that LMRDA Section 203(c) defines by law as exempt.

In this regard, the stated purpose of Section 203(c) is to remove from coverage certain activity that otherwise would be reportable. If this were not the case, there would be no need for the exemption in the first place. But in advancing an interpretation that whenever there is an overlap of advice with persuader activities (*i.e.*, "where it is impossible to separate advice from activity that goes beyond advice," Interpretation of "Advice" Exemption, 76 Fed. Reg. at 36191), the Department eviscerates what was intended to be a broad exemption.

The Department asserts it has the authority to impose its interpretation "[b]ased on its administrative authority and discretion." *Id*. (citing *Kawasaki*, 869 F.2d at 620). Although administrative agencies have latitude to interpret the governing statute, courts will not hesitate "to reject administrative constructions which are contrary to clear congressional intent." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). *See, Bd. of Governors, Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) ("traditional deference court pays to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"). Because Congress undeniably intended for the reporting exemption to be broadly construed, the Department's narrowest possible interpretation of the reporting exemption is arbitrary, capricious and contrary to law.

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[6] This broader interpretation of "advice" that is reportable on Form LM-21 when a consultant engages in any persuader activity (but that is not in and of itself persuader activity reportable on Form LM-20) has been upheld by the 4th, 5th, 6th, and 7th Circuits. While not disagreeing with the traditional definition of persuader activity reportable on Form LM-20, the 8th Circuit has rejected the Department's broader Form LM-21 reporting requirements and would limit Form LM-21 reporting to true persuader activities.

II. The Proposed Interpretation is Unlawful and Unconstitutional

In effectively nullifying the advice exemption in LMRDA Section 203(c), the Department not only would violate the express terms of the LMRDA, but would also violate the terms of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq., and the United States Constitution.

A. The Department's Proposal Conflicts with the NLRA

The Department's proposed reinterpretation of Section 203(c) impermissibly undermines Section 8(c) of the NLRA, which guarantees that: "The expression of any views, argument, opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." As the Supreme Court made clear in *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008), Congress enacted Section 8(c) of the NLRA to foster free and robust debate about labor matters among the various stakeholders, including employers. Moreover, "[i]n enacting the LMRDA in 1959, Congress did not purport to alter the provisions of § 8(c)." *Alpert v. Excavating, etc., Local Union*, 184 F. Supp. 558, 561 (D. Mass. 1960) (Wyzanski, D.J.).

In pursuing any perceived need to correct deficiencies in the conduct of organizational campaigns and collective bargaining, the Department does violence to federal labor policy. The inevitable and unconstitutional effect of the regulation will be to impair the ability of employers to receive legal advice during union organizing or collective bargaining, while not likewise impairing unions' ability to do so. The regulation of any protected concerted union activity is, in the first instance, the province of the NLRB, and to the extent not regulated by the NLRA, forbidden territory for other regulation. *See generally Machinists v. Wisconsin Employ. Relations Comm'n*, 427 U.S. 132 (1976).

While the Department's "tipping" of the balance may not be preempted as would be a similar effort by a state agency, it does run aground of its obligation to apply the LMRDA in a manner that can be harmonized with other federal statutes. And even though the NLRB rather than the Department is charged with policing the NLRA, even the NLRB's power is not unlimited. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-143 (2002). Thus, even the NLRB does not have the power to construe the NLRA in a manner that would infringe upon constitutional rights. *See Edward J. DeBartolo Corp v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575-76 (1988) (rejecting Board's construction of Section 8(b)(4) of the Act to prohibit peaceful hand-billing urging a boycott, as it directly implicated First Amendment rights); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 497-499 (1979) (refusing to allow Board to exercise jurisdiction over church-operated school and its lay-faculty because it would implicate the freedom of religion clause of the First Amendment).

Likewise, any federal agency's broad discretion under its enabling statute may not invalidate other federal policies and legislation. In *Hoffman Plastic Compounds*, for instance, the NLRB awarded back pay under the NLRA to an undocumented illegal alien who had never been legally

authorized to work in the United States. *See id.* at 140. The Court determined that the award conflicted with the Immigration and Reform Control Act of 1986, which incorporated employment verification procedures and required the discharge of any employees that were not authorized to work in the United States. *See id*. at 147-148. Thus, the Court concluded:

> [A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as express in IRCA…However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so bounded so as to authorize this sort of an award.

Id. at 151-52; *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (refusing to enforce order directing reinstatement of illegal aliens as being in conflict with the Immigration and Nationality Act, and noting that "[i]n devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objectiv[e]'").

Similarly, in *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), the Supreme Court rejected an agency decision that awarded reinstatement with backpay to five employees whose strike on a ship had amounted to a mutiny in violation of the "mutiny" statute, 18 U.S.C.A. § 2192. Instructively, the Supreme Court stated:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.

Id. at 47.

Indeed, the Supreme Court has consistently stated that federal agencies may not assert their prerogative in matters that would interfere with federal statutes and policies unrelated to their enabling act. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532-34 (1984) (refusing to enforce an award that conflicted with the Bankruptcy Code and stating that "[w]hile the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (rejecting argument that federal antitrust policy should defer to the NLRA); *Carpenters v. NLRB*, 357 U.S. 93, 108-110 (1958) (precluding NLRB from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act).

Here the proposed regulation not only conflicts with and lacks any rationale under the LMRDA, but does violence to the ordering of employee and employer rights under the NLRA. Accordingly, any interpretation of the LMRDA must be consistent with NLRA Section 8(c)'s purpose by not undermining an employer's ability to obtain advice regarding its permissible speech under federal labor law. And as discussed more fully below, the Department's proposed reinterpretation would have a chilling effect on an employer's ability to obtain that advice.

B. The Department's Proposal Violates Constitutional Free Speech Guarantees

Beyond the proposed interpretation's failure to acknowledge that none of Congress' Section 8(c) concerns were altered or attenuated by the LMRDA, the proposal impermissibly infringes upon the First Amendment rights of both employers and their legal counsel. To begin, in *NLRB v. Gissel Packing Co., Inc.*, 395 US. 575, 617 (1969), the Supreme Court underscored that Section 8(c) "merely implements the First Amendment." With respect to the First Amendment directly, the Supreme Court has made it clear that compelled government disclosure impairs constitutional free speech guarantees unless warranted by a "compelling interest" to be adjudged through "exacting scrutiny," *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), including that the means are "carefully tailored" to avoid undue burdens. *See USWA v. Sadlowski*, 457 U.S. 102, 111 (1982).

The proposed reinterpretation is not even close to satisfying such a high constitutional standard. For the better part of 50 years, the Department's and the courts' consistent construction of the LMRDA has recognized that the existing, broad understanding of the "advice exception" is constitutionally mandated. As discussed more fully below, any suggestion that "newfound realities" have been revealed is unsupported by the facts, and represents a politics-driven approach that is precisely what the Constitution protects against.

This is especially so where, as here, the proposed regulation provides for criminal penalties for violation. Beyond the fact that *any* impairment of free speech is to be considered with profound constitutional skepticism, a regulation with criminal implications cannot be hopelessly vague and confused, as the proposed one plainly is. Recently, the Supreme Court again emphasized that "[p]rolix laws chill speech for the same reason that vague laws chill speech: people of 'common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Citizens United v. FEC*, 130 S.Ct. 876, 889 (2010) (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

C. The Department's Proposal Constitutes Unconstitutional Viewpoint Discrimination

The Department's proposed interpretation of employer persuader reporting would constitute a form of unconstitutional viewpoint discrimination. Indeed, it is striking that the Department is proposing this massive expansion of the reporting of persuader activity at a time when the Department has closed the comment period on another rulemaking that will exempt union persuaders from the Form LM-20 and Form LM-21 reporting regime.

Thus, on July 2, 2007, the Department issued a final rule concerning the Form LM-30 that is filed by labor organization officers and employees, which stated that for purposes of the LMRDA, labor organizations were employers under the LMRDA and "held to the same obligations as other employers." 72 Fed. Reg. 36106, 36140. The decision to deem labor organizations as employers under the LMRDA was grounded in analogies to the treatment of unions as employers in relation to internal staff unions representing their employees "under the Labor Management Relations Act." *Id.* at 36141.

Notably, the LMRDA has but a single definitions section in which terms are defined for all purposes under all sections of the Act. An employer is defined in Section 402(e); there is no separate definition of the term in any other part of the statute. Accordingly, it has the same meaning in the sections governing labor organization officer and employee reports as it does in the sections governing persuader reports. Therefore, under the current interpretation of the term "employer," a labor organization is an "employer" for purposes of having to report "any agreement or arrangement with an employer . . . where an object thereof is, directly or indirectly, to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing."

On August 10, 2010, however, the Department proposed to revise its 2007 rulemaking regarding union reporting under the LMRDA. The proposed rule states that "payments from labor organization-employers represented by staff unions are reportable on Form LM-30 pursuant to sections 202(a)(1), (2), and (5)." 75 Fed. Reg. 48416, 48429. Section 202(a)(1) of the LMRDA requires union officers and employees to disclose "any stock, bond, security, or other interest, legal or equitable . . . which he or his spouse or minor child derived directly or indirectly from, an *employer* whose employees his labor organization represents . . . ." Section 202(a)(2) of the LMRDA requires union officers and employees to report "any transaction in which he or his spouse or minor child engaged directly or indirectly, involving any stock, bond security, or loan to or from, or any other legal or equitable interest in the business of an *employer* whose employees" the union represents or is actively seeking to represent. Section 202(a)(5) requires union officers and employees to disclose "any direct or indirect business transaction or arrangement between him . . . and any employer whose employees his organization represents or is actively seeking to represent."

While making clear that labor organizations remain employers for purposes of the Form LM-30 reports in relation to the officers and employees of the unions that represent their workers, the proposed rule takes the anomalous position that they are not employers for purposes of the Form LM-20 reporting provisions of the LMRDA. 75 Fed. Reg. at 48429 fn 12. For this extraordinary proposition, the Department relies on a provision from its interpretative manual, which was never subject to public comment, and its view of alleged Congressional intent. In doing so, it ignores the plain language and structure of the LMRDA and its definitions section.

The comment period on this proposed rule closed long before the issuance of the Department's proposed rule on the advice exemption. This presents the prospect that by concocting different definitions of the term "employer" for different sections of the LMRDA, the Department is discriminating against employers and their attorneys by subjecting only pro-management persuasion to the Form LM-20 and LM-21 reporting regime. In contrast, unions and their consultants and attorneys would not be subject to similar Form LM-20 and LM-21 reporting.

There is no compelling evidence that Congress intended such viewpoint discrimination in relation to union organizing efforts, collective bargaining, and other concerted activity. This is unsurprising because doing so would be patently unconstitutional. The combination of the proposed Form LM-30 rule and the newly proposed Form LM-20 and LM-21 advice exemption rule bifurcates the definition of "employer" under the LMRDA to create just such impermissible and unconstitutional discrimination.

The Department justifies its proposed advice exemption redefinition by claiming that it provides "employees with essential information regarding the underlying source of the views and materials being directed at them in evaluating their merit and motivation, and as assisting them in developing independent and well-informed conclusions regarding union representation and collective bargaining." But this is true whether the persuader agreement is in favor of or against unionization. The Department's tortured interpretation of the term "employer" in the overall context of the LMRDA has the obvious and likely intentional effect of materially suppressing only the views of management while not similarly impacting the views of unions and their supporters. Such targeted regulation of just one kind of persuader activity deprives the Department's proposed interpretation of the LMRDA of even the patina of being a content-neutral regulation of speech.

The Form LM-20 and LM-21 regime as applied to attorneys goes well beyond mere disclosure, however, and would impose real rather than speculative or inchoate harm. Complying with the revised reporting requirements would not just threaten important client relationships, it would also require many attorneys to violate the professional ethics and responsibility rules of their jurisdictions, which could lead to disbarment or other sanctions that could clearly harm their careers. These repercussions are far more severe than the "incidental burdens on speech" that the Supreme Court countenances under First Amendment jurisprudence. The rules of many states are quite clear on these issues, as is discussed more fully below.

Such a discriminatory interpretation of the LMRDA persuader reporting scheme must also be considered in light of the Department's current interpretation of the scope of the Form LM-21, which requires the reporting of clients and activities that are unrelated to the types of persuader activity Congress deemed necessary to regulate. In addition to being discriminatory, the proposed interpretation of the persuader reporting regime is not narrowly tailored to a compelling purpose, which compounds the suspect nature of the discriminatory manner in which the statute is being interpreted.

What the Department is now proposing to do is akin to what the City of Chicago attempted to accomplish in *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92 (1972), where the city enacted an ordinance that prohibited picketing or demonstrating within 150 feet of a secondary school, except for labor picketing. In striking down the ordinance, the Supreme Court noted:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. …But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. …The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan, supra*, at 376 U.S. 270.

Id at 95-96. Indeed and as discussed above, NLRA Section 8(c)'s purpose is precisely to provide this type of robust and wide-open debate. By restricting employer but not union speech, however, the Department's proposal impermissibly violates this constitutional principle.

Similarly, the Supreme Court recently invalidated an attempted Vermont regulatory scheme in *Sorrell v. IMS Health, Inc., et. al.,* 131 S. Ct. 2653 (U.S. 2011), where Vermont had restricted the sale, disclosure and use of pharmacy records that reveal the prescribing practices of individual doctors for the stated purpose of safeguarding "medical privacy." *Id.* at 2659. The prohibition was, however, subject to exceptions permitting the use of this data by academics for research, to enforce compliance with health care formularies or preferred drug lists, and for "care management communications." The statute had the effect of allowing pharmacy records for many purposes, but not for commercial data-mining and marketing purposes. The Supreme Court deemed this content-based restriction subject to heightened scrutiny that it could not survive. This was because "[t]he explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers." *Id.* at 2668.

Like Vermont, the Department seeks to regulate a narrow and disfavored class of persuaders—those speaking for management. While its asserted justification is the neutral goal Congress pursued of disclosing all persuader agreements so that employees are fully informed, the Department is interpreting the LMRDA so that employees only obtain some persuader information. Equally important, only attorneys acting as persuaders for management, but not labor, are forced to choose between compliance with the LMRDA and state ethical and professional conduct standards on which their professional licenses are conditioned. And like Vermont, the Department cannot assert that its content-based speech restrictions are narrowly tailored, especially since every entity that files a single Form LM-20 (under even the current broad advice exemption) must complete a Form LM-21 report that disclosing clients and fees unrelated to persuader activity.

The Department's proposal unconstitutionally encumbers the NLRA Section 8(c) rights of employers, but not those of unions. As such, it is a form of viewpoint discrimination that the Supreme Court has repeatedly struck down. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (unconstitutional to discriminate against religious group's use of school); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (denying Jehovah's Witnesses right to use city park for Bible talks while permitting other religious groups to do so); *Good News Club, et al. v. Milford Central School*, 533 U.S. 98 (2001) (unconstitutional to deny religious group use of school while permitting use by other community groups). For all of these reasons, the Department's proposal is contrary to law and would be unconstitutional.

III. The Proposed Interpretation Violates the Attorney-Client Privilege and Lawyers' Ethical Obligations

The U.S. Supreme Court recognizes the importance of the attorney-client privilege in serving the public interest by promoting corporate compliance. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Thus, the privilege serves to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id* at 389.

The Department's proposed reinterpretation of LMRDA Section 203 threatens to significantly compromise this attorney-client relationship and ultimately the public interest. Information that has for decades been treated as confidential and privileged between employers and their lawyers now risks being disclosed, an unnecessary and unjustified result of the Department's proposal to effectively eliminate the advice exemption in Section 203(c).

The new interpretation's vague criterion that information is reportable if it involves activities where "an object thereof, directly or indirectly, is to persuade employees," creates an irreconcilable conflict between adherence to the law as reinterpreted by the Department and, as discussed below, an attorney's ethical obligations to clients with respect to confidentiality and privilege. If that were not enough, legitimate concerns about having confidential information made public would likely chill the willingness of employers to seek legal advice on numerous issues – many of them completely unrelated to labor matters.

Rather than fostering the LMRDA's overarching purpose of making the NLRA work more effectively, the Department's new interpretation will have the precise opposite effect. With a perverse and chilling effect, fewer employers will be willing to seek advice from fewer experienced lawyers who will be willing to advise employers on NLRA matters. As a result of their ignorance of the law, employers will be more likely to violate the NLRA's complex rules about permissible and impermissible conduct in both the union organizing and collective bargaining contexts. Of course, those inadvertent NLRA violations resulting from a narrowing of the advice exemption will adversely affect the very workers that the NLRA specifically seeks to protect.

Both the current and proposed Form LM-20 instructions provide that if any reportable "agreement or arrangement is in whole or in part contained in a written contract, memorandum, letter, or other written instrument, or has been wholly or partially reduced to writing, you must refer to that document and attach a copy of it to this report." (Current instructions at page 3; proposed Instructions at 76 Fed. Reg. 36213). The mandate to publicly disclose retainer agreements and other documents related to the provision of legal services is much more problematic if the Department finalizes it proposal to force reporting of agreements for services that mix "advice" and reportable persuader or information supplying activities, since – to comply with both bar ethical requirements and malpractice insurance guidelines – those required, written retainer agreements often describe in detail the exact nature of the work that will be performed. This exacerbates an attorney's dilemma under any state bar's ethics rules, because it extends far beyond revealing the identity of and fees paid by clients. Many employers may react to the proposed rule by obtaining assistance from non-attorney consultants, who are not compelled by legal ethics and malpractice carriers to reduce their agreements for services to writing.

Almost immediately after the LMRDA was introduced in Congress in 1959, the American Bar Association ("ABA") issued a resolution recognizing attorneys' ethical obligations to keep certain information about their clients confidential. That original resolution urged that no legislation require reporting or disclosure of "any matter which has traditionally been considered as confidential . . . including but not limited to the existence of the relationship of attorney and client,

the financial details thereof, or any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law."[7] This standard – that a lawyer "shall not reveal information relating to the representation of a client" - is repeated in ABA Model Rule of Profession Conduct 1.6[8] and in numerous states' ethics rules for lawyers. The Department's proposed revision to the advice exception flies directly in the face of those rules, which have successfully protected the close and confidential relationship between attorneys and their clients with respect to labor matters for more than five decades.

At least thirty states' laws on attorney ethics and professionalism hold that information such as the identity of the client, fees paid, and the nature of the legal engagement is to be considered confidential, disclosed only with approval of the client.[9] Clients engage legal counsel with the understanding that such information will remain confidential and that assistance and advice may be freely sought and rendered between lawyer and client without concern about disclosure to employees or the public. When an attorney acts as a legal advisor for a labor client, whether a portion of that advice concerns "persuasion" or not, the information transmitted between lawyer and employer, including matters related to fees, the fact of the engagement, and the nature of the terms of employment, must remain confidential. Any other result devalues the significance of the attorney-client relationship and wrongly treats true legal advice as an ordinary business activity.

One of the public policies underlying this privilege is the recognition that lawyers have an ethical duty and serve in the public interest by ensuring their clients' compliance with the law. The Department's proposal, however, negates the distinction between the activities of a lawyer and those of any other business.

Recent legislative efforts to expand attorneys' responsibilities to disclose information about their clients under the Sarbanes Oxley Act and the Fair Credit Reporting Act raised similar concerns about the chilling of attorney-client relations. In both cases, the proposed changes were found to be overbroad and unnecessary to effect the purposes of the statutes at issue, resulting in a revision or non-implementation of the reporting requirements.

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[7] ABA Policy on Preservation of the Confidential Attorney-Client Relationship in the Labor-Management Field (Adopted 1959).

[8] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html

[9] See, e.g., Ariz. Rules of Prof. Conduct 1.6(a) (2010) ("a lawyer shall not reveal information of a client unless the client gives informed consent."); Cal. Bus & Prof § 6068(e)(1) and Los Angeles Bar Ass'n Form.Opns. 456 (1990) & 374 (1978) (A written fee contract is protected from disclosure and billing statements showing time spent on particular matters is likely confidential); Ky. R. Prof. C. 1.6 ("A lawyer shall not reveal information relating to representation of a client unless that client consents after consultation"); Tex. Prof. Ethics Comm., Ethics Op. 479, 1993 WL 840538 (1993) (citing TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05 (2005) ("Absent a client's informed consent, the law firm may not reveal either the names of its clients or the amounts which those clients owe").

Thus, when the Securities and Exchange Commission first implemented the Sarbanes-Oxley Act of 2002, Section 307 proposed rules on attorney conduct that included both a scheme for "reporting up" and "reporting out" (the so-called "noisy withdrawal" rule)[10] when an attorney learned of evidence that his or her client violated the law. Similar to the proposed Department rule at issue here, the SEC's regulation would have required law firms to disclose sensitive information about their relationship with clients.

This proposed noisy withdrawal rule resulted in numerous comment letters from law firms concerned about the chilling of attorney-client relationships because clients would be less likely to consult with their attorneys on important questions if there were a chance that the fact of the consultation could be disclosed. Although proposed in 2002, the noisy withdrawal rule has not been adopted in the nine years since then.

Similarly, in 1997 a Federal Trade Commission ("FTC") opinion letter (the "Vail Letter")[11] opined that if a law firm regularly engaged in investigations of employee misconduct for employers, the law firm could be considered a "consumer reporting agency" (CRA), and thus responsible for adhering to the FCRA's considerable notice and reporting requirements for CRAs. Among these were requirements that a CRA must disclose the fact and nature of its investigation for a client before conducting a background check and must obtain permission from the target of the investigation prior to conducting it. Amid fears that many companies would cease engaging lawyers to conduct sensitive investigations rather than face the notice and disclosure requirements of the FCRA, the FTC amended its position to exclude lawyers who investigate employee misconduct from the definition of a CRA.

Many of the same concerns that led to the abandonment of reporting requirements for lawyers under both Sarbanes-Oxley and the FCRA are relevant to the narrowing of the LMRDA advice exception. In all three situations, overly broad reporting requirements would have made it difficult or impossible for attorneys to act as true legal advisors to their clients without disclosing confidential and sensitive information. For good reasons, the Sarbanes-Oxley and FCRA notice requirements were never implemented; the Department should follow this wise example when it comes to amending its interpretation of the advice exception.

In explaining its new interpretation of the advice exception and revised Form LM-20, the Department spends considerable effort trying to justify its contention that reportable persuader activities can be separated from pure advice and that it is possible for a law firm or lawyer to report on the nature of its engagement with a client for the former activities, while refraining from disclosing the latter. How exactly is this to be accomplished? The reality of legal representation makes the proposed distinction untenable. If a lawyer is accused of improperly failing to report, the only way to disprove that a lawyer engaged in persuader activity is to disclose privileged

[10] http://www.sec.gov/news/press/2003-13.htm

[11] http://www.ftc.gov/os/statutes/fcra/vail.shtm

information as to what the lawyer did and why it was done; i.e., the actual substance of the lawyer's advice and representation of its client.

Once a law firm is forced to begin revealing information about its relationships with its clients, any number of confidential – and likely privileged – items of legal advice inevitably would be made public. For despite the Department's stated recognition that LMRDA Section 204(d) does not require disclosure of "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship," restricting the advice exception will make sequestering privileged material impossible in a "forced disclosure" to defend against an allegation that a lawyer engaged in reportable persuader activity.

A major flaw with the Department's view is its failure to recognize that for law firms, the "nature of the engagement" with a client commonly extends far beyond pure persuader activities and may include information protected by both confidentiality and privilege. Thus, if both attorneys and employers must report on the reasons and purposes behind every legal engagement that includes even an indirect relation to persuader activities, employees and the public could become privy to confidential business decisions, sensitive strategic planning information and other private employer information.

Some of the examples provided by the Department itself illustrate the impossibility of separating privileged legal advice from persuader activity. For example, the Department states that "training or directing supervisors and other management representatives to engage in persuader activity" is reportable. But what happens where a law firm is engaged to draft a legally compliant anti-harassment policy and training program for managers and supervisors? If the program includes education for supervisors on how to legally respond to pro or anti-union disputes or harassment in the workplace, must the lawyer or consultant now report on Form LM-20 that it has been engaged to offer harassment training, thus publicizing that the company might be having problems with harassment?

Likewise, consider the situation where a buyer is exploring the possibility of acquiring a unionized company. If the purchaser uses a law firm to help assess the different legal issues involved in structuring a transaction as a stock purchase, asset purchase, or merger, including circumstances under which the target employer's existing unionized status or collective bargaining agreement(s) would continue or be extinguished, does the engagement become reportable, alerting employees, the target company, and the public about the potential transaction well before it is a reality? What effect would that forced disclosure have on the value or price for the transaction, the actions of competitors, or the willingness of buyers to even consider the transaction?

Similarly, when considering a possible workforce reduction, employers regularly seek legal advice to ensure that their decisions about which employees to retain and to lay off comply with a panoply of federal and state laws that are wholly separate from and unrelated to any specific considerations under the NLRA or the Railway Labor Act. Examples include the Worker Adjustment & Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623 et seq.; and the Employee Retirement Income Security Act of

1974 ("ERISA"), 29 U.S.C. § 1001 et seq. Those decisions about which specific employees to retain and which employees to lay off, however, have an inevitable effect ─ in whole or in part, directly or indirectly ─ on the employees' present and future ability and willingness to band together collectively. For numerous sound business reasons, employers have no desire to publicize these considerations. Would an attorney or other advisor have an obligation to timely file a Form LM-20 and inevitably disclose to employees, customers, shareholders, and competitors that these issues are under consideration?

Similarly, employers regularly seek advice on how to structure employee committees that focus on workplace improvement on a wide variety of issues, including safety, process improvement, the reduction of waste, and customer relations. For example, a hospital may seek guidance on how best to communicate with a group of nurses about improving the quality of patient care through changing staffing models, staff coverage based on patient acuity, and other actions that affect terms and conditions of employment. All of these committees and employee involvement efforts arguably have an object, directly or indirectly in whole or in part, of ultimately persuading employees about issues that will affect their desires to organize or to bargain collectively. Would the Department assert that the consultant's advice was reportable activity? If a consultant were required to report her engagement on a Form LM-20, it would have the perverse effect of signaling to the general public that the employer – whether a manufacturer, hospital, service provider, restaurant, or other type of business – was encountering safety, quality, customer relations or other problems. Rather than encouraging employers' efforts to improve their business models, the Department's expanded filing requirements would signal the general public about illusory problems, damage the employer's business, and eliminate the incentive for continual process improvement.

Even in areas more obviously related to union organizing or collective bargaining, employers regularly seek legal advice that, if disclosed, would have a material adverse impact on the employer's business due to its arguable "mixed" persuader element. Thus, an employer may seek advice in connection with outsourcing, relocating, or subcontracting aspects of its business. Whether the affected employees are unionized or not, the legal advice regarding decisions, strategies, and terms under which the employer does so will inevitably have a persuader element in whole or in part, directly or indirectly. If a lawyer were required to disclose these confidential considerations ─ which may never result in any actual outsourcing or relocation that affects employees ─ the mere fact of this disclosure could have a significant adverse impact on the employer's business. Would any attorney or consultant's advice on these issues be reportable?

Even in the litigation context, it is likely that legal advice would frequently be reportable under the Department's proposed interpretation. The proposed instructions for the Form LM-20 state that "excluded" from the supplying information trigger "are agreements or arrangements that cover services relating exclusively to supplying the employer with information for use only in conjunction with an administrative, arbitral or judicial proceeding." 76 Fed. Reg. 36178, 36211. But this exception is of little value, because it is immediately followed by the following admonition: "**Note:** If the agreement or arrangement provides for **any** reportable activity, the exemptions do not

apply and the information must be reported for the entire agreement or arrangement." *Id.* (Bold in original).[12] Thus, it is not only when "advice" is mixed with otherwise reportable "persuader activity" that previously non-reportable services trigger a Form LM-20 (and LM-21) filing requirement, but also when "information" in relation to a "labor dispute" is supplied for any purpose outside the narrows confines of the proposed "advice" exemption or the exception for use in "an administrative, arbitral, or judicial proceeding." Accordingly, when seeking a court injunction due to strike violence, a lawyer – who frequently reviews the evidence surrounding picket line misconduct not only to litigate the injunction proceedings but also to advise about whether specific picketers may lawfully be discharged for picket line misconduct – would apparently need to report his arrangement and all fees, including those in connection with the court proceedings.

If detailed information were to be filed about the terms and conditions of a law firm's engagement under the Department's proposal, that mere filing will reveal that the client has sought advice whose object was to directly or indirectly persuade employees about their right to organize and bargain, and may reveal (at least by inference) something about the substance of the advice. Given the vague and potentially broad scope of the Department's proposed rule, such a disclosure might also create the false impression that a client has sought advice about its employees' collective bargaining rights when in fact, the advice may have actually related to financing and capital structure issues related to an ESOP. This would result in meaningless and inaccurate information, as well as potentially confusing other stakeholders (e.g., lenders, investors, business partners), possibly leading to requests for clarification from those stakeholders, which further erodes the employer's interest in confidentiality and potentially infringes on the attorney-client privilege as well.

As the above examples show, the Department's proposed rule is so vague as to be arbitrary in that it could apply to numerous areas of general corporate counseling and transactions that have, at best, a very attenuated relationship to advice about organizing and collective bargaining. This, in turn, interferes with a client's ability to conduct business in a variety of areas, engage in transactions, investigate its own conduct, and obtain advice to comply with legal requirements.

The broad reach of the Department's proposal would also impose new and extensive compliance burdens on employers. Employers would need to assess every business decision they make to ensure that their annual Form LM-10 reports capture every action or communication that might be deemed to have an object, in whole or in part directly or indirectly, to persuade employees about their rights to engage in protected concerted behavior. Faced with criminal penalties for noncompliance, every employer would be forced to comb through countless business decisions to see whether one of its employees, with or without a consultant's help, had performed a persuader act. At a time when the President and his Administration are calling for less "red tape" and burdens on business, this additional compliance cost and impediment to business is inexplicable. Indeed, we

[12] There is almost identical language on page 3 of the current Form LM-20 instructions, but it has a different meaning now that mixed-purpose arrangements would no longer be exempt under the advice exemption.

submit that the Department has failed to conduct an adequate burden analysis when it estimates a "reporting burden of 45 minutes per filer." 76 Fed. Reg. at 36200. The Department includes in this 45 minutes the time necessary to "record the nature of the agreement or arrangement . . . as well as the types of activities engaged in . . . . It also includes the time required to read the Form LM-20 instructions to discover whether or not a report is owed and determine the correct manner to report the necessary information." *Id.* We submit that this estimate is so erroneous as to be surreal, as is the Department's "estimates that the burden of maintaining and gathering records is 15 minutes." *Id.* This estimate "accounts for the 5-year retention period required by statute." *Id.* No employer or consultant could meet these estimates under the burdensome reporting requirements proposed by the Department.

The Department's longstanding interpretation addresses these concerns in a rational way, recognizing that even when the subject of an attorney's work for a client may relate in part to persuasion and union matters, such work often constitutes legal advice and is a privileged communication. The proposed new requirement that attorneys must reveal the nature of their engagement with a client when part of the work performed involves the provision of pure legal advice – simply because that advice is co-mingled with communications that might end up before employees in some form – strikes at the heart of the protections afforded by the attorney-client privilege. Nothing in the proposed revision to the advice exception explains how an attorney can fulfill responsibilities to a client while at the same time adhering to the law's reporting requirements.

The Department's current interpretation of the advice exemption effectively balances the competing needs of employers who seek legal advice on numerous labor matters on one hand, with the LMRDA's pursuit of transparency in labor and management relations on the other. Until now, lawyers have been able to identify a bright-line distinction between providing legal advice behind the scenes pursuant to the ordinary practice of law, and interacting directly with employees in an attempt to persuade them with respect to unionization. The new interpretation erases this longstanding distinction and threatens to require the disclosure of privileged information.

IV. Fear of Having Their Confidential Legal Relationships Revealed Will Have a Chilling Effect and Dissuade Employers From Seeking Needed Legal Advice

Faced with the threat that their confidential legal relationships and activities will become public, employers – including many that employ neither an internal legal staff nor any human resources specialists – may attempt to address employee relations issues on their own and without the help of experienced counsel. And without the guidance of a knowledgeable attorney, it is much more likely that an employer's employment decisions – both persuader-related and not – will violate the various laws that are designed to protect employees. Maintaining the current advice exemption as it has been applied for the past half-century would encourage employers to continue to consult with their attorneys on employment matters of all types, and then to decide whether to accept or reject the advice or communications given – and thereby preserve the confidentiality of the employers' relationship with its attorneys. Such a method permits reporting of truly persuasive activities in fulfillment of the statutory objective and still maintains the confidentiality of information that does not involve direct attorney persuasion.

The chilling effect of the Department's proposed reinterpretation on an employer's willingness to obtain advice would be exacerbated by the effect on attorneys and other consultants who never previously were required to report. This is because LMRDA Section 203(b) also requires persons who file even a single Form LM-20 to also file a publicly available Form LM-21 (Receipts and Disbursements Report) within 90 days of the end of the firm's fiscal year. Form LM-21 requires filers to report receipts and disbursements for "labor relations advice or services regardless of the purpose of the advice or services."[13] According to section 269.520 of the LMRDA Interpretive Manual:

> "Labor relations advice or services" as that term is used in section 203(b) of the [LMRDA] would include all advice and services on matters having a bearing on the relations between an employer and his employees, including advice which is informally given as part of a service where a retainer fee is paid. Advice on contract negotiations, employee training programs, development of vacation, overtime, and job evaluation policies, and employee education programs, for example, would fall within this definition as would advice on the various Federal and state laws bearing on the employer-employee relationship.

The Form LM-21 requires disclosure of the identity and fees paid by almost any client of a law firm's broad-based labor and employment and employee benefits practices, even work unrelated to labor unions or union organizing, such as employee training programs, the development of vacation and overtime polices, or employee benefit programs. If a firm cannot segregate its receipts from "labor relations advice and services," as broadly defined by the Department, then it may have to report all receipts and disbursements in the aggregate to comply with its LM-21 obligations.

If the Department finalizes its re-interpretation of the advice exemption to significantly expand what is reportable persuader activity, then numerous law firms that employ even one attorney who engages in reportable activity for even a single employer client will have to report the services rendered and the fees collected by <u>all</u> of its attorneys who provide a broad range of "labor relations advice or services" to <u>all</u> of its clients and potentially <u>all</u> fees from <u>all</u> clients, irrespective of whether it relates to labor relations advice. Thus, the non-persuader labor relations advice provided by an attorney for an employer-client that does not use the firm for persuader services (or even union-related matters) will nonetheless have to be disclosed along with the fees it paid to the law firm.

Moreover, a law or consulting firm would file reports not only when one of its members performs reportable activities, but also when it agrees "to have them performed" by another party, 29 CFR 406.1(c), or "secure[s] the services of another or of others in connection with an agreement of the type [that triggers reporting]," 29 CFR 406.1(d). This creates numerous problems. For example, when a law or consulting firm assists an employer by drafting an anti-harassment policy and in the process retains a separate consulting firm to translate that policy into other languages, the primary law or consulting firm might – correctly or incorrectly under the Department's vague

[13] *See* Form LM-21 Part B.

proposal – think that no reporting was required. If the "translator" consultant disagreed or the client-employer casually asked it to expand its scope of work, their decisions could force the initial law or consulting firm to report. Accordingly, under the proposed revisions to the Form LM-20, the translation firm would have to identify the law or consulting firm on its Form LM-20 report, which would require the law or consulting firm to file its own Form LM-20 and corresponding Form LM-21. 76 Fed. Reg. 36178, 36194; *See* Item 8 on the Form LM-20 as proposed at 76 Fed. Reg. 36178, 36207. Simply put, lawyers and human resources consultants would have to deal not only with the ambiguities the proposal creates in relation to the services they provide, but also manage the risk of how their retained consultants perform translation services, compensation analysis, benefit plan design, and other services under the Department's standards for reporting its proposed, vague definition of "advice."

In practice, the Form LM-21's broad reporting requirements are generally not onerous for traditional labor consultants because their work is often confined to activities that are otherwise reportable as persuader activity. Law firms, however, usually provide advice on a range of labor relations issues beyond what has historically been, or even under the proposed reinterpretation possibly might be, considered persuader activity. The unwillingness of many employers – particularly those who have never sought advice on "persuader"-related matters – to have the fact of their attorney engagements, fees paid, and other information made public on a Form LM-21 will likely either cause those employers to seek other legal counsel, or cause these experienced attorneys to cease performing any newly reportable activities in order to retain their existing client relationships. In short, just as employers will have less incentive to seek advice about how to act lawfully, lawyers will have less incentive to advise clients about how to comply with the law in this complex area. As a result, the chilling effect of the Department's proposed reinterpretation of the advice exemption will lead to less compliance with the underlying statutes that the LMRDA was designed to advance.

V. The Department's Rationale for the Revised Interpretation is Flawed

The Department advances several policy arguments in support of its proposal, but none of these arguments withstands scrutiny when contrasted with available facts and data. Simply put, the Department's proposal is a solution in search of a problem.

As a threshold matter, the Department fails to explain a key justification for its proposal; i.e., how its proposal allegedly provides employees with relevant knowledge of an employer's persuader efforts at the time when they are occurring. In fact, it does not do so. An employer's Form LM-10 is only due after its fiscal year has ended; a consultant's Form LM-20 is only due within 30 days of his engagement. Both reports may be filed and first made publicly available long after the consultant's work, and any union organizing or collective bargaining, have concluded. Thus, despite the claimed result of providing employees with contemporaneous information to make better informed decisions, even under the Department's proposal, the additional Form LM-10 and LM-20 reporting may provide employees with no real additional information at the time when the persuasion and employees' decisions are in fact taking place. Likewise, the Department's remaining policy arguments are without merit.

A. The False Argument about Underreporting

The Department claims that the labor consultant industry has "proliferated since the passage of the LMRDA" and that there has been "extraordinary growth in the labor consultant industry and employers' utilization of that industry." 76 Fed. Reg. 36185-86. The Department provides no evidence for its broad claim other than to reference a lone study published in a foreign journal which claimed that an "estimated" 100 "management consultant firms" had "grown ten times" between the 1960s and the mid-1980s.

The meaning and indeed the relevance of these statements by the Department are not clear. For instance, the Department fails to explain the current relevance of an estimate from a foreign journal that more than 25 years ago there was some number of management firms in excess of 100? The Department provides no data on the types of work these firms performed, whether they were persuaders, their size, or their number of employees. Is the Department suggesting that it believes there were 1000 management consultant firms in the mid 1980s? And if there were 1000 such firms 25 years ago, how many are there in 2011? The number of firms would, in any event, be irrelevant. From the Department's perspective, what is more significant for purposes of its proposal? Does it matter whether 100 firms each with 200 employees engaged in persuader activity in 1960 or that 1000 firms each with 10 employees engaged in persuader activity in 1985? Moreover, the number of consultant firms is meaningless because the Department provides no indication that the "management consultant firms" to which it refers were engaging in persuader activity that would be subject to reporting.

Without ever explaining the relevance of the number of consultant firms, their size, or their activities, the Department pivots to estimating the percentage of employers that are utilizing consultants, at least according to a few authors. But again, these percentages are meaningless, as the Department provides no information about the actual number of consultants in support its central claim of "extraordinary growth" in the industry. Further, the studies cited by the Department describing percentages of alleged consultant use by employers are meaningless without knowing the numbers of consultants and the number of employers. For example, a 1980 congressional report cited by the Department estimated that 66% of employers used consultants; a 1994 study estimated it as 70%; a 1998 study estimated it as 87%; a 1999-2003 study estimated it as 75%; a 2005 study estimated it as 82%; while a 2006 study estimated it as 75%. Assuming these percentages are even marginally accurate, an increase of nine percentage points from 66% in 1980 to 75% in 2006 hardly seems to qualify as "extraordinary growth" in the utilization of consultants – and is no evidence at all as to the number of consultants who engaged in reportable persuader activity as that term has been consistently defined.

The Department then recites the average number of representation cases filed with the National Mediation Board and NLRB between the years 2005-2009 (although the Department does not explain why these years are selected) and extrapolates from the median percentage of alleged consultant usage from the previous group of studies to determine the number of LM-20s it believes should have been filed. The Department then further extrapolates that, based on the average number of LM-20s actually filed over that period, the Department received only 7.4% of the expected number. Thus, without any supporting evidence that these consultants engaged in

reportable activity, based on a belief that a non-specified number of consultants over an undefined time period that ended about 25 years ago constitutes a "proliferation," and based on a recitation of meaningless percentage estimates of the use of consultants by employers, the Department concludes there is a "significant" problem of underreporting of persuader activity because the number of LM-20s filed on average each year does not match the Department's "expectations." Yet there is no evidence that the Department's expectations are reasonable or are grounded in reality.

The Department expects that it should have received on average 2,601 LM-20s annually. But without knowing how many consultants there are in the U.S., how can the Department conclude that its expectation is reasonable? If there were 1000 consultants in the mid 1980s, are there currently more, fewer, or the same number of consultants? If the use of consultants is "proliferating" as the Department claims, then should there not be more consultants now than there were in 1985? If 1000 consultants are engaged to perform persuader activity in a year, and reported on 2,601 LM-20s, that means a consultant would be engaged just 2.6 times per year. Is that reasonable or likely? How many engagements does the typical persuader undertake in a year?

The Department suggests that persuader reporting has decreased despite a claimed increase in employer utilization of consultants. Yet the Department cites no data in support of its assertion, and as a result the public is deprived of the opportunity to challenge or comment on the basis for the Department's conclusion. The Department implies that the lack or reporting by persuaders deprives employees of information that would enable the employee to make a more informed choice in a representation election. Yet, the Department offers no evidence to support the conclusion that information that is or would be reported on an LM-20 would have any bearing on the outcome of a representation election. Indeed the delay in filing any Form LM-20 means that a consultant's work – and its supposed persuasive effects on employees – may have ended even before the form was filed. The Department also suggests that work by the persuaders prevents unions from winning elections they otherwise would have won if only more LM-20s were filed. But such a view is mere conjecture that is plainly contradicted by the historical data on union success rates in representation elections.

In fact, the union success rate in representation elections has been higher in the past 10 years than at any time since the early 1970s. In each of the past two years alone, the union election victory rate has exceed 66% and for a ten-year stretch until 2006 the union election success rate increased every year. The Department fails to explain how it is that at a time of supposed "extraordinary growth" in the existence of consultant firms and the use of consultants by employers, the union success rate in representation elections has been consistently increasing. Although union election victory rates are not as high as they were in the mid-1940s, the union election success rate has declined steadily from that time until the early 1980s. See Farber, Henry S., Union Success in Representation Elections: Why Does Unit Size Matter?, Working Paper #420, Princeton University, Industrial Relations Section (June 1999). With no examination of other historical, social, or economic factors that might explain workers' changing desires for union representation and no data to support any correlation between consultants' activity and union election success or failure, the Department simply claims that the increasing usage of consultants is affecting union organizing success.

The Department's lacks any reasonable for basis for its claims about alleged underreporting of persuader activity. The Department fails to provide any data in support of its assertion, including data on the number of LM-20 reports that have allegedly declined. The Department also fails to provide any data on the number of consultants or consultant firms currently operating in the U.S. that would support its claim that there has been a "proliferation" of such firms. The Department also fails to demonstrate how additional reporting by alleged persuaders would produce any meaningful change in election outcomes.

B. The False Argument about Greater Compliance with the NLRA

The Department's argument that the current interpretation of the persuader reporting requirement results in undue delays, unfair labor practices, and acrimony is fundamentally flawed. The Department asserts that the full disclosure regarding the use of a consultant will lead to a more informed electorate and will contribute to more reliable and acceptable election results. Specifically, the Department stated in its comments:

> Pressurized campaign tactics can and do lead to objections regarding the outcome of the election, which results in long periods of litigation before the NLRB about the election conduct. Such disputes heighten the acrimony between the parties, and in the event that the union is ultimately certified, prevent bargaining during the pendency of the election-related litigation. Making transparent the role of consultants during a campaign will permit employees to better evaluate campaign materials and tactics, increase the integrity of the election outcome, and promote reliance on the results of the election.

The Department's rationale, however, is unsupported by any evidence. Indeed, the available empirical evidence fully refutes this asserted rationale. Since the 1960's when the NLRB first initiated time targets to ensure timely processing of cases by its field offices, the NLRB has prided itself on its ability to set and achieve aggressive goals for the expeditious processing of cases. Indeed, just this past January, Acting General Counsel Lafe Solomon lauded the "outstanding" efforts of the NLRB's field offices in reaching and in some instances surpassing the "ambitious overarching goals" in the processing of petitions for election.[14] The NLRB's accomplishments in this regard illustrate that the Department's concerns regarding delays and acrimony under the current persuader rules are unfounded.

Acting General Counsel Solomon's justified praise of NLRB efficiency was based on a number of noteworthy efficiency goals achieved or exceeded in fiscal year 2010 such as:

- elections were conducted in a median of 38 days from the filing of a petition, easily exceeding the NLRB's goal of 43 days;

[14] General Counsel Memorandum 11-03, Summary of Field Operations (Fiscal Year 2010).

- 86.3% of petitions for election were "closed" (i.e. all pre and post election issues are resolved) within 100 days;

- 92.1% of elections were conducted without a hearing pursuant to an agreement by the parties, easily exceeding the NLRB's goal of 85%;

- only 185 petitions for election required a pre-election hearing, and in those cases decisions were issued within a median of only 37 days, far surpassing the NLRB's goal of 45 days;

- 95.1% of all elections were conducted within 56 days of the filing of the petition, again easily exceeding the NLRB's goal of 90%;

- only 88 cases of the 1,790 elections conducted required any post-election procedures because of alleged objectionable conduct by a party or because of issues regarding voter eligibility;

- of the 88 post-election cases only 56 required a hearing, and decisions were issued in a median of 70 days, easily exceeding the NLRB's goal of 80 days; and

- of the 88 post-election cases, 32 were resolved without a hearing in a median of only 22 days, far exceeding the NLRB's goal of 32 days.

These statistics ─ gathered and analyzed by the NLRB itself ─ clearly show that the current persuader rules have not resulted in the delays and conflicts identified by the Department. Thus, to the extent the proposed persuader rules are premised on a need to increase efficiency and decrease disputes, the premise is simply flawed.

That the current persuader rules have not resulted in the problems envisioned by the Department is also reflected in the low number of representation cases that are challenged by "test of certification" litigation in the courts of appeals and the even lower number of cases in which the NLRB's decisions were overturned by the courts. In fiscal year 2010, only 7 "test of certification" cases were filed with the NLRB and its decisions were sustained in every case decided by the appellate courts.

Further, notwithstanding the so-called "studies" purportedly supporting the Department's position that the use of consultants is accompanied by unlawful anti-union tactics and widespread improper employer interference during union organizing campaigns, the data maintained by the NLRB clearly refutes any such claims. Further, the NLRB has a long and well-established policy of requiring that elections be conducted under "laboratory conditions" ─ a very stringent standard. The requirement that these laboratory conditions be maintained begins with the filing of a petition and, thus, the parties are held to this standard during most of the election campaign and certainly during the most critical stages. If a union believes that an employer has somehow violated that standard, it may file objections to the election and seek a rerun of the election. Objections are filed

by either party in only approximately 5% of all NLRB elections, however, and of the cases in which objections are filed, the NLRB finds that 50% have no basis in fact or law.[15]

Thus, based on the NLRB's own data, more than 97% of its elections are conducted without interference by either party. Simply put, the current persuader rules have not resulted in the widespread unlawful and objectionable conduct envisioned by the Department. Moreover, even the Bronfenbrenner study that is ironically cited by the Department states that "*with or without* the advice of labor consultants, employers utilize aggressive and even unlawful tactics in opposing unions…" (emphasis added).[16]

C. The False Argument for "Parallel" Reporting Requirements

The Department also asserts that since union finances are reported, employers should likewise be required to report expenditures on persuaders under its proposed broader reporting standard. As discussed above, however, the Department's rationale is fundamentally flawed since amounts paid to true persuaders are currently required to be reported. Further, the current system works well, as the NLRB's rules adequately safeguard employee rights in the context of an organizing campaign.

No empirical evidence indicates that broadening the interpretation of persuader activity will do anything to improve the excellent results achieved under the current standard. Indeed, a likely, if paradoxical, result of an expanded reporting requirement would be to encourage employers to act on their own without the benefit of legal advice concerning the lawfulness of contemplated actions or communicating with employees during a union organizing campaign, and to discourage such employers from seeking legal advice on relevant issues during a union organizing campaign. Such a result would almost certainly increase conflict during organizing campaigns and result in significant delays, far more than is the case today.

Finally, the Department's assertion that employers and unions should be subject to similar reporting requirements fails to consider a key difference between employers and unions. Employers generate revenue by creating a product or providing a service to their customers. Unions, on the other hand, generate revenue solely by collecting dues from their members. Union reporting is justified since it enables employee members to see how the unions are using the dues money that they pay. This rationale is wholly inapplicable to employers.

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[15] NLRB Annual Reports.

[16] Moreover, and as discussed above, given that the proposed reporting would occur months after any election activity and/or would be of information that would not be contemporary to the activity, the "informed electorate" argument is unfounded.

VI. The Current Interpretation of Advice Works Well

For almost 50 years, the Department has consistently construed "advice" to include not only a consultant's review of persuasive material prepared by an employer and any comments thereon, but also the consultant's preparation of material for the employer, so long as the employer remained free to accept or reject that material. With court approval of this construction in *Kawasaki*, 869 F.2d 616, the Department has been guided by a clear standard providing in pertinent part that:

> [A] usual indication that an employer-consultant agreement is exempt is the fact that the consultant has no direct contact with employees and *limits his activity to providing the employer or his supervisors advice or materials which the employer has the right to accept or reject.*

66 Fed. Reg. 2785 (emphasis added). For almost half a century, this standard has provided a clear and effective distinction between activity by a consultant that is reportable and activity that is not reportable.

The current standard establishes a bright-line test that is easily understood. Both employers and their consultants know that reporting is required if the attorney or other consultant meets directly with employees in an effort to persuade them about joining or not joining a union. Where an attorney or other consultant does not address employees directly, however, and merely reviews or prepares materials that the employer is free to accept or reject, both the employer and its advisors likewise can be confident that their actions are not reportable. This clear, bright-line test avoids misunderstanding, ensures consistent reporting by both employers and their consultants, and reflects the reality that advice – and particularly legal advice – will almost invariably contain some element that will meet the employer-client's objective of being persuasive.

VII. The Proposed Interpretation is Overbroad and Hopelessly Vague

The Department's proposed reinterpretation not only ignores the sound basis for the longstanding interpretation of non-reportable advice, but it is impossible to apply and creates numerous problems for attorneys, consultants, and employers. Requiring a consultant to report advice if there is any intent or purpose – in whole or in part, directly or indirectly – to persuade employees about collective bargaining or choosing union representation effectively includes not only persuaders on union organizing and collective bargaining, but anyone in either the legal profession or the human resources consultancy industry whose work affects employees. The problem, of course, is that almost any communication between employer and lawyer with respect to labor and employment matters could be seen as an indirect attempt to persuade employees that they should cast their lot with the employer rather than obtaining benefits or changes to employment policies through collective bargaining.

Indeed, most employers' actions occur out of a desire or purpose – in whole or in part, directly or indirectly – to influence, i.e., persuade others. Employers make and communicate decisions about hiring, compensating, providing benefits to, implementing and modifying their workplace practices for, and even terminating the employment of individuals with an almost

universal goal of promoting employee engagement, productivity, and retention. These universal objectives and any sort of employer communication that advances them inextricably involve persuasion. Does that render any action the employer takes arguably one having an object in whole or in part to persuade employees about choosing to act or not act collectively?[17]

For example, an entire human resources consultancy industry has developed around "benchmarking" best practices, measuring employee satisfaction, and advising employers on wages, hours, terms and conditions of employment and other practices designed to ensure employee satisfaction – any of which therefore arguably have an object in whole or in part, directly or indirectly, of persuading employees about collective bargaining or choosing union representation.

Likewise, the reality of the legal profession is that lawyers are not merely asked whether a course of conduct is lawful or unlawful, but instead are asked to assist in developing and advising on effective and best practice solutions to their clients' legal issues. Employers invariably look to their lawyers not only to define the parameters of the law, but also to draft documents and suggest optimal approaches to issues. Thus, rather than seeking their lawyers' opinion as to the legality of documents initially prepared by the clients, clients instead request that their lawyers draft these legally compliant documents *that best accomplish the clients' stated purposes* – whether a real estate contract, an agreement related to the purchase and sale or merger of a business (which nearly always contains provisions relating to employees and their remuneration), articles of incorporation, employment policies, or other employee communications. By redefining as reportable any mixed advice and persuader activity (any conduct "that in whole or in part [has] the object directly or indirectly to persuade employees" concerning their rights), the persuader aspect invariably will apply to any issue that touches upon the employment relationship – and therefore will effectively eliminate the advice exemption.

The Department's proposed reinterpretation is both unclear and unworkable in practice. Without clear definitions about what conduct triggers the reporting requirements, employers, consultants and attorneys will be unable to tailor their conduct accordingly. For example:

Who assesses the "object" behind an action?

- Who ultimately makes the determination that an employer's actions have an object in whole or in part, directly or indirectly, to persuade employees?

[17] A series of recent decisions by the NLRB highlights just how expansively it defines concerted or collective action, even in a non-union setting. See, e.g., *Medco Health Solution of Las Vegas*, 357 NLRB No. 25 (2011) (employer policy prohibiting employees from wearing provocative clothing illegal because of its potential chilling effect on employee organizing); *Paraxel International* 356 NLRB No. 87 (2011) (non-union employer's personnel action in response to a single employee's personal complaint illegal based on the possibility that the action might dissuade the employee from engaging in organizational activities sometime in the future); *WorldMark by Wyndham* 356 NLRB No. 184 (2011) (non-union employer illegally disciplined employee for his personal objections to the Company's dress policy because the discipline could potentially dissuade him and other employees from organizational efforts).

- Will this object be determined by assessing the employer's motivations or "state of mind" or the impact on employees who are the object of the employer's activity and may subjectively feel they are being "persuaded?"

- If it is the latter, what happens if some employees subjectively feel they are being persuaded and others do not?

- Does it matter how many or what percentage of the employees feel they are being persuaded?

- Alternatively, will the Department conduct its own independent assessment as to the object of an employer's actions, regardless of the employer's initial intent when seeking the advice or the consultant's knowledge of how the advice was ultimately to be used?

- If the Department will independently assess the object behind an act, how can it or any other third party exercise twenty-twenty hindsight to assess the employer's intent at some point in the past?

- What evidence is required?

- What standards will the Department apply?

- Who within the Department will make that determination?

- How can those standards be objective, measurable and applied consistently when the object or purpose behind an action is undisclosed?

- How can an employer, its consultant or lawyer prove a negative and that there was no object to persuade?

- What evidence is required and how can an employer or attorney supply it without breaching the attorney-client privilege?

Does it matter who is being persuaded?

- In connection with the reportability of any specific employer action or communication, does it matter if the employer's conduct equally affects both bargaining unit (or potential bargaining unit) employees and others who clearly are exempt from organizing or collective bargaining under the NLRA or Railway Labor Act, such as statutory supervisors?

- What if the employer's action only affects a portion of the potential or actual bargaining unit, as well as others who are clearly excluded from it?

- Do either the relative numbers or percentages of individuals in each of these groups matter?

- If only one employee is affected by a communication, could the Department claim that an employer's object was to persuade that single individual, and thereby, any potential bargaining unit into which he or she might be placed?

- If an employer takes an action regarding or communicates with customers, contractors, suppliers, statutory supervisors, or others who are excluded from organizing or collective bargaining, under what circumstances might the Department claim that the employer's conduct had an object of persuading its employees who could in fact organize or bargain collectively, thereby triggering the LMRDA's filing requirements?

- Does it matter if the if the employer's action only affects one or more employees who are then being separated from employment, whether for misconduct or due to a reduction in force?

- Would it make a difference if the communication occurred immediately prior to the employee ceasing employment, or if it occurred at the time an employee was given, for example, 60 days' WARN notice of his reduction in force?

Does the existence of union organizing matter?

The "existence" of an actual "labor dispute" is pertinent only under LMRDA Section 203(b)(2) involving the supplying of information. The Department, however, makes it very clear that an agreement with an employer for the purpose of persuading employees as to their rights to organize and bargain collectively or the manner in which they exercise these rights "should be reported irrespective of whether there is a labor dispute."

Thus, for purposes of triggering the filing of a Form LM-20 report for activities that have as their purpose supplying the employer with information on employees or a labor organization in connection with a labor dispute, "the labor dispute need not necessarily be in progress at the time a consultant supplies the information." LMRDA Interpretative Manual, §261.005. It is enough if the information is gathered in connection with an anticipated organizing effort or other form of labor dispute that has not yet materialized but that the employer believes will arise in the future. The Department takes the view that a consultant supplying specific, non-public "information to an employer in connection with a labor dispute is required to file a report even when it has no knowledge of the purpose for which the information is wanted. Any doubt as to the purpose should be resolved by reporting." *Id.* at §264.005. Moreover, if a union is involved in a labor dispute with an employer, a Form LM-20 is required even if the consultant is only supplying specific, non-public information to such employer about "activities of the union or its officers during a previous organizing drive or a labor dispute involving a different employer in another location." *Id.* at §257.220.

Under not only subsection (b) but also subsection (a) of LMRDA Section 203, however, employers and their consultants are left with a host of unanswered questions:

- Regarding the reportability of any specific action or communication under either subsection, does it matter whether or not there is any evidence of union organizing?
- If evidence of any actual union organizing is irrelevant, how will the Department assess the employer's object in taking an action?
- If organizing activity is deemed a factor in considering an employer's object, how does that organizing activity matter?
- Do the extent, duration or apparent seriousness of any union organizing efforts matter?
- What if the employer was unaware of the organizing activity?
- What if one employee reports to her employer that she found a single union flyer on her car in a public parking space outside her employer's workplace?
- What if the employees of multiple employers use that parking lot?
- What if that parking lot was instead on the employer's property?
- What if while eating lunch in an employee breakroom, a supervisor discovers a single, unsigned union authorization card crumpled on the floor?
- Does it matter whether a representation petition has been filed with the NLRB?
- What if the employer's action was decided upon before any organizing activity commenced?
- What if an unsuccessful organizing campaign occurred among the "affected employees" at some point in the past?
- Does it matter when that campaign occurred or whether or not the union obtained sufficient signatures to petition for an NLRB election?
- What if an action is taken concurrently by an employer at multiple locations covering thousands of employees, but there is union organizing activity at just one of its sites having only a handful of workers?
- What if that broad action is taken for all the employer's locations, none of which are currently involved in an organizing campaign, but an unsuccessful organizing campaign occurred at a single, small location at some point in the past?

- What if an employer's action or communication is limited to a single facility where there is no union organizing activity taking place, but union organizing is then occurring at a separate facility owned and operated by the same employer?
- What if the decisionmakers and their consultants at that lone facility are unaware of the union organizing campaign at that separate location?
- What if that separate facility where organizing is taking place is in a completely separate and distinct business unit of the employer?
- Does the passage of time since any organizing activity occurred matter and to what extent?
- What if an employer's action or communication is consistent with its longstanding and regular practice, but on this occasion there is a union organizing campaign in progress?
- What if that longstanding and regular practice is generally consistent, but contains variations year after year?
- Does the degree of variation matter and to what extent?
- For example, will it be evidence of an object to persuade if the employer has communicated an increase in the employee share of health insurance premiums annually for the past ten years, but on this occasion it announces a reduction in the employee cost?
- What if the employer's regular practice continues, either uniformly or with some variations, where an unsuccessful organizing campaign occurred three, five or twenty years in the past?
- What if there is no organizing activity among that employer's employees, but union organizing is occurring in that geographic area?
- To what extent does the geographic proximity of any organizing activity matter?
- What if that "nearby" union organizing campaign is taking place at another employer in a wholly separate and unrelated business, with completely different operations, jobs, and skill and education levels among its employees?
- What if the organizing is occurring among competitors in the same industry as the employer?
- Does it matter if that organizing is occurring at all of the competitor's facilities, a single nearby location, or a single, distant site among that competitor's multiple facilities?

- How will the Department assess a foreign-based multinational employer's action that applies to all its employees across the globe, including any U.S. operations governed by the LMRDA?

How many employees must be affected before there is an object to persuade?

- What if an employer seeks legal advice about potential disciplinary actions for misconduct committed by employees who are known union organizers?

- What if a single employee expresses dissatisfaction with his wages, hours or working conditions and the employer responds to remedy that employee's concerns?

- What if the employee's concerns affect other similarly situated employees?

- What if they affect only that individual employee?

- What if the employer, over time, responds to multiple different concerns raised by that same employee?

- Does the passage of time between each action matter?

- Could the Department nevertheless claim that one or more actions taken regarding that one individual employee were designed with an object of persuading him regarding his desire to join a union ─ thereby affecting in whole or in part any potential bargaining unit containing him ─ and making reportable the action and any communications regarding it prepared or revised by a lawyer or human resources consultant?

- If one such action does not trigger a reporting requirement, what happens if the employer addresses different employees' separate and discrete workplace issues?

- How many such actions would make the employer's overall efforts reportable?

- What if any given consultant assisted with only one of those efforts, which standing alone would not be reportable?

- If the employer files a Form LM-10 report based on its overall campaign and therefore includes all its consultants' work, how can any individual consultant know that her limited assistance was part of the employer's overall effort and was reportable?

- How can an employer determine if communications to a statutory "employee" under the NLRA ─ in contrast to a supervisor, manager, independent contractor, or other individual ineligible to be part of a bargaining unit ─ are at issue? The status of such individuals may not be definitely established for months or even years.

Absent clear and specific guidance, employers and their consultants will have no way of knowing how the Department may assess the employer's object in taking an action based on any of these different circumstances, either individually or in combination with others. Any test claiming to rely on a "case-by-case," "reasonable person," or other purportedly measurable assessment of the individual facts and circumstances would be hopelessly vague and subject employers, their attorneys, and other consultants to an after-the-fact interpretation as to undisclosed motivations. To avoid such second-guessing, employers and their attorneys would avoid conferring, with a reduction in legal compliance being a predictable result.

Who within the employer's organization has the authority to establish the object for an employer's action?

- What if an action is decided and implemented by a committee, and a minority of the collective decisionmakers had an object to persuade?
- Does it matter whether or not their objective was disclosed to the majority?
- Does it matter whether their assent was necessary to obtain that consensus or majority decision?
- Does it matter if they played no part in and never influenced the committee's decision?
- What if a majority of the collective decisionmakers decide against a course of action but a rogue manager secretly proceeds on his own with a persuader act?
- What if the employer's management official who requests the policy or communication in question has no intent to persuade employees, but a subordinate who develops and implements that policy or communication does possess that intent, and how would a lawyer or other consultant necessarily know of that intent?
- What if the subordinate's intent is not made known to others, or the subordinate affirmatively covers up his intent to ensure that others are unaware of it?
- How, under the terms of the Department's proposal, can the chief executive officer of that organization bear potential incarceration and penalties for failing to file a required report based on the unknown and undisclosed intentions of lower-level subordinate employees?
- Similarly, how can an attorney or other consultant who assists the employer be subject to the reporting requirements if there was no way the consultant could know of the undisclosed persuasive intent?
- Conversely, what if the management official requesting a policy or communication desires to take an action with an object – perhaps one of many – of persuading

> employees, but never communicates that object to the subordinate officials (and any outside consultants) who draft, review, revise and implement that action?

Indeed, clients frequently do not inform their attorneys or other consultants of the reasons why they are requesting legal or human resources advice. For instance, a lawyer or HR consultant may be asked to review or even prepare portions of an employee handbook, edit or draft a memorandum to be distributed to the employer's employees, or provide an employer with "competitive or best practices" regarding wages or other employment terms. Unless the employer affirmatively states *all* of the reasons why it is seeking the advice, the lawyer or consultant must guess as to whether the client's object, in whole or in part, directly or indirectly, was to persuade or influence employees.

If an attorney is uncertain, one can imagine the lawyer's dilemma. She may err on the side of caution and report the services. If it turns out that the attorney was not required to report, the employer-client may claim a breach of confidentiality and a violation of the lawyer's state bar ethics requirements. Even if an employer assures its attorneys that it does not intend to use the advice or counsel for persuasive purposes, many lawyers, faced with the threat of sanctions for non-compliance, may find themselves erring on the side of caution and reporting activity that is truly unrelated to persuasion. And yet doing so threatens to alienate the client, who suddenly finds its confidential information, including the fact that it engaged legal counsel to assist with any number of labor matters, made public.

Conversely, if the employer – only at the end of its fiscal year – files a Form LM-10 and for the first time reports its previously undisclosed object of persuading employees, can a consultant be held responsible for violating its legal requirement to have previously filed either a Form LM-20 within 30 days of the engagement or a Form LM-21 (in the event the consultant's fiscal year and filing deadline ended long before the client's Form LM-10 was due)? What happens if neither the employer nor the consultant has filed a report (because neither believed the actions were in fact reportable), but a third party challenges their failure to file the required reports? How do employers and their consultants prove a negative – that they did not have an object, in whole or in part, directly or indirectly, to persuade? Attorneys, other consultants and their employer-clients should not be put in any of these untenable positions where they do not know in advance where they stand with regard to compliance.

Thus, there is simply no way for a law firm or client to defend against a charge of violating the reporting requirements without revealing the content of attorney-client privileged information and its attorneys' thought processes, both of which are protected from disclosure by every state jurisdiction in the country as well as federal common law. For example, suppose a union that has lost a representation election asserts that it observed a member of a particular law firm at the employer's facility during the union organizing campaign and asks the Department to investigate the law firm's non-reporting of that activity. Assume, however, that the attorney was there to discuss the enforcement of a non-compete agreement signed by a former CEO, a potential hostile takeover or tender offer, or a forthcoming securities offering – and that the attorney and her firm had nothing whatsoever to do with any union campaign. In order to defend itself during the potential criminal investigation, the law firm would be caught in a Catch-22. To rebut the failure to

report charges, it would necessarily be compelled to reveal attorney-client privileged information as to the content of the communications, and the intent and knowledge of the attorneys involved (whether the attorney knew that a purpose was to persuade employees). The firm may also need to reveal what the client's agents communicated and what the attorneys thought of such representations, in order to determine whether the requisite intent to persuade existed under the revised interpretation.

Obviously, however, an attorney cannot ethically reveal such information without the permission of the client, and so would either have to ask the client to give up the attorney-client privilege and work product protections, or proceed in attempting to defend itself in the criminal investigation over its failure to report without being able to reveal the nature of the communications. In simple terms, there is no way this reinterpretation of the law can ever be enforced, or that law firms and clients can ever defend themselves, without clients potentially giving up the attorney-client privilege or law firms facing criminal liability as to a wide range of subject of legal representation, regardless of whether it has anything to do with labor law. This is a massive and sweeping rollback of the longstanding protections provided to attorney-client communications and work product (including attorney thought processes).

The potential reach of the new rule could extend to areas of legal work that are remote from any labor relations advice simply because they are deemed to have an object, in whole or in part, directly or indirectly, to persuade. Thus, "persuasion" would not be limited to organizing efforts and the negotiation of a collective bargaining agreement. The proposed rule states that it would extend to all "activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining, or assisting a union, collective bargaining, or *any protected concerted activity* (such as a strike) in the workplace." 76 Fed. Reg. 36178, 36211 (emphasis supplied).

In union organizing situations, the NLRB carefully scrutinizes employers' actions and statements due to their propensity to persuade employees. Requiring "laboratory conditions" and maintenance of the status quo during union organizing campaigns, the Board has found that an exceedingly broad variety of employer actions unfairly affect employee choice because of their persuasive effect and are either objectionable conduct or unfair labor practices.

Even where no organizing activity is occurring, however, routine communications from employers to employees are frequently deemed objectionable or illegal by the NLRB because they may unduly influence employees' subsequent organizational efforts. *See, e.g., Medco Health Solution of Las Vegas*, 357 NLRB No. 25 (2011) (employer handbook policies regarding dress codes); *E. I. du Pont & Co.*, 311 NLRB 893, 919 (1993) (policy against use of employer equipment by employees); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (policy against employee loitering on company premises); *Freund Baking Co.* 336 NLRB 847 (2001) (policy against the release of confidential company information); *AP Automotive Systems, Inc.*, 333 NLRB 581 (2001) (statements regarding the future economic viability of the company); *Fairmont Hotel*, 282 NLRB 139 (1986) (policies regarding access by non-employees to company property); August 18, 2011 report of the NLRB's Acting General Counsel concerning social media policies such as Facebook or Twitter. And as discussed below, in applying the definition of persuasion to include

"any protected concerted activity," the proposed reporting requirement could encompass a wide range of advice provided by lawyers or other consultants on the basis that the advice has the potential to persuade one or more employees.[18]

Any consultation with an attorney to help implement new or changed policies on these subjects and to communicate them with employees could be covered by the proposed disclosure rule. Employers and their consultants deserve to know in advance exactly what conduct is reportable, which is what the current interpretation has provided for almost 50 years. The Department's nebulous revised standard would leave both employers and their consultants guessing as to whether or not an object, in whole or in part, directly or indirectly, was to persuade.

The proposed narrowing of the advice exception ignores the reality that the current interpretation protects: that employers seek advice and opinions from their lawyers on numerous legal matters, only a fraction of which might ever be presented to employees for the purposes of persuasion. By holding that an attorney's work product will now be considered a reportable activity merely because some portion of it – in whole or in part, directly or indirectly – might someday be used to persuade employees, the Department has transformed the bulk of the work that attorneys perform for labor clients into potentially reportable information.

Consultants frequently advise on best employment practices, conduct market assessments, advise on benefit claims and employee tax consequences, and draft legally required plan documents, summary plan descriptions, securities disclosures and letters to employee participants regarding: health insurance programs (including recommendations on and decisions regarding coverage, deductibles, co-pays, co-insurance carriers, out-of-pocket maximums, stop loss insurance), retirement programs, equity compensation, gain sharing and profit sharing plans, vision care programs, dental care programs, and other employee benefits plans.

- Will the Department claim that there is a reportable persuader element if a consultant advises an employer on what best practices are, what other local employers are doing, what is common in the industry and other similar issues?

- If an employer drafts a letter that the employer sends to its employees explaining its benefits plans and the excellent terms that they provide, may this be seen as an effort to persuade employees against seeking union representation to obtain even better benefits?

When merely considering what health insurance and pension benefits to offer employees, especially in light of federal legislation such as the Pension Protection Act and the Affordable Care Act, employers regularly seek legal advice to ensure that their decisions will comply with ERISA, state regulations, employment discrimination statutes, and, to the extent employees are covered under collective bargaining agreements, their contractual and NLRA obligations. Such decisions –

[18] This is particularly true if the Department concludes that no current union organizing activity is required to make an action reportable.

whether and how to provide health insurance and pension benefits – have an inevitable effect on the employees' present and future ability and willingness to band together collectively. For numerous sound business reasons, however, employers have no desire to publicize these considerations.

- Would an attorney or other advisor have an obligation to timely file a Form LM-20 and inevitably disclose to employees, customers, shareholders and competitors that these issues are under consideration?

Similarly, outside consultants are regularly relied upon in developing, changing, and drafting employee communications covering a wide range of terms and conditions of employment. Employers use outside consultants to develop wage structures; job evaluation systems; policies for uncompensated pre and post-shift activities (donning and doffing); meal and rest period policies; incentive programs; involuntary severance plans; voluntary enhanced separation programs; programs regarding vacations, paid time off, unpaid leave, holidays, childcare, employee wellness, flu shots and other inoculations; continuing education or tuition reimbursement plans; and a host of similar programs.

- Will the Department argue that the design, drafting or implementation of those of programs may have an object of persuading employees to refrain from engaging in collective action to seek other working conditions?

- Will the Department claim that providing advice regarding job classifications or reclassifications may have an object of minimizing the likelihood that certain groups of employees share a community of interests as an appropriate bargaining unit?

- Does it matter whether or not the job reclassification benefits the employees with higher pay, making them more satisfied with their employer and therefore less likely to unionize?

- What if the lawyer advises on or makes recommendations on all of these same issues concerning job duties with regard to whether or not certain employees are exempt under the Fair Labor Standards Act, statutory supervisors under NLRA Section 2(11), or are non-employee independent contractors, any of which could affect the employees' ability to organize?

Employee collective action and concerted behavior is inextricably intertwined with employees' use of social media such as Twitter and Facebook, employees' access to their employers' computer and technology systems for sending personal email, employees' use of their own private computer systems when using their company email addresses, and similar means of communication. Lawyers and other consultants frequently draft policies and advise on lawful best practices regarding these electronic media.

- Will the Department take the position that because these policies, by their very nature, affect an employee's ability to act in concert with others, they therefore have an inevitable persuader effect "in whole or in part, directly or indirectly?"

Employers and other consultants regularly prepare, review, and revise employment policies. Some policies ─ such as an open door policy that encourages employees to resolve disputes internally, internal grievance or dispute resolution mechanisms, arbitration policies, statements regarding a union-free workplace and others ─ can be argued to implicate collective action on the part of employees and their potential desire for unionization.[19]

- Does this mean that any advice with regard to those types of policies is reportable?
- Is it reportable if an attorney drafts a notice or statement for an employee handbook that explains employees' rights to engage in or refrain from engaging in protected activity under the NLRA?
- Does the addition in the communication of that statutory right "to refrain from" engaging in protected concerted behavior automatically impute a reportable persuader object?
- Must a consultant report if he provides non-union managers with training on informal dispute resolution techniques, which might be deemed to replace union grievance procedures?
- Must a consultant report if he provides non-union managers with training on how to be a more effective supervisor generally if a result of that training is that employees will be less inclined to unionize?
- If an employer subsequently seeks legal advice on how to respond to an employee who has brought a complaint pursuant to an open door policy, is that reportable?
- Does it matter if the advice is related to a legal concern?

As discussed above, the NLRB recognizes that almost any other employment related policy, work rule, or section of an employee handbook likewise has the potential to affect an employee's desire to organize and bargain collectively.

- Is it reportable if an employer seeks counsel before implementing rules that may restrict communications about organizing or bargaining activity, such as policies or procedures governing confidentiality and the disclosure of confidential information, personal or non-business use of company e-mail and other computer resources, personal phone calls at work, access to the employer's premises during off-duty time, solicitation/distribution and the like?

[19] See for example the NLRB's invitation to receive *amicus* briefs in the pending case, *D. R. Horton, Inc.*, Case No. 12-CA-25764.

- Is it reportable if a consultant advises about the use of surveillance cameras in the workplace, where those cameras may have the indirect effect of chilling the willingness of employees to assemble?

- When an attorney or other consultant reviews and edits an employee handbook, work rule, or policy, would the lawyer or consultant have a reporting requirement under the Department's proposed interpretation?

- To the extent lawyers advise clients on the new NLRB requirement that employers post a mandatory notice of NLRA rights, is that advice exempt from reporting under Section 203(c)?

- What if clients ask an attorney for advice on how to respond if employees ask questions about the NLRB notice or their NLRA rights?

An entire consulting industry has arisen around employee engagement efforts, including employee satisfaction surveys, workplace diversity initiatives, workplace design, workplace improvement through "change management," employee selection, and employee training. Each of these efforts can be interpreted to improve employee morale and lessen the likelihood of employees seeking outside representation through a labor union.

- Would the Department take the position that an employer who engages in these processes has an object – in the whole or in part, directly or indirectly – to persuade employees?

Likewise, employers regularly rely on consultants to advise on manufacturing plans, site selection, facility design and other similar issues. The current, well-publicized NLRB litigation involving a major aircraft manufacturer's alleged relocation of bargaining unit work is a graphic example of this type of case, where the NLRB argues that the employer's assignment of work to a non-union manufacturing facility was designed to quell union activity at another location. Similarly, decisions about an employer's layout of a facility, its management and reporting structures, jobs, and staffing may create different communities of interest and increase or decrease the likelihood that any specific group or groups of employees will align and seek to unionize or bargain collectively. For example, regarding space and facilities planning, the physical layout of an employer's facility may have the indirect effect of inhibiting organizing activities (e.g., separating workers or units) or improving conditions (e.g., improving the employees' lockerroom, breakroom or parking lot) that would otherwise be bargained for or an impetus to organize.

- Would the Department take the position that advice or counsel regarding these strategic business decisions has an object, in whole or in part, directly or indirectly, of persuading employees regarding their decision to organize or bargain collectively?

- If an employer relocates a manufacturing operation to enjoy lower labor costs, might the Department argue that part of the decision directly or indirectly was to show ─

not only the affected employees but others elsewhere in the organization ─ the potential effects of selecting a union to bargain collectively on their behalf?

- If an employer seeks a consultant's advice in closing one of its unprofitable locations, would the Department argue for similar reasons that this has a chilling effect on union organizing and is therefore reportable?

Any legal analysis, recommendations, and decisions about employee discipline or employment litigation ─ whether involving a single individual or multiple employees ─ can affect one or more employees' desire to act in concert and potentially organize. Even the drafting of an employee's disciplinary notice may have the same effect.

- If a lawyer reviews the facts regarding possible misconduct involving one or more employees, under what circumstances would the lawyer's recommendations concerning appropriate disciplinary actions be deemed a persuader act?

- If the lawyer drafts or edits the eventual proposed disciplinary or termination notice, would that be viewed as reportable?

- Does it matter whether the employees are organized or non-union?

- Is it reportable if an attorney participates in settling employment litigation, whether a single-plaintiff case or class action, where the resulting settlement has the effect of making union organizing less likely?

As an example, the legal analysis and recommendations concerning exempt status under the Fair Labor Standards Act or other state laws affect which employees can ultimately participate in a collective action under those laws. In any wage-hour collective action litigation, the employer's counsel usually participates in drafting a letter to potential opt-in plaintiffs explaining not only their rights but the risks in joining or not joining in that lawsuit.

- Are these actions reportable because of their potential effects on employees' collective behavior?

- Is it reportable if an attorney takes steps to defeat class certification in a wage and hour collective action, which requires arguing that putative class members are not similarly situated (and therefore, would not share a community of interests as an appropriate bargaining unit)?

- Is it reportable for the lawyer to conduct a declaration campaign of employees in the putative class (and of their supervisors) as part of that wage and hour litigation, where the goal is to obtain evidence that the employees are not similarly situated?

Even where the proposed reinterpretation is more directly related to potential employee organizing activity or collective bargaining, the Department's proposal is impracticable. For example:

- If an attorney or other consultant corrects typographical, factual, or grammatical errors in a client's speech or letter to employees during an organizing campaign, do the corrections arguably make the "corrected" speech more persuasive and therefore reportable?

- Is it reportable if, in response to a client's request for lawful union campaign materials, a lawyer simply furnishes copies of NLRB decisions that contain specific speeches or excerpts from speeches the Board has found lawful?

- Is it reportable if the attorney merely strings together into a single document multiple quotes from different cases that the NLRB has found lawful?

- If it is not reportable for an attorney to advise an employer that certain statements to employees are illegal, is it reportable for that lawyer to advise on alternative statements that would be lawful?

- Is it reportable if an attorney reviews an employer's speech to employees for legality and states that, while the proposed draft contains one unlawful clause, the speech would be lawful if it instead were given with that clause revised by the lawyer?

- If one such revision is not reportable, what if the lawyers revises two, five, or twelve of these clauses?

- What if the lawyer revises clauses that are not unlawful?

- Where employees threaten to strike their employer, is it reportable if the employer asks its counsel to review for legality the employer's draft letter to employees explaining both its and the employees' legal rights in the event of a strike?

- What if the lawyer, in addition to reviewing such a letter for legality, corrects typographical, grammatical, or factual errors?

- What if the lawyer replaces unlawful statements in the letter with similar content that is legally permissible but arguably more "persuasive?"

- What if the lawyer merely furnishes her client with copies of NLRB decisions or quotes from decisions that the Board has found lawful in strike situations?

- What about the same issues with respect to any employer communications with managers, supervisors, and non-union coworkers who might be expected to cross any union picket lines?

- In the event that an employer establishes a reserved gate due to union picketing of another employer on its property, is it reportable persuader activity for a lawyer to draft a letter explaining that reserved gate for the first employer to provide to its employees?

- Does it matter whether or not the first employer's employees are organized?

- If they are organized, does it matter whether or not they have a no-strike clause in their collective bargaining agreement that prohibits sympathy strikes?

- Will this be seen to have an object of persuading the employees regarding their right to engage in concerted activity?

- Even outside the context of a labor arbitration or other judicial or quasi-judicial proceeding, under NLRA Section 8(a)(5) employers have an ongoing duty (in both labor negotiations and simply to monitor compliance with collective bargaining agreements) to respond to union information requests. Is it reportable if an attorney assists an employer by drafting a response to a union request for information?

- As part of any investigation of employee misconduct, potential employee witnesses have rights described generally in *Johnnie's Poultry, Inc.*, 146 NLRB 770 (1974). Is it reportable if an attorney drafts a document for the employer's use in explaining those rights to the employee?

With regard to collective bargaining, it appears that an attorney or other consultant may continue to serve as chief spokesman in articulating the employer's position during negotiations without incurring an obligation to report ─ despite the fact that these statements during bargaining are obviously made in an attempt to persuade the other side to accept the employer's proposals.

- Does this activity become reportable if that consultant's statements are later communicated directly to other bargaining unit employees in an effort to convince them of the reasonableness of the employer's bargaining proposals?

- Does it matter whether the consultant is quoted verbatim or if his comments are summarized?

- As with a lawyer's varying levels of involvement described above in employee communications in the contexts of a union organizing campaign or potential strike, how will that attorney's involvement in comparable communications be assessed if it occurs during collective bargaining?

- Is it reportable if a lawyer advises a unionized employer on communicating with employees generally during labor negotiations, for example on how to legally discuss the impact of the economy on the company's competitive position?

- Is it reportable if a lawyer merely drafts collective bargaining proposals for an employer and does not otherwise actively assist in negotiations?

- Is it reportable if a lawyer or other consultant who serves as the employer's chief spokesman in labor negotiations jointly drafts with his union counterpart an agreed upon joint communication that is then disseminated to bargaining unit employees?

Each of the above examples, which reflect but a few of the almost infinite number of complex and nuanced fact patterns that are likely to arise, demonstrates the difficulty in knowing when an action has an object, directly or indirectly in whole or in part, of persuasion. Employers and their consultants need to understand exactly how the Department will assess the advice exemption under all of these situations. The Department's proposed reinterpretation and effective elimination of the advice exemption creates countless questions about how to comply with the LMRDA's reporting requirements. Absent clear answers that can result in effective compliance on the part of both employers and their consultants, the Department's proposal inevitably will result in unnecessary problems.

CONCLUSION

For almost 50 years, the existing definition of the advice exemption under LMRDA Section 203(c) has provided a bright line that has allowed employers and their consultants to distinguish between reportable persuasion and exempt advice. This standard has worked well in effectuating the purposes of the LMRDA, and has also served to ensure compliance with not only the NLRA and Railway Labor Act, but a host of other federal, state, and local labor and employment laws. Contrary to the purpose and express terms of the LMRDA, the Department's proposal effectively eviscerates the "broad" advice exemption in Section 203(c), and discourages use of the advice needed to comply with laws designed to protect workers. It unconstitutionally limits employer speech and unconstitutionally discriminates between employer and union persuader activity. The proposal is both vague and unworkable; and, especially so, given the criminal sanctions attached to non-compliance. It also drastically alters the longstanding protections afforded to attorney-client privileged communications and puts lawyers and their clients in the untenable position of having to reveal attorney-client privileged communications having nothing to do with NLRA or Railway Labor Act persuader activity to comply with the Department's proposal and defend themselves from charges of non-compliance. For all of the above reasons, the Department should abandon its proposed reinterpretation and continue to apply the existing rules. The current system is not broken and does not need fixing.

Very truly yours,

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