RIN 1245-AA07

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

DEPARTMENT OF LABOR

Concerning

RESCISSION OF RULE INTERPRETING "ADVICE" EXEMPTION IN SECTION 203(c) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT *82 FED. REG. 111* (June 12, 2017)

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August 11, 2017

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U.S. Department of Labor
Office of Labor-Management Standards
www.regulations.gov

Re: Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act
RIN 1245-AA07; 82 Fed. Reg. 111 (June 12, 2017)

Dear Sir or Madam:

Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments in response to the Department of Labor's (DOL) proposed rulemaking that would rescind DOL's March 24, 2016 rule (the "Persuader Rule") regarding the reporting requirements of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). WLF strongly supports the proposed rescission.

WLF supports LMRDA's goal of ensuring that labor and management conduct labor-management relations in a manner that protects the rights of employees to exercise their right to choose whether to be represented by a union for purposes of collective bargaining. However, the Persuader Rule expands LMRDA's reporting requirements far beyond anything contemplated by Congress and to such an extent that it seriously impinges on the First Amendment rights of individuals who play no direct role in union-representation issues.

The Persuader Rule dramatically expands the definition of who is a "persuader" to include those who have no direct contact with employees and who merely provide advice to

management on labor relations—merely because the advice could ultimately be used by management in connection with persuading employees regarding organizing and collective bargaining rights. The expanded definition of persuaders, which simultaneously shrinks the definition of exempt "advice," places a heavy new content-based disclosure burden on speech that cannot pass constitutional muster under the strict First Amendment scrutiny applied to such speech restrictions.

Interests of Washington Legal Foundation

Washington Legal Foundation is a public-interest law firm and policy center based in Washington, DC, with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF is submitting these comments because of the critical First Amendment issues that the Persuader Rule raises. WLF regards the First Amendment as one of the most important constitutional safeguards against excessive government regulation. It frequently litigates in the U.S. Supreme Court and other federal courts in support of First Amendment rights. For example, WLF filed *amicus* briefs in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), and *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). WLF also filed briefs in support of federal district court challenges to the Persuader Rule. *See National Federation of Independent Business* ["*NFIB*"] *v. Perez*, No. 16-66, 2016 WL 3766121 (N.D. Tex., June 27, 2016) (order granting preliminary injunction against Persuader Rule); *Assoc. Builders & Contractors of Arkansas v. Perez*, No. 16-169 (E.D. Ark.); *Labnet Inc. v. U.S. Dep't of Labor*, No. 16-844 (D. Minn.).

WLF believes it is of critical importance for DOL to consider the First Amendment issues raised here as they relate not only to labor relations, but also to the proper role of government regulation of speech generally. As the district court in Texas held in enjoining enforcement of the Persuader Rule on First Amendment grounds, "it is rare that a regulation restricting speech because of its content will ever be permissible." *NFIB*, slip op. at 58.

I. Statutory Framework of the Labor-Management Reporting and Disclosure Act and Advice Exemption under Section 203(c).

LMRDA's disclosure provisions protect the rights of employees to exercise the ability to choose whether to be represented by a union for collective-bargaining purposes. The reporting provisions promote the employees' rights by requiring unions, employers, and labor relations consultants to publicly disclose certain information about particular financial transactions, agreements, and arrangements.

Under Section 203(a) of LMRDA, employers are required to report to the DOL "any agreement or arrangement with a labor relations consultant or other independent contractor or organization" including payments, along with an explanation of the circumstances and understandings pursuant to which they were made. 29 U.S.C. § 433(a)(4)-(5). Section 203(b) imposes a similar reporting requirement on labor relations consultants and other persons like that of Section 203(a). It requires those persons who enter into an agreement with an employer to undertake an activity where the object is to directly or indirectly persuade employees to exercise, or not exercise, or influence how to exercise their rights regarding union representation, and collective bargaining, to file a report about such agreement or arrangement and any payments. 29 U.S.C. § 433(b).

For the last five decades, DOL has adopted a balanced view regarding the scope of disclosure requirements under Section 203. Section 203(c) ensures that both sections 203(a) and 203(b) are not interpreted as requiring reporting "by reason of [the consultancy] giving or agreeing to give advice." 29 U.S.C. § 433(c). The "advice" exemption provides that "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." 29 U.S.C. § 403(c). Since 1962, DOL has construed the advice exemption broadly by excluding from the reporting requirement the provision of materials by a third party to an employer that the employer could accept or reject—known as the "accept or reject" test.

A. The 2016 Persuader Rule changes five decades of bipartisan interpretation and implementation of Section 203.

The federal rules governing who must file disclosure reports and what they must disclose have been in full force for over half a century. The Persuader Rule overturns longstanding bipartisan consensus and dramatically expands the definition of who is a "persuader," while simultaneously shrinking the definition of exempt "advice." The Rule makes a consultant a persuader if the consultant writes a speech to be delivered by the employer or drafts a letter to employees for the employer's signature, but exempts the consultant if he or she simply provides "an oral or written recommendation regarding a decision or course of conduct." 81 FR at 15936-37. The Persuader Rule also states that under this approach a consultant is a persuader if the consultant engages in both "advice" and persuader activities. *Id.* at 15937.

Employers and their consultants must now report not only agreements or arrangements where the consultant has direct contact with employees, but also where a consultant engages in any activity that is "behind the scenes" and has the objective to persuade employees with regard

to their rights to organize and collectively bargain—*i.*e., indirect activities. *See* 81 FR at 15946-16000. The new Rule's expansion of reporting requirements for indirect activities includes: directing supervisor activity, providing materials for employers to disseminate to employees, conducting tailored seminars on the issues of unionization, and developing or implementing personnel policies designed to encourage unionization. 81 FR at 15938.

Further, under the new LMRDA interpretation, the LM-21 form compels a consultant, such as a law firm, to disclose to the world "receipts of any kind from employers *on account of labor relations advice or services*, designating the sources thereof." (Emphasis added). The required information is not limited to labor relations advice or services provided to an employer for whom persuader work is done, but specifically includes information regarding receipts from *all* employers on account of labor relations advice or services. Thus, for example, if a firm were advising 100 clients on labor relations matters, but engaged in persuader activities with respect to just one of them, LM-21 would compel the firm to provide detailed information regarding the labor relations work done for all 100.

Thus, the new Persuader Rule—in addition to dramatically expanding the definition of "persuader"—makes it very difficult to distinguish between persuaders of employees and mere advisors, because the classification depends on the state of mind of the consultant. Put differently, any consultant, including any law firm, that delivers advice or service to an employer regarding any labor relations, without making the disclosures required of persuaders, must be prepared to show the lack of intent to persuade employees. The "accept or reject" test no longer exists under the Persuader Rule. For example, even if it is the employer itself that chooses to

deliver a message or carry out a policy that is developed by a consultant, reporting is still required.

WLF agrees with the Texas district court that the Persuader Rule is not consistent with Congress's intent in adopting the LMRDA. However, WLF's chief concern is that the Persuader Rule, by expanding the definition of persuaders and shrinking the definition of exempt "advice," places a heavy new content-based disclosure burden on speech that exceeds First Amendment limitations. Based on these concerns, WLF agrees with DOL that the Persuader Rule should be rescinded.

B. The Northern District of Texas federal district court's permanent injunction provides further reason for rescission of the Rule.

Shortly after DOL issued the Persuader Rule, it was challenged in three separate district-court proceedings. *Associated Builders & Contractors of Arkansas v. Perez* (E.D. Ark. 4:16-cv-169); *Labnet Inc. v. United States Department of Labor* (D. Minn. 0:16-cv-00844); *NFIB v. Perez* (N.D. Tex. 5:16-CV-00066-C).

On December 12, 2016, Judge Cummings from the Northern District of Texas issued a permanent injunction against enforcement of the Persuader Rule, as published in 81 Fed. Reg. 15,924. He held that the Rule is unlawful and should be set aside. In a preliminary injunction order issued June 27, 2016, Judge Cummings listed multiple reasons for the injunction. The court determined that the Rule violates the APA because it is arbitrary, capricious, and an abuse of discretion, and it exceeds the Department's authority under the LMRDA. *NFIB v. Perez*, 2016 WL 3788121, at *24, *31 (N.D. Tex. June 27, 2016). Further, he concluded that the Rule improperly reads the Section 203(c) exemption out of the statute. *Id.* at * 28.

The district court fully agreed with WLF's First Amendment arguments and applied strict scrutiny in evaluating the Rule's content-based speech restrictions. The court found that DOL failed to articulate a compelling interest to justify those restrictions or show that the Rule was the least-restrictive means to advance the government's purported interest. The court also stated that the government had failed to satisfy even the lower standard of "exacting scrutiny" review, for which DOL advocated. It also held that the Rule was overbroad and that "the chilling of speech protected by the First Amendment" constituted "irreparable injury." *Id.* at *44 (citing *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 180 (5th Cir. 2009)). Lastly, the court stated that the Rule was unconstitutionally vague, in violation of the Due Process Clause of the Fifth Amendment. *Id.* at *35-37. WLF agrees with Judge Cummings that the Persuader Rule is illegal for all the reasons listed above.

II. The Persuader Rule's restrictions on the LMRDA's "advice" exemption violates the First Amendment and is subject to strict scrutiny.

The First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). Congress, when it enacted the LMRDA in 1959, attempted to walk the fine line between legislation that violates the First Amendment and legislation that does not. Congress sought to stay within proper bounds by advancing the nation's interest in fair and ethical labor-management negotiations while simultaneously not compelling either labor or management to make disclosures other than those that were essential to achieving the objectives of the Act. Critical to the constitutional legitimacy of the LMRDA has been the understanding, prior to adoption of the Persuader Rule, that consultants who do not engage in

direct persuasion of employees, and merely provide advice that can be accepted or rejected by employers, are not regarded as persuaders.

However, the Rule's constriction of the advice exemption raises all the First Amendment complications that Congress sought to avoid. If not rescinded, the Rule would render Section 203 itself unconstitutional because the statute no longer would serve a compelling governmental interest and would be broader than necessary to achieve the government's claimed objectives.

A. The Persuader Rule is subject to strict First Amendment scrutiny because it discriminates on the basis of content.

The burden on free speech imposed by the Persuader Rule is content-based. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). As noted by the Texas district court in its opinion enjoining enforcement of the Persuader Rule on First Amendment grounds, the Constitution demands that any content-based restrictions on speech are presumed to be invalid, and "'the Government bears the burden of showing their constitutionality.'" *NFIB*, 2016 WL 3766121, at *32 (citing *United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012)).

As construed by the Persuader Rule, Section 203 suppresses the speech of specific speakers: employers and their consultants who express views regarding whether employees should be represented by a union for purposes of collective bargaining. Importantly, the Rule suppresses speech of individuals who have no direct contact whatsoever with employees. While DOL may have an interest in regulating the activities of those who directly interact with employees on labor-representation issues, those interests are vastly reduced with respect to the speech of those who lack any such direct interaction.

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015), the Supreme Court made clear that in regard to a First Amendment issue "the crucial first step [is] determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (quoting *Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 429 (1993)). Although *Reed* was evaluating a municipal ordinance regulating signs and the Persuader Rule regulates speech related to labor-management issues, the Supreme Court has "recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (citing *Labor Board v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941)). Section 203 is a law that plainly is content-based. It is targeted directly at speech intended "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." 29 U.S.C. § 433. The law does not apply to any other speech content, whether the speech originates with employers and is directed at employees or originates elsewhere.

A regulation is content-based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1964)). The Persuader Rule concedes the content-based nature of its speech regulation, stating that "reporting under both the prior interpretation and this rule rests upon whether the consultant undertakes activities with an object to persuade employees, which is determined, generally, *by viewing the content of the communication* and the underlying

agreement with the employer." 81 FR 15,969 (emphasis added). Because the Rule is a content-based speech regulation, it is subject to strict scrutiny under the First Amendment. Further, *Reed* is quite explicit in that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* at 2226. In other words, all content-based laws must be subjected to strict scrutiny. As interpreted by the Persuader Rule, Section 203 singles out the speech of employers and their consultants based entirely on its content.

B. The new Rule's interpretation compels speech that cannot withstand strict scrutiny.

While Section 203 does not directly *prohibit* employers and consultants from engaging in speech, it does compel speech in the form of disclosure whenever an object of their speech is to persuade employees, whether directly or indirectly, regarding organization and collective bargaining. The First Amendment guarantees "'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 796-97 (1988). "It is … a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *United States Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013) (*quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (*citing W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977))).

The burden arising from the Persuader Rule comes in the form of compelled disclosures when it is determined that the object of the speech is to persuade employees regarding

organization and collective bargaining—without regard to whether the speaker has any direct contact with employees or whether the speaker is the one who decides if his words are passed along to employees. DOL does not contest that this compelled speech substantially burdens the right to speak. Moreover, burdening speech based on its content rather than banning it does not decrease the scrutiny to be applied—strict scrutiny.

The Supreme Court recognized the significant First Amendment implications of speech restrictions in the labor-relations context in *Thomas v. Collins*, 323 U.S. 516, when it considered a state-law registration requirement imposed on union organizers. The government argued there that registration posed only a minimal burden on the union and therefore that the registration requirement should not be subjected to strict scrutiny. The Court disagreed, ruling: "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede." *Id.* at 543.

The disclosure requirements in the Persuader Rule are highly burdensome to employers and their consultants. The disclosures deter consultants, including law firms, from offering their services to employers who wish to persuade employees. They also dissuade employers from hiring firms that occasionally engage in employee-persuasion activities—even when the employers are not seeking counsel regarding such activities. Regardless whether that burden is gauged to be great or small, it is not a burden that is imposed on other types of speech and therefore cannot be imposed unless the statute survives strict scrutiny.

Essentially, the Persuader Rule seeks to compel those who engage in what DOL characterizes as persuader speech to communicate to employees (or to their client's employees) a vast amount of information about the identity of their clients, the fees that are paid by their clients, and expenditures that are made in connection with those representations. It forces consultants to convey a message to employees (and the public at large) that they serve a wide array of employers on a wide array of labor relations matters (which often do not even arguably involve employee persuasion), and that they are well compensated by those clients. Such disclosures render the consultants vulnerable to union campaigns directed at them and their other clients. Such compelled, controversial, and content-based disclosures are subject to the strictest of First Amendment scrutiny, a scrutiny that the Persuader Rule cannot plausibly survive.

C. Speech under Section 203 is not commercial speech and is therefore subject to strict scrutiny

Disclosure requirements are commonly imposed on commercial speech or advertising used by the sellers of products or services in order to protect consumers from deception. Courts have often imposed a somewhat relaxed level of First Amendment scrutiny to disclosure requirements when the compelled speech at issue is properly characterized as "commercial speech."

However, employers and their consultants are not engaging in commercial speech when they discuss whether employees should be represented by a union for purposes of collective bargaining. Speech of employers and consultants concerning labor relations cannot be categorized as mere "commercial speech" because that term has been defined as "speech proposing a commercial transaction." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (2007). Employers and their consultants are not proposing any sort of commercial transaction,

but rather are engaged in discussions regarding labor-relations issues. Speech is not classified as commercial speech simply because it is spoken by those engaged in profit-seeking ventures. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989).

When employers, consultants, and attorneys are engaged in persuader speech, they are not proposing a commercial transaction, they are not offering to sell a product or service. Rather, they are expressing their views regarding the optimal structure for a private workplace. Particularly when this form of speech is not conveyed directly to any employees, it is entitled to the highest level of First Amendment protection—and any content-based restrictions on such speech must be reviewed under the strict-scrutiny standard. *See Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (holding speech regarding labor relations is not merely "commercial speech"). Protected speech is not transformed into commercial speech merely because the speaker is drawing a salary (or otherwise making a profit) while speaking. *See Bd. of Trustees of State Univ. of New York*, 492 U.S. at 482 ("Some of our most valued forms of fully protected speech are uttered for a profit. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)."). Moreover, "the fact that [a business] has an economic motivation for [its speech is] insufficient by itself to turn [the speech] into commercial speech." *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 67 (1983). "Strict scrutiny must apply to a government regulation that is directed at the expressive component of speech. That the speech is used in commerce or has a commercial component should not change the inquiry when the government regulation is entirely directed to the expressive component of the speech." *In re Tam*, 808 F.3d 1321, 1338 (Fed. Cir. 2015) (*en banc*), *aff'd*, 137 S. Ct. 1744 (2017). Since the

Persuader Rule imposes content-based restrictions on noncommercial speech, and DOL does not seriously contend that the restrictions can withstand strict scrutiny, DOL should rescind the Rule.

III. The Rule should be rescinded because it fails to meet strict scrutiny under the First Amendment.

As the Texas district court explained, "'if a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.'" *NFIB*, 2016 WL 3766121, at *32 (citing *United States v. Playboy Entm't Group, Inc*., 529 U.S. 803, 813 (2000)). Additionally, strict scrutiny requires that the Government must show that it "has used the least restrictive means of advancing that allegedly compelling interest." *NFIB* at *32. If a less-restrictive alternative is available, the restriction cannot survive strict scrutiny.

Courts have very rarely upheld content-based speech restrictions and have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. *See, e.g., Ashcroft v. ACLU,* 542 U.S. 656, 666 (2005) (affirming grant of a preliminary injunction where the federal government had failed to show that it was likely to prevail on the merits and holding that "[a]s the Government bears the burden of proof on the ultimate question of [the challenged Act's] constitutionality, respondents [the movants] must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [enforcing the Act]"); *R.A.V. v. St. Paul*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid," and the government bears the burden to rebut that presumption.); *Burson v. Freeman*, 504 U.S. 191, 198 (1992). Strict scrutiny governs to ensure that the government's legislative and executive powers are not used to suppress a point of view unless such extreme action is crucial to the nation's highest interests.

Judge Cummings explained at length why the Persuader Rule cannot withstand strict scrutiny. WLF will not repeat that explanation here, particularly because DOL has never maintained that the Rule could withstand strict scrutiny; rather, it has asserted (erroneously, in WLF's view) that a lower level of scrutiny applies. WLF simply notes that there is no plausible reason why employees would benefit from disclosure of the names of consultants with whom they have no direct contact. While WLF agrees that fair union-representation elections require that employees be informed whether those who address them on election-related issues are being compensated by their employer, that interest does not apply to those who have no direct contact with employees.

CONCLUSION

WLF respectfully urges the Department of Labor to rescind the Rule based on the reasoning outlined above.

Respectfully submitted,

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