



September 20, 2011

Andrew R. Davis
Chief of the Division of Interpretations
and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Ave., NW
Room N-5609
Washington, D.C. 20210

**RE: Labor-Management Reporting and Disclosure Act; Interpretation of the
“Advice” Exemption RIN 1215-AB79; RIN 1245-AA03**

Dear Mr. Davis:

These comments are submitted for the record on behalf of the National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center to the request for comments from the above-referenced June 21, 2011, Notice of Proposed Rulemaking.

Introduction

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States, in varying industries that cover virtually all of the industries potentially affected by this proposed rule.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

NFIB's national membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports

gross sales of about \$500,000 a year. Roughly 15 percent of NFIB members employ 10-20 people and approximately 28 percent have 10 or more employees.¹

Currently, small businesses in this country employ just over half of all private sector employees.² Small businesses pay 44 percent of total U.S. private payroll.³ Small businesses generated 64 percent of net new jobs over the past 15 years.⁴ In 2008, there were just over 29.5 million businesses in the United States of which businesses with fewer than 500 employees comprised 99.9 percent of the 29.5 million businesses.⁵

Small businesses are America's largest private employer. For this reason it is critical that the United States Department of Labor ("Department") understand small firms' unique business structure and the exceptional problems that the Department's proposed rulemaking would place on these smaller but critically-important employers in our country.

Suffice it to say that labor law is difficult to understand. The current National Labor Relations Board ("NLRB") is changing the law by reversing precedential decisions, promulgating new rules, and expanding enforcement through increased penalties. And this is not new or unique to the current NLRB; with each new administration comes new direction at the NLRB. It is always difficult enough for experienced labor lawyers to know what the law is, how it is changing, and how to counsel clients what the law will be in the future. It is doubly difficult for small business owners to understand the quirks and nuances of labor law, which sometimes can seem illogical and counterintuitive.

Imagine, then, the challenge facing America's small businesses – the backbone of our economy – when it comes to understanding and complying with labor law. These businesses are run by men and women who are struggling day-to-day simply to make ends meet. They typically have no administrative staff, little human resource expertise, and certainly no regular access to legal counsel.

Our Members⁶

Imagine for a moment a man named Randy, a plumber in Illinois who worked by himself for years before deciding to hire a few assistants to cover growing demand for his services. Randy serves as CEO, President, Treasurer, HR VP, CFO and front-line supervisor of his company, all while working on the front line as a plumber on a daily basis. One day Randy gets approached by someone identifying himself as a representative from the local

¹ <http://www.nfib.com/about-nfib/what-is-nfib-/who-nfib-represents> (last visited July 18, 2011).

² <http://sba.gov/advocacy/7495/8420> (last visited July 18, 2011).

³ *Id.*

⁴ *Id.*

⁵ <http://www.sba.gov/advocacy/7495/8425> (last visited July 18, 2011).

⁶ These hypotheticals are compiled from real-life scenarios that Mr. Fricke has experienced in his 20-plus years of representing small employers in labor matters. Mr. Fricke also worked directly with NFIB members over the past five years, when he responded to NFIB Employment Hotline callers with labor questions.

Plumbers Union. He tells Randy that three of Randy's four plumbers want to be represented by a union.

Randy does not know much about unions, but he knows he does not want a union representing the four plumbers he employs and works with hand-in-hand on a daily basis. Should he talk with the employees? What can he ask them? What can he tell them? When can he talk with them? What does Randy do?

Imagine for a moment a painter in Ohio named Mark. He borrowed money and bought a friend's failing painting company. He tries to provide steady employment to the six employees who worked for his friend. He hustles business day and night, trying to get indoor work during the rainy season, and outdoor work during the summer months. One day a Teamster business agent tells Mark that he has to sign on to a Teamster contract to work on a government project Mark has landed. The contract has higher wage rates than Mark pays, and requires signatories to pay into the Teamster health & welfare, pension, and charitable funds. Mark wants no part of signing the agreement, but he really needs the work. What does Mark do?

Imagine for a moment a woman named Betsy, who borrowed money to buy a small clothing store in California. The little boutique employed three people, mostly on a part-time basis. Somehow the three were covered by a UNITE HERE contract from a relationship that began long before anyone at the store worked there. Betsy decides that she does not need a union – and the part-time employees do not really want the union, either. So when Betsy opens the doors of her shop for the first time, she tells her part-time employees that they do not have the union anymore. Within days Betsy gets a nasty letter from the UNITE HERE local, advising her that she cannot unilaterally walk away from the union. The local demands information from Betsy, and wants to set up a date to begin negotiations. What does Betsy do?

Imagine for a moment a woman named Val, who owns a 12-employee hair salon. She heard from some friends that she should have a handbook for her employees. She thinks that is a good idea. She also has heard that it is a good idea to include a grievance procedure of some sort in the handbook so that employees have a "voice" in their careers. She has heard about peer review committees for certain types of discipline, and she wants to look into building into her handbook some sort of similar grievance-processing mechanism. Val does not know where to start.

Today Randy, Mark, Betsy and Val would call NFIB. After an initial brief consultation with an NFIB consultant, each small business owner would then be directed to find a local attorney to help them. Typically the local attorney then becomes a business partner for these small businesses – helping the businesses through the maze that is today's field of labor law. It is this partnership that is at grave risk due to the Department's new proposed persuader rule.

Current Law

Under the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), employers must disclose on Form LM-10 “any agreement or arrangement” with an outside party where such party “undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise, or persuade employees as to the manner of exercising, their right to organize and bargain collectively through representatives of their own choosing....”⁷ The outside party performing the activities must file related Forms LM-20 and 21. Both filings must be made under threat of *criminal penalty* for failing to report or reporting insufficiently.

For nearly 50 years legal advice has been excluded from reporting.⁸ Since the early 1960s companies did not have to report any advice they received from their counsel, so long as the company was free to accept or reject the advice, including printed material. In practice this meant that labor counsel could not communicate directly with a company’s employees on subjects covered by section 203(a) of the LMRDA, since a company could not accept or reject the advice once the company’s employees already had received the advice.

The Change

Now the Department proposes a radical change. Under the proposed new rule, all actions, comments or communications that could have a “direct or indirect” “object” to “persuade” employees would be reportable. This includes drafting documents, training, drafting policies – virtually *everything* that labor counsel does for clients – and whether or not there is union organizing activity or other protected, concerted activity going on at all. The widened scope of “persuader” activities is so broad as to include virtually every form of legal advice and counsel in the labor relations field.⁹

The Problem

⁷ LMRDA section 203(a).

⁸ LMRDA section 203(c).

⁹ The Department’s NPRM contains a “laundry list” of activities which, under current law would be considered “advice” and would not trigger reporting, but which under the reinterpretation, either alone or in combination, will be considered reportable, including: drafting, revising, or providing a persuader speech, written material, website content, an audiovisual or multimedia presentation, or other material or communications of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly; planning or conducting individual or group meetings designed to persuade employees; developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness; training supervisors or employer representatives to conduct individual or group meetings designed to persuade employees; coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees; establishing or facilitating employee committees; developing employer personnel policies or practices designed to persuade employees; deciding which employees to target for persuader activity or disciplinary action; and coordinating the timing and sequencing of persuader tactics and strategies.

But why the big deal? After all - all that is required are routine filings disclosing the fees paid for particular services. The danger the new Department rules pose is not simply revealing the law firm or consultant's identity - which was the congressional objective of the LMRDA. The real danger is the requirement that lawyers, if they report as a "persuader" for one client, will be required to disclose all fees and arrangements from all clients for all labor relations services, even those services not considered "persuader activity." Further, lawyers who report have to report the portions of their salary derived from such activities.

Not only lawyers and law firms have to file form LM-20 reporting persuader activities, but labor relations consultants, and other individuals and organizations - including trade associations and chambers of commerce - are required to file Form LM-20. This would mean, for example, that such common chamber and trade association activities as positive employee relations videos, webinars and seminars would be subject to reporting, as would materials and newsletters intended to advise member companies how to lawfully respond to union organizing. Is this really what the Department has in mind? And if a trade association must report as a "persuader" for a single member, must it report all labor relations services for all of its members? Unfortunately, the answer appears to be yes, thus chilling freedom of speech and association. This is totally unacceptable to the NFIB.

The net result of the new proposed rule will be that lawyers and law firms with normal attorney-client relationships where such information is treated as privileged and confidential may no longer be willing or available to advise employers because to do so will force them to breach their ethical obligations. This is an enormous concern for the Randys, Marks, Betsys and Vals of our economy. If this happens, they will have two choices - either "go it alone" and not seek any advice (hoping they guess correctly) or find a lawyer who is willing to overlook the ethical obligations and other issues involved with filing as a persuader. If they do find a lawyer who is willing to file the Forms LM 20 and 21, then of course they will have to file their own LM-10 disclosing the financial terms of the assistance they receive.

Given the extremely overbroad scope of the re-interpretation of the definition of "persuader" activities, and the requirement that lawyers and consultants report fees from all labor relations clients, the purpose of the proposed revisions is stunningly clear - chill all labor advice to employers. There is absolutely no justifiable reason for requiring reporting of fees paid by clients who do not obtain "persuader" services other than to chill all labor relations advice, "persuader" or other. Few if any lawyers or consultants are going to knowingly engage in reportable activities for one client if, by doing so, they subject their other clients to public reporting of fees unrelated to "persuader" activities. Unions know this, the NLRB knows this, and the Department knows this.

Of course, that is the unions' objective - to remove competent legal counsel from union organizing campaigns, leaving un-counseled, inexperienced employers, especially smaller employers, defenseless against skilled and experienced union organizers. The business community is not in the business of union organizing, but for union organizers that is their only business. Union organizers are far more sophisticated in organizing strategies than most businesses are in opposing such strategies. If employers are un-counseled in communicating with their employees during union organizing, the result will be a significant increase in unfair

labor practices, delays in certifying the results of elections, and increased costs to employers and the government agencies charged with enforcing the laws.

A Solution in Search of a Problem

When Congress enacted section 203(a) of the LMRDA it was for the purpose of preventing labor consultants, acting on behalf of management, from deceiving employees through efforts to persuade them not to form or join a union or engage in collective bargaining. The fact of the matter is that Congress passed the LMRDA with an eye towards “middlemen” employed by certain employers to spy on employee organizing activity or otherwise unlawfully and deceptively squash employee organizing activity.¹⁰ Those “middlemen” do not exist among NFIB-member companies. Again, our members typically are not multi-location, multi-shift, multi-classification plants. When the owner is working hand-in-hand with the workforce, as is the case in most NFIB-member companies, there is complete transparency. Further, our members have benefitted from receiving competent legal counsel on their labor matters. Neither our members nor their counsel have any interest in “deceiving” employees or committing unfair labor practices. Just the opposite occurs; employers and their employees gain by understanding labor law. From our perspective, then, there is absolutely no good reason for the Department’s new proposed rule.

The Labor Department’s proposed regulation is much more than simply a “reinterpretation” of the LMRDA’s “Advice” Exemption. In fact, it eviscerates that exemption and makes virtually any “advice” from law firms and other organizations reportable “persuader activity.” We fear that this proposal will limit small employers’ access to counsel on most aspects of labor law. Such limited access will rob employers of their right to speak freely and lawfully on many employment issues, and employees of their right to receive lawful and complete information on employment matters that affect them on a daily basis. This is not good for small employers, their employees, or the U.S. economy.

The NLRB must reevaluate its proposed rule.

Sincerely,



Karen R. Harned, Esq.
Executive Director
NFIB Small Business Legal Center

¹⁰ S. Rep. No. 85-1417 at 255-300 (1958)