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THE PERSUADER RULE: THE ADMINISTRATION'S LATEST ATTACK ON EMPLOYER FREE SPEECH AND WORKER FREE CHOICE

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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THE PERSUADER RULE: THE ADMINISTRATION'S LATEST ATTACK ON EMPLOYER FREE SPEECH AND WORKER FREE CHOICE

Wednesday, April 27, 2016
U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:00 a.m., in room 2175, Rayburn House Office Building. Hon. David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Foxx, Walberg, Guthrie, Byrne, Carter, Grothman, Allen, Polis, Pocan, Wilson, Bonamici, Takano, Jeffries, and Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Christie Herman, Professional Staff Member; Tyler Hernandez, Deputy Communications Director; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Geoffrey MacLeay, Professional Staff Member; Dominique McKay, Deputy Press Secretary; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Pierce Blue, Minority Labor Detailee; Christine Godinez, Minority Staff Assistant; Carolyn Hughes, Minority Senior Labor Policy Advisor; Brian Kennedy, Minority General Counsel; Richard Miller, Minority Senior Labor Policy Advisor; and Marni von Wilpert, Minority Labor Detailee.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order. Good morning, and I want to thank our witnesses for joining us today.

We are here today to examine a new rule finalized by the Department of Labor and its impact on American workers and employees.

I would like to start by saying now we are in the seventh year of the economic recovery, the slowest recovery in our Nation's his-

tory. Although we have made progress over the years, we have a long way to go for the economy to reach its full potential.

Millions of Americans are still stuck in part-time jobs and what they really want and need is full-time work. Too many working families are struggling with stagnant wages, and the workforce participation rate is at its lowest point since the 1970s.

These are very real challenges facing middle-class families and advancing responsible solutions to address them should be the top priority of this administration. Unfortunately, this administration spent more time advancing the interests of big labor at the expense of American workers and employers, and the Department of Labor's "persuader rule" is the latest example. This new regulatory scheme may boost union dues, but it will do absolutely nothing to boost our economy or expand opportunities for the middle class.

Under the guise of promoting fair and democratic union elections, the persuader rule upends over half a century of labor policy by changing the interpretation of the well-established "advice exemption" of the *Labor-Management Reporting and Disclosure Act*.

When enacting the law in 1959, Congress wanted to ensure employers were able to receive basic legal advice on union-related matters in order to protect the ability of workers to hear from both sides of the debate. Now, over 50 years later, the administration is attempting to rewrite the law through executive fiat.

There are far-reaching consequences for this dramatic change in longstanding labor policy. First, this extreme and partisan rule will chill employer free speech. Union elections are complex matters with a host of legal issues to navigate and understand. Many employers acting in good faith seek outside advice to ensure they are in compliance with the law when communicating with their employees about union elections.

Under the persuader rule, they will face onerous, costly, and invasive new requirements that will force them to report virtually all contact with advisors, and undermine their ability to communicate with workers during union organizing campaigns. Adding insult to injury, union bosses remain exempt from the same requirements.

As the American Bar Association has expressed, this is an attack on the fundamental right of employers to seek legal counsel. We are fortunate to have Bill Robinson, former president of the American Bar Association, with us today to discuss this concern in more detail.

It is a concern shared by the State attorney generals across the country. As is often the case with this administration's flawed policies, small businesses will bear the brunt of the burden. Large businesses have teams of in-house attorneys to make sense of the confusing and complex set of labor rules, but small businesses do not.

With far fewer resources, small businesses will struggle to navigate the maze of Federal labor rules and requirements. Some will become tied up in bureaucratic red tape and mistakenly run afoul of the law while trying to do what is best for their employees.

But let me be clear, America's workers will be hurt the most. Union elections are not just complex legal matters. They are personal matters. The decision to join or not join a union is an impor-

tant one that has a direct impact on the livelihood of millions of American families, their paychecks, their benefits, and their work schedules.

It is critical that workers are able to hear from both sides and receive all the information they need to make a fully informed decision. They have that right. This rule will stifle debate and restrict worker free choice, with the sole purpose of stacking the deck in favor of organized labor.

As I alluded to earlier, the real shame in all of this is the administration's priorities are completely out of step with the needs of the American people. It is time for the administration to focus on creating jobs and growing the economy instead of playing politics with policies that shape our Nation's workforce.

With that, I recognize Ranking Member Polis for his opening remarks.

[The information follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

We are here today to examine a new rule finalized by the Department of Labor and its impact on America's workers and employers.

I'd like to start by saying that we are now in the seventh year of the economic recovery—the slowest recovery in our nation's history. Although we've made progress over the years, we have a long way to go for the economy to reach its full potential. Millions of Americans are still stuck in part-time jobs when what they really need is full-time work. Too many working families are struggling with stagnant wages, and the workforce participation rate is at its lowest point since the 1970s.

These are very real challenges facing middle-class families, and advancing responsible solutions to address them should be the top priority of this administration. Unfortunately, this administration has spent more time advancing the interests of Big Labor at the expense of American workers and employers, and the Department of Labor's "persuader" rule is the latest example. This new regulatory scheme may boost union dues, but it will do absolutely nothing to boost our economy or expand opportunities for the middle-class.

Under the guise of promoting fair and democratic union elections, the persuader rule upends over half a century of labor policy by changing the interpretation of the well-established "advice exemption" of the Labor-Management Reporting and Disclosure Act. When it enacted the law in 1959, Congress wanted to ensure employers were able to receive basic legal advice on union-related matters in order to protect the ability of workers to hear from both sides of the debate. Now, over fifty years later, the administration is attempting to rewrite the law through executive fiat.

There are far-reaching consequences for this dramatic change in long-standing labor policy. First, this extreme and partisan rule will chill employer free speech. Union elections are complex matters, with a host of legal issues to navigate and understand. Many employers, acting in good faith, seek outside advice to ensure they're in compliance with the law when communicating with their employees about union elections. But under the "persuader" rule, they'll face onerous, costly, and invasive new requirements that will force them to report virtually all contact with advisors and undermine their ability to communicate with workers during union organizing campaigns. Adding insult to injury, union bosses remain exempt from the same requirements.

As the American Bar Association has expressed, this is an attack on the fundamental right of employers to seek legal counsel. We are fortunate to have Bill Robinson, former president of the American Bar Association, with us today to discuss this concern in more detail. It's a concern shared by State Attorneys General across the country.

As is often the case with this administration's flawed policies, small businesses will bear the brunt of the burden. Large businesses have teams of in-house attorneys to make sense of a confusing and complex set of labor rules. But small businesses don't. With far fewer resources, small businesses will struggle to navigate the maze of federal labor rules and requirements. Some will become tied up in bureau-

cratic red tape and mistakenly run afoul of the law while trying to do what's best for their employees.

But let me be clear. America's workers will be hurt the most. Union elections aren't just complex legal matters, they're personal matters. The decision to join or not join a union is an important one that has a direct impact on the livelihood of millions of families—their paychecks, their benefits, and their work schedules. It's critical that workers are able to hear from both sides and receive all the information they need to make a fully informed decision. But this rule will stifle debate and restrict worker free choice—with the sole purpose of stacking the deck in favor of organized labor.

As I alluded to earlier, the real shame in all of this is that the administration's priorities are completely out of step with the needs of the American people. It's time for the administration to focus on creating jobs and growing the economy instead of playing politics with the policies that shape our nation's workforce. And with that, I yield to Ranking Member Polis for his opening remarks.

Mr. POLIS. Thank you, Mr. Chairman. Unfortunately, instead of holding a hearing today on supporting rules and legislation that lift our workers, like raising the minimum wage or giving workers the overtime pay that they have deserved, we are spending time attacking a very important disclosure rule, namely the persuader rule, that helps level the playing field between union organizing campaigns and companies with regard to disclosure requirements.

When workers seek to organize and bargain collectively, employers often enlist the assistance of outside labor relations consultants known as "persuaders," and that is who we are talking about here today. These are union avoidance consultants, perfectly legal, perfectly fine. What we are talking about today is the disclosure requirements around that.

In fact, studies show this is a common practice. Employers hire union avoidance persuaders in as many as 87 percent of union organizing campaigns.

Now, since its inception in 1959, the *Labor-Management Reporting and Disclosure Act* has required disclosure of both direct and indirect persuader activity. Starting in 1962, there was a loophole that was carved in the DOL's interpretation of the law, resulting in employers and their hired consultants only reporting direct persuader activity like when a persuader communicates directly with employees, not the more common behind the scenes effort, which includes things like scripting the employer's talking points, preparing videos, and organizing anti-union campaign plans, which is the lion's share, the largest bulk, of indirect persuader activity has essentially gone unreported.

For too long, union avoidance persuaders have been able to operate in the shadows due to this loophole. Workers have been kept in the dark about the activities of anti-union consultants, the costs of those anti-union campaigns, some of which could have even gone to raises for the employees.

Working men and women deserve to know who their employer is hiring and how much the employer is spending to discourage them from forming a union. That is all the DOL persuader rule does.

Essentially, it means the consultants and attorneys who are engaged in persuader activities and the employers who hire them must disclose their persuader agreements, a description of the services to be performed, including the amount the employer has paid for their services.

This is really about leveling the playing field. As a general matter, unions already disclose far more information than is being required of employers.

This is an example of union reports filed with the Department of Labor, which are often hundreds of pages long, regarding exactly how their union organizing campaigns are run, compared to the two pages under this persuader rule for the companies to disclose to the unions what they are doing with regard to indirect persuasion.

I think we can have similar disclosure requirements on both sides. Transparency is not a union value, it is not a corporate value, it is an American value, and this rule furthers the cause of transparency in a labor organizing process.

There are hardworking families in my district and in every district across our country that are working harder and harder and are struggling to make ends meet. What is happening is workers are having a harder time sharing in the growth of our economy, and income and wealth inequality is one of the greatest problems facing our Nation.

This rule is a small step towards transparency, to make sure that workers and other stakeholders, like shareholders and others, are aware of indirect expenditures to fight off union organizing campaigns.

I hope that this committee can make it possible for workers to come together and negotiate their fair share of economic growth because when we do and when working people organize, families do better, our economy does better, and our Nation does better.

I yield back the balance of my time.

[The information follows:]

Prepared Statement of Hon. Jared Polis, Subcommittee on Health, Employment, Labor, and Pensions

Today, we're holding yet another hearing that shows the backwards priorities of the Majority. Instead of supporting rules and legislation that lift up workers, like raising the minimum wage or giving workers the overtime pay they deserve, Republicans are spending time attacking the Obama Administration's persuader rule.

When workers seek to organize and bargain collectively, employers often enlist the assistance of outside labor relations consultants – known as "persuaders" or "union avoidance" consultants – to orchestrate and roll out professionally managed anti-union campaigns. Studies show that employers hire union-avoidance persuaders in as many as 87% of union organizing campaigns.

Since its inception in 1959, the Labor-Management Reporting and Disclosure Act (LMRDA) has required disclosure of both direct and indirect persuader activity. Yet, starting in 1962, a loophole was carved into DOL's interpretation of the law, resulting in employers and their hired consultants only reporting direct persuader activity – such as when a persuader communicates directly with employees. Since most persuaders operate behind the scenes – such as by scripting the employer's talking points, preparing videos and organizing the antiunion campaign plan – the lion's share of indirect persuader activity has gone unreported.

For too long, union-avoidance consultants have been able to operate in the shadows due to this large loophole in the reporting requirements. Workers have been kept in the dark about the activities of anti-union consultants, whose words and tactics are being used to influence their decisions about union representation. Working men and women deserve to know who their employer is hiring and exactly how much the employer is spending to discourage them from forming a union.

Under the DOL's persuader rule, consultants and attorneys who engage in these persuader activities, the indirect activities – and the employers who hire them – must disclose their persuader agreements and a description of the services to be performed, including the amount employers paid for these services.

Basic fairness dictates that workers should be able to know who is responsible for the information that is being shared with them during union organizing efforts. The DOL's revised disclosure requirement means that working people will know who has crafted the message when there is a counter-union organizing effort in their workplace. Workers who are told that the company has no money to raise wages may be interested in knowing how much money their employer is spending on these outside union-avoidance consultants.

Moreover, the Persuader Rule evens the playing field. As a general matter, most unions already must disclose far more information than is being required of employers and consultants under this Rule. Union reports filed with the Department of Labor can be hundreds of pages long. For example, this report, filed by AFL–CIO, is 187 pages long (point to report), compared to two pages that are required under the new persuader rule.

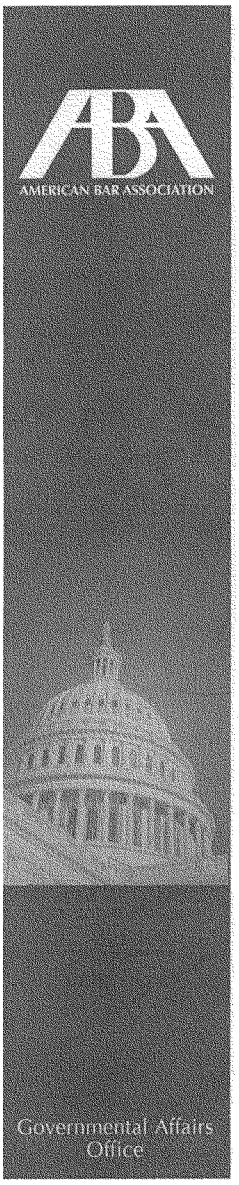
Disclosures required under DOL's final rule do not breach an attorney's responsibility to maintain confidentiality regarding a client relationship. Under the ABA's Model Rule of Professional Conduct, the Model Rules contain an exception that allows disclosures that are required by statute (e.g., LMRDA).

There are hardworking American families in my district – and every one of our districts – that continue to work harder and harder, but are struggling to make ends meet. Workers no longer share in the growth of our economy, and income and wealth inequality is one of the greatest problems facing our nation.

I applaud the Department's final rule, and I will continue to call on my colleagues in Congress to once again make it possible for more workers to come together to organize and form a union – because we know, when working people do better, families do better, our economy does better, and our nation does better.

Chairman ROE. I thank the gentleman for yielding, and I ask unanimous consent to insert a statement from the American Bar Association president, Paulette Brown, a letter from the State of Arkansas attorney general attaching an amicus brief filed by 10 State attorney generals, and a letter from the Associated Builders and Contractors, all opposing the final persuader rule. Hearing no objection, so ruled.

[The information follows:]



STATEMENT OF

PAULETTE BROWN

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

submitted to the

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

of the

COMMITTEE ON EDUCATION AND THE WORKFORCE

of the

UNITED STATES HOUSE OF REPRESENTATIVES

concerning

"THE PERSUADER RULE: THE ADMINISTRATION'S LATEST ATTACK ON EMPLOYER FREE SPEECH AND WORKER FREE CHOICE"

April 27, 2016

1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
www.americanbar.org

Mr. Chairman and Members of the Subcommittee:

My name is Paulette Brown, and I am the President of the American Bar Association ("ABA") and a partner at Locke Lord LLP in Morristown, New Jersey, where I practice in the area of labor and employment law. On behalf of the ABA, which has over 400,000 members, thank you for the opportunity to express our concerns regarding the U.S. Department of Labor's recent changes to the "Persuader Rule."[1] Those changes substantially narrow the Department's longstanding interpretation of what lawyer and other consultant activities constitute "advice" to employer clients and hence are exempt from the extensive reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 433 (1982). We request that this statement be made part of the hearing record.

At the outset, I would like to emphasize that by expressing concerns over the Final Rule, the ABA does not intend to take sides on a union-versus-management dispute. Instead, the ABA is defending the confidential lawyer-client relationship and seeking to prevent the Department from imposing what we view as an unjustified and intrusive burden on lawyers, law firms, and their clients.

As explained in more detail below, the ABA believes that the Department's original broad interpretation of the advice exemption in effect for over 50 years—which excluded lawyers from the Act's "persuader activities" reporting requirements when they merely provide persuader-related advice or other legal assistance directly to their employer clients *but have no direct contact with the employees*—should be retained with respect to lawyers and their employer clients for several important reasons. In particular, the Department's previous interpretation provides a

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[1] The text of the Department of Labor's final rule, titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," 81 Fed. Reg. 15924 ("Final Rule"), was published in the Federal Register on April 24, 2016 and is available at https://www.gpo.gov/fdsys/pkg/FR-2016-03-24/pdf/2016-06296.pdf. The Department's previous proposed rule, published in the Federal Register on June 21, 2011 ("Proposed Rule"), is available at. https://www.gpo.gov/fdsys/pkg/FR-2011-06-21/pdf/2011-14357.pdf.

useful, bright-line rule that is consistent with the actual wording of the LMRDA and congressional intent, while the new interpretation will essentially nullify the Act's advice exemption, undermine the related attorney-client communications exemption, and hence thwart the will of Congress. The Final Rule will also conflict with lawyers' existing state rules of professional conduct regarding client confidentiality and will seriously undermine both the confidential lawyer-client relationship and the employers' fundamental right to effective counsel. Once it is fully implemented, the Final Rule could also require lawyers engaged in direct or indirect persuader activities to disclose a great deal of other confidential client information that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor.

To avoid these negative consequences, the ABA urges Congress to preserve the previous well-established interpretation of the advice exemption. Lawyers should continue to be exempt from the Persuader Rule's disclosure requirements when they provide advice or other legal assistance to their employer clients that is designed to help the employer to persuade its employees on unionization issues, without any direct lawyer communication with the employees on these issues.

The Department's New Interpretation of the "Advice" Exemption

Under Section 203(b) of the LMRDA, consultants and independent contractors, including attorneys, are generally required to file periodic disclosure forms with the Department describing any "persuader" agreements or arrangements with employers where the object is to influence their employees' unionization decisions. In addition, Section 203(a) imposes a similar reporting requirement on employers that have entered into these types of persuader agreements or arrangements.

At the same time, Section 203(c) of the statute contains the following broad "advice" exemption to the general reporting requirements outlined in Section 203(b):

> Nothing contained 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.... [Section 203(c), 29 U.S.C. § 433(c).]

In addition, Section 204 of the LMRDA specifically exempts lawyers from having to report "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."[2] Although the Department and some federal courts have taken the view that this provision exempts lawyers from disclosing any information protected by the attorney-client privilege and that the provision provides the same degree of protection as that provided in the common-law attorney-client privilege, the expansive language of Section 204 appears to exempt all attorney-client communications from disclosure, not just those communications that are "privileged"; that term simply appears nowhere in Section 204.

Over the years, both the federal courts and the Department have noted that a significant "tension" exists between the broad coverage provisions of Section 203(b) of the LMRDA requiring disclosure of persuader activities and the Act's broad exemption for "advice." However, since 1962 this tension has been alleviated by the Department's broad interpretation of the advice exemption under Section 203(c) as generally excluding from the rule's disclosure requirements any advice or materials provided by the lawyer or other consultant to the employer for use in persuading employees, so long as the consultant has no direct contact with the employees.[3] The Department has also long taken the position that when a particular consultant activity involves

[2] See Section 204, 29 U.S.C. § 434.

[3] See Section 265.005 (Scope of the "Advice" Exemption) (1962) of the LMRDA Interpretative Manual and the Memorandum from Mario A. Lauro, Jr., Acting Deputy Assistant Secretary for Labor-Management Standards (March 24, 1989) ("Lauro Memorandum"), both cited in the Final Rule, 81 Fed. Reg. at 15935-15936.

both advice to the employer and persuasion of employees, but the consultant has no direct contact with the employees, the advice exemption controls.

In its new Final Rule, the Department has adopted major changes to its longstanding interpretation and application of Section 203. In particular, the Final Rule states that the advice exemption will no longer shield employers and their lawyers from reporting agreements in which the lawyer or other consultant "has no face-to-face contact with employees but nonetheless engages in activities behind the scenes (known as indirect persuader activities) where an object is to persuade employees concerning their rights to organize and bargain collectively."[4] The Final Rule also states that "if the consultant engages in both advice and persuader activities…the entire agreement or arrangement must be reported."[5] The Final Rule became effective on April 25, 2015 and will apply to arrangements, agreements, and payments made on or after July 1, 2016.

As a result of these major changes, lawyers will now be required to file periodic disclosure reports when they advise their clients on the clients' persuader activities, even if the lawyer has no direct contact with the employees. These reports, in turn, will require lawyers (and their employer clients) to disclose a substantial amount of confidential client information, including the existence of the lawyer-client relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. In addition, once the Labor Department begins to fully enforce the new rule and unless Form LM-21 ("Receipts and Disbursements Report") is substantially changed,[6] lawyers will be forced to report detailed

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[4] See Final Rule, 81 Fed. Reg. at 15925.

[5] *Id.* at 15937.

[6] On April 13, 2016, the Department announced a "Special Enforcement Policy for Certain Form LM-21 Requirements" that explained that because it plans to propose additional changes to Form LM-21—the form that requires consultants engaging in persuader activities to disclose a great deal of financial information regarding all of their employer clients—the Department will not take enforcement action against consultants who fail to disclose this financial information on Form LM-21 until further notice. However, the Special Enforcement Policy is a temporary measure only and can be rescinded by the Department at any time by providing 90 days' notice.

information regarding the *legal fees paid by all of the lawyers' employer clients, and disbursements made by the lawyers, on account of "labor relations advice or services" provided to any employer client, not just those clients who were involved in persuader activities.*

The ABA's Concerns Regarding the Department's Final Rule

Many organizations and individuals have voiced opposition to the Department's new Persuader Rule for a variety of reasons. Let me be clear that the ABA has a single overarching concern: The Final Rule substantially narrows the traditional scope of the advice exemption, and so for the first time in 50 years, many lawyers and their employer clients will now be required to report a great deal of sensitive and confidential client information that has not previously been subject to disclosure. The ABA also believes that the Final Rule is deeply flawed and we oppose it[7] for several important reasons.

First, while the Department's longstanding interpretation of the advice exemption is consistent with the structure and the actual wording of the LMRDA, the new interpretation outlined in the Final Rule runs counter to the plain language of the statute. The result is unfortunate: the Final Rule will effectively nullify the advice exemption and undermine the attorney-client communications exemption. As noted above, the three key provisions of the Act applicable to lawyers advising employer clients include Section 203(b), establishing a general

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[7] For over 50 years, the ABA has opposed measures similar to the Department's new Final Rule. In 1959, the ABA House of Delegates adopted a formal resolution which provided in pertinent part as follows:

> *Resolved*, That the American Bar Association urges that in any proposed legislation in the labor-management field, the traditional confidential relationship between attorney and client be preserved, and that no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as confidential between a client and his attorney, 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…

While the Department's new Persuader Rule is only designed to increase the obligations of *employer-side* labor lawyers—and not *union-side* labor lawyers—to report confidential client information to the Department, the ABA would be equally opposed to any similar future attempt by the Department or any other agency to force union-side lawyers to disclose any confidential client information.

reporting requirement for consultants engaged in persuader activities, followed by the broad advice exemption in Section 203(c), and finally the equally broad attorney-client communication exemption in Section 204.

For many years, the Department distinguished between lawyers who are subject to the reporting requirements of Section 203(b) because they communicate directly with employees in an effort to persuade them on unionization issues and lawyers who are exempt under Sections 203(c) or 204 because they have no direct contact with employees but merely provide advice and other legal services to their employer clients that may in turn help the clients persuade the employees on these issues. So long as lawyers limited their activities to providing advice, materials, and other communications directly to their employer clients and did not contact the employees directly, the Department properly deemed those legal services to be exempt "advice" under Section 203(c) or attorney-client communications under Section 204. These communications were thus not reportable "persuader activities" under Section 203(b) of the statute.

The Department's longstanding interpretation of the advice exemption provided an appropriate and rational bright-line test that harmonized the broad scope of the Section 203(b) reporting requirement with the equally broad advice and attorney-client communication exemptions in Sections 203(c) and 204 far better than the Department's new interpretation. Sections 203(c) and 204 clearly contemplate that at least some of the advice and attorney-client communications that a lawyer provides to the employer client might be designed to help the employer to persuade employees on unionization issues. This is evident because if none of the lawyer's advice or other communications to the employer client were related to persuader activities, the statute simply would not be applicable, with or without the advice or attorney-client communications exemptions, and no such exemptions would be needed.

Conversely, the Department's new interpretation of the advice exemption—which provides that a lawyer who gives advice or provides other legal assistance to an employer client will now be subject to the Act's disclosure requirements if an object of the advice or legal assistance is to help persuade the employees on unionization matters—will effectively remove the advice exception from Section 203(c) of the statute, undermine the attorney-communications exemption in Section 204, and thwart the will of Congress.

Second, the ABA is concerned that by requiring lawyers to disclose confidential client information to the government regarding the identity of the client, the nature of the representation, and details concerning legal fees, the Final Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA Model Rule.[8] ABA Model Rule 1.6 states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." or unless one or more of the narrow exceptions listed in the Rule is present.[9]

The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client

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[8] See ABA Model Rule of Professional Conduct 1.6, and the related commentary, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html See also Charts Comparing Individual Professional Conduct Rules as Adopted or Proposed by States to ABA Model Rules, available at http://www.americanbar.org/groups/professional_responsibility/policy.html.

[9] Although ABA Model Rule 1.6(6) allows a lawyer to disclose confidential client information "to comply with other law or a court order," nothing in the LMRDA expressly or implicitly requires lawyers to reveal client confidences to the government. On the contrary, Section 204 of the statute expressly exempting "information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship" strongly suggests that Congress recognized and sought to protect the ethical duty that lawyers have to protect client confidences, whether or not that client information is technically privileged.

privilege and the work product doctrine, the Model Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential.[10] In most jurisdictions, this category of non-privileged, confidential client information includes the identity of the client as well as other information related to the legal representation, such as the nature of the representation and the amount of legal fees paid by the client to the lawyer. Because the Final Rule will require all lawyers who provide persuader-related advice or other legal assistance to their employer clients to disclose the identity of those clients, the nature of the representation, the fees received from the clients, and other confidential client information, the new rule is clearly inconsistent with lawyers' existing ethical duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule.

Third, the ABA is concerned that the application of the Final Rule to lawyers engaged in the practice of law could seriously undermine both the confidential client-lawyer relationship and employers' fundamental right to counsel. Lawyers for employer companies play a key role in helping those entities and their officials to understand and comply with the applicable law and to act in the entities' best interest. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the company's officers, directors, and other leaders, and the lawyers must be provided with all relevant information necessary to properly represent the entity. In addition, to maintain the trust and confidence of the employer client and provide it with effective legal representation, its lawyers must be able to consult confidentially with the client. Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice.

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[10] See, e.g., Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency).; Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party); and Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients' identities, which may constitute secret).

By requiring lawyers to file detailed reports with the Department stating the identity of their employer clients, the nature of the representation and the types of legal tasks performed, and the receipt and disbursement of legal fees whenever the lawyers provide advice or other legal services relating to the clients' persuader activities—all under penalty of criminal sanctions—the Final Rule could chill and seriously undermine the confidential client-lawyer relationship. In addition, by imposing these unfair reporting burdens on both the lawyers and the employer clients they represent, the Final Rule will likely discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.

Finally, the ABA is concerned with the overly broad scope of the information that the Department's Final Rule will ultimately require lawyers and law firms to disclose to the government on a periodic basis once the Department begins to enforce that portion of the new rule.[11] The Final Rule provides that when a lawyer or law firm enters into an agreement to provide persuader-related advice and other legal services to an employer client, the lawyer or law firm will be required to fill out both a revised version of Form LM-20 ("Agreement & Activities Report") and the current version of Form LM-21 ("Receipts and Disbursements Report"), unless Form LM-21 is significantly modified as a result of the future rulemaking process recently announced by the Department. Form LM-21 currently requires lawyers and law firms engaged in persuader activities to disclose all receipts of any kind received from all their employer clients "on account of labor relations advice or services" and disbursements made in connection with such services, not just those receipts and disbursements that are related to persuader activities.[12]

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[11] As noted in footnote 6, *supra,* while the Department's "Special Enforcement Policy" announced on April 13 states that the Department will not take enforcement action against consultants who fail to disclose certain information on Form LM-21 while the Department considers possible changes to the form, the policy is temporary only and can be unilaterally rescinded by the Department with as little as 90 days' notice.

[12] See the current Instructions for Department of Labor Form LM-21, at pages 3-5, available at http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-21_Instructions.pdf.

Unless it is substantially changed in a future Department rulemaking, the overly broad scope of this disclosure requirement will compel many lawyers who were previously exempt from the Persuader Rule to disclose a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor. In particular, the current disclosure requirement is grossly excessive to the extent it seeks to compel lawyers to report all receipts from and disbursements on behalf of *every employer client* for whom the lawyers performed any "labor relations advice or services," not just those employer clients for whom the lawyer provided persuader-related advice.

No rational governmental purpose is served by this overly broad requirement. By analogy, while law firms and lawyers who lobby Congress on behalf of clients must file periodic reports with the Clerk of the House and the Secretary of the Senate disclosing the identity of those clients, the issues on which they lobbied, and the dollar amount received for lobbying, the Clerk and the Secretary would never presume to require a law firm or lawyer to disclose extensive information regarding all of their other clients to whom they give advice on governmental issues, but for whom they are not registered lobbyists.

Moreover, by discouraging lawyers and law firms from agreeing to represent employers, the overly broad financial disclosure requirement in the Final Rule could have the unintended consequence of increasing the number of employers who, without advice of counsel, would engage in unlawful activities in response to union organizing campaigns and concerted, protected conduct by employees.

Clearly, these required disclosures triggered by the Final Rule are unjustified and inconsistent with a lawyer's existing ethical duties under Model Rule 1.6 (and the related state rules) not to disclose confidential client information absent certain narrow circumstances not present here. Lawyers should not be required, under penalty of perjury, to publicly disclose

confidential information regarding such clients who have not even engaged in the persuader activities that the statute seeks to address. The ABA also agrees with the Eighth Circuit Court of Appeals that it is "extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders under § 203(b) and (c) to be so broad as to encompass dealings with employers who are not required to make any report whatsoever under § 203(a)(4)." *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985).

While acknowledging the concerns raised by the ABA and others concerning the excessive scope of the affected lawyers' reporting requirements under LM-21, the Department summarily dismissed those concerns in its Final Rule, noting that it planned to propose certain changes to Form LM-21 in a separate rulemaking in the future. Unfortunately, the Department's assurance of revisiting the overly broad reporting requirements of Form LM-21 at some point in the future provides little comfort to the many lawyers—and their employer clients—who were previously exempted from the rule's onerous reporting requirements but could be compelled to disclose an excessive amount of confidential client information to the government if and when the Department decides to begin enforcing compliance with Form LM-21, either in its current form or with only minor modifications.

Conclusion

For all these reasons, the ABA urges Congress to preserve the Department of Labor's longstanding interpretation of the advice exemption to the Persuader Rule so that lawyers and law firms will continue to be exempt from the rule's onerous disclosure requirements when they merely provide advice or other legal assistance to their employer clients regarding the clients' persuader activities and the lawyers have no direct contact with the employees. In addition, irrespective of whether the new Final Rule is implemented, the ABA urges the Department to narrow the scope of Form LM-21 so that when a lawyer engages in persuader activities that are

not subject to the advice or attorney-client communications exemptions, disclosure is required only for those receipts and disbursements that relate directly to the employer clients for whom persuader activities were performed, not for those other employer clients for whom no such persuader activities were provided.

Thank you again for the opportunity to express the ABA's views on this important issue.



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

April 22, 2016

Hon. David P. Roe, Chairman
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe,

In connection with your upcoming hearing addressing the new Department of Labor Persuader Advice Exemption Rule, I submit for your consideration and for the record the amicus brief filed by ten (10) state Attorneys General in the case of *Associated Builders and Contractors of Arkansas, et al. v. Thomas E. Perez* in the United States District Court for the Eastern District of Arkansas, Case No. 4:16CV00169 KGB. The brief was filed by Arkansas, Alabama, Arizona, Michigan, Nevada, Oklahoma, South Carolina, Texas, Utah, and West Virginia. A substantively similar brief has also been filed in similar litigation in federal district court in Minnesota. The only significant difference between the two amicus briefs is the addition of an eleventh state, namely Wisconsin, on the brief filed in Minnesota.

I hope that the Members will find the amicus brief useful in preparation for and during the April 27 hearing on this topic. Please take the brief under consideration. I thank you for all of your important work on this topic.

Best Regards,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS OF ARKANSAS; ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ARKANSAS STATE CHAMBER OF COMMERCE/ASSOCIATED INDUSTRIES OF ARKANSAS; THE ARKANSAS HOSPITALITY ASSOCIATION; COALITION FOR A DEMOCRATIC WORKPLACE; THE NATIONAL ASSOCIATION OF MANUFACTURERS; and CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C., on behalf of themselves and their membership and clients — PLAINTIFFS

v. — No. 4:16CV00169 KGB

THOMAS E. PEREZ, in his official capacity as Secretary of Labor, U.S. Department of Labor, MICHAEL J. HAYES, in his official capacity as Director, Office of Labor Management Standards, U.S. Department of Labor, and the U.S. DEPARTMENT OF LABOR — DEFENDANTS

BRIEF OF THE STATES OF ARKANSAS, ALABAMA, ARIZONA, MICHIGAN, NEVADA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The States of Arkansas, Alabama, Arizona, Michigan, Nevada, Oklahoma, South Carolina, Texas, Utah, and West Virginia ("*Amici*"), through their Attorneys General, submit this brief supporting Plaintiffs' motion for a preliminary injunction, which seeks an order enjoining the United States Department of Labor's new rule interpreting the "advice" exemption in section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("Act"), 29 U.S.C. § 401 et seq. Doc. 49.

I. INTRODUCTION

The Department of Labor ("Department") has recently promulgated a new final rule concerning a portion of the Act. This new rule, the "Labor-Management Reporting and Disclosure Act, Interpretation of the Advice Exemption" ("new rule" or "final rule") imposes novel requirements on employer-side labor lawyers—and not union-side labor lawyers—to disclose to the Department a wealth of highly-sensitive details regarding their advice to clients, thus invading the confidentiality of the attorney-client relationship. 81 Fed. Reg. at 15924. The new rule is inconsistent with the governing statutory framework and departs from nearly 55 years of contrary interpretation by the Department and the federal courts. Unless enjoined by this Court, this dangerous rule will go into effect on April 25, 2016, immediately intruding into the integrity and confidentiality of the attorney-client relationship and hindering employers' ability to obtain legal advice—consequences contrary to the intent of the Act.

II. THE INTEREST OF *AMICI*

Amici, through the chief legal officer of each state, are charged with defending the interests of their states and the public. *Amici* believe that both of these interests are put in jeopardy by a rule that invades the attorney-client relationship. As sovereigns ultimately responsible for the ethical practice of law within their borders, *Amici* (in their own right and on behalf of their citizens) have a significant interest in preserving the law's longstanding respect for the integrity and confidentiality of the attorney-client relationship. Indeed, the states' licensing and disciplinary authority in matters of attorney conduct endow *Amici* with a peculiar interest in safeguarding the integrity and confidentiality of the attorney-client relationship.[1]

[1] *Amici* do not view this issue as a management-versus-labor-union issue, but rather as an issue of respect for the attorney-client privilege. *Amici* would be equally opposed to any similar attempt to compel union-side lawyers to disclose confidential client information. For the same

III. THE UNDERLYING STATUTORY FRAMEWORK

Section 203(a) of the Act, 29 U.S.C. § 433(a), requires an employer to disclose to the Department the existence and terms of any persuader agreement—that is, any agreement (or other arrangement) between the employer and a consultant regarding the employer's efforts to influence its employees' unionizing activities. Section 203(b) of the Act requires "consultants," including attorneys, to make similar disclosures to the Department. 29 U.S.C. § 433(b). But section 203(c) expressly exempts from disclosure any "advice" the consultant provides to the employer. 29 U.S.C. § 433(c). Furthermore, section 204 of the Act broadly exempts attorney-client communications from disclosure:

> Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

29 U.S.C. § 434.

IV. THE PRELIMINARY INJUNCTION MOTION SHOULD BE GRANTED BECAUSE THE NEW RULE INTRUDES INTO THE ATTORNEY-CLIENT RELATIONSHIP.

Consistent with the paramount importance of attorney-client confidentiality to the American judicial system and the rule of law, the Department has heretofore broadly interpreted section 203(c) to generally exempt from the reach of the disclosure rule any advice or materials provided by an attorney to an employer for use in persuading employees, so long as the attorney has no contact with the employees. *See* Lauro Memorandum, cited in the final rule, 81 Fed. Reg. at 15936. As the Department itself recognized in its 2011 proposed rule, the Department has long

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reason, *Amici* take no position on the new rule's application to non-attorney labor consultants. Unlike licensed attorneys, non-attorney labor consultants have no confidential relationship with their clients, nor are they are subject to state-court regulation and disciplinary authority.

taken the position "that in cases in which a particular consultant activity involves *both* advice to the employer *and* persuasion of employees, the 'advice' exemption controls." 76 Fed. Reg. at 36191 (emphases added). The Department's broad interpretation is a longstanding one, originating in its 1962 Donahue Memorandum, also cited in the 2011 proposed rule. *See* 76 Fed. Reg. at 36181; *see also* 81 Fed. Reg. at 15935. That interpretation makes perfect sense in light of the Act's exemption language and the obvious motivation for that language: protecting from interference the special nature of the attorney-client relationship.

A. The New Rule Unjustifiably Extends the Disclosure Requirement into Sensitive Areas of the Attorney-Client Relationship.

The Department's new rule extends the reach of the disclosure requirement into the confidential relationship between an attorney and his or her client—an area the Department has, until now, recognized that Congress intended to exempt from disclosure. The new rule will require an attorney who advises his or her client on the client's efforts to persuade its employees concerning unionizing issues to disclose confidential client information. The new rule accomplishes this end by narrowly redefining what counts as "advice." Under the new rule:

> No longer exempt from reporting are those agreements or arrangements in which the consultant engages in the indirect persuasion of employees. Such indirect persuader activities are no longer considered to be "advice" under LMRDA section 203(c), and, if undertaken, they now trigger reporting under sections 203(a) and (b).

81 Fed. Reg. at 15937. What the new rule refers to as "the indirect persuasion of employees" includes an attorney's mere advising an employer on the employer's efforts to persuade its employees, even where the attorney interacts only with the employer and has no contact whatsoever with the employees. More specifically:

> Reporting of an agreement or arrangement is triggered when:
>
> * * *
>
> (2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employees:
>
> (a) Plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;
>
> (b) provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;
>
> (c) conducts a seminar for supervisors or other employer representatives; or
>
> (d) develops or implements personnel policies, practices, or actions for the employer.

81 Fed. Reg. at 15938.

In the Department's own language, the new rule expressly acknowledges that an attorney who merely advises an employer on persuader issues will now be required to specifically disclose all of the following information:

> • A copy of the persuader agreement between the employer and consultant (including attorneys);
> • the identity of the persons and employers that are parties to the agreement;
> • a description of the terms and conditions of the agreement;
> • the nature of the persuader and information-supplying activities . . . undertaken or to be undertaken pursuant to the agreement . . . ;
> • a description of any reportable persuader and information-supplying activities: the period during which the activities were performed, and the extent to which the activities have been performed as of the date of the report's submission; and
> • the name(s) of the person(s) who performed the persuader or information-supplying activities; and the dates, amounts, and purposes of payments made under the agreement.

81 Fed. Reg. at 15992. This bounty of information—which the Department brazenly characterizes as "limited," *see id.*—includes nearly every salient aspect of the relationship between the attorney and his or her employer-client. The new rule requires not only that the attorney turn over the actual written representation agreement, but also that he or she disclose the nature of the advice given, the dates when the advice is given, how much advice has already

been given, and the names of the attorneys giving the advice—not to mention the amount of money the client paid for the advice, the dates on which the client paid the money, and the purpose for which the client paid the money.[2]

It does not stop there. The new rule further provides that "[s]ection 203(b) also requires persons subject to this requirement to report receipts and disbursements of any kind 'on account of labor relations advice and services.'" 81 Fed. Reg. at 15929 (quoting 29 U.S.C. § 433(b)). Thus, once the disclosure requirement is triggered, the new rule requires the attorney to file a Form LM-21 ("Receipts and Disbursements Report"). *Id.* The scope of the disclosures required to complete Form LM-21 is staggering. Completing the Form LM-21 requires the attorney to disclose *all* receipts of any kind received from *all* of its employer-clients "on account of labor relations advice or services"—including receipts and disbursements that have *nothing whatsoever* to do with its employee-client's efforts to persuade employees on unionization issues. Such information has no reasonable nexus to the "persuader activities" that the Act seeks to monitor. Thus, an attorney who advises a single client on a single issue regarding the client's efforts to persuade its employees is required to disclose all receipts from and disbursements on behalf of *every* employer-client for whom the attorney has performed anything that might fall under the description of "labor relations advice or services."

The Eighth Circuit has found "it extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders under § 203(b) and (c) to be so broad as to encompass dealings with employers who are not required to make any report whatsoever under § 203(a)(4)." *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985). Nevertheless, the Department utterly fails to address this unprecedented and unwarranted intrusion into the

[2] As discussed more fully below, the attorney's duty of confidentiality requires nondisclosure of *any* information relating to the representation of a client.

confidential attorney-client relationship. The new rule bureaucratically brushes it aside: "While some of the comments submitted in this rulemaking concern issues that may arise in connection with the Form LM-21 Receipts and Disbursements Report, such as the scope and detail of reporting about service provided to other employer clients, that report is not the subject of this rulemaking." 81 Fed. Reg. at 15928.

The Department seeks to diminish the impact of the new rule by noting that any attorney who engages in persuader activity where he or she makes direct contact with employees (e.g., personally meeting with, speaking to, or writing to them) already must make the required disclosures. *See* 81 Fed. Reg. at 15998 ("[I]f attorneys engaging in direct persuasion must disclose information concerning the entire agreement or arrangement with the employer it logically follows that indirect persuaders, including attorneys, should disclose the same information."). But this is a non-sequitur: an attorney who seeks to directly persuade someone *who is not the client* is not thereby *advising the client*. Direct contact with employees is not "advice" falling within the advice exemption. Therefore, it does not "logically follow" that an attorney who merely advises his or her client must be treated the same as an attorney who directly seeks to persuade the employer's employees.

B. The New Rule Is Irreconcilable with the Structure and Language of the Act.

The new rule's intrusion into the attorney-client relationship is at odds with almost 55 years of the Department's interpretation of section 203. But, more importantly, the structure and language of section 203—which has not changed—is difficult to reconcile with the new rule. First, the very existence of the advice exemption in section 203 presupposes that *some* of the advice that an attorney provides to his or her client will be intended to help the employer persuade its employees on unionization issues. After all, if none of the attorney's advice were

related to persuader activities, then there would be nothing to exempt from disclosure. But the fact that the statute expressly exempts attorney "advice" manifests Congress's intent to exempt from disclosure *any* advice an attorney gives to his or her client—including advice that helps the client persuade its employees on unionization issues. The new rule effectively writes section 203(c)'s advice exemption out of the statute by treating an attorney's advice on efforts to persuade employees the same as if the attorney were him- or herself attempting to persuade the employees. It cannot have been the intent of Congress to create an advice exemption that leaves no advice exempt from disclosure.

Another way to think about this is to consider that the statutory framework, saliently, 29 U.S.C. § 433(b) & (c), contemplates three categories of attorney representation: (1) representation not relating to a persuader issue, which is exempt from disclosure by negative inference from the statutory language; (2) representation relating to a persuader issue that is *not* exempt, and therefore *is* subject to disclosure; and (3) representation relating to a persuader issue that *is* exempt (i.e., "advice"), and therefore is *not* subject to disclosure. The new rule unjustifiably eliminates the third category, leaving no advice exempt from disclosure under section 203(c), 29 U.S.C. § 433(c).

Consequently, the *sole* analytical criterion for disclosure under the new rule is whether the representation relates to a persuader issue. If it does, then the new rule will *never* exempt it from disclosure, thus depriving section 203(c), the "advice" exemption, of any force or effect. A court's "duty [is] to give effect, if possible, to every clause and word of a statute," and the Court should therefore be "reluctant to treat statutory terms as surplusage." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001) (quotations and citations

omitted). The Court should be "especially unwilling to do so," where, as here, "the term occupies so pivotal a place in the statutory scheme." *Id.*, 121 S. Ct. at 2125.

Furthermore, section 203(c) is expressly an advice "exemption"—not an advice "exception." Had Congress chosen to use "exception" language, that might have evinced a Congressional intent that "advice" come within the scope of the disclosure rule before being excepted from it. However, the statute's use of "exemption" language manifests a Congressional intent that the disclosure rule not even *reach* "advice" in the first instance. In brief, by expressly *exempting* "advice" from the reach of the disclosure rule, an attorney's advice to his or her client does not ever come within the scope of the statute so as to permit the sort of intrusion into the attorney-client relationship that the new rule requires. The Department's effort to extend its regulatory power into the confidential attorney-client relationship is an unjustified and statutorily-unsupported innovation that this Court should not permit.

C. The New Rule Conflicts with the Attorney's Duty of Confidentiality.

The Department questions why "services offered by attorneys should be shielded from . . . the public while the very same activities would be reported by their non-attorney colleagues." 81 Fed. Reg. at 15992. The answer, of course, is that—unlike a non-attorney labor consultant—an attorney is a member of a profession that is both regulated by the state and subject to the state court's disciplinary authority in matters of professional conduct, which imposes on him or her a duty of confidentiality.

The duty of confidentiality is clearly set forth in each (and every) state's rules of professional conduct. For example, Arkansas Rule of Professional Conduct 1.6, dealing with "Confidentiality of Information," contains virtually identical wording to the American Bar Association's Model Rule 1.6, which states, in pertinent part: "A lawyer shall not reveal

information relating to the representation of a client unless the client gives informed consent . . . ," or unless one or more of the narrow exceptions listed in the Rule is present.[3] Although Rule 1.6 prohibits attorneys from disclosing information protected by either the attorney-client privilege or the work product doctrine, the Rule also forbids attorneys from voluntarily disclosing other non-privileged information.[4] As comment 3 to Arkansas's Rule 1.6—which contains identical wording to the ABA Model Rules—provides, "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." This category of non-privileged, confidential information includes the identity of the client, the nature of the representation, and the amount of legal fees paid by the client to the attorney.

The Department seeks to rely on provisions such as Arkansas Rule 1.6(b)(6), which allow an attorney to disclose confidential client information "to comply with other law or a court order." *See* 81 Fed. Reg. at 15998 ("[T]he LMRDA constitutes 'other law,' which under the ethical rules authorizes attorneys to disclose otherwise confidential client information.").

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[3] Similar rules exist in virtually all states. See the American Bar Association Center for Professional Responsibility's Charts Comparing Individual Professional Conduct Rules to the American Bar Association's Model Code of Professional Conduct, available at http://www.americanbar.org/groups/professional_responsibility/policy/charts.html.

[4] *See, e.g.*, Alabama Ethics Op. 89-111 (1989) (attorney may not disclose name of client to funding agency); Indiana Ethics Op. 1 (1995) (attorneys prohibited from disclosing client information, including identity, on IRS Form 8300 under Rule 1.6); Nevada Ethics Op. 41 (2009) ("Even the mere identity of a client is protected by 1.6. . . . Rule 1.6(a) requires that ALL information relating to the representation of a client is confidential and protected from disclosure." (emphasis in original)); New Mexico Ethics Op. 1989-2 (1989) (attorney may not ethically disclose client identity to the government even though federal law requires disclosure); South Carolina Ethics Op. 90-14 (1990) (attorney may not volunteer identity of client to third party); Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); and Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of client's identities).

However, the language of section 204 is directly at odds with the Department's position. Section 204 unequivocally states, "Nothing contained in this chapter shall be construed to require an attorney . . . to include in any report . . . any information . . . communicated to such attorney . . . in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434. No clearer language could be desired to show that the Act *precludes* an attorney's disclosure of client information. This statutory language thwarts any attempt to construe the Act as "other law" *requiring* disclosure.

Nevertheless, "the Department believes that . . . this [new] rule supersede[s] [Model Rule of Professional Conduct] Rule 1.6 and any particular state equivalent." 81 Fed. Reg. at 15998. Consequently, the new rule will unavoidably put attorneys in an ethical dilemma: either risk liability by refusing to disclose employer confidences or risk professional disciplinary action by disclosing them. Therefore, the Department's new rule is on a collision course with the ethical duty of confidentiality as outlined in Arkansas Rule 1.6 and the corresponding rules of other states. Decisions affecting attorney-client confidentiality are the special prerogative of the states that license attorneys and exercise disciplinary authority over them. The decision to significantly nullify attorney-client confidentiality should not be left to the interpretive whim of a federal regulatory body with no special interest in the attorney-client relationship.

The Department's traditional rule respects the attorney-client relationship by requiring only attorneys who make direct contact with an employer-client's employees to disclose information. The traditional rule thus preserves attorney-client confidentiality by ensuring that attorneys who merely advise their clients are not compelled to make the far-reaching disclosures that are required under the Act. That longstanding rule should be preserved.

D. The New Rule Conflicts with the Attorney-Client Privilege.

Relying on the reasoning of *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1216 (6th Cir. 1985), the Department "rejects . . . [the] contention that section 204 broadly protects from disclosure any information . . . that is not covered by the traditional attorney-client privilege." 81 Fed. Reg. at 15997. However, the Eighth Circuit has previously distinguished *Humphreys* on a related issue. *See Rose Law Firm*, 768 F.2d at 967. And in any case, the Department's position fails to give effect to the intent of Congress as manifested in section 204's broad language. *See id.* at 975 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

The expansive language of section 204 does not restrict its non-disclosure protections merely to "privileged" information. Such a restriction would make little sense, given that the attorney-client privilege is an evidentiary privilege that applies only in the context of a legal proceeding "in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." Ark. R. Prof'l Conduct 1.6 cmt 3; *see* Restatement (Third) of the Law Governing Lawyers § 86 (2000) (applying "[w]hen an attempt is made to introduce in evidence or obtain discovery of a communication privileged . . . ."). Rather, section 204's protections are much broader than the attorney-client privilege, protecting an attorney from having "to include in any report . . . any information." 29 U.S.C. § 434.

But even if the Court were to accept the Department's implausibly-narrow reading of section 204, the Department still acknowledges that the new rule requires disclosure of information that the attorney-client privilege protects only "as a general rule." 81 Fed. Reg. at 15992. For example, once an attorney discloses the required information, any ensuing

investigation of the nature of the relationship between the attorney and his or her client would necessarily require the attorney to disclose further privileged and confidential client information. If the attorney were him- or herself accused of wrongdoing, he or she would be hamstrung by both the duty of confidentiality as well as by the attorney-client privilege, unable to defend him- or herself against charges of wrongdoing without violating duties to his or her client and incurring the consequences thereof. Because non-attorney labor consultants are not subject to such duties, they would not be placed in this impossible situation.

The Department's new rule "declines to comment on the applicability of the attorney-client privilege to hypothetical questions concerning investigations of potential reporting violations." 81 Fed. Reg. at 15997. Ominously, the Department states, "Issues pertaining to the interplay between the attorney-client privilege and any ensuing investigations under section 203 are more appropriately resolved upon enforcement of the final rule once it becomes effective." *Id.* Of course, the Department "emphasizes that it will protect information relating to the attorney-client relationship to the full extent possible in its investigations." *Id.* But this assurance that the Department will safeguard an attorney's confidential and privileged client information is little comfort to an attorney who has already been compelled to violate his duties by disclosing client information. Again, a non-attorney labor consultant would not be faced with the catch-22 of either violating ethical duties or facing criminal charges. The new rule quite obviously conflicts with the attorney-client privilege.

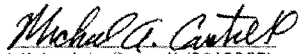
CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the Plaintiffs' motion for a preliminary injunction of the Department's new rule until the conclusion of this litigation. Alternatively, *Amici* respectfully request that this Court grant the Plaintiffs' request for

a preliminary injunction specifically as to licensed attorneys, whose ability to confidentially represent their clients will be unavoidably jeopardized by the new rule. Given the Department's own longstanding rule exempting attorney advice from disclosure, and the likelihood that the Department's new, radical adventure into areas of attorney-client confidence is in conflict with the governing Act, a preliminary injunction to preserve the status quo pending litigation is well justified, and is the best way to protect the public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael A. Cantrell, hereby certify that on April 13, 2016, I conventionally filed the foregoing with the Clerk of the Court, and I mailed a copy of the same by U.S. Mail, postage prepaid, to the following:

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April 26, 2016

The Honorable David Roe
Chairman, Subcommittee on Health, Employment, Labor and Pensions
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jared Polis
Ranking Member, Subcommittee on Health, Employment, Labor and Pensions
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Roe and Ranking Member Polis,

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 members, I am writing in regards to the April 27 Subcommittee on Health, Employment, Labor and Pensions hearing titled, "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice." We appreciate you calling this hearing and your attention to this important matter.

In June 2011, the U.S. Department of Labor (DOL) issued proposed changes to redefine "persuader" activity under the Labor Management Reporting and Disclosure Act (LMRDA). Section 203 pertains to federal reporting and disclosure requirements for individuals and entities hired by employers "to persuade employees to exercise or not exercise or persuade employees as to the manner of exercising, the right to organize..." Employers and true "persuaders" have long been required to file disclosure reports with DOL. However, when attorneys or consultants do not communicate directly with employees, but instead simply advise the employer, they have not been required to disclose. DOL's proposal virtually eliminates this exemption, resulting in the drastic expansion of the types of circumstances that will trigger reporting—including communications between attorneys and their clients. If finalized, the proposal will deny employers their rights to free speech, freedom of association and legal counsel, and deprive employees of their right to obtain balanced information as they decide whether to be represented by a union.

The rule will require complex and unprecedented levels of disclosure for attorneys, consultants, associations and other professionals who provide advice to employers about how to legally communicate with their employees.

It is essential that employers in the construction industry retain the ability to receive expert counsel and advice on labor relations matters. The vast majority of ABC contractors are small businesses without in-house attorneys or advisors; accordingly, they should not be burdened with vague and intrusive reporting regimes before, during and after a union organizing campaign.

ABC supports a resolution introduced by Rep. Bradley Byrne (R-Ala.) (H.J. Res. 87) under the Congressional Review Act to prevent DOL from proceeding with this dramatic overreach and we urge all members of Congress to support this resolution.

Thank you again for calling this hearing and we look forward to working with Congress to protect American businesses and their employees.

Sincerely,

Kristen Swearingen
Vice President of Legislative & Political Affairs

Chairman ROE. Pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record and, without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses. First, Mr. Joseph Baumgarten, partner, Proskauer Rose, in New York. Mr. Baumgarten is the co-chair of the firm's Labor and Employment Law Department. Mr. Baumgarten represents publicly held and privately owned employers in virtually all areas of labor and employment law. Welcome.

Ms. Sharon Sellers is President of SLS Consulting in Santee, South Carolina. As an HR executive, Ms. Sellers has directed HR functions for corporations covering the medical, manufacturing, government contracting, and services industries. She will testify on behalf of SHRM.

Mr. Jonathan Newman is a partner in Sherman, Dunn, Cohen, Leifer & Yellig, P.C., here in Washington, D.C. Mr. Newman litigates regularly in U.S. District Courts, the U.S. Court of Appeals, State courts, and before the NLRB and other government agencies. Welcome, Mr. Newman.

Mr. William "Bill" Robinson III, is a member of Frost Brown Todd in Florence, Kentucky. Mr. Robinson is a former president of the American Bar Association, and he signed the 2011 ABA letter objecting to the then-proposed persuader rule due to its threat to the attorney-client confidentiality. He will testify on his own behalf.

Welcome to each of you. I will now ask our witnesses to stand and raise your right hand.

[Witnesses sworn.]

Chairman ROE. Let the record reflect the witnesses answered in the affirmative. You may take your seats.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You have five minutes to present your testimony. When you begin, the light in front of you will turn green. With one minute left, the light will turn yellow. When your time is expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best you can. Members each will have five minutes to ask questions.

Mr. Baumgarten, you are recognized for five minutes.

TESTIMONY OF JOSEPH BAUMGARTEN, PARTNER, PROSKAUER ROSE, NEW YORK, NY

Mr. BAUMGARTEN. Good morning, Chairman Roe, Ranking Member Polis, and members of the subcommittee. My name is Joseph Baumgarten, and I am a partner with the law firm of Proskauer Rose and co-chair of Proskauer's Labor and Employment Law Department.

My firm has been practicing labor and employment law for more than 75 years, representing hundreds of employers in collective bargaining unionization and other matters.

Thank you for the opportunity to participate in today's panel on the Department of Labor's persuader rule.

For more than 50 years, labor relations practitioners functioned under clearly defined rules that were consistent with the statutory mandate of the *Landrum-Griffin Act*, and were, in fact, upheld by the courts.

Advice to employer clients was not reportable. Direct communications with a client's employees were reportable. This longstanding approach harmonized the various provisions in Sections 203 and 204 of the statute. It permitted employers to obtain expert labor relations advice. It preserved the attorney-client privilege, allowed attorneys to satisfy their ethical obligations.

The Department's new rule represents a dramatic and radical change. The rule now requires reporting in circumstances where lawyers are merely giving advice to employers about personnel policies, preparing or revising material for an employer to distribute to its employees, or advising employers and their supervisors about how to communicate effectively about matters that are important, indeed, essential to employees.

The inevitable result of this rule will be a chilling effect on speech. The loss of services will impact most acutely the small businesses with little or no in-house experience to guide them in what they can and cannot say to their employees.

Those employers may refrain from saying anything at all, leaving unrebutted whatever message is being disseminated by the union. Employees will be deprived of an important voice expressing facts, views, and opinions.

It is important to point out that there is considerably more at stake here than simply what happens in a union organizing campaign, although that surely is important. In fact, very little attention has been paid to the effect on unionized employers in collective bargaining.

Let me briefly explain. Section 203(c) of the *Landrum-Griffin Act* could hardly be clearer that giving advice or engaging in collective bargaining on behalf of an employer is not persuader activity. Thus, communications in support of the employer's bargaining proposals that are prepared for delivery at the bargaining table are and will continue to be exempt from reporting.

Under the Department's new rule, the same communications delivered to the employees in the bargaining unit at large in the form of a letter, a bulletin from management, would subject both the lawyer and the employer to an obligation to report.

If that seems not to make sense, it is because the Department's new rule takes a unitary process, that is collective bargaining, and artificially parses it into its component parts. At its core, everything that goes on in collective bargaining involves the art of persuasion.

The art is practiced not just at the bargaining table but in every communication made by the employer and the union, from the first exchange of proposals to the final ratification of an agreement.

The 2nd Circuit Court of Appeals made this point in a decision 30 years ago: "Labor negotiations do not occur in a vacuum. The employees are naturally interested parties. During a labor dispute, the employees are like voters who both sides seek to persuade. Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech, it also

aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their union's performance."

Note the court's language. This is not just about protecting employer rights. It is about ensuring that workers can make informed decisions.

Under the Department's new rule, a lawyer can say to a client I can help you develop bargaining proposals, I can deliver those proposals for you at the bargaining table, I can explain them at the table, I can help draft the agreement itself. However, I cannot then also help you even write a letter to your employees explaining the basis for the proposals or urging ratification, or talking about what happens in the event of a work stoppage without becoming a persuader that requires us both to report.

That is completely inconsistent with the statute. In fact, I submit to you it is nonsensical.

For all of these reasons and others, I support H.J. Res. 87, Congressman Byrne's effort to prevent this rule from taking effect. Thank you.

[The statement of Mr. Baumgarten follows:]

Proskauer Proskauer Rose LLP Eleven Times Square New York, NY 10036-8299

Testimony of Joseph Baumgarten
Co-Chair, Labor & Employment Law Department
Proskauer Rose LLP

Before the
Subcommittee on Health, Employment, Labor and Pensions

April 27, 2016

Good morning, Chairman Roe, Ranking Member Polis, and members of the Subcommittee. My name is Joseph Baumgarten and I am a partner with the law firm of Proskauer Rose and co-chair of Proskauer's Labor and Employment Law Department, where I have practiced for more than 32 years. My firm has been practicing labor and employment law for more than 75 years. During those 75 years we have represented hundreds of employers, including unionized employers in collective bargaining in industries and sectors spanning our economy, from professional sports leagues and teams, television, live theater, manufacturing, newspapers, health care, construction, hospitality and many others. Thank you to the Subcommittee for the opportunity to participate in today's panel on the Department of Labor's Persuader Rule.

I. The Rule Conflicts With The Plain Language Of The LMRDA

Any inquiry into an agency's interpretation of its governing statute must begin with a careful parsing of the statutory language. Where the language and intent of Congress is clear, an agency must give effect to the unambiguously expressed intent of Congress.

A. The Rule Is Inconsistent with Section 203

1. "Collective Bargaining" Activities Are Expressly Exempt From Reporting

Section 203(c) of the LMRDA, titled "Advisory or representative services exempt from filing requirements," provides that employers and consultants, including attorneys, are not required to file reports covering their services "by reason of . . . giving or agreeing to give advice to [an] 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 and conditions of employment or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 433(c). Though § 203 is often referred to as the "advice exemption," its scope is – as the quoted text indicates – broader than that. The exemption expressly excludes: (i) giving "advice" to an employer (without qualification); (ii) representing an employer in a legal proceeding of any kind; and (iii) engaging in collective bargaining.

Putting aside for the moment the impact on employers who face union organizing campaigns, the Rule will fundamentally deprive unionized employers of their choice of counsel during the collective bargaining process in a way that the statute was never intended.

As reflected in the legislative history of the LMRDA, Congress added these specific exemptions to address, among other things, concerns regarding disclosure of attorney-client confidences and to avoid impeding legitimate activities undertaken by labor relations consultants. Thus, the statute makes clear that giving "advice" OR engaging in collective bargaining on behalf of an employer are exempt from the reporting requirements. To my

knowledge, neither the Department nor anyone else has ever taken a contrary position. That is, until now. Under the Department's new interpretation of the exemption, when a lawyer or other outside consultant is engaged in collective bargaining, communications in support of the employer's bargaining proposals that are prepared for delivery to employees at the bargaining table are exempt from reporting. But the same or similar entirely lawful communications lose their exempt status if they are prepared for delivery to the employees in the bargaining unit at large, away from the table (say, in the form of a letter or bulletin from management).

In effect, the Department is trying to take the unitary collective bargaining process and artificially parse it in a way that nullifies the exemption. Any professional worth his or her salt – whether on the union or management side – would agree that their job when "engaged in collective bargaining" is not only to make arguments at the table, but also to advise their clients on how to "sell the deal" to the workforce as a whole.

The Department's Rule, however, means that lawyers cannot assist their clients away from the bargaining table without incurring an obligation to report as persuaders.

To illustrate the irrational results of the Rule, a lawyer can say to a client: "I can help you develop bargaining proposals, I can deliver those proposals for you at the bargaining table and I can explain them at the table. I can even work collaboratively with the union and its counsel to draft the collective bargaining agreement. However, although I may be the most knowledgeable person about the proposals and about the CBA, I cannot then help you write a letter to your employees explaining the basis for the proposals or urging ratification (or even suggest that such a letter be written); nor can I assist you in drafting talking points to be used when speaking to employees about what happens in the event of a work stoppage without

becoming a 'persuader' that requires us both to report." That result is not only unprecedented, it is completely inconsistent with the statute.

This flaw was pointed out in comments made in response to the Department's 2011 NPRM. Regrettably, the Department dismissed those comments in a single paragraph:

> One law firm questioned the reportability of communications in connection with the collective bargaining process. The Department emphasizes that the presence of a labor dispute is not a prerequisite for reporting of persuader agreements, although it may provide important context to determine if the consultant engaged in persuader activities. Section 203 exempts from reporting activities involved in negotiating an agreement, or resolving any questions arising from the agreement. An activity, however that involves the persuasion of employees would be reportable. For example, a communication for employees, drafted by the consultant, about the parties' progress in negotiations, arguing the union's proposals are unacceptable to the employer, encouraging employees to participate in a union ratification vote or support the union committee's recommendations, or concerning the possible ramifications of striking, would trigger reporting. 81 Fed. Reg. at 15971; *see id.* at 15939 ("While many reports will be triggered by persuader activities related to the filing of representation petitions, *others will result from activities related to collective bargaining. . . .")* (Emphasis added).

The Department's attempt to distinguish collective bargaining, on the one hand, from "persuasion of employees," on the other hand, finds no basis in the statute or in common sense. At its core, collective bargaining involves the art of persuasion. The art is practiced not just at the bargaining table. Section 101 of the NLRA refers to "the practice and procedure of collective bargaining" for a reason. In every collective bargaining negotiation it is the employees themselves who ultimately decide to make or not make the agreement with the employer. That is what the ratification process is for. It is also the employees who decide whether or not to authorize a work stoppage. That is what a strike vote is for.

That collective bargaining encompasses much more than negotiations and communications at the table is not a new or controversial concept. Here is one very good definition:

> Collective bargaining (also called contract negotiations) is the heart and soul of the labor movement. It is when workers band together to negotiate workplace matters with their employer. The end result is a **collective bargaining agreement** or **contract** that spells out in black and white all of the terms both parties agree to, from pay rates and benefits, to a grievance procedure, time off and more. The employees, or **bargaining unit**, generally nominate a few of their coworkers to represent them, along with expert negotiators from the union. Once the negotiating team reaches a **tentative agreement** with management, the bargaining unit meets to vote the contract terms up or down. This is called the ratification process. The contract only goes into effect if a majority of the employees approve the tentative agreement.

You can find this definition on the website of the International Brotherhood of Teamsters - - one of this country's largest labor organizations. IBT, Frequently Asked Questions (https://teamster.org/about/frequently-asked-questions-faq). The IBT obviously considers the ratification process part of collective bargaining.[1] Thus, a management lawyer who provides content for his or her client to communicate with the bargaining unit about ratification is, by the IBT's own definition, "engaged in collective bargaining."

Likewise, the Second Circuit Court of Appeals recognized over 30 years ago that "labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade . . . ." *NLRB v. Pratt & Whitney Air Craft Div.* 789 F.2d 121, 134 (2d Cir. 1986) (citations omitted). Accordingly, "granting an employer the

[1] *See also* "Why Employees Vote to Ratify Union Contracts" (http://clas.wayne.edu/Multimedia/labor) ("When unions complete bargaining and reach a settlement with an employer, they usually present a proposed agreement to the membership to vote whether or not to accept it, referred to as a ratification vote. When employees vote yes, the contract typically goes into effect. When they vote no, the union may return to negotiations with the employer or a strike may occur. . . . Thus contract ratification is a crucial stage near the end of the collective bargaining process.").

opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decision while also permitting them a reasoned critique of their unions' performance." *Id.* (emphasis added).

Both Congress and the Supreme Court have also stressed the special importance of "encourag[ing] free debate on issues dividing labor and management" in the workplace. *Chamber of Commerce of United States v. Brown*, 554 U.S. 60, 67 (2008). Similarly, the NLRB recognized that:

> The goal of the Federal labor policy has always been to create a favorable climate in which a healthy and stable bargaining process can be established and maintained. We believe that **permitting the fullest freedom of expression by each party to that process** offers the best hope of nurturing that environment. Ideas which are tested in the marketplace of free debate provide the foundation of a sound labor relations framework. We recognize that there may be some risk that direct communication between an employer and its employees which bears on the bargaining process may be perceived by some as an attempt to undermine the statutory collective-bargaining representative. However, we are convinced that the benefits to be derived from free, noncoercive expression far outweigh such speculative concerns.

United Technologies Corp., 274 NLRB No. 87 (1985) (emphasis added); *see Adolph Coors Co.*, 235 NLRB 271, 277 (1978) (employer lawfully sent letters setting forth certain proposed contract terms which had been presented to the union and thereafter implemented when impasse was reached in negotiations); *Stokely-Van Camp, Inc.*, 186 NLRB 440, 449-50 (1970) (employer that conducted meetings with its employees for the purpose of discussing and clarifying its bargaining proposals acted lawfully and did not engage in improper "direct dealing").

The Department's Rule will, without doubt, result in many consultants and lawyers declining to give advice to employers, which would then lead to employers – especially small businesses with no in-house counsel – deciding to forego expressing opinions regarding a union

or a union's proposals. It will also, without doubt, result in many employers declining to ask for such advice. By thus chilling employers' free speech, the Rule will preclude employees from hearing the "other side" of the story – an alternative view and information that a union would not present. As a result, the employees will be deprived of an opportunity to discover their employer's views, and they will be less informed about the important choices they face – be it during union organizing or during the ratification process.

Let me respond here to the Department's comment that the Rule does not prohibit employers and consultants from engaging in any kind of activity – it merely requires that the activity be reported. The Department understates the consequences of being deemed a "persuader" under the Rule. Given the Department's position that the scope of the reporting obligation extends to all labor relations advice or services, not just persuader activities, many lawyers will simply decline to provide services which could conceivably be deemed "persuader activity" out of fear of triggering the reporting obligation as to all of their clients. Conversely, employers may eschew seeking counsel for these types of communications if they have to report their agreements with counsel, as well as the fees and the details of such agreements - - clearly chilling the free flow of communications necessary between a client and his attorney. This is critical – as the NLRB has strict guidelines on the scope and nature of communications to employees during the bargaining process. Without counsel to assist in the drafting of these communications, it could easily lead to entirely unintended unlawful behavior by employers that, in fact, interferes with the bargaining process - - an entirely perverse result from a statute that is intended to promote the process.

Let me also be clear because much has been said about the need to expose unethical practices of so-called "union busting" consultants and surreptitious "middlemen." The reporting

requirements of the LMRDA ensure that employees are aware of who is behind messages regarding a union when they receive such messages from someone who cannot readily be identified as an agent of the employer.[2] The application of the Rule to work done in collective bargaining does not advance that goal in any way. When a lawyer participates in collective bargaining negotiations everyone knows that he or she is a representative of management. There can be no confusion as to the source of the messages.

2. The Department's Revised Interpretation of "Advice" Is Inconsistent With The Statute

The Department's revised treatment of what constitutes "advice" exempted by § 203(c) does not fare any better. For over fifty years, the Department administered the advice exemption in a manner that was true to the plain meaning of the statute and that had the added, and critical, benefit of giving employers and their counsel a bright-line test that was easy to administer: so long as outside counsel or consultant was not communicating directly with employees, but rather providing or editing content for their employer client, which the employer client was free to accept or reject, the work did not give rise to a reporting obligation. That made sense. After all, the definition of "advice" (as contained in Merriam-Webster's Collegiate Dictionary (10th ed. 2002)) is a "recommendation regarding a decision or course of conduct: counsel."

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[2] The LMRDA was designed to target "middlemen flitting about the country" in order to "work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts." S. Rep. No. 86-187, at 10 (1959). These "middlemen" were involved in "bribery and corruption as well as unfair labor practices." *Id.* Accordingly, "[t]he committee in drafting section [203(b)] was particularly desirous of requiring reports from middlemen masquerading as legitimate labor relations consultants." *Id.* at 39. "The committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations and do not engage in activities of the types listed in section [203(b)]." *Id.* at 40. *See also* S. Rep. No. 85-1684 at 8-9 (1958) ("[s]ince attorneys at law and other responsible labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice [would not] be required to report").

Consistent with the dictionary definition of "advice," if a lawyer recommends that a client take a more – or less – conciliatory tone about a union or its bargaining proposals or record, that is a recommendation. It is advice. The character of that recommendation is no less "advice" when the communication that is being considered is intended to persuade employees than it would be if it were for the purpose of persuading newspaper editorial writers, customers or company shareholders. The language of § 203(c) does not distinguish among the potential audiences for the communications that are the subject of the lawyer's (or other consultant's) advice. Yet, the Department's Rule would irrationally make the question of reportability turn on that question.

At the same time, the Rule would constrict the term "advice" so that it applies purely to advising a client as to the legality of a communication or course of action. But we all know that lawyers do much more. Lawyers are advocates. They persuade. That is why lawyers are asked by clients to help script business meetings; to help draft prospectuses; to prepare comments to the media on behalf of their clients' positions. To suggest that "advice" is no longer "advice" because there is a persuasive element to the subject matter on which the advice is given makes no sense. And, it is simply an impossible line to draw. Any statement given to the client or edit made to a document by a lawyer could potentially be construed as "persuasive" even where the attorney's sole intent was to ensure the lawfulness of the communication.

B. The Rule Is Inconsistent with Section 204

Much attention has been focused on the impact of the new Rule on the attorney-client relationship, specifically, the invasion of the attorney-client privilege and the impact on lawyers' ethical obligation to refrain from disclosing even non-privileged information that their clients wish to keep confidential. Those concerns are valid and they are profound. An attorney is

obligated by the laws of virtually every state to maintain in confidence communications made to him or her by a client in confidence. That obligation is sacrosanct. No attorney can or will risk his or her license and professional reputation by reporting matters clients demand not be reported. And no attorney will perform work that is required to be reported if they cannot in fact comply with that requirement. It is for that reason that § 204 of the LMRDA exempts from reporting "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434.

Under the new Rule, there will be a variety of circumstances in which lawyers may be required to report the activities they have performed for clients in ways that would require the disclosure of information conveyed to them in confidence by a client. This is, in fact, precisely what the Department would require in the revised LM-20, which would require employers to report exactly what kinds of services they have been asked to provide for purposes of "persuasion." Moreover, depending on what happens to the LM-21 report – which remains a moving target – a lawyer who performs "persuader" work for even a single client could conceivably be required to report its receipts and disbursements for labor relations work performed on behalf of all its clients, even those for whom no persuader work was performed and even if those other clients considered (with good reason) that such information was confidential and subject to attorney-client privilege. (The courts of appeals are split on this question.)

The result, quite obviously, will be a loss of services, and the loss of services will impact most acutely the small businesses that have limited funds and little or no in-house experience to guide them in what they can and cannot say to their employees. By dramatically increasing the cost and consequences of securing advice (potential criminal penalties), the Rule would result in

fewer firms seeking advice and, again, will have the perverse effect of causing more unfair labor practices by employers who are deprived of the services of responsible counsel. Alternatively, employers may refrain from saying anything at all, leaving unrebutted whatever message is being disseminated by the union. Employees will be left with no countervailing voice.

II. The Rule Is Unduly Vague

The Rule extends the reporting obligation to activities that bear no resemblance to the abuses which led to the enactment of the LMRDA and it does so in a way that requires a subjective determination of intent that is both unrealistic and unworkable. For the first time, a lawyer (or other consultant) who develops employer personnel policies may be required to report, even if no union is on the scene and even in the absence of any evidence that the employees have even considered a union. Specifically, under the Rule, reporting will be required if the personnel policies that the lawyer has been asked to prepare are "designed to persuade." In determining whether an object of the activities is to persuade employees, the Department intends to look at "the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking."

In essence, under the new Rule, the reporting obligation of employer (LM-10) and its counsel (LM-20 and LM-21) will turn on the subjective determination of each – and, ultimately, on the Department's subjective view of their intent – as to whether the policies that the lawyer developed were for the purpose of persuading employees whether or how to exercise their right to unionize and bargain collectively. If "an object" of the agreement is to persuade employees with respect to their right to unionize or bargain collectively, it is persuader activity. A lawyer may, for example, advise an employer regarding promulgation of an internal grievance process, without incurring an obligation to report. But the same action may be deemed to be "persuader"

work if the Department were to conclude later – based on "circumstances relevant to the undertaking" – that the policy had a purpose, in whole or in part, of discouraging employees from unionizing.

In the real world, there is no way to make this determination with any degree of confidence – particularly where both the employer and the lawyer/consultant have to make their own independent determination as to whether the work performed is reportable. Put yourselves in the shoes of the lawyer. What happens if your client has not told you their objective in implementing the kind of policy under consideration - - and given the framework here, a client may simply withhold the true intent of the policy in order to receive the necessary legal advice (which, again, highlights the perverse chilling effect this will have on the attorney-client relationship). What if there are multiple people involved from the client who have different objectives from one another? What if the client's objective changes after the work has begun but before it is concluded? What if the lawyer is not certain about the client's objective and decides, in the interest of being conservative that he or she must file an LM-20 report – and by doing so arguably violates a duty of confidentiality? What if the lawyer does not report because he or she believes in good faith that the work was not reportable – but the client does file an LM-10 because it actually did request the policy be developed with an object to persuade? This is not how the attorney-client relationship should function – and it could never function like this in any other area of the law.

The difficulty of applying this new Rule is exacerbated by the fact that the Department has failed to come to grips with what to do about the LM-21, the annual report that consultants must file. As constituted, the LM-21 requires consultants to report receipts received from any client for whom it has provided labor relations advice or services – even if such work did not

involve labor relations advice or services. (As noted, above, there is a split among the federal appellate courts regarding the propriety of this requirement.) The LM-21 also requires a statement of disbursements to employees of the consultant in connection with labor relations advice and services. For several years, the Department has had under consideration potential changes to the reporting requirements of the LM-21, including the detail to be reported. However, the Department has not issued an NPRM regarding such changes.

It should be quite obvious that the rules governing what must be reported on the LM-10 and LM-20, on the one hand, and what must be reported on the LM-21, on the other hand, are closely related and intertwined. It is for this reason that several commenters requested that the Department should refrain from publishing its final rule regarding the "advice" exemption until the Department was also ready to publish its final rule regarding the LM-21, and that the proposed advice exemption rule be consolidated with the impending proposal to change the LM-21. That would have made sense. Without clarity on what will be required to be reported in the LM-21, a consultant cannot diligently track the nature and scope of services provided in each fiscal year or the receipts from employers and disbursements associated with such services. Nor can he give appropriate advice to his clients regarding its reporting obligations.

The request to deal with all of these issues comprehensively fell on deaf ears; the Rule was issued in March with no clarity at all around changes to the LM-21. So, today, nobody who is or may become a "persuader" knows exactly what they will need to track in order to be able to report on the LM-21. Belatedly, the Department has dealt with this in the form of a Special Enforcement Policy that was issued on April 13. Under that enforcement policy the Department will not take enforcement action based on a failure to complete the Statement of Receipts and Statement of Disbursements sections (Parts B and C) of the LM-21.

To be sure, the issuance of this special enforcement policy is a positive development. But its issuance highlights the haphazard way in which the Department used its rulemaking authority. We still do not have an NPRM concerning the LM-21. We do not know what the Department intends to do with the LM-21. We do not know how long the Special Enforcement Policy will remain in effect, other than that there will be not less than 90 days' notice of any change. We do not even know how the Department defines "labor relations advice and services" for purposes of completing Parts B and C – if those Parts are even retained in their current form. This is simply no way to implement policy.

In summary, I submit that the Rule should be withdrawn because it is contrary to the plain language of the statute and Congressional intent and it is contrary to public policy. It will inhibit employers' rights to seek advice and representation, and chill communications between employers and employees – communications that Congress, the NLRB and the courts have all recognized to be valid, statutorily and Constitutionally protected, in the interest of employees themselves and important for constructive labor relations. For these reasons, I support Representative Byrne's effort to prevent the Rule from taking effect.

Thank you for allowing me to testify and I will be happy to answer any questions from the Subcommittee.

Chairman ROE. Thank you. Ms. Sellers, you are recognized for five minutes.

TESTIMONY OF SHARON SELLERS, PRESIDENT, SLS CONSULTING, LLC, SANTEE, SC

Ms. SELLERS. Good morning, Chairman Roe and Ranking Member Polis. I am Sharon Sellers with SLS Consulting, headquartered in South Carolina. I am appearing today on behalf of the Society for Human Resource Management, or SHRM. Thank you for the opportunity to testify on the persuader rule that will impact both employers and employees.

Mr. Chairman, let me paint the picture of a perfect storm. With the recent implementation of the National Labor Relations Board's ambush elections rule, combined with changes to the joint employer standard, a new definition of a bargaining unit with new micro units, and now the persuader rule, the timing could not be worse for our Nation's employers.

Now more than ever it is critical for employers and employees to understand their rights and obligations under the Nation's labor laws and regulations, especially our small employers.

My organization, SLS Consulting, a human resources services and training firm, seeks to help these employers.

I serve clients in all major industries with half of my clients in smaller organizations. As an HR consultant, I am brought in as an expert to assist managers with employee management issues, leverage effective practices, and assist in the compliance of laws and regulations.

While I do not consider myself a persuader, the definitions in the new rule could very well affect my work, a perfect example of the unintended consequences of the rule.

Consider this, in my supervisory training, a segment on union organizing is included to help educate supervisors on the signs of organizing activity as envisioned by the *National Labor Relations Act*. It is critical for supervisors in today's workplace to recognize signs of union organizing and avoid any behaviors that could be considered unfair labor practices.

For example, during supervisor training, employers are taught what I call "TIPS," which define what supervisors can and cannot communicate to their employees under the NLRA.

Herein lies the unintended consequences created by this rule, namely that stringent reporting requirements may deter many employers from seeking out labor compliance information training like mine. This is a serious concern for SHRM and its 275,000 members. That is why we support H.J. Res. 87.

Some employers will likely object to potentially showing up on a report and refuse to work with a consultant who provides labor consulting services. Consultants will be placed in a challenging position to either abandon all indirect persuasion work for all clients or lose valuable clients.

The stakes are high for noncompliance with the persuader rule, leading to criminal penalties. It is not just HR consultants who will be impacted. This rule negatively impacts all employers, including small employers, and their employees who do not have in-house

counsel or an HR department to advise them at a time when unions are increasingly targeting small employers.

Mr. Chairman, one must not overlook how this rule will impact employees. SHRM believes that all employees and organizations benefit when supervisors are highly trained. If employers remove labor-related training, it is increasingly likely that more supervisors will be unprepared for the appropriate way to address union organizing activity, resulting in more complaints of unfair labor practices, which is harmful to both employers and employees.

In addition, SHRM believes that the DOL has underestimated the cost and time burden placed on employers by this rule. Hundreds of thousands of organizations will be impacted or at least potentially impacted because even if an employer does not have to report, employers and consultants will still have to determine whether, in fact, they do need to report.

In closing, our main concern is the clients I serve may avoid seeking my training if the services are now reportable under the rule. I believe training strong supervisors helps the entire organization succeed. The rule can only lead to further confusion and perhaps even more violations of the law, which not only conflicts with the objectives of the *National Labor Relations Act*, but also my underlying mission and my business to train strong supervisors for successful organizations.

Thank you, Mr. Chairman. I look forward to your questions.

[The statement of Ms. Sellers follows:]



STATEMENT OF SHARON L. SELLERS, SHRM-SCP, SPHR, GPHR

PRESIDENT OF SLS CONSULTING, LLC

ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR & PENSIONS

HEARING ON THE PERSUADER RULE: THE ADMINISTRATION'S LATEST ATTACK ON EMPLOYER FREE SPEECH AND WORKER FREE CHOICE

APRIL 27, 2016

Introduction

Chairman Roe, Ranking Member Polis and distinguished members of the Subcommittee, my name is Sharon L. Sellers, and I am president of the HR consulting firm SLS Consulting, LLC, headquartered in Santee, South Carolina. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for over twenty years. Currently, I am proudly serving as a SHRM Member Advisory Council (MAC) representative for the Southeast region. On behalf of our 275,000 members in over 160 countries, I thank you for the opportunity to discuss how the U.S. Department of Labor's (DOL) persuader rule will impact employers and employees.

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

SLS Consulting, LLC, a human resources services and training firm, was created in 2004. As a former HR executive, I've directed the HR functions for corporations covering the medical, manufacturing, and government contracting and service industries. Through my consulting firm, I serve clients ranging from local start-ups to global enterprises in all major industries, with half of my clients in smaller organizations. As an HR consultant, I am brought in as a human resource expert with over 30 years of experience to assist managers with employee management issues, leverage effective practices, and assist in the compliance of laws and regulations. While I do not consider myself a "persuader," the definitions included in the new rule could very well apply to my work.

Furthermore, under DOL's current interpretation, consultants will have to report *all* advice activity for *all* clients in any year they trigger the reporting requirements for even one client. This will force consultancies like SLS to reveal advice activity for clients who are not even receiving indirect persuasion services. Many of those clients may object to potentially showing up on a report and refuse to work with a consultant who provides those services. Consultants will be placed in a challenging position to either abandon all indirect persuasion work for all clients or lose valuable clients. The stakes are high for noncompliance with the persuader rule, leading to criminal penalties.

In my testimony today, I will discuss some of the practical challenges the rule presents and negative impacts it will have on HR consultants like myself as well as on employers and employees, especially those working in small business.

Background

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) is the federal statute promoting standards for labor unions made up in whole or in part by private-sector employees. The LMRDA covers union officer elections and union trusteeships and outlines safeguards for union assets. It also governs the reporting and disclosure requirements for labor unions and their officials, employers, and labor consultants. Administered by DOL's Office of Labor-Management Standards, the LMRDA also includes reporting requirements for individuals known as "persuaders."

Currently, reports must be filed by lawyers and consultants who engage in activities intended to directly or indirectly "persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of

their own choosing ..."[1] Similarly, employers that utilize the services of such consultants must also submit a Form LM-10 documenting payments under agreements covering these activities.

The LMRDA includes an important "advice exemption" that has been beneficial to many employers who seek assistance from consultants and lawyers to make sure they are in compliance with the National Labor Relations Act (NLRA). Prior to this new rule, under Section 203 of the LMRDA and the advice exemption, employers and consultants reported to the DOL the scope and cost of arrangements when the consultants were hired to persuade employees about unionization, but not when consultants merely provided advice to the employer and did not directly persuade employees. Under the new rule, communications between a consultant and employers, managers or supervisors must be reported.

New Persuader Rule

DOL released its final rule reinterpreting the advice exemption in the *Federal Register* on March 24, 2016. Originally proposed in June 2011, DOL's final rule includes important changes based on stakeholder comments, including those from SHRM. Unfortunately, despite these changes, the final rule still dramatically alters the interpretation of advice and contains ambiguous language. The final rule defines persuader activity that must be reported as direct persuasion and four types of indirect persuasion, including:

- Planning, directing or coordinating supervisors or managers (interviewing managers, coaching communicators, drafting a campaign calendar, planning meetings, etc.);
- Providing persuader materials (anything other than off-the-shelf communications drafted or developed for communication to employees, including written, online, video, etc.);
- Providing a seminar for supervisors or other employer representatives (most supervisory training related to how to communicate with employees during a campaign); and
- Developing or implementing personnel policies or actions (policies intended to change how someone feels about a union, or targeting individual employees to change how they feel about a union).

SHRM believes in the fundamental right, guaranteed by the NLRA, of every employee to make a private choice about whether or not to join a union. The final DOL rule, however, will create many challenges for consultants, attorneys and employers, especially smaller employers that are particularly dependent on consultants and attorneys for navigating complexities of union organizing activities and that lack in-house HR and compliance expertise. On a personal note, I am very concerned about the impact of this rule on the clients I serve.

Impact on HR Consulting

Thousands of HR consultants who are not directly working with employees but instead providing critical supervisory training to employers nationwide could be inadvertently impacted by this final rule's broadened definition of "indirect persuasion" activities. SHRM is concerned by the unintended consequences created by this rule, namely that stringent reporting requirements will deter many employers from seeking out labor compliance information and will have a specific negative impact on small employers and their employees that do not have in-house counsel or an HR department to advise them. While persuaders are the key audience the Administration intended

[1] LMRDA, 29 USC 433

to target, consultancies like SLS will feel obligated to report their more general HR consulting to DOL.

At SLS, supervisory training is conducted with primarily small companies. The type of training my consultancy provides includes establishing policies and handbooks and developing procedures for recruiting, employee development and employee management. SLS provides extensive training focused on anti-harassment laws, the Family and Medical Leave Act, Americans with Disabilities Act compliance, communication techniques, participative management, performance management, and the prevention of domestic violence in the workplace. Fifty percent of my clients are small businesses with 100 or less employees; thirty-four percent have 50 or fewer employees.

As a part of my supervisory training, a segment on union organizing is included to help educate supervisors on the signs of organizing activity. As envisioned by the NLRA, it is critical for supervisors in today's workplace to recognize signs of union organizing and avoid any behaviors that could be considered unfair labor practices.

For example, during supervisor trainings, employers are taught what I call the "TIPS," which define what supervisors can and cannot communicate to their employees under the NLRA. The TIPS are as follows: employers cannot **threaten** employees with adverse action if they support a union; employers cannot **interrogate** employees about their union activities; employers cannot **promise** certain benefits to employees if they vote against the union; and finally, employers cannot **spy** on employee union activities.

In addition, information is provided regarding unfair labor practices and the general do's and don'ts during a union campaign. Clients are taught to be watchful for signs of union activity occurring within their organizations. Often, small businesses are not knowledgeable about the nuances of labor rules. For example, many don't realize that if, during a union "card check "campaign, an employee provides the cards to an unassuming manager and the manager inadvertently states that the signatures are legitimate, the manager could be recognizing the union.

Furthermore, according to the Labor Relations Institute[2], unions appear to be looking to organize smaller employers at a much higher rate than larger companies. In fact, companies employing fewer than 25 employees were 15 percent more likely to receive a union election petition in 2015 than 2014. During the same timeframe, employers with more than 25 employees saw no difference in the number of petitions filed. Now more than ever, small employers need the consultant and legal services provided by highly trained professionals to navigate the increasingly complex labor relations space.

Similarly, it's important to educate employers about "Union Salts" in the workplace. This is a legal tactic where a union could hire a person to apply for a job with a company, and, if hired, he or she would try to promote union organization from the inside. The person would be receiving pay from the company and also be on the payroll for the union. Salting is legal, and if a company finds out that a person is a salt, it is illegal to fire or discipline him or her for being a salt. Supervisors and managers need to be prepared for this potential dynamic in their workplace.

In addition, because an employer may not know whether a union organizing campaign is currently occurring within the organization before I conduct my training, I could be required to comply with

[2] http://lrionline.com/labor-relations-ink-january-2016/

the reporting requirements when I had no knowledge that the employer site was in the beginning stages of union organizing activity.

In the end, the reality is that many consultants, like myself, will protect themselves by broadly interpreting the rule's coverage and subjecting their own small business to significant reporting obligations. I, for example, will either have to report my services or choose not to serve my clients. In addition, some employers will likely avoid the reporting obligation by deciding to not train on labor relations, which will result in a significant disservice to the managers within the organization. Even making a clear decision not to include labor relations on a training agenda may not be enough to exempt us from reporting, as the open forum of most training sessions result in an attendee raising the subject on his or her own.

Practical Consequences for Employers and Employees

SHRM believes that employers should not encounter obstacles when reaching out to consultants and law firms on how to comply with the law when communicating with employees about unionization. Many have expressed concern that the information about funds spent on consultants will be used by unions to imply that employers are merely engaged in union avoidance rather than trying to communicate with employees about the direction of the workplace.

Key areas of concern with the final persuader rule include the impact on free speech; the chilling effect on employers seeking guidance, including legal advice; and the impact on employees and professional associations. I will now explore these topics in further detail:

Free Speech

The final rule will likely inhibit employer free speech in a number of ways. It will cause employers to think twice about seeking expert advice about their legal rights because they will have to disclose their strategy in detail. It will also cause consultants to leave the marketplace rather than report everything they do to DOL.

Companies confronted with labor relations situations often are uncertain as to how to respond. It is natural for the employer to turn to an expert for advice, including seeking help with how to lawfully communicate with employees. The final rule risks taking what has been previously considered consultant advice and redefining it as reportable "persuader activity." This conflation of advice into persuader activity will inhibit an employer's free speech as it causes the employer to wonder whether the use of an expert will be misrepresented by a union to imply or state that employers are adverse to the interests of their employees.

Chilling Effect on Employers Seeking Assistance

SHRM believes most employers seek advice when faced with an unfamiliar situation, not out of ideological reasons but because they want to ensure compliance with the law. Oftentimes companies do not know how to communicate about a particular problem and seek expert guidance. Seeking advice is not something that is limited to labor relations issues; companies seek advice on a myriad of matters, any one of which includes some type of communication. The overbroad rule will inhibit this process as it will lay bare all strategic decisions regardless of appropriateness and lawfulness.

Many HR consultants who are acting totally appropriately will not want to report their dealings and will cease to provide training on responding to union organizing campaigns. A strict read of the persuader rule indicates that conducting seminars for supervisors could trigger the newly expanded reporting requirements. For example, at SLS, I would definitely consider limiting the information about how to watch for signs of unionization in my supervisory training. This would be unfortunate because it is critical for new supervisors to fully understand how to lawfully react to a union campaign and to better understand labor relations in general.

The level of labor law complexity has dramatically grown over the past year or two with the implementation of the National Labor Relations Board's revised election rules, or "ambush elections," and changes to the joint employer standard and the definition of a bargaining unit with new "micro units." The final persuader rule is yet another challenging regulation which increases the possibility of employer's running afoul of collective bargaining rights and obligations. This is why the persuader rule is so damaging and can have a chilling effect on communication.

Impact on Legal Advice Provided to Employers

Another consequence of the final rule is that it could result in a decrease in the number of lawyers who provide legal advice to employers regarding obligations under the NLRA with respect to organizing and bargaining. Lawyers are held to a higher ethical standard than most, and are sworn to represent their clients according to the ethics of their profession. The rule would now mandate that lawyers violate that oath by reporting in detail not only the existence of their clients, but also the advice they give. The destruction of this privilege as envisioned by the rule will upend the lawyer-client relationship.

Impact on Employees

It is critical to not overlook how the final persuader rule will impact employees. SHRM believes that all employees and organizations benefit when supervisors are highly trained in effective employee management techniques. Supervisory training is critical in developing leaders to navigate ever-changing federal and state employment laws, which are growing in complexity by the day. Employers should be encouraged to provide training, yet the rule is likely to discourage small employers who are concerned about the potential onerous reporting requirements.

According to DOL, this rule will result in a total annual recurring burden of $1,263,499.50. SHRM believes that DOL has significantly underestimated the cost burden to employers, consultants, and small businesses, in particular. We believe there are hundreds of thousands of organizations that will be impacted by this rule or at least potentially because even if an employer doesn't have to report, employers and consultants will still have to determine whether they need to report. An estimate published by the Manhattan Institute predicted the total cost on the U.S. economy for the first year for the proposed rule to range between $7.5 billion and $10.6 billion[3].

DOL even agreed that it should consider the impact of the rule on certain entities that may be affected by the rule, even though they may not be required to file reports. DOL estimates

[3] http://www.manhattan-institute.org/html/high-costs-proposed-new-labor-law-regulations-5715.html

this activity to require a total of 60 minutes for consultants to read and apply the new requirements. But, I believe it will take many more hours for employers and their advisors to determine whether each particular piece of advice does or does not meet DOL's vague and overbroad test for persuader activity.

As a result, under increased reporting requirements, small employers—including myself—will be tempted to remove the labor union segments of training that could trigger the reporting. This would result in many supervisors being woefully unprepared for the appropriate way to address a union organization, resulting in increased complaints of unfair labor practices. This will be harmful to both employers and employees.

For smaller employers, the impact on employees will be even greater. Training and development for managers is critical to the organization, and oftentimes leaders are promoted within the organization from entry-level positions with little employment law experience.

Impact on Professional Associations and Organizations

Another significant concern SHRM raised about the proposed rule is that it was written so broadly that even professional and trade associations would need to report educational sessions on unionization (including employers attending those sessions). The final rule addressed some of these concerns.

Under the final rule, "presenters at union avoidance seminars must file persuader reports, but employers attending those seminars need not file such reports. Professional or trade associations do not have to file reports for hosting union avoidance seminars unless their employees are also serving as presenters. A professional or trade association is not required to report if it selects off-the-shelf materials for distribution to one or more employers, but it must report if its employees undertake direct or indirect persuader activities on behalf of employers."

Also, in response to comments, the final rule removes from the reporting requirements employee surveys and union vulnerability assessments. While SHRM appreciates some additional clarity, certain educational programs that SHRM offers to its members will be reportable under the rule. For example, SHRM's special expertise panels, including the SHRM Labor Relations Panel, often conduct webinars and presentations on the basics of the NLRA to educate the human resource profession about their rights and responsibilities under the law. Sometimes these sessions will also discuss how to prepare for potential union organizing activity.

Given all of these practical consequences of the rule for employers and employees, SHRM is pleased that a resolution has been introduced to address the persuader rule. SHRM thanks the leadership of the House Committee on Education and the Workforce, including Rep. Bradley Byrne (R-AL), for introducing a resolution (H.J. Res. 87) under the Congressional Review Act that would stop the rule, which is currently scheduled to go into effect this week. SHRM supports this resolution and appreciates the Committee's attention to an important workplace issue impacting both employers and employees.

Conclusion

Despite changes made to the final persuader regulation, SHRM believes the rule will likely inhibit employer free speech and may actually exacerbate poor employer practices as employers, especially small employers, could unintentionally commit violations of the law as consultants leave the field rather than report under these requirements.

As a consultant for small businesses, I remain concerned that the clients I serve may avoid seeking my training if the services are now reportable under the rule. I believe training strong supervisors helps the entire organization succeed. The rule can only lead to further confusion, and perhaps even more violations of the law, which runs counter to the objectives of the NLRA and the objectives of my consulting business to train strong supervisors for successful organizations.

Thank you again for inviting me to share my testimony today. I welcome your questions.

Chairman ROE. Thank you, Ms. Sellers. Mr. Newman, you are recognized for five minutes.

TESTIMONY OF JONATHAN NEWMAN, PARTNER, SHERMAN, DUNN, COHEN, LEIFER & YELLIG, P.C., WASHINGTON, DC

Mr. NEWMAN. Thank you, Chairman Roe, Ranking Member Polis, members of the subcommittee. My name is Jonathan Newman, and I am a shareholder in the Washington, D.C., law firm of Sherman, Dunn, Cohen, Leifer & Yellig. I appreciate the opportunity to appear before the Subcommittee today, and I do so in my individual capacity.

My law firm represents all types of labor unions, including the International Brotherhood of Electrical Workers, North America's Building Trades Unions, and the Major League Soccer Players Union, among others. I have been a member of the Bar since 1994, and I have also been a member of the American Bar Association since that time.

Justice Brandeis famously said, "Sunlight is said to be the best of disinfectants; electric light, the most efficient policeman." The persuader rule is a rule of transparency; it sheds light through disclosure, closing a massive loophole that has kept workers in the dark about hidden efforts to deny them union representation.

The LMRDA requires that when a labor relations consultant is retained by an employer to undertake activities or an object thereof, directly or indirectly, to persuade workers regarding their vote in a union election, that relationship and its terms must be disclosed.

That requirement, however, is, as the Education and Labor Subcommittee found in 1980, a virtual dead letter because no reports had to be filed where consultants operate behind the scenes without dealing with employees face-to-face. Anti-union consultants are well aware of this loophole.

Former consultant, Martin Jay Levitt, in his book, "Confessions of a Union Buster," said, "As long as the consultant deals directly only with supervisors and management, the consultant can easily slide out from under the scrutiny of the Department of Labor."

In a typical consultant-run campaign, the consultant prepares written scripts, written materials for supervisors to hand out, produces anti-union videos, and prepares speeches for management to deliver in closed-door captive audience meetings that employees are required to attend or they will be disciplined.

Consultants create a campaign and assert that the union is a third party outsider that will drive up the employer's costs. That is not advice, Mr. Chairman. That is drafting the game plan, that is choosing the plays to call, and that is directing management to carry them out. These anti-union campaigns are a product sold by a large anti-union consulting industry in the U.S.

Attached to my written testimony are examples of consultants' advertisements. One firm even promises a money back guarantee claiming, "IF YOU DON'T WIN, YOU DON'T PAY."

The persuader rule will make transparent the consultant's relationship so that workers may learn that the employer has itself, for example, retained a third party outsider to orchestrate its campaign. In short, the persuader rule will ensure that workers are no

longer kept in the dark, making the title of today's hearing, "The Administration's Attack on Worker Free Choice," seem particularly Orwellian.

Critics of the rule claim it is unfair because it requires employers and consultants to disclose but not unions, but unions have their own broad transparency obligations under the LMRDA. They must disclose, for example, the identity of the law firms and consultants they retain and report disbursements to those firms, no matter what the firms do, including if all they do is provide legal advice.

Mr. Chairman, this is a four-page report that must be filed under the persuader rule by employers. This is the two-page report that persuaders would be required to file under the persuader rule. This is one of our clients', the IBEW's most recent LM–2 annual report. It is 150 pages long. This is the AFL–CIO's most recent report required to be filed with the Department of Labor. It is hundreds of pages long.

The ABA claims that the persuader rule interferes with the attorney-client privilege and conflicts with model rules of professional conduct. The ABA made those same arguments in 1959 when Congress enacted the LMRDA. Congress rejected them then and it should do so now.

In addition, numerous courts have held that disclosing the information required by the persuader rule does not breach the attorney-client privilege. The rule is also consistent with State Bar ethics rules. The LMRDA is a Federal rule that trumps any conflicting State law governing any attorney conduct, and more importantly, ABA's Model Rule 1.6 on which they rely does not apply to disclosures that are mandated by law.

Finally, the persuader rule does not violate the employer's or consultant's right to free speech. The rule does not restrict any speech. In Federal election law cases, the Supreme Court has rejected First Amendment challenges to disclosure, finding that, "Transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." That, by the way, is from the Citizens United case.

The persuader rule enables the electorate, in this case, workers, to decide whether to choose union representation, and allows them to make informed decisions and give proper weight to messages from their employers.

Thank you, Mr. Chairman.

[The statement of Mr. Newman follows:]

STATEMENT OF JONATHAN D. NEWMAN, ESQ.

BEFORE THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT,

LABOR AND PENSIONS

UNITED STATES HOUSE OF REPRESENTATIVES

Hearing entitled "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice."

APRIL 27, 2016

I appreciate the opportunity to appear before the Subcommittee and express my views on the Department of Labor's Final Rule on the Interpretation of the Advice Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"). 81 Fed. Reg. 15924-16051 (March 24, 2016) ("Rule" or "Persuader Rule").

I am a shareholder in the law firm of Sherman, Dunn, Cohen, Leifer & Yellig, P.C. in Washington, D.C., and I am appearing today in my individual capacity. My firm's practice is dedicated exclusively to representing labor unions and their affiliated organizations. We represent unions across a wide array of industries, including construction, public utilities, telecommunications, manufacturing, broadcasting, government contracting, professional sports, as well as building security. Our clients include international offices of large labor organizations, as well as small local unions.

I have been a member of the bar since 1994, first in Ohio and then in the District of Columbia. My entire career has been spent as a labor lawyer, and I have always focused my practice on the representation of labor unions. I have been a member of the American

Bar Association ("ABA") since 1994, and am a member of its Section on Labor and Employment Law, as well as its Section on Litigation.

My testimony will focus on the following:

(1) The Rule is a rule of transparency that closes a massive loophole that has left workers in the dark with respect to indirect persuader activity.

(2) Labor consultants do not merely give advice, but instead craft the game plan and call the plays for anti-union election campaigns.

(3) Labor organizations already have broad transparency obligations under the LMRDA and report much more than that which is required of employers and consultants under the Rule.

(4) The Rule does not interfere with the attorney-client privilege and is consistent with the Model Rules of Professional Conduct governing attorneys' ethical obligations.

(5) The Rule does not violate the free speech rights of any entity that must report.

I. The Statute and the Rule

The Persuader Rule is a transparency rule. It does not limit or prohibit the activities of labor consultants, but instead ensures that, consistent with the LMRDA, indirect persuader activity is reported and transparent. As Justice Brandeis famously said, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67, and n. 80 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933)); *see also Master Printers of America v. Donovan*, 751 F.2d 700, 707-08 (D.C. Cir. 1984) (upholding constitutionality of Section 203(b) of the LMRDA).

In a typical anti-union campaign run by a labor consultant, the consultant will prepare: written campaign materials; scripts for supervisory personnel to use when talking to employees; anti-union videos; and speeches for upper-level management to deliver in

closed door captive audience meetings that employees are required to attend. Among the common tactics used by consultants is to have the employer's supervisors portray the company as "a family" from the top executive down to the lowest level employee, and assert that the union is an outside third-party interloper seeking to disrupt the family's harmonious relationship. The labor consultant may also design a campaign that claims that if the employees choose union representation, the employer would incur increased costs, damaging its ability to compete. These types of activities and claims are a routine part of the consultant's anti-union campaign playbook.

The Persuader Rule will, consistent with the intent of the LMRDA, make transparent the consultant's relationship. Employees may learn that the employer has, for example, itself retained a "third-party" to orchestrate its campaign and that perhaps the message from the employees' supervisors is not a reflection of the supervisors' views, but instead is being directed by that third-party. Moreover, the Persuader Rule will enable employees to evaluate an employer's claim of the alleged costs associated with union representation against the employer's expenditures to retain a consultant to persuade employees to vote against union representation. In short, the transparency mandated by the Rule will enable employees to make a more informed choice. The Rule will ensure that workers are no longer kept in the dark about their employers' use of anti-union consultants, making the title of today's hearing – "the Administration's attack on . . . worker free choice," particularly Orwellian.

Congress enacted the LMRDA in 1959 "to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers

and representatives . . . ." 29 U.S.C. § 401. In Title II of the LMRDA, Congress set forth reporting and transparency requirements for labor organizations, union officers, employees of unions, employers, and labor relations consultants. The Persuader Rule concerns the disclosure requirements set forth in Title II for employers and consultants.

Section 203 broadly requires employers and labor relations consultants to report on "any agreement or arrangement . . . pursuant to which [the consultant] undertakes activities where an object thereof, directly ***or indirectly***, is to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively." 29 U.S.C. §§ 433(a)(4) and (b)(1) (emphasis added). At the same time, Section 203(c) also states that this broad reporting requirement does not 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. § 433(c). Section 203 is "something less than a model of statutory clarity." *Wirz v. Fowler*, 372 F.2d 315, 325 (5th Cir. 1966). Therefore, it is the Department of Labor's responsibility to reasonably interpret the advice exemption.

The Department of Labor's prior interpretation of the advice exemption ignored the statute's requirement that not only direct, but also indirect, persuader activity must be subject to transparency and reported. The prior interpretation exempted from reporting any type of activity by the labor consultant, so long as the consultant had no direct contact with employees. 81 Fed. Reg. at 15933. That loophole resulted in vast underreporting of persuader activities, and did not go unnoticed by the consultant community.

> The law states that management consultants only have to file financial disclosures if they engage in certain kinds of activities, essentially attempting to persuade employees not to join a union or supplying the employer with information regarding the activities of employees or a union in connection with a labor relations matter. Of course, that is precisely what anti-union consultants do, have always done. Yet, I never filed with [the Department of Labor] in my life, and few union busters do . . . As long as [the consultant] deals directly only with supervisors and management, [the consultant] can easily slide out from under the scrutiny of the Department of Labor which collects the [LMRDA] reports.

MARTIN JAY LEVITT (WITH TERRY CONROW), CONFESSIONS OF A UNION BUSTER 41-42 (New York: Crown Publishers, Inc. 1993); 81 Fed Reg. at 15933.

The Persuader Rule closes that loophole and interprets the advice exemption in a manner that ensures that, while a consultant's advice remains exempt from reporting, that consultant's indirect persuader activity is transparent. The Rule relies on the plain meaning of the term "advice" and exempts from reporting the giving of advice, *i.e.*, an oral or written recommendation regarding a decision or course of conduct.[1] Therefore, for example, the Rule is clear that "an attorney or labor relations consultant does not need to report . . . when he counsels a business about its plans to undertake a particular action or course of action, advises the business about its legal vulnerabilities and how to minimize those vulnerabilities, identifies unsettled areas of the law, and represents the business in any disputes and negotiations that may arise." 81 Fed. Reg. at 15926.

Critics of the Rule who claim that it will force employers to report virtually all contact with advisors on union-related issues, or who assert that the Rule will deter small

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[1] Merriam-Webster Dictionary (on-line), defining "advice" as "recommendation regarding a decision or course of conduct." http://merriam-webster.com/dictionary/advice (accessed April 22, 2016).

businesses from seeking help to navigate labor laws, must not have read the Rule. The Persuader Rule could not be clearer: neither an employer nor a consultant need report when a consultant or attorney advises the employer on the employer's plans to take a course of conduct, including advice about labor laws. Any claim that the Persuader Rule, for example, will make it harder for small business owners to obtain advice about the legal rules governing labor relations, therefore, is simply mistaken.

Where, however, labor consultants or attorneys cross over and "manage or direct the business's campaign to sway workers against choosing a union – that must be reported." 81 Fed. Reg. at 15926. The Rule and the revised reporting forms provide clear instructions and examples with respect to what constitutes reportable persuader activity and what does not. For example, if an attorney confines him or herself to the traditional role of providing advice and counsel, or represents the employer in litigation, that attorney need not file a report under the Rule. If, however, the attorney chooses not only to provide legal counsel, but also to serve as a labor consultant by "developing and implementing the company's anti-union strategy and campaign tactics," that attorney has chosen not just to engage in the traditional practice of law, but also to provide the same services as non-lawyer labor consultants. In so doing, the attorney has the same reporting obligation as a consultant. 81 Fed. Reg. at 15931; John Logan, *The Union Avoidance Industry in the U.S.A.*, 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 651, 658-61 (2006) (describing the growth of law firms engaging in persuader activities that had often been performed exclusively by consultants); *see also Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1216

(6th Cir. 1985) (explaining that only when an attorney chooses to cross "the boundary between law and persuasion, [is he] subject to extensive reporting requirements").[2]

II. The Anti-Union Consultant Industry

I have represented unions in connection with numerous representation election cases. Those cases obviously involve union organizing campaigns. In my experience, employers in those campaigns often hire professional consultants to persuade their employees not to choose union representation. In promulgating the Rule, the Department of Labor relied on numerous academic studies to find that employers use such consultants in 71% to 87% of union organizing campaigns. 81 Fed. Reg. at 15933 and n. 10. As the Rule notes, however, employees often do not know that a third-party has been retained to orchestrate a non-union campaign. *Id.* at 15926. Nevertheless, in my practical experience, the evidence of the use of anti-union consultants in most union campaigns is overwhelming.

No matter the industry, the geographic region, or the size of the employer, the anti-union materials used in organizing campaigns undoubtedly make the same assertions, sometimes using identical language. For example, in almost all anti-union campaigns employers disseminate professionally produced materials in writing, via video, or through supervisor's statements: (i) warning employees not to sign union authorization cards; (ii)

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[2] Although the LMRDA includes criminal penalties if an employer, consultant, or union fails to file a report required under Title II of the LMRDA, a criminal penalty can only be imposed if the failure to file is "willful." 29 U.S.C. § 439; *United States v. Ottley*, 509 F.2d 667, 673 (2d Cir. 1975) (mere negligence is not enough to impose criminal liability for violating Title II of the LMRDA).

portraying the employer as a family, and stating that as such, the employer has "an open door policy" for its employees; (iii) asserting that the union is a "third-party" that will unduly disrupt the family and come between the employer and its employees; (iv) contending that the union is a "business"; (v) warning about strikes; (vi) stating that collective bargaining cannot force the employer to make any concessions; and (vii) claiming that the union will bring increased costs that will impede the employer's ability to compete.

Throughout the campaign, employers hold "captive audience" meetings at which employee attendance is mandatory and at which these messages are disseminated through scripted speeches and/or videos. Finally, approximately 24-hours prior to the election,[3] the employer inevitably holds a captive audience meeting at which it asks its employees "for another chance" and carefully implies that it will correct any problems that have led the employees to seek union representation.

During these campaigns, unidentified strangers are seen by employees shuttling in and out of meetings with management officials and first-line supervisors. Rarely, if ever, however, do these consultants meet with employees face-to-face. Instead, front-line supervisors the distribute professionally produced pamphlets, fliers, videos and other materials, all of which very clearly are for the purpose of persuading employees to reject union representation.

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[3] Under the National Labor Relations Act, an employer's captive audience meetings must cease 24-hours prior to the election. *Peerless Plywood*, 107 NLRB 427 (1963).

This campaign, "often formulaic in design," is no accident. *See* 81 Fed. Reg. at 15926. Instead, it is the product of an industry that has grown in size, and which in 1990 was estimated to produce revenues of $200 million a year. John Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA since the 1970s*, 33 INDUSTRIAL RELATIONS JOURNAL 197, 198 (2002).

A simple internet search using terms like "union avoidance" or "union consultant" wields a sea of businesses and law firms offering to provide services to employers that are faced with a request by their employees for union representation. Consultants boast about their "win rates" and one – Labor Relations Institute, Inc. – even offers a "guaranteed winner" proclaiming "YOU DON'T WIN, YOU DON'T PAY!" Another – Adams Nash Haskell & Sheridan – advertises on its website, "[w]hen employees begin to organize, it strikes fear into the heart of any organization. The good news? You have a powerful labor relations team of experienced union avoidance consultants in your corner." Adams Nash also proclaims at "95% win rate." Barnes & Thornburg LLP, a self-proclaimed "firm of more than 600 legal professionals throughout 13 offices" advertises on its web page that it provides "union avoidance" services and employers need not worry when "[a] union flyer was posted on one of your facility's employee bulletin board [sic] last night" because "we will get you through this." Another large law firm – Reed Smith – advertises that it "helps craft a strong drive against unionization."

The Burke Group, a consultant firm that Professor John Logan discussed at length in *The Union Avoidance Industry in the United States*, 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS at 655-58, advertises that it creates "custom campaign websites," offers "union

organizing response planning" and will "audit, train, coach, counsel and support the employees and employer during a union's campaign process." PTI Labor Research offers to create a wide array of campaign materials, including "campaign specific" vote no posters, paycheck stuffers, hats and t-shirts.

I have attached an addendum to these written remarks consisting of pages from the websites of eight firms: (1) Labor Relations Institute, (2) the Burke Group, (3) PTI Labor Research, (4) Adams Nash Haskell & Sheridan, (5) Barnes & Thornburg, (6) the Weissman Group, (7) Chessboard Consulting, and (8) Reed Smith, from which the excerpts above were recently taken. A search of the Department of Labor's on-line public disclosure room reveals only a tiny handful of LM-20 persuader reports filed by any of those firms. The on-line public disclosure room does not contain any reports from five of the firms; only one from Chessboard Consulting that was filed in 2007; a handful from the Burke Group, the most recent of which was filed in 2011; and a small handful from Labor Relations Institute, the most recent of which were filed in 2013. Each of those few reports concerned face-to-face persuader activity. No reports were filed for indirect activity. As the Department of Labor exhaustively outlined in the Rule, 81 Fed. Reg. at 15931-34, the prior interpretation of the advice exemption resulted in the consultant reporting requirements being a "virtual dead letter." *Id.* at 15934 (quoting *Subcommittee on Labor-Management Relations, H. Comm. On Education and Labor, Pressures in Today's Workplace* (Comm. Print 1980) at 27. The Persuader Rule revives that dead letter and ensures that peaceful and stable labor-management relations are promoted through transparency.

III. Union Transparency Requirements

Section 203(b) of the LMRDA requires consultants who, pursuant to an agreement or arrangement with an employer, engage in persuader activities, and employers who make such agreements or arrangements, to report their relationship and agreements. The LMRDA does not require identical reporting if a consultant is retained by a labor organization as part of that union's efforts to organize a company. Critics of the Rule claim this is unfair. Such criticism is completely misplaced because unions have extensive reporting requirements under a different provision of the LMRDA – Section 201, 29 U.S.C. §431. For example, among other reports, unions much file extensive annual reports. The Form LM-2 report is the annual report that must be filed by unions that have receipts of $250,000 or more. It requires those unions to provide detailed and itemized information concerning each disbursement to any person or entity of $5,000 or more, as well as all disbursements to any person or entity to whom $5,000 or more is disbursed in any fiscal year. In addition, the union report requires unions to disclose salaries and disbursements for all of its officers and employees. Further, the reporting on the union report must be organized and disclosed by functional category, including representational activities that concern organizing or collective bargaining. These reports often consume hundreds of pages, compared to the revised four-page LM-10 form for employers, and the two-page LM-20 form for consultants that must be filed under the Persuader Rule if an employer retains a consultant to perform direct or indirect persuader activity.

Thus, unions already report much more than that which may be required by consultants and employers under the Rule. For example, payments to counsel for the union must be reported if they total $5,000 or more, irrespective of whether those payments are for persuader activities, or for providing traditional legal advice. Moreover, those payments must be disclosed even if counsel's advice has nothing to do with an organizing campaign or collective bargaining. Further, the salaries of union officers and union organizers must be reported by their union. The Persuader Rule does not require an employer that retains a consultant to report the salaries of the employer's executives, let alone those of the first-line supervisors who often carry out the consultant's anti-union game plan. Moreover, the Department of Labor's On-line Public Disclosure Room not only makes unions' reports searchable, but entities that receive payments from any union may be searched by payee so that, for example, one can see the amounts paid to, and the clients for which, union attorneys perform services of any type.

In my experience, just as it is inevitable that a third-party labor consultant will prepare materials for employers to give to their employees referring to the union as an outside "third party," so too will those consultants prepare campaign materials based on the union's reports that must be filed with the Department of Labor. I have seen several fliers referring, for example, to the salaries paid to union officials – information the consultant obtains from the union's reports.

Indeed, the use of unions' reports has long been part and parcel of the consultant playbook. Martin Jay Levitt explained that the LMRDA's reporting requirements imposed on unions are a great asset to labor consultants.

> "Wow. Union busters couldn't have asked for a bigger break. For the first time, detailed, timely information on the inner working and finances of unions and labor leaders would be available to consultants and attorneys for the price of a photocopy. Thank you Congress."

CONFESSIONS OF A UNION BUSTER at 41. Mr. Levitt also explained that he had easily avoided any reporting.

> "[O]ur anti-union activities were carried out in backstage secrecy; meanwhile we gleefully showcased every detail of union finances that could be twisted into implications of impropriety or incompetence."

Id. at 42.

The relevant point is not that consultants should be prohibited from using the reports filed by unions under the LMRDA. Union financial reports play a role in furthering the LMRDA's goal of promoting union self-government. The reporting scheme designed by Congress in Title II of the LMRDA, however, was not meant to be a one-way proposition. In promulgating the LMRDA, Congress recognized that:

> "[I]f unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees . . . ."

81 Fed. Reg. at 15934 (quoting S. Rep. 187 at 39-40, 1 LMRDA Leg. Hist. at 435-46).

IV. The Persuader Rule does not Require Attorneys to Breach the Attorney-Client Privilege or Their Broader Ethical Duties

The Persuader Rule modifies and narrows the advice exemption, and thus makes transparent a wider array of persuader activity. The scope of the information that is required to be reported once the reporting obligation is triggered, however, is not changed substantively by the Rule. Revised Form LM-20, which is required to be filed by a

persuader within 30 days of entering into an agreement or arrangement with an employer to conduct persuader services, requires attorneys engaged in persuader activity to report (1) the client's identity; (2) the nature of the fee arrangement; and (3) a description of the nature of the services agreed to be performed. If the attorney provides legal advice, in addition to persuader services, the attorney need only note that portion of services as "legal services." 81 Fed. Reg. at 16050-51, 16046.[4] The persuader must also attach a copy of its agreement with the employer for which it is providing persuader services. Those elements have long been required on Form LM-20, and have withstood legal challenges.

Section 204 of the LMRDA provides that the Act's reporting requirements shall not be construed to require an attorney to report information subject to the attorney-client privilege.[5] In enacting §204, Congress sought "to accord the same protection as that

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[4] The Form LM-21 is an annual report that must be filed by consultants that engage in persuader activity. In other words, if a Form LM-20 activity report must be filed by a consultant, that consultant must also file an LM-21 annual report. On the annual report, the consultant must report all receipts from employers in connection with labor relations advice or services regardless of the purpose of the advice or services. The Persuader Rule did not address or change the LM-21 annual report requirements. Nevertheless, on April 13, 2016, the Department of Labor issued a non-enforcement policy pursuant to which it will not enforce the requirement that consultants' report on the LM-21 annual report their receipts from employers and their disbursements to their officers, employees, contractors or vendors.

[5] Section 204 states: "Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of an attorney-client relationship." 29 U.S.C. § 434.

provided by the common-law attorney-client privilege." *Humphreys*, 755 F.2d at 1219 (6th Cir. 1985).

The attorney-client privilege broadly protects from disclosure communications between an attorney and his or her client. *E.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The scope of the privilege is not, however, without limitations. It is well-settled that, with limited exceptions that do not apply here, the existence of an attorney-client relationship, the identity of an attorney's client, the terms of a fee arrangement, and the details regarding the scope and nature of the attorney-client relationship, are not subject to the privilege. *E.g.*, *United States v. Kingston*, 971 F.2d 481, 491 n.5 (10th Cir. 1992) (noting that testimony by an attorney concerning the client's identity and the source of legal fees would not constitute a violation of the privilege); *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063 (9th Cir. 1987) (holding that information regarding a fee arrangement was not privileged); *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 247-48 (2d Cir.) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986) (explaining that the Second Circuit has "consistently held" that client identity and fee information are not privileged); *Condon v. Petacque*, 90 F.R.D. 53, 54 (N.D. Ill. 1981) (explaining that the attorney-client relationship and the dates on which services were performed are not privileged); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D.N.Y. 1979) (explaining that the purpose for which a lawyer was retained is not protected from disclosure by the attorney-client privilege).

It is not surprising, therefore, that courts have long held that the information required on the Form LM-20 consultant activity report – which the proposed rule does not

substantively modify – is not protected by the attorney-client privilege. In *Humphreys,* 755 F.2d at 1219, for example, the Sixth Circuit held that, "none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege." Accord *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), *overruled in part on other grounds*, *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969).

The elements to be reporting under the Rule are similar to those required under Internal Revenue Code Section 6050-1 when an attorney is paid more than $10,000 in cash by a client. Revenue Code 6050-1 states that, "[a]ny person . . . engaged in a trade or business, and who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" must file a return specified as IRS Form 8300. 26 U.S.C. § 6050-I.

Form 8300 requires the filer to provide the name, address, date of birth, taxpayer identification number, and occupation, profession, or business of the individual from whom the cash was received. *See* IRS Form 8300, available at https://www.irs.gov/pub/irs-pdf/f8300.pdf (last visited April 21, 2016). The form also requires the filer to provide a description of the transaction, including a specific description of any services provided. *Id.* Finally, the filer must verify the identity of the person from whom the cash was received. *Id.*

Section 6050-I's reporting requirements apply to attorneys, and legislative and judicial efforts to exempt attorneys from the reporting requirement have failed. For example, Congress has rejected efforts by, among others, the ABA to amend the law to exempt attorneys. *See* Ellen S. Podger, *Form 8300: The Demise of Law as a Profession*, 5

GEO. J. LEGAL ETHICS 485, 492 and n.45 (1992). Likewise, in promulgating regulations implementing Section 6050-I, the IRS specifically rejected the argument that attorneys should be excluded from the reporting requirements. 56 Fed. Reg. 57974, 57976 (Nov. 15, 1991).

Federal courts of appeals have consistently rejected arguments that Form 8300 requires the disclosure of information subject to the attorney-client privilege. *E.g., United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-05 (2d Cir. 1991) (holding that Section 6050-I does not conflict with the traditional attorney-client privilege); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995). In doing so, those courts have recognized that "[t]he identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-client] privilege." *Leventhal*, 961 F.2d at 940 (quoting *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982)).

Thus, although the Rule will require more consultants and attorneys to report under Section 203(b) of the Act, the scope of the information to be reported by those consultants and attorneys remains unchanged by the Rule. The information required simply is not protected by the attorney-client privilege.[6]

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[6] The Rule recognizes that there may be rare, exceptional circumstances where the disclosure of some information may be privileged. For example, to the extent that an agreement or arrangement between an attorney and an employer may disclose privileged communications, the privileged matters are protected from disclosure. 81 Fed. Reg. at 15995.

Courts also have rejected claims that such information although not protected by the attorney-client privilege, is nevertheless confidential information that cannot be divulged under state bar ethics rules. These state rules require attorneys to maintain client confidences, even if the confidences are not subject to the attorney-client privilege. For example, the ABA *Model Rules of Professional Conduct* provide in Rule 1.6 that "[a] lawyer shall not reveal information relating to representation of a client . . . ." This prohibition, while broader than the attorney-client privilege, is not applicable with respect to the Persuader Rule. Very simply, where disclosure is required by federal law, the Rule 1.6 restrictions do not apply. The Rule, therefore, is completely consistent with state bar ethics rules that may govern attorneys that engage in persuader activity.

Rule 1.6(b)(6) provides, "[a] lawyer may reveal information relating the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or a court order." Therefore, where disclosure is required by federal law, courts have consistently held that Rule 1.6 does not shield attorneys from reporting requirements.

In *United States v. Monnat*, 853 F.Supp. 1304 (D.Kan. 1994), for example, the court considered whether an attorney could be compelled to comply with the reporting requirements mandated by Internal Revenue Code Section 6050-I, discussed above. The court referred the matter to the court's Committee on Attorney Conduct, which concluded that "[a] lawyer does not act unethically by complying with Section 6050-I or an order of the court directing compliance because he is permitted under Rule 1.6(b) to disclose otherwise confidential information when he reasonably believes disclosure is required by

law or order of court." *Id.* at 1809. Likewise, in *Blackman*, 72 F.3d at 1424, the court ruled that attorneys are not exempt from Section 6050-I's reporting requirement, explaining that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements[.]" (quoting *United States v. Sindel*, 53 F.3d 574, 577 (8th Cir. 1995)). The courts have, therefore, consistently found that Section 6050-I's reporting requirements do not contravene state ethics rules such as Model Rule 1.6.

The LMRDA is another such federal law, and compliance with its reporting requirements is not at all inconsistent with Model Rule 1.6. Nothing in the Act indicates that Congress intended that state ethics rules should protect from disclosure the information that must be reported by employers and consultants. Indeed, the opposite is true. The legislative history of the LMRDA reveals convincingly that such protections for attorneys were considered and rejected.

The House version of LMRDA Section 204 adopted almost verbatim a proposal from the ABA and would have protected from disclosure "any information which is confidential" between an attorney and client, "including but not limited to the existence of the relationship of attorney and client, the financial details thereof, or any information obtained, advice given, or activities carried on by the attorney within the scope of the legitimate practice of law." H.R. 8342, 86th Cong., 2d Sess. § 204 (1959), U.S. Cong. & Admin. News 1959, p. 2318. In conference, however, Congress rejected that language, enacting the much narrower protection afforded by Section 204, which Congress intended "to accord the same protection as that provided by the common-law attorney-client

privilege." *Humphreys,* 755 F.2d at 1219; *see* discussion in the Rule at 81 Fed. Reg. at 15992-98. Thus, for the purpose of Model Rule 1.6 and similar state ethics laws, the LMRDA does not contravene those laws, nor require an attorney who engages in persuader activity to face the Hobson's choice of complying with the LMRDA but not his or her state ethics rules.

V. The Rule does not Unconstitutionally Infringe on the First Amendment Rights of Consultants or Employers, nor is it Inconsistent with Section 8(c) of the National Labor Relations Act

The Persuader Rule does not outlaw any type of activity engaged in by consultants or employers. It "does not regulate in any way the content of any communications by the consultant or the employer, the nature of such communications, or their timing." 81 Fed. Reg. at 15984.[7] Critics of the Persuader Rule contend that the Rule nevertheless will unconstitutionally chill consultants conduct because a consultant's arrangement or agreement with its client employer will now be transparent. Those arguments have been made to numerous courts and have been rejected in each instance. *Humphreys*, 755 F.2d at 1223 (rejected a law firm's First Amendment challenge to Section 203(b) and citing the numerous courts that had rejected similar challenges). As the Department of Labor explains in detail, the Persuader Rule bears a substantial relation to important governmental

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[7] By contrast, the National Labor Relations Act, as interpreted and enforced by the National Labor Relations Board, regulates the conduct of employers and unions, and establishes unfair labor practices for both. Thus, for example, if a consultant engages in persuader activity, the LMRDA only requires disclosure of that arrangement, whereas the NLRA regulates the conduct the persuader can and cannot engage in. *E.g.*, *Exelon Generation*, 347 NLRB 815, 832 (2006) (election set aside due in part to objectionable conduct by the employer's labor consultant).

interests. Indeed, in rejecting a First Amendment challenge to Section 203, the Sixth Circuit held that disclosure by consultants and the employers that retain them is "unquestionably 'substantially' related to the government's compelling interest" in deterring improper activities. *Humphreys*, 755 F.2d at 1222.

The Supreme Court's opinions concerning federal election law also support the Rule. An often overlooked aspect of the Supreme Court's *Citizen United* case is that the Court rejected challenges to federal election law disclosure requirements. In *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-71 (2010), Citizens United not only challenged the prohibition on the use of corporate monies to make independent expenditures that expressly advocate for federal candidates, but also challenged certain disclosure requirements under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). At issue was the BCRA's requirement that any person who spends more than $10,000 on electioneering communications within a calendar year must disclose the identity of the person making the expenditure, the amount, the election to which the communication was directed, and the names of certain contributors. 558 U.S. at 366.

The Court rejected the challenge to those disclosure requirements. In doing so, it recognized that, "disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." 558 at 366 (citation and internal quotations omitted). Rather, "disclosure could be justified based on 'providing the electorate with information' about the sources of election-related spending." *Id.* at 367 (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). Thus, the Court concluded, the "First Amendment protects speech; and disclosure permits citizens and

shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 558 at 371.

The Persuader Rule is fundamentally no different. It is a rule of transparency. It enables the electorate – in this case employees deciding whether to choose union representation – to make informed decisions and give proper weight to persuader messages from their employer. Therefore, any claim that the Rule unconstitutionally interferes with employers or consultants' First Amendment rights is mistaken.

Citizens United and the Supreme Court cases upholding disclosure requirements recognize that, although speech may be protected, it does not mean that it cannot trigger disclosure. The same holds true for speech protected by section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c). That provision states that the expression of "any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." The Persuader Rule does not limit in any manner what an employer may say during a union election campaign. It does not make any employer statement an unfair labor practice. Therefore, it in no way conflicts with Section 8(c) of the National Labor Relations Act. Indeed, the Department of Labor has long held the view that Section 8(c) cannot excuse the reporting required under section 203 of the LMRDA. 29 C.F.R § 405.7. Although Section 8(c) may protect certain employer speech from violating federal labor law, it does mean that such speech cannot be the basis of a transparency requirement. That is particularly true where such transparency leads to a more informed electorate,

which is entirely consistent with the National Labor Relations Act's purpose of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. Section 8(c) of that same law cannot be read to require workers to be kept in the dark about their employers' use of anti-union persuaders.

Chairman ROE. Thank you, Mr. Newman. Mr. Robinson, you are recognized for five minutes.

TESTIMONY OF WILLIAM ROBINSON, MEMBER, FROST BROWN TODD LLC, FLORENCE, KY

Mr. ROBINSON. Thank you, Mr. Chairman, Ranking Member Polis, and distinguished members of this subcommittee. Thank you for this opportunity to testify before you.

I am here to express my intense concerns over the Department of Labor's new so-called "persuader rule." The new rule rejects the protection of confidentiality for attorney-client communications embodied in the advice exemption of the *Labor-Management Reporting and Disclosure Act*, as recognized by President John F. Kennedy's administration in 1962, and consistently followed for more than 50 years, until now.

When the Department of Labor first proposed this new rule in 2011, I wrote to the Department as president of the American Bar Association expressing the ABA's concerns. That letter expresses ABA policy then and now. It is Attachment B to my written statement.

Today, however, I speak only for myself, and I want to emphasize that. As Chairman Roe indicated, Paulette Brown, the current distinguished president of the American Bar Association, has submitted to this committee a written statement on behalf of the ABA expressing the ABA's continued concerns about the new administrative rule.

Many Bar associations have also spoken out against the new rule, and some of them are listed in Attachment A to my written statement.

The overriding concern here is the best interest of clients, not the best interest of lawyers. In *Upjohn Co. v. United States*, decided in 1981, the Supreme Court taught us that the purpose of the attorney-client confidentiality is, "To encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."

Client confidences are protected by the ethical rules applicable to lawyers. Model Rule 1.6 prohibits lawyers from revealing any information relating to the representation of a client, unless the client gives informed consent or certain narrow exceptions exist.

For over 50 years, the Department of Labor has consistently followed the Kennedy administration's interpretation of the advice exemption. The Kennedy Administration's exemption—interpretation rather—excludes from regulation and reporting all advice of attorneys to their employer clients. On the other hand, the act does not protect and does require reporting when an attorney communicates directly with a third party, namely the client's employees.

The new law abandons the Kennedy Administration's bright line test. Instead, the new law substitutes a subjective arbitrary standard. This new standard administratively allows the Department of Labor to investigate any confidential communication to determine if that communication has the object to persuade the employees, even directly, to support the client's position.

From what my labor partners tell me, few workplace decisions or communications are made in a vacuum without some concern for how employees may respond.

For employers without a union, the employer may be pursuing the lawful objective of avoiding the union. For employers with a union, the employer's lawful objective may be to maintain harmony in its relationship with the union and its members. In either case, the interaction between the law and the employer client's goals are the labor lawyer's responsibility to navigate in order to ensure legal compliance.

Especially troubling here is the ethical dilemma created by enforcement of the new rule. How can labor lawyers defend against accusations that they have violated the new rule? There really is only one answer. Disclosure will be required as to the purpose and content of the otherwise confidential communications.

The new administrative rule must not be allowed to, in effect, wipe out the statutory advice exemption that Congress expressly, purposely, and explicitly included in Section 203 of the Act. The rule of law in America has been built on the cornerstone of the client-attorney confidentiality, and unless defeated, the new administrative rule will undermine in the context of labor relations the confidentiality so essential to effective attorney-client communications.

Your support and vote for Congressman Byrne's House Joint Resolution 87 and for all other legislative efforts to defeat this rule are respectfully requested. Your leadership is needed. The labor law in labor law matters hangs in the balance.

Thank you again for this special opportunity to address this subcommittee.

[The statement of Mr. Robinson follows:]

Statement

By

Wm. T. (Bill) Robinson III
Attorney at Law
Member, Frost Brown Todd LLC

President (2011-12)
American Bar Association

Before the
Subcommittee on Health, Employment, Labor and Pensions
House Education and the Workforce Committee

April 27, 2016

Hearing on

The Department of Labor New Rule on the Labor-Management Reporting and Disclosure Act; Interpretation of "Advice" Exemption



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Introduction.

Good morning Chairman Roe, Ranking Member Polis, and distinguished members of this Subcommittee. Thank you for this opportunity to testify before you on a subject of such great importance to the Rule of Law in this country. It is a privilege for me to express for your consideration my intense concerns over the Department of Labor's new Rule redefining what attorney communications constitute "advice" to their clients within the meaning of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 433 (1982).

I am Bill Robinson. From September 1, 2011 through August 31, 2012, I had the honor and privilege of serving as President of the American Bar Association. I want to make it clear, however, that in this Statement, I speak only for myself and not for the ABA. Many bar associations across the nation have also spoken out in opposition to the new Rule. I provide a list of those bar associations in **Attachment A** to these comments.

As you know, the Department of Labor first issued an earlier version of the new Rule that is the subject of this Hearing, on June 21, 2011. At that time, the ABA very carefully studied the Rule as proposed and concluded that the Rule would undermine fundamental legal and ethical principles that have made the American judicial system the gold standard for the administration of justice throughout the world. Although the Department has now made some minor, cosmetic changes to the Rule as originally proposed, the new Rule still retains the provisions of its original version that were of such great concern to the American Bar Association in 2011.

On September 21, 2011, as President of the American Bar Association, I wrote to the Department of Labor on behalf of the ABA. I have provided to you a copy of that letter as **Attachment B** to these comments. That letter explains why the ABA reacted publicly with such "serious concerns" about the Rule in September, 2011. That letter at the time, reflected ABA policy going back to 1959 and still represents ABA policy to this day with regard to the importance of client-attorney confidentiality as the cornerstone of the Rule of Law.

As you know, a member of your Subcommittee, Representative Bradley Byrne, has already introduced a resolution under the Congressional Review Act (H.J.Res.87) that would reverse the new DOL Rule due to a variety of legal and public policy objections to the new Rule. Moreover, litigation has been filed in at least three federal courts across the country challenging the legality of the new Rule on many legal grounds. I am not, myself, an expert on administrative law or labor law. Nor do I offer expertise in labor-management relations. I am here primarily because of the new Rule's destructive impact upon the confidential relationship between attorneys and their clients that is so essential to the American system of justice. I, therefore, focus this Statement primarily on the new Rule's attack on client attorney confidentiality in labor relations matters.

From my perspective, the new Rule is not a labor-management matter. I am not here to choose sides in a labor dispute. What is before this Subcommittee is essentially an attorney-client matter involving the essential ingredient for effective legal advice - i.e., client attorney confidentiality - to assure compliance with the law and avoidance of non-compliance. I speak as an individual attorney in my 45th year of law practice with knowledge of the ABA's Model Rules of Professional Conduct. The confidentiality of attorney client communications ensures that the citizens of the

United States, including the corporate managers of businesses, large and small, have the effective assistance, guidance and needed advice of counsel. Without the effective, confidential advice of legal counsel, our system of justice would fail to effectively serve our society and respect for the Rule of Law would melt away. This has been true throughout the history of the United States. It remains true today.

"Confidentiality of Information" Required by Rules of Professional Conduct and the Law.

Client confidential communications with their lawyer are protected by the ethical rules applicable to lawyers. The American Bar Association adopted the Model Rules of Professional Conduct in 1983. Those rules have served as models for the lawyer ethics rules of most states today. Similar rules requiring lawyers to maintain clients' confidences were set forth in the Model Code of Professional Responsibility adopted by the ABA in 1969 and the Canons of Professional Ethics adopted by the ABA in 1908. Model Rule 1.6 prohibits lawyers from revealing any information relating to the representation of a client, unless the client gives informed consent, or certain narrow exceptions exist. In adopting the rule, the ABA House of Delegates recognized that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." ABA Model Rule of Professional Conduct 1.6, cmt. 2.

Client attorney confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship." *Id.* The rule of confidentiality is important not only for clients and their lawyers, but for society as a whole. Protecting communications between lawyers and their clients encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.* Only if a lawyer has complete and candid information from a client is the lawyer able "to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." *Id.*

The Model Rules of Professional Responsibility, Rule1.6, protects as confidential, communications between a lawyer and a client. Moreover, in litigation and other contested proceedings, all communications between lawyer and client enjoy privileged confidentiality. Those rules of client-attorney confidentiality are a matter of ethical responsibility. The privilege of client attorney confidentiality associated with litigation is essential to the proper functioning of the American legal system. They ensure that clients can obtain the advice they need to fulfill their legal obligations. The best interests of clients, not lawyers, are the overriding concern and focus at stake here.

Historically, the attorney-client confidentiality and privilege has deep roots in Anglo-American law. The privilege is first mentioned in the English case *Berd v. Lovelace*, which was decided in 1577—thirty years before the settlement of Jamestown. 21 Eng. Rep. 33 (1577). The doctrine of confidentiality continued to develop and, in the nineteenth century, an English court held that "[t]he first duty of an attorney is to keep the secrets of his clients." *Taylor v. Blacklaw*, 132 Eng. Rep. 401, 406 (C.P. 1836). The attorney-client privilege is also well established in American law. The Supreme Court has recognized that "[t]he attorney-client privilege '[i]s the oldest of the privileges for confidential communications.'" *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Attorney-client confidentiality and privilege continues to be a vital doctrine in American law not simply because of its deep roots in our legal system, but also because it ensures the proper functioning of our system of justice. As our Supreme Court has explained, "[i]ts purpose is 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.* The American legal system preserves the confidentiality of client communications because without confidentiality, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Attorney-client confidentiality is more about the client that about the lawyer. The client's need to receive confidential advice about what not to do, is an essential aspect of effective legal advice.

The New Rule Will Undermine the Confidential Attorney-Client Relationship.

For over 50 years, the Department of Labor has interpreted Section 203(c) of the Act, 29 U.S.C. § 433(c), generally referred to as the "Advice Exemption," as excluding from regulation under the Act all communication between attorneys and their employer-clients. **The Act's regulation** and public exposure **of attorney communications** on the subject of labor relations **arose only where a lawyer communicated directly to the client's employees**. The Department of Labor announced this interpretation of the Advice Exemption during the administration of President John F. Kennedy. Senator Kennedy had co-sponsored the Act including the Advice Exemption.

The Kennedy Administration's understanding of the Advice Exemption faithfully follows the language and purpose of Section 203(c) of the Act itself, which plainly 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 question arising thereunder.

29 U.S.C. § 433(c) (emphasis added.). The new Rule however, will effectively strike from the Advice Exemption its most fundamental, essential provision: namely, confidentiality for an attorney's advice to an employer client concerning the employer's labor relations. Through this means, the new Rule would essentially nullify and render meaningless the statutory "Advice Exemption" that Congress expressly included within Section 203 of the Labor-Management Reporting and Disclosure Act. It would set a trap for attorneys whose responsibility it is to advise members of an entire class of clients – every person and business creating jobs in America.

The new Rule will comprehensively circumvent and effectively undermine the Advice Exemption by imposing a limitation on the very purpose and scope of attorney client legal advice that for over 50 years has qualified for the statutory Advice Exemption. **The new Rule** is so broad and ambiguous that it, in effect, **will administratively erase the statutory Advice Exemption.** No longer will a **bright line** make clear who is in compliance and who is in violation. And in the face

of any charge brought for alleged violation of the new Rule, a defense would require disclosure of confidential client attorney communications in order to mount a defense.

Under the new Rule, otherwise legal advice in compliance with the statue itself, will now actually trigger administrative disclosure under the LMRDA ...even though that advice is offered only to the attorney's client ... in all instances where the advice of the lawyer furthers the employer client's "object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions concerning his or her representation or collective bargaining rights." I'm quoting directly from the "Instructions for Form LM-20," attached to the Proposed Rule. Form LM-20 is one of two forms that the Proposed Rule would require attorneys to complete and file with the Department of Labor, as a means for the DOL to review and regulate attorney client advice and communications.

As indicated earlier, I do not practice labor relations law. Nevertheless, one does not have to be a labor lawyer to recognize that the proposed Rule's regulation of all attorney client communications that contain any "object to persuade" or "affect an employee's decisions" takes away, as a practical matter, the Advice Exemption's most basic protection – the confidentiality of attorney-client communications. Attorneys responsible for representing employers are not law professors opining about hypothetical legal questions. The role of attorneys representing employer clients, like the role of all lawyers, includes the responsibility to advise and assist their clients on how to lawfully achieve the client's lawful goals. Similarly, a labor lawyer's responsibility includes counseling clients against unlawful goals and against unlawful means of pursuing even lawful goals. Few workplace decisions or communications are made in a vacuum without some concern for how employees may react. Thus, from what my labor law partners tell me, whenever a labor lawyer is consulted by management about any proposed workplace action, strategy, issue or communication, one dimension of any management decision that the attorney must consider is whether and how the employer can or possibly would, directly or indirectly, thereby "persuade" employees to react favorably.

The DOL's new Rule focuses much emphasis on employee decisions as to whether to choose union representation. However, neither the DOL, nor anyone else to my knowledge, has suggested that it is either unlawful or unethical for an employer to seek to persuade its employees on the advantages or disadvantages of being represented by a union, or a particular union, provided that the employer pursues this "object to persuade" within lawful bounds as established by the National Labor Relations Act. Employers, small businesses and large corporations alike, must look to their legal counsel to insure they stay within the bounds of the law. It is unrealistic, if not disingenuous, however, to suggest that a labor lawyer can effectively help her/his client pursue this lawful objective by giving "legal advice" divorced from the client's lawful objective.

The scope of the proposed Rule, moreover, extends far beyond union organizing campaigns and even into the entire field of "labor relations." Employees who are not represented by a union are always free to choose union representation. Almost every workplace action or communication can influence this decision in that regard. So, employers (and their lawyers) desirous of avoiding unions are always cognizant of how their management actions and communications may potentially impact this objective. On the other hand, employees represented by a union choose whether to support or oppose their union's collective bargaining proposals, contract administration, handling of grievances, and all other aspects of collective bargaining. Union members express their preference through ratification votes, election of union officers, and at

union meetings. Union officials must listen to the opinions of their members or they are soon replaced. Any employer who seeks harmonious labor relations must take into account how the union and its members will react to workplace actions and communications.

Accordingly, almost every management objective of an employer includes, directly or indirectly, some "object to persuade" employees to support, or at least accept, the employer's actions. A labor lawyer cannot, as a practical matter, divorce her/himself from consideration of how the lawyer's advice furthers or detracts from her/his client's lawful objectives. Less than this is not effective assistance of counsel. In providing advice, a labor lawyer can no more separate legal advice from her/his client's "object to persuade" than a lawyer drafting a Last Will and Testament can separate probate and tax advice from the client's objectives in disposing of his or her property.

The New Rule's Enforcement Will Negate the Confidentiality of Legal Advice on Labor Relations Law, Thus Hurting Legal Compliance.

Especially troubling is the ethical dilemma created by enforcement of the new Rule. How can and will the Department of Labor enforce its new Rule? How can labor relations attorneys defend against accusations by DOL that they have violated the new Rule? There is only one answer. To enforce the new Rule, the Department of Labor will have to inquire into all advice and communications passing between the lawyer and her/his client on the subject of labor relations, and perhaps other employment-related topics.

The DOL will have to examine whether the client asked her/his attorney to consider the relative persuasive impact of two equally lawful courses of action or communication. What was in the lawyer's mind when she/he made a particular recommendation, or prepared, approved, or recommended a change to a particular document? Did the lawyer in any way join in her/his client's "object to persuade" employees to accept the employer's proposals or somehow "affect an employee's decisions" in collective bargaining, or decide for or against union representation? What did the client communicate to the lawyer about the purpose of a particular employment policy, practice, rule, or benefit that the attorney is asked to review? Did the client ask for, and did the lawyer opine about, her/his experience or opinion on whether a particular communication or action under consideration might, directly or indirectly, have any "persuasive" impact upon employees?

The breadth of the proposed Rule opens up to public and administrative disclosure and scrutiny virtually every confidential, attorney-client communication with management on the subject of labor relations since virtually every attorney client communication about labor-relations *could* involve the lawyer in her/his client's "object to persuade" the client's employees or somehow "affect an employee's decisions." Will the genuine risk and potential that client communications will have to be disclosed to the Department of Labor restrict and compromise what some clients will disclose to their attorneys? Of course it will. Will this cause some employers to risk proceeding with some actions or communications without the benefit of legal counsel? Only the naïve would suggest otherwise. The result will be far less compliance, and less rule of law.

The employers most effected will be the many, many small businesses that provide the largest share of jobs in the United States. Large corporations may be able to turn to their own in-house legal departments for legal advice on labor relations issues. As employees of their client, in-house

counsel are not subject to proposed Rule. The large corporations that they advise trigger no reporting requirement when they consult their in-house counsel, and face to risk that their confidential communications with their in-house lawyer will have to be disclosed to the Department of Labor.

Small businesses, on the other hand, will have no such option. Their dilemma will be to either act without legal advice, or take the risk that any legal question they ask, and any action they disclose, to their outside legal counsel will ultimately have to be disclosed to the Department of Labor. In short, the right of small business to receive confidential legal advice on labor relations matters will be gone.

Conclusion

The ends of justice and the Rule of Law are never well-served when lawyers and their clients cannot communicate with full candor and complete confidence in the confidentiality of their communications. The new DOL administrative Rule undermines, in the reality of every day labor relations, the critically important confidentiality that is the *sine qua non* of effective attorney-client communications. Moreover, if the new Rule stands, there is little reason to assume that other governmental agencies, at the federal or state level, will not similarly infringe upon the confidentiality of attorney-client communications with arguments similar to those advanced in support of this new DOL Rule.

Could not law enforcement agencies argue that they could better identify and suppress criminal activity if criminal defense attorneys had to report the identity of their clients and the amount of fees paid whenever an attorney is consulted with a particular lawful, but disfavored, "object" in view? Under other circumstances, and perhaps under future administrations, the precedent set by this new DOL Rule not only may, but is likely to, yield consequences unforeseen and unforeseeable today.

What is certain now is that this new DOL Rule will comprehensively undermine and effectively erase the time-honored purpose and historically protected value of attorney client confidentiality. Attorney client confidentiality has been recognized and respected for over 50 years under the MLRDA. Attorney client confidentiality has been consistently upheld "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." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

This new DOL administrative Rule must be defeated. The new Rule must not be allowed to wipe out the statutory Advice Exemption that Congress expressly, purposefully and explicitly included in Section 203 of the Labor Management Reporting and Disclosure Act. As mentioned earlier, a Joint Resolution that would defeat the new DOL Rule now at issue before this Subcommittee has already been introduced in the House of Representatives by Congressman Byrne. Your support and vote for H.J.Res.87 and for all other legislative efforts to defeat this new DOL Rule is respectfully requested. The Rule of Law in labor relations matters hangs in the balance.

Thank you again for this opportunity to address you on this very important subject. It is an honor and a privilege for me to be called as a witness before this Subcommittee.

Exhibit A

BAR ASSOCIATIONS OPPOSING THE DEPARTMENT OF LABOR PROPOSED RULE NARROWING THE "ADVICE" EXEMPTION TO THE "PERSUADER ACTIVITIES" RULE

National and Specialty Bar Associations:

American Bar Association

Association of Corporate Counsel

Ohio Management Lawyers Association

State and Local Bar Associations:

State Bar of Arizona

Broome County (NY) Bar Association

Cleveland (OH) Metropolitan Bar Association

The Florida Bar

State Bar of Georgia

Illinois State Bar Association

State Bar of Michigan

The Missouri Bar

The Mississippi Bar

Nebraska State Bar Association

Ohio State Bar Association

Peoria County (IL) Bar Association

South Carolina Bar

Tennessee Bar Association

Westchester County (NY) Bar Association

The West Virginia State Bar

Exhibit B

Defending Liberty
Pursuing Justice

Wm. T. (Bill) Robinson III
President

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September 21, 2011

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

Re: Department of Labor Proposed Rule on the Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption; RIN 1215-AB79 and 1245-AA03, 76 Fed. Reg. 36178 (June 21, 2011)

Dear Mr. Davis:

On behalf of the American Bar Association ("ABA"), I write to express our serious concerns over the above-referenced proposed rule (the "Proposed Rule") that would substantially narrow the U.S. Department of Labor's ("Department") longstanding interpretation of what lawyer activities constitute "advice" to employer clients and hence are exempt from the extensive reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 433 (1982). By expressing concerns over the Proposed Rule and urging the Department to reconsider, the ABA is not taking sides on a union-versus-management dispute, but rather is defending the confidential client-lawyer relationship and urging the Department not to impose an unjustified and intrusive burden on lawyers and law firms and their clients.

As more fully explained below, the Department's current broad interpretation of the advice exemption—which excludes lawyers from the Act's "persuader activities" reporting requirements when they merely provide advice or other legal services directly to their employer clients but have no direct contact with the employees—should be retained with respect to lawyers and their employer clients[1] for several important reasons. In particular, we support the current interpretation of the advice exemption and oppose the Department's Proposed Rule to the extent it would apply to lawyers representing employer clients because:

- The Department's longstanding interpretation of the "advice" exemption provides a useful, bright-line rule that is consistent with the actual wording of the statute and Congress' intent,

[1] Although the ABA supports the Department's traditional broad interpretation of the advice exemption with respect to lawyers providing advice and other legal services to their employer clients, the ABA takes no position on the Department's proposed narrowing of the advice exemption as applied to non-lawyer labor consultants providing persuader services to employers. Unlike labor lawyers, non-lawyer labor consultants have no confidential relationship with their employer clients and are not subject to the extensive state court regulation and disciplinary authority that covers all licensed attorneys.

while the new proposed interpretation would essentially nullify the advice exemption contained in the statute and thwart the will of Congress;

- The Department's Proposed Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA Model Rule;

- The Proposed Rule could seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel; and

- The scope of the information that the Department's Proposed Rule would require lawyers engaged in direct or indirect persuader activities to disclose encompasses a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor.

To avoid these negative consequences, the ABA urges the Department to preserve its existing, well-established interpretation of the advice exemption under Section 203(c) with respect to lawyers representing employer clients and continue to exempt lawyers from the disclosure requirements of Section 203(b) when they provide advice or other legal services to their employer clients designed to help the employer to lawfully persuade employees as to unionization issues but the lawyers do not directly contact the employees to persuade them regarding these issues.

The Department's Proposed Changes to the "Advice" Exemption

Under Section 203(b) of the LMRDA, employers and labor relations consultants are required to file periodic disclosure forms with the Department describing any agreements or arrangements with employers where the object is directly or indirectly to (1) "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) "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 connection with an administrative or arbitral proceeding or a criminal or civil judicial proceeding."[2] Section 203(a) imposes a similar reporting requirement on employers that have entered into these agreements or arrangements.[3]

Section 203(c) of the statute, however, contains the following broad "advice" exemption:

> Nothing contained 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...[4]

[2] See LMRDA, Section 203(b), 29 U.S.C. § 433(b).
[3] See Section 203(a), 29 U.S.C. § 433(a)(4).
[4] Section 203(c), 29 U.S.C. § 433(c).

In addition, Section 204 of the LMRDA specifically exempts lawyers from having to report "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."[5] The Department has acknowledged that this provision exempts lawyers from disclosing any information protected by the attorney-client privilege and that the provision demonstrates Congress' intent "to afford the attorneys the same protection as that provided in the common-law attorney-client privilege, which protects from disclosure communications made in confidence between a client seeking legal counsel and an attorney."[6] Similarly, the courts have found that in adopting Section 204, Congress intended to accord the same degree of privilege as that provided by the common law attorney-client privilege.[7]

Over the years, both the federal courts and the Department have noted that a "tension" exists between the broad coverage provisions of Section 203(b) of the LMRDA requiring disclosure of persuader activities and the Act's broad exemption for "advice."[8] Since at least 1989, however, the Department has broadly interpreted the "advice" exemption under Section 203(c) to generally exclude from the rule's disclosure requirements any advice or materials provided by the lawyer or other consultant to the employer for use in persuading employees, so long as the consultant has no direct contact with the employees.[9] This interpretation had its origins in the Department's previous 1962 interpretation of the rule contained in the so-called "Donahue Memorandum."[10] The Department also has long taken the position that when "a particular consultant activity involves both advice to the employer and persuasion of employees" but the consultant has no direct contact with the employees, the 'advice' exemption controls.[11]

In its Proposed Rule, the Department has proposed major changes to its longstanding interpretation and application of Section 203 that would require lawyers who both provide legal advice to employer clients and engage in any persuader activities to file periodic disclosure reports, even if the lawyer has no direct contact with the employees. These reports, in turn, would require lawyers (and their employer clients) to disclose a substantial amount of confidential client information, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. The lawyers also would be required to report detailed information regarding the *legal fees paid by all of the lawyers' employer clients, and disbursements made by the lawyers, on account of "labor relations advice or services" provided to any employer client, not just those clients who were involved in persuader activities.*

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[5] See Section 204, 29 U.S.C. § 434.
[6] See Proposed Rule, 76 Fed. Reg. at 36192.
[7] See, e.g., *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1216-1219 (6th Cir. 1985).
[8] See, e.g., *International Union, UAW v. Dole*, 869 F.2d 616, 618 (D.C. Cir. 1989). See also generally, Memorandum from Charles Donahue, Solicitor of Labor, to John L. Holcombe, Commissioner, Bureau of Labor-Management Reports (February 19, 1962) ("Donahue Memorandum"); and Memorandum from Mario A. Lauro, Jr., Acting Deputy Assistant Secretary for Labor-Management Standards (March 24, 1989) ("Lauro Memorandum"), Proposed Rule, 76 Fed. Reg. at 36180-36181.
[9] See Lauro Memorandum, cited in the Proposed Rule, 76 Fed. Reg. at 36181.
[10] See Proposed Rule at 36181, referencing the Donahue Memorandum.
[11] Id. at 36191.

The ABA's Concerns Regarding the Department's Proposed Rule

The American Bar Association opposes the Department's proposal to narrow the traditional scope of the "advice" exemption, which would have the effect of requiring many lawyers and their employer clients to report sensitive and confidential client information that has not previously been subject to disclosure[12]. Instead, the ABA urges the Department to retain the current, longstanding interpretation of the exemption with regard to lawyers who provide advice and other legal services directly to employer clients but have no contact with employees, for several important reasons.

1. The Department's longstanding interpretation of the "advice" exemption provides a useful, bright-line rule that is consistent with the actual wording of the statute and Congress' intent, while the new proposed interpretation would essentially nullify the advice exemption contained in the statute and thwart the will of Congress

The Department's longstanding interpretation of the advice exemption is much more consistent with the plain language of the LMRDA and with Congress' intent in adopting the statute than the new interpretation outlined in the Proposed Rule. While the overall purpose of the Act was to require those acting as "persuaders" to publicly disclose these activities, the main purpose of Section 203(c) dealing with "Advisory or Representative Services" was to exempt lawyers who provide legal advice to their employer clients or represent them before a court, administrative agency or arbitration tribunal. As the Sixth Circuit further explained in the case of *Humphreys, Hutcheson and Moseley v. Donovan*,[13] "the majority of courts…[have found] the purpose of Section 203(c) is to clarify what is implicit in Section 203(b)—that attorneys engaged in the usual practice of labor law are not obligated to report under Section 203(b)."[14] Therefore, the key issue in determining whether a lawyer is subject to the Act's reporting requirements is whether the lawyer is acting as a persuader or whether

[12] For over 50 years, the ABA has opposed measures similar to the Department's Proposed Rule. In 1959, the ABA House of Delegates adopted a formal resolution which provided in pertinent part as follows:

> *Resolved*, That the American Bar Association urges that in any proposed legislation in the labor-management field, the traditional confidential relationship between attorney and client be preserved, and that no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as confidential between a client and his attorney, 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…

While the Proposed Rule that is now under consideration is only designed to increase the obligations of *employer-side* labor lawyers—and not *union-side* labor lawyers—to report confidential client information to the Department, the ABA would be equally opposed to any similar future attempt by the Department or any other agency to force union-side lawyers to disclose any confidential client information.

[13] *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985).

[14] Id. at 1215 (agreeing with precedents issued by the 5th and 4th Circuits regarding Congress' intent with respect to Section 203(c) of the LMRDA). Although *Humphreys* Court concluded that the attorney plaintiff in the case, who was making speeches directly to employees urging them to vote against union representation, was acting as a persuader and must file disclosure reports, it added that attorneys engaged in the usual practice of labor law and confining themselves to the activities of Section 203(c) need not report under the statute. Id. at 1216.

the lawyer is providing legal advice or otherwise engaged in the practice of law.[15]

For many years, the Department has distinguished between lawyers who are subject to the Act because they engage in direct persuasion activities—such as personally meeting with, speaking to, or writing to employees in an effort to persuade them regarding labor organization issues—and lawyers who are exempt because they have no direct contact with employees but merely provide advice and other legal services to their employer clients, even if an object of that advice is employee persuasion.[16] At least one federal circuit has approved of this approach as a reasonable and rational interpretation of Congress' intent with respect to the scope of the advice exemption under the Act.[17]

The Department's traditional broad interpretation of the "advice" exemption"—which exempts lawyers who provide legal advice or other legal services *to help their employer clients to persuade employees* but have *no direct contact with employees*—is entirely consistent with the plain wording of the statute and with Congress' intent as explained above. When an employer retains a lawyer to advise and assist the employer in its disputes with its employees, including with regard to helping the employer to persuade employees as to organizational rights, the lawyer will ordinarily be asked to provide legal advice and other legal services to the employer that constitute the practice of law. So long as the lawyer limits his or her activities to providing advice and materials directly to the employer client and does not contact the employees directly, the Department should continue to deem these legal services to be exempt "advice" or "representation" under Section 203(c), and not reportable "persuader activity" under Section 203(b) of the statute.

The ABA also submits that the Department's traditional broad interpretation of the advice exemption as applied to lawyers representing employer clients provides an appropriate and rational bright-line test that harmonizes the broad coverage of the persuader activities rule in Section 203(b) with the equally broad advice exemption in Section 203(c) far better than the Department's new proposal. Section 203(c) clearly contemplates that at least some of the "advice" that a lawyer provides to the employer client will be designed to help the employer to persuade employees on unionization issues. This is self-evident because if all of the lawyer's advice to the employer client were unrelated to persuader activities, it would not be covered by the statute at all, with or without an advice exemption, and no exemption would be needed.

The Department's current bright-line test—which exempts lawyers from the rule when they provide advice or other legal services to their employer clients that helps *the employer* to persuade employees on unionization issues so long as the lawyer has no direct contact with the employees—preserves the effectiveness of both Section 203(b) and Section 203(c). The current test ensures the vitality of both sections in the statute by exempting those lawyers who only advise their employer clients how the

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[15] As the Sixth Circuit noted in the *Humphreys* case, "Congress recognized that the ordinary practice of labor law does not encompass persuasive activities." Id. at 1216, fn. 9. Similarly, the Fourth Circuit has noted that Congress directed the "persuader" disclosure requirement in the Act to labor consultants, whose work is not necessarily a lawyer's, and that while clients can direct lawyers to perform persuader activities, "for a legal advisor it would be extracurricular." Id.

[16] See footnote 8, *supra*.

[17] See, e.g., *International Union*, 869 F. 2d at 617-619. As the Sixth Circuit notes in footnote 3 of *International Union*, each of the leading federal court decisions cited by the district court merely confirm a lawyer's obligation to report when engaging in direct persuasion activities with employees and do not address the threshold issue, as the Sixth Circuit does, of how to characterize activity not involving direct employee contact that can be viewed as both persuasion and advice.

clients can persuade employees on unionization issues, or who both advise their clients and provide other legal services designed to help the clients persuade employees, while subjecting other lawyers to the statute's disclosure requirements when they engage in direct persuader activities by contacting the employees.

Conversely, if the Department's new proposed interpretation of the advice exemption were adopted and a lawyer who only gives advice to an employer client in connection with the client's persuader activities, or who gives advice and provides other legal services in support of the client's persuader activities, were nonetheless subjected to the Act's disclosure requirements, the advice exception in Section 203(c) would be effectively written out of the statute and the Department's persuader activities rule. The ABA urges the Department to resist such an illogical interpretation that would nullify the advice exception and thereby clearly thwart the will of Congress.

2. The Department's Proposed Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA rule

The ABA also is concerned that by requiring lawyers to disclose confidential client information to the government regarding the identity of the client, the nature of the representation, and details concerning legal fees, the Proposed Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA Model Rule.[18] ABA Model Rule 1.6 states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." or unless one or more of the narrow exceptions listed in the Rule is present.[19]

The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, the Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential.[20] This category of non-privileged, confidential client information includes the identity of the client as well as other information related to the legal

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[18] See ABA Model Rule of Professional Conduct 1.6, and the related commentary, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html
See also Charts Comparing Individual Professional Conduct Rules as Adopted or Proposed by States to ABA Model Rules, available at http://www.americanbar.org/groups/professional_responsibility/policy.html.

[19] Although ABA Model Rule 1.6(6) allows a lawyer to disclose confidential client information "to comply with other law or a court order," nothing in the LMRDA expressly or implicitly requires lawyers to reveal client confidences to the government. On the contrary, Section 204 of the statute expressly exempting "information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship" suggests that Congress recognized and sought to protect the ethical duty that lawyers have to protect client confidences.

[20] See, e.g., Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency).; Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party); and Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients' identities, which may constitute secret).

representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer. Because the Department's Proposed Rule would require every lawyer who directly or indirectly engages in any persuader-related activities in the course of representing an employer client to disclose the identity of their clients, the nature of the representation, the fees received from the clients and other confidential client information, the proposal is clearly inconsistent with lawyers' existing ethical duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule.

3. The Proposed Rule could seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel

The ABA also is concerned that the application of the Proposed Rule to lawyers engaged in the practice of law will undermine both the confidential client-lawyer relationship and employers' fundamental right to counsel. Lawyers for employer companies play a key role in helping these entities and their officials to understand and comply with the applicable law and to act in the entity's best interest. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the company's officers, directors, and other leaders, and the lawyers must be provided with all relevant information necessary to properly represent the entity. In addition, to maintain the trust and confidence of the employer client and provide it with effective legal representation, its lawyers must be able to consult confidentially with the client. Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice.

By requiring lawyers to file detailed reports with the Department stating the identity of their employer clients, the nature of the representation and the types of legal tasks performed, and the receipt and disbursement of legal fees whenever the lawyers provide advice or other legal services relating to the clients' persuader activities, the Proposed Rule could chill and seriously undermine the confidential client-lawyer relationship. In addition, by imposing these unfair reporting burdens on both the lawyers and the employer clients they represent, the Proposed Rule could very well discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.

4. The scope of the information that the Department's Proposed Rule would require lawyers engaged in direct or indirect persuader activities to disclose encompasses a great deal of confidential financial information about clients that has no reasonable nexus to the persuader activities that the Act seeks to monitor

Finally, the ABA is concerned with the overly broad scope of the information that the Department's Proposed Rule would require lawyers and law firms who are engaged in direct or indirect persuader activities to disclose on a periodic basis. The Proposed Rule provides that when a lawyer or law firm enters into an agreement with an employer to engage in direct or indirect persuader activities, the lawyer or law firm will be required to fill out both Form LM-20 ("Agreement & Activities Report") and the related Form LM-21 ("Receipts and Disbursements Report"). Form LM-21 then requires all lawyers and law firms engaging in persuader activities to disclose all receipts of any kind received from all employer clients "on account of labor relations advice or services" and disbursements made in connection with such services, not just those receipts and disbursements that are related to

persuader activities.[21]

The scope of this disclosure requirement compels the disclosure of a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor. In particular, the proposed disclosure requirement is excessive to the extent it would require lawyers who engage in any direct or indirect persuader activities to report all receipts from and disbursements on behalf of *every employer client* for whom the lawyers performed any "labor relations advice or services," not just those employer clients for whom persuader activities were performed.

No rational governmental purpose is served by this overly broad requirement. By analogy, while law firms and lawyers who lobby Congress on behalf of clients must file periodic reports with the Clerk of the House and the Secretary of the Senate disclosing the identity of those clients, the issues on which they lobbied, and the dollar amount received for lobbying, the Clerk and the Secretary would never presume to require a law firm or lawyer to disclose extensive information regarding all of their other clients to whom they give advice on governmental issues, but for whom they are not registered lobbyists. Moreover, by discouraging lawyers and law firms from agreeing to represent employers, the overly broad financial disclosure requirement in the Proposed Rule also might have the unintended consequence of increasing the number of employers who, without advice of counsel, would engage in unlawful activities in response to union organizing campaigns and concerted, protected conduct by employees.

In our view, these required disclosures proposed by the Department are unjustified and inconsistent with a lawyer's existing ethical duties under Model Rule 1.6 (and the related state rules) not to disclose confidential client information absent certain narrow circumstances not present here. Lawyers should not be required, under penalty of perjury, to publicly disclose confidential information regarding such clients who have not even engaged in or requested the persuader activities that the statute seeks to address. The ABA also concurs with the Eighth Circuit Court of Appeals that it is "extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders under § 203(b) and (c) to be so broad as to encompass dealings with employers who are not required to make any report whatsoever under § 203(a)(4)." *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985)

Conclusion

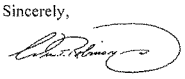
For all these reasons, the ABA urges the Department to reaffirm its longstanding interpretation of the advice exemption under Section 203(c) of the Act with respect to lawyers engaged in the practice of law and continue to exempt such lawyers and law firms from the disclosure requirements of Section 203(b) when they merely provide advice or other legal services to their employer clients in connection with the employer's persuasion activities and the lawyers have no direct contact with the employees. In addition, for those lawyers and law firms that engage in direct persuader activities and are therefore subject to the disclosure requirements of Section 203(b) under the Department's longstanding interpretation of the rule, the ABA urges the Department to narrow the scope of the information that must be disclosed under Form LM-21 so that disclosure is required only for those

[21] See Instructions for Department of Labor Form LM-21, at pages 3-5.

receipts and disbursements that relate directly to the employer clients for whom persuader activities were performed.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the Proposed Rule or our suggestions for modifying the proposal, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or ABA Senior Legislative Counsel Larson Frisby at (202) 662-1098.

Sincerely,



Wm. T. (Bill) Robinson III

Chairman ROE. Thank you, Mr. Robinson. I thank all the witnesses. I will now yield myself five minutes.

Mr. Robinson, I want to start with you. In your long career as an attorney and certainly as president of the American Bar Association, have you ever had to disclose publicly information about your clients as will be required by this new rule?

Mr. ROBINSON. Mr. Chairman, attorney-client confidentiality is the cornerstone of the rule of law. It has been so for 50 years in labor relations matters and beyond. The rule of law goes back to the 16th century. The rule of law is the key to ensuring good client advice so the client is enabled to comply with the law. That requires closed door, confidential, trustworthy advice to consider what is and what is not lawful.

That is compromised and jeopardized with any rule that requires disclosure of this information. Lawyers are bound by these ethical rules. They go back, as I say, centuries. They are the cornerstone of the rule of law in this country.

Chairman ROE. And have been upheld by the courts.

Mr. ROBINSON. Over and over and over, as recently as a case in California, which has looked at this issue and has recognized how sacrosanct this attorney-client confidentiality really is in implementing and ensuring the rule of law.

Chairman ROE. My concern is not labor law. My concern is the law in general. If we start down this slippery slope, where are we going to end if we dissolve attorney-client privilege?

If you are my attorney, I feel like I can bear my soul with you in a closed door, and I can get good information back from you about what is in the best interest of my business, myself, and my employees, so I do not do something wrong. Am I right about that or wrong about that?

Mr. ROBINSON. Let's say you were accused of a crime or being investigated for a crime, and you came to me as a lawyer and wanted to discuss that with me, and I had to say to you at the outset, look, there is a new rule at work here and it may require that I disclose everything you are going to tell me. How much do you think you would tell me? Probably not very much. My ability to advise you on your legal rights, the best course for you to take, would be severely compromised.

I think it is really clear if one appreciates and respects the significance and importance of client confidentiality to the rule of law that this is really a key issue. This is not about transparency. This is about ensuring that adequate advice is given to those who want to comply with the law, need to comply with the law, and need to be able to think out loud and explore options and opportunities to get the advice that assures they comply with the law.

Chairman ROE. I think this is a frightening rule when you begin to think that 50 years from now, you could take this as precedent and take this slippery slope anywhere. I think this needs to be stopped now.

It should be bipartisan because we are going to vote on a bill today on the House about the Internet, and the government being able to look at your emails over 180 days. It is bipartisan because this should affect and does affect all Americans.

Another question to any of the witnesses, why would an employer hire a consultant or an attorney during a union organizing campaign if this is the case? What benefit would it be? Ms. Sellers? Anyone?

Mr. NEWMAN. Ask the union, to do what they do—

Chairman ROE. I am asking Ms. Sellers.

Mr. NEWMAN. I thought you said anyone. My apology.

Ms. SELLERS. I believe with this rule employers will be less likely to contact labor attorneys or consultants, even when they are asking for advice. In my line of work, 50 percent of my clients are employers with less than 100 employees. Many of these people are not experts in union organizations. They are trying to run a business, many times wearing various hats, and they do not know this information, but still they certainly do not want to turn out on a form and get on the radar, they would be worried about having their name made public any time they ask any questions.

So, I think they would refrain from asking the questions, which would really put them at a disadvantage, not only in the union organization for themselves but for the whole process, because they will not have the information. There could be inadvertent unfair labor practices, which could jeopardize the whole election process.

Chairman ROE. Mr. Baumgarten, you said with 203(c) expanding this rule would have a chilling effect on free speech.

Mr. BAUMGARTEN. Yes, that is right, Mr. Chairman, it would have a chilling effect. Let me say that in any policy situation where we are evaluating an agency rule, we must start with the language of the statute, and 203(c) is a broad exemption for advice, any kind of advice that is given.

The reality of this situation is the LM–10 and the LM–20 obligations cannot be thought about without thinking about the LM–21 as well, which is the roll-up report, and in the Department of Labor's view that report requires disclosure of receipts received from any client—any client—who receives labor relations advice or services of any kind, even if not persuader advice.

No client will want to be on that list, and no consultant or law firm will want to have that disclosure.

Chairman ROE. My time has expired. I am going to yield to Mr. Polis.

Mr. POLIS. Thank you, Mr. Chair. Mr. Newman, are you an attorney, a member of the Bar?

Mr. NEWMAN. Yes, I am.

Mr. POLIS. As such, do you have any concerns at all with regard to any conflict this rule has with the long and important tradition of attorney-client confidentiality?

Mr. NEWMAN. I do not. What the rule requires is the identification of a client, fee arrangement with a client, the nature and scope of that client representation. That has been upheld by the 4th Circuit Court of Appeals, the 5th Circuit Court of Appeals, certainly no pro-union sentiment on that court, as well as the 6th Circuit Court of Appeals, and is not violating the attorney-client privilege.

Mr. POLIS. It seems to me another precedent outside of the direct organizing realm is the additional disclosure requirements that attorneys who function as lobbyists have as well with regard to how much they are paid and for whom they lobbied.

Do you see that as an analogous requirement that also is no threat to attorney-client confidentiality, but is consistent with the rules of public policy just as this is?

Mr. NEWMAN. I do. I also cited another statute in my written testimony that applies where an attorney is paid in cash, they have to disclose their client and the amount, *et cetera*.

Mr. POLIS. So, as was briefly mentioned, the *Labor-Management Reporting Disclosure Act* does mandate a reporting obligation for labor consultants and employers, including those who work indirectly to persuade workers, and the Labor Department says there are zero reports from union avoidance consultants who indirectly persuade people not to organize.

It has been alluded to there is a loophole.

Mr. Newman, I wanted to ask you what exactly is this loophole that has allowed this to go on, contrary to legislative intent, contrary to the words of the legislation and the law, for the past 54 years? How is the Department of Labor's new rule more consistent with the actual law than the previous policy?

Mr. NEWMAN. Sure. The statute applies to persuasion that is not only direct but indirect. The advice exemption has been interpreted from 1962 until 2000, and I will get to that, saying so long as the union buster or the persuader is behind the scenes and does not show his face and speak directly to employees, he does not have to report. In other words, he only has to report if he engages in direct persuader activity, leaving the word "indirect" out of the statute.

In 2000, the Department of Labor took a different interpretation, similar to what they are taking now in the persuader rule. There was an election, obviously, in 2000, and the Department of Labor overturned that interpretation in 2001 and went back to that which existed from 1962.

Mr. POLIS. So, before this rule, essentially the previous Secretaries of Labor and Departments of Labor have chosen to ignore a word that is in the statute, that is "indirect" consultants, is that your opinion?

Mr. NEWMAN. Yes. They have ignored the statutory language and they have ignored the legislative history.

Mr. POLIS. Now, let us get to the topic of why this can be important. Your testimony included an advertisement from a union avoidance firm where they actually talked about a money back guarantee if they do not successfully defeat the organizing effort.

What are some reasons it might be important for workers to know about that kind of persuader arrangement or other kinds of examples of ways the consultants try to dissuade employees from joining unions?

Mr. NEWMAN. In my experience, one thing that a consultant always does is script messages where the employer says to its employees we are one big, happy family, the union is a third party outsider that has no business coming into this workplace. They will also proclaim that this outsider union is going to drive up the employer's costs and impede their ability to compete.

When you have a money back guarantee, the consultant has skin in the game. So, it seems to me perfectly reasonable for the voters, the employees, to know, number one, their employer has hired a third party outsider to script their messages; number two, what

they are paying that consultant when they are saying at the same time they cannot afford a union; and, number three, the words from the supervisors are not the supervisors' words, they are the words of the consultant that has skin in the game, that has guaranteed to the employer we will bust your union, we will defeat the union.

Mr. POLIS. If, in fact, the fee was entirely contingent on success, which I understand is the case some of the time in these agreements, let us say arbitrarily it is $500,000, would the employees also know that were they to succeed and the company not to pay that $500,000, there would, therefore, be an additional $500,000 available on an operating basis that the employees might be able to share in, in the form of raises and promotions?

Mr. NEWMAN. Yes, they would.

Mr. POLIS. A very tangible identification if a company is otherwise saying there are no resources available, it is clear in that case they would have saved X-dollars by losing the campaign, a great way for companies to save money by losing organizing campaigns.

I yield back the balance of my time.

Chairman ROE. I thank the gentleman for yielding. Dr. Foxx, you are recognized.

Ms. FOXX. Thank you, Mr. Chairman, and I thank our witnesses for being here today. Mr. Baumgarten, with the new NLRB rules that shorten the time between union petitions and elections, do you feel employers are likely to require any more assistance in legally and effectively communicating with employees about both sides of the decision to unionize?

Mr. BAUMGARTEN. Yes. One of the great myths that has been created is that employers lie in wait and plan and practice and hire consultants and hone their message months in advance of a petition filed with the NLRB.

My experience and the experience of many of my colleagues has been just the opposite, that very often employers are very surprised to receive a representation petition, and that is particularly true for smaller employers who do not have the sophistication to really understand what may be going on in the workplace.

We now have a regime which has already been alluded to that the NLRB has created an environment that makes it more and more difficult to effectively respond to a representation petition by virtue of the rules that preclude pre-election hearings, by virtue of the micro unit rules, and by virtue of the ambush election rules.

An election can be held now in as little as 11 days from filing of the petition to the election. In general, I think the latest statistics show that it takes about 20 days or so down from 38 days prior to the ambush election rules last year.

Employers are already behind the eight ball, so to speak, in respect of their ability to understand what is going on, to develop the message, to understand what is legal, to understand what is going to be effective, to understand what should be communicated, what is the message employees want to hear.

There is, I think, a fundamental misunderstanding of what this rule will provide. When a company that does not have in-house experience and does not have prior experience with a representation campaign receives a petition, what do they do?

They call their lawyer and they say what is this? They find out what it is. The very first question, if not the first question then the second question, is what should I say to the employees? What should I say?

The answer to that under this rule will be I cannot tell you because if I tell you, we will both become persuaders, and pending resolution of what goes on with the LM–21, which the Department has played hide-and-seek with, I, as a lawyer, may then have to disclose information, privileged information, about the identity of all of my other labor relations clients. That is an unworkable system.

Ms. FOXX. Thank you very much. Ms. Sellers, I would like to go a little farther on the comments Mr. Baumgarten talked about. Let us talk a little bit about the impact on employees. Tell us about how an employer being better prepared and informed about labor issues benefits the employees. What are some of the unintended consequences of the new rule for employees?

Ms. SELLERS. Thank you for the question. It is a very good question because my heart is in education of supervisors, and I know you have a wonderful background, also, in employee education.

Supervisors that I normally deal with my small employers are not people that came from colleges with MBA degrees. As a matter of fact, most small employers cannot afford to hire the best and brightest with the biggest degrees. A lot of them grow their own and they have to hire them from within and, in many cases, they want to hire them from within. They have good people who are technical people, and now they have placed them in a supervisory role. They have no other knowledge.

So, with my training, I work very hard to give them basic information, including the labor information, such as making sure they do not say the wrong thing that could eventually result in an unfair labor practice.

Proper education of supervisors will result in an engaged workplace, where you will really have the sense—this sounds very naive—the truth is you will have much happier employees if you have well-trained supervisors, and as a result, you will have more successful organizations that will then create more jobs.

Ms. FOXX. Thank you, Mr. Chairman. I yield back.

Chairman ROE. The gentlelady's time is expired. Mr. Pocan, you are recognized for five minutes.

Mr. POCAN. Thank you, Mr. Chairman. Thank you to the witnesses. So, I guess I come to this from a little bit of an interesting perspective because I have a small union printing business, and about weekly, I get one of these mailers. I will be honest, I have not looked at them all that closely on the way to the recycling bin as I have got them.

Clearly, there is a very big business in union busting, and I think maybe my perspective is slightly different in that while you are talking about these rules that are going to be so terrible for employers versus workers, you know, I come from Wisconsin, where recently we passed a law that made it harder for people to collectively bargain. We just passed a right to work law.

I would say quite the opposite, this has been much more onerous on workers than it has been on employers. I guess I do not quite

understand the concern at some level when it gets to the persuading level versus the regular legal information level.

I know you are all familiar with "Confessions of a Union Buster." I am sure you all have a copy. Just the first line in the prologue, "Union busting is a field populated by bullies and built on deceit."

Now, there is a big difference from just providing simple advice and then when you get to the steps of—are you all familiar with Cruz & Associates? This is just one firm that does this sort of work and does it with some of the big hotels.

If you look at the things that have happened in some of these campaigns, whether it would be the firing and intimidation of employees, whether it be a cartoon—here is a cartoon management put out at the Miramar Sheraton, and it shows a cartoon of Hitler with an arm band showing "814," which is the number of the Local.

I do not know if that is really legal advice or if that falls maybe a little more to the persuading, but I do not know if you need a well-paid attorney to tell you that Adolf Hitler cartoons may or may not help persuade, but this business seems to go much farther than what people are talking about.

Mr. Newman, specifically, what is listed—under this rule, what will you be listing? People are talking about bearing their soul and confidential information. What is going to be disclosed on this form?

Mr. NEWMAN. The identity of the employer that has retained the union buster, the amount the employer is paying to the union buster, the scope of the union buster's representation, a copy, if there is one, of the agreement or arrangement between the union buster and the employer.

Mr. POCAN. By "scope," how many words are we talking about? Pages and pages? Are we talking sentences and sentences?

Mr. NEWMAN. I think we are talking about a sentence or two, and I think what is important to understand is that information has always been required on the LM–10 filed by the employer, the LM–20 filed by the consultant.

The scope of the information that is being sought in this rule is no different than what the Department of Labor has always sought when the union buster deals directly face-to-face with employees.

Numerous courts have said that it is not protected by the attorney-client privilege, numerous courts have said it is completely consistent with State ethics obligations.

Mr. POCAN. In these firms, often the work does go way beyond. We are hearing the nice of it. We just give a little advice on what they are doing. A lot of these firms are doing things like this. This is the advice they give. That definitely goes to a different level of what I think was intended, and that is why we want the disclosure.

It has been said people will not hire these firms. I do not know why, if that is all the disclosure is, why that is so chilling to an employer, because if they are going through this, and I have that mailing and I decide I want to bust my union for whatever reason, to have to disclose that little bit is not exactly the bearing of one's soul and the conflict that people are asking for.

Why would someone be afraid to be listed on there?

Mr. NEWMAN. Because they like to have these consultants operating in the shadows. And consultants in the book that you ref-

erenced, Mr. Levitt's book, not only does that allow the consultant not to report, but I think the industry has found they are more persuasive when they operate in the shadows because employees do not know that.

When the employer comes out and says, hey, we are one big, happy family, do not listen to this third party outsider, I always have an open-door policy, and by the way, here is your paycheck. I mean, that is going to resonate with employees. And at the same time, they do not know that the message that is being delivered is by someone like Cruz & Associates and others who are not providing legal advice.

Legal advice is not reportable under the rule, period, done. What they are doing is drafting the game plan, running the plays, directing supervisors on how to do it.

Mr. POCAN. Persuading?

Mr. NEWMAN. Persuading, absolutely.

Mr. POCAN. Thank you. I yield back.

Chairman ROE. I thank the gentleman for yielding. Mr. Walberg, you are recognized for five minutes.

Mr. WALBERG. Thank you, Mr. Chairman. I was just sitting here thinking in listening to all of this of what it would be like to have this same persuader rule for political campaigns, all of us at the dais here, what impact it would have. It certainly would change the presidential campaign going on right now, would it not? Well, that is another issue.

Mr. Robinson, what other areas of law could the reporting requirements like those in the new rule be applied to, if this precedent is allowed to stand?

Mr. ROBINSON. I suspect various Federal agencies, whether involved in consumer matters—all kinds, everything should be transparent. If everything should be outside the protection of attorney-client privilege, if clients are not to be able to turn to lawyers without cautioning them that whatever they are discussing may have a persuader impact on the employees, and, therefore, not be confidential, I really do not know what is foreseeable and really unforeseeable.

The scope of this carries over in unlimited ways, and it gives us great concern.

Mr. WALBERG. Most likely a chilling effect on the issue of seeking good counsel in almost any area.

Mr. ROBINSON. What was mentioned about the LM–20 form being so harmless and really not being of any consequence, let me say that under the new rule, the rule going into effect, otherwise legal advice in compliance—I say this in my written statement—under the new rule, otherwise legal advice in compliance with the statute itself will now actually trigger administrative disclosure under the LMRDA.

One needs to look at the new form and see all the different boxes that have to be checked off disclosing what the legal advisor, the lawyer, has done with respect to that client if the advice could even be indirectly identified/called "persuader advice."

Even though that advice is offered only to the client, in all instances where the advice of the lawyer furthers the employer client's object explicitly or implicitly—I am quoting now from the in-

structions to Form LM–20 that was referred to—"Explicitly or implicitly, directly or indirectly, the object to affect an employee's decision concerning his or her representation or collective bargaining rights." That is persuader advice.

Mr. WALBERG. Pretty broad.

Mr. ROBINSON. Pretty broad, and if we want good advice at all levels on both sides, imagine the position of the advisor, the legal advisor, when a complaint is filed with the Department of Labor alleging that persuader activity was taken and no report was filed, and there is a dispute over whether it was persuader activity, even indirectly, what is going to be the defense to that allegation or charge?

At that point, the defense is going to require that counsel and the client do what? Tell everything they talked about, explain that it was not persuader activity, but they have to disclose the confidential conversation, the advice, the various considerations that went into that conference that was otherwise confidential.

Mr. WALBERG. Thank you.

Mr. ROBINSON. That is what they are going to be facing, so the lawyer today with this new rule has to say to the employer client at the outset, look, I cannot assure you that somebody is not going to say our discussion—

Mr. WALBERG. I appreciate that. I think we get the message there. I want to go to the consultant, Ms. Sellers. As a general HR consultant, you are likely not the intended target for the persuader rule, but you would clearly be impacted by the rule.

Ms. SELLERS. Correct.

Mr. WALBERG. Clearly, that is why you are here. How will SLS Consulting respond to the persuader rule, and what consequences does it create for your clients, in particular small businesses?

Ms. SELLERS. I am very concerned about the rule, obviously. I am still trying to determine what I am going to do. I have basically two choices. I can continue as I am doing and risk or jeopardize the fact that I may trigger filing that form. I know a lot of my employer clients will not want me to be on that form, and they will not want their names on the form.

So, the other opportunity would be for me to basically stop doing any discussion when I train employers and train supervisors regarding the union organization or what people should and should not say. In that case, I feel like I am doing a disservice to those employers and those supervisors by withholding information.

Mr. WALBERG. Mr. Chairman, I think it is clear that employees and employers could be hurt by taking away this type of—

Chairman ROE. The gentleman's time has expired.

Mr. WALBERG. Thank you.

Chairman ROE. I now yield five minutes to the full committee ranking member, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Newman, can you tell me how this rule differs or conforms with the actual statute?

Mr. NEWMAN. Yes, sir. Yes, Representative Scott. The rule, unlike previous interpretations, conforms with the language in the statute because it will require persuaders to report not only their direct persuader activities but also their indirect persuader activities.

Mr. SCOTT. And what does the statute require?

Mr. NEWMAN. Both direct and indirect to be reported.

Mr. SCOTT. And so the statute just recites—the rule just recites the statute?

Mr. NEWMAN. Correct, and supported by the legislative history as well.

Mr. SCOTT. I would like to ask a question of Mr. Robinson, I guess. You indicated there would be a disclosure of privileged information if this rule went through. You would have the same problem you articulated under the present rule, is that right?

Mr. ROBINSON. No, we would not because there is specifically in the statute an advice exemption which by the Department of Labor for 50 years, over 50 years, has been interpreted as not applying to a lawyer's advice to an employer client as long as they do not communicate directly with the employees.

Mr. SCOTT. The client-lawyer relationship, under Rule 1.6 of the ABA rule—you are a former president of the ABA, is that right?

Mr. ROBINSON. Yes, sir.

Mr. SCOTT. Rule 1.6, confidentiality of information, says the lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes it is necessary, and Subsection (6) is to comply with other law. If the law requires the disclosure, where is the problem with the representation?

Mr. ROBINSON. So, the new rule is not a law. It is an administrative regulation which we are arguing and pointing out is in direct conflict with the Department of Labor's interpretation of the advice exemption in the statute which is the law and, therefore—

Mr. SCOTT. How do you interpret the statute? How do you read the statute? Does it not say "direct or indirect?"

Mr. ROBINSON. I am sorry.

Mr. SCOTT. Does not the statute say "direct or indirect?"

Mr. ROBINSON. I am not addressing the point of whether it is direct or indirect. I am directing to the fact that either way, it is an administrative regulation and cannot overrule 1.6 as adopted by the various States around this country, because it is not the law, it is an administrative regulation.

The statute itself says there is an advice exemption, and that advice exemption, as it has been implemented for over 50 years, beginning with the administration of President Kennedy, has protected confidential attorney-client communications.

Mr. SCOTT. It is protected under the indirect, also?

Mr. ROBINSON. Indirect and direct, yes.

Mr. SCOTT. Right. We would not expect to have a problem with forced revelation of privileged information? You are suggesting that the rule would require the revelation of privileged information, actual communication, when, in fact, all that is revealed is the fact of representation.

Mr. ROBINSON. It would be revealed in the face of investigation by DOL and accusations and challenges as to whether or not the advice was persuader advice. The only way to defend against that would be to say what the advice was, to disclose the advice, to lay it all on the table, which effectively would erase the client confidentiality of the conversation.

Mr. SCOTT. How is that different from present law?

Mr. ROBINSON. I am sorry, I could not hear.

Mr. SCOTT. How is that different from present law? Why do you not have the same problem—

Mr. ROBINSON. Under present law, it is not to be disclosed as long as the lawyer advisor of the employer client does not communicate directly with the employer client's employees.

Mr. SCOTT. They do not—right now, they do not ask for that information. If there is a question, they use what is objective evidence. They do not ask for the privileged conversations, is that right?

Mr. ROBINSON. Well, they could ask, but—

Mr. SCOTT. They can ask now?

Mr. ROBINSON. It would not be required to be disclosed.

Mr. SCOTT. They can ask now and they do not?

Mr. ROBINSON. They can ask. With all due respect, they can ask anything, but it would not need to be disclosed if the advisor has not spoken directly to the employees.

Mr. SCOTT. And the rule could be implemented in such a way that the confidentiality is not—

Chairman ROE. The gentleman's time has expired. Mr. Guthrie, you are recognized for five minutes.

Mr. GUTHRIE. Thank you. Thank you, Mr. Robinson, for coming up from the Commonwealth of Kentucky. I know a lot of people have pointed out certain situations, and a good friend of both of ours, our former Senate president, David Williams, one time when I was in the State Senate told me that there are bad situations, and sometimes bad situations result in bad law.

I know your reputation. I know who you are. I know when people hire you, you are walking in to tell them how to comply and how to follow. I think probably 99 percent of the cases are that way. It is just going to tie up people who are trying to do things the right way and trying to do things correctly and getting the correct advice.

My understanding of where you were going with the last point is once you speak to the employees, then it triggers the persuader, so there is no need to know what you told the employees, all they have to do is know you spoke to the employees. When you speak to the employer, then they have to figure out what you said to say whether or not it triggered the advice. That was where you were going, right? Did I make that clear, Mr. Robinson?

The current persuader rule, they do not really need to know the content, the way it is previously applied, they do not need to know the content of the conversation, they just need to know you talked to the employees?

Mr. ROBINSON. Correct, it is a bright line. It is clearly enforceable. A lawyer on behalf of the employer client who talks directly to the employees knows the lawyer is engaged in persuader activities and discloses that, files the appropriate forms and so on, and the client knows that.

But now the advice given in private could be subject to investigation if the inference or accusation is made or the allegation is made that had the object of persuading the employees indirectly, implicitly. If that accusation is made, and I do not want to be redundant—

Mr. GUTHRIE. Yes, I know.

Mr. ROBINSON.—then we are back to disclosing what should have been confidential.

Mr. GUTHRIE. I will ask the question. Some other people have kind of talked similarly, but I will ask it again. You can elaborate again as well, Mr. Robinson. This change that the Department of Labor is moving towards or putting in place, do you think that is authorized by the statute?

Mr. ROBINSON. It is a dramatic change. It is erasing or attempting to erase over 50 years of respect and recognition of attorney-client privilege as an essential component of the rule of law. And that is why I am here today as an individual to make that point, so that it is understood how catastrophic this will be for the rule of law if it is allowed to go forward.

Mr. GUTHRIE. What are your biggest concerns with the way the Department would enforce this rule? Well, I would say, getting into the content of your conversation, to be able to enforce the rule.

Mr. ROBINSON. I guess in that regard I would defer to Mr. Baumgarten since he practices this law every day. I do not. It is not my area. I have expressed my thoughts and concerns. I will defer to him, if I may.

Mr. GUTHRIE. Absolutely.

Mr. BAUMGARTEN. Let me address a couple of things that are embedded in the last few questions. First, the suggestion has been made that the change of the rule is necessary in order to give effect to the statutory mandate that reporting is required if somebody indirectly persuades, and I would submit to you that the Department has misconstrued what the word "indirect" was intended to capture.

The abuses detailed in the McClellan hearings focused on so-called "middlemen," and their identity was shrouded in mystery. Sometimes they themselves engaged employees directly and sometimes they engaged others to engage employees directly. And there was a lot of testimony about these so-called "middlemen" who formed "vote no committees" of employees, and they engaged in bribery and coercion and the like.

The word "indirectly" was inserted into the statute so that if those middlemen did not themselves persuade but engaged others to persuade, they would be captured if they spoke or acted through others to speak directly to the employees.

Now, the Department has twisted that to say if you as the labor relations consultant advised your own client on communications with employees, you are indirectly persuading within the meaning of the statute, and that is simply not the case. That takes us back to the advice exemption.

As to the point about the worst-case scenario, as you point out, the most irresponsible activities and, frankly, the most ineffective ways to communicate with employees—this was really addressed in the original solicitor's memo that gave rise to the rule that we have lived with for more than 50 years.

It was Solicitor of Labor Donahue who addressed this, and he addressed it in a very simple and straightforward fashion.

He said, and I will quote, "Even where the advice is embedded in a speech or a statement prepared by the advisor to persuade, it

is nevertheless advice and must be fairly treated as advice." The employer and not the advisor is the persuader.

In any situation in which an outside consultant, myself, Ms. Sellers, anybody that is giving advice to a client, it is up to the client to accept or reject that advice, and if the client does, whatever the client communicates is the employer's advice.

Chairman ROE. Mr. Baumgarten, I am going to ask you to wrap up Mr. Guthrie's time.

Mr. GUTHRIE. I have to go cast a vote, so I appreciate it. Thank you very much.

Chairman ROE. Mr. Jeffries, you are recognized.

Mr. JEFFRIES. Thank you, Mr. Chair. Ms. Sellers, do you think there is a public interest in making sure that unionization elections are conducted in a fair and equitable fashion?

Ms. SELLERS. I believe they should be fair and to the point where we should make sure that all those involved understand the rules and regulations and the do's and don'ts, and my big concern is that our small employers especially are not going to get that information with these rules.

Mr. JEFFRIES. You have that concern because you believe that your clients would ultimately not want to reveal the fact that they have entered into a consulting relationship, is that right?

Ms. SELLERS. Well, I think a large part, especially on my behalf—probably the biggest irony is that I am in this committee meeting because not only do I not deal with employers when they are being under the threat of maybe union organization, I refer them to others. That is not my area of expertise.

So, the reason for me being here is because in the definition, I am being scooped up and being part of this where I may actually have to do some of this filing because, quite frankly, I do not look good in handcuffs. So, I am extremely worried. This could be criminal charges. Things that I do today with my employers, it may just be advice, it may just be training, but as you know, unions do not knock on the front door and say we are getting ready to organize. Things can go on for months at a time.

I could be offering opinions in general terms, but later we can find out that actually there is a union organization afoot.

Mr. JEFFRIES. Why do you think that less information, just in terms of the public interest—you acknowledged having a free, equitable, fair election, I think, makes sense for all sides, but why is less information better than more information?

Ms. SELLERS. I do not believe I said that. As a matter of fact, I think supervisors should get more information so they can handle their employees. However, when we are talking about actual union organization, as I mentioned, that is not my area of expertise, and that is why I send people to those who know more about it.

Mr. JEFFRIES. I think Justice Brandeis, directing my question to Mr. Newman, once said that, "Sunlight is said to be the best of disinfectants; electric light, the most efficient policeman."

In your view, is the public interest served by a more expansive rule that just provides information to the public?

Mr. NEWMAN. Yes. That is why there is disclosure requirements with respect to your election, Representative, and everyone on the dais.

Mr. JEFFRIES. There has been this concern that has been expressed about the attorney-client privilege being breached. I think there are many attorneys on both sides of the aisle, no one would support that type of approach, I would imagine.

Do you think this concern is overblown? You touched on this in different ways. If so, why is this concern overblown and being overhyped here at this hearing?

Mr. NEWMAN. Let me try to emphasize one particular point. The information that is required under the persuader rule to be reported by the consultant and the employer is no different than the information that the Department of Labor has always required from a persuader and the employer if they engaged in face-to-face persuader activity.

The issue is does the disclosure of that information violate the attorney-client privilege. Numerous courts have addressed that question under this law, the 4th Circuit Court of Appeals, the 5th Circuit Court of Appeals, 6th Circuit Court of Appeals.

Mr. JEFFRIES. Is it fair to say, as you have pointed out, I believe, those are amongst the most conservative circuit courts in the Nation, particularly the 5th?

Mr. NEWMAN. In my opinion.

Mr. JEFFRIES. Historically, the 4th, one of the most conservative?

Mr. NEWMAN. Not so much anymore, but, yes, historically.

Mr. JEFFRIES. They have all concluded that the attorney-client privilege would not be breached, is that right?

Mr. NEWMAN. Correct.

Mr. JEFFRIES. Under this particular statute, is that right?

Mr. NEWMAN. Yes.

Mr. JEFFRIES. Let me just turn in closing to Mr. Baumgarten. In terms of the public good as it relates to free and fair elections, would you agree with the premise generally that unionization rates tend to correlate with States that have lower levels of poverty as compared to States, for instance, that lack unionization? Is that an accurate assessment?

Mr. BAUMGARTEN. I am not familiar with those statistics, Congressman. I would say to the extent of regulation, and I am familiar with this in the Northeast, businesses take into account regulation, they take into account requirements, and onerous requirements, and they have choices.

Capital is mobile. There are no boundaries on capital anymore. Businesses will move and they will create jobs in the environment that is most receptive.

Mr. JEFFRIES. I would just ask—

Chairman ROE. The gentleman's time has expired.

Mr. JEFFRIES. Can I just ask unanimous consent that we enter into the record two things, Poverty Rankings by State, and also a listing of State Right to Work Requirements?

Chairman ROE. Without objection, so ordered.

[The information follows:]

POVERTY RANKINGS BY STATE (2009)

	State	2009
	United States	**14.3**
1	Mississippi	21.9
2	Arkansas	18.8
3	Kentucky	18.6
4	District of Columbia	18.4
5	New Mexico	18.0
6	West Virginia	17.7
7	Alabama	17.5
8	Louisiana	17.3
9	Texas	17.2
10	Tennessee	17.1
11	South Carolina	17.1
12	Arizona	16.5
13	Georgia	16.5
14	North Carolina	16.3
15	Oklahoma	16.2
16	Michigan	16.2
17	Ohio	15.2
18	Montana	15.1
19	Florida	14.9
20	Missouri	14.6
21	Indiana	14.4
22	Idaho	14.3
23	Oregon	14.3
24	South Dakota	14.2
25	California	14.2
26	New York	14.2
27	Kansas	13.4
28	Illinois	13.3
29	Colorado	12.9
30	Pennsylvania	12.5
31	Wisconsin	12.4
32	Nevada	12.4
33	Nebraska	12.3
34	Washington	12.3
35	Maine	12.3
36	Iowa	11.8
37	North Dakota	11.7
38	Utah	11.5
39	Rhode Island	11.5
40	Vermont	11.4

41	Minnesota	11.0
42	Delaware	10.8
43	Virginia	10.5
44	Hawaii	10.4
45	Massachusetts	10.3
46	Wyoming	9.8
47	Connecticut	9.4
48	New Jersey	9.4
49	Maryland	9.1
50	Alaska	9.0
51	New Hampshire	8.5

Source: US Census Bureau

STATE RIGHT TO WORK TIMELINE**

Right To Work State**	Right To Work Date	By Statute or Constitutional Provision
Arkansas	Tuesday, November 07, 1944	By Constitution
Florida	Tuesday, November 07, 1944	By Constitution
Arizona	Tuesday, November 05, 1946	By Constitution
Nebraska	Wednesday, December 11, 1946	By Constitution
Virginia	Sunday, January 12, 1947	By Statute
Tennessee	Friday, February 21, 1947	By Statute
North Carolina	Tuesday, March 18, 1947	By Statute
Georgia	Thursday, March 27, 1947	By Statute
Iowa	Monday, April 28, 1947	By Statute
South Dakota	Tuesday, July 01, 1947	By Constitution
Texas	Friday, September 05, 1947	By Statute
North Dakota	Tuesday, June 29, 1948	By Statute
Nevada	Thursday, December 04, 1952	By Statute
Alabama	Friday, August 28, 1953	By Statute
Mississippi*	Wednesday, February 24, 1954	By Statute
South Carolina	Friday, March 19, 1954	By Statute
Utah	Tuesday, May 10, 1955	By Statute
Kansas	Tuesday, November 04, 1958	By Constitution
Mississippi*	Tuesday, June 07, 1960	By Constitution
Wyoming	Friday, February 08, 1963	By Statute
Louisiana	Friday, July 09, 1976	By Statute
Idaho	Thursday, January 31, 1985	By Statute
Oklahoma	Sunday, September 02, 2001	By Constitution
Indiana	Wednesday, February 01, 2012***	By Statute
Michigan	Friday, March 08, 2013***	By Statute
Wisconsin	Monday, March 09, 2015***	By Statute

*Mississippi first passed a statute then a constitutional amendment
**including hyperlinks to state Right To Work laws ***Effective Date

Chairman ROE. Mr. Byrne, you are recognized for five minutes.

Mr. BYRNE. Thank you, Mr. Chairman. I would like to make a couple of points and ask a question. The last colloquy about attorney-client privilege is really interesting to me because I used to be one of those lawyers giving that advice. No court has ruled on this because this has not been out there long enough for a court to rule on, so to say that any existing Circuit Court of Appeals' opinion is applicable to this new interpretation is just flat wrong, that is erroneous.

So, let me say as somebody that had to comply with it, this would invade my client's attorney-client privilege. Just remember, it is not the attorney's privilege, it is the client's privilege. We are, in fact, invading that privilege with this rule. I would just make that point.

Second point, let us get down to what is really going on here. Unions do not want employers talking to their employees about this. Who loses in that environment? Employees. When unions go to organize, they sell, and they sell what they think are the good parts of what they do and they never tell the employees the other side of the story, never.

They never tell the employees that they can take them out on strike without the employees having any right to have any say about that. They never tell them that their dues can be increased without the employees having a vote or anything to say about that. They never tell them that there has been a history of violence or criminal activity inside the union. Obviously, they do not do that.

Who is going to say that? If the union is not going to say that, somebody else has to say it. It has to be the employer. If an employer cannot get legal advice to know what the employer can say and not say, an employer is not going to say anything. That is what the unions want with this rule, for employers to say nothing. That way, the employees of the United States of America do not get the other side of the story. Who loses? The employees, the people that we say we are here to protect, they lose in this. That is who is the real loser here.

Now, this law has been in effect for a very long time. It has been in effect during the John F. Kennedy Administration, the Lyndon B. Johnson Administration, the Jimmy Carter Administration, the Bill Clinton Administration. None of those great Democratic administrations ever put this interpretation on this law, ever.

Mr. Baumgarten, are you familiar with the Kennedy Administration's interpretation when this was first passed and how they applied it?

Mr. BAUMGARTEN. I think I am.

Mr. BYRNE. Could you speak to it, please?

Mr. BAUMGARTEN. As I am sure the members of the subcommittee know, then Senator Kennedy was one of the sponsors of the *Landrum-Griffin Act* when he was in the Senate. The interpretation of the rule that has been in existence up until just a couple of days ago for more than 50 years was, as you point out, the interpretation that was given in 1962 as a result of a memorandum prepared by the Solicitor of Labor, Mr. Donahue, that was enacted during the Kennedy Administration. And interestingly enough, the Secretary of Labor at that time was Arthur Goldberg, who later be-

came Justice Goldberg, and spent a career before entering public service as a preeminent union-side labor lawyer. I would submit that Arthur Goldberg knew a little bit about labor law and knew a little bit about the *Landrum-Griffin Act*, and was obviously a fair-minded public servant as well.

So, we have lived under an interpretation that was given to us under the administration by one of the drafters of the bill and interpreted by people who I think we can fairly say had an objective view of it. And I think it is also worth pointing out that the interpretation was upheld in the courts. It was upheld by the D.C. Circuit. And it will take a couple of lines, and the judge who wrote the decision summarized the then Secretary's position by saying if the arrangement is solely for advice to the employer, then it matters not that the advice has as an object employee persuasion.

The very purpose of Section 203's exemption proscription is to remove from the section's coverage certain activity that otherwise would have been reportable. In the overlap area, the Secretary thus concludes the exemption direction, not the coverage provision, generally must control.

That is the interpretation that the Department of Labor—you might be interested to know that interpretation was withheld in this decision and the decision was written by then Circuit Court Judge Ruth Bader Ginsburg.

Mr. BYRNE. Thank you. Mr. Chairman, I would like unanimous consent to insert letters from the NFIB, the Retail Industry Leaders Association, and the National Association of Home Builders into the record.

I would say to this committee I think it is time for us to vote on the bill I have recently introduced in Congress to repeal this unconscionable interpretation by the Department of Labor, and I yield back.

Chairman ROE. Without objection, so ordered.

[The information follows:]

NFIB
The Voice of Small Business.

April 26, 2016

The Honorable Bradley Byrne
U.S. House of Representatives
119 Cannon House Office Building
Washington, DC 20515

Dear Representative Byrne:

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I am writing you in support of H. J. Res. 87, a Congressional Review Act resolution of disapproval in response to the controversial persuader rule issued by the U.S. Department of Labor (DOL). This legislation would provide relief for small businesses by nullifying this burdensome regulation.

In a regulation finalized on March 23, 2016, the DOL dramatically expanded the definition of what is considered a persuading activity by an employer when communicating with her employees. The persuader rule has previously governed only individuals who directly communicate with workers. A persuader is required to file wide-ranging disclosures with the DOL. Under the new rule, for the first time, merely providing legal advice about how to communicate with employees would cause a lawyer to fall under the persuader rule.

As a result of this new rule, attorneys may seek to avoid working with small businesses. Small businesses are more likely to seek advice about how to communicate with employees, but the new filing requirements will mean that attorneys will be reluctant to provide these companies with crucial information. The net effect of this new rule could see small businesses lose their ability to consult a lawyer during a union organizing election. This scenario places the owner at a severe disadvantage should a union attempt to organize her workers.

NFIB supports this commonsense legislation that will uphold an employers' ability to have access to counsel before communicating with employees regarding union elections. We look forward to working with you to secure this much needed regulatory relief as H. J. Res. 87 makes its way through the legislative process.

Sincerely,

Amanda Austin
Vice President
Public Policy

National Federation of Independent Business
1201 F Street NW * Suite 200 * Washington, DC 20004 * 202-554-9000 * Fax 202-554-0496 * www.NFIB.com

RILA
RETAIL INDUSTRY LEADERS ASSOCIATION
Educate.Collaborate.Advocate.

1700 North Moore Street, Suite 2250, Arlington, VA 22209

April 26, 2016

The Honorable Bradley Byrne
U.S. House of Representatives
119 Cannon House Office Building
Washington, DC 20515

Dear Congressman Byrne:

On behalf of the Retail Industry Leaders Association (RILA), I write to offer our support for H.J. Res. 87, which, under the authority of the *Congressional Review Act,* blocks the final "persuader rule" issued by the Department of Labor (DOL) from taking effect. RILA and its members are deeply concerned the final rule infringes upon the rights of both employers and employees and will have a detrimental impact on the candid and productive employer-employee relationship that is so integral to the creation of good jobs and bolsters economic stability.

RILA is the trade association of the world's largest and most innovative retail companies that promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

DOL's final persuader rule overturns a five-decade old precedent regarding the statutory "advice" exemption, which will now subject employers to extensive disclosure requirements for merely seeking labor-related advice. As written, this new interpretation not only infringes upon and erodes attorney-client privilege, but also discourages employers from seeking counsel in a broad swath of areas that do not typically concern traditional persuader activities, thus putting employers at risk for inadvertent unfair labor practices.

This unnecessary and overly broad expansion of what constitutes "persuasion" will also impede the rights of employees. By denying the right to counsel, the safest course will be for employers to deny their employees information crucial to making informed decisions with respect to union representation. Examples of this information includes the legal effect of signing a union card, how the election process works, and answering questions about current benefits or other promises made by union representatives. This notion completely undermines the more general principles guiding the National Labor Relations Act (NLRA) and the Labor-Management Reporting and Disclosure Act (LMRDA) that are designed to ensure that government does not tilt the scales in favor of or in opposition to unionizing.

RILA believes that DOL's final persuader rule is yet another example of regulatory overreach committed by the Administration. Absent Congressional action, the implementation of DOL's final persuader rule will increase economic uncertainty that will have negative ramifications for the retail industry, the employees in our stores and distribution centers, and the tens of millions of consumers we serve. RILA is prepared to work further with you as H.R. Res. 87 advances through the legislative process. Thank you for your leadership and continued dedication to this important matter.

Sincerely,

Kelly Kolb
Vice President of Government Affairs

National Association of Home Builders

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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

April 25, 2016

The Honorable Bradley Byrne
U.S. House of Representatives
119 Cannon House Office Building
Washington, DC 20515

Dear Representative Byrne:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), thank you for your leadership to protect our nation's small businesses from the U.S. Department of Labor's (DOL) efforts to limit their access to effective counsel when seeking labor-related advice. NAHB supports H.J.Res.87, which would provide for congressional disapproval of DOL's rule to dramatically limit the persuader advice exemption under the Labor-Management Reporting and Disclosure Act.

Under the new rule, DOL narrows the scope of the "advice exemption" so that virtually all employers' interactions with labor lawyers and consultants will be subject to disclosure requirements. For example, if a consultant conducts a seminar for employers on how to achieve positive employee relations, such action would be reportable. If a trade association presents a labor relations educational seminar at a board meeting, such action would also be reportable. Conversely, labor-related activities, including seminars and educational sessions, conducted by unions would *not* be reportable.

DOL's final persuader rule is another example of regulatory overreach that will impose far-reaching reporting requirements on employers and their consultants and result in significant monetary and legal implications for home building firms. The rule is inherently prejudicial and dramatically skewed towards organized labor.

NAHB stands ready to work with you as H.J.Res.87 moves forward in the legislative process. The legislation is necessary to maintain long standing policy on what union-related communications between employers and attorneys remain confidential. Thank you again for your support and leadership on this issue of critical importance to the housing industry.

Sincerely,

James W. Tobin III

Chairman ROE. Ms. Bonamici, you are recognized for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman, and thank you to our witnesses. Before I ask a question, I want to address a couple of things that have been placed on the record.

First, a little clarification about concerns that have been raised about the potential for criminal penalties under this act. It is my understanding there is a willfulness requirement, so we are not talking about mistakes or even negligence here. There is a willful requirement before any criminal penalties would be imposed.

Also, with regard to the recent discussion, it is also my understanding there is a suggestion made that the Clinton administration was aligned with others and, in fact, the Clinton administration tried to reverse the 1962 determination about what needed to be disclosed.

So, Mr. Newman, I also used to practice law, so I know about the attorney-client privilege, and I know how critical it is for effective client representation.

So, we have had a lot of discussion this morning, but I wanted to follow up on some of that, because Section 2 of the *Labor-Management Reporting Disclosure Act* actually states, "Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the Bar of any State to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of an attorney-client relationship."

So, can you talk a little bit about the suggestion that has been made in testimony that lawyers will have to disclose the content of advice they give? Do you agree with that? Do you agree the rule might somehow change that?

Mr. NEWMAN. No. If you read the rule and if you read the forms on which this reporting will take place, what is disclosed is the identity of the client, fee arrangement, scope and nature of the services, all of which have been held by those Circuit Courts of Appeals I cited not to violate the attorney-client privilege.

The rule goes on to say that it requires also the attachment of the arrangement or agreement between the consultant and the employer. If that agreement contains any attorney-client privileged information, then it should be redacted and can be redacted consistent with the rule.

Ms. BONAMICI. Thank you. Since you mentioned what needs to be reported, how do the reporting obligations of employers under this rule compare with the reporting obligations of the unions under the act? So, compare what the unions have to report with respect to hiring attorneys and consultants with what employers report.

Mr. NEWMAN. Oh, my goodness. They do not compare, and they do not compare because unions have to report the identity of the attorneys that they retain, the amounts of money they pay them, not just for persuader activities, but for any activities.

If someone retains—if the union retains my law firm for the purposes of looking at their lease and advising them on real estate issues, then the union has to disclose those payments if they exceed

$5,000, and, as you know, lawyers can rack up a $5,000 bill in short order. They have to disclose that on their annual report.

It is available publicly. It is on the Department of Labor's website, and not only can you search by union, you can search by law firm. Up pops every dollar that was paid by unions to their attorneys and who their attorneys are.

Ms. BONAMICI. The unions also disclose salaries of officers and executives?

Mr. NEWMAN. Yes.

Ms. BONAMICI. Companies do not do that, the employers?

Mr. NEWMAN. They do not. I should add the disclosure requirements that are imposed on unions were amended and broadened substantially under the George W. Bush Administration in 2003–2006, including all this disclosure information with respect to what attorneys must disclosure.

I should add that the ABA at that time did not say a word about it.

Ms. BONAMICI. There is a little bit of time left. Could you expand just a little bit on—this law has been around since the late 1950s. This loophole really did come up through the implementation. Can you talk a little bit about the history of that and why it needs to be closed in the remaining time?

Mr. NEWMAN. Sure. The House version of this, LMRDA, this law, did exactly what the ABA wants to do. In fact, verbatim, just took the ABA's language and inserted it into the statute. Attorneys do not have to disclose basically anything. The bill goes to conference. The conference committee rejects completely that language the ABA was pushing.

Fast forward to 1962, Representative Landrum, who was the House leader of the LMRDA, pushes it again with the Department of Labor with the ABA. If you read the 1962 letter that my learned colleague, Mr. Baumgarten, described, it references both the ABA and Representative Landrum were pushing that opinion.

So, in 1962, the Department of Labor takes the view that you only have to have direct face-to-face persuader activity to trigger a reporting requirement, and then the Clinton Administration reversed that.

Chairman ROE. The gentlelady's time has expired.

Ms. BONAMICI. Thank you, Mr. Chairman. I yield back.

Chairman ROE. Mr. Allen, you are recognized.

Mr. ALLEN. Thank you, Mr. Chairman. This administration has unleashed an onslaught of rules and regulations since I began to serve in Congress just last year. We have had hearings on ambush elections, joint employer rules, overtime mandates. That is just a few of the regulations that will negatively impact how job creators run their businesses.

Now, we add another to the list, the persuader rule. I am frustrated with yet another example of regulatory overreach from this administration, meaning this one-size-fits-all, particularly with regard to my State.

Ms. Sellers, how will this rule impact professional associations focused on providing educational resources to their members? I understand industry groups often conduct webinars and presentations on the basis of the NLRB to educate employers about their rights

and responsibilities under the law. Everyone here wants employers and employees informed.

Ms. SELLERS. Yes, they do.

Mr. ALLEN. In my understanding, sometimes these sessions discuss how to prepare for potential union organizing activities. How is this going to be affected?

Ms. SELLERS. The revision, the recent revision, did clarify this some, but it is still going to affect associations such as SHRM. We have a labor relations panel that traditionally and will probably continue to hold these types of webinars and seminars, and in some cases they do discuss preparing for union activity.

Again, we have employers of all sizes, many of them do not have the luxury of in-house counsel, and some of them do not have very informed HR departments, so they need this training, and it is our belief that if we do present these types of webinars and seminars, we will have to file.

Mr. ALLEN. From your experience, are smaller employers generally prepared for communicating with employees about union issues or do they require assistance from consultants?

Ms. SELLERS. They do require assistance. They do not know, especially small employers. The leaders in small employers wear multiple hats. They are trying to do production. They are doing marketing. They are doing accounting and everything else. The last thing they are thinking about at this point is union organization. That is not even on their radar.

So, when they are approached, and oftentimes they are approached far after the union has had a long time talking to their employees in secret, these employers need to find some assistance from attorneys and consultants who understand this information and can help them catch up quickly.

Mr. ALLEN. As a small business owner, it is unconscionable to me that I cannot talk to my employees. I know their children, their families, hobbies, everything. It is just amazing. I guess this is the world as we see it.

Mr. Baumgarten, the Department of Labor says that requiring more people to file disclosures will bring transparency to workers considering union representation. In your opinion, how will unions and employees use this information?

Mr. BAUMGARTEN. Well, I am afraid that what the Department of Labor has done is create an artificial need for something that really is beside the point.

You know, 50 years ago or so, when the statute was enacted, something like close to one in three of American workers belonged to unions. When I started practicing law in 1983, that was down to about 20 percent. Today, in the private sector, it hovers between 6 and 7 percent; all told, it is about 11 percent including the public sector.

The law has not changed. It is the same law that was in effect, applied more or less the same way, for the last 50 years. So, my point is do not blame it on the law. The economy has changed, and union messages have to change if they want to keep up, and they just have not done that.

I am afraid that what the Department has done is essentially, under the heading of talking about underreporting, has really deprived the employers and employees of fundamental rights.

Mr. ALLEN. That is what my argument is. All of a sudden I have to tell my employees, hey, do not come into my office, I have an open door, I cannot talk to you. How is that going to make them feel? I think that is going to alienate them even further.

Mr. BAUMGARTEN. And all of this is under the artifice of claiming there was underreporting. If there was underreporting under the old rule, then the Department should have enforced the old rule more vigorously instead of trying to change the rule, cast the net wider, capture more people within that net, and then characterize them in this, frankly, boogieman fashion.

Mr. ALLEN. Thank you, panel. I yield back.

Chairman ROE. The gentleman's time has expired. Mr. Takano, you are recognized.

Mr. TAKANO. Thank you, Mr. Chairman. It seems to me all this talk about underreporting is a lot of mumbo-jumbo. It seems to me the Department's persuader rule is about guaranteeing the intent of the *Labor-Management Reporting Disclosure Act*, that the intent is met.

Unions have long had to submit very detailed reports under the LMRDA, and it is correct that employees should know—employees are voting. They are the voters in this case. They are deciding the facts, the presentations on both sides, the arguments of the labor and the arguments of management.

It is right that employees should know all of the parties who are involved in this persuasion exercise when they are considering whether or not they are going to vote for union representation.

Now, we have talked about this comparison of congressional candidates running for office, all reporting requirements. I am required to report contributors and people involved in the campaign.

It seems to me that if I claimed attorney-client privilege as a way of trying to disguise who is contributing to me or who is acting on my behalf or who I am paying, I do not think the voters would accept that. I would say voters would feel they have a right to know.

In a similar fashion, do not workers have a right to this transparency, but would they not more widely consider all the facts being taken into account if employers were required to disclose who they are hiring as persuaders? Mr. Newman?

Mr. NEWMAN. Thank you for the question. Yes, I think that is obvious. I think transparency is good. I think the more information that employees have before they decide whether to choose representation, the better.

Mr. TAKANO. So, this idea that—we are trying to draw a distinction between persuaders, people who are hired specifically to persuade the workers one way or the other on whether or not to vote for union representation from legal advice, from legal advice which is protected.

Can we hone in on that? What is that distinction?

Mr. NEWMAN. Again, I draw up the playbook, I design the plays, I script the message, and I carry that out through supervisors. That is not advice. That is persuasion.

Mr. TAKANO. If you have been paid to do that, that has to be disclosed and how much you are being paid, how much is being spent on that, right?

Mr. NEWMAN. Yes, who retained you and how much is being paid, so that employees can know that information when they make a very important choice.

Mr. TAKANO. That is what is at stake here, the employees' right to be able to know that. It is relevant. We are not getting to the point where we are disclosing the chief executive officers of the company's salaries, which would be even more relevant than, say, a contract negotiation where you are trying to get a bump up of $1 or $2 in your pay if you are a worker, right?

If the company says we cannot afford to give you that raise, we are not even saying you have a right to know what the chief executive officers are making. All we are saying here is, worker, you have a right to know when the company is hiring somebody to try to spin you or persuade you or try to dissuade you or counteract what the union is saying. You have a right to know how much money the company is spending on doing that, is that right?

Mr. NEWMAN. That is right, and let me add union busters in my experience are not shy and always use the reports that the unions have to file to try to engage in persuader activity. And to that point, and I mentioned the legislative history, let me quote the Senate report on the LMRDA, authored by then Senator John F. Kennedy.

"If unions are required to report all their expenditures including expenses in organizing campaigns, reports should be required for employers who carry on or engage some persons to carry on various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees."

Mr. TAKANO. Senator Kennedy has been invoked to make the argument on the other side, but it is clear what his intent is, that even the indirect activity should be covered by this law. So, the intent of the law has not been really reflected by the regulations.

Mr. NEWMAN. Up until now.

Mr. TAKANO. Up until now.

Mr. NEWMAN. And in 2000.

Mr. TAKANO. Up until now and 2000. We are trying to correct that loophole now.

Mr. NEWMAN. Correct.

Mr. TAKANO. Thank you.

Chairman ROE. I thank the gentleman for yielding. Mr. Grothman, you are recognized for five minutes.

Mr. GROTHMAN. Thank you. We are going to start with Mr. Baumgarten. Under the final rule, the employer will have to report if the advice it receives is given with the intent to persuade.

Now, I can imagine talking to a consultant and that could be a vague standard, but I want you to comment, is that a hard standard or it is one of these things where there is a grey area in the law and you do not know if you are breaking the law or not?

Mr. BAUMGARTEN. This is a prime example of poorly drafted rules that leave everybody scratching their heads, everybody in the real world, which is where I function, trying to scratch their head as to what it really means, and there are criminal penalties, and

it does not make anybody feel much better that it has to be willful because God help any of us if we have to defend a claim, claiming we made an error, but it was not a willful error.

Mr. GROTHMAN. What is the penalty?

Mr. BAUMGARTEN. The penalties are criminal penalties.

Mr. GROTHMAN. Do you know what it is?

Mr. BAUMGARTEN. Imprisonment.

Mr. GROTHMAN. How long?

Mr. BAUMGARTEN. I am not sure, but I can tell you that even one day is too long for me.

Mr. GROTHMAN. Okay. How does the employer know about this law?

Mr. BAUMGARTEN. Well, the employer has to be advised by its legal counsel. If the employer does not have legal counsel but simply hires a consultant who is a labor relations advisor but not counsel, they may not ever know about it.

Mr. GROTHMAN. This is one of the major problems we have in this country, in my opinion. You go into business, whatever that business is, service industry, manufacturing, whatever. It is hard enough to know in your business how to make your customers happy. They have all these peripheral laws out here. There is no guarantee the employers even know this law exists.

Mr. BAUMGARTEN. One of the problems with this law is it is very, very sweeping. Under the new LM–10 and new LM–20, there are 13 boxes to have to fill out, and if you engage somebody to help you draft, revise, or provide a personnel policy, you might have to report if it is intended to persuade.

How do we know if it is going to be intended to persuade? The Department of Labor will ultimately tell us whether that was the intent or not, because all they have said is they will look at all the facts and circumstances.

As an attorney talking to a client, if a client comes to you and says we want you to help us draft a personnel policy, that is okay. I can help you draft a personnel policy. I can begin to draft it. Tell me what you are trying to achieve. Well, we want to achieve competitive state-of-the-art policies that will help us recruit and retain effective employees and compete in a very competitive marketplace. I can do that. I can start to do that.

What else would be your objectives? We want to remain a union-free workplace because we have the right to do that. We do not think—whoa, now we have to stop, whether we started the project or did not start the project, whether I have one person as a client, a general counsel, who has one objective, and I have a senior vice president of Human Resources who has a different objective, it is simply too vague to have any confidence that you are complying.

Mr. GROTHMAN. You are a lawyer, right, Mr. Baumgarten? That is why you are here today?

Mr. BAUMGARTEN. Yes.

Mr. GROTHMAN. If your client asks you a question, you have to respond. Even you, a trained lawyer who went to law school, been an expert on this, been to many seminars, you are going to have to respond. I do not know if you have to or not.

Mr. BAUMGARTEN. In many cases, it will be unclear.

Mr. GROTHMAN. The expert, here you are testifying before Congress, the expert, and we have another vague law here in which your clients do not know whether they are doing something criminal or not. Is that true?

Mr. BAUMGARTEN. It is for no demonstrable, appreciable reason. We had 50-plus years of a bright line rule that worked well and that everybody could apply.

Mr. GROTHMAN. Okay. Ms. Sellers, I have a question for you. We sit here before this committee as well as the other committees and we keep coming across new laws, new regulations, new things, that if you dare to do business in the United States of America, you have to know something.

How long have you been involved in—

Ms. SELLERS. I have been in human resources for 30 years.

Mr. GROTHMAN. I would never have guessed it.

Ms. SELLERS. Thank you.

Mr. GROTHMAN. During this 30 years, and I am sure you have been at seminars, blah, blah, blah, and new stuff keeps coming up, how many times have you seen laws disappear in which your clients get good news, and all of a sudden we do not have to worry about something anymore?

Ms. SELLERS. I have very seldom ever had something like that.

Mr. GROTHMAN. Ever in 30 years?

Ms. SELLERS. I cannot recall any.

Mr. GROTHMAN. We never take away any rules, all we do is add new rules? You have never seen anything taken away, Ms. Sellers, in 30 years?

Chairman ROE. The gentleman's time has expired. Ms. Wilson, you are recognized for five minutes.

Ms. WILSON. Thank you, Mr. Chair. I want to ask a question of Mr. Newman. In current Federal employment and labor law, do workers benefit by not having all relevant information they need in order to make informed decisions as it relates to their working conditions, wages, or retirement?

Mr. NEWMAN. I have been doing this for 22 years, and I think not.

Ms. WILSON. If not, what credence do you give to arguments that workers should not have information needed to make decisions regarding their collective bargaining and unionizing rights?

Mr. NEWMAN. I do not give any credence to it. I think, as I said, the idea and the title of this hearing that the persuader rule is an attack on employee free choice is bizarre, to put it diplomatically.

Ms. WILSON. You stated in your testimony that in your practical experience, in most union campaigns, the evidence of the use of anti-union consultants is overwhelming. What are these signs?

Mr. NEWMAN. The signs are it does not matter the size of the employer, it does not matter the industry in which the employer operates, it does not matter what part of the country in which the employer operates.

The messages are the same, the manner of their delivery is the same, and there are scripted messages. There are handbills and leaflets that are drafted, sometimes they are identical. You will see the identical handbill in one campaign, in one industry, in one part

of the country that is used in a different industry, in a different part of the country.

The messaging is exactly the same. The theme of the campaign is exactly the same. The union is a third party outsider, we are one big, happy family, reject that outsider.

To the extent that a variety of different employers of all sizes in all varieties of industries can themselves come up with the exact same campaign materials, I think, is impossible. And I think the academic studies on this support that, that up to 87 percent of cases employers retain union-busting consultants.

Ms. WILSON. Do you think the average worker working today has the knowledge or experience needed to detect these signs and recognize the true source of communications?

Mr. NEWMAN. They do not. Most employees give their employers and their supervisors the benefit of the doubt. When their supervisors are telling them something that they claim is their opinion and their message, they are going to believe it, unless they are able to understand through disclosure that supervisor's message is not the message from the supervisor, it is a message from a union buster.

Ms. WILSON. What is the dividing line between labor and consultants or attorneys giving advice and engaging in persuader activity?

Are attorneys who keep detailed records of their time spent and routinely make determinations about the character of their communications able to easily identify whether they are engaging in reportable persuader advice?

Mr. NEWMAN. Yes. Let me say something that I say to my children often, which is saying something over and over does not make it true. Saying that legal advice is reportable under this rule is just not true.

The Department of Labor is very clear about this. Let me quote the rule. "An attorney or consultant does not need to report when he counsels a business about its plans to undertake a particular action or course of action, advises the business about its legal vulnerabilities and how to minimize those vulnerabilities, identifies unsettled areas of the law, and represents the business in any disputes and negotiations that may arise."

That is legal advice, it is not reportable.

Ms. WILSON. So, the rule gives examples or instructions in this regard?

Mr. NEWMAN. Detailed examples.

Ms. WILSON. Detailed. That is great. Does the disclosures on Form LM–20 filed by consultants and Form LM–10 filed by employers in any way aid employers in complying with disclosure requirements? Can employers use information filed by consultants to file their disclosures?

Mr. NEWMAN. Can employers use information filed by consultants? They can. They can certainly look at the consultant's report to see whether the consultant has deemed its activities reportable, which would trigger a reporting requirement for the employer.

Employers often do not use the consultant's reports, they use the union's reports, and the consultants use the union reports to persuade employees.

Ms. WILSON. Is there any way—

Chairman ROE. The gentlelady's time has expired. Mr. Carter, you are now recognized for five minutes.

Mr. CARTER. Thank you, Mr. Chairman. Thank all of you for being here today, we appreciate it very much.

Ms. Sellers, I want to start with you. As I understand it, you are a human resources professional, and certainly you have had a lot of experience in this type of thing, in this kind of work, and particularly in the compliance area.

Earlier during your testimony you mentioned the fact that you work primarily with small businesses.

Ms. SELLERS. Right.

Mr. CARTER. Under 100 employees?

Ms. SELLERS. Fifty percent of my clients have 100 employees or less, and I think 34 percent have 50 employees or less.

Mr. CARTER. I was formerly a small business owner, and now my wife is a small business owner. I am from a right-to-work state, I am from Georgia. We are a right-to-work state. Of course, we are very concerned—we have had a tremendous amount of job growth, and that is good, and that is what we wanted to do, that is what we have intended to do.

I am particularly concerned about what this is going to do to small businesses. Can you give me an idea of the impact this could have on small businesses?

Ms. SELLERS. Because of the vagueness of certain areas of this rule, I think we are all, the small business owners as well, going to over report or just back away from the topic completely. Over reporting will result in a great deal of time and effort.

It may take 60 minutes to review the form, but if I have to go through each of the services that I provide to each of my clients, and I must admit, it is usually different things every day, to determine whether or not this could possibly be considered persuader or offering advice in the event of some sort of union organization, many times after the fact, without my knowledge, I would either over report or I would just make sure all employers knew we were not to discuss employee organization, and I could not share with them the rules. Because even if I just go by the rules, with TIPS, not to threaten, interrogate, and so forth, someone is going to say, well, what can I do?

When I start telling them what they can do, now I am offering that advice, and I would then be under the indirect persuader rule.

Mr. CARTER. I would suspect that the opposite could be true, and that is some small businesses and, in fact, a lot of small businesses, instead of over reporting, they will not be able to report at all.

Ms. SELLERS. Absolutely, they are going to shy away because they do not want their name on the form.

Mr. CARTER. Right. That is the impact it is going to have on businesses. What about the employees? Can you see it having an impact on the employees?

Like most small business owners, my employees, they are my family. I want to make sure they are okay, too.

Ms. SELLERS. Well, I believe if we start shying away from we cannot say this and that in employer training and supervisory

training, I think a lot of these supervisors are just going to back away because we are still at risk even if I change my outlines and my training. We are still at risk for the attendee asking a question that will then turn into advice.

I am afraid that a lot of employers will turn away from having any of that type of training for their supervisors. We really firmly believe at SHRM that supervisors should be trained well, that will lead to employee engagement and successful companies.

So, the employees will be directly affected because they will not have as effective supervisors as they could.

Mr. CARTER. Right. One last thing, and this is for you, Mr. Baumgarten. You obviously have an extensive background in labor law, and obviously that is where your expertise is.

When businesses hire a lawyer, they hire them primarily for one reason, and that is to just make sure they are legally abiding by the laws. They want to make sure they are in compliance. I certainly have done that myself. It is more a precautionary measure than anything.

The direct contact test that was established in 1962 and has been in place since then, can you explain that to me a little bit just to make sure I understand it correctly?

Mr. BAUMGARTEN. The issue that was addressed during the McClellan hearings and the fundamental issue that was addressed in the *Landrum-Griffin Act* were these middlemen who were acting on their own or through other third parties in ways that were coercive, involved corruption, or otherwise were in the shadows.

When an employer is speaking directly to its employees, whether it is with the advice of counsel, whether it is with the advice of a labor relations consultant, an accounting firm, or anybody else, it is the employer's message. There is nothing that is in the shadows, and the employees have no lack of clarity as to who stands behind that message. It is the employer.

Mr. CARTER. Right. Mr. Chairman, I know my time has expired. I appreciate it. I just wanted to make sure because this is probably going to impact that quite significantly.

Chairman ROE. I thank the gentleman for yielding. Again, I want to thank our witnesses, great discussion today, big turnout of members. I would like to thank you for taking your time to testify in front of the subcommittee today.

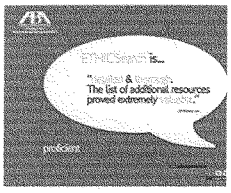
Mr. Polis, do you have any closing remarks?

Mr. POLIS. I do. I would like to begin by submitting two letters for the record, without objection, Mr. Chairman. One is an ABA policy statement, the other is a letter from attorneys.

Chairman ROE. Without objection, so ordered.

[The information follows:]

Rule 1.6: Confidentiality of Information



Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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April 27, 2016

Hon. John Kline
Chairman
Committee on Education and the Workforce
Washington, DC 20515

Hon. Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
Washington, DC 20515

Dear Honorable Members Kline and Scott:

We write as members of law school faculties with research and teaching experience in Legal Ethics, Constitutional Law and Labor Law to address attorney-client confidentiality concerns that have been raised by members of the legal community to the Department of Labor's (DOL's) Final "Persuader" Rule ("Final Rule" or "Persuader Rule"). The Final Rule implements the disclosure requirements of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) by requiring employers and their hired labor relations consultants to report their agreements under which the consultants agree to, directly or indirectly, persuade employees regarding how they exercise their rights to organize and bargain collectively. For the reasons discussed below, we believe that the reporting regime contemplated by the LMRDA as amended, can coexist comfortably within the lawyer's obligations under the American Bar Association's Model Rules of Professional Conduct (herein, "M.R." or "Model Rules").

The DOL's Persuader Rule Does Not Require Reporting of Arrangements where an Attorney Agrees to Exclusively Provide Legal Advice to Clients.

The LMRDA's reporting regime has always accommodated attorneys' professional responsibility concerns when attorney-client communications were potentially subject to disclosure. For example, it is undisputed that Section 204 of the LMRDA expressly exempts the reporting of any "information which was lawfully communicated to such attorney by any of his clients." 29 U.S.C. § 434 (2012). Further, several circuit courts of appeal have seen no conflict between LMRDA's reporting requirements and the attorney-client privilege.[1]

[1] *See, e.g., Humphreys et al v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985) (upholding LMRDA's reporting requirements for attorneys engaged in persuader activity and noting that, "[i]n general, the fact of legal consultation or employment, clients' identities, attorneys' fees, and the scope and nature of employment are not deemed privileged"); *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), rev'd in part on other grounds, *Price v. Wirtz*, 412 F.2d 647 (1969) (same); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965) (same) .

The DOL's Final Rule is Consistent with the Model Rules of Professional Conduct.

There is no conflict between the LMRDA's regulatory regime administered by the DOL and the ethical responsibilities of lawyers. In the comment of the American Bar Association, filed with the DOL on September 21, 2011, the ABA argued that the proposed Persuader Rule was inconsistent with Model Rule 1.6 which prevents attorneys from disclosing confidential information. Even when an attorney engages in persuader activities and must report those activities under the Final Rule, however, there is no conflict between the Persuader Rule and legal ethics rules because the current version of the Model Rules contains several possible exceptions to the attorney's ethical duty of confidentiality. The language of ABA Model Rule 1.6(a) is broad in terms of the material possibly covered by the attorney's ethical duty of confidentiality, as it applies to all "information relating to the representation of a client." M.R. 1.6(a). For decades, though, the ABA has gradually added exceptions to the confidentiality rule.

Indeed, current Model Rule 1.6(b)(6) was added to the rules in 2002, and protects attorneys from discipline if they disclose certain client information to comply "with other law or court order." M.R. 1.6(b)(6). Therefore, the Model Rule clearly contemplates the disclosure of confidential information to comply with a law such as the LMRDA. To date, forty-nine states and the District of Columbia have adopted professional conduct rules patterned on the ABA Model Rules.[2]

There are many other laws that require certain disclosures by attorneys when they engage in certain activities on behalf of a client, including the Lobbying Disclosure Act (LDA) of 1995. Lobbying disclosure reports require much of the same information as on the forms that are at issue here, including the names of clients and payments. Both lawyers and non-lawyers alike are subject to the reporting requirements of the LDA, which has never been successfully challenged in over 20 years in effect. There are numerous other examples of similar reporting regimes that have been enacted over the last several decades, with little evidence that attorneys are being chilled from fulfilling their duties to clients.

Conclusion

In sum, we believe the Department of Labor has not placed attorneys who engage in persuader activity between a labor law rock and a legal ethics hard place. Please let us know if you have any questions or concerns for us.

[Signatures to follow on next page: Titles and affiliations are for identification purposes only.]

[2] The State Bar of California has not adopted the ABA Model Rules, but California often considers the Model Rules for guidance in its case law. *See, e.g.*, Cho v. Superior Court, 39 Cal. App. 4th 113 (1995); Goldberg v. Warner/Chappell Music, 125 Cal. App. 4th 752 (2005).

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Mr. POLIS. This is a letter from many, many attorneys, including many professors of law, that states in part, "For the reasons discussed below, we believe that the reporting regime contemplated by the MLRDA, as amended, can coexist comfortably with the lawyers' obligation under the American Bar Association's model rules of professional conduct," as Mr. Newman also testified to, and as is also contemplated in the ABA's own information section, also entered into the record, which has a clear component to comply with the law or other court orders.

I want to thank our witnesses for joining us today and for engaging members of the subcommittee in a substantive discussion.

As we have discussed, reforms to the persuader rule are more than 54 years overdue, and help conform the actual implementation of the rule with the words of the law and the legislative intent.

The MLRDA does not require reporting when consultants really give employers advice, but the DOL's previous interpretation of the advice exemption was so broad that it allowed employers and consultants to avoid disclosing things that any reasonable person would consider indirect persuader activities covered under the statute.

The previous interpretation was, in fact, rooted in an erroneous two-page solicitor's memorandum issued in 1962.

This rule is the final step towards fulfilling the original requirement in MLRDA, and will provide needed transparency in the workplace.

I do want to address briefly some of the arguments we have heard today, that somehow the disclosure would affect an attorney's ethical duty of client confidentiality. As Mr. Newman said very clearly, many experts, legal experts, agree, which is also in the letter, that this does not in any way violate confidentiality, nor does the additional reporting requirements for attorneys who happen to be registered lobbyists.

As Mr. Newman and many of my Democratic colleagues shared, the persuader rule helps level the playing field for workers, rather than having an enormous stack of filings that unions have to have with regard to persuasion activities, we are talking about simply for employers, a few pages, help level that playing field for transparency, not to the benefit of either party.

I believe we as a society and all those acting in good faith, both employers and unions, benefit from transparency around the process.

Despite clear congressional direction to provide public disclosure of indirect persuader agreements, disclosure has been a one-sided proposition. Unions have to file hundreds of pages to report on how they spend money. Meanwhile, workers seeking to form unions are denied information and kept in the dark about their employer's persuader arrangements.

Under this new rule, which fulfills the statute, employers and consultants would be on more of a level playing field with regard to disclosures. It is a significant step forward, requiring employers to make public a small fraction of important information that unions have already made public for years.

Transparency helps ensure good governance in unions, and transparency will also help ensure a more democratic workplace, and above-board process at the employer level.

A level playing field is exactly what our workers and corporations need today.

I support this rule and look forward to successful implementation, and I yield back.

Chairman ROE. I thank the gentleman for yielding. I again thank the panel, a great discussion.

Let me just conclude briefly by saying that you have a right in America to belong to a union or not belong to a union. That is a right. I grew up in a union household. My father was a member of the union. I understand and realize what that union membership entailed during the time I was a kid growing up.

As a small business owner, which I was until I got here, the most valuable asset that we have in small business are our employees. No question about it, certainly in our service industry like I was in, in a medical practice.

As Mr. Allen said, many of these employees are like family members to us, and to not be able to speak to them in any way seems to me not who we are as a country.

What has happened through nine administrations—I just counted them off in my head—this did not seem to be a problem through nine administrations until this administration came along. What has happened in the labor market? What has happened in NLRB in the seven years I have been here?

We have seen the push to have card checks, not a secret ballot, that is the most sacrosanct thing. I put on a uniform, left this country, and went to Southeast Asia to protect your right to have a secret ballot. It is the most sacrosanct thing we can have, number one. That did not go anywhere.

Ambush elections, and it seems that my colleagues are very interested in getting all this sunshine on somebody getting some legal advice, but it can only shine for 11 days because we have to get this election done really quick before anybody finds out what is really there.

What is wrong with having a process that goes longer so the employees and the employers and everyone understands, because it is a huge thing that we are voting for. That is all anybody is asking for.

Micro unions, persuader rule, overtime, on and on I could go with the Department of Labor and this administration.

My concern, quite frankly, since it is arguable, and attorneys make a lot of money arguing about things, if the attorney-client privilege is arguable, if we are arguing about that, then we have lost a very basic right that we had as American citizens. Our system of laws in this country has been to protect individual rights throughout the 200-plus years of this Republic.

I will just go through them briefly, there are some differences of opinion. We have the American Bar Association who opposes this. The Association of Corporate Counsel, the Ohio Management Lawyers Association, State Bar of Arizona, the Broom County, New York Bar Association, the Ohio Metropolitan Bar Association, the Florida Bar, the State Bar of Georgia, Illinois State Bar Associa-

tion, the State Bar of Michigan, the Missouri Bar, the Mississippi Bar, the Nebraska State Bar, the Ohio State Bar, the Peoria County Bar Association, the South Carolina Bar, the Tennessee Bar Association, the West Chester County, New York Bar Association, the West Virginia State Bar Association, and on and on, seem to oppose this.

I think this is a rule that starts us down a slippery slope, and not a law, I might add, but a rule that could negate the attorney-client privilege. We need to go very thoughtfully and carefully with this.

Once again, this was a very thoughtful discussion, great debate from both sides of the aisle. And with nothing further, this meeting is adjourned.

[Additional submission by Mr. Byrne follows:]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

April 26, 2016

The Honorable Bradley Byrne
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Byrne:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, supports H.J. Res. 87, a resolution of disapproval that would repeal the Department of Labor's (DOL) recently finalized "persuader" regulation.

The "persuader" regulation upends a clear, brightline interpretation of "advice" under the Labor Management and Reporting Disclosure Act (LMRDA) that had been in place for over 50 years. This previous interpretation required employers and their attorneys or consultants to publicly disclose to DOL their relationships only when the attorney or consultant communicated *directly* with employees about unionization. DOL's new interpretation dramatically narrows the meaning of "advice" in order to expand reporting, which now includes a wide array of innocuous activities, such as retaining an attorney to draft certain workplace policies.

DOL's new "persuader" regulation is incredibly vague and arbitrary, forcing employers and their attorneys and consultants to guess as to what activities must be reported. This ambiguity is particularly perilous given that there are criminal penalties attached to this reporting process. Moreover, public disclosure of the attorney-client relationship raises serious legal and ethical issues for attorneys, which will discourage attorneys from offering legal advice on labor matters. All of these issues are features, rather than bugs, of the "persuader" regulation: reporting uncertainty, a complicated disclosure process, attorney-client confidentiality issues and the specter of criminal penalties will all combine to make it harder for employers to communicate with employees about the pros and cons of unionization. Limiting employer free speech was precisely the goal of the deceptively named "Employee Free Choice Act" (EFCA) as well as the National Labor Relations Board's 2014 "ambush" election regulation. Congress rejected EFCA and voted to rescind the ambush election rule (S.J. Res 8). For the same reasons, Congress should likewise reject the DOL's new "persuader" regulation.

Thank you for your leadership on this issue, and for sponsoring H.J. Res. 87. We look forward to working with you and Congress to advance this important legislation.

Sincerely,

R. Bruce Josten

R. Bruce Josten

[Additional submissions by Mr. Jeffries follows:]

UNIONIZATION BY STATE - Direct Union Membership

State	2015				
	Total employed	Members of unions(1)		Represented by unions(2)	
		Total	Percent of employed	Total	Percent of employed
New York	8,249	2,038	24.7	2,141	26
Hawaii	583	119	20.4	126	21.7
Alaska	304	60	19.6	66	21.7
Connecticut	1,587	269	17	277	17.4
Washington	2,977	500	16.8	536	18
California	15,657	2,486	15.9	2,689	17.2
New Jersey	3,880	596	15.4	644	16.6
Illinois	5,566	847	15.2	892	16
Michigan	4,083	621	15.2	672	16.5
Oregon	1,586	235	14.8	256	16.2
Nevada	1,232	177	14.3	203	16.5
Minnesota	2,565	363	14.2	385	15
Rhode Island	483	68	14.2	72	14.9
Pennsylvania	5,601	747	13.3	804	14.4
Massachusetts	3,103	402	12.9	441	14.2
Vermont	284	36	12.6	42	14.7
West Virginia	665	83	12.4	91	13.7
Ohio	4,914	606	12.3	670	13.6
Montana	427	52	12.2	59	13.9
Maine	549	64	11.6	75	13.6
Kentucky	1,705	187	11	207	12.1
District of Columbia	334	35	10.4	40	12.1
Maryland	2,757	287	10.4	337	12.2
Alabama	1,863	190	10.2	204	11
Indiana	2,828	283	10	319	11.3
New Hampshire	641	62	9.7	73	11.4
Iowa	1,435	138	9.6	174	12.2
Delaware	412	38	9.2	43	10.4
Missouri	2,615	230	8.8	257	9.8

Kansas	1,255	110	8.7	136	10.8
Colorado	2,310	194	8.4	215	9.3
Wisconsin	2,682	223	8.3	253	9.4
Nebraska	882	68	7.7	80	9
Wyoming	261	19	7.1	22	8.2
Florida	7,994	546	6.8	671	8.4
Idaho	679	46	6.8	50	7.3
New Mexico	782	49	6.2	61	7.9
South Dakota	382	22	5.9	26	6.9
Louisiana	1,847	107	5.8	126	6.8
Oklahoma	1,567	88	5.6	116	7.4
Mississippi	1,103	60	5.4	75	6.8
North Dakota	352	19	5.4	24	6.8
Tennessee	2,693	146	5.4	175	6.5
Virginia	3,736	202	5.4	258	6.9
Arizona	2,661	138	5.2	163	6.1
Arkansas	1,155	58	5.1	74	6.4
Texas	11,177	503	4.5	626	5.6
Georgia	4,016	162	4	206	5.1
Utah	1,274	50	3.9	67	5.2
North Carolina	4,089	123	3	167	4.1
South Carolina	1,960	41	2.1	57	2.9

UNIONIZATION BY STATE - People Represented by Unions

State	2015 Total employed	Members of unions(1) Total	Members of unions(1) Percent of employed	Represented by unions(2) Total	Represented by unions(2) Percent of employed
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[Additional submission by Mr. Newman follows:]

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Testimonials

Although I do not own a company any more, and never did have more than four employees, I never had a good interaction with a union. I appreciate this site because it's good to know that business owners can get help in dealing with unions. I believe that in spite of some good results from union efforts in our nation's history, the bottom lien score for unions overall are about a minus-5 on a scale of minus 10 to plus 10. If I had a large company here in Florida, I'd be watching out for unions very much, because our Governor is on the make for a presidential bid, and he's a RINO. Even though our state is RTW, that can change. It is good to have a resource like the Labor Relations Institute for companies that need help, especially when our so-called President has never seen a law he won't break for his own advantage.
— **R. Canary**

Extremely well written! Concise, pragmatic, useful data. One of the best 'book reviews' and actionable advice I've read in quite a while!!! THANK YOU!!!
— **D. Harris**

I just wanted to take a moment and personally thank you for lending us your expertise and hard work in helping [Company Name Withheld] remain Union-Free. You were instrumental in helping me stop the Teamsters, who had been previously batting 1000 against [Company Name]; winning several elections against this past year. With a resounding 50%

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The Union Battleground (TRT 19:32)

The Union Gamble (TRT 18:59)

Who's In Control? (TRT 17:26)

Your Job On The Line (TRT 20:01)

Your Decision, Your Future (TRT 17:17)

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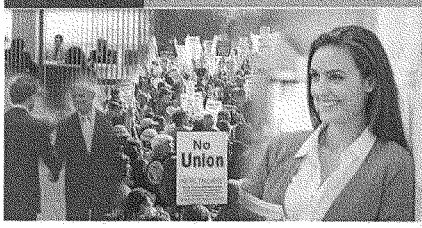
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The Burke Group

Labor Relations Consultants to Management

Client Login



- Union Vulnerability Assessments and Management Audits
- Counter Organizing Campaigns
- Union Card Signing & Union Avoidance
- Direct Employee Communication
- Labor Contract Negotiations and FACTS
- Supervisory Training & Development
- Corporate Campaigns

Click here for TBG EU division website

The Burke Group (TBG) - Labor Relations Consultants

The Burke Group [TBG], established in 1982, is the international leader in guiding management during union organizing (recognition) and **union card signing** campaigns. With 1400 clients in 50 industries and 10 countries (including the United States, E.U., Canada, Mexico and China), we have participated in over 800 elections and employees in 96% have have either voted no, decertified or experienced petition withdrawal. Our record of success is unequaled and our professional **labor relations consultants** are the most culturally diverse and experienced in the world. TBG's expertise rests in these major areas:

Testimonial



HONEYWELL (US, UK, CANADA & PR)

"The Burke Group provides outstanding skills assessment and hands-on training for managers and front-line supervisors regarding improving employee communications and interpersonal skills. Over the last five years, our company's experience with the professionals from The Burke Group has been uniformly excellent in wide variety of business situations and geographic locales. The Burke Group is responsive and have great impact and the highest ethical standards. No matter how difficult the assignment, The Burke Group has always been successful for us."

Edward J. Bocik
Vice President Labor Relations

Read More >

- **Union Avoidance Education, Training, and Mentoring** to management is key to delivering communications that adhere to applicable current law during both union card signing and union recognition drives. In **union recognition** campaigns in which TBG participates, organizations experience larger voter turnout and we take great pride that over 96% of eligible employees will cast ballots and confidently demonstrate their right to vote their decision.

- **Preventive Labor Relations - Union Free workplaces** require period Vulnerability Audits for employers to understand where they are falling short of employee expectations and what may trigger employees toward union organizing. We can design management training such that identify issues and solve them. We will guide you to optimum conditions that can be periodically monitored by company staff or TBG so that your successful business climate and satisfied employees will not seek outside union intervention or representation.

The Burke Group [TBG] is a labor relations consulting firm that specializes in labor relations strategies, industrial training, management audits, NLRA Training, NLRB elections, preventative labor relations, union avoidance, union card signing and union organizing.



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Related Links

Industry News

Press Releases

Union Avoidance FAQ

How can union organizing be prevented?

The employees within the unit targeted by the union as eligible to vote will ultimately decide whether your organization will remain union free. They will demonstrate their conviction to remain union free by exercising their right to vote and by making an "informed" decision. TBG possesses the professional expertise at all levels of a union's organizing efforts (pre-petition, counter campaigning, and post-election) that guarantees that the voting unit will be "informed", and we specialize in the tough ones.

What services does The Burke Group perform?

TBG provides consultation services that will "balance" both sides of the issues so that the union campaign can't dominate. We manage all sizes and types of campaigns and specialize in large complex crisis situations including multiple unions and/or multiple locations, within organizations with multi-cultural and multi-lingual workforces. We have completed over 700 campaigns and have a 96% win rate! Our client list is so extensive we decided to provide a representative sample of election results to demonstrate the kinds of results that can be achieved.

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Card Signing & Petition Withdrawal

Direct Employee Communications

NLRB Elections

Organizing Avoidance

Supervisory Training & Development

Union Organizing Response Planning

Vulnerability Assessment

Labor Contract Negotiations

Corporate Campaign Strategy

Positive Employee Relations Programs (PERP)

Labor Research and Communications

Strike Plans & Return to Work

Select a category: Labor Research and Communications

Digital Video Communication CD/DVD Communication

In today's digital and media driven world, messages must be delivered in varied formats. Custom labor videos provide excellent pro-employer messages with hard-hitting facts as well as personal testimonials and perspectives from employees and supervisors. CD/DVD hosted presentations are another format that will enable you to reach the technical savvy of your employee group, allowing employees to browse through information in "chapters" and learn at their own pace. Digital communications strengthen critical messages with verbal and visual reinforcement.

Custom Campaign Websites

Custom Campaign Websites reinforce your campaign message in a format that preserves employee anonymity, enhances personalization and enables dynamic content solutions. Employees will be able to access current news, organizational communications, union activity data and statistics anywhere, anytime.

Communication Strategy

Effective communication strategy must integrate organizational objectives with labor relations strategies. The Burke Group will develop strategic plans that recognize the need to be both flexible and responsive to internal and external audiences. The Burke Group understands the importance of actively managing the organization's image within the community during a labor relations campaign.

When employees feel vulnerable because of business actions (mergers, acquisitions, downsizing, etc.) they become susceptible to promises by the unions to protect them. Management can also be ineffective when they do not understand the business climate and do not have the communications skills key to preserving effective employee relations.

The Burke Group's years of experience has shown that providing both the management team and the workforce with quality and reliable information is one of the best techniques for success.

Videos and Labor Research available through PTI Labor Research

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Labor Relations Strategies & Consulting Services – TBG



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Labor Research and Communications

Strike Plans & Return to Work

Select a category: NLRB Elections

Union Organizing Response Planning

Most managers and supervisors within small businesses and corporations are untrained and/or inexperienced when it comes to a union's organizing campaign and need to quickly learn how to respond within the guidelines of the NLRA. Professional union organizers plan and direct a union campaign but the actual work of organizing is generally carried out by employees selected and trained to form a plant organizing committee.

When a union campaign has begun, the organizers are often ahead of supervision in communicating with employees and perhaps making promises that employees do not fully understand. The organization needs to make key action decisions.

The Burke Group works with the leadership team to quickly understand the issues, develop a campaign response plan and educate the leadership on all aspects of the organizing process. TBG brings the management team together to meet the union's challenge.

TBG is committed to building a positive workplace climate encouraging managements' direct communication with employees. We encourage managers and employees to become fully engaged in resolving workplace problems together. Our consultants train, coach, counsel, AND develop an employee communications program and motivate supervisors and managers right up to the election date.

We identify employee concerns, make recommendations, and work with managers and employees to build a better workplace. We are engaged to strengthen the internal consultation process, encourage two-way dialogue, and ensure line managers and employees are fully informed about the complex process of union recognition.

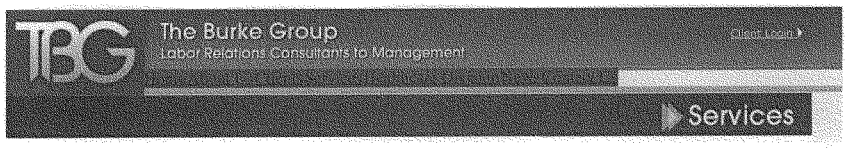
TBG fully respects each person's legal right to belong to a trade union and we advocate for the right to make individual and informed decisions about union-based collective bargaining.

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TBG is a labor relations consultants firm that specializes in labor relations strategies, training, management audit, NLRA, NLRB elections, preventative labor relations, union avoidance, union card signing and union organizing.

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Strike Plans & Return to Work

Select a category: Card Signing & Petition Withdrawal

Card Signing

Card signing is the first step in a union's organizing campaign. The number of cards signed will determine a union's interest in pursuing continued organizing efforts in a particular workplace before they decide to file a petition with the NLRB. If a union does not collect enough cards, generally there will be no petition filed. But lack of cards is no guarantee that an election will not be sought. Campaigning is ongoing and signed cards will continue to be sought. Signed cards will inform union organizers of interest that will guide them in determining the viability of pursuing an election.

Once card signing starts, organizers will begin an aggressive communications campaign. And once the petition is filed, they become more aggressive via letters, emails, meeting, social networking, home visits and all means available to them.

Throughout the process, organizers may make grand promises to attract interest from workers, but the law does not require those promises to be kept. **The time from card signing and from the petition to the election is critical for employers to help employees sort fact from fiction.**

The Burke Group can assist in the communications effort. We audit, train, coach, counsel and support the employees and employer during a union's campaign process. Most employers lack the personnel and expertise required during the critical period preceding an election. Legal communications are critical.

Petition Withdrawal

As employees learn the facts, our experience has shown they often lose interest or withdraw support. Without positive supportive momentum and/or enough cards, the union will determine it is NOT in their best interests to continue an organizing campaign and will cease the organizing process or withdraw the petition if one has been filed.

Employer communication is critical.

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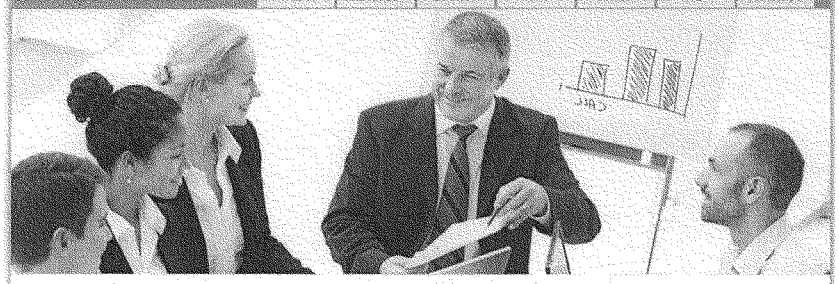
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PTI

LABOR RESEARCH & MEDIA SOLUTIONS

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About Us

MISSION STATEMENT

PTI strives to be the premier provider of customized labor research services and union avoidance products in the United States and selected other markets

PTI works closely with labor relations professionals in the U.S., Canada, Puerto Rico, the U.K. and Europe. Our emphasis is in helping you maintain your union-free status by promoting a positive employee relations environment. Our innovative videos and research can address ALL your communications needs and help deliver your corporate message to employees during counter union campaigns.

Labor relations attorneys, management consultants, Labor Relations and Human Resource specialists, trainers, analysts and corporate executives all rely on our products such as:

- Custom Corporate Videos
- Campaign Research
- Campaign Support
- Referral Service (Labor Relations Attorneys and Consultants by Geographic area)
- Training

PTI's research includes representation election results, strike history, Unfair Labor Practices charges, contracts, collective bargaining agreements, news articles and more.

PTI's database contains historical union activity records from 1990 to today, which cannot be matched by any competitor and is unique in this industry.

PTI means Power Through Information

PTI Latest Products

CampaignWebsites

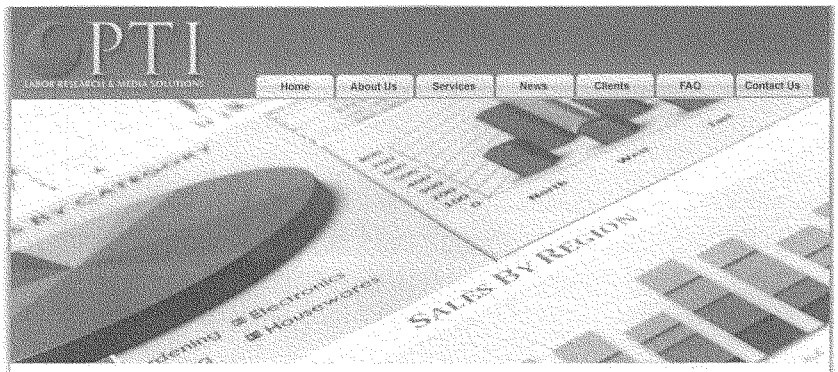
Deliver your message anywhere, anytime. Campaign Websites reinforce your campaign message in a format that preserves employee anonymity.
More...

Union Awareness Program

PTI Labor Research has been obtaining and analyzing union activity and petitions for over 20 years. We have the largest and most extensive research data in the country which has been utilized by thousands of companies, labor lawyers and consultants.
More...

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Campaign Materials

1. Banners
    - Strengthen corporate themes and messages through prominent visual display
2. Campaign Specialty Items
    - T-shirts, jackets, baseball caps, buttons, pens, stickers, stress release novelty items
3. Print Materials
    - Paycheck Stuffers
    - Table Tents
    - Vote No Campaign Posters (Spanish/English)
        - Campaign Specific Topics
        - Union Specific Topics
        - Generic Campaign Topics
4. Launch a communication campaign that will increase the visibility of your corporate objectives.
    - Newsletters
    - Posters
5. PowerPoint Presentations – Campaign specific templates emphasizing your key messages.
6. Campaign Calendar – Short one as a courtesy, detailed for a fee
7. Campaign Checklist

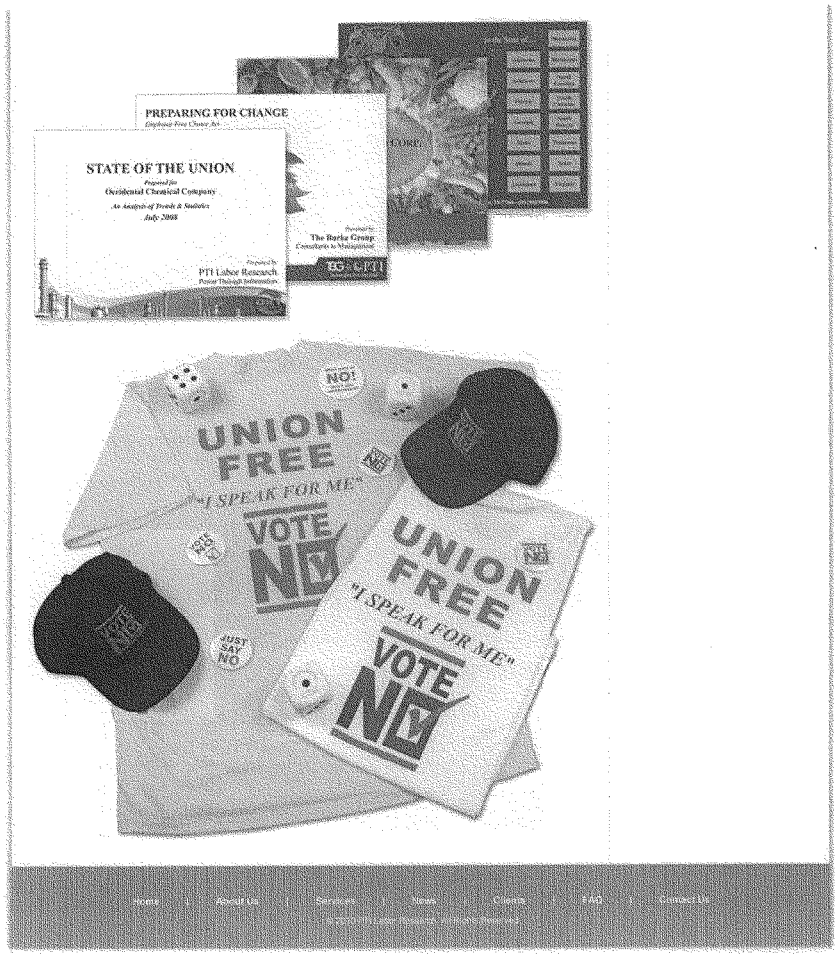
PTI Latest Products

CampaignWebsites

Deliver your message anywhere, anytime. Campaign Websites reinforce your campaign message in a format that preserves employee anonymity.
More...

Union Awareness Program

PTI Labor Research has been obtaining and analyzing union activity and petitions for over 20 years. We have the largest and most extensive research data in the country which has been utilized by thousands of companies, labor lawyers and consultants.
More...


PREPARING FOR CHANGE
STATE OF THE UNION
Occidental Chemical Company
An Analysis of Trends & Statistics
July 2008
Prepared by
PTI Labor Research
The Burke Group
UNION FREE
"I SPEAK FOR ME"
VOTE NO
JUST SAY NO
Home
About Us
Services
Union
Clients
FAQ
Contact Us

Adams Nash Haskell & Sheridan

QUESTIONS? CALL NOW

WHY ANHS? SERVICES PRODUCTS BLOG



WHY ANHS?

OUR SERVICES.
YOUR UNION-FREE FUTURE.

THE POWER OF BETTER THINKING.

When employees begin to organize, it strikes fear into the heart of any organization.

The good news? You have a powerful labor relations team of experienced union avoidance consultants in your corner. For nearly 30 years, Adams Nash Haskell & Sheridan has provided winning services, campaigns, and insights for clients across the country. Don't wait to take back the control you've worked so hard to achieve. With top of the line labor relations consulting, its hard not to win. Contact our union avoidance consultants today.

URGENT SERVICES

COUNTER UNION CAMPAIGNS >

UNION AVOIDANCE >

COUNTER CORPORATE CAMPAIGNS >

COUNTER CARD SIGNING CAMPAIGN >

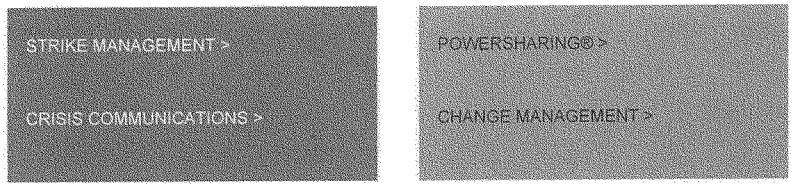
STRATEGIC SERVICES

WORKPLACE ISSUE ASSESSMENT >

THE UNION-FREE PRIVILEGE® >

MANAGEMENT EDUCATION >

VIEWPOINT® SURVEY >



Loading

HEADS UP

Blitzkrieg NLRB Elections

February 4, 2016

If you think you have a union problem ... you .

NLRB v. Browning-Ferris — Transforming the Joint Employer Rule After Thirty Years

December 1, 2015

Somewhere along the way, the NLRB's use of the Act's ...

Quickie Elections ... You Can Win!

August 31, 2015

We are now over 90 days into the era of ...

The Rise of Online



ESTIMATED

INCREASE

IN LABOR COST ONCE YOU BECOME UNIONIZED.

MORE INFORMATION



WIN RATE

FOR OUR CLIENTS IN OVER 1,400 UNION ORGANIZING CAMPAIGNS

603

UNION REPRESENTATION ELECTIONS

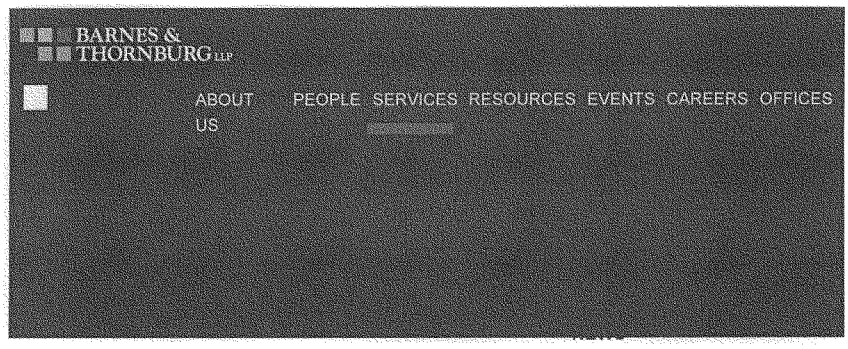


CLIENT VICTORIES

ANHS Election Win Rate

84%

TAKE THE VULNERABILITY QUIZ



Labor & Employment Law Alert - September 2010

Labor & Employment Law Alert - June 2010

Labor & Employment Law Alert - May 2010

VIEW ALL

FIRM EVENTS

Barnes & Thornburg LLP Presents: The Employee Free Choice Act and Union Organizing

Employment Litigation Skills Traning: Basics Course

UNION AVOIDANCE

A union flyer was posted on one of your facility's employee bulletin board last night. What should you do next?

Fortunately, you don't have to know the answer -- because we do. We have the experience, depth and understanding to deal with any situation at a moment's notice. We will get you through this – our professionals have worked with employers from coast-to-coast, across most industries and with most

of the major unions. Our passion is to preserve a client's freedom to manage and to assist our clients in helping them remain union-free.

Our goal is to engage clients in union avoidance activities prior to an actual campaign – to avoid campaigns altogether. Part of that strategy involves training of key supervisors. Employers can demonstrate their commitment to providing employees a voice in three key ways:

- Creating an environment where employees are comfortable speaking to management about issues and concerns
- Engaging a management team that is willing and able to listen to these concerns
- Providing a culture and operational structure that allows the management team to follow up and act effectively to correct these issues when necessary

Experience and Innovation

We have an extensive team of legal professionals that offer creative solutions and innovation, aimed at engaging clients in union avoidance activities prior to the formation of an actual campaign. We estimate our team has helped manage hundreds of union organizing attempts and/or campaigns, and our clients have obtained favorable results in more than 96% of the campaigns in which we have been involved. Our team has also helped companies avoid hundreds of campaigns across the country, including UAW, Steelworkers, Teamsters, CWA, IBEW, UFCW, UNITE-HERE, IAM, AFTRA, SEIU, The Laborers, GMPP, Sheet Metal Workers, 1199, just to name a few.

Training and Strategy

The key to any union avoidance plan lies with front-line supervisors and their ability to deal with issues immediately and constructively. A major component of our union avoidance strategy is to train supervisors and alert them to the skills necessary to avoid unions, skills they can use each day in their interaction with employees.

An effective union avoidance strategy involves a number of other components, including:

- **Assessing Vulnerabilities.** We regularly help our clients assess their vulnerabilities to union organizing through audits, surveys, supervisor inquiries and employee forums.
- **Application Screening Process.** Unions often try to plant their members into a company's workforce to assist with union organizing efforts. We have developed an applicant screening process.
- **Monitoring the NLRB and Other Pro-Labor Legislation and Regulations.** Barnes & Thornburg is involved in the U.S. Chamber of Commerce's executive legislative committee in Washington, D.C.

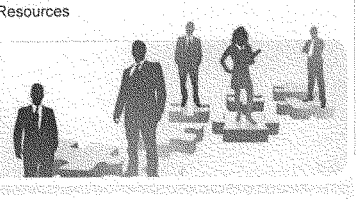
We monitor what's happening on the legislative and regulatory front, and we communicate these developments to our clients regularly.

- **Rapid Response Capabilities.** We have been called in by clients to manage rapid responses to organizing activities and have prepared our entire team with campaign management tools that allow us to quickly address union organizing activities in the event of any card-signing or other union activity.

LANGUAGES SITE MAP DISCLAIMER PRIVACY POLICY CLIENT WEB PORTALS ALUMNI

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HR ARCHITECTS
organizational performance
SINCE 1980



Union Avoidance Consulting and Strategy

Strategies

Most organizations believe they are better off operationally and from an employee morale standpoint if they remain union-free. In addition to the prospect of a work stoppage, unionization brings with it the cost and uncertainty of collective bargaining, as well as the potential interference or limitation of direct communication with employees. If there are issues that are causing employee morale to suffer, most organizations would agree that they can be more successful if they can identify and resolve those issues directly, rather than having their employees go to an outside third party. A well conceived union avoidance strategy can benefit you and your employees.

Union organizing campaigns

Many organizations facing a union organizing campaign find it to be one of the most disruptive and disillusioning experiences they encounter. Developing an appropriate response to this situation must entail a careful analysis of the operational situation, the emotions of those involved (both employees and managers) and the impact such activity could have on other parties, such as customers.

In your corner: The role of consultants

The Weissman Group consultants work with managers and supervisors to help organizations achieve a positive outcome. Through this process, we not only help guide supervisors and managers to accurately educate employees about the potential implications of union representation, but help them identify and understand the issues which brought about the unionization effort. This process not only enhances the organization's likelihood of success in the unionization attempt, but decreases the likelihood of future attempts by heightening managers' sensitivity to issues that negatively impact employee morale.

The National Labor Relations Act guarantees employees the right to choose whether they want to have a union represent them. However, the law also guarantees employees the right to not be represented. An employer has an obligation – moral, if not legal – to make sure employees make an informed decision about unionization by making sure they have the necessary facts.

Ultimately, the decision is their decision to make.

- Compensation Systems
- Employee Free Choice Act
- Organization Design/Redesign
- Employee Relations Consulting
- Human Resources Outsourcing
- Merger & Acquisition Services
- Labor Negotiations
- Union Avoidance Strategy

TESTIMONIAL

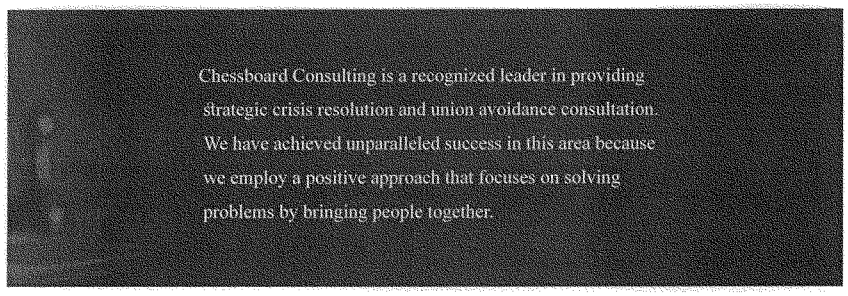
"We retained The Weissman Group to assist us during an organizing campaign at one of our larger parts warehouses outside Atlanta. They gave our campaign a structure and discipline that enabled our local management team to effectively communicate our message to our employees. Not only did The Weissman Group assistance lead to an overwhelming defeat of the union, our local management team emerged from the campaign experience as much stronger communicators and more effective leaders. Honda recommends The Weissman Group wholeheartedly."

Rex Simpson
American Honda Motor Company

353 Regency Ridge • Dayton, Ohio 45459 • 937.438.0100

Chessboard

MENU

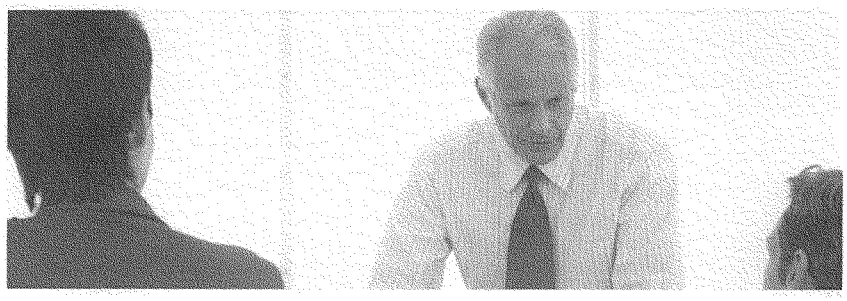


Countering Union Card Signing and Organizing Campaigns

When assisting clients who are experiencing an active union organizing attempt, Chessboard Consulting utilizes an "educational" approach that emphasizes informed choice and mutual objectives for both staff and management.

Chessboard's track record helping clients maintain their union-free work environment is unmatched in our industry. One of the keys to our success is the reliance on a team approach that involves those at every level of organizational leadership.

Indeed, the ultimate goal of Chessboard's counter-organizing campaign strategy is not simply to help the client preserve their union-free status, but also to strengthen the organization so that it is more successful and less vulnerable to union organizing in the future.





Countering Union Negative Public Image Campaigns

In recent years, organized labor has turned increasingly to using "negative public image campaigns" or Corporate Campaigns as a means to pressure organizations into signing agreements (i.e., neutrality agreements, code of conduct agreements, etc.) that facilitate union organizing.

Chessboard assists clients in preparing for and appropriately responding to union-led negative public image campaigns by first conducting an assessment that employs a proven methodology evaluating all of the key areas of potential client vulnerability (i.e., pay practices, safety, charity care, billing and collection practices, relationships with key stakeholders, community involvement, etc.).

Chessboard's consultants then craft a strategic communication plan that includes pre-emptive action and actions your organization may take if you become the target of a union-launched negative public image campaign.

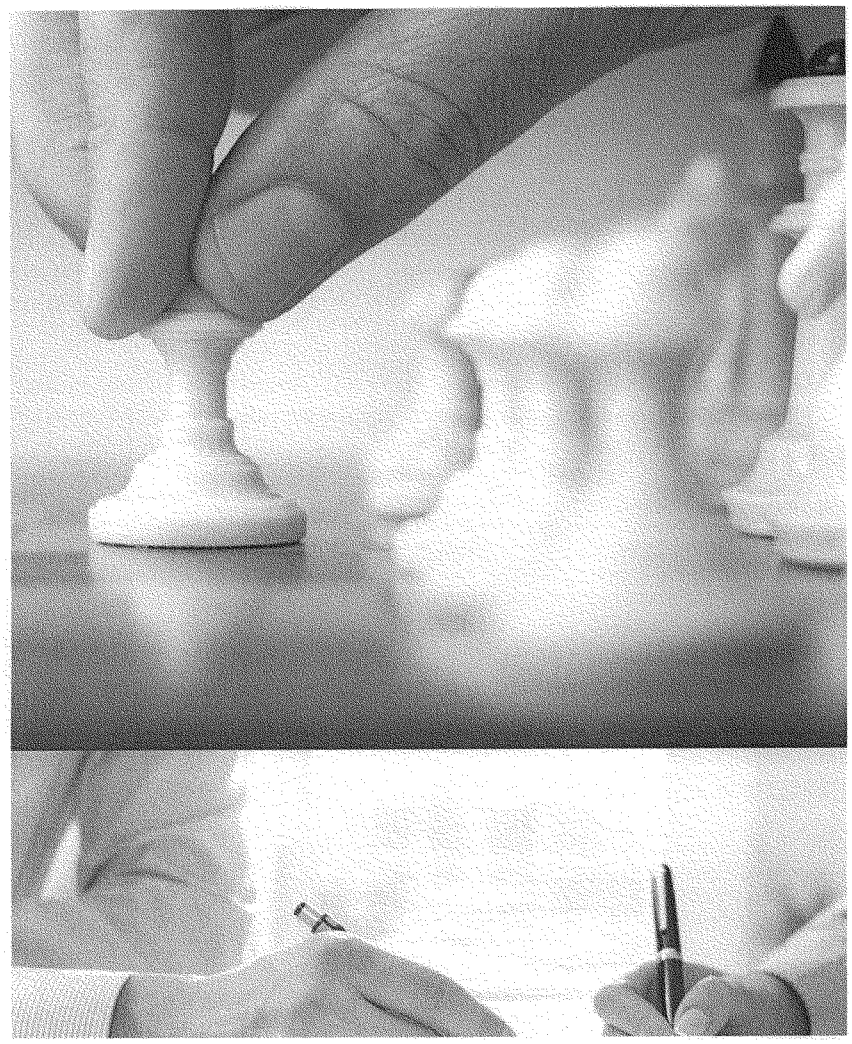
Union Decertification Campaigns

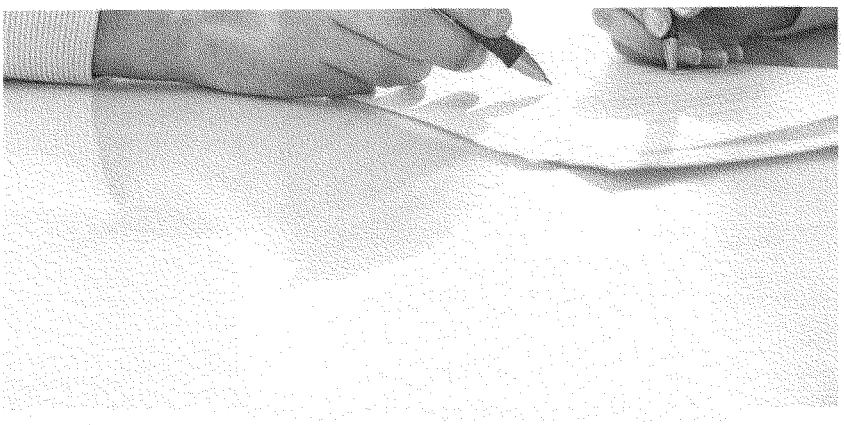
Occasionally, union-represented employees become dissatisfied with the union representing them. When this happens employees may consider efforts to "de-certify" the union.

Federal law severely restricts what employers can do in these situations. However, while the law prohibits employers from instigating decertification efforts, once employees have launched an effort of their own, management is free to communicate with employees and share their views.

Chessboard Consulting offers services to support employers' efforts to protect their employees' rights and legally communicate their position during decertification attempts. As always, Chessboard's approach emphasizes an "educational" fact-based approach that encourages employees to make an "informed choice."

As with our other service offerings, the objective is always to increase understanding and communication between leadership and employees in the voting unit. We have found that this approach yields a much more positive result and can help form the basis of a new relationship between employees and leadership.





Collective Bargaining Communications Support and Strike Planning

The process of collective bargaining can be extremely complicated. Unions are using complex "negative public image campaigns" to pressure clients to accept their demands at the bargaining table. When damaging the organization's public image doesn't work, some unions will threaten a costly and disruptive strike.

Chessboard's approach to supporting clients in collective bargaining relies on making certain that important stakeholders have the all facts and information they need to understand the organization's bargaining position. We have found that careful communications planning can be the key to minimizing disruptions during bargaining and reaching a reasonable agreement with the union.

This careful approach, however, is also critical in the event the union decides to declare war against your organization and call employees out on strike. In these situations, again, Chessboard's Consultants provide clients with support in the areas of communication and logistical strike planning.

ReedSmith

The business of relationships.

Union Avoidance

Practice Leaders

Sara A. Begley (Philadelphia)

Linda S. Husar (Los Angeles)

Betty S.W. Graumlich (Richmond, Tysons)

Practice Areas

Labor & Employment

Labor & Employment - U.S.

- **Union Avoidance**

Overview

Unions are increasing their pressure to convert union-free companies and attract new members, whether it be through conventional organizing campaigns, lobbying for union-friendly federal legislation, or, increasingly more common, using their economic weapons to force employers to agree to neutrality agreements. Unions are also actively seeking to amend the national labor laws to make it even easier for them to unionize a workplace.

Reed Smith works with employers before unions first show up at their facilities to help create the type of working environments where employees view unions as unnecessary. If a union does begin circulating authorization cards or files a petition for election, Reed Smith helps craft a strong drive against unionization and helps employers through the representation hearing process, the election campaign, and the election itself.

Publications

30 January 2009 **New Legislation Modifying New York Law Governing Use of Criminal Background Checks in Employment Taking Effect; Posting Date February 1, 2009**
Client Alerts

21 December 2007 **NJ Millville Dallas Act Passed Into Law**
Client Alerts

16 November 2007 **Conditional Veto on New Jersey 'Baby Warn' Act**
Client Alerts

2 May 2006 **Employment Law Review**
Newsletters, Employment Law Review

Events

19 June 2014 **Labor & Employment Breakfast Briefing "Understanding the NLRB's Latest Proposed Rules on Union 'Quickie Elections, and Other Significant Changes in R-Case Procedure: Round Two"**
Reed Smith Centre
Pittsburgh, PA
CLE / CPD

18 June 2014 **Union Avoidance Dos and Don'ts: Beating the Unions and the NLRB at Their Own Game**
Reed Smith
New York, NY
CLE / CPD

4 June 2014 **Understanding the NLRB's New Rules for Union Elections**
Reed Smith's San Francisco Office
San Francisco, CA

CLE / CPD

31 January 2013 **Reed Smith's 2013 Employment Law Boot Camp**
Reed Smith's Philadelphia Office
Philadelphia, PA
CLE / CPD

4 March 2009 **Reed Smith's Food Industry Teleseminar Series: Part IV - Labor & Employment**
"Looking Into the Crystal Ball: Food Law Topics Under the New Administration"
Teleseminar

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[Whereupon, at 12:03 p.m., the Subcommittee was adjourned.]

○