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

Dear Mr. Davis:

This letter is to comment regarding your Notice of Proposed Rulemaking narrowing the "advice exception" under the Labor Management Reporting and Disclosure Act. This proposed rule is unnecessary, an extreme over-reach and a direct threat to job creation in the United States. The timing and scope of the proposed rule can only be described as the most transparent kind of political payback to labor unions at the expense of small businesses and entrepreneurs, who are the ones most likely to be harmed by these new regulations.

My name is Phillip Wilson and I am President and General Counsel of Labor Relations Institute, located in Broken Arrow, Oklahoma, where we have been filing reports under the LMRDA for years. I formerly practiced labor and employment law in Chicago on behalf of employers and also served as a Director of Human Resources at a large employer in St. Louis. Because of these three experiences - these rules impact labor consulting firms, law firms and the employers who hire them - I am probably unique in my knowledge of how these rules work and are enforced. I have also written extensively about these reporting requirements and testified twice in Congress about them.[1]

My objections to this new proposed interpretation of the "advice exception" fall into 3 categories. First, whether there is a need for this new interpretation in the first place (there is not). Second, whether the substance of the proposed changes fix the supposed problems with the current interpretation (they don't). And finally, the potential impact of the current proposed rules (it is massive and quite negative).

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[1] See e.g. Phillip B. Wilson, *Conquering the Enemy Within: The Case for Reform of the Landrum-Griffin Act*, Journal of Labor Research (Vol. 26 No. 1 2005); Phillip B. Wilson, *The Case for Reform of Union Reporting Laws: How Financial Transparency Could have Prevented ULLICO and Other Abuses* (Labor Policy Association 2002).

The Need For the Proposed Rule

It is interesting to look at how the Department develops its argument regarding the sudden need for this substantial regulatory shift. The Department spends a lot of time discussing the alleged illegal "union-busting" tactics of so-called "middlemen" during union organizing efforts, things like bribing union leaders or spying on workers involved in union campaigns. They predictably trot out biased and shoddy research based mainly on surveys of union organizers (who of course never point the finger at themselves to explain an election loss and instead blame the "vicious anti-union tactics of employers" - even though unions win nearly 70% of contested elections each year).[2]

The vast majority of the so-called "studies" cited by the Department of Labor are derivative of the research of Kate Bronfenbrenner, who has published prolifically on the issue of management campaign tactics and their impact on union election outcomes. These studies are routinely conducted using very small samples and questionable data. For example, the Rundle study cited in the rulemaking proposal[3] (Rundle specifically states that his study is derivative of an earlier one by Bronfenbrenner) examines only 130 elections plus 30 withdrawn petitions in 1994.

According to our LRIonline.com database which tracks NLRB records since 1990, there were 3,350 NLRB elections certified and 5,451 NLRB petitions filed in 1994. Rundle's "study" looked at less than 4% of elections and only 3% of petitions filed in that year.[4] Rundle collected data using the same method used by Bronfenbrenner, by sending questionnaires sent to lead organizers in this small sample of campaigns.[5] These lead organizers are hardly an objective source of information about why they lost the campaigns they did. Both Rundle and Bronfenbrenner looked at elections involving 50 or more employees[6], which can hardly be seen as a "random" sample of all elections - in fact, it seems more like a sample intentionally chosen to spotlight the more sophisticated employers. Finally, the bulk of the research cited by the Department was conducted nearly 20 years ago.[7]

Notwithstanding all the problems with the research, two surprising things emerge from this research that the Department seems to have overlooked in its exhaustive look at the problems with the status quo. First, even Bronfenbrenner and Juravich themselves conclude:

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[2] See Infra at 7.

[3] See NPRM at p. 40.

[4] See James Rundle, *Winning Hearts and Minds in the Era of Employee Involvement Programs*, in Organizing to Win: New Research on Union Strategies (Kate Bronfenbrenner, et al. eds., Cornell University Press 1998) at 216 (Organizing to Win hereafter).

[5] See Id. See also Kate Bronfenbrenner and Tom Juravich, *It Takes More than Housecalls: Organizing to Win with a Comprehensive Union-Building Strategy*, Organizing to Win at 20-21 (hereafter *Housecalls*).

[6]See Id at 26, 216.

[7] Even the more recent papers cited in the NPRM refer liberally to Bronfenbrenner's research cited here.

> "Perhaps the most striking finding of Bronfenbrenner's study was that **union tactics as a group play a greater role in explaining election outcome than any other group of variables, including employer characteristics and tactics...**"[8]

In other words, the research relied on by the Department concludes that so-called "union-busting" doesn't really work, and that unions win by working hard at organizing. The good news for unions? In the nearly 2 decades after these studies were conducted, the experience for unions has proven exactly that. Unions today win nearly 70% of all elections held, in spite of the "epidemic" increase in the use of management consultants and attorneys.[9]

It is important to note that many of these so-called "union-busting" activities are, in addition to being illegal, also exceedingly rare. For example, union-sponsored researchers regularly claim that companies fire internal union organizers in around one-quarter of union campaigns.[10] Looking carefully at actual NLRB data (versus interviewing union organizers) shows that internal organizers are terminated in less than 3% of organizing campaign.[11] While even that small number of terminations is way too many, the good news is that in these cases the NLRB remedy includes reinstatement, back pay and often a re-run election or a bargaining order (where the union is put in place without winning an election). In other words, the current system effectively remedies even the small number of abuses that occur under the current system.

More important, the activities are not impacted in any way by the proposed rule. They are illegal under the NLRA and have been reportable under the LMRDA since its inception. If these alleged abuses are not impacted by the revised rule, why talk about them? The reason is to try to demonize the use of outside attorneys or consultants. The Department spends nearly 20 pages of its proposed rulemaking lumping these illegal activities with the perfectly legal and protected right of an employer to state its position to employees about the exercise of their rights under the NLRA.

The Department complains that between 71% and 87% of companies hire outside attorneys and/or consultants during a union campaign.[12] That is like complaining that

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[8] See Bronfenbrenner and Juravich, *Housecalls* at 21.

[9] According to LRIonline.com data, unions won 48% of all certification elections held in 1994. They won 67% of certification elections in 2010 and so far in 2011 have won 68% of certification elections.

[10] See J. Justin Wilson, *Union Math, Union Myths: An Analysis of Government Data on Employees Fired During Union Organizing Campaigns*, (Center for Union Facts 2008) at 2.

[11] See Id. at p. 7.

[12] Again, these statistics are based on a skewed sample of only large employers with 50 or more employees, so to the extent that this statistic matters at all - we believe it doesn't - it is undoubtedly overstated.

the parties to a divorce case hire an attorney. This example is apt. Many employers, especially small companies who will be most negatively impacted by the proposed rule, look at union campaigns like a divorce. They are emotional cases in a complex legal environment. Unions do everything they can to increase that emotion and taunt any employer who dares resist into making a mistake. The only thing surprising is that anything less than 100% of companies hire an attorney or other outside expert to help them.

The LMRDA, especially the advice exception, clearly anticipate that *most* companies will hire attorneys and consultants for advice activities during labor negotiations and election campaigns. In fact Congress exempted most of those activities from reporting - it is only the limited activity of persuasion that must be reported. But instead of looking at the hiring of legal counsel as a normal and expected part of dealing with these cases (as Congress clearly did when adopting the statute) the Department has now somehow turned it into proof that the companies who hire outside experts must be up to something nefarious.

The Department finishes up this intellectual tour de force by claiming that around 92% of the persuader activity that happens in America goes unreported each year.[13] The Department justifies this claim by creating a new category of persuasion activity ("indirect persuasion" - aka "advice" under the current interpretation). The purpose of the proposed rule is to change the rules to redefine what has been clearly considered non-reportable advice activity to now be considered reportable "indirect" persuasion activity. When the government changes the tax laws they don't go back and collect taxes and penalties for the years before because you "under-reported" your taxes. To use this "under-reporting" as justification for the new rule shows just how far the Department is stretching to come up with a disease that they can cure with this regulatory effort.

The Department provides no evidence that what is currently considered "persuasion" activity is under-reported. What the Department is really saying is that unions don't like the fact that there are so many attorney and consulting relationships that are (legally and correctly) not reported under the current interpretation. Unions like to use these financial disclosures to attack consultants, attorneys and the companies who hire them. The more reports that get filed, the more people unions can squeeze.

This is the only real "need" for the current rule. It is political payback and nothing more. Employees will not be more or better informed after the rulemaking, and the Department

[13] See NPRM at 43.

provides nothing more than its own conjecture that increased reporting of lawful and legitimate consulting or attorney relationships will somehow affect how employees feel about the persuasion materials they see in a union campaign. The Department doesn't even close the loop on its arguments about illegal consultant activities. Reporting these consultant relationships will not in any way deter or reduce the alleged unlawful acts that the Department complains about. Ironically the proposed rule does absolutely nothing to reduce the only unlawful or egregious activities discussed in the rules.

There is no need for this proposed rule. Most of the "research" cited in the proposed rulemaking is old, based entirely on small samples of anecdotal incidents reported by unreliable or biased resources. In addition, most of the illegal activities complained about (bribing employees, firing organizers, or spying on workers) are not affected in any way by the proposed rule. The proper way to discourage or prevent illegal activities is to investigate and punish them - this is exactly what the National Labor Relations Board does on a regular basis. Instead, your proposed rulemaking seeks to substantially increase reporting of lawful activities by millions of employers. It makes no sense.

The Substance of the Rule

The department proposes drastic expansion of the definition of "persuasion" to include numerous common human resource activities. They include activities like conducting employee surveys, drafting policies or procedures, holding employee committee meetings, or attending continuing education seminars or conferences. All these activities are legally protected and consistent with creating an engaged workforce in today's competitive global economy. Nevertheless, they are treated as somehow wrong - literally crimes if improperly reported - in the Department's proposed rule.

There are several major problems with the proposed rule. I'll summarize just a few:

1. The proposed rule abandons a "bright line" trigger for a subjective one.
Virtually any positive employee relations practice provided with assistance of either an attorney or consultant could trigger the reporting requirement. The Department's current interpretation is a bright line - if an attorney or consultant meets directly with employees it is "persuasion" and therefore triggers the reporting requirement. This is a simple, easy to recognize event that creates certainty around the reporting process. Today a company knows that if it hires an attorney or consultant to talk to employees about unions that they must report the agreement and any disbursements that follow.

Under the proposed rule the bright line is blurred by using a test so subjective that it is meaningless. The list of activities that could trigger the reporting obligation are basically limitless, and many of them rely on the "intent" of the company. Companies spend $18.4 billion annually on human resources consulting each year. The amount of money spent on labor and employment legal advice is harder to determine, but is probably more than the amount spent on consulting. Many of these activities could be loosely interpreted to touch matters covered by the proposed rule.

The net effect of this proposed rule is to create potential criminal liability for the mere act of engaging the services of a consultant or attorney. Due to the serious potential consequences of improper reporting, companies will have to spend a lot of time making sure they identify all persuasion and advice activities each year. This diverts resources to compliance with a rule of questionable value that could otherwise be devoted to innovation, productivity improvements and other job-creating activities. This notion is preposterous in any economic situation; to add this huge regulatory burden to American businesses during the current tepid recovery is astounding.

2. The proposed rule interferes with long-standing attorney-client and consultant-client relationships. The underlying intent of the current reporting framework is to disclose "direct-contact" persuader activities in the hope that companies will be less likely to engage in them. While one may differ about the wisdom of even the current rule, it is triggered in limited circumstances nearly always during the course of a union organizing campaign. The current rule probably does discourage some companies from hiring "direct-contact" consultants during union campaigns today.

In many jurisdictions today if an employer triggers the reporting requirement it is not only required to report "persuasion activities" (however those are defined), but also any "advice" activities performed during that reporting year.[14] In many of these same

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[14]In *Douglas v. Wirtz,* 353 F.2d 30 (4th Cir. 1965), the Fourth Circuit (covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia) ruled that all labor relations expenditures - including "advice" activities – must be reported in any reporting year where the law firm or the lawyer engages in persuasion activity. In *Price v Wirtz,* 412 F.2d 647 (5th Cir. 1969) (En Banc), the Fifth Circuit (covering Louisiana, Mississippi and Texas) agreed with the Fourth Circuit decision that all activities, including "advice" activities must be reported in a year for which they engaged in persuader activities. The Sixth Circuit (covering Kentucky, Michigan, Ohio and Tennessee) ruled similarly in *Humphreys, Hutchison and Moseley v. Donovan,* 755 F.2d 1211 (6th Cir. 1985). The *Master Printers Association v. Donovan,* 699 F.2d 370 (7th Cir. 1983), decision in the Seventh Circuit (covering Illinois, Indiana and Wisconsin) is the most expansive interpretation of the reporting requirement. It deals with an association of employers, not just an individual company. In that case a group of "open shop" or non-union printers argued that they did not have to disclose "advice" activities during a fiscal year in which the association performed "persuader" activities for one association member. The Seventh Circuit ruled that the association must report ALL

jurisdictions a law firm or consulting firm that engages in persuasion activity for any one client during a reporting year must report all advice activities for all clients that year, even if many or nearly all of those clients did not receive any persuader services during that year. This means that many clients may have their financial arrangements with their consultant or attorney reported even thought they have never hired an attorney or consultant to engage in any persuader activities. There is no evidence that this was the result Congress intended when adopting the reporting requirements.

By greatly expanding the types of activities that will trigger the reporting requirement, the new interpretation will interfere with tens of thousands of client relationships. It discourages clients from seeking advice and counsel from professionals and may even result in disclosure of confidential or privileged communications. To the extent that the rule discourages these activities it will destroy the jobs of many consultants, attorneys and the many support staff that work for those professionals. In addition it destroys the great value these professionals provide to their clients and the employees who work for them. If the intent of the rule is to discourage unlawful attorney or consultant activities, the DOL is clearly throwing out the baby with the bathwater by requiring such expansive reporting of consultant and attorney relationships.

3. The reporting requirement is extremely burdensome on small and large businesses. The Department of Labor estimates that the administrative burden caused by its rule will be minimal. These estimates are completely unrealistic and dramatically understate the financial impact of these regulations on employers.

The Department estimates that only 2,601 companies will be required to file the forms required under the new rulemaking. This is a gross underestimate. The Department bases its estimate by assuming that 75% of companies hire outside attorneys or consultants during NLRB elections. But they completely ignore the fact that their interpretation covers activities far outside the scope of union elections. There are literally millions of companies who hire consultants and attorneys to conduct employee surveys, facilitate employee committees, deliver training, and review policies or handbooks each year. The number of managers attending conferences or outside training sessions conducted by attorneys or consultants is also staggering (more than 10,000 people attend just the SHRM annual conference each year). Each one of these companies would potentially trigger the reporting requirement.

The Department focuses its estimates almost entirely on the amount of time they think it will take to fill out the required forms each year (they estimate between one and two

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labor relations activities (even "advice" activities) for ALL association members, whether or not any of the other members received "persuasion" activities during the reporting year.

hours per year depending on the form). But this assumes that an organization will only have one reportable activity during the reporting year. If you are talking about hiring someone to talk directly to employees that estimate is probably about right. But when you look at the litany of potential triggering activities it is clear that employers are likely to trigger the reporting requirement multiple times each year.

Filling out the report is the least time-consuming part of the process. The most time consuming aspect of complying with the new rule will be trying to figure out whether the new, subjective definition of "persuasion" has been triggered in the first place (and, if so, whether any additional "advice" activities were also performed by the consultant or law firm during the same reporting year). Some of the activities that may be facially neutral still could trigger the reporting requirement if their intent is to reduce the likelihood that employees might seek out a union. This means that the company must look at the *intent* behind consultant or attorney activities.

Based on the proposed interpretation this means that each year companies will have to engage in compliance related activities like:

- Review the agenda of every conference or trade association meeting attended by every employee in the company, to make sure that none of the presentations cover "persuasion" topics;
- Review the agenda and content of every training session or employee committee meeting facilitated by an outside consultant or attorney, to make sure that none of the content triggers the reporting requirement;
- Evaluate on a case-by-case basis every communication with an outside attorney or consultant to determine whether that communication qualifies as persuasion content or advice content and whether it qualifies as a privileged conversation (the DOL takes the position that persuasion activities are by their nature not privileged);
- Examine every employee opinion survey or similar tool to make sure it does not contain any component that could be considered related to union vulnerability or proneness.

In order to fully comply with the reporting requirements this review must be ongoing - it can't just happen once a year. That means that every time a consultant or attorney is engaged, or any time anyone goes to a conference or seminar, that a review must happen to ensure that if reporting is required it occurs within 30 days of the initial "agreement or activity."

It is hard to say how many hours each year would be needed to comply with these rules. Obviously it depends on how many attorney or consulting relationships a company maintains, or how many outside conferences or training sessions employees attend. But it is safe to say that at least a few hours per month per company location

would be needed to ensure compliance. Even if you estimated only one hour per month you are talking about a compliance burden of nearly two days per year per company.

If the proposed rule includes attendance at conferences and seminars the evaluation discussed above will have to occur at tens of thousands of companies each year. For example, labor issues for managers are generally discussed at HR conferences, law firm conferences, or state and local chamber of commerce meetings. If you estimate that only the 200 largest metro areas host one HR conference, one Chamber event and one law firm event each year that covers a potentially reportable labor topic you can estimate that at least 600 of these meetings occur annually (there are undoubtedly hundreds more than this). If you further estimate that an average of 100 companies attend each of these conferences (remember, the SHRM national conference hosted 12,000 attendees last year) then 60,000 companies would potentially have to report.

If you include opinion surveys as a potential triggering event, even more companies would have to report. Scholars estimate that between one-half and three-quarters of companies conduct employee opinion surveys each year.[15] According to the US Census there are 5,930,132 employer firms doing business in the United States.[16] Of those firms 655,587 employers had more than 100 employees.[17] Even if you assume that only one-quarter of these larger companies (with more than 100 employees) conduct regular opinion surveys, there are 163,897 companies who would potentially trigger the reporting requirement each year. Remember, since the issue on opinion surveys is the subjective one of whether the survey is used to predict union sympathy or "proneness" each survey event would need to be evaluated, even if the ultimate decision was that it did not trigger the reporting requirement.

Even using these very conservative estimates of just two of the 13 triggering events outlined in the DOL proposed rulemaking, it is clear that at least 100,000 firms will have to regularly evaluate their attorney and consulting relationships each year to ensure they are in compliance. Even if you say that an HR clerk would only have to spend an hour a month reviewing activities to make sure they do not trigger the requirement and agree with the Department's estimate that the total burden for completing the forms is 2 hours per year, you are talking about a regulatory burden of 1.4 million hours per year.

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[15] Kraut, A.I. (June 2004). How Organizational Surveys can be made more useful: A look at current and future survey practices. Presentation given at the Second IT Survey Group Symposium, St. Leon Rot, Germany.
[16] http://www.census.gov/econ/smallbus.html
[17] Id.

The costs of this compliance is staggering. If you use the Department's own estimate of $87.59 per hour as the cost of compliance, the total compliance burden on employers is more than $122 million each year.[18] And remember, this is only half of the total reporting burden - each time the reporting event is triggered it requires a similar amount of reporting by the consulting firm, the law firm and then independent reporting by any subcontractors used by those firms. Using these very conservative assumptions, **the total cost of this tax on employer free speech is more than a quarter of a billion dollars*.*** It is likely to be much more.

Conclusion

There is nothing in the text of the LMRDA or the legislative history that suggests that Congress intended employers to have to report basic HR activities as potential "persuasion" activity. The Department has overstated the need and underestimated the costs of this rule. This is due in large part to the one-sided and clearly limited investigation that went into the proposal. The Department has dramatically overstepped its regulatory authority, not to mention basic common sense, in suggesting these reporting requirements. The proposed rule is clearly driven by doing what is best for labor unions, at the expense of employers and, most important, the working people who depend on those companies for their livelihood. We strongly urge that the rule be withdrawn and that the current, common-sense and bright line interpretation remain in place.

Respectfully submitted,

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[18] The actual figure would be $122,626,000. If you assume all 163,897 firms would potentially have to comply the total compliance burden would balloon to $200,980,335.