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Via Electronic Upload

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

Re: RIN 1245-AA07

Dear Mr. Davis:

The National Employment Law Project (NELP) submits these comments in response to the Department of Labor's June 12 Notice of Proposed Rulemaking seeking comment on the proposed rescission of the "Persuader Rule," the final rule titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act." NELP strongly urges the Department not to rescind this important rule, which is designed to help workers make informed decisions about whether or not to join a union or support a collective bargaining campaign.

NELP is a non-profit research and policy organization that for more than 45 years has advocated for the employment and labor rights of low-wage workers. The right to make informed choices about whether or not to organize and bargain collectively is absolutely central to those rights, especially in today's climate of economic inequality, where too many workers are working more and earning less.

The Persuader Rule is a commonsense reform to provide workers with the information that they need to exercise their right to collective bargaining. The rule itself simply closes a longstanding loophole in the LMRDA's implementing regulations that had previously eviscerated the statute's reporting requirements for antiunion activity. The Department has not adequately justified its proposal to rescind the Persuader Rule and effectively abdicate its statutory mandate once again. Moreover, the Department's decision to rescind the Persuader Rule would at minimum call into question the validity of analogous disclosures required of labor organizations under the LMRDA.

The Persuader Rule Has Closed a Longstanding Loophole in LMRDA Reporting

The LMRDA requires two parallel categories of reports: one set from labor organizations, and officers and employees of the same (sections 201 and 202, respectively); and the other set from employers who hire labor relations consultants to persuade employees on

collective bargaining issues and from those consultants themselves (section 203). The Department has long enforced regulations to vigorously enforce the reporting requirements for labor organizations; indeed, the Department's latest Spring Regulatory Agenda has signaled, if anything, an intent to *intensify* these reporting requirements further. See Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1245-AA08>.

Conversely, prior to the Persuader Rule, the LMRDA's implementing regulations had effectively eliminated the reporting requirements for the vast majority of employers and labor relations consultants seeking to influence workers' choices about collective bargaining. Section 203(b) of the LMRDA clearly requires both employers and labor relations consultants to report any agreements under which those consultants pursue activities intended "directly or indirectly" to persuade employees concerning their organizing and collective bargaining rights. 29 U.S.C. § 433(a)(4); 29 U.S.C. § 433 (b)(1). Section 203(c) exempts "advice" from those reporting requirements. 29 U.S.C. § 433(c). But as the Department has recognized, its prior expansive interpretation of "advice" essentially eliminated the reporting requirement for "indirect" persuasion, which is out of line with the plain text of Section 203(b). See 81 Fed. Reg. 15,924, 15925-26 (Mar. 24, 2016).

Employers and consultants have unsurprisingly tailored their antiunion campaigns to take advantage of this exemption so that they do not have to file reports. As one well-known labor consultant described:

The entire campaign . . . will be run through your foreman. . . I'll teach them what to say and make sure they say it. But I'll stay in the background.

MARTIN JAY LEVITT, CONFESSIONS OF A UNION BUSTER 10 (1993). See also 81 Fed. Reg. at 15,931-32. As a result, few employer reports are filed each year, even though the Department continues to acknowledge the "proliferat[ion]" of the use of outside consultants. 82 Fed. Reg. 26,877, 26,879 (June 12, 2017).

The Persuader Rule closed this loophole by narrowing the scope of the advice exemption in a manner consistent with the statutory text of the LMRDA, its underlying purpose, and the Department's initial (1960) interpretation of the statute. 81 Fed. Reg. 15,937. The Persuader Rule finally draws a clear line between "indirect persuasion" and "advice," and implements the full statutory mandate of the LMRDA.

In effect, the Persuader Rule plays a necessary role in giving workers information that they need to exercise their voice and cast informed votes in collective bargaining campaigns. As a practical matter, employers have significantly more power and opportunities than labor organizations do in influencing workers' votes on whether or not to join a union. Employers can hold employee orientation sessions, one-on-one meetings with supervisors, and other captive-audience meetings to get their views across. Given that most union activity must occur off-premises, employers' on-premises antiunion campaigns are largely one-sided. Workers therefore need transparency and context about the antiunion consultants that their employers are hiring – and what they are being hired to do. They deserve to know that third parties are writing their supervisors' talking points, and also when companies who are balking at pay raises have plenty of cash to pay antiunion consultants. The Persuader Rule provides workers with this important context, in line with the statutory text and original interpretation of the LMRDA.

The Department Failed to Justify the Elimination of Most Employer Reporting

In proposing to repeal the Persuader Rule, the Department has also proposed simply to return to the prior version of the rules implementing Section 203 of the LMRDA. 82 Fed. Reg. at 26,833. In doing so, the Department would essentially eliminate any reporting requirement for indirect persuasion, and therefore, most employer reporting under the LMRDA. The Department acknowledges as much, and indeed, counts the resulting resource savings of failing to enforce the law as a net benefit: “Under the prior interpretation, there are significantly fewer reports, which reduces the investigative resources devoted to enforcing the rules on filing timely and complete reports.” 82 Fed. Reg. at 26,881.

In the proposed rule, the Department does not even attempt to justify its proposal to revert to the 2015 rule – a remarkable omission. The Department does attempt to justify rescission of the Persuader Rule itself, but its justification for doing so is extremely thin. For example, the proposed rule seeks to provide the Department “an opportunity to give consideration to several important effects of the [Persuader Rule] on the regulated parties,” including “interaction between Form LM-20 and Form LM-21” and how the new reporting requirement will affect the provision of legal services. *Id.* at 26,879-81. But the Department fails to explain how *rescission* of the Persuader Rule will facilitate such consideration. The Department collected extensive feedback not so long ago through a robust notice-and-comment process in developing the rule, receiving 9000 comments on a much more extensive proposed rule than the current one. 82 Fed. Reg. at 26,879. Against that backdrop, full implementation of the Persuader Rule would be much more effective at providing the Department with the information it needs to judge the rule’s effects, for example, how (if at all) additional transparency affects employers’ retention of legal services.

The Department also claims in its proposed rule that rescinding the rule will “allow the Department to engage in further statutory analysis.” 82 Fed. Reg. at 26,879-80. The Department already engaged in a thorough analysis of Section 203’s statutory text and legislative history in the proposed Persuader rule. 76 Fed. Reg. at 36,183-84. In issuing the final Persuader Rule, the Department carefully considered and addressed thousands of comments, including those involving its statutory analysis. The proposed rule provides no alternative statutory analysis justifying its return to an exclusion of indirect reporting; in fact, it fails to acknowledge at all the detailed statutory analysis just recently undertaken in the preamble to the final Persuader Rule. *See* 81 Fed. Reg. 15,946-49.

The Department does acknowledge litigation in three courts involving the Persuader Rule, including concerns raised by two of those judges. 82 Fed. Reg. at 26, 879-80. But even one of those opinions recognized that “the rule plainly has multiple valid applications,” and that enjoining the rule would “prevent DOL from requiring disclosure of information that it has the right (*indeed, statutory mandate*) to obtain.” *Labnet v. U.S. Dep’t of Labor*, 197 F. Supp. 3d 1159, 1168 (D. Minn. 2016) (emphasis added).

Moreover, rescinding the Persuader Rule does nothing to clarify the legal boundaries of Section 203(b). To the contrary, the Department’s continued defense of the rule would far better inform through litigation what, if any, changes may be needed to ensure that the statutory intent of the LMRDA is fully implemented.

The Department Implicitly Calls Into Question Labor Organization Reporting Requirements

Finally, the Department has argued that rescinding the Persuader Rule will provide it time to undertake “more detailed consideration” of concerns raised about attorneys’ activities, including a possible “chilling

effect” on employers’ abilities to obtain representation. 82 Fed. Reg. at 26,880-81. In signaling its concern about the effects of transparency on effective legal representation in this context, the Department is, at minimum, calling into question the analogous reporting requirements that it has established for labor organizations.

To explain, under Section 201(b) of the LMRDA, labor organizations are required to file annual reports outlining a variety of receipts and expenditures, including a catch-all of “other disbursements made by it including the purposes therefore, all in such categories as the Secretary may prescribe.” 29 U.S.C. § 431(b)(6). The Department has accordingly adopted requirements for unions to disclose their disbursements to employee sand “total disbursements for ‘outside’ legal and other professional services.” *See* Form LM-2 Instructions at p.22, https://www.dol.gov/olms/regs/compliance/GPEA_Forms/LM2_Instructions_6-2016_techrev.pdf; Form LM-3 Instructions at pp.7, 15, https://www.dol.gov/olms/regs/compliance/GPEA_Forms/LM3_Instructions_2010_Version_Tech%20Rev_6-2016.pdf.

The Department has not previously articulated any concern that requiring labor organizations to report their disbursements to attorneys (whether on staff as employees or working as outside counsel) has had a chilling effect on their ability to retain legal services. The Department’s newfound concerns regarding any such chilling effect should apply equally to labor organizations reporting their legal expenditures, lest the Department draw an arbitrary and capricious distinction between the various reports required under the LMDRA. NELP urges the Department not to take action to eliminate one such reporting requirement (for employers) without eliminating the other (for labor organizations) as well.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Christine L. Owens".

Christine L. Owens