Via http://www.regulations.gov and first class mail

September 19, 2011

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

Re: Proposed Persuader Rule Changes, RIN 1245-AA03

Dear Mr. Davis:

Worklaw Network is an association of 32 law firms, located throughout the United States (and in five foreign countries), that specialize in representing management in labor and employment law matters.[1] We strongly oppose the Department of Labor's proposed reinterpretation of the statutory advice exemption and the accompanying revisions to the reporting forms. 76 Fed. Reg. 36178 (June 21, 2011). At a time when the Department's most urgent task should be to help American employers create jobs, the Department's politically motivated proposal would impose another burdensome and intrusive reporting requirement, plainly intended to promote union organizing efforts by discouraging employers from obtaining legal advice when they need it most.

Employers have a recognized interest in ensuring that employees make informed choices when faced with a union organizing drive, NLRB election or strike vote. Most employers, especially medium-sized and small businesses, are not well schooled in labor relations law and practice and are at a severe disadvantage in responding to professional union organizers. Moreover, NLRB precedents, located in 357 volumes of case law, create numerous counterintuitive pitfalls that must be avoided in communicating with employees. Even first-line supervisors can get the employer in trouble if they say something wrong. In short, employers need specialized professional advice in order to educate themselves and exercise their right to inform their workers. The need will be even greater if the NLRB implements its proposal to speed up representation elections.

Our law firms assist employers facing labor issues. We represent employers before the NLRB, arbitrators and in collective bargaining negotiations. We defend them in court

[1] For more about Worklaw Network, go to http://www.worklaw.com.

if they are sued. We assist employers in developing policies, procedures and accurate, legally correct communications to employees. We train employers, including supervisors, on their legal rights and responsibilities.

The Labor-Management Reporting and Disclosure Act specifically exempts advice from the reporting requirement. Since 1962, the Department has used a bright line test to distinguish reportable activity from advice, which is exempt from reporting under 29 U.S.C. § 433(c). The test is whether the consultant or law firm directly communicates with employees (which is reportable) or whether it provides recommendations which the employer is free to accept, modify or reject (which is not reportable). The Department's historic position has withstood legal challenge. *UAW v. Dole*, 869 F.2d 616 (D.C. Cir. 1989). Now, after 49 years, the Department is proposing to reinterpret the statute in a way that would effectively nullify the statutory exemption. The proposed reinterpretation is both ill-advised and legally incorrect for a number of reasons:

1. **The proposed reinterpretation conflicts with the plain meaning of the statute**. The dictionary definition of advice is "a recommendation regarding a decision or course of conduct." The Department's historic interpretation of the advice exemption uses exactly that definition. The Department's new proposal takes an unrealistic view of what it means to give legal advice. Legal advice is not limited to telling clients what they cannot do. It also includes telling them what they can do. Law firms recommend policies, procedures and communications for their clients' use all the time in all areas of law. That does not mean that they are not giving advice. Ultimately, the client reviews the recommendation and chooses what it will say and do.

2. **The proposed interpretation conflicts with the legislative history**. The Department asserts that its historic interpretation of the advice exemption is excessively broad. The legislative history, however, makes it clear the exemption was intended to be broad. "Subsection (c) of section 203 of the conference substitute grants a broad exemption from the requirements of the section with respect to the giving of advice." Conf. Report No. 1147 at 33. The persuader reports were intended to apply only to agreements with "independent contractors…pursuant to which the independent contractor undertakes to persuade employees." *Id.* at 32.

3. **The Department has historically taken the position that the advice exemption trumps the reporting requirement**. Recognizing that crafting a message and giving legal advice cannot be separated, the Department has historically taken the position that the advice exemption prevails over the reporting requirement. As a matter of statutory construction, that approach was necessary and correct. As the Department previously recognized, the very purpose of the advice exemption is to remove from coverage certain activity that otherwise would be reportable. As a matter of law, if there is a question as to coverage, statutes carrying criminal penalties must be narrowly construed. *U.S. v. Santos*, 553 U.S. 507 (2008). In addition, because the statute places a burden on free expression, it must be narrowly construed. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 891 (2010).

4. **The proposed reinterpretation replaces a bright line test with a vague and subjective distinction that would be impossible to administer.** For example, it states that a lawyer's editing of a client's speech or letter to enhance the persuasive message triggers the duty to report, "unless the revisions exclusively involve advice and counsel regarding the exercise of the employer's legal rights." Of course, in actual practice, editing involves putting the employer's intended message in words that will pass muster with the NLRB. It is impossible to separate crafting the message from giving legal advice. Similarly, under the reinterpretation, "developing personnel policies or practices," and "conducting a seminar for supervisors or employee representatives" may be reportable if they are "designed to prevent organizing." In practice, however, every policy and procedure designed to ensure that employees are treated fairly also reduces the employer's vulnerability to union organizing.

5. **The Department's policy justifications for the reinterpretation do not stand up to scrutiny**. The Department has no first-hand experience with union organizing drives, NLRB elections, collective bargaining and strikes. Those matters are regulated by the NLRB, an independent agency outside the Department. In the absence of first-hand experience, the Department's explanation for its reinterpretation is a simplistic mishmash of library research consisting of 53 year old investigations, sensationalistic literature (e.g., "*Confessions of a Union Buster*") and biased academic studies. For example, the Department recites some dubious unofficial statistics about the prevalence of unfair labor practices in NLRB elections. However, by the Department's own account, the statistics are irrelevant to the advice exemption, because employers supposedly engage in such unlawful practices, "[w]ith or without the advice of labor consultants." 76 Fed. Reg. at 36190. The Department also fails to mention that the proposed reinterpretation would do nothing to address these alleged abuses, which are actively discouraged by reputable law firms and effectively policed by the NLRB. Most notably, the Department fails to mention that in 2010, unions won 68 percent of all NLRB elections.

6. **The proposed reinterpretation violates the First Amendment**. "As a general matter…government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merchants Assoc.*, 131 S.Ct 2729, 2733 (2011). The giving and receipt of legal services is protected by the First Amendment. *Legal Services Corp. v. Velazquez*, 531 U.S. 553, 546 (2001). Reporting and disclosure requirements impose a burden on First Amendment activity. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986). Regulations that burden First Amendment activity must be justified by a compelling governmental interest, *id*., and above all must be content neutral. *Sorrell v. IMS Health Inc*., 131 S.Ct. 2653, 2664 (2011). Regulations based on the content of communication are subject to strict scrutiny and presumptively invalid. *Id.* Measured against these standards, the Department's proposal cannot survive, for it is clearly not content-neutral. Instead, it clearly targets a particular type of communication between lawyers and clients that the Department disfavors because of its content. 76 Fed. Reg. at 36190.

In an effort to articulate a compelling state interest the Department argues that its disclosure requirements are analogous to the campaign finance reporting requirements

approved in *Buckley v. Valeo*, 424 U.S. 1 (1976). In that case, the Supreme Court held that the disclosure requirement was permissible because it permitted voters to assess the candidates and alerted them to special interests among their donors. That rationale does not apply to our services. At the most fundamental level, our clients are not running for public office. Moreover, the flow of money is different. We do not pay our clients to take a position, they pay us for advice. The employees do not need a disclosure form to figure out where their employer stands on the issues or whose interests are at stake. What they need is accurate information about the effect of their choice to sign an authorization card, vote in a NLRB election or go on strike. The Department's proposal is intended to stifle the free flow of that kind of information.

7. **The proposed reinterpretation is a stalking horse for an even more objectionable and legally dubious reporting requirement**. Under the proposal, if we engage in reportable activity, our client would be required to file form LM-10 and we would be required to file form LM-20. Additionally, we would be required to file form LM-21. The LM-21 form, if applicable, would require us to report our total receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or service, list the names of our clients and the amounts each paid, and list our disbursements to our officers and employees. Among other things, this would breach the confidentiality of clients who may not wish to publicly disclose their use of legal counsel in matters having nothing to do with persuasion. Requiring us to file LM-21 forms would also violate our own privacy. These burdens and intrusions are avoided by the previous, correct interpretation of the advice exemption as applied to law firms.

In short, the Department's proposed change would place an unjustified, intrusive reporting burden on employers seeking legal advice in connection with labor matters. As a practical matter, this would discourage them from obtaining advice necessary for them to accurately and legally communicate with their employees concerning questions of vital mutual interest. As a matter of law, the proposed reinterpretation is contrary to the purpose and plain terms of the statute, excessively vague and subjective and an unconstitutional burden on free speech. **We urge the Department to withdraw the proposal.**

Respectfully submitted,

/s/

WORKLAW NETWORK