



VIA ELECTRONIC SUBMISSION

October 13, 2022

Jeffrey R. Freund
Director
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Revision of the Form LM–10 Employer Report [RIN 1245-AA13]

Dear Mr. Freund:

Associated Builders and Contractors hereby submits the following comments in response to the above-referenced proposed rule published by the U.S. Department of Labor’s Office of Labor-Management Standards in the Federal Register on Sept. 13, 2022, at 87 Federal Register 55952.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC’s membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.¹

The vast majority of ABC’s contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration’s Office of Advocacy’s findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction

¹ For example, see ABC’s 32nd Excellence in Construction Awards program from 2022: <https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.
² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.
³ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴ The vast majority of small businesses are not unionized in the construction industry.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private-sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

Specific to this proposed revision, ABC members won 57% of the \$128.73 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2021. These federal contractors provided subcontracting opportunities to large and small contractors in the specialty trades and delivered taxpayer-funded construction projects on time and on budget for their federal government customers.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Background

On Sept. 13, 2022, the OLMS published a proposed revision to its Form LM-10 Employer Report. Under the Labor-Management Reporting and Disclosure Act, employers must file the LM-10 form to disclose payments and loans to unions or union officials and payments to employees or outside labor relations consultants for the purpose of persuading employees with respect to their bargaining and representation rights (referred to as "persuader activities").

Under the proposed revision, a checkbox would be added to Form LM-10 requiring employers to report whether they were federal contractors or subcontractors in the prior fiscal year. The proposed revision would also require employers to provide their Unique Entity Identifier and contracting agency or agencies, if applicable.

ABC's Response to the Proposed Rule

The Proposed Revisions Are Intended to Create a Chilling Effect on Legal, First-Amendment Protected Activities

Throughout the OLMS's justification for the proposed revision, which aligns directly with recommendations generated by the White House Task Force on Worker Organizing and Empowerment Report with little opportunity for public feedback, the agency clearly states that the intent of this change is to discourage lawful persuader activities by federal contractors. The

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, Available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

proposed revision would have a chilling effect on contractors' right to engage in First Amendment-protected speech that is not otherwise prohibited by the National Labor Relations Act, and therefore is preempted by the NLRA and should be withdrawn.

As mentioned above, under the LMDRA employers are permitted to hire outside labor relations consultants (including attorneys) to help employers persuade their employees regarding union organizing or collective bargaining. Information on these persuader arrangements is reported by employers to the OLMS through the LM-10 form. The third-party consultants must also report these agreements on the LM-20 and LM-21 forms, ensuring that the OLMS has full knowledge of all persuader activities. By engaging in lawful persuader activities, merit shop contractors are exercising their right to free speech in response to union organizing campaigns. It is also the right of employees to obtain balanced and informed input from both sides as they decide whether to be represented by a union.

On April 26, 2021, President Joe Biden issued Executive Order 14025, which established the White House Task Force on Worker Organizing and Empowerment.⁵ The work of the task force, which had the stated goal of “[identifying] executive branch policies ... to promote my Administration’s policy of support for worker power, worker organizing, and collective bargaining”⁶ led to a report released on Feb. 7 containing nearly 70 recommendations to promote pro-union policies and practices in the federal government.⁷

The task force’s report includes a recommendation to alter reporting on persuader activity, recommending that the OLMS propose a revision to its LM-10 form to require employers to disclose whether they are a federal contractor.⁸

In response, ABC expressed concerns regarding the lack of public involvement with the task force and its recommendation of policies that will restrict fair and open competition and discriminate against nonunion construction workers and businesses.⁹ The fact that the proposed revision draws from this task force’s report is evidence of the OLMS’s intent to discourage lawfully permitted employer speech through this revision.

The OLMS states that the proposed revision is necessary for transparency in federal procurement, and to help prevent federal funding from being used for persuader activities.¹⁰ However, on Nov 2, 2011, in accordance with Executive Order 13494 signed by President Barack Obama,¹¹ the Federal Acquisition Regulatory Council issued a final rule to bar federal agencies from providing payment for any persuader activities.¹² The executive order itself

⁵ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/26/executive-order-on-worker-organizing-and-empowerment/>.

⁶ Ibid.

⁷ <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/02/OSEC20220195.pdf>.

⁸ Ibid.

⁹ “White House Union Report Fails to Create Opportunities for All of the Construction Industry,” ABC Newswire, Feb. 9, 2022.

¹⁰ See preamble: <https://www.federalregister.gov/d/2022-19229/p-42>.

¹¹ <https://www.govinfo.gov/content/pkg/DCPD-200900038/pdf/DCPD-200900038.pdf>.

¹² <https://www.federalregister.gov/documents/2011/11/02/2011-27790/federal-acquisition-regulation-labor-relations-costs>.

arguably violates the First Amendment and NLRA rights of government contractors.¹³ But in any event the current regulations implementing that order are more than sufficient to prevent federal payments for the purpose of these activities, and the OLMS has not provided any evidence that additional reporting requirements are necessary for enforcement.

Despite admitting that persuader activities are lawful, the OLMS states that the government has an interest in obtaining information on these activities as they are “disruptive of harmonious labor relations” in federal contracting.¹⁴ However, the agency fails to provide any evidence of persuader activities negatively affecting labor relations or leading to increased costs or delays for these contracts.

Further, the OLMS clearly admits its intent to assist advocacy efforts against federal contractors engaged in persuader activities, stating that the proposed revision will assist employees in contacting their representatives in Congress and coordinating with advocacy groups and the media to “disseminate their views as employees” more effectively.¹⁵

In addition, the OLMS states that the publication of which federal agencies are choosing to contract with employers engaged in persuader activities could result in increased public debate about federal support for employers engaged in these activities, again indicating that the agency is seeking to increase public pressure against these contractors.¹⁶

Based on the evidence outlined above, it is clear that the intent of the proposed revision is to discourage persuader activities by federal contractors, despite the fact that these activities are lawfully permitted by the LMRDA within certain limitations. The revision would accomplish this goal by increasing public pressure on these federal contractors and assisting advocacy efforts against these companies and federal agencies that choose to employ them, as well as potentially providing a basis for federal agencies to “blacklist” these contractors in future regulations.

Ultimately, this will serve to create a chilling effect on federal contractors in their decisions on how to engage with employees regarding unionization efforts. The proposed revision is invalid for the same reasons as those relied on by the U.S. Supreme Court in striking down a similar law in California, in the case of *U.S. Chamber of Commerce v. Brown*.¹⁷ In *Brown*, the Supreme Court struck down California state law AB 1889, which restricted the use of state funds by recipients who sought to inform their employees about the disadvantages of unionization. The Supreme Court found that the state law targeted protected speech of employers and interfered with employers’ private exercise of labor relations.

Similarly, under the proposed revision the OLMS would be improperly restricting the First Amendment rights of these companies through a chilling effect that would prevent them from

¹³ See *U.S. Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

¹⁴ See preamble: <https://www.federalregister.gov/d/2022-19229/p-39>.

¹⁵ See preamble: <https://www.federalregister.gov/d/2022-19229/p-46>.

¹⁶ See preamble: <https://www.federalregister.gov/d/2022-19229/p-50>.

¹⁷ 554 U.S. 60 (2008).

choosing whether to provide information to their employees regarding the potential impacts of collective bargaining.

Conclusion

For the reasons described above, ABC urges the OLMS to withdraw the proposed revision to ensure that the agency does not improperly restrict the rights of federal contractors to communicate with their employees regarding collective bargaining activities.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



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