



VIA ELECTRONIC SUBMISSION

August 11, 2017

Mr. Andrew Auerbach
Deputy Director
Mr. Andrew R. Davis
Chief, 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: Rescission of Rule Interpreting “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; RIN 1245-AA07

Dear Deputy Director Auerbach and Division Chief Davis:

Associated Builders and Contractors Inc. (ABC) submits the following comments to the U.S. Department of Labor (Department) in response to the above-referenced notice of proposed rulemaking (NPRM) published in the *Federal Register* on June 12, 2017, at 82 Fed. Reg. 26877.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association established in 1950 that represents more than 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy, which 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.

ABC is a member of the Coalition for a Democratic Workplace (CDW), which is filing a more detailed set of comments on the Department’s proposed rulemaking. ABC supports CDW’s comments and hereby incorporates them by reference.

Background

On March 24, 2016, the Department issued a final rule entitled “Interpretation of the ‘Advice’ Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act” (LMRDA)¹, which is the subject of the present NPRM to rescind the regulations established in the 2016 rule. ABC was an active participant throughout the proposed rulemaking process² and expressed serious concerns³ with the Department’s June 21, 2011, proposed rule to “revise its interpretation of the ‘advice’ exemption to [Section 203 of the Labor-Management Reporting and Disclosure Act 1959 LMRDA] by limiting the definition of what activities constitute ‘advice’ under the exemption, thus expanding those circumstances under which reporting is required of employer-consultant persuader agreements.”⁴ ABC urged the Department to withdraw the proposed rule.

The previous administration issued the final rule and on March 30, 2016, ABC filed a lawsuit challenging the legality of the rule under the Administrative Procedure Act (APA) along with a number of other business organizations.⁵ In addition to ABC’s lawsuit, two other legal challenges were filed against the Department’s 2016 rule.⁶ ABC hereby incorporates by reference its complaint, motions and briefs in support of preliminary injunction and summary judgment that are publicly available in the electronic court docket at pacer.gov. The Department’s attention is particularly directed to the undisputed sworn affidavits attached to Plaintiffs’ Motion for Preliminary Injunction and Reply, which were filed on April 2 and May 5, 2016, in the Arkansas case. As further discussed below, these documents provide new evidence under oath of the burdensome and chilling effects of the 2016 rule, which justify rescission.

On Nov. 16, 2016, the 2016 rule was permanently enjoined on a nationwide basis in *National Fed’n of Indep. Bus. v. Perez*.⁷ As the *NFIB* district court held, the 2016 rule is “defective to its core” and effectively nullifies the advice exemption spelled out in the LMRDA. Another district judge found that the rule draws lines that are “simply incoherent.”⁸

ABC’s Comments in Response to the Department’s Proposed Rule

As is explained in greater detail in the CDW comments and in the previously submitted briefs and affidavits related to ABC’s legal challenge, ABC supports the Department’s proposal to rescind the unlawful “persuader advice” rule.

¹ 81 Fed.Reg. 15924.

² 76 Fed.Reg. 36178.

³ See ABC’s Comments filed on Sept. 21, 2011 (Docket ID: LMSO-2011-0002).

⁴ 76 Fed.Reg. 36178.

⁵ *Associated Builders and Contractors of Arkansas v. Perez*, Case No. 4:16-cv-169 (E.D. Ark.)

⁶ *National Fed’n of Indep. Bus. v. Perez* (hereafter “*NFIB*”), Case No. 5:16-CV-00066-C (N.D. Tex.) and *Labnet, Inc. v. United States Department of Labor* (hereafter “*Labnet*”), Case No. 16-CV-0844 (D. Minn.).

⁷ *NFIB*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016), *incorporating by reference* 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016), *appeal placed in abeyance pending the present rulemaking*, Docket No. 17-10054 (5th Cir. June 15, 2017).

⁸ *Labnet*, 197 F.Supp.3d 1159, 1168 (D. MN. 2016).

1. The 2016 rule has been found to violate the plain language of the “advice” exemption of the LMRDA by requiring employer advisors to publicly report advice given to employers, which Congress explicitly exempted from any reporting requirement.

At the outset, the 2016 rule must be rescinded because it has been found to violate the LMRDA and was enjoined on a nationwide basis for that reason in the *NFIB* case. The *NFIB* decision is plainly correct and should be accepted by the Department.

Congress intended from the inception of the LMRDA to broadly exempt advice from the reporting requirements.⁹ Congress used the word “advice” without requiring a statutory definition, because it was then—and remains now—a commonly understood term. In the Department’s own words, affirmed by the courts, advice has consistently been understood to mean communications “submitted orally or in written form to the employer for his use” where the employer “is free to accept or reject the oral or written material submitted to him.”¹⁰ The Department’s claim that this longstanding interpretation is somehow inconsistent with the text of the LMRDA is unsupported by the Act and its legislative history. Without any rational justification, the 2016 rule departs from more than fifty-five years of established enforcement of the LMRDA, upon which employers and their advisors have come to rely.

The Department’s claim that its longstanding interpretation of the LMRDA’s plain language has somehow led to a proliferation of consultants, or that such consultants have encouraged employers to violate the labor laws in order to defeat union organizing, is unsupported by credible, objective research. There is no evidence that consultant-sponsored violations of the Act have been responsible for the decline of unions in the construction industry. Indeed, the evidence is to the contrary.¹¹

2. The 2016 rule has been found to be arbitrary and capricious in its requirements

As the *NFIB* opinion also properly found, the 2016 rule arbitrarily sets aside more than fifty-five years of enforcement precedent and leads to inconsistent and absurd results.¹² The 2016 rule requires some advice to be reported while arbitrarily exempting other types of advice. Such inconsistencies include the following:

- The 2016 rule does not explain why a trade association should be allowed to help employers select “off-the-shelf” material, but should lose the “advice” exemption

⁹ H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959) (“Subsection (c) of section 203 ... grants a broad exemption from the [reporting] requirements of the section with respect to the giving of advice.”).

¹⁰ *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F. 2d 616, 617 (D.C. Cir. 1989). *See also Martin v. Power Inc.*, 1992 WL 252264, *2 (W.D. Pa. Sept. 28, 1992); *Wirtz v. Fowler*, 372 F. 2d 315, 330-331, n.32 (5th Cir. 1966), *overruled in part on other grounds*, *Price v. Wirtz*, 412 F. 2d 647 (5th Cir. 1969).

¹¹ Herbert R. Northrup, *Open Shop Construction Revisited* (Wharton 1985).

¹² *NFIB*, 2016 U.S. Dist. LEXIS 89694, at **79-81.

if the association staff advise the employer how to tailor the material to the employer's particular needs. The act of giving advice somehow deprives the association of the "advice" exemption.¹³

- The Department does not explain why trade associations can sponsor union avoidance seminars under the current rule without reporting, but if the associations' own staff presents the same advice as the consultants, then reporting will be required. Meanwhile, employers can attend anti-union seminars and receive the advice, without themselves filing reports, even though the consultant and/or the association staff member who presents the advisory program is required to file reports.¹⁴
- The Department also fails to justify the requirement that consultants, including trade associations, file reports if they develop or implement personnel policies or actions with the object of persuading employees. The 2016 rule states that no reporting is required if the policies only "subtly" affect or influence the attitudes or views of the employees. There is no logical difference between these two situations.¹⁵
- Construction employers who hire consultants are also baffled as to why the current rule allows consultants to provide "off-the-shelf" materials to them without imposing a reporting requirement; but if the consultant gives actual advice as to which are the *best* materials, reports must be filed.
- Employers and consultants alike, and especially labor attorneys, have received no clear guidance as to the line arbitrarily drawn in the 2016 rule between advice that is "indirectly"¹⁶ persuasive and therefore reportable and advice that is not. The only way for consultants and attorneys to avoid crossing this line is to not give labor relations advice at all, to the severe detriment of ABC members and many other employers.

3. The 2016 rule has been found to be overbroad under the First Amendment

The *NFIB* court further held that the 2016 rule is unconstitutionally overbroad, burdening the right of employers to speak out on the subject of unionization and to obtain advice on what they can or should say to their employees.¹⁷ The court properly found a constitutional violation

¹³ 81 Fed. Reg. at 15938.

¹⁴ *Id.*

¹⁵ *Id.* at 15939.

¹⁶ *Id.* at 15938.

¹⁷ *Citing Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *McCullen v. Coakley*, 135 S. Ct. 2518, 2531 (2014); *U.S. v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012); *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000).

under both the “strict scrutiny” and “exacting scrutiny” standards.¹⁸ In addition, the 2016 rule unconstitutionally compels attorneys and consultants to identify themselves as “persuaders,” a highly controversial label in the labor relations field, and forces such advisors and their client employers to publicly stigmatize themselves in violation of the First Amendment.¹⁹

The 2016 rule’s evisceration of the advice standard would cast doubt on the ability of ABC and other trade groups to provide essential labor relations advice to their employer members, for fear of being unjustifiably deemed to be engaged in persuader activity. Under the Department’s 2016 rule, the only way to be sure to avoid the burdensome reporting requirements—for the association as well as its unsuspecting employer members—would be for the association to stop giving any advice to its members on labor relations matters. There is no justification for the Department to retain a rule that would unquestionably create such a direct chilling effect on ABC and its members.

ABC is particularly concerned that its members’ rights of speech and association under the First Amendment would be infringed by the 2016 rule due to the forced disclosure of ABC members resulting from the combined effect of the expanded LM-20 requirements together with the already overbroad disclosures of the current LM-21s. As sworn testimony established in ABC’s Arkansas federal lawsuit,²⁰ both ABC and its members have been subject to specific threats, harassment and reprisals over many years that meet or exceed the Supreme Court’s standards for finding violations of association rights under the First Amendment.²¹

4. The 2016 rule has been found to be unconstitutionally vague under the Fifth Amendment

As the *NFIB* court further held,²² the 2016 rule is vague and confusing to employers and their advisors, a situation made worse by the illogical and arbitrary exceptions discussed above. This unconstitutional vagueness can only be remedied by rescinding the 2016 rule and returning to the Department’s previous longstanding interpretation of the LMRDA, which gave clear guidance to the business community as to what conduct is persuader activity and what conduct is exempt advice.

The preamble to the 2016 rule mistakenly relied on older cases that upheld the Department’s previous “bright line” interpretation of the advice exemption under the Fifth Amendment,²³ ignoring the fact that the 2016 rule has so muddied the meaning of “advice” that those earlier

¹⁸ *NFIB*, 2016 U.S. Dist. LEXIS 89694, at **89-97.

¹⁹ See *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015, rehearing en banc denied, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015)); see also *Associated Builders and Contractors of Southeast Texas v. Rung*, 2016 U.S. Dist. LEXIS 155232, at **28-30 (E.D. Tex. Oct. 24, 2016).

²⁰ See Affidavit of Ben Brubeck attached to ABC’s Memorandum in Support of Preliminary Injunction in *ABC v. Perez*, Docket No. 16-CV-00169 (E.D. AR. April 4, 2016).

²¹ See *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

²² *NFIB*, 2016 U.S. Dist. LEXIS 89694, at **98-103.

²³ *Master Printers v. Donovan*, 751 F.2d 700, 710-12 (4th Cir. 1984); *Wirtz v. Fowler*, 372 F.2d 315, 332-35 (5th Cir. 1966).

decisions can no longer serve as any defense for the rule. Those holdings were also rejected by the Eighth Circuit in *Donovan v. The Rose Law Firm*²⁴ and, as noted above, by the district court in *NFIB*. It must further be noted that the LMRDA is a criminal statute, and the 2016 rule is utterly disingenuous in its assertion that employers need not be concerned about being accused of criminal behavior if they violate the rule's arbitrary definition of advice.²⁵

5. Absent rescission, the 2016 rule will harm employers, their advisors, and the public interest

The vagueness and unlawful reporting requirements of the new rule will effectively deprive employers in the construction industry in many instances of their right to legal counsel. As established by sworn testimony in ABC's and NFIB's lawsuits, many lawyers will refuse to advise employers on appropriate responses to union organizing without much clearer guidance from the Department as to what recommendations do and do not constitute persuader activity.²⁶ The preamble to the 2016 rule dismissed such claims in the previous comments as "speculative;"²⁷ but in light of the more recent sworn affidavits and trial testimony from representatives of large and small labor law firms all over the country, as well as the continued opposition to the 2016 rule by the American Bar Association, the Department can no longer ignore the chilling effect of the 2016 rule on the ability of employers to obtain counsel. For this reason as well, as stated in the NPRM, the 2016 rule must be rescinded to allow the Department to give greater consideration to such adverse impacts of changing the definition of reportable "advice."

Lawyers are particularly placed at risk by the 2016 rule because of the related requirement that annual LM-21 reports disclose all of the lawyers' *non*-persuader clients, fees and services, even if a single persuader event is found to have occurred. If by merely suggesting or revising documents, speeches or policies, an attorney would risk being required to file government reports that include detailed information, including fee arrangements for all other labor clients, many attorneys will simply cease providing such services.

The 2016 rule would thereby force businesses to either say nothing at all, or risk saying something inaccurate—or even illegal—to employees, simply because companies will no longer be able to obtain quality advice on what to say. Either way, a company's ability to communicate with its employees about a subject of vital importance will be severely restricted and employees' right to receive balanced information will be virtually eliminated.

It must also be noted that the adverse impact of the 2016 rule on employers and their advisors is not limited to the types of communications with employees that arise during a union organizing campaign. The 2016 rule plainly applies equally to advice rendered even in the absence of any known union organizing activity and purports to restrict for the first time group

²⁴ 768 F.2d 964, 973 (8th Cir. 1985).

²⁵ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Parker v. Levy*, 417 U.S. 733, 775 (1974); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

²⁶ *ABC v. Perez*, Docket No. 16-cv-00169 (E.D. Ark.), exhibits A-H to Reply Memorandum, Doc. 41 (May 5, 2016); *Id.* at Doc. 3, Attachments 1-3 (April 2, 2016); see also *NFIB*, at **27-29, 32-33.

²⁷ 81 Fed. Reg. at 15987.

seminars with employers and/or their supervisors, again regardless of any ongoing union organizing. The Department's regulatory impact analysis in the 2016 rule fails to take into account the number of possible communications that may occur between employers and their advisors—including lawyers and association staff—outside the context of known organizing campaigns, which greatly magnifies the impact of the 2016 rule. Indeed, the *NFIB* court found that the actual costs of compliance with the 2016 rule would be between \$7.5 to \$10 billion, far exceeding the Department's previous estimates. For this reason as well, the Department should rescind the 2016 rule, in order to conduct a more thorough economic analysis.

6. The Department is fully authorized by law to rescind the rule for each of the reasons set forth above and in the NPRM.

As the Department itself recognized in the preamble to the 2016 rule,²⁸ the agency is entitled to revise its interpretation of statutory terms at any time, so long as certain basic criteria under the APA are complied with. These criteria include the need to show that the new policy is “permissible under the statute,” that there are “good reasons” for the change in policy, and that the Department believes the change in policy is “better.”²⁹

In the present circumstances, there can be no dispute that restoring the interpretation of “advice” that was in place for 55 years before the 2016 rule is “permissible under the statute.” The D.C. Circuit explicitly so held in *UAW v. Dole*.³⁰ Moreover, the *NFIB* decision establishes that the 2016 rule is *impermissible* under the statute, further justifying rescission of the 2016 rule. As to the existence of “good reasons,” the district court’s vacatur of the 2016 rule in *NFIB* constitutes sufficient grounds alone to rescind the rule. But in addition, the factual findings of the court, as the NPRM rightly points out, call for rescission at a minimum in order to analyze the court’s holdings, and those of other courts cited in these comments, which cast serious doubt on the legality of the 2016 rule under the LMRDA, the Constitution and the APA.

Further supporting the NPRM’s stated grounds for rescission, the public record of testimony occurring after the issuance of the 2016 rule in the courts and in Congress, gives strong reason to believe that the adverse impact of the 2016 rule would be significantly greater than was estimated prior to the rule’s publication in 2016. For this reason as well, as stated in the NPRM, the Department is justified in rescinding the rule to study this new information and restore the previous “bright line” reporting standard in the meantime. As further asserted in the NPRM, the Department should consider any changes to the LM-20 forms together with possible changes to the LM-21 form, because the latter form greatly magnifies the reporting obligation of any consultant who is found to be a persuader, no matter how minimal the persuader activity. Finally, the shifting priorities and resource constraints since the publication of the 2016 rule, including the President’s executive orders requiring agencies to review burdensome regulations, strongly justify the rescission of the 2016 rule and a return to the well understood standard that was in place for the previous 55 years.

²⁸ 81 Fed. Reg. at 15947, citing *Home Care Ass’n of America v. Weil*, 799 F.3d 1084, 1094-95 (D.C. Cir. 2015).

²⁹ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

³⁰ 869 F.2d 616 (D.C. Cir. 1989).

Conclusion

Absent rescission, if allowed to take effect, the Department's 2016 rule redefining "advice" under the LMRDA would deprive employers in the construction industry of their right to free speech, freedom of association and legal counsel, and would deprive employees of the right to obtain balanced and informed input from both sides as they decide whether to be represented by a union. The 2016 rule would harm many small businesses in the construction industry and impair their ability to grow and create new jobs. For the reasons set forth above and in the comments filed by the CDW as well as all previously submitted briefs and affidavits related to ABC's legal challenge and the other lawsuits as well, ABC supports the Department's proposal to rescind the unlawful "persuader advice" rule.

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

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" and last name "Brubeck" clearly distinguishable.

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

Of Counsel: Maurice Baskin