

DEPARTMENT OF LABOR**Office of Labor-Management Standards****Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act**

AGENCY: Office of Labor-Management Standards, Employment Standards Administration, Labor.

ACTION: Notice of revised statutory interpretation.

SUMMARY: The Department of Labor's Office of Labor-Management Standards (OLMS) intends to implement a revised interpretation, by the Secretary of Labor, of Section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA). That statutory provision creates an "advice" exemption from reporting requirements that apply to employers and other persons in connection with persuading employees about the right to organize and bargain collectively. This notice announces a revised interpretation of LMRDA Section 203(c), as it applies to persuasive communications made to employees. The Department of Labor will, as a matter of enforcement policy, apply this revised interpretation prospectively, to conduct occurring 30 days or more after the date of this Notice.

FOR FURTHER INFORMATION CONTACT: Kay H. Oshel, Chief, Division of Interpretations and Standards, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5605, Washington, DC 20210. (202) 693-1233 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Secretary of Labor administers the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), Public Law 86-257, 73 Stat. 519-546, codified at 29 U.S.C. 401-531. Section 203 of the LMRDA, 29 U.S.C. 433, requires employers and other persons to file certain reports with the Department of Labor in connection with persuading employees about the right to organize and bargain collectively. The statute also creates an exemption from these reporting requirements if the activity involved is "giving or agreeing to give advice" to an employer. This notice: (1) Describes the relevant reporting requirements of LMRDA Section 203(a) and section 203(b), as well as the "advice" exemption of section 203(c); (2) discusses the history of the Department of Labor's

interpretation of the section 203(c) "advice" exemption, as it applies to persuasive communications made to employees; (3) explains why the Department has reviewed its prior interpretation; and (4) announces a revised interpretation of the "advice" exemption, which will be applied prospectively by the Department as a matter of enforcement policy.

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, the Department is not required to engage in notice-and-comment rulemaking in order to adopt or modify a statutory interpretation. The Department does not intend to publish a new regulation interpreting or implementing LMRDA section 203(c) in the Code of Federal Regulations.

A. The Reporting Requirements of LMRDA Section 203(a) and Section 203(b); the "Advice" Exemption of Section 203(c)

Among the abuses that prompted Congress to enact the Labor-Management Reporting and Disclosure Act in 1959 was questionable conduct by some employers and their labor relations consultants, which interfered with the right of employees to organize labor unions and to bargain collectively under the National Labor Relations Act. See, e.g., Senate Report No. 86-187 at 7-8 (1959), reprinted in 1959 United States Code Congressional and Administrative News 2326-2328. Congress believed that certain consultant activities "should be exposed to public view," since they are "disruptive of harmonious labor relations and fall into a gray area," even if they are not illegal or unfair labor practices. *Id.*

As a result, Congress imposed reporting requirements on employers and other persons, in LMRDA section 203. Under LMRDA Section 208, the Secretary of Labor is authorized to issue, amend, and rescind rules and regulations prescribing the form and publication of required reports, as well as "such other reasonable rules and regulations * * * as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. 438. The Secretary is also authorized (section 210) to bring civil actions to enforce the LMRDA's reporting requirements. 29 U.S.C. 440. Willful violations of the reporting requirements, knowingly false statements made in a report, and knowing failures to disclose a material fact in a report are subject to criminal penalties. LMRDA section 209, 29 U.S.C. 439.

LMRDA section 203(a) requires employers annually to report to the Department of Labor:

any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing * * *. 29 U.S.C. 433(a)(4).¹ "[A]ny payment (including reimbursed expenses) pursuant to an agreement or arrangement described in" this provision must also be reported. 29 U.S.C. 433(a)(5).

The report must be one "showing in detail the date and amount of each such payment, * * * agreement, or arrangement * * * and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made." 29 U.S.C. 433. The Department of Labor's implementing regulations require employers to file a Form LM-10 ("Employer Report") that contains this information in a prescribed form. 29 CFR part 405.

LMRDA section 203(b), in turn, imposes a similar reporting requirement on labor relations consultants and other persons. It provides, in part, that:

Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing * * * shall file within thirty days after entering into such agreement or arrangement a report with the Secretary * * * containing * * * a detailed statement of the terms and conditions of such agreement or arrangement.

29 U.S.C. 433(b). Section 203(b) also requires persons subject to this requirement to report their relevant receipts and disbursements. The Department of Labor's implementing regulations require labor relations consultants and other persons to file a Form LM-20 "Agreement and Activities Report" and a Form LM-21 "Receipts and Disbursements Report" that contain the required information in a prescribed form. 29 CFR part 406. Consistent with the Department's traditional

¹ The LMRDA defines a "labor relations consultant" as "any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities." 29 U.S.C. 402(m).

interpretation of LMRDA Section 203(b), Form LM-21 requires a consultant or other person who undertakes persuader activity for, or who supplies information to, one employer to report information related to "labor relations advice or services" that were provided to other employers. "Labor relations advice or services" refers to advice or services concerning employee organizing, representation, or concerted activities; collective bargaining activities; or labor disputes.

In addition to requiring reports from employers and other persons involved in "persuasive activities," LMRDA section 203 also creates an exemption from these requirements for "advisory or representative services." Section 203(c) provides in part that:

Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person *by reason of his giving or agreeing to give advice to such employer.* * * *

29 U.S.C. 433(c) (italics added).

Finally, LMRDA section 204 creates an exemption from reporting for "attorney-client communications," that is, "information which was lawfully communicated to [an] * * * attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. 434.

This Notice addresses the applicability of the LMRDA's reporting requirements when an employer enters into an agreement or arrangement with another person to produce *persuasive communications*: material such as speeches, scripts, documents, or videotapes that, in the words of LMRDA section 203(a) and section 203(b), are designed "to persuade employees to exercise, or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing." The issue is whether, and under what circumstances, the activities of these persons constitute "advice" within the meaning of section 203(c) and thus need not be reported. Examples of persuasive communications would include (but would not be limited to) materials explicitly or implicitly urging employees to vote against union representation, to take a certain position with respect to collective bargaining proposals, or to refrain from concerted activity, such as a strike, in the workplace.

B. History of the Department of Labor's Interpretation of the "Advice" Exemption in LMRDA Section 203(c); the Most Recent Interpretation

The "advice" exemption of LMRDA section 203(c) is reflected in the Department's implementing regulations, but the regulations simply track the language of the statute. 29 CFR 405.6(b), 406.5(b). The Department has, however, interpreted the "advice" exemption in the course of administering the LMRDA. As explained below, this interpretation has varied in the years since the LMRDA was enacted.² Apparently, the Department has never provided public notice and opportunity for comment in connection with adopting or revising its interpretation of section 203(c). The Department's interpretation has been communicated primarily in documents intended to guide Department staff in administering the LMRDA and in documents distributed to the public to assist employers, labor relations consultants, and others in complying with the LMRDA.

1. The Department's Initial Interpretation of the "Advice" Exemption

In its earliest approach to the "advice" exemption, reflected in a 1960 publication to guide employers, the Department took the position that employers were required to report any "arrangement with a 'labor relations consultant' or other third party to draft speeches or written material to be delivered or disseminated to employees for the purpose of persuading such employees as to their right to organize and bargain collectively." Department of Labor, Bureau of Labor-Management Reports, Technical Assistance Aid No. 4: Guide for Employer Reporting at p. 18 (1960).

The Department also took the position, in at least some opinion-letters to members of the public, that a lawyer or consultant's revision of a document prepared by an employer was reportable activity. In a 1961 article, a Department of Labor official, after noting that the drafting of speeches or written material by a consultant or lawyer was reportable, addressed the issue of revisions to material prepared by the employer:

²That the "advice" exemption of LMRDA Section 203(c) might pose interpretive challenges was quickly clear to at least some observers. See, e.g., Bureau of National Affairs, *The Labor Reform Law 36* (1959) ("The exemption applicable to consultants who merely give advice is susceptible of several different interpretations. * * * It is questionable whether the exemption would also cover payments to a consultant who drafted anti-union letters and otherwise mapped out a campaign to combat union organizing").

[A]dvice to a client with respect to a speech or letter, drafted by the client, is not reportable. However, if the individual undertakes to revise that speech, this constitutes an affirmative act; it is the undertaking of activities to persuade employees in the exercise of their rights and, comparable to the giving of a speech, requires reporting. *The Bureau [Bureau of Labor-Management Reports] takes the position that reporting is required in any situation where it is impossible to separate advice from activity which goes beyond advice.* In any situation where an attorney undertakes activities which are more than mere advice for the same employer, the exclusion of [LMRDA] section 203(c) does not apply since the causal relationship is clear.

Benjamin Naumoff, Reporting Requirements under the Labor-Management Reporting and Disclosure Act, in Fourteenth Annual Proceedings of the New York University Conference on Labor 129, 140-141 (1961) (italics added).

2. The Department's Most Recent Interpretation of the "Advice" Exemption

In 1962, the Department changed its original view of the "advice" exemption, adopting what remained the Department's interpretation until now.

The change is reflected in a February 19, 1962 memorandum from then Solicitor of Labor Charles Donahue to John L. Holcombe, then Commissioner of the Bureau of Labor-Management Reports, in response to a November 17, 1961 memorandum from Commissioner Holcombe. Commissioner Holcombe's memorandum sought guidance from Solicitor Donahue on "exactly what the Department's position is with respect to the drafting and editing of communications to employees which are intended to persuade employees." Holcombe endorsed the view that the initial preparation of a persuasive document by a lawyer or consultant for use by an employer was reportable, but that revising a draft constituted "advice" for purposes of Section 203(c).

In response, the Donahue memorandum addressed three situations: (1) Where persuasive material is prepared and delivered by the lawyer or consultant; (2) where an employer drafts the material and intends to deliver it to his employees, and a lawyer or other person provides oral or written advice on its legality; and (3) where a lawyer or consultant prepares an entire speech or document for the employer.

The Donahue memorandum concluded that the first activity (preparation and delivery of material) was reportable; that the second activity (legal review of a draft) constituted

“advice;” and that the third activity (preparation of an entire document) “can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer.” In discussing the preparation of an entire document, the Donahue memorandum observed:

[S]uch activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, that fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.

The Donahue memorandum did not explicitly analyze the language of LMRDA section 203 or the statute’s legislative history, but asserted that both had been examined.

In a 1962 presentation to the American Bar Association’s Section of Labor Relations Law, Solicitor Donahue described the Department’s original interpretation of the “advice” exemption this way:

[T]he Department of Labor originally took the position that [the exemptions in LMRDA section 203(b) and section 204] did not extend to drafting or revising speeches, statements, notices, letters, or other materials by attorneys or consultants for the use of dissemination by employers to employees for the purpose of persuading them with respect to their organizing or bargaining rights. This kind of help was not viewed as advice but, instead, was regarded as an affirmative act with the direct or indirect objective of persuading employees in the exercise of their rights.

Charles Donahue, *Some Problems under Landrum Griffin in American Bar Association, Section of Labor Relations Law, Proceedings 48-49 (1962)*. Donahue observed that this position had been “reviewed in the light of Congressional intent,” which revealed “no apparent attempt to curb labor relations advice in whatever setting it might be couched.” *Id.* at 49. Expert legal advice was often necessary, Donahue suggested, and thus:

Even where this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be fairly treated as advice. The employer and not the advisor is the persuader.

Id.

The conclusions and language of the 1962 Donahue memorandum appear in section 265.005 (“Scope of the Advice Exemption”) of the LMRDA

Interpretative Manual. The Manual reflects the Department’s official interpretations of the LMRDA and is designed to guide the work of the staff of the Office of Labor-Management Standards in the administration and enforcement of the statute. Section 265.005 of the Manual states:

Section 203(b) provides for reports from every person who pursuant to an agreement or arrangement with an employer undertakes the type of activities described therein. Section 203(c) provides that nothing in section 203 shall be construed to require any person to file a report * * * by reason of his giving or agreeing to give advice to such employer * * *

The question of application of the “advice” exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or other services in whole or in part. Such a test cannot be mechanically or perfunctorily applied. It involves a careful scrutiny of the basic fundamental characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it.

As to specific kinds of activity, it is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees for the purpose of persuading them with respect to their organizational or bargaining rights is reportable. Moreover, the fact that such material may be delivered or disseminated through an agent would not alter the result. Such undertakings obviously do not call for the giving of advice to an employer.

However, it is equally plain that where an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is not in itself sufficient to require a report. Furthermore, we are now of the opinion that the revision of the material by the lawyer or other person is a form of written advice given the employer which would not necessitate a report.

A more difficult problem is presented where the lawyer or middleman prepares an entire speech or document for the employer. We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.

In later years, the Department reiterated the 1962 position, sometime expressing doubts about its soundness. See Oversight Hearings on Landrum-Griffin Act before the Subcommittee on Labor-Management Relations of the House of Representatives Committee on Education and Labor 98th Cong. 342 (1984) (statement of Richard Hunsucker, Director, Office of Labor-Management Standards Enforcement, Labor-Management Standards Administration, U.S. Department of Labor); 4 Pressures in Today’s Workplace: Oversight Hearing before the Subcommittee on Labor-Management Relations of the House of Representatives Committee on Education and Labor, 96th Cong. 5 (1980) (statement of William Hobgood, Assistant Secretary of Labor for Labor-Management Relations) (current interpretation “when stretched to its extreme, * * * permits a consultant to prepare and orchestrate the dissemination of an entire package of persuader material while sidestepping the reporting requirement merely by using the employer’s name and letterhead or avoiding direct contact with employees”).

3. *The Kawasaki Motor Corporation Litigation: International Union, United Automobile Workers v. Dole*

The Department of Labor’s most recent public statements involving the “advice” exemption were made in the context of litigation. The Department’s position in the litigation was consistent with, and derived from, the interpretation of LMRDA section 203(c) reflected in the Donahue memorandum and the LMRDA Interpretative Manual.

In 1982, the United Automobile Workers sued the Department, seeking to compel the Department to proceed against the Kawasaki Motor Corporation for failing to report conduct that allegedly was reportable under LMRDA section 203(a) and 203(b). One focus of the litigation was Kawasaki’s payments to a consultant to devise personnel policies to discourage unionization. The Department took the position that the payments were not reportable, since the consultant’s activity constituted “advice” under section 203(c). In a statement of its reasons for not proceeding against Kawasaki, the Department cited section 265.005 of the LMRDA Interpretative Manual and stated: “An activity is characterized as advice if it is submitted orally or in written form to the employer for his use, and the employer is free to accept or reject the oral or written material submitted to him.”

A federal district court ruled against the Department. *International Union v.*

Secretary of Labor, 678 F. Supp. 4 (D.D.C. 1988). However, the U.S. Court of Appeals for the District of Columbia Circuit reversed this ruling and deferred to the Department's interpretation of LMRDA section 203 as reasonable in the context of the case, since the statute itself was "silent or ambiguous with respect to the issues before" the court. *International Union, United Automobile Workers v. Dole*, 869 F.2d 616, 617 (D.C. Cir. 1989).

Following the decision of the Court of Appeals, OLMS staff has been guided by a March 24, 1989 memorandum from then Acting Deputy Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr. The Lauro Memorandum cited LMRDA Interpretative Manual Section 265.005 and stated:

[T]here is no purely mechanical test for determining whether an employer-consultant agreement is exempt from reporting under the Section 203(c) advice exemption. However, a usual indication that an employer-consultant agreement is exempt is the fact that the consultant has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject.

C. Reasons for Revising the Department's Interpretation of the "Advice" Exemption in LMRDA Section 203(c)

The Department has decided to revise its most recent interpretation of the "advice" exemption (as adopted in 1962 and reflected in the LMRDA Interpretative Manual and later statements derived from the Manual), in favor of an interpretation that best captures the intent of Congress in enacting the LMRDA and that today best achieves the aims of the statute. There is persuasive evidence that the most recent interpretation has led to the under-reporting of activities that Congress believed should be disclosed to employees and to the public, particularly given the apparent growth in the use of labor relations consultants beginning in the 1970's. The revised interpretation, discussed below, is superior to the prior interpretation in these respects. The LMRDA is silent or ambiguous on the issues addressed here. See *International Union, United Automobile Workers v. Dole*, 869 F.2d 616 (D.C. Cir. 1989) (discussed above). As a result, the Department is free to reconsider its prior interpretation and to adopt a different interpretation, so long as it, too, is reasonable. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991); *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984).

1. *The Textual Basis for the Prior Interpretation Is Dubious*

As explained, under the Department's most recent interpretation of LMRDA Section 203(c), the preparation of an entire speech or document for an employer is considered "a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer." LMRDA Interpretative Manual, section 265.005. This interpretation is in tension with the ordinary meaning of the term "advice," used in Section 203(c).

"Advice" is ordinarily understood to mean a recommendation regarding a decision or a course of conduct. See, e.g. Webster's Third New International Dictionary of the English Language Unabridged 32 (1968) (defining "advice" as "recommendation regarding a decision or course of conduct: counsel"); Black's Law Dictionary 55 (defining "advice" as "guidance offered by one person, esp. a lawyer, to another") (7th ed. 1999); 1 The Oxford English Dictionary 191 (defining "advice" as "opinion given or offered as to action; counsel. *spec.* medical or legal counsel") (2d ed. 1989). This understanding of "advice" seems easily to cover situations where an employer has drafted persuasive material, which a lawyer or consultant reviews at the employer's request to determine whether the statements in the material are allowed by the National Labor Relations Act. But a consultant or lawyer's own preparation of material that will be distributed or disseminated to employees is an activity that seems different in kind from reviewing or editing the employer's work-product. The most recent interpretation, however, treats these two activities the same way: neither must be reported.

While a consultant or lawyer may recommend that the employer use the persuasive material that he has prepared, the preparation of the material is not itself a recommendation and thus not "advice" in the ordinary sense. For example, to the extent that the persuasive material is disseminated to employees, it is clearly not the sort of communication that would be protected from disclosure by the attorney-client privilege: the material itself has been deliberately disclosed to third parties and any privilege has thus been waived. The Department's most recent view—that preparation of material is advice, so long as the employer is free to accept or reject the material—is open to question. Because an employer generally has the

authority to accept or reject the work done for him (and can exercise that authority whenever he is aware of the work), the scope of the "advice" exemption as most recently applied is very broad.

For purposes of the LMRDA, the distinction between direct communication by a consultant or a lawyer, and situations where an employer essentially serves as the channel for a communication by a consultant or a lawyer, is not clear. The important role of a person other than the employer in persuading employees would seem to be what Congress intended to be disclosed to employees and to the public, since Congress believed that there is a potential for abuse when employers rely heavily on third parties in the context of union organizing drives and collective bargaining. See, e.g., Senate Report No. 86-187 at 7-8 (1959), reprinted in 1959 United States Code Congressional and Administrative News 2327 (citing evidence "showing that large sums of money are spent in organized campaigns on behalf of some employers' and stating that such activities 'should be exposed to public view'").

The Department's most recent approach seems inconsistent with LMRDA section 203(a)(4), which refers to "activities where an object thereof, directly or indirectly, is to persuade employees," and with LMRDA section 203(b), which uses a nearly identical formulation ("activities where an object thereof is, directly or indirectly—to persuade employees"). The direct object, or at least the indirect object, of preparing persuasive material that is intended to be transmitted to employees is to persuade employees. It seems reasonable to believe that Congress envisioned that this type of activity, which goes beyond just giving advice in the ordinary sense, would be reported. In discussing the provision that became Section 203(c), for example, a Senate committee report observed that, "An attorney or consultant who confines himself to giving legal advice * * * would not be included among those required to file reports. * * *" Senate Report No. 86-187 at 7-8 (1959), reprinted in 1959 United States Code Congressional and Administrative News 2328. It seems fair to infer that reporting is required when a person engages in activities that involve persuasion in addition to giving advice. In such instances, the lawyer or consultant functions less as an advisor to the employer than as a persuader of employees.

2. The Most Recent Interpretation Has Harmed the Effectiveness of the LMRDA in Requiring Disclosure of Persuader Activities

The objections to the Department's most recent interpretation of LMRDA section 203(c) as a matter of statutory construction are not the only basis for reviewing that interpretation. The apparent practical consequences of the interpretation also suggest the need for revision.

Over the years, the Department's most recent interpretation of the "advice" exemption has been criticized by a Congressional subcommittee and by commentators, who have suggested that the interpretation has seriously harmed the effectiveness of the LMRDA in requiring the disclosure of persuader activities.³

More recently, a former labor relations consultant, Martin Jay Levitt, has published a book that seems to confirm this criticism. Discussing the LMRDA (also known as the Landrum-Griffin Act, after its Congressional sponsors), Mr. Levitt has written:

The law states that management consultants only have to file financial disclosures if they engage in certain kinds of activities, essentially attempting to persuade employees not to join a union or supplying the employer with information regarding the activities of employees or a union in connection with a labor relations matter. Of course, that is precisely what anti-union consultants do, have always done. Yet I never filed with Landrum-Griffin in my life, and few union busters do. Here's why not:

According to the law, in order to be engaged in "persuader" activities, the consultant must speak directly to the employees in the voting unit. As long as he deals directly only with supervisors and management, he can easily slide out from under the scrutiny of the Department of Labor, which collects the Landrum-Griffin reports.

Martin Jay Levitt (with Terry Conrow), *Confessions of a Union Buster 41-42* (New York: Crown Publishers, Inc. 1993) (italics added). Mr. Levitt's description of the actual practice of labor relations consultants is consistent with prior statements by other consultants. See Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 96th

Cong., *Pressures in Today's Workplace 44* (Comm. Print 1980) (quoting testimony of labor relations consultant and stating that the "current interpretation of the law has enabled employers and consultants to shield their arrangements and activities").

Considering Mr. Levitt's apparent personal experience in the field, his statement raises concerns about the effectiveness of the LMRDA's reporting provisions, in light of the Department's most recent interpretation of the "advice" exemption. Mr. Levitt's statement is incorrect in suggesting that the LMRDA, by its terms, requires direct contact between a consultant and employees before the statutory duty to report persuader activities is triggered. But the Department's most recent interpretation of LMRDA section 203(c) lends itself to the understanding described by Mr. Levitt, since it views most activity other than direct contact between a consultant and employees as falling within the "advice" exemption. If Mr. Levitt's statement is accurate, then the Department's most recent interpretation may be contributing to the substantial under-reporting of persuader activities that Congress wanted disclosed.

Since 1962, when the Department's most recent interpretation of the "advice" exemption was adopted, the means and methods used by labor relations consultants to market themselves to employers and to persuade workers have become more sophisticated, reflecting new technologies.

For example, one prominent labor relations consulting firm—which recently merged with another, long-established firm—advertises its services on the Internet. Its Website announced that the "new firm will have combined billings of \$5.5 million," that it "represents the merger of the field's top intellectual assets in response to the explosive growth of union organizing across the country," and that the two merging firms "have worked with thousands of companies over the years." Among the services offered by the firm on its Website are "full scale counter-union campaigns." The firm states, "We know how unions organize employees, why employees turn to unions, and how to keep unions out. * * *" Among the products offered by the firm is a videotape called "Inside the Union." The firm describes it this way:

[The firm] can produce a customized video for your organization that goes inside the union that is attempting to organize your employees * * * This tape provides your employees with everything they need to

make an informed decision at the voting booth.

The firm invites employers to "discuss how Inside the Union can fit into your counter-union campaign."

The use of consultant-prepared, customized video presentations appears to be a common persuasive technique. One consultant firm, on its Website, describes its "custom video presentations for management," begun in 1984, which evolved into an "NLRB Representation Election Campaign Program," "used in more than 3,000 elections." According to the firm, "[t]his revolutionary approach utilized a series of captive audience videos that enabled employers to effectively conduct their own campaigns without expensive consulting services." The firm describes its videos as "credible communications that inform and persuade employees," noting that its "standards * * * mean that [the employer's] union-free message commands attention and respect."

Other firms offer services that depend less on high technology. The Website of one firm offers services that include "developing flyers aimed [at] company specific issues." According to the firm "flyers mailed to worker's homes let family members realize what is at stake." In the words of another firm's Website, addressed to employers, it can help "get your anti-union message indelibly engraved upon your employee's minds."

The sophistication of today's labor relations consultants is apparent from their Internet sites, like those just described. Many consultants have such sites, which they use to market their services in a way that was not possible in 1962. The Internet sites seemingly illustrate the important role consultants play in employers' responses to union organizing campaigns. One firm describes itself as "providing professional on-site campaign management expertise" and says it has been involved in 930 campaigns. Its services include "persuader, bilingual, and custom video campaigns," billed as "highly credible, direct employee communications that build lasting positive impressions." The firm refers to its staff members as "professional campaign managers," who are "thoroughly experienced in developing and using video, internet, and multi-media based communications programs." Staff members "design a winning strategy and deliberate tactics fine-tuned to the particular issues and requirements of your [the employer's] campaign."

Like the firms already described, other labor relations consultants who

³ See Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 98th Cong., *The Forgotten Law—Disclosure of Consultant and Employer Activity under the LMRDA 13-14* (Comm. Print 1984); Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 96th Cong., *Pressures in Today's Workplace 43-44* (Comm. Print 1980); Jules Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U.C. Davis L. Rev. 1, 23-27 (1980).

advertise on the Internet make clear that they provide comprehensive services to employers. One firm, which has claimed involvement in 950 union representation and decertification elections over 25 years, offers "campaigns to defeat Union attempts to organize employees." Another firm's Website offers "counter-union organizing strategies" and "union avoidance" efforts, among services "custom designed to meet the needs of the individual client." The firm observes, "When organizing occurs, [the firm] works closely with the employer's management team to ensure that employees receive full and accurate information regarding what a union can and cannot do for them." A different firm offers "union avoidance campaigns" among its services, describes itself as "nationally recognized as a leader in conducting successful campaigns for companies," and points out that it can "strategically utilize the expertise and skills of company supervisors to influence a positive outcome to elections."

In addition to consulting firms, law firms also appear to be engaged in developing persuasive communications, as well as more traditional legal work. One law firm Website, in describing its "legal services to management," includes (in addition to "advice and counsel") "union avoidance," noting that its "lawyers are prepared to counter the union's efforts with election campaign tactics," "focusing on not only why employees should vote against the union, but why they should vote for the kind of relationship they really want to have with their employer." Similarly, another law firm says that it "frequently advises clients in union avoidance, organizing campaigns, and representation elections" and "frequently assist[s] * * * clients in employee communication strategies, including the development of speeches, multimedia, and written employee communications."

Evidence suggests since the 1960's, the use of labor relations consultants by employers has increased significantly, that such consultants play an important role in connection with the process of union organizing efforts, and that this role may contribute to harmful conflicts in American workplaces. Reporting by labor relations consultants under the Department's most recent interpretation of LMRDA section 203(c) does not appear fully to reflect the scale and scope of consultant activity.

Observers of American labor relations have noted an increased use of labor relations consultants in the years since the Department's most recent

interpretation of the "advice" exemption was adopted. See, e.g., Unions and Management Representatives Disagree on Extent of Consultants' Influence in 75 Daily Labor Report (Bureau of National Affairs) at C-1 (April 19, 1988) ("The number of labor relations consultants * * * has proliferated in recent years"). A 1984 Congressional subcommittee report observed:

In the 25 years since the enactment of the LMRDA there has been a dramatic increase in management's use of consultants to counter the unionization efforts of employees or to decertify existing unions. This well-documented increase has been most pronounced in the past 10 years.

Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 98th Cong., *The Forgotten Law—Disclosure of Consultant and Employer Activity under the LMRDA 2* (Comm. Print 1984).⁴ See also Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 96th Cong., *Pressures in Today's Workplace 28* (Comm. Print 1980) ("[T]he labor consultant industry has undergone very substantial growth since the Landrum-Griffin Act [LMRDA], particularly during the past decade."). A scholar has described the apparent trend this way:

Anti-union labor relations consultants became fairly active in the 1950s; they were important enough to be the subject of congressional investigations in 1958 and 1959. By the 1970s, however, they came to represent a quantitatively and qualitatively different phenomenon. From being atypical in the late 1950s, they became the usual occurrence in the 1970s; their activities continue unabated today.

Michael Goldfield, *The Decline of Organized Labor in the United States 193* (Chicago: University of Chicago Press, 1987). For a similar description of this trend, see Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to*

⁴ Witnesses at Congressional subcommittee hearings in 1979 and 1980, including both labor union officials and labor relations consultants, testified to a "staggering increase in the number of practicing labor relations consultants." Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 96th Cong., *Pressures in Today's Workplace 27* (Comm. Print 1980). One prominent consultant estimated "tenfold growth in the past 10 years," i.e., during the 1970's. Id. See 3 *Pressures in Today's Workplace: Oversight Hearing before the Subcommittee on Labor-Management Relations of the House of Representatives Committee on Education and Labor, 96th Cong. 12* (1980) (testimony of Herbert G. Melnick, Modern Management, Inc.).

Amend Section 9(c) of the NLRA, 29 U.C. Davis L. Rev. 1019, 1072-1077 (1996).

In its 1994 fact-finding report, an advisory committee appointed by the Secretary of Labor and the Secretary of Commerce and chaired by Professor John T. Dunlop of Harvard University, found that "[f]irms spend considerable internal resources and often hire management consulting firms to defeat unions in organizing campaigns at a sizable cost." Commission on the Future of Worker-Management Relations (Dunlop Commission), *Fact Finding Report* at p. 74 (May 1994). The same report observed that "[s]tudies show that consultants are involved in approximately 70 percent of organizing campaigns," but also stated that "[t]here are no accurate statistics on consultant activity." Id. at p. 68.⁵

Some studies of employers' use of labor relations consultants have been done. They suggest that employers frequently use consultants. A study based on a random sample of 261 National Labor Relations Board elections between July 1986 and July 1987, found that 71 per cent of employers used an outside consultant during the election campaign. Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform in Restoring the Promise of American Labor Law 80* (Sheldon Friedman et al. eds., 1994) (Ithaca, N.Y.: ILR Press). The use of consultants, according to the study, appears to have an effect on the outcome of union representation elections: unions won 40 per cent of the elections in which employers used a consultant, as opposed to 50 per cent when no consultant was used. Regardless of the effect, the common use of consultants in the course of union election campaigns suggests widespread persuader activity that may be subject to the LMRDA's reporting requirements.

⁵ In the past, a Congressional subcommittee has suggested that a "careful study by the Department of Labor of the dimension and impact of this phenomenon [the growth in the number of labor relations consultants] is overdue." Subcommittee on Labor-Management Relations, Committee on Education and Labor, U.S. House of Representatives, 96th Cong., *Pressures in Today's Workplace 28* (Comm. Print 1980). For a detailed analysis of the business of labor relations consultants in the mid-1980's, see Bureau of National Affairs, *Labor Relations Consultants: Issues, Trends, and Controversies* (1985). That report observed that "[m]anagement consulting is a large industry" and that "[m]any observers see the industry growing." Id. at 3. But the report also pointed out that "[b]ecause much of the management consultants' work is done behind the scenes, keeping tabs on the activities of consultants—and thus getting an estimate of the size of the industry—is difficult." Id. at 5.

The reports of the Dunlop Commission, meanwhile, suggest that the use of labor relations consultants may be harmful to good labor-management relations.⁶ In its fact-finding report, the Dunlop Commission observed that:

The NLRA [National Labor Relations Act] process of representation elections is often highly confrontational with conflictual activity for workers, unions, and firms that thereby colors labor-management relations.

Commission on the Future of Worker-Management Relations, Fact Finding Report at p. 68 (May 1994). In its final report, the Commission noted the harm to good labor-management relations caused by the "import of the worst features of political campaigns into the workplaces by managers and unions." Commission on the Future of Worker-Management Relations, Report and Recommendations at p. 15 (December 1994).

The apparent rise in the use of labor relations consultants since 1962, the reasonable possibility that some labor relations consultants contribute to harmful conflicts in labor-management relations (an object of Congressional concern in passing the LMRDA), and evidence that the Department's most recent interpretation of the "advice" exemption has led to the under-

reporting of the activities of these consultants, all support revision of the interpretation.

D. Revised Interpretation of the "Advice" Exemption

For the reasons just described, the Department has revised its interpretation of LMRDA section 203(c) with respect to the preparation of persuasive materials by labor relations consultants and other persons. The Department's new interpretation, as it will appear in the LMRDA Interpretative Manual distributed to the staff of the Office of Labor-Management Standards (superseding section 265.005 of the most recent version of the Manual, described above), is as follows:

LMRDA Section 203(b) requires reports from: "every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing* * * ." Section 203(c) provides that a person need not file a report "by reason of giving or agreeing to give advice to * * * an employer."

The application of the "advice" exemption depends on whether an activity can fairly be considered giving "advice," as opposed to engaging in direct or indirect persuasion of employees. "Advice" means an oral or written recommendation regarding a decision or a course of conduct.

For example, a lawyer or consultant who counsels an employer on what he may lawfully say to employees or on how to exercise his legal rights most effectively is providing "advice," even if the employer's communication is intended to persuade

employees within the meaning of the LMRDA. This activity is not reportable.

However, persons who give advice to employers may also engage in activities that must be reported. When a consultant or lawyer or their agent communicates directly with employees in an effort to persuade them, the "advice" exemption does not apply. The duty to report can be triggered even without direct contact between a consultant or lawyer and employees, if persuading employees is an object (direct or indirect) of the person's activity pursuant to an agreement or arrangement with an employer.

For example, when such a person prepares or provides a persuasive script, letter, videotape, or other material for use by an employer in communicating with employees, no exemption applies and the duty to report is triggered.

Material is persuasive if, for example, it explicitly or implicitly urges employees to vote against union representation, to take a certain position with respect to collective bargaining proposals, or to refrain from concerted activity (such as a strike) in the workplace.

A lawyer or consultant who, as a means of providing legal or other advice, simply reviews and revises persuasive material prepared by the employer is not required to report that activity.

The Department will, as a matter of enforcement policy, apply this interpretation prospectively, to conduct occurring thirty days or more after the date of this Notice.

Signed at Washington, D.C., this 8th day of January, 2001.

Bernard E. Anderson,
Assistant Secretary for Employment Standards.

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⁶Labor relations consultants may be held liable by the National Labor Relations Board for unfair labor practices committed on behalf of employers. See, e.g., *Blankenship and Associates, Inc. v. N.L.R.B.*, 999 F.2d 248 (7th Cir. 1993), enforcing 306 N.L.R.B. 994 (1992). Employers may also be held liable, based on the actions of their consultants. See, e.g., *Wire Products Manufacturing Corp.*, 326 N.L.R.B. No. 62 (1998).