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Good morning, Chairman Roe, Ranking Member Polis, and members of the Subcommittee. My name is Joseph Baumgarten and I am a partner with the law firm of Proskauer Rose and co-chair of Proskauer's Labor and Employment Law Department, where I have practiced for more than 32 years. My firm has been practicing labor and employment law for more than 75 years. During those 75 years we have represented hundreds of employers, including unionized employers in collective bargaining in industries and sectors spanning our economy, from professional sports leagues and teams, television, live theater, manufacturing, newspapers, health care, construction, hospitality and many others. Thank you to the Subcommittee for the opportunity to participate in today's panel on the Department of Labor's Persuader Rule.

I. The Rule Conflicts With The Plain Language Of The LMRDA

Any inquiry into an agency's interpretation of its governing statute must begin with a careful parsing of the statutory language. Where the language and intent of Congress is clear, an agency must give effect to the unambiguously expressed intent of Congress.

A. The Rule Is Inconsistent with Section 203

1. "Collective Bargaining" Activities Are Expressly Exempt From Reporting

Section 203(c) of the LMRDA, titled "Advisory or representative services exempt from filing requirements," provides that employers and consultants, including attorneys, are not required to file reports covering their services "by reason of . . . giving or agreeing to give advice to [an] employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms and conditions of employment or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 433(c). Though § 203 is often referred to as the "advice exemption," its scope is – as the quoted text indicates – broader than that. The exemption expressly excludes: (i) giving "advice" to an employer (without qualification); (ii) representing an employer in a legal proceeding of any kind; and (iii) engaging in collective bargaining.

Putting aside for the moment the impact on employers who face union organizing campaigns, the Rule will fundamentally deprive unionized employers of their choice of counsel during the collective bargaining process in a way that the statute was never intended.

As reflected in the legislative history of the LMRDA, Congress added these specific exemptions to address, among other things, concerns regarding disclosure of attorney-client confidences and to avoid impeding legitimate activities undertaken by labor relations consultants. Thus, the statute makes clear that giving "advice" OR engaging in collective bargaining on behalf of an employer are exempt from the reporting requirements. To my

knowledge, neither the Department nor anyone else has ever taken a contrary position. That is, until now. Under the Department's new interpretation of the exemption, when a lawyer or other outside consultant is engaged in collective bargaining, communications in support of the employer's bargaining proposals that are prepared for delivery to employees at the bargaining table are exempt from reporting. But the same or similar entirely lawful communications lose their exempt status if they are prepared for delivery to the employees in the bargaining unit at large, away from the table (say, in the form of a letter or bulletin from management).

In effect, the Department is trying to take the unitary collective bargaining process and artificially parse it in a way that nullifies the exemption. Any professional worth his or her salt – whether on the union or management side – would agree that their job when "engaged in collective bargaining" is not only to make arguments at the table, but also to advise their clients on how to "sell the deal" to the workforce as a whole.

The Department's Rule, however, means that lawyers cannot assist their clients away from the bargaining table without incurring an obligation to report as persuaders.

To illustrate the irrational results of the Rule, a lawyer can say to a client: "I can help you develop bargaining proposals, I can deliver those proposals for you at the bargaining table and I can explain them at the table. I can even work collaboratively with the union and its counsel to draft the collective bargaining agreement. However, although I may be the most knowledgeable person about the proposals and about the CBA, I cannot then help you write a letter to your employees explaining the basis for the proposals or urging ratification (or even suggest that such a letter be written); nor can I assist you in drafting talking points to be used when speaking to employees about what happens in the event of a work stoppage without

becoming a 'persuader' that requires us both to report." That result is not only unprecedented, it is completely inconsistent with the statute.

This flaw was pointed out in comments made in response to the Department's 2011 NPRM. Regrettably, the Department dismissed those comments in a single paragraph:

> One law firm questioned the reportability of communications in connection with the collective bargaining process. The Department emphasizes that the presence of a labor dispute is not a prerequisite for reporting of persuader agreements, although it may provide important context to determine if the consultant engaged in persuader activities. Section 203 exempts from reporting activities involved in negotiating an agreement, or resolving any questions arising from the agreement. An activity, however that involves the persuasion of employees would be reportable. For example, a communication for employees, drafted by the consultant, about the parties' progress in negotiations, arguing the union's proposals are unacceptable to the employer, encouraging employees to participate in a union ratification vote or support the union committee's recommendations, or concerning the possible ramifications of striking, would trigger reporting. 81 Fed. Reg. at 15971; *see id.* at 15939 ("While many reports will be triggered by persuader activities related to the filing of representation petitions, *others will result from activities related to collective bargaining. . . .")* (Emphasis added).

The Department's attempt to distinguish collective bargaining, on the one hand, from "persuasion of employees," on the other hand, finds no basis in the statute or in common sense. At its core, collective bargaining involves the art of persuasion. The art is practiced not just at the bargaining table. Section 101 of the NLRA refers to "the practice and procedure of collective bargaining" for a reason. In every collective bargaining negotiation it is the employees themselves who ultimately decide to make or not make the agreement with the employer. That is what the ratification process is for. It is also the employees who decide whether or not to authorize a work stoppage. That is what a strike vote is for.

That collective bargaining encompasses much more than negotiations and communications at the table is not a new or controversial concept. Here is one very good definition:

> Collective bargaining (also called contract negotiations) is the heart and soul of the labor movement. It is when workers band together to negotiate workplace matters with their employer. The end result is a **collective bargaining agreement** or **contract** that spells out in black and white all of the terms both parties agree to, from pay rates and benefits, to a grievance procedure, time off and more. The employees, or **bargaining unit**, generally nominate a few of their coworkers to represent them, along with expert negotiators from the union. Once the negotiating team reaches a **tentative agreement** with management, the bargaining unit meets to vote the contract terms up or down. This is called the ratification process. The contract only goes into effect if a majority of the employees approve the tentative agreement.

You can find this definition on the website of the International Brotherhood of Teamsters - - one of this country's largest labor organizations. IBT, Frequently Asked Questions (https://teamster.org/about/frequently-asked-questions-faq). The IBT obviously considers the ratification process part of collective bargaining.[1] Thus, a management lawyer who provides content for his or her client to communicate with the bargaining unit about ratification is, by the IBT's own definition, "engaged in collective bargaining."

Likewise, the Second Circuit Court of Appeals recognized over 30 years ago that "labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade . . . ." *NLRB v. Pratt & Whitney Air Craft Div.* 789 F.2d 121, 134 (2d Cir. 1986) (citations omitted). Accordingly, "granting an employer the

[1] *See also* "Why Employees Vote to Ratify Union Contracts" (http://clas.wayne.edu/Multimedia/labor) ("When unions complete bargaining and reach a settlement with an employer, they usually present a proposed agreement to the membership to vote whether or not to accept it, referred to as a ratification vote. When employees vote yes, the contract typically goes into effect. When they vote no, the union may return to negotiations with the employer or a strike may occur. . . . Thus contract ratification is a crucial stage near the end of the collective bargaining process.").

opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decision while also permitting them a reasoned critique of their unions' performance." *Id.* (emphasis added).

Both Congress and the Supreme Court have also stressed the special importance of "encourag[ing] free debate on issues dividing labor and management" in the workplace. *Chamber of Commerce of United States v. Brown*, 554 U.S. 60, 67 (2008). Similarly, the NLRB recognized that:

> The goal of the Federal labor policy has always been to create a favorable climate in which a healthy and stable bargaining process can be established and maintained. We believe that **permitting the fullest freedom of expression by each party to that process** offers the best hope of nurturing that environment. Ideas which are tested in the marketplace of free debate provide the foundation of a sound labor relations framework. We recognize that there may be some risk that direct communication between an employer and its employees which bears on the bargaining process may be perceived by some as an attempt to undermine the statutory collective-bargaining representative. However, we are convinced that the benefits to be derived from free, noncoercive expression far outweigh such speculative concerns.

United Technologies Corp., 274 NLRB No. 87 (1985) (emphasis added); *see Adolph Coors Co.*, 235 NLRB 271, 277 (1978) (employer lawfully sent letters setting forth certain proposed contract terms which had been presented to the union and thereafter implemented when impasse was reached in negotiations); *Stokely-Van Camp, Inc.*, 186 NLRB 440, 449-50 (1970) (employer that conducted meetings with its employees for the purpose of discussing and clarifying its bargaining proposals acted lawfully and did not engage in improper "direct dealing").

The Department's Rule will, without doubt, result in many consultants and lawyers declining to give advice to employers, which would then lead to employers – especially small businesses with no in-house counsel – deciding to forego expressing opinions regarding a union

or a union's proposals. It will also, without doubt, result in many employers declining to ask for such advice. By thus chilling employers' free speech, the Rule will preclude employees from hearing the "other side" of the story – an alternative view and information that a union would not present. As a result, the employees will be deprived of an opportunity to discover their employer's views, and they will be less informed about the important choices they face – be it during union organizing or during the ratification process.

Let me respond here to the Department's comment that the Rule does not prohibit employers and consultants from engaging in any kind of activity – it merely requires that the activity be reported. The Department understates the consequences of being deemed a "persuader" under the Rule. Given the Department's position that the scope of the reporting obligation extends to all labor relations advice or services, not just persuader activities, many lawyers will simply decline to provide services which could conceivably be deemed "persuader activity" out of fear of triggering the reporting obligation as to all of their clients. Conversely, employers may eschew seeking counsel for these types of communications if they have to report their agreements with counsel, as well as the fees and the details of such agreements - - clearly chilling the free flow of communications necessary between a client and his attorney. This is critical – as the NLRB has strict guidelines on the scope and nature of communications to employees during the bargaining process. Without counsel to assist in the drafting of these communications, it could easily lead to entirely unintended unlawful behavior by employers that, in fact, interferes with the bargaining process - - an entirely perverse result from a statute that is intended to promote the process.

Let me also be clear because much has been said about the need to expose unethical practices of so-called "union busting" consultants and surreptitious "middlemen." The reporting

requirements of the LMRDA ensure that employees are aware of who is behind messages regarding a union when they receive such messages from someone who cannot readily be identified as an agent of the employer.[2] The application of the Rule to work done in collective bargaining does not advance that goal in any way. When a lawyer participates in collective bargaining negotiations everyone knows that he or she is a representative of management. There can be no confusion as to the source of the messages.

2. The Department's Revised Interpretation of "Advice" Is Inconsistent With The Statute

The Department's revised treatment of what constitutes "advice" exempted by § 203(c) does not fare any better. For over fifty years, the Department administered the advice exemption in a manner that was true to the plain meaning of the statute and that had the added, and critical, benefit of giving employers and their counsel a bright-line test that was easy to administer: so long as outside counsel or consultant was not communicating directly with employees, but rather providing or editing content for their employer client, which the employer client was free to accept or reject, the work did not give rise to a reporting obligation. That made sense. After all, the definition of "advice" (as contained in Merriam-Webster's Collegiate Dictionary (10th ed. 2002)) is a "recommendation regarding a decision or course of conduct: counsel."

[2] The LMRDA was designed to target "middlemen flitting about the country" in order to "work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts." S. Rep. No. 86-187, at 10 (1959). These "middlemen" were involved in "bribery and corruption as well as unfair labor practices." *Id.* Accordingly, "[t]he committee in drafting section [203(b)] was particularly desirous of requiring reports from middlemen masquerading as legitimate labor relations consultants." *Id.* at 39. "The committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations and do not engage in activities of the types listed in section [203(b)]." *Id.* at 40. *See also* S. Rep. No. 85-1684 at 8-9 (1958) ("[s]ince attorneys at law and other responsible labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice [would not] be required to report").

Consistent with the dictionary definition of "advice," if a lawyer recommends that a client take a more – or less – conciliatory tone about a union or its bargaining proposals or record, that is a recommendation. It is advice. The character of that recommendation is no less "advice" when the communication that is being considered is intended to persuade employees than it would be if it were for the purpose of persuading newspaper editorial writers, customers or company shareholders. The language of § 203(c) does not distinguish among the potential audiences for the communications that are the subject of the lawyer's (or other consultant's) advice. Yet, the Department's Rule would irrationally make the question of reportability turn on that question.

At the same time, the Rule would constrict the term "advice" so that it applies purely to advising a client as to the legality of a communication or course of action. But we all know that lawyers do much more. Lawyers are advocates. They persuade. That is why lawyers are asked by clients to help script business meetings; to help draft prospectuses; to prepare comments to the media on behalf of their clients' positions. To suggest that "advice" is no longer "advice" because there is a persuasive element to the subject matter on which the advice is given makes no sense. And, it is simply an impossible line to draw. Any statement given to the client or edit made to a document by a lawyer could potentially be construed as "persuasive" even where the attorney's sole intent was to ensure the lawfulness of the communication.

B. <u>The Rule Is Inconsistent with Section 204</u>

Much attention has been focused on the impact of the new Rule on the attorney-client relationship, specifically, the invasion of the attorney-client privilege and the impact on lawyers' ethical obligation to refrain from disclosing even non-privileged information that their clients wish to keep confidential. Those concerns are valid and they are profound. An attorney is

obligated by the laws of virtually every state to maintain in confidence communications made to him or her by a client in confidence. That obligation is sacrosanct. No attorney can or will risk his or her license and professional reputation by reporting matters clients demand not be reported. And no attorney will perform work that is required to be reported if they cannot in fact comply with that requirement. It is for that reason that § 204 of the LMRDA exempts from reporting "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434.

Under the new Rule, there will be a variety of circumstances in which lawyers may be required to report the activities they have performed for clients in ways that would require the disclosure of information conveyed to them in confidence by a client. This is, in fact, precisely what the Department would require in the revised LM-20, which would require employers to report exactly what kinds of services they have been asked to provide for purposes of "persuasion." Moreover, depending on what happens to the LM-21 report – which remains a moving target – a lawyer who performs "persuader" work for even a single client could conceivably be required to report its receipts and disbursements for labor relations work performed on behalf of all its clients, even those for whom no persuader work was performed and even if those other clients considered (with good reason) that such information was confidential and subject to attorney-client privilege. (The courts of appeals are split on this question.)

The result, quite obviously, will be a loss of services, and the loss of services will impact most acutely the small businesses that have limited funds and little or no in-house experience to guide them in what they can and cannot say to their employees. By dramatically increasing the cost and consequences of securing advice (potential criminal penalties), the Rule would result in

fewer firms seeking advice and, again, will have the perverse effect of causing more unfair labor practices by employers who are deprived of the services of responsible counsel. Alternatively, employers may refrain from saying anything at all, leaving unrebutted whatever message is being disseminated by the union. Employees will be left with no countervailing voice.

II. The Rule Is Unduly Vague

The Rule extends the reporting obligation to activities that bear no resemblance to the abuses which led to the enactment of the LMRDA and it does so in a way that requires a subjective determination of intent that is both unrealistic and unworkable. For the first time, a lawyer (or other consultant) who develops employer personnel policies may be required to report, even if no union is on the scene and even in the absence of any evidence that the employees have even considered a union. Specifically, under the Rule, reporting will be required if the personnel policies that the lawyer has been asked to prepare are "designed to persuade." In determining whether an object of the activities is to persuade employees, the Department intends to look at "the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking."

In essence, under the new Rule, the reporting obligation of employer (LM-10) and its counsel (LM-20 and LM-21) will turn on the subjective determination of each – and, ultimately, on the Department's subjective view of their intent – as to whether the policies that the lawyer developed were for the purpose of persuading employees whether or how to exercise their right to unionize and bargain collectively. If "an object" of the agreement is to persuade employees with respect to their right to unionize or bargain collectively, it is persuader activity. A lawyer may, for example, advise an employer regarding promulgation of an internal grievance process, without incurring an obligation to report. But the same action may be deemed to be "persuader"

work if the Department were to conclude later – based on "circumstances relevant to the undertaking" – that the policy had a purpose, in whole or in part, of discouraging employees from unionizing.

In the real world, there is no way to make this determination with any degree of confidence – particularly where both the employer and the lawyer/consultant have to make their own independent determination as to whether the work performed is reportable. Put yourselves in the shoes of the lawyer. What happens if your client has not told you their objective in implementing the kind of policy under consideration - - and given the framework here, a client may simply withhold the true intent of the policy in order to receive the necessary legal advice (which, again, highlights the perverse chilling effect this will have on the attorney-client relationship). What if there are multiple people involved from the client who have <u>different</u> objectives from one another? What if the client's objective changes after the work has begun but before it is concluded? What if the lawyer is not certain about the client's objective and decides, in the interest of being conservative that he or she must file an LM-20 report – and by doing so arguably violates a duty of confidentiality? What if the lawyer does not report because he or she believes in good faith that the work was not reportable – but the client does file an LM-10 because it actually did request the policy be developed with an object to persuade? This is not how the attorney-client relationship should function – and it could never function like this in any other area of the law.

The difficulty of applying this new Rule is exacerbated by the fact that the Department has failed to come to grips with what to do about the LM-21, the annual report that consultants must file. As constituted, the LM-21 requires consultants to report receipts received from any client for whom it has provided labor relations advice or services – even if such work did not

involve labor relations advice or services. (As noted, above, there is a split among the federal appellate courts regarding the propriety of this requirement.) The LM-21 also requires a statement of disbursements to employees of the consultant in connection with labor relations advice and services. For several years, the Department has had under consideration potential changes to the reporting requirements of the LM-21, including the detail to be reported. However, the Department has not issued an NPRM regarding such changes.

It should be quite obvious that the rules governing what must be reported on the LM-10 and LM-20, on the one hand, and what must be reported on the LM-21, on the other hand, are closely related and intertwined. It is for this reason that several commenters requested that the Department should refrain from publishing its final rule regarding the "advice" exemption until the Department was also ready to publish its final rule regarding the LM-21, and that the proposed advice exemption rule be consolidated with the impending proposal to change the LM-21. That would have made sense. Without clarity on what will be required to be reported in the LM-21, a consultant cannot diligently track the nature and scope of services provided in each fiscal year or the receipts from employers and disbursements associated with such services. Nor can he give appropriate advice to his clients regarding its reporting obligations.

The request to deal with all of these issues comprehensively fell on deaf ears; the Rule was issued in March with no clarity at all around changes to the LM-21. So, today, nobody who is or may become a "persuader" knows exactly what they will need to track in order to be able to report on the LM-21. Belatedly, the Department has dealt with this in the form of a Special Enforcement Policy that was issued on April 13. Under that enforcement policy the Department will not take enforcement action based on a failure to complete the Statement of Receipts and Statement of Disbursements sections (Parts B and C) of the LM-21.

To be sure, the issuance of this special enforcement policy is a positive development. But its issuance highlights the haphazard way in which the Department used its rulemaking authority. We still do not have an NPRM concerning the LM-21. We do not know what the Department intends to do with the LM-21. We do not know how long the Special Enforcement Policy will remain in effect, other than that there will be not less than 90 days' notice of any change. We do not even know how the Department defines "labor relations advice and services" for purposes of completing Parts B and C – if those Parts are even retained in their current form. This is simply no way to implement policy.

In summary, I submit that the Rule should be withdrawn because it is contrary to the plain language of the statute and Congressional intent and it is contrary to public policy. It will inhibit employers' rights to seek advice and representation, and chill communications between employers and employees – communications that Congress, the NLRB and the courts have all recognized to be valid, statutorily and Constitutionally protected, in the interest of employees themselves and important for constructive labor relations. For these reasons, I support Representative Byrne's effort to prevent the Rule from taking effect.

Thank you for allowing me to testify and I will be happy to answer any questions from the Subcommittee.