MINORITY VIEWS
H.J. Res. 87, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act."
114th CONGRESS, SECOND SESSION
September 9, 2016

INTRODUCTION

On March 24, 2016, the Department of Labor (DOL) issued its final persuader rule updating the reporting requirements for union avoidance consultants and employers; the rule reinstates the statutory requirement that employers and consultants must report *both* their direct *and* indirect persuader activity under the Labor Management Reporting and Disclosure Act (LMRDA) of 1959 (29 U.S.C. 401 *et seq.*).

1) **The DOL's persuader rule promotes transparency** by closing a massive reporting loophole that has allowed employers to keep *indirect* persuader activity secret. This rule will pull back the curtain on employer arrangements with union avoidance consultants that have been improperly withheld from workers for nearly 50 years.
2) **The rule does not interfere with the attorney-client privilege** and is consistent with the Model Rules of Professional Conduct governing attorneys' ethical obligations.
3) **The persuader rule helps level the playing field** for workers who want to join together to negotiate with their employer for better working conditions. By requiring employers to disclose the identity of and amounts paid to outside consultants who are responsible for crafting their anti-union messages, employees will be better informed when making decisions during union elections and during collective bargaining.

On April 15, 2015, Representative Bradley Byrne (AL-01) filed H.J. Res 87, a Joint Resolution of Disapproval of the rule pursuant to the Congressional Review Act. The Committee's Subcommittee on Health Employment Labor and Pensions held a hearing on the persuader rule on April 27th, and on May 18th there was a full committee markup of H.J. Res. 87. Given that H.J. Res 87 would overturn the DOL's persuader rule and reinstate the reporting loophole, a more descriptive name for this resolution would be the "*Keeping Employees in the Dark Act*."

There have been two conflicting court decisions regarding this rule, which was due to become enforceable July 1. On June 27, 2016, a federal district court in Texas issued a preliminary injunction blocking enforcement of the rule, but a second federal district court in Minnesota denied a nearly identical request on June 22, 2016.

WHAT IS A PERSUADER?

When workers seek to organize and bargain collectively, employers often hire union avoidance consultants – also known as "persuaders" – to orchestrate and roll out time-tested, anti-union campaigns. One union avoidance consultant outlined the services he offers to help defeat a union organizing effort:

> [We] prepare[] all counter union speeches, small group meeting talks, letters to employees' homes, bulletin board posters, handouts to employees, etc., and schedule[] dates for each counter union communication media piece to be used. We have assembled a very large library of counter union materials, much of what [sic] is customized to a particular union.[1]

Union avoidance consultants may try to persuade employees by contacting them directly, thus engaging in "direct persuader" activity, or by engaging in "indirect persuader" activity, in which they do not contact employees directly, but instead work behind the scenes by creating materials (such as flyers, speeches, and videos) for management to use to communicate with employees.

Under Section 203(a) of the LMRDA, consultants and attorneys who engage in *direct* and *indirect* persuader activities – and the employers who hire them – must disclose their arrangements, a description of the services to be performed, and the amount the employer paid.

The union-avoidance industry is big business; in 1990 it was estimated to produce revenues of $200 million a year, and employers hire union-avoidance persuaders in as many as 87% of union organizing campaigns.[2] For example, IRS records filed by Catholic Healthcare West (a non-profit hospital chain and a major recipient of state Medicaid funds) show that in 1998 the hospital paid a union avoidance consultant, the Burke Group, $2.6 million to roll out its campaign.[3] And in 2004, Energy's, a multinational manufacturer of industrial batteries, paid Jackson Lewis $2.7 million to run a campaign against the International Union of Electrical Workers (IUE) at its South Carolina battery plant.[4]

THE DOL PERSUADER RULE CLOSES A LOOPHOLE

LMRDA Section 203(a) states that employers must disclose their agreements in which a consultant:

> 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.[5]

---

[1] John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the U.S.A. since the 1970s*, 33 INDUSTRIAL RELATIONS JOURNAL, 197, 203 (2002), *available at*, http://www.jwj.org/wp-content/uploads/2014/03/Logan-Consultants.pdf

[2] *See* 81 FR 15933 n.10; James Rundle, *Winning Hearts and Minds in the Era of Employee Involvement Programs, in Organizing to Win: New Research on Union Strategies* 213, 219 (Kate Bronfenbrenner, et al. eds., Cornell University Press 1998). *See also* John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the USA since the 1970s*, 33 INDUSTRIAL RELATIONS JOURNAL 197, 198 (2002).

[3] John Logan, *The Union Avoidance Industry in the United States*, BRITISH JOURNAL OF INDUSTRIAL RELATIONS 44:4, 656 (December 2006), *available at*, http://www.newunionism net/library/organizing/Logan%20-%20The%20Union%20Avoidance%20Industry%20in%20the%20United%20States%20-%202006.pdf

[4] *Id.* at 660.

[5] 29 U.S.C. 433(a) (emphasis added). Section 203(b) contains a similar reporting requirement for consultants.

However, the LMRDA exempts employers and consultants from reporting when consultants merely give employers “advice.” While the statute does not define the term “advice,” the statute provides DOL with the authority to issue regulations, including those “necessary to prevent the circumvention or evasion of [the Act’s] reporting requirements.”

After initially requiring disclosure of indirect persuader agreements following the enactment of the LMRDA, the DOL Solicitor reinterpreted the law in 1962 to treat all *indirect* persuader activities as non-reportable “advice.”[6] This interpretation created a massive loophole, and as a result DOL currently receives zero *indirect* persuader reports. While consultants file a few hundred reports annually covering *direct* persuader agreements, this 1962 Solicitor’s interpretation—which was not adopted as a regulation—only covers a small fraction of the total universe of persuader agreements.

In 1979 and 1980, the House Committee on Education and Labor conducted nine days of hearings entitled, “Pressures in Today’s Workplace” and issued a report on the evidence it gathered. The report stated in part that “the current interpretation of [section 203 of the LMRDA] law has enabled employers and consultants to shield their arrangements and activities.”[7]

The DOL briefly closed this loophole at the end of the Clinton Administration on January 9, 2001, when it issued sub-regulatory guidance that brought indirect persuader activities back into the reporting requirements. In April 2001, the Administration of President George W. Bush rescinded this reform.

On March 24, 2016, following notice and comment rulemaking that began in June 2011, the DOL’s final rule closed the loophole by reinstating the LMRDA’s requirement to report *both* direct and indirect persuader activity.[8] As explained in the final rule, “[t]he prior interpretation failed to achieve the very purpose for which [LMRDA] . . . was enacted — to disclose to workers, the public, and the Government activities undertaken by labor relations consultants to persuade employees — directly or indirectly, as to how to exercise their rights to union representation and collective bargaining.”[9]

Under the final rule:

- “Advice” – which <u>does not</u> have to be reported – includes oral or written *recommendations* regarding a decision or a course of conduct. For example, a consultant gives advice when he or she counsels a business about its plans to undertake a particular action *that is not intended to persuade employees about union rights*, advises the business about its legal vulnerabilities and how to minimize them, or identifies and explains unsettled areas of the law.

---

[6] Memorandum from Charles Donohue, Solicitor of Labor regarding “Modification of Position Regarding ‘Advice’ under Section 203(c)” of the LMRDA, February 19, 1962.

[7] *Pressures in Today’s Workplace: Report of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor,* U.S. House of Representatives 27, 44 (1980).

[8] *Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act*, March 24, 2016, *Federal Register* Vol 81. No. 57. This rule took effect on April 25, 2016. It would have been applicable to agreements between employers and consultants made on or after July 1, 2016, had a preliminary injunction not been issued on June 27, 2016 by a U.S. Federal District Court in Lubbock, Texas (see below).

[9] 81 FR 15935, 15926 (March 24, 2016).

- "Indirect persuader activity" – which does have to be reported – includes *activities* that *are designed to persuade employees* regarding the union or collective bargaining, such as when the consultant trains supervisors to conduct anti-union meetings; coordinates or directs the activities of supervisors; drafts, revises or provides speeches designed to persuade employees regarding the union; or identifies pro-union employees for discipline or reward.

Some have alleged that "the administration is attempting to rewrite the law through executive fiat,"[10] but Section 208 of the LMRDA states:

> "The Secretary shall have authority to issue, amend, and rescind rules and regulations . . . as he may find necessary to prevent the circumvention or evasion of [the Act's] reporting requirements."

This Congressional directive is precisely what the DOL followed when it issued the final rule.

THE REPORTING REQUIREMENTS DO NOT IMPOSE AN ADMINISTRATIVE BURDEN

The reporting requirements for this rule do not constitute an administrative burden: the employer must fill out a 4-page form, the consultant a 2-page form, and they must attach copies of their persuader agreements. There are two reporting forms impacted by this rule:

- **"Employer's Report" Form LM-10**: (4 pages) Employers must submit one annual report listing their persuader agreements over the fiscal year, the dates they entered into contracts, the terms and conditions of these contracts (including the amount employers paid for these services), and a description of the persuader services performed.

- **Consultant's "Activities Report" Form LM-20**: (2 pages) Labor relations consultants must submit a report within 30 days after entering into each persuader agreement, listing the date they entered into contract, the terms and conditions of the agreement (including the amount employers paid), and a description of the persuader services to be performed.

The DOL's final rule updates the instructions to Forms LM-10 and LM-20 only. DOL estimates that 2,777 employers will file Form LM-10 reports once annually under the new rule, and that approximately 358 consultant firms (including law firms) will file an estimated 4,187 Form LM-20 reports within 30 days of entering into consulting agreements.[11]

The DOL's reporting requirements for consultants involve a third form, the LM-21, that was unaffected by the final rule:

---

[10] Opening Statement of David P. Roe at the April 27, 2016 HELP Subcommittee Hearing entitled "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Employee Free Choice," *available at,* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400635

[11] 81 FR 16009-10 (March 24, 2016).

- **Consultant's "Receipts and Disbursements Report" Form LM-21**: (2 pages) Labor relations consultants must submit this report once annually, if any payments were made or received during the fiscal year pursuant to persuader agreements reported in an LM-20.

DOL has placed a new rulemaking notice on the regulatory agenda for Form LM-21, and in the interim, has issued a non-enforcement policy stating that, pending the rulemaking, it will not enforce the annual financial disclosure requirements (disbursements and receipts) for consultants under Form LM-21.[12] Therefore, any of the Majority's concerns about LM-21 are premature.

DISCLOSURE REQUIREMENTS FOR UNIONS ARE FAR MORE SUBSTANTIAL THAN THE DISCLOSURE REQUIREMENTS FOR EMPLOYERS

Some contend that this rule is one-sided on the grounds that it only addresses employer disclosure requirements. As Democratic witness Jon Newman, a partner in the Washington, D.C., law firm of Sherman, Dunn, Cohen, Leifer & Yellig, testified at the April 27 hearing:

> [U]nions have their own broad transparency obligations under the LMRDA. They must disclose, for example, the identity of the law firms and consultants they retain and report disbursements to those firms, no matter what the firms do, including if all they do is provide legal advice.

Thus, unions are held to a much broader scope of disclosures than employers. Mr. Newman also explained that while the consultant's and employer's reporting forms are two and four pages respectively, "the IBEW['s] most recent LM-2 (Labor Organization) annual report . . . is 150 pages long," and "the AFL-CIO's most recent report required to be filed with the Department of Labor . . . is hundreds of pages long."[13]

Due to the longstanding reporting loophole, employers have had an unfair advantage in union elections by hiding their arrangements with consultants, but have often used information from the union's reports in their anti-union campaign materials. This rule helps level the playing field.

THE RULE PROMOTES – RATHER THAN CHILLS – SPEECH IN THE WORKPLACE

Neither the LMRDA nor the DOL rule restrains in any way the content of an employer's message, the timing of the message, or the means by which it is delivered. Yet Republican Members contend that the rule chills free speech because employers will choose to be silent rather than disclose the fact that they have hired anti-union consultants:

---

[12] Office of Labor-Management Standards (OLMS), Form LM-21 Special Enforcement Policy (April 13, 2016), *available at,* http://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm

[13] Testimony of Jonathan D. Newman, Esq., Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, pp 26-27.

> This extreme and partisan rule will chill employer free speech … this rule will stifle debate and restrict worker free choice — with the sole purpose of stacking the deck in favor of organized labor.[14]

Far from restricting speech, the disclosure requirements actually promote speech by enhancing transparency during union organizing drives and in collective bargaining. The U.S. Courts of Appeals have uniformly rejected every First Amendment challenge to the LMRDA,[15] including a case in the Fourth Circuit, where the Court stated that:

> [d]isclosure laws perform the important function of deterring actual corruption and avoiding the appearance of corruption, but unlike other types of restrictive laws they actually *promote* speech by making more information available to the public and thereby bolstering the 'marketplace of ideas.'[16]

The United States Court of Appeals for the Sixth Circuit noted that disclosure of persuader agreements under the LMRDA:

> enable[s] employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign.[17]

The Lobbying Disclosure Act of 1995 requires similar disclosures by lobbyists, yet lobbying activities have not been chilled simply because lobbying targets and the amounts lobbying firms are charging their clients must be publicly disclosed.

Given that this rule promotes speech, is there a valid policy reason why workers should not know who is hiding behind a curtain like the Wizard of Oz during union election campaigns?

OPPONENTS INACCURATELY CLAIM THAT THE RULE WILL REQUIRE EMPLOYERS TO DISCLOSE THEIR ARRANGMENTS WITH ATTORNEYS OR CONULTANTS WHEN SEEKING ADVICE

Republican witness Joseph Baumgarten testified at the April 27th hearing that "employers may eschew seeking counsel ... if they have to report their agreements with counsel, as well as the fees and the details of such agreements."[18] This assertion mischaracterizes the rule.

---

[14] Opening Statement of David P. Roe at the April 27, 2016 HELP Subcommittee Hearing entitled "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Employee Free Choice," *available at,* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400635

[15] *See Humphrey v. Donovan*, 755 F. 2d 1211, 1221 (6th 1985) ("[W]e conclude that the [LMRDA's] report requirements do not substantially burden [persuaders'] first amendment rights."); *Master Printers of America v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984) (same); *Master Printers Association v. Donovan*, 699 F.2d 370, 371 (7th Cir. 1983), (adopting district court's opinion, 532 F. Supp. 1140, 1148 (N.D. Ill. 1981) (same).

[16] *Master Printers of Am. v. Donovan*, 751 F.2d 700, 710 (4th Cir. 1984).

[17] *Humphreys et. al.*, *v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985).

[18] Written testimony of Joseph Baumgarten, Esq., Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, p 7.

The LMRDA, Section 203(c), exempts law firm/consultant reporting when an employer retains a labor relations consultant or attorney solely for representation:

> 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 . . . 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[.]

Moreover, DOL's instructions to its LM-10 and LM-20 reporting forms match the statute:

> As a general principle, no reporting is required for an agreement or arrangement to exclusively provide legal services. For example, no report is required if a lawyer or other consultant revises persuasive materials, communications, or policies created by the employer in order to ensure their legality rather than enhancing their persuasive effect. In such cases, the consultant has no object to persuade employees.[19]

Republican witness Sharon Sellers, who appeared on behalf of the Society for Human Resource Management at the April 27th hearing, testified that she conducts trainings for businesses that cover "what supervisors can and cannot communicate to their employees under the NLRA." Yet, she asserted that her "main concern is the clients I serve may avoid seeking my training if the services are now reportable under the rule."[20]

Ms. Sellers' characterization of this rule is mistaken; her trainings clearly constitute non-reportable "advice" under the final rule. Consistent with the statute, the DOL specifically states in its instructions to the employer and consultant reports that:

> No report is required covering the services of a labor relations consultant by reason of the consultant's giving or agreeing to give advice to an employer. . . . For example, a consultant who exclusively counsels employer representatives on what they may lawfully say to employees, reviews personnel policies or actions for legality or to ensure a productive and efficient workplace for the client, or provides guidance on National Labor Relations Board (NLRB) or National Mediation Board (NMB) practice or precedent is providing 'advice.'[21]

---

[19] 81 FR 16028, 16044 (March 24, 2016).

[20] Testimony of Sharon Sellers, Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, pp. 20-22. Ms. Sellers also raised a concern that consultants who fail to report activity due to a mistaken understanding of a reporting obligation will be subject to criminal sanctions. Criminal sanctions only apply in the rare case when a person willfully violates the law, such as by making a false statement involving a material fact, knowing it to be false. This is not something that could arise from negligence or a good faith misunderstanding. LMRDA Section 439(a) states: "Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

[21] 81 FR 16028, 16044 (March 24, 2016).

Ms. Sellers also stated that employers "would be worried about having their name made public" because they "do not want their name on the form."[22] Again, DOL reports only have to be filed when attorneys or consultants are engaged in persuasion activities.

What is it, exactly, that is so objectionable about the disclosure of agreements with a behind-the-scenes union-avoidance consultant? Perhaps, employers do not want to expose their relationships with union busters to their employees. In his book *Confessions of a Union Buster*, Martin Jay Levitt – who had been a leader in the union-avoidance industry for twenty years – wrote:

> Union busting is a field populated by bullies and built on deceit. A campaign against a union is an assault on individuals and a war on the truth. . . . The only way to bust a union is to lie, distort, manipulate, threaten, and always, always attack. The law does not hamper the process. Rather, it serves to suggest maneuvers and define strategies.[23]

When asked, "Why would someone be afraid to be listed?" on the DOL forms, Mr. Newman testified:

> Because they like to have these consultants operating in the shadows. . . the industry has found they are more persuasive when they operate in the shadows because employees do not know.

Mr. Newman's testimony also provided examples of consultants' advertisements.[24] One firm even promises a money back guarantee for its ability to defeat union organizing campaigns, proclaiming in all caps, "IF YOU DON'T WIN, YOU DON'T PAY." As Mr. Newman explained:

> When you have a money back guarantee, the consultant has skin in the game. So, it seems to me perfectly reasonable for the voters, the employees, to know . . . [that] the words from the supervisors are not the supervisors' words, they are the words of the consultant that has skin in the game, that has guaranteed to the employer 'we will bust your union, we will defeat the union.'

By enacting the LMRDA, Congress sought to shine a spotlight on the persuader industry. The 1959 Senate Committee Report accompanying the LMRDA stated that persuader activities "are disruptive of harmonious labor relations and fall into gray area" between proper and improper conduct. To address this potential for harm, Congress chose to rely on transparency. As Justice Brandeis famously said, "Publicity is justly commended as a remedy for social and industrial

[22] Testimony of Sharon Sellers p. 37, 91.
[23] Martin Jay Levitt, *Confessions of a Union Buster*, 1 (Crown Publishers, 1993).
[24] Testimony of Jonathan D. Newman, Esq., Subcommittee on Health, Employment, Labor And Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, pp 24, *available at,* http://democrats-edworkforce house.gov/imo/media/doc/NewmanTestimony_w.Appendix042716.pdf

diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[25] The DOL's rule brings the regulations back in line with the statutory mandate.

In sum, *direct* persuaders (those who speak directly to employees) have long been disclosing their agreements under the LMRDA, but these disclosures have not chilled employers' efforts to hire them. For example, FedEx Freight Corporation agreed to pay LRI Consulting Services $3,000 per day as a *direct* persuader in April 2016,[26] and the Laboratory Corporation of America agreed to pay LRI Consulting $375 per hour as a direct persuader.[27] As Mr. Newman testified: "The scope of the information that is being sought in this rule is no different than what the Department of Labor has always sought when the union buster deals directly face-to-face with employees."

THE ABA RULES OF PROFESSIONAL CONDUCT DO NOT PROHIBIT PUBLIC DISCLOSURE OF ARRANGEMENTS BETWEEN UNION AVOIDANCE CONSULTANTS AND EMPLOYERS, NOR DO THEY VIOLATE ATTORNEY CLIENT PRIVILEGE OR CONFLICT WITH CONGRESSIONAL INTENT REGARDING CONFIDENTIALITY

As the U.S. Court of Appeals for the Sixth Circuit explained when upholding the LMRDA's reporting requirements for attorneys:

> [A]s long as an attorney confines himself to the activities set forth in section 203(c), [rendering legal advice and representing a client in legal proceedings or in bargaining] he need not report, *but if he crosses the boundary* between the practice of labor law and persuasion, he is subject to the extensive reporting requirements."[28]

The American Bar Association (ABA) contends that this rule impinges on attorneys' broader ethical duty of confidentiality. The ABA claims that the rule "will conflict with lawyers' existing state rules of professional conduct regarding client confidentiality, and will seriously undermine both, the confidential lawyer-client relationship, and the employers' fundamental right to effective counsel."[29] Republicans go further and contend that this rule "is an attack on the fundamental right of employers to seek legal counsel." These arguments do not withstand scrutiny.

The ABA's Model Rule of Professional Conduct §1.6 states that attorneys should not reveal "information relating to the representation of a client" *but makes an exception* for disclosure "to comply with other law"—such as the LMRDA.[30] This exception is what allows attorneys to

---

[25] *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)).
[26] LM-20 Form, *available at,* https://olms.dol-esa.gov/query/orgReport.do?rptId=618922&rptForm=LM20Form
[27] LM-20 Form, *available at,* https://olms.dol-esa.gov/query/orgReport.do?rptId=618921&rptForm=LM20Form
[28] *Humphreys v. Donovan*, 755 F.2d 1211, 1216 (6th Cir. 1985) (emphasis added); *accord Price v. Wirtz,* 412 F.2d 647, 651 (5th Cir. 1969) (en banc).
[29] Statement of Paulette Brown, President of the American Bar Association, April 27, 2016, p 2.
[30] Forty-nine states and the District of Columbia have adopted professional conduct rules patterned on the ABA Model Rules, and California has a substantially similar rule.

disclose the identity of clients under other laws, such as the Lobbying Disclosure Act, and to disclose cash transfers from a client in excess of $10,000 on IRS Form 8300.

The Democratic witness, Jon Newman, who is a member of the ABA, stated:

> Very simply, where disclosure is required by federal law, the Rule 1.6 restrictions do not apply. The Rule, therefore, is completely consistent with state bar ethics rules that may govern attorneys that engage in persuader activity.[31]

In a letter submitted to the Committee, law professors from across the country have affirmed that the LMRDA's reporting requirements, and the DOL's final rule, are consistent with an attorney's responsibility to maintain confidentiality.[32] Likewise, over 500 attorneys – 244 of whom are ABA members – submitted a letter in support of the DOL rule and to voice their concern about the ABA "taking sides in a labor-management issue contrary to the views of its members who represent workers and unions."[33]

A second objection raised by the ABA is that the DOL rule will force attorneys to disclose information protected by the attorney-client privilege. A Republican witness, William Robinson, questioned, "How can labor lawyers defend against accusations that they have violated the new rule?" and added "[t]he only way . . . would be to say what the [lawyer's] advice was, to disclose the advice, to lay it all on the table, which effectively would erase the client confidentiality of the conversation."[34] This criticism is unfounded.

First, as a matter of law, privileged attorney-client communications are exempt from disclosure under the LMRDA. Sec. 204 of the LMRDA states:

> [n]othing contained in this chapter shall be construed to require an attorney . . . to include in any report . . . any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

Second, the DOL made clear in its instructions to the Consultant's Report (Form LM-20), a determination of whether activities were intended to persuade employees is an objective inquiry:

---

[31] Testimony of Jonathan D. Newman, Esq., Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, p 18, *available at,* http://edworkforce.house.gov/uploadedfiles/testimony_newman.pdf

[32] Letter from Law Professors to Chairman Kline and Ranking Member Scott, May 16, 2016, *available at*, http://democrats-edworkforce.creative house.gov/imo/media/doc/34%20Law%20Professors%20Letter%20to%20HEW%20Committee%20%28003%291.pdf

[33] Letter from Labor Attorneys to Chairman Kline and Ranking Member Scott, May 17, 2016, *available at,* http://democrats-edworkforce.creative house.gov/imo/media/doc/5.17.16LaborLawyerPersuaderLetter.pdf

[34] Transcript of the Hearing before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, Tr. pp. 32, 56.

> To be reportable, as noted above, such activities must be undertaken with an object to persuade employees, *as evidenced by* the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.[35]

Third, the preamble to the rule adds further clarity on what must be disclosed during an enforcement investigation. It states that "in determining the intent of a consultant's activity…the test is not subjective." It adds: "[e]very communication from the consultant to the employer would not be analyzed; rather, only communications created by the consultant and intended for dissemination or distribution to employees."[36]

Given that the LMRDA and the DOL's rule ensure adequate protections for attorneys' ethical duties, there is no principled reason why the disclosure of persuader services offered by attorneys should be shielded from employees and the public, while the very same activities would be reported by their non-attorney colleagues in the union-avoidance industry.

Finally, the ABA contends that the LMRDA's exemption of *privileged* attorney-client communications under Section 204 "strongly suggests that Congress recognized and sought to protect the ethical duty that lawyers have to protect client confidences, whether or not that client information is technically privileged."[37] To the contrary, in 1959, Congress considered and rejected the ABA's views when enacting the LMRDA.

During its midwinter meeting in 1959, the ABA adopted a resolution regarding the LMRDA which stated in part:

> no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as *confidential* between a client and his attorney, including but not limited to the existence of the relationship of attorney and client, [and] the financial details thereof . . .[38]

The House version of LMRDA contained a confidentiality exemption almost identical to the ABA's 1959 resolution, which would have foreclosed disclosure of any persuader arrangement if it was conducted by an attorney.[39] However, the House version of the bill was rejected by the Conference Committee, and the Senate version of the bill – which contained the much narrower exemption <u>only</u> for attorney-client <u>privilege,</u> but excluded the ABA-recommended confidentiality provision – was enacted into law as LMRDA section 204. Moreover, an argument that Congress had intended to preclude disclosure of an attorney client relationship was

[35] 87 F.R. 16043 (emphasis added).
[36] 87 F.R. 15969-70.
[37] Statement for the Record of Paulette Brown, American Bar Association, submitted to the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016. at 7 n.9.
[38] *See Humphreys*, 755 F.2d at 1218 (quoting the ABA's 1959 resolution) (emphasis added).
[39] H.R. 8342, 86th Cong., 2d Sess. § 204 (1959), U.S. Code Cong. & Admin. News 1959, p. 2318.

rejected by multiple United States Courts of Appeal when upholding the LMRDA's reporting requirements for attorneys.[40]

PENDING LITIGATION ON PERSUADER RULE

Three lawsuits were filed in federal district courts in Minnesota, Texas, and Arkansas requesting a preliminary injunction of the persuader rule. Plaintiffs have raised essentially the same six objections as were voiced at the April 27, 2016, legislative hearing:[41] the persuader rule (1) is contrary to the LMRDA because it eliminates the advice exception; (2) chills employer free speech or is otherwise unconstitutional under the First Amendment; (3) is unconstitutionally vague under the Fifth Amendment; (4) is arbitrary and capricious under the Administrative Procedures Act; (5) violates the Regulatory Flexibility Act by failing to undertake a small business regulatory impact review; and (6) violates attorney-client privilege and attorneys' ethical duty of confidentiality.

The district court in Lubbock, Texas issued a preliminary injunction on June 27, 2016, and found that the plaintiffs, led by the National Federation of Independent Business, had demonstrated a substantial likelihood of success on all six claims. Curiously, the Texas court issued a 90-page Order that was virtually identical to the Proposed Order the plaintiffs had filed earlier that day, including the same typos (such as the misspelling of a witness' name and missing punctuation). DOL appealed that ruling to the Fifth Circuit Court of Appeals on August 25.

The Minnesota district court rejected the plaintiffs' request for a preliminary injunction on June 22, 2016. The Court stated the plaintiffs had no likelihood of success on their claims that the rule violates the First Amendment, conflicts with the attorney-client privilege, is unconstitutionally vague, or violates the Regulatory Flexibility Act. In denying the motion for a preliminary injunction, the Minnesota court found that DOL's previous interpretation of the LMRDA's reporting requirements "was underinclusive,"[42] but nonetheless expressed concern that the final rule could potentially conflict with the LMRDA by requiring the reporting of "advice" in certain situations. The Court stated that "rule plainly has multiple valid applications,"[43] but the question of whether the DOL had correctly drawn the line between advice and persuasion would be most appropriately considered as part of an "actual enforcement action."[44]

The Arkansas court has not ruled as of the circulation of these minority views.

---

[40] *See, e.g.*, *Humphreys et al* v. *Donovan,* 755 F.2d 1211, 1219 (6th Cir. 1985); *Wirtz* v. *Fowler,* 372 F.2d 315, 332-33 (5th Cir. 1966), rev'd in part on other grounds, *Price* v. *Wirtz,* 412 F.2d 647 (1969); *Douglas* v. *Wirtz,* 353 F.2d 30, 33 (4th Cir. 1965).

[41] In the Minnesota case, *Labnet, Inc. et al v. U.S. Dep't of Labor et al.*, Case No. 0:16-CV-00844 (D. Minn), the plaintiffs are Labnet Inc., an association of management-side labor law firms, and others; in Texas, *NFIB v. Perez*, 5:16-CV-00066 (N.D. Tex.), the plaintiffs are the National Federation of Independent Businesses (NFIB) and others; and in Arkansas, *Associated Builders and Contractors of AR v. Perez,* Case 4:16-cv-00169-KGB (E.D. Ark), the plaintiffs also include the National Association of Manufacturers and others.

[42] *Labnet,* No. 0:16-CV-00844 (D. Minn. June 22, 2016) at 13.

[43] *Id.* at 33.

[44] *Id.*

Two district court decisions at a preliminary stage in the proceedings certainly do not invalidate the rule, despite contentions made by some of the business groups challenging it. These two decisions are preliminary, are not decisions on the merits, and may be overturned upon appeal. Further, they are limited to two district courts. It would be inappropriate to draw any conclusions based on these preliminary decisions, where courts have not made any final determinations on the merits.

AMDENDMENTS

An amendment was offered by Mr. Pocan during the May 18, 2016 markup. The amendment would have added a preamble to H.J. Res 87 detailing how the LMRDA requires the disclosure of both direct and indirect persuader activity and how the DOL's rule is necessary to effectuate that statutory direction. The amendment was ruled non-germane by the chair. No vote was taken.

ROLL CALL VOTE ON H.J. RES. 87

H.J. Res. 87 was reported on a straight party line vote of 22 ayes and 13 nays (with 3 democrats not present).

CONCLUSION

A primary goal of the LMRDA is to ensure transparency during union elections and in collective bargaining by requiring employers and consultants who engage in *direct* or *indirect* persuader activities to publicly disclose their agreements. The DOL's persuader rule implements this mandate by closing a massive loophole that excluded disclosure of *indirect* persuader agreements. This rule helps to level the playing field for workers seeking to form a union.

The Association of Flight Attendants, the International Association of Machinists and Aerospace Workers, the United Steel Workers, the AFL-CIO, the American Federation of State, County, and Municipal Employees (AFSCME), and United Auto Workers have all submitted letters to the Committee in support of the DOL's persuader rule. Over 500 attorneys, many of whom are members of the ABA, who practice labor law have also written the Committee in support of the rule.

While productivity has increased substantially over the past 40 years, real wages have lagged behind, and far too many families are finding it hard to get ahead. Our nation is stronger when prosperity is broadly shared. One necessary ingredient of shared prosperity is working people banding together and raising their voices. Strengthening workers' right to organize and form a union can help workers secure the fruits of their productivity. However, by enabling employers to keep their anti-union consulting arrangements secret, workplace democracy is frustrated. H.J. Res. 87 is intended to make it harder for workers to organize unions. It should be rejected.

ROBERT C. "BOBBY" SCOTT
Ranking Member

RUBÉN HINOJOSA

SUSAN A. DAVIS

RAÚL M. GRIJALVA

JOE COURTNEY

MARCIA L. FUDGE

JARED POLIS

GREGORIO KILILI CAMACHO SABLAN

FREDERICA S. WILSON

SUZANNE BONAMICI

MARK POCAN

MARK TAKANO

HAKEEM S. JEFFRIES

KATHERINE M. CLARK

ALMA S. ADAMS

MARK DeSAULNIER