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before the

House Committee on Education and the Workforce

Subcommittee on Health, Employment, Labor, and Pensions

regarding

"The Future of Union Organizing,"

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The NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the U.S. The NSBA represents more than 65,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

About 28 percent of our members have 20 or more employees. Roughly four percent of our members have unions and 8 percent have dealt with a unionization campaign.[2] A very large proportion of our members fall within National Labor Relations Board (NLRB) jurisdictional standards.[3]

This testimony address four issues:

1. The proposed Department of Labor (DOL) persuader or advice rule;
2. The withdrawn NLRB accelerated union elections rule;
3. NLRB Micro-union or micro-unit decisions; and
4. NLRB social media decisions.

Persuader Rule

On June 21, 2011 the DOL proposed a rule[4] that would make substantial changes to the existing interpretation of the "advice" exemption of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[5] contained in section 203(c) of the Act. The underlying section 203(a)(4) rule imposing reporting obligations is often referred to as the "persuader" rule or the persuader reporting obligations.

It is our considered view that the proposed rule:

- is contrary to Congressional intent (for at least five reasons);
- upends a half century of settled law, creates uncertainty and replaces a relatively clear bright line rule with one riddled with ambiguity;
- imposes substantially higher costs than the DOL claims;
- will harm employers' right to secure advice;
- violates attorney-client privilege; and
- lacks an adequate evidentiary basis.

We have therefore urged the Department to withdraw the proposed rule. The rule has remained unpromulgated since it was proposed over two years ago. DOL has indicated to OMB that it presently expects to finalize the rule by November of this year.

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[2] See 2013 NSBA *Workforce and Immigration Study* available at http://nsba.biz/docs/Workforce-Immigration-Survey-2013.pdf .

[3] See NLRB "Jurisdictional Standards," available at http://www.nlrb.gov/rights-we-protect/jurisdictional-standards.

[4] "Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption." Proposed Rule, *Federal Register*, Volume 76, Number 119, June 21, 2011, pages 36177-36230. RIN 1215-AB79 and 1245-AA03.

[5] 29 USC 401 *et seq*.

Background

Section 203 of the LMRDA requires employers to report with respect to five different types of matters. Section 203(a)(4) requires that employers report to DOL for public release the details of agreements or arrangements with consultants that undertake persuader activities. The reports are made on DOL-required forms, Form LM-10 and Form LM-20.

Persuader activities are 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, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer."[6]

Section 203(c) of the LMRDA provides an exception from the forgoing reporting requirement. The exception covers agreements or arrangements for "advice" and for representing "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." Ever since a 1962 Kennedy Administration interpretation by the DOL known as the Donahue memorandum (and subsequent formal guidance), the section 203(c) advice exception has been interpreted such that employers and consultants need not file reports when the consultants have no direct contact with employees and act only through the employer who has the choice whether or not to accept and use the advice.[7] Engaging in persuader activity for one client can, however, trigger reporting with respect to other "advice only" clients that would not otherwise be reportable.[8] This has also been the DOL position in litigation and the DOL position has prevailed in court.[9] In other words, when the consultant's role was advisory, no reporting was required. Only when the consultant's role was to actually engage in persuasion was reporting required.

In contrast, under the interpretation of section 203(c) contained in the proposed rule, virtually any imaginable activity by almost any consultant or vendor that in any manner, directly or indirectly, relates to a labor dispute or attempted organization of an employer would be reportable. At the very least, speechwriting, public relations advice, strategic advice, and the preparation of campaign materials, letters, videos, web sites, emails or other materials for employer communication to employees must be reported. As discussed in more detail below, it is also quite likely that employee benefits consultants and similar human resources type advisors will be required to report.[10] There is no de minimis rule based on time or fees. Thus, even extremely minor activities must be reported.

Under the proposed rule, "[t]he duty to report can be triggered even without direct contact between a lawyer or other consultant and employees, if persuading employees is an object, direct

[6] Section 203(a)(4) of LMRDA; 29 USC 433(a)(4).

[7] See section 265.005 of the LMRDA Interpretative Manual.

[8] *Master Printers Association v. Donovan*, 699 F.2d 370 (7th Cir.1983), cert. denied, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984)

[9] See, e.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F.2d 616 (D.C. Cir. 1989).

[10] One of the boxes to check on the proposed LM-10 and 20 is "developing personnel policies or practices."

or indirect, of the persons activity …"[11] and "a consultant's revision of the employer's material or communications to enhance the persuasive message also triggers the duty to report …"[12] Even holding multi-employer "seminars, webinars and conferences that have as their "direct or indirect object to persuade employers concerning their representation or collective bargaining rights," would trigger a consultants or employers obligation to file the necessary reports.[13]

Under the proposed rule, the statutory section 203(c) exception would become so narrow as to be unrecognizable and, as discussed below, irrelevant. It would become a dead letter. The advice exception is narrowed by redefining "advice" extraordinarily narrowly. "A lawyer or other consultant, who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law or provides guidance on NLRB practice or precedent is providing 'advice.'"[14] Period.

The Proposed Rule is Contrary to Congressional Intent

Notwithstanding the many unsubstantiated assertions in the proposed rule discussion that the proposed rule is designed to better reflect Congressional intent, there are at least five strong reasons to believe that the current rule reflects Congressional intent better than the proposed rule.

First, the 1959 Conference Committee Report explicitly stated that Congress intended the section 203(c) advice exception to be broad. It is, quite literally, difficult to conceive of a more narrowly drafted definition of advice than that contained in the proposed rule. Second, Congress has had five decades to change the code if it was dissatisfied with the Kennedy Administration interpretation. They have not. In fact, no corporate action of any kind has been taken by Congress. Neither chamber of Congress nor any committee of Congress has taken action to change the rule. This half century of Congressional acquiescence to the current interpretation is strong evidence that the Kennedy Administration DOL got it right (and every subsequent Administration for that matter). Third, the courts have found the current DOL rule to be consistent with Congressional intent. Fourth, basic rules of statutory construction would lead us to a different understanding of Congressional intent than that proffered by the authors of the proposed rule. The plain meaning of the word advice, whether used by a layman or an attorney, is much broader than the definition the authors of the proposed rule have chosen. No objective analyst could conclude that Congress meant so narrow an exception when it used the word advice. Fifth, the proposed rule's construction of the section 203(c) exception would make it quite literally a dead letter because under the proposed rule's exception language nothing would be exempt under section 203(c) that is not already exempt under section 204 (relating to attorney-client communications). It is inconsistent with basic rules of statutory construction to read a section of the statute as surplusage (i.e. unnecessary, unneeded or meaningless words) when an alternative construction gives meaning to the provision.

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[11] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 1).
[12] *Ibid.*
[13] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 2).
[14] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 1).

Congress Intended for the Exception to be Broad

Contrary to the assertion made in section IV (C) of the discussion in the proposed rule,[15] the 1959 Conference Committee report language makes the Congressional intent to grant a **broad** exemption patently clear. The proposed rule's discussion of Congressional intent is simply an attempt to obfuscate the issue.[16] The Conference Committee Report language with respect to the advice exception is set forth below.

> Section 203-reports of employers
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> …
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> Subsection (c) of section 203 of the conference substitute grants a **broad** *(emphasis added)* exemption from the requirements of the section with respect to the giving of advice. This subsection is further discussed in connection with section 204.[17]
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> …
>
> Section 204-attorney-client communications exempted
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> The senate bill provides that an attorney need not include in any report required by the act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.
>
> The conference substitute adopts the provisions of the senate bill, but in connection therewith the conferees included, in section 203(c), a provision taken from the senate bill that provides that an employer or other person is not required to file a report covering the services of such person by reason of his giving or agreeing to give advice to such 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 or the negotiation of an agreement or any question arising thereunder.

[15] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36184.

[16] Quite literally none of the discussion in section IV(C) is relevant to the scope of the advice exception. The only part of the legislative history on point is reproduced here and makes it abundantly clear that the exception is to be broad rather than as narrow as it could conceivably be. The proposed regulation's authors seem to think that a discussion of the why the overall Act is necessary somehow trumps the only discussion of the advice exception. Again, elementary rules of construction and common sense dictate a more reasonable construction -- the construction that every DOL since the Kennedy Administration has adopted.

[17] Conf. Rep. 86-1147, Conf. Rep. No. 1147, 86TH Cong., 1st Sess. 1959, 1959 U.S.C.C.A.N. 2318, P.L. 86-257, Labor-Management Reporting and Disclosure Act of 1959.

Congress Has Knowingly Acquiesced to the Kennedy DOL Interpretation for Half a Century

The proposed rule seeks to change a rule in effect for half a century under Democratic and Republican Presidents and unchanged by Congress whether controlled by Democrats, Republicans or jointly. The fact that Congress has neither seen fit to change the underlying statute nor sought to invalidate the rule in any way for half a century is very strong evidence that Congress is satisfied with the current rule. In the last five decades, Congress has not passed legislation in either chamber changing this requirement nor has any committee reported out legislation making such a change. Nor, to our knowledge, has Congress even so much as held a hearing regarding the subject matter of the proposed rule (although the rule has been mentioned a few times by witnesses). This acquiescence by Congress belies the argument made in preamble to the proposed rule that the proposed changes are necessary to reflect the intention of Congress. We believe that Congress is satisfied with the current state of the law for the simple reason that there is no real problem with the law as it currently stands.

This argument is not only in accord with common sense but has long been recognized by the courts. See, e.g., *United States v. Midwest Oil Co*., 236 U.S. 459 (1915). See also, *Kaplan v. Corcoran*, 545 F.2d 1073, (7th Cir. 1976).

The Courts Have Confirmed the Existing DOL Interpretation

Courts have upheld the current DOL interpretation of Congressional intent. For example, in the 1989 case, *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, [18] the Union appellees argued a position virtually identical to the position taken by the authors of the proposed rule. The D.C. Circuit Court disagreed.

The Circuit Court's discussion is directly on point and a good discussion of the current state of law:

> The Secretary reconciles section 203's coverage and exemption prescriptions differently. If the arrangement is one solely for advice to the employer and his supervisor representatives, then it matters not, according to the Secretary, that the advice has as "an object" employee persuasion. The very purpose of section 203's exemption prescription, the Secretary maintains, is to remove from the section's coverage certain activity that otherwise would have been reportable. In the overlap area, the Secretary thus concludes, the exemption direction, not the coverage provision, generally must control.
>
> Given the tension Congress created, and the deference due the Secretary's reconciliation, we cannot call arbitrary her view that if an activity is properly characterized as "advice," reporting generally is not required. We therefore proceed to inquire whether the Secretary has reasonably delineated what constitutes advice within the meaning of section 203(c), 29 U.S.C. Sec. 433(c).

[18] 869 F.2d 616 (D.C. Cir. 1989).

> The statute itself, always the starting point, nowhere attempts a definition of the term. See Memorandum from Charles Donahue, Solicitor of Labor, to John L. Holcombe, Commissioner, Bureau of Labor-Management Reports, at 1 (Feb. 19, 1962).
>
> In a 1962 effort to describe the "advice" exemption, LMRDA Interpretative Manual Entry Sec. 265.005 (Jan. 19, 1962) (Scope of the "Advice" Exemption), the Department contrasted 1) material a consultant delivers directly to employees to persuade them regarding organizational rights, with 2) material the employer drafts, then refers to a consultant for review or revision. The first category falls outside, and the second, inside, the advice exemption. There is no dispute over either of these rankings.
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> The "more difficult" to classify cases, the Department has acknowledged, involve presentations for and to the employer prepared entirely by the consultant, e.g., a fully scripted speech for supervisors to deliver. In such cases, it has been the Department's policy that 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.
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> …
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> Recognizing the Secretary's right to shape her enforcement policy to the realities of limited resources and competing priorities, and comprehending her ruling on advice to involve no *volte face* from longstanding statutory definition and interpretation, we reject the challenge to her ruling.

No court has held that an attorney or consultant that provides only advice and has no contact with employees must file reports.

<u>There is No Reason to Part from the Ordinary Meaning of the Word Advice</u>

There is absolutely no reason to believe that those drafting the Act meant something unusual when they used the word advice in the statute. There is certainly no reason to believe that they meant to exclude most categories of advice when they used the word advice. Had they meant to exclude only lawyers in administrative proceedings or providing the narrowest kind of legal advice, they would have said so.[19] They undoubtedly intended what they said and Congress in enacting the legislation did not assume some oddly narrow definition of the word. That they did not define the word in the statute strongly implies they used the word in its ordinary sense. In accordance with the canons of statutory construction, in the absence of any clear evidence to the contrary and explicit legislative history saying they meant for the advice exception to be broad, the word advice should be construed in accordance with its ordinary meaning. The Supreme

[19] And section 203(c) would be unnecessary in light of section 204 (regarding attorney-client privilege), as discussed below.

Court has held that "statutory words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them."[20] The proposed rule, if finalized, would constitute an abuse of discretion by the DOL because it construes the word advice in an abusively narrow manner. The proposed rule does not further Congressional intent. Instead, it is in direct contravention of clearly expressed Congressional intent.

The Proposed Rule Effectively Reads Section 203(c) Out of the Law

The proposed rule's construction of the section 203(c) exception would make it quite literally a dead letter because under the proposed rule's exception language nothing would be exempt under the new interpretation of section 203(c) that is not already exempt under section 204 (relating to attorney-client communications). It is inconsistent with basic rules of statutory construction to read a section of the statute as surplusage (i.e. unnecessary, unneeded or meaningless words) when an alternative construction gives meaning to the provision.

The Supreme Court has held that "[i]t is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[21]

Section 204 provides:

> Sec. 204. Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

The proposed rule would limit the advice exception by defining advice as follows:

> A lawyer or other consultant, who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law or provides guidance on NLRB practice or precedent is providing "advice."[22]

There is virtually no advice that meets the proposed definition of advice that would not also be protected by section 204. Ergo, the proposed rule quite literally reads section 203(c) out of the law and violates the canons of statutory construction laid down by the Supreme Court.

The Proposed Rule Upends a Half Century of Settled Law, Creates Uncertainty and Replaces a Clear Bright Line Rule with One Riddled with Ambiguity

While it is clear that the authors of the proposed rule want to broaden LMRDA dramatically, it is not clear where they really mean for the line to be drawn. After half of century of practice,

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[20] *Caminetti v. United States*, 242 U.S. 470, 471 (1917).
[21] *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).
[22] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 1).

guidance and court rulings, the scope of the current rule is well known. Replacing the current rule will create uncertainty, require firms to spend time and money evaluating the new rule and consulting with their attorneys and other advisors. And, notwithstanding all of that effort, it will be years before the final contours of the new rule are known.

These costs are generally underappreciated by government regulators in any event. But at this time of economic difficulty, imposing additional costs and creating additional uncertainty is particularly ill-advised.

NSBA is gravely concerned by the implication in the proposed regulation that modifications of personnel policies and practices fall under the persuader activities list. This concern is further bolstered by the fact one of the boxes to check on the proposed LM-10 and 20 is "developing personnel policies or practices." Any prudent business has its employee handbook reviewed for reasons entirely unrelated to union organizing or labor disputes. Yet, under the proposed rule, this could be construed to be persuader activity and apply to the attorneys, insurance agents, HR consultants, pension consultants, accountants or financial advisors who review benefits packages or other personnel practices. Given the civil and criminal penalties associated with the Act, such a broad reporting requirement is totally unwarranted and deeply troubling.

A final point. The proposed rule provides that even multiemployer "seminars, webinars and conferences that have as their "direct or indirect object to persuade employers concerning their representation or collective bargaining rights," would trigger an obligation by "the consultant and the employer … to file the necessary reports."[23] A law firm, consulting firm, trade association, professional association or other entity that puts on a seminar, webinar or conference regarding the advice exception or other labor law issues typically has no idea what those hearing the presentation are going to do with the information. Absent mind reading skills, it will be impossible for them to comply with the rule unless they report all attendees to their events and the fees that they paid. This constitutes a grave violation of privacy and a tremendous administrative burden on providers. It will reduce the number of informational programs and will increase their cost. It will lead to a less informed business and inevitably result in less, not more, compliance with the law.

The Proposed Rule Imposes Substantially Higher Costs than the DOL claims

The DOL analysis of the cost of the proposed rule does a better job than most of providing the logic and basis of its cost analysis. For this, the agency is to be commended. However, the analysis is substantially flawed and potentially under estimates the cost that the proposed rule would impose by an order of magnitude or, probably, more. In short, the estimate is very, very wrong.

First, the reporting obligations imposed by the new rule are extremely broad. Reporting obligations fall on anyone who may indirectly or direct be involved in persuasion. This goes far beyond the 3,414 Form LM-10 filers and the 2,601 Form LM-20 filers that the Department estimates. If the proposed rule is to be taken seriously (and because of the associated criminal penalties for non-filing, it must be), virtually every lawyer, consultant, advisor, publisher, web

[23] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 2).

page consultant and the like who works for a firm with a labor union that may have a labor dispute will end up having to familiarize themselves with these rules and may well have to file.

Thus instead of 6,000 filers, the DOL may see ten times that many or more.

Second, the time estimates (60 minutes for an LM-20 and 120 minutes for an LM-10) are dramatically too low.[24] Perhaps, a labor lawyer already familiar with the rule and the underlying law who also had taken an Evelyn Wood speed reading course and had highly efficient support staff could meet these times if only one consultant is involved. Perhaps. But most business people are going to have to spend time familiarizing themselves with the LMRDA, the rules promulgated thereunder and any DOL issued guidance, then go on to familiarize themselves with the forms, then collect the information necessary and then fill out the form. Moreover, given the breadth of the proposed rule, employers are likely to have many, not just one, consultant that is reportable.

Third, given the complexity and ambiguity of the law and the potential criminal penalties involved, any prudent affected employer is going to seek outside advice regarding compliance from an attorney or consultant expert. This will take time and cost a considerable amount of money. Yet the DOL cost estimates do not take into account the cost of outside advice.

We suggest the following empirical experiment. Give random persons a copy of the law and the regulations and copies of DOL guidance. Then give them a reasonable fact pattern. Then tell them to figure out whether they need to file and, if so, to prepare the forms correctly. Then tell them they will go to prison if they are wrong. We suggest that they will not be able to complete this task in 60 to 120 minutes. And that they probably would want to consult an expert before filing the forms. Of course, a more realistic experiment would entail them having to find the law, the regulations and the guidance on their own. The idea that firms are going to be able to comply with this rule for $87 to $175 is simply ludicrous.[25]

The Proposed Rule will Harm Employers' Right to Secure Advice

By imposing such a burden on employers securing advice, the proposed rule would act as a substantial deterrent to employers securing advice. This effect is likely to be particularly pronounced on small employers that have limited funds, cannot afford expensive advice and do not have in-house counsel. This is undoubtedly part of the unstated agenda of supporters of the rule. An unintended consequence of the proposed rule is that by dramatically increasing the cost and consequences (potential criminal penalties) of securing advice, fewer firms will seek advice and compliance with important aspects of the National Labor Relations Act will decline.

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[24] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at pages 36198-36204.
[25] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36203.

The Proposed Rule Violates Attorney-Client Privilege

The authors of the proposed rule wrongly assert that "In general, the fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged."[26]

The American Bar Association Model Rules of Professional Conduct have been adopted, with modifications, in most states. Rule 1.6 of the Model Rules has routinely been interpreted to prohibit attorneys from disclosing, without client consent, the existence of an attorney-client relationship and the fee arrangement. It also, of course, protects attorney client communication. Merely by providing a client with advice beyond the narrow confines of the exception set forth in the Proposed Rule, the Proposed Form LM-10 not only would require the disclosure of an attorney-client relationship, the size of the fee and the full contents of the engagement agreement, part C of the form would also require that the attorneys' activities be disclosed with specificity. The Proposed Rule would, therefore, force attorneys either to violate the disciplinary rules that govern their practice of law and face disbarment or to violate the regulations implementing the LMRDA and face criminal sanctions under that Act. Thus, the Proposed Rule places attorneys in a manifestly absurd position. This situation will engender great uncertainty and adversely affect the trust between attorney and client. It will harm their ability to provide sound advice and the ability of their employer clients to obtain sound advice.

Moreover, section 204 of the LMRDA makes it clear that the proposed rule is blatantly inconsistent with the underlying statute. Section 204 provides:

> **Attorney-Client Communications Exempted**
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> Sec. 204. Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.[27]

The proposed rule should be withdrawn both because it is inconsistent with the clear Congressional intent to protect attorney-client privilege expressed by section 204 and because it is inconsistent with the attorney disciplinary rules in most if not all U.S. jurisdictions.

The Proposed Rule Lacks an Adequate Evidentiary Basis

It is unclear to the NSBA how dramatically increasing reporting and increasing business compliance costs is going to have a meaningful positive impact on working Americans. Nor does the NSBA membership believe that there is a meaningful problem that this proposed regulation is addressing. Yes, there are consultants that provide advice to employers. Generally, they help firms navigate the thicket of labor laws that a firm must comply with. They also, of

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[26] *Federal Register*, Vol. 76, No. 119, June 21, 2011 at page 36192 (column 1).
[27] 29 USC 434.

course, may assist a firm in achieving a desired result in a labor dispute or prevailing in an NLRB election. We see nothing inherently wrong with that. It is not as if labor unions do not engage consultants.

If consultants or lawyers are engaging in unlawful practices, then the DOL should use the many tools available to it to attack that problem rather than imposing an additional compliance burden on the small business community. But radically increasing reporting is not going to materially improve DOL's ability to police unlawful practices since neither employers nor consultants engaging in such practices are going to report doing so.

Accelerated Union Elections

In June, 2011, the NLRB published a proposed rule that would revise election procedures so that in most cases elections would be conducted 10 to 21 days after the filing of the petition.[28] Currently, most elections are conducted 35 to 40 days after filing of the petition and cannot be conducted before 25 days have elapsed. The rule accomplishes this acceleration by limiting pre and post election hearings and appeals primarily relating to bargaining unit scope, and voter eligibility issues. The rule is sometimes referred to as the "quickie election rule" or the "ambush election rule."

In December, a revised and final rule was published[29] and it took effect in April, 2012. On May 14, 2012, the U.S. District Court for the District of Columbia granted summary judgment to employer groups challenging the rule on the procedural grounds that the NLRB did not have a quorum when it adopted the rule.[30] The court did not address the substantive objections raised in the lawsuit.[31] NLRB then suspended implementation of the new rule.

With the confirmation of five members of the NLRB and the consequent end of the lack of a quorum issue, there is every reason to believe that the Board will revisit the accelerated election rule.

The reasons that the NLRB majority gave in support of the changes were "to remove the most obviously unnecessary steps in the representation-case process" and to "eliminate unnecessary litigation." These are laudable goals that NSBA shares. Litigation costs can be a crushing burden for small employers and there is little doubt that the current process can be streamlined. However, we believe that the proposed rule has two basic infirmities. First, it effectively denies due process to employers and, second, it makes the election process fundamentally unfair.[32]

Our biggest concern is that the rule so accelerates representation elections that few employers and almost no small employers will be able to fairly and fully present their views to employees.

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[28] "Representation—Case Procedures," *Federal Register*, Vol. 76, No. 120, June 22, 2011, p. 36812.
[29] "Representation—Case Procedures," *Federal Register*, Vol. 76, No. 246, December 22, 2011, p. 80138.
[30] *Chamber of Commerce v. NLRB*, May 14, 2012 (DCDC), Civil Action No. 11-2262 (opinion of James E. Boasberg).
[31] The substantive challenges being that the rule violates the First and Fifth Amendments and that the rule exceeds the NLRB's statutory authority.
[32] It is not clear whether the rule sufficiently deprive litigants of due process so as to run afoul of constitutional guarantees.

Therefore, both employers and employees will be ill served because there will not be a complete airing of the issues involved and employees will be forced to vote with incomplete information.

NLRB Chairman Pearce in a Separate Concurring Statement wrote:

> However long the time from petition to election, it is the same for both parties. The Board's analysis does not play favorites between the parties. As the rule explains, if 10 days has always been enough for the union to campaign with the Excelsior list, then even 10 days from the petition would be enough for the employer (who needs no such list of employees) to campaign, too.[33]

This is deeply disingenuous.

The members of this committee know a thing or two about elections. I invite each member of this committee to undertake a thought experiment.

Imagine if your opponent was permitted to organize his or her campaign, raise money, hire consultants, recruit volunteers, communicate with voters and only then were you informed that there was an election coming up and it would be in 10 days. Perhaps I am wrong, but I doubt anyone in this hearing room would regard this as fair in the context of elections for public office. It is, I submit, no more fair in elections determining whether or not a union will collectively bargain for employees

Unions will have spent months organizing and laying the groundwork before filing an election petition. Unions know labor law and have counsel with expertise. Unions are experts at waging unionization campaigns. Most small employees, in contrast, do not know anything about the law relating to representation elections, and do not have attorneys on staff. Under the proposed rules, they will be accorded only 10 days to find counsel, inform them of the facts, develop their message and campaign materials and communicate to employees.

The Supreme Court has on many occasions noted that Congress intended for the election process to be robust, most recently in the 2008 case *Chamber of Commerce v. Brown*.[34] In that decision, the court noted:

> We have characterized this policy judgment which suffuses the NLRA as a whole as favoring uninhibited, robust and wide open debate in labor disputes, stressing that freewheeling use of the written and spoken word … has been expressly fostered by Congress and approved by the NLRB.[35]

A review of the legislative history makes it clear that this analysis is correct.[36]

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[33] *Federal Register*, Vol. 77, No. 83, April 30, 2012, p. 25558.
[34] 554 U.S. 60, 128 S. Ct. 2408 (2008).
[35] *Brown*, quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-273 (1974).
[36] See Joseph P. Mastrosimone, "Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech," 52 Washburn Law Journal 473 (2013), especially pp. 486-493. The amendments to the NLRA (1935, the "Wagner Act," P.L. 74-198) made by the Labor Management Relations Act of 1947 (the Taft–Hartley Act, P.L. 80–101) are the foundation of modern labor law. Taft–Hartley created statutory protections for employer

In the event that the NLRB goes down this path again, we support the *Workforce Democracy and Fairness Act,*[37] particularly the provision which provides that no NLRB election will be held in less than 35 days after filing of the petition.

Micro Unions

In *Specialty Healthcare*[38] the NLRB started the process of dismantling the traditionally understood "community of interest" rule for determining bargaining units. The NLRB allowed the initial bargaining unit to be a single job description, namely certified nursing assistants. In *Specialty Healthcare,* the NLRB enunciated a new standard that in effects allows unions to determine the bargaining unit (i..e. the representation election electorate) and the union determination is presumed correct unless the employer "demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." As discussed below, this presumption that the union determination of bargaining unit is correct appears to be virtually irrebuttable.

Employers expressed concern at the time that the *Specialty Healthcare* decision would result in a proliferation of bargaining units and allow unions to balkanize the workplace, forcing employers to deal with a potentially huge number of unions. In addition, it appeared to allow unions to organize very small parts of a company's workforce, even if the overwhelming majority of employees opposed unionization, by picking occupations or departments where they believed they could achieve a majority. Thus, they would be able to partially organize employers where they would have no chance of prevailing under traditional rules.

Within months, these concerns proved more than justified.

For example, in *Northrop Grumman*[39] the union was permitted to organize a departmental unit of 223 radiological control and other technicians out of 2400 technical employees and 18,500 Northrop employees overall at the shipyard.

The most egregious example I know of is the *Bergdorf Goodman*[40] case. The union sought to represent all full-time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department. The employer asserted that the smallest appropriate unit must be comprised of a store-wide unit, or in the alternative, all

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speech and employer involvement in the elections process. Sen. Taft: "… the bill contains a provision guaranteeing free speech to employers." Rep. Hartley: "One of the main purposes of the Act was to guarantee "employees and employers, and their respective representatives, the full exercise of free speech." See *Southern Colorado Power Co.*, 13 NLRB 699 (1939) for a discussion of pre Taft-Hartley law ("almost any expression of opinion by an employer expressing disapproval of a labor organization is unlawful"); see also "Paul L. Herzog and Howard A. Rikoon, "The Employer and the First Amendment," St. John's Law Review, Vol. 22, No. 1, November 1947.

[37] H.R. 3094, 112 th Congress.

[38] *Specialty Healthcare and Rehabilitation Center of Mobile*, NLRB (December 22, 2010 and August 26, 2011).

[39] *Northrop Grumman Shipbuilding, Inc. and International Association Of Machinists And Aerospace Workers, AFL–CIO*, NLRB (December 30, 2011).

[40] The Neiman Marcus Group, Inc., D/B/A Bergdorf Goodman v. Local 1102 Retail, Wholesale Department Store Union, NLRB (May 4, 2012).

selling associates in the store. The NLRB allowed the union chosen bargaining unit of 46 employees in the 2nd and 5th floor shoe departments to be separately organized.

The *Specialty Healthcare*, *Northrop Grumman* and *Bergdorf Goodman* cases represent a path that is not warranted by the underlying law[41] and is a stark departure from decades of NLRB practice. It certainly is good for labor attorneys given the complexity, litigation and proliferation of bargaining units it will engender. It may prove to be good for unions because they will be able to unionize small groups of employees in workplaces they would not otherwise be able to unionize.

It is undoubtedly bad for employers because of the huge increase in costs it will cause and the substantially complexity and reduced flexibility caused by a proliferation in the number of bargaining units. There is absolutely no reason to believe that increasing the costs to employers and complexity in the workplace will do anything material to help employees.

It is our hope, if not our expectation, that the NLRB will walk back from this line of cases. If not, then we would expect the courts to require the adoption of more reasonable bargaining unit rules more in keeping with the NLRA. If they do not, however, we would urge Congress to step in and adopt legislation providing for clear and reasonable rules governing the size and number of bargaining units at a workplace.

NLRB Social Media Policies

Section 7 of the National Labor Relations Act reads:

> **Employees shall have the right** to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). (emphasis added)[42]

This protection of "concerted activities" applies to all employees working for employers subject to the jurisdiction of the NLRB. This includes a huge swath of the non-unionized workforce. In June, 2012, the NLRB launched a web site directed at providing information regarding protected concerted activity and seeking complainants. See www.nlrb.gov/concerted-activity .

As part of its general initiative regarding protected concerted activities, NLRB General Counsel's office has issued a series of three Operations-Management memoranda regarding how the NLRB believes that employers' rules governing the use of social media might contravene employees' section 7 rights.[43] Operations-Management memoranda are issued to the field

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[41] Namely section 9 of the NLRA.
[42] 29 USC 157.
[43] August 18, 2011 (OM 11-74), January 24, 2012 (OM 12-31), and May 30, 2012 (OM 12-59)

offices from the Division of Operations-Management of the General Counsel's Office to give direction to regional offices in case handling matters.

Before addressing our serious concerns with NLRB policies in this area, I would like to commend the agency in one important respect. In the most recent Operations-Management memorandum (May 30, 2012), the NLRB provided a model Social Media Policy that it finds acceptable. Entirely independent of the merits of the model policy, this is a very constructive step because small business owners, their attorneys and their advocates can read it and know what NLRB finds acceptable. The NLRB approach contrasts favorably, for example, with the EEOC approach on criminal background screening. The EEOC has issued a 55 page, 167 footnote "guidance" document which provides no meaningful guidance as to what is and is not acceptable in their view regarding the use of conviction records.[44]

That said, there are aspects of the current NLRB approach to social media that are very difficult to understand. For example, the NLRB deems unlawful the seemingly common sense instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."[45] NLRB argues that "this provision proscribes a broad spectrum of communications that would include protected criticisms of the employer's labor policies or treatment of employees." It is, to be charitable, doubtful that section 7 protects "offensive, demeaning, abusive or inappropriate remarks." It is, in contrast, quite likely that employers that permit the use of such language would find themselves liable under other theories (sexual harassment, civil rights violations, etc.). I would like to think that federal law is not that the employer is liable whether they prohibit inappropriate speech or permit it.[46]

The core point of the employer's handbook language rejected by the NLRB above is, I believe, accurate. The section 7 analysis should not vary depending on how the speech was made. If it is inappropriate in one medium, then it is inappropriate in another. Conversely, speech that is protected is protected whether it is made in person, on-line, over the telephone or by some other mechanism. It is a mistake for the NLRB to treat speech differently depending on how it is transmitted rather than what it says or to whom it was directed.

The September 28, 2012 NLRB decision in *Knauz BMW* is based on a similar "analysis" and is particularly remarkable. It shows how unmoored from the underlying purpose or language of section 7 the NLRB has become in the social media area. The employer's employee handbook contained the following language which was deemed a violation of the employees' rights:

> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

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[44] The "guidance" does make two things clear: The use of arrest records (as opposed to conviction records) is ill advised and the mere fact that a state or local law requires a business to bar certain felons from certain jobs will not protect the business owner from EEOC enforcement action. Other than that, I would recommend the guidance to law school professors as an example of how **not** to conduct legal writing.

[45] OM 12-59, May 30, 2012.

[46] I hesitate entirely ruling out the possibility. See note 44 above regarding the EEOC.

Thus, the NLRB has now ruled that requiring courtesy is unlawful. According to the NLRB, "Employees would reasonably construe its broad prohibition against disrespectful conduct and language which injures the image or reputation of the Dealership as encompassing Section 7 activity." I find it utterly implausible that the authors of section 7 intended to prevent employers from requiring employees to be courteous to their customers or fellow employers. It is a mystery why, as a matter of policy, we should want to encourage employees to be discourteous to each other or their employers' customers. I would hope that that the courts will find this beyond the scope of *Chevron* deference.

In its September 7, 2012 *Costco Wholesale Corporation* decision, the NLRB held that Costco's social media policy was unlawful. The board found that the policy—which prohibited Costco employees from making statements on social media that could damage the company or damage any person's reputation—could violate employees' free speech rights under section 7 of the NLRA. This decision, while questionable, is at least plausibly related to the purposes of the NLRA in that Costco's policy, which was quite broad ("damage the company" or "damage any person's reputation"), could be read as limiting protected speech.

Conclusion

Both the DOL and the NLRB are taking actions, or are likely to take actions, inconsistent with the laws enacted by Congress. These actions will also impose a tremendous burden on small firms and are fundamentally unfair. They will harm job creation and create needless costs. We have asked the agencies to rethink these actions. If they do not, it is our hope that the courts will correct the agencies' excesses. If they do not, we would urge Congress to do so.