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SUBMITTED TO U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR & PENSIONS

HEARING ON THE PERSUADER RULE: THE ADMINISTRATION'S LATEST ATTACK ON EMPLOYER FREE SPEECH AND WORKER FREE CHOICE

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Introduction

Chairman Roe, Ranking Member Polis and distinguished members of the Subcommittee, my name is Sharon L. Sellers, and I am president of the HR consulting firm SLS Consulting, LLC, headquartered in Santee, South Carolina. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for over twenty years. Currently, I am proudly serving as a SHRM Member Advisory Council (MAC) representative for the Southeast region. On behalf of our 275,000 members in over 160 countries, I thank you for the opportunity to discuss how the U.S. Department of Labor's (DOL) persuader rule will impact employers and employees.

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

SLS Consulting, LLC, a human resources services and training firm, was created in 2004. As a former HR executive, I've directed the HR functions for corporations covering the medical, manufacturing, and government contracting and service industries. Through my consulting firm, I serve clients ranging from local start-ups to global enterprises in all major industries, with half of my clients in smaller organizations. As an HR consultant, I am brought in as a human resource expert with over 30 years of experience to assist managers with employee management issues, leverage effective practices, and assist in the compliance of laws and regulations. While I do not consider myself a "persuader," the definitions included in the new rule could very well apply to my work.

Furthermore, under DOL's current interpretation, consultants will have to report *all* advice activity for *all* clients in any year they trigger the reporting requirements for even one client. This will force consultancies like SLS to reveal advice activity for clients who are not even receiving indirect persuasion services. Many of those clients may object to potentially showing up on a report and refuse to work with a consultant who provides those services. Consultants will be placed in a challenging position to either abandon all indirect persuasion work for all clients or lose valuable clients. The stakes are high for noncompliance with the persuader rule, leading to criminal penalties.

In my testimony today, I will discuss some of the practical challenges the rule presents and negative impacts it will have on HR consultants like myself as well as on employers and employees, especially those working in small business.

Background

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) is the federal statute promoting standards for labor unions made up in whole or in part by private-sector employees. The LMRDA covers union officer elections and union trusteeships and outlines safeguards for union assets. It also governs the reporting and disclosure requirements for labor unions and their officials, employers, and labor consultants. Administered by DOL's Office of Labor-Management Standards, the LMRDA also includes reporting requirements for individuals known as "persuaders."

Currently, reports must be filed by lawyers and consultants who engage in activities intended to directly or indirectly "persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of

their own choosing …"[1] Similarly, employers that utilize the services of such consultants must also submit a Form LM-10 documenting payments under agreements covering these activities.

The LMRDA includes an important "advice exemption" that has been beneficial to many employers who seek assistance from consultants and lawyers to make sure they are in compliance with the National Labor Relations Act (NLRA). Prior to this new rule, under Section 203 of the LMRDA and the advice exemption, employers and consultants reported to the DOL the scope and cost of arrangements when the consultants were hired to persuade employees about unionization, but not when consultants merely provided advice to the employer and did not directly persuade employees. Under the new rule, communications between a consultant and employers, managers or supervisors must be reported.

New Persuader Rule

DOL released its final rule reinterpreting the advice exemption in the *Federal Register* on March 24, 2016. Originally proposed in June 2011, DOL's final rule includes important changes based on stakeholder comments, including those from SHRM. Unfortunately, despite these changes, the final rule still dramatically alters the interpretation of advice and contains ambiguous language. The final rule defines persuader activity that must be reported as direct persuasion and four types of indirect persuasion, including:

- Planning, directing or coordinating supervisors or managers (interviewing managers, coaching communicators, drafting a campaign calendar, planning meetings, etc.);
- Providing persuader materials (anything other than off-the-shelf communications drafted or developed for communication to employees, including written, online, video, etc.);
- Providing a seminar for supervisors or other employer representatives (most supervisory training related to how to communicate with employees during a campaign); and
- Developing or implementing personnel policies or actions (policies intended to change how someone feels about a union, or targeting individual employees to change how they feel about a union).

SHRM believes in the fundamental right, guaranteed by the NLRA, of every employee to make a private choice about whether or not to join a union. The final DOL rule, however, will create many challenges for consultants, attorneys and employers, especially smaller employers that are particularly dependent on consultants and attorneys for navigating complexities of union organizing activities and that lack in-house HR and compliance expertise. On a personal note, I am very concerned about the impact of this rule on the clients I serve.

Impact on HR Consulting

Thousands of HR consultants who are not directly working with employees but instead providing critical supervisory training to employers nationwide could be inadvertently impacted by this final rule's broadened definition of "indirect persuasion" activities. SHRM is concerned by the unintended consequences created by this rule, namely that stringent reporting requirements will deter many employers from seeking out labor compliance information and will have a specific negative impact on small employers and their employees that do not have in-house counsel or an HR department to advise them. While persuaders are the key audience the Administration intended

[1] LMRDA, 29 USC 433

to target, consultancies like SLS will feel obligated to report their more general HR consulting to DOL.

At SLS, supervisory training is conducted with primarily small companies. The type of training my consultancy provides includes establishing policies and handbooks and developing procedures for recruiting, employee development and employee management. SLS provides extensive training focused on anti-harassment laws, the Family and Medical Leave Act, Americans with Disabilities Act compliance, communication techniques, participative management, performance management, and the prevention of domestic violence in the workplace. Fifty percent of my clients are small businesses with 100 or less employees; thirty-four percent have 50 or fewer employees.

As a part of my supervisory training, a segment on union organizing is included to help educate supervisors on the signs of organizing activity. As envisioned by the NLRA, it is critical for supervisors in today's workplace to recognize signs of union organizing and avoid any behaviors that could be considered unfair labor practices.

For example, during supervisor trainings, employers are taught what I call the "TIPS," which define what supervisors can and cannot communicate to their employees under the NLRA. The TIPS are as follows: employers cannot **threaten** employees with adverse action if they support a union; employers cannot **interrogate** employees about their union activities; employers cannot **promise** certain benefits to employees if they vote against the union; and finally, employers cannot **spy** on employee union activities.

In addition, information is provided regarding unfair labor practices and the general do's and don'ts during a union campaign. Clients are taught to be watchful for signs of union activity occurring within their organizations. Often, small businesses are not knowledgeable about the nuances of labor rules. For example, many don't realize that if, during a union "card check "campaign, an employee provides the cards to an unassuming manager and the manager inadvertently states that the signatures are legitimate, the manager could be recognizing the union.

Furthermore, according to the Labor Relations Institute[2], unions appear to be looking to organize smaller employers at a much higher rate than larger companies. In fact, companies employing fewer than 25 employees were 15 percent more likely to receive a union election petition in 2015 than 2014. During the same timeframe, employers with more than 25 employees saw no difference in the number of petitions filed. Now more than ever, small employers need the consultant and legal services provided by highly trained professionals to navigate the increasingly complex labor relations space.

Similarly, it's important to educate employers about "Union Salts" in the workplace. This is a legal tactic where a union could hire a person to apply for a job with a company, and, if hired, he or she would try to promote union organization from the inside. The person would be receiving pay from the company and also be on the payroll for the union. Salting is legal, and if a company finds out that a person is a salt, it is illegal to fire or discipline him or her for being a salt. Supervisors and managers need to be prepared for this potential dynamic in their workplace.

In addition, because an employer may not know whether a union organizing campaign is currently occurring within the organization before I conduct my training, I could be required to comply with

[2] http://lrionline.com/labor-relations-ink-january-2016/

the reporting requirements when I had no knowledge that the employer site was in the beginning stages of union organizing activity.

In the end, the reality is that many consultants, like myself, will protect themselves by broadly interpreting the rule's coverage and subjecting their own small business to significant reporting obligations. I, for example, will either have to report my services or choose not to serve my clients. In addition, some employers will likely avoid the reporting obligation by deciding to not train on labor relations, which will result in a significant disservice to the managers within the organization. Even making a clear decision not to include labor relations on a training agenda may not be enough to exempt us from reporting, as the open forum of most training sessions result in an attendee raising the subject on his or her own.

Practical Consequences for Employers and Employees

SHRM believes that employers should not encounter obstacles when reaching out to consultants and law firms on how to comply with the law when communicating with employees about unionization. Many have expressed concern that the information about funds spent on consultants will be used by unions to imply that employers are merely engaged in union avoidance rather than trying to communicate with employees about the direction of the workplace.

Key areas of concern with the final persuader rule include the impact on free speech; the chilling effect on employers seeking guidance, including legal advice; and the impact on employees and professional associations. I will now explore these topics in further detail:

Free Speech

The final rule will likely inhibit employer free speech in a number of ways. It will cause employers to think twice about seeking expert advice about their legal rights because they will have to disclose their strategy in detail. It will also cause consultants to leave the marketplace rather than report everything they do to DOL.

Companies confronted with labor relations situations often are uncertain as to how to respond. It is natural for the employer to turn to an expert for advice, including seeking help with how to lawfully communicate with employees. The final rule risks taking what has been previously considered consultant advice and redefining it as reportable "persuader activity." This conflation of advice into persuader activity will inhibit an employer's free speech as it causes the employer to wonder whether the use of an expert will be misrepresented by a union to imply or state that employers are adverse to the interests of their employees.

Chilling Effect on Employers Seeking Assistance

SHRM believes most employers seek advice when faced with an unfamiliar situation, not out of ideological reasons but because they want to ensure compliance with the law. Oftentimes companies do not know how to communicate about a particular problem and seek expert guidance. Seeking advice is not something that is limited to labor relations issues; companies seek advice on a myriad of matters, any one of which includes some type of communication. The overbroad rule will inhibit this process as it will lay bare all strategic decisions regardless of appropriateness and lawfulness.

Many HR consultants who are acting totally appropriately will not want to report their dealings and will cease to provide training on responding to union organizing campaigns. A strict read of the persuader rule indicates that conducting seminars for supervisors could trigger the newly expanded reporting requirements. For example, at SLS, I would definitely consider limiting the information about how to watch for signs of unionization in my supervisory training. This would be unfortunate because it is critical for new supervisors to fully understand how to lawfully react to a union campaign and to better understand labor relations in general.

The level of labor law complexity has dramatically grown over the past year or two with the implementation of the National Labor Relations Board's revised election rules, or "ambush elections," and changes to the joint employer standard and the definition of a bargaining unit with new "micro units." The final persuader rule is yet another challenging regulation which increases the possibility of employer's running afoul of collective bargaining rights and obligations. This is why the persuader rule is so damaging and can have a chilling effect on communication.

Impact on Legal Advice Provided to Employers

Another consequence of the final rule is that it could result in a decrease in the number of lawyers who provide legal advice to employers regarding obligations under the NLRA with respect to organizing and bargaining. Lawyers are held to a higher ethical standard than most, and are sworn to represent their clients according to the ethics of their profession. The rule would now mandate that lawyers violate that oath by reporting in detail not only the existence of their clients, but also the advice they give. The destruction of this privilege as envisioned by the rule will upend the lawyer-client relationship.

Impact on Employees

It is critical to not overlook how the final persuader rule will impact employees. SHRM believes that all employees and organizations benefit when supervisors are highly trained in effective employee management techniques. Supervisory training is critical in developing leaders to navigate ever-changing federal and state employment laws, which are growing in complexity by the day. Employers should be encouraged to provide training, yet the rule is likely to discourage small employers who are concerned about the potential onerous reporting requirements.

According to DOL, this rule will result in a total annual recurring burden of $1,263,499.50. SHRM believes that DOL has significantly underestimated the cost burden to employers, consultants, and small businesses, in particular. We believe there are hundreds of thousands of organizations that will be impacted by this rule or at least potentially because even if an employer doesn't have to report, employers and consultants will still have to determine whether they need to report. An estimate published by the Manhattan Institute predicted the total cost on the U.S. economy for the first year for the proposed rule to range between $7.5 billion and $10.6 billion[3].

DOL even agreed that it should consider the impact of the rule on certain entities that may be affected by the rule, even though they may not be required to file reports. DOL estimates

[3] http://www.manhattan-institute.org/html/high-costs-proposed-new-labor-law-regulations-5715.html

this activity to require a total of 60 minutes for consultants to read and apply the new requirements. But, I believe it will take many more hours for employers and their advisors to determine whether each particular piece of advice does or does not meet DOL's vague and overbroad test for persuader activity.

As a result, under increased reporting requirements, small employers—including myself—will be tempted to remove the labor union segments of training that could trigger the reporting. This would result in many supervisors being woefully unprepared for the appropriate way to address a union organization, resulting in increased complaints of unfair labor practices. This will be harmful to both employers and employees.

For smaller employers, the impact on employees will be even greater. Training and development for managers is critical to the organization, and oftentimes leaders are promoted within the organization from entry-level positions with little employment law experience.

Impact on Professional Associations and Organizations

Another significant concern SHRM raised about the proposed rule is that it was written so broadly that even professional and trade associations would need to report educational sessions on unionization (including employers attending those sessions). The final rule addressed some of these concerns.

Under the final rule, "presenters at union avoidance seminars must file persuader reports, but employers attending those seminars need not file such reports. Professional or trade associations do not have to file reports for hosting union avoidance seminars unless their employees are also serving as presenters. A professional or trade association is not required to report if it selects off-the-shelf materials for distribution to one or more employers, but it must report if its employees undertake direct or indirect persuader activities on behalf of employers."

Also, in response to comments, the final rule removes from the reporting requirements employee surveys and union vulnerability assessments. While SHRM appreciates some additional clarity, certain educational programs that SHRM offers to its members will be reportable under the rule. For example, SHRM's special expertise panels, including the SHRM Labor Relations Panel, often conduct webinars and presentations on the basics of the NLRA to educate the human resource profession about their rights and responsibilities under the law. Sometimes these sessions will also discuss how to prepare for potential union organizing activity.

Given all of these practical consequences of the rule for employers and employees, SHRM is pleased that a resolution has been introduced to address the persuader rule. SHRM thanks the leadership of the House Committee on Education and the Workforce, including Rep. Bradley Byrne (R-AL), for introducing a resolution (H.J. Res. 87) under the Congressional Review Act that would stop the rule, which is currently scheduled to go into effect this week. SHRM supports this resolution and appreciates the Committee's attention to an important workplace issue impacting both employers and employees.

Conclusion

Despite changes made to the final persuader regulation, SHRM believes the rule will likely inhibit employer free speech and may actually exacerbate poor employer practices as employers, especially small employers, could unintentionally commit violations of the law as consultants leave the field rather than report under these requirements.

As a consultant for small businesses, I remain concerned that the clients I serve may avoid seeking my training if the services are now reportable under the rule. I believe training strong supervisors helps the entire organization succeed. The rule can only lead to further confusion, and perhaps even more violations of the law, which runs counter to the objectives of the NLRA and the objectives of my consulting business to train strong supervisors for successful organizations.

Thank you again for inviting me to share my testimony today. I welcome your questions.