AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210
Submitted online at http://www.regulations.gov

RE: Labor-Management Reporting and Disclosure Act, Interpretation of the "Advice" Exemption; RIN 1215-AB79; RIN 1245-AA03

Dear Mr. Davis:

On behalf of the Associated General Contractors of America ("AGC") and the AGC Labor and Employment Law Council ("LELC"), I thank you for the opportunity to submit comments on the proposed rule issued by the U.S. Department of Labor ("the Department") Office of Labor-Management Standards, as published in the Federal Register on June 21, 2011, that proposes revisions to the Form LM-10 Employer Report and to the Form LM-20 Agreements and Activities Report. AGC maintains that the proposed rule is unwarranted primarily because it would have the unintended effect of denying to employers access to important advice on how to conduct themselves lawfully in dealing with employees.

AGC is the leading association in the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC is now the nation's largest and most diverse trade association in the commercial construction industry, representing more than 33,000 firms in nearly 100 chapters throughout the United States. AGC members include approximately 7,500 of general contractors, 12,500 specialty contractors, and 13,000 suppliers and service providers working in the building, highway, heavy, industrial, municipal utility, and virtually all other sectors of the construction industry. The LELC is a network of attorneys who regularly assist and represent AGC chapters and members on labor and employment matters. AGC and the LELC proudly represent both union and open shop companies.

AGC is a member of the Coalition for a Democratic Workplace ("CDW") and fully supports the comments submitted to the Department by CDW. We submit these separate comments to supplement CDW's submission in order to emphasize certain points and to point out particular implications for our association and for the construction industry.

The Proposed Rule Appears to Inappropriately Include Association-Provided Advice and Education as Persuader Activity Outside the "Advice" Exemption

AGC has 95 chapters. There is an AGC chapter in all 50 states and in the District of Columbia and Puerto Rico. Each AGC chapter has its own chapter manager and staff whose job is to supply local members with a wide array of construction services. Those services include educating contractor-members on the do's and don'ts of labor relations in connection with collective bargaining and labor disputes. Over a third of AGC chapters negotiate or administer collective-bargaining agreements. Clearly, employers, employees, and the legal system all benefit from the unfettered availability of information regarding the rights, obligations, and restrictions under the National Labor Relations Act ("NLRA").

AGC and AGC chapter staff do not engage in direct communications with employees of their contractor members. However, AGC chapter staff might engage in activities that could trigger the obligation to report by both the chapter and the contractor member under the proposed rule. The following is a general description of the types of activities in which association staff might engage: providing oral or written guidance to a contractor member in the preparation of lawful personnel policies and guidelines; holding in-seat seminars, webinars, and videos for training owners, managers and supervisors of member firms on what is permissible conduct during a labor dispute or organizing drive, or with regard to other employment practices; providing members with information on labor organizations that represent employees in the chapter's geographic area; publishing newsletter articles and white papers on labor and employment legal developments and providing related guidance on what is permissible conduct.

The sole purpose of any of these activities is to provide information to contractor members – employers – regarding their legal rights and obligations. Neither AGC national nor chapter staff engage in conduct that is designed to persuade employees.

Under the Department's current interpretation, what is and what is not persuader activity is clearly defined. The proposed regulations substitute a clear definition for one which is amorphous and inherently backward looking. The reporting obligation is triggered if "an object" (meaning not the only object) of the communication is to persuade. The proposed rule also states that one persuader activity will trigger the duty to report all activities but covered by the agreement or the arrangement between the employer and its consultant or attorney. While pure advice is excluded from the reporting requirement, the proposed rule provides that advice can trigger a reporting obligation when, after the fact, the communication is construed as having enhanced a persuasive message to employees. The proposed regulations will open the litigation floodgates over whether advice or information was prepared in a way to enhance its effectiveness.

For example, does a chapter manager's counseling of employers on a one-to-one basis or in a group presentation on how to draft a lawful no-solicitation/no-distribution rule triggered the reporting requirement? The proposed regulations provide that developing employer personnel policies and practices designed to persuade employees triggers the reporting obligation. It can be argued that the inclusion of a lawful no-solicitation/no-distribution rule has at least as one of its objects the influencing of employees on the exercise of their rights under the NLRA.

Another example is whether a reporting obligation is triggered when a chapter manger advises an employer regarding how to communicate with employees concerning the employer's right to hire temporary or permanent replacements during a labor dispute. While ordinarily providing such information would not trigger a reporting obligation, the proposed rule fosters litigation over whether the manner in which such advice is communicated to employees was to enhance its persuasive message so as to deter employees from engaging in a strike or other protected activity.

We believe it is unfair and inappropriate for trade associations, such as AGC and AGC chapters, to be so burdened in their receipt of advice or in their providing of advice from consultants and attorneys to its members. If the proposed rule becomes final, AGC national and chapter staff are likely to cease dispensing guidance on these and other potentially reportable issues; they will simply refrain from putting themselves in a position where their advice could be construed after the fact as persuader activity under the vague and amorphous rule. We are confident that the advice and planning assistance that such associations provide are beneficial for labor relations in the industry, and we think that the effect of the proposed rule would be to simply create more bad decisions as construction employers rely only on "self-help" in the decision-making process in these areas.

The Proposed Rule Would Have a Particularly Damaging Impact on the Construction Industry

The construction industry is the only industry (other than healthcare) covered by numerous specialized legal provisions and case law determinations under the NLRA. These include the authorization of "pre-hire collective bargaining agreements" under Section 8(f) of the Act (illegal for all other employers) and a very complex set of secondary boycott, picketing and "bannering" provisions and case law determinations. All of these relate largely to the construction industry, because of the fact that construction work sites usually include numerous employers at the same location. In addition, the temporary nature of construction work and the multiplicity of temporary work sites in numerous geographical areas for the same company generate specific issues concerning the terms of employment (often at-will, even for union signatories) and the nature of construction bargaining units. Special provisions of the law also govern the issue, most significantly in the construction industry, of competing union jurisdictions for the same groups of employees or types of work. Further, construction unions represent a larger fraction of the construction work force, even in generally non-union areas, than unions do in many other industries.

These unique features of construction labor relations make the Department's proposed changes to the advice exemption even less appropriate than they are for employers in other industries. Numerous real and difficult legal and practical issues for construction employers are created because of the complexity of the law governing, e.g.: (1) when a "pre-hire agreement" is lawful; (2) when and in what way picketing or bannering is lawful under state and/or federal law; (3) when injunctive relief and/or damages are appropriate for improper picketing under state and/or federal law; (4) which union properly has a jurisdiction over which types of trade work in what geographical areas; and (5) which groups of employees at which work sites in which states constitute an appropriate unit for collective bargaining purposes. The burden that the proposed rules places on construction employers is untenable, particularly since these rules are paralleled by the National Labor Relations Board's ("Board" or "NLRB") proposed rules which will shorten the election period and abbreviate the process for determining bargaining units and voter eligibility.

Employers, particularly in the construction industry, need all the good advice they can get, not artificial restrictions on that advice. Existing law covers bad decisions by employers (creating unfair labor practice liability) and also covers bad advice by attorneys and consultants (creating malpractice and contract breach liability). There is no reason to seek to multiply bad decisions and bad advice by further burdening and discouraging advice to employers in these complex areas. The burden placed on construction industry employers is particularly unnecessary, given that union representation in our industry is among the highest among American industries, which leaves us at a loss to understand what problem we are fixing with these rule changes.

The Proposed Rule Presents Additional Legal and Practical Problems

In addition to the construction industry-specific arguments against the Department's proposed interpretation, AGC wishes to individually comment on some of the most damaging and ill-advised implications that apply to all industries.

1. The Proposed Rule is Amorphous, Undefined and Overbroad

For nearly 50 years, the "advice exemption" of the LMRDA has been a bright-line, easy to understand – and follow – rule. If you had direct contact with employees for the purpose of persuasion, it was reportable. If you merely advised a course of conduct that an employer was free to accept or reject, no report was required as it was covered under the advice exemption. The proposed interpretation eviscerates this exemption in favor of an amorphous, undefined, and overbroad standard.

The definition of a "rule" is: "a prescribed guide for conduct or action." *See Merriam Webster On-Line Dictionary*, http://www.merriam-webster.com/dictionary/rule. The historical reporting rule of *direct employee contact* meets this definition. It is a clear guide for conduct or action. Under the proposed interpretation, however, the advice exemption is limited to "an oral or written recommendation regarding a decision or course of conduct," and reportable conduct includes any communications or actions that "have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively." *See* Proposed Rule, 76 Fed. Reg. 36178, 36182. This interpretation is amorphous, undefined and ineffective. It is no guide at all. Thus, it is no rule.

The problem with the Department's interpretation lies not only in the lack of definition, but in the breadth of application. The interpretation – perhaps purposefully – ignores the fact that the modern workplace draws little or no distinction between "union avoidance" and "positive employee relations." Most non-union employers see dual benefits to well-selected and trained managers and supervisors, generous benefit packages, open door policies, informal complaint procedures, and safe workplaces – (1) satisfied, productive employees and (2) no need for or interest in union representation. So, when a lawyer or consultant assists employers outside of any organizing context in training managers on how to better communicate with employees, or assists with drafting policies and procedures, or audits the workplace for safety compliance, is it for the purpose of "directly or indirectly to persuade employees concerning their rights to organize or bargain collectively?" Some would argue in the affirmative, some the negative. Unfortunately, the Department's interpretation leaves much to guess.

Not left to guess, however, is the Department's stated intention to generally cover drafting and revision of written materials for communication to employees, presentations and training (for employees and managers), website content, developing personnel policies or practices, seminars and "other" reportable activities. The Department's interpretation is simply so overbroad as to arguably cover the majority of advice and counsel that lawyers or consultants would provide even in the absence of any active organizing campaign. The fact that a lawyer who drafts an open door policy for a client's employee handbook would somehow be required to report the relationship, activity, income and all other required information is surely not a result intended by Congress.

Moreover, the proposed interpretation swallows even the barest concept of an exemption. For example, in drawing a distinction between the *review* of persuasive material prepared by an employer and the *drafting* of persuasive material for consideration by the employer, the Department concludes that *because* the latter is "quintessential persuader activity" the conduct should be reportable. *See* 76 Fed. Reg. at 36183. However, because the Department cannot logically separate the two activities (Where does *review* end and *drafting* begin?), it ultimately concludes that *both* situations constitute reportable activity. By the same reasoning, the Department finds itself slipping and sliding down the proverbial slope, accumulating activity after activity...when it should have logically recognized what its predecessors 50 years ago decided – a line has to be drawn between material that an employer is free to accept or reject and pleas made directly to employees.

The Department's interpretation also ignores the entire concept that the advice exemption is just that – an *exemption* from what would otherwise be reportable conduct. In enacting the LMRDA, Congress determined that "advice" given to employers, which the employer then utilizes – even advice with persuasive content – should not be reportable. Otherwise, what would be the point of having an exemption? That is, stated differently, an advice *exemption* would not be required unless the advice would otherwise be *reportable*. The Department's logic fails at its inception with the false premise that because the purpose is persuasion, the conduct must be reportable.

Finally, it is important to note that the seriousness of the proposed rule's ambiguity and overbreadth is compounded by the fact that the LMRDA provides that "individuals are subject to criminal penalties for willful failure to report" covered activities. *See Instructions for Form LM-20,* at section VII (Responsibilities and Penalties). No person should be subject to criminal penalties when the underlying conduct cannot be strictly and easily determined, yet the proposed rules are far from clear in their application. Moreover, there is some question as to whether a reverse onus could be created by a lawyer's or consultant's mere association with an employer and/or campaign. Some counsel have in the past received – unsolicited – reporting forms from government agencies. Would the new rules increase the likelihood of counsel being required to prove that there has been no reportable persuader activity? Would such an inquiry require divulgence of privileged information even in the absence of reportable conduct (see below)? The breadth of the proposed rule begs these and other questions regarding its basic legitimacy.

2. <u>The Proposed Rule Violates the Attorney-Client Privilege</u>

One of the more troubling aspects of the proposed reporting requirements is the violation of the attorney-client privilege. Such a result is clearly prohibited by the LMRDA.

Section 204 of the LMRDA (29 USC § 434) states:

> 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*.

If reporting is triggered under the Department's proposed interpretation – conceivably by something as simple as reviewing an open-door policy in a handbook or advising a client on some disciplinary action – lawyers and their clients would be required to reveal, for public dissemination, information that has long been considered privileged. This would include information concerning the existence of the relationship, the terms and conditions of the engagement (including written agreements between the lawyer/client), the nature of the advice and counsel sought and provided, payments made (dates, amounts, nature and circumstances), receipts from all clients, disbursements made by the firm "in connection with labor relations advice or services rendered," and other information pertaining not only to this but other clients. The Department must know that such a requirement is in direct violation of lawyers' ethical duties under the rules of professional conduct (s*ee, e.g.*, ABA Model Rule 1.6), which state that a lawyer must not reveal information relating to the representation of a client without the client's consent. Although the rules of conduct allow for disclosure required by "law or a court order," Section 204's strong language supports the contention that the LMRDA never intended the sweeping interpretation now sought by the Department.

In addition, the proposed interpretation would inhibit an employer's right to effective assistance of counsel. The proposed rule is so overbroad – both in application and reporting – that counsel may be reluctant to provide advice. In addition, the proposed rule is so amorphous that it could delay necessary advice while the parties attempt to determine whether their engagement would be reportable. Take for example the following scenario: A lawyer and client are having a conversation regarding a union's allegation (made to employees) that the employer acted unlawfully when it implemented an annual, scheduled wage increase. Obviously, the lawyer can comment on whether the increase is or is not lawful under existing legal authority. However, what if the client then asks the lawyer whether the client should have his manager explain to the employees at the start of the next shift why the increase was lawful legal (like the lawyer just told him). Is the advice still exempt? Can the lawyer even comment on or agree to the client's suggestion that he share that information with employees without triggering the reporting obligation? The lawyer's only safe recourse may be to withhold any further advice until reporting requirements are explored, explained and agreed upon. At a minimum, the employer's right to provide information and express opinions is temporarily restrained. More importantly, however, management's inability to expeditiously respond to the false allegations could have negative consequences in the overall campaign.

3. <u>Many of the Department's Logical Premises are Faulty</u>

In addition to problems with the effects of the proposed rule, many of its premises and justifications are faulty. The following provides a non-exclusive list of those false premises.

First, the premise that disclosure of the source of persuasive information will somehow benefit decision making is incorrect. The Department states that the reporting of persuader activity "enables workers to become more informed as they determine whether to exercise, and the manner of exercising, their protected rights to organize and bargain collectively." *See* 76 Fed. Reg. at 36187. This justification makes no sense given the timing of reporting. Under the reporting requirements, Forms LM-10 (employer) must be filed within 90 days after the close of the employer's fiscal year, Form LM-21 within 90 days after end of the persuader's fiscal year, and Form LM-20 within 30 days after entering into the arrangement or agreement to engage in persuader activities. Under current Board authority, the median time to election from the filing of a petition is only 38 days. *See NLRB Office of General Counsel Summary of Operations (Fiscal Year 2010)* (Jan. 10, 2011), available at http://www.nlrb.gov/summary-operations. In fact, more than 90% of elections occur within 56 days. *See id*. Thus, even the Form LM-20's expedited information would not likely be available publicly until after an election is held, and the bulk of the information would not be available until much later – long after a decision regarding representation has been made. This justification is baseless.

Likewise, the premise that the report is necessary to counter an argument that "the union is a third party," because it would "reveal a counter-campaign orchestrated in whole or in part by a third-party consultant" (*see* 76 Fed. Reg. at 36187) is false for at least two reasons. First, the only "parties" to any collective bargaining relationship – by contract or by the NLRA – are the employer, the employees and the union. Consultants and counsel are not and never will be "parties" to this arrangement. Second, unless the consultant or lawyer is engaged in direct employee contact – which would be both reportable and patently obvious to employees – the employer must stand as the only management party responsible for its words, deeds and actions during a campaign or otherwise. If the employer says or does something – be it utterly brilliant or entirely stupid, absolutely persuasive or wholly unconvincing, simply lawful or unlawful – the employer alone is responsible for its statements and conduct. The proposed reporting requirements cannot and do not change that dynamic whatsoever.

Similarly flawed is the premise that there is some correlation between "the proliferation of employers' use of labor relations consultants" and "the substantial utilization of anti-union tactics that are unlawful under the NLRA." *See* 76 Fed. Reg. at 36190. First, the idea that lawyers (or consultants) would regularly and purposefully advise clients to act illegally is offensive to those professionals. Second, the premise is not supported by *any* empirical data.[1] Third, the fact that employers are turning to legal counsel and consultants more frequently does not indicate a desire to act unlawfully, but rather the opposite. Employers engage counsel and consultants so that they can maximize their legal right to educate and inform employees. Finally, if the Department's concern is

[1] For example, neither the Bronfenbrenner nor Logan studies cited by the Department are empirical works. Bronfenbrenner's study is based on interviews and surveys of union organizers. *See* Kate Bronfenbrenner, Economic Policy Institute, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 5 (2009) Logan's *Union Free* publication is described at the outset at a "qualitative analysis," and is based largely on secondary sources. *See* John Logan, *Consultants, Lawyers, and the 'Union Free' Movement*, 33 Industrial Relations Journal 197 (2002). Likewise, his *Union Avoidance Industry* states that its primary sources are records of the AFL-CIO, as well as secondary sources and interviews with union officials and union avoidance practitioners. *See* John Logan, *The Union Avoidance Industry in the United States*, 44 British Journal of Industrial Relations 651, 670 (2006). Neither author provides independent data to justify the position taken or comments made by the Department.

with unlawful practices, it is looking in the wrong place. Unlawful labor practices are not prohibited by the reporting requirements of the LMRDA but under the remedial provisions of the NLRA – the province of the NLRB, not the Department of Labor.

Moreover, if the Department's misplaced concern is with *reducing* unfair labor practices, the proposed interpretation could have the opposite consequence. As indicated above, we submit that the chilling effect of the proposed interpretations will result in less informed employers and employees and more unfair labor practices. The proposed rules will greatly reduce any incentive for employers to engage experienced counsel on labor relations issues because of the burdensome and invasive reporting requirements – leaving them to their own devices for determining the best and legal course of conduct. As a result, they will be less informed about the consequences of union representation – good, bad or other – meaning that their employees will also be less informed. For these reasons, the Department should promote rules that *encourage*, not discourage, the confidential and routine assistance of counsel.

Conclusion

For all of the foregoing reasons as well as those set forth in comments submitted by the CDW, AGC urges the Department to withdraw its proposed rule governing representation-case proceedings. We thank the Department for considering our views and are available to provide additional information on the issues presented should the Department desire any.

Sincerely,

Denise S. Gold
Associate General Counsel, Associated General Contractors of America
Staff Associate, AGC Labor and Employment Law Council

Ryan McCabe Poor
Chairman, AGC Labor and Employment Law Council