114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–739

PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES CODE, OF THE FINAL RULE OF THE DEPARTMENT OF LABOR RELATING TO "INTERPRETATION OF THE 'ADVICE' EXEMPTION IN SECTION 203(c) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT"

SEPTEMBER 12, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.J. Res. 87]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the joint resolution (H.J. Res. 87) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

PURPOSE

House Joint Resolution 87, as ordered reported by the Committee on Education and the Workforce (Committee) on May 18, 2016, expresses congressional disapproval of the U.S. Department of Labor (DOL or Department) rule relating to interpretation of the "advice"

exemption [1] in section 203(c) of the *Labor-Management Reporting and Disclosure Act* (LMRDA).[2]

COMMITTEE ACTION

112TH CONGRESS

Full Committee Hearing on Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice

On July 7, 2011, the Committee held a hearing entitled "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice." Witnesses before the Committee were Mr. Peter C. Schaumber, Former Chairman of the National Labor Relations Board (NLRB), Washington, D.C.; Mr. Larry Getts, Tube Press Technician, Dana Corporation, Garrett, Indiana; Mr. Kenneth Dau-Schmidt, Professor, Indiana University, Maurer School of Law, Bloomington, Indiana; Mr. John Carew, President, Carew Concrete & Supply Company, Appleton, Wisconsin; and Mr. Michael J. Lotito, Attorney, Jackson Lewis LLP, San Francisco, California. The hearing primarily examined the NLRB "ambush election" rule, but Mr. Schaumber and Mr. Lotito also testified that the proposed DOL "persuader rule" would have a negative impact on employers and employees.[3]

113TH CONGRESS

Health, Employment, Labor, and Pensions Subcommittee Hearing Examining the Future of Union Organizing

On September 19, 2013, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing entitled "The Future of Union Organizing." Witnesses were Mr. Ronald Meisburg, Partner, Proskauer Rose LLP, Washington, DC; Mr. David R. Burton, General Counsel, National Small Business Association, Washington, DC; Mr. Clarence Adams, Field Technician, Cablevision, Brooklyn, New York; and Mr. Stefan J. Marculewicz, Shareholder, Littler Mendelson, Washington, DC. At the hearing, Rep. Brett Guthrie (R–KY) expressed concern that the DOL's proposed rule would discourage small business owners from seeking much needed advice during a unionizing campaign.[4]

114TH CONGRESS

Full Committee Hearing Examining the Policies and Priorities of the U.S. Department of Labor

On March 16, 2016, the Committee held a hearing entitled "Examining the Polices and Priorities of the U.S. Department of

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[1] Interpretation of the "Advice" Exemption in section 203(c) of the Labor-Management Reporting and Disclosure Act; Final Rule, 81 Fed. Reg. 15923 (Mar. 24, 2016) [hereinafter "Persuader Rule"]. The Committee ordered this bill reported to the House of Representatives on May 18, 2016. In the intervening time, a Texas federal court has issued a nationwide preliminary injunction prohibiting implementation of this regulation. *Nat'l Fed'n of Indep. Bus.* v. *Perez*, No. 5:16–cv–00066 (N.D. Tex. June 27, 2016) (Preliminary Injunction Order).

[2] 29 U.S.C. § 401 *et seq*.

[3] *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice: H. Comm. on Educ. and the Workforce*, 112th Cong. (Jul. 7, 2011) (Written Testimony of Peter C. Schaumber and Written Testimony of Michael J. Lotito).

[4] *The Future of Union Organizing: Hearing Before the H. Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 113th Cong. (Sept. 19, 2013) (statement of Rep. Brett Guthrie, Member, H. Comm. on Educ. and the Workforce).

Labor." DOL Secretary Thomas E. Perez was the sole witness. During the hearing, Rep. Bradley Byrne (R–AL) expressed concerns that the forthcoming final rule would greatly harm small businesses and the ability of employees to make informed decisions about their right to join a union.[5]

Introduction of H.J. Res. 87, Providing for congressional disapproval of the rule submitted by the Department of Labor relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act"

On April 15, 2016, Rep. Byrne, along with Committee Chairman John Kline (R–MN), Health, Employment, Labor, and Pensions (HELP) Subcommittee Chairman David "Phil" Roe (R–TN), and 17 additional cosponsors, introduced H.J. Res. 87, *Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act."* In response to the threat posed by DOL's persuader rule, Rep. Byrne introduced the resolution to ensure employers are able to receive advice about how to lawfully communicate with their employees and to preserve employees' access to information during a union organizing campaign.[6]

Subcommittee Hearing Examining the Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice

On April 27, 2016, the HELP Subcommittee held a hearing entitled "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice" to examine the March 24, 2016, DOL final rule expanding the application of LMRDA reporting requirements. Witnesses before the Subcommittee were Mr. Joseph Baumgarten, Partner, Proskauer Rose, New York, New York; Mr. Jonathan D. Newman, Partner, Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.; Mr. Wm. T. (Bill) Robinson III, Member, Frost Brown Todd LLC, Florence, Kentucky; and Ms. Sharon L. Sellers, President, SLS Consulting, LLC, Santee, South Carolina. During the hearing, witnesses testified in favor of H.J. Res. 87, discussing how the new rule will undermine attorney-client confidentiality, make it more difficult for small employers to receive the advice they need when faced with a union organizing campaign, and undermine the right of employees to make informed decisions concerning union representation.[7]

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[5] *Examining the Policies and Priorities of the U.S. Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Mar. 16, 2016) (statement of Rep. Bradley Byrne, Member, H. Comm. on Educ. and the Workforce).

[6] Press Release, H. Comm. on Educ. and the Workforce, Byrne Introduces Resolution to Block Controversial "Persuader" Regulation (Apr. 15, 2016), http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400593.

[7] *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Apr. 27, 2016).

Committee Passes H.J. Res. 87, Providing for congressional disapproval of the rule submitted by the Department of Labor relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act"

On May 18, 2016, the Committee considered H.J. Res. 87. One amendment was offered, but it was ruled non-germane. H.J. Res. 87 was reported favorably to the House of Representatives by a vote of 22–13.

SUMMARY OF H.J. RES. 87

Under the resolution, the House of Representatives expresses its disapproval of the rule submitted by DOL relating to the advice exemption for employer and consultant reporting in section 203(c) of the LMRDA. If enacted, the resolution would prohibit the regulation from going into effect.

COMMITTEE VIEWS

BACKGROUND

Congressional Review Act

The Congressional Review Act (CRA) enacted in 1996 established special congressional procedures for disapproving a broad range of regulatory actions (largely encompassing, but not limited to, rules) issued by federal agencies.[8] Before any rule covered by the CRA can take effect, the federal agency that promulgates the rule must submit it to Congress. If Congress passes a joint resolution disapproving the rule, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency also may not reissue that rule or any substantially similar rule, except under authority of a subsequently enacted law.[9]

The CRA establishes special expedited procedures for congressional action on joint resolutions of disapproval.[10] The CRA dictates that, in both houses, to qualify for expedited consideration, a disapproval resolution must be submitted within 60 days after Congress receives the rule, exclusive of recess periods. It then lays out a set of action periods and deadlines that must be met before the joint resolution can be privileged, thereby circumventing the Senate's filibuster rules.

Labor Management Reporting and Disclosure Act

The LMRDA was enacted in 1959 to ensure basic standards of democracy and fiscal responsibility in labor organizations representing employees in private industry and the U.S. Postal Service. It sets standards for reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, the protection of union funds and assets, the administration of trusteeships by labor organizations, and the election of labor organization officers. In most cases, the LMRDA's reporting requirements are the only means by which more than 7

[8] 5 U.S.C.§ 801(a).
[9] 5 U.S.C. § 801.
[10] 5 U.S.C. § 802.

million private sector union members [11] can get information about how their union dues are used. The LMRDA requires unions to submit annual financial reports to DOL. This is often the only publicly available information on the financial dealings of many unions.

DOL's Office of Labor-Management Standards (OLMS) is responsible for administering and enforcing the LMRDA. From 2001 to 2008, OLMS created an unprecedented level of union transparency and accountability, including improved reporting forms for unions, more strictly enforced reporting requirements, and reduced time between union audits. By contrast, the Obama administration has rescinded many of these improvements and focused on creating burdensome requirements for employers, despite the law's stated goal of union transparency.

The advice exemption of Section 203 of the LMRDA

Under section 203 of the LMRDA, employers and labor consultants are required to report agreements or arrangements to directly or indirectly "persuade" employees with respect to the exercise of their rights to organize or bargain collectively, known as "persuader activity." [12] The statute explicitly exempts those who only provide "advice" to employers from these reporting requirements. Section 203(c) creates the exemption for "any employer or other person [from filing] a report covering the services of such person [for] giving or agreeing to give advice to such employer."

Previous interpretation

For over 50 years, prior to the new rule, a simple "bright-line" test was used to define the section 203(c) advice exemption. Starting in 1962, DOL regulations exempted employer and labor-consultant reporting if a consultant had no direct contact with employees, and the employer was free to accept or reject the consultant's advice.[13] With a brief exception of a few months in 2001,[14] the "direct contact" test for the advice exemption was in place from 1962 until the new rule.

The new rule

On June 21, 2011, OLMS issued the proposed persuader rule.[15] It received over six thousand comments, largely in opposition.[16] The rule then remained dormant until it was sent to the Office of Management and Budget in December 2015 for review. On March 24, 2016, DOL issued the final rule and published it in the Federal

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[11] DOL Bureau of Labor Statistics, *Union Members—2015* (Jan. 28, 2016), http://www.bls.gov/news.release/union2.nr0.htm.

[12] 29 U.S.C. § 433.

[13] LMRDA Interpretive Manual § 265.005 (1962). *See also* Persuader Rule, 81 Fed. Reg. at 15923.

[14] In January 2001, during the final days of the Clinton administration, DOL issued a revised interpretation of the advice exemption that was rescinded by the Bush administration's DOL after only a few months.

[15] Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption; Proposed Rule, 76 Fed. Reg. 36178 (Jun. 21, 2011).

[16] On September 21, 2011, shortly after the rule was initially proposed, U.S. House Education and Workforce Committee Chairman Kline submitted comments opposing the rule. The comments highlighted how the proposed rule was an effort to advance DOL's "culture of union favoritism" at the expense of employees and job creators. Comments available at https://www.regulations.gov/#!documentDetail;D=LMSO-2011-0002-5864.

Register.[17] The new rule became effective 30 days after its publication in the Federal Register and applies to arrangements commenced after July 1, 2016.

Under DOL's final rule, the bright-line "direct contact" test is replaced by a broad, vague standard based on the intent or "object" of employer-consultant arrangements. Under the new rule, any arrangement that in whole or in part has the object directly or indirectly to persuade employees, regardless of whether advice is also given, falls outside of the advice exemption.

OBJECTIONS TO DOL'S FINAL RULE

Uncertainty in triggering reporting requirements

Under the new rule, the reporting requirement depends on subjective, vague distinctions, creating uncertainty for employers and consultants. For example, if an employer engages a human resource consultant to draft a presentation for new employees, the employer may be required to report to OLMS.[18] Under the old rule, as long as the consultant had no direct contact with employees, reporting would not have been required, but under the new rule it depends on the employer's motivation. If the employer is motivated to give the presentation to boost employee morale or enhance communication between employees and management, then reporting does not appear to be triggered. However, if even a secondary concern in the employer's mind is potential unionization, then reporting likely is required, even if the consultant never comes into contact with the employees. Therefore, employers can trigger burdensome reporting requirements by seeking advice on issues that may relate to unions only in minor or abstract ways. Additionally, the consultant's reporting obligations are also in doubt where the object of the employer's request was unclear.

Instructions to be included on the revised reporting forms, meant to clarify the rule, demonstrate the lack of a clear distinction between reportable "persuader activity" and exempt "advice" under the new rule. The instructions define "persuader activities" as "any actions, conduct, or communications with employees that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights." [19] "Advice" is defined as an "oral or written recommendation regarding a decision or a course of conduct." [20]

The difference between a reportable consultant arrangement designed to "implicitly" and "indirectly" affect an "employee's decision" and an exempted arrangement that instead only guides an employer's "course of conduct" will confuse employers. This makes reporting obligations unclear, unlike the previous bright-line rule. The vague standard in the new rule is especially alarming because criminal sanctions can apply for failure to report under the violations and penalties provisions of the LMRDA.[21]

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[17] Persuader Rule; Final Rule, 81 Fed. Reg. at 15923.

[18] Employers have to report the existence of arrangements to OLMS under 29 U.S.C. § 433(a). Consultants have to report both the existence of arrangements as well as their receipts and disbursements to OLMS under 29 U.S.C. 433(b).

[19] Persuader Rule, 81 Fed. Reg. at 16022 ("Instructions for LM–10 Employer Report").

[20] *Id.* at 16028.

[21] 29 U.S.C. § 439.

Witnesses before the HELP Subcommittee were concerned about the vagueness of the new rule. Labor attorney Joseph Baumgarten testified "in the real world, there is no way to make this determination with any degree of confidence—particularly where both the employer and the lawyer/consultant have to make their own independent determination as to whether the work performed is reportable." [22] Human resources consultant Sharon Sellers noted, "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." [23]

Attack on attorney-client confidentiality

OLMS received thousands of comments criticizing the proposed rule before it was finalized.[24] Of particular interest were comments submitted by 11 state bars, as well as the American Bar Association (ABA). The ABA argued the rule "could seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel." [25] Following publication of the final rule, the current ABA President submitted a statement to the Committee opposing the final rule on the same grounds:

> The ABA urges Congress to preserve the Department of Labor's longstanding interpretation of the advice exemption to the Persuader Rule so that lawyers and law firms will continue to be exempt from the rule's onerous disclosure requirements when they merely provide advice or other legal assistance to their employer clients regarding the clients' persuader activities and the lawyers have no direct contact with the employees.[26]

Under the previous rule, labor-management attorneys who did not have direct contact with employees knew they were exempt from LMRDA reporting requirements. Under the new rule, however, legal advice given with the objective to assist an employer communicating with employees are reportable. Again, reporting is triggered even if the advisor has no contact with employees. This is true even in situations where the legal advice has other objectives, such as making sure the employer is compliant with the *National Labor Relations Act*. To comply with the new rule, many attorneys will have to publicly report their clients and potentially violate attorney-client confidentiality and privilege.

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[22] *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. 12 (Apr. 27, 2016) (written testimony of Mr. Joseph Baumgarten, Partner, Proskauer Rose).

[23] *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. 5 (Apr. 27, 2016) (written testimony of Ms. Sharon Sellers, President, SLS Consulting, LLC).

[24] Regulations.gov, LMSO–2011–0002, RIN 1245–AA03, http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=LMSO-2011-0002.

[25] Comments of Wm. T. (Bill) Robinson III, American Bar Association, on the Labor Management Standards Office Proposed Rule: Labor-Management Reporting and Disclosure Act: Interpretation of the Advice Exemption (Sept. 21, 2011), http://www.regulations.gov/#!documentDetail;D=LMSO-2011-0002-5577.

[26] *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Apr. 27, 2016) (written statement of Paulette Brown, President, American Bar Association).

Furthermore, attorneys who enter into a single persuader agreement may have to report every other employer labor-relations client, even if no persuader activity has taken place with those other clients. When an attorney enters into an agreement with an employer to engage in activity reportable under the rule, the attorney is required to fill out a "Receipts and Disbursements Report." This report requires all attorneys engaging in the new, expansive definition of persuader activities to disclose receipts and disbursements *of any kind* received from *all employer clients* "on account of labor relations advice or services," not just those receipts and disbursements that are related to persuader activity.[27]

In his testimony before the HELP Subcommittee, former ABA President William. T. Robinson focused entirely on the rule's threat to the attorney-client relationship. He testified the new rule "undermines, in the reality of every day labor relations, the critically important confidentiality that is the *sine qua non* of effective attorney-client communications" and that the rule would "effectively erase the time-honored purpose and historically protected value of attorney-client confidentiality."[28]

Rather than risk running afoul of state bar rules by disclosing private information about their clients, many attorneys may simply avoid this area of law, depriving employers—particularly smaller employers—the legal advice they need to navigate a host of complex federal labor policies. Ultimately, depriving employers of the ability to receive legal counsel deprives employees of the information they need to make fully informed decisions regarding union representation.[29]

Combined effect of DOL's rule and the NLRB's "ambush elections" rule

Due to the NLRB's recent "ambush election" rulemaking, the time between a union first filing a representation petition and the election can now be as short as 11 days.[30] This means an even shorter time period exists for employers to educate themselves as to the rules and restrictions placed on them in regards to union organizing campaigns, as well as less time for employees to learn about the issues surrounding unionization.

In such a short time period, employers will often heavily rely on trusted attorneys and consultants. In her testimony, Ms. Sellers noted that "now more than ever, small employers need consultants and legal services provided by highly trained professionals to navigate the increasingly complex labor relations space."[31] Yet, under this rule, employers now may be unable to receive guidance from

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[27] In April 2016, OLMS put out a "special enforcement policy" for LM–21 forms that will stop "enforcement actions" for failure to list receipts and disbursements from other employer clients. While a step in the right direction, this does not change the rule, but rather is just a temporary statement that for the time being the rule will not be enforced. See Form LM–21 Special Enforcement Policy. http://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm.

[28] *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. 7 (Apr. 27, 2016) (written testimony of Mr. Wm. T. Robinson, Member, Frost Brown Todd LLC).

[29] *See* Robinson, *supra* note 26, at 6–7; *and* Baumgarten, *supra* note 20 at 6–7.

[30] NLRB Representation-Case Procedures; Final Rule, 79 Fed. Reg. 74308 (Dec. 15, 2014).

[31] Sellers, *supra* note 21, at 4.

such attorneys and consultants who would forgo working on these matters due to the invasive reporting requirements.[32]

The NLRB's "ambush election" rule and the DOL's "persuader rule" were first proposed just a day apart in June 2011. They both promote the interests of unions during organizing campaigns, with little regard for the interests of employers and employees. When combined, they create an environment where employers have little chance to properly and effectively communicate with their employees and employees have less opportunity to make informed decisions.

Depriving employees of information

From organizing campaigns to contract disputes, unions run highly sophisticated operations to persuade employees to join and support them. Many unions employ full-time staff and rely on outside help just to persuade employees. Larger unions run multi-million dollar public relations campaigns with the intent of gaining members.[33] Workers are often bombarded with slick sales pitches from an interested union.

Employers, on the other hand, are focused on running their businesses. Smaller employers in particular may have little or no background in effectively communicating with their employees about union issues. As a result, employees often do not get to hear the other side of the story about a union unless their employer has help. That help often comes in the form of a consultant who can explain the issues with the same detail offered by the union. Yet, many employers will be hesitant to engage with labor consultants due to the increased reporting requirements under the new rule.

In his testimony before the HELP Subcommittee, Mr. Baumgarten noted small businesses and their employees will be hurt the most. He testified the new rule will result in a loss of consulting and legal services to employers "and the loss of services will impact most acutely the small businesses that have limited funds and little or no in-house experience to guide them in what they can and cannot say to their employees." [34]

If employers are deprived of help communicating with employees, then employees are deprived of important information they need to make decisions about unions in their workplaces. Whether to join a union is a deeply personal and important decision, and employees deserve to hear both sides of the story when making their decision.

Union favoritism

The new rule creates a double standard unfairly favoring unions. It forces employers and employer consultants to disclose additional

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[32] *See* Comments of Michael Eastman, U.S. Chamber of Commerce, on the Labor Management Standards Office Proposed Rule: Labor-Management Reporting and Disclosure Act: Interpretation of the Advice Exemption (Sept. 22, 2011), http://www.regulations.gov/#!documentDetail;D=LMSO-2011-0002-5949; *and* Comments of Karen Harned, National Federation of Independent Business, Small Business Legal Center on the Labor Management Standards Office Proposed Rule: Labor-Management Reporting and Disclosure Act: Interpretation of the Advice Exemption (Sept. 20, 2011), https://www.regulations.gov/#!documentDetail;D=LMSO-2011-0002-4269.

[33] For example, in 2015 The International Brotherhood of Electrical Workers reported over 870 million dollars in disbursements, including disbursements to staff, public relations firms and for organizing campaigns. 2015 Labor Organization Reports available at https://olms.dol-esa.gov/query/getOrgQry.do.

[34] Baumgarten, *supra* note 20, at 10.

information but continues to exempt union consultants and "salts" [35] from the same degree of scrutiny.

Even prior to the changes made by the new rule, the LMRDA's reporting requirements allowed unions to avoid the same scrutiny as employers during organizing campaigns. For example, under the previous rule, a consultant must report within 30 days of entering into agreement with an employer.[36] This gives a union notice that an employer has received help to educate employees during an organizing campaign. Furthermore, if an employer has received help to prepare for the contingency of a unionization effort, this will likely have been reported. Yet a union is not required to report about ongoing organizational campaigns if reporting would provide a "tactical advantage" to other parties or expose the union's strategy.[37] Even when a union does have to report, it must do so only once per year.[38] So while a union can often find out during an organizing effort exactly who is assisting an employer, the union itself is not required to file anything until the campaign is complete.

DOL states the purpose of the new rule is to provide workers with what it believes is "essential information" regarding the views and materials directed at them.[39] However, a labor organization is not required to disclose similar information if it "would expose the reporting union's prospective organizing strategy." [40] The fact that a labor organization is paying a co-worker to organize a workplace would seem to be "essential information" for workers to know, yet the Department has not proposed a rescission of that confidentiality exception.

Additionally, the broad categories included in union reporting forms make that information much more opaque than the specific information required in employer and consultant reporting forms. For instance, a union may have an entry under the broad "representational activities" category indicating that they hired a consultant for "media outreach" or a law firm for "labor law issues," but nowhere will it indicate whether the objective was to organize a specific workplace or to persuade employees to vote for a union.[41] By comparison, an employer must check a box indicating that he or she hired a consultant with the purpose of persuading employees.[42] Moreover, consultants must identify which groups of employees they were hired to persuade, which topics were covered, and what unions were involved.[43] Due to the asymmetry of the requirements affecting unions and employers, unions often know exactly what sort of outside help employers are receiving during an orga-

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[35] Salt: a union member, consultant or employee who joins a non-unionized organization as an employee for the purpose of organizing its membership.

[36] 29 U.S.C. § 433.

[37] Instructions for Form LM–2 Labor Organization Annual Report 22, Pg. 23–24 (Nov. 2010), http://www.dol.gov/olms/regs/compliance/EFS/LM-2InstructionsEFS.pdf.

[38] 29 U.S.C. § 431.

[39] Persuader Rule, 81 Fed. Reg. at 15926.

[40] Instructions for Form LM-2 Labor Organization Annual Report 22, Pg. 23–24 (Nov. 2010), http://www.dol.gov/olms/regs/compliance/EFS/LM-2InstructionsEFS.pdf.

[41] Department of Labor Form LM–2. Labor Organization Annual Report, https://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm2_blankForm.pdf.

[42] Department of Labor Form LM–10, Employer Report, https://www.dol.gov/olms/regs/compliance/GPE_Forms/2016/FormLM-10_3-15-16.pdf.

[43] Department of Labor Form LM–20, Agreements and Activities Report, https://www.dol.gov/olms/regs/compliance/GPEA_Forms/2016/FormLM-20_3-15-16.pdf.

nizing campaign, while employers and employees do not have similar knowledge of the unions' outside help.[44]

The new rule makes this inequitable treatment even worse by narrowing the advice exemption to the reporting requirements for labor consultants and employers under the LMRDA. By contrast, the new rule made no changes to the reporting requirements placed on unions in the LMRDA. As a result, both employers and consultants have to comply with more burdensome requirements covering more interactions than previously, exacerbating the inequity.

Implementation cost

DOL's cost analysis of its new persuader rule has also been questioned. DOL estimated the total annual cost imposed by the rule on filers to be just over $1 million.[45] However, the Manhattan Institute estimated the proposed rule could cost significantly more.[46] The Manhattan Institute study argued DOL underestimated the number of businesses that will be affected by the change, failed to take into account the cost of consulting with lawyers to comply with the proposed rule, and underestimated the number of hours that will be spent on compliance with the proposed rule.

CONCLUSION

DOL's final rule imposes costly and invasive new requirements on employers that represent a dramatic departure from long-standing labor policies. The new rule threatens attorney-client confidentiality, chills employer free speech, undermines employee free choice, and makes it harder for business owners—especially small business owners—to navigate a host of complex labor rules. The resolution of disapproval protects the rights of employers and employees by preventing implementation of the Department of Labor's misguided persuader rule.

SECTION-BY-SECTION ANALYSIS

Congress expresses its disapproval of the rule submitted by DOL relating to the advice exemption for employer and consultant reporting in section 203(c) of the LMRDA and prohibits it from going into effect.

EXPLANATION OF AMENDMENTS

One amendment was offered, and its disposition is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. House Joint Resolution 87 expresses congressional disapproval of the DOL rule

[44] Unions often use these reports to argue the money spent by the employer on a consultant could have instead gone to salaries and benefits, if only the employer was not so anti-union. Yet, the employee does not get to see the money, raised through dues and other forced fees taken out of employee paychecks, spent by the union on similar consultants until after an organizational campaign is over—and even then it is not reported so clearly.

[45] Persuader Rule, 81 Fed. Reg. at 15929.

[46] Diana Furchtgott-Roth, *The High Costs of Proposed New Labor-Law Regulations*, Manhattan Institute for Policy Research (Apr. 2013), http://www.manhattan-institute.org/html/high-costs-proposed-new-labor-law-regulations-5715.html.

relating to interpretation of the "advice" exemption in section 203(c) of the LMRDA.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.J. Res. 87 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: May 18, 2016

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.J. Res. 87 Amendment Number:

Disposition: Ordered favorably reported to the House by a vote of 22 yeas and 13 nays.

Sponsor/Amendment: Mrs. Foxx - motion to report the bill to the House.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. SALMON (AZ)	X			Mr. SABLAN (MP)			X
Mr. GUTHRIE (KY)	X			Ms. WILSON (FL)			X
Mr. ROKITA (IN)	X			Ms. BONAMICI (OR)		X	
Mr. BARLETTA (PA)	X			Mr. POCAN (WI)		X	
Mr. HECK (NV)	X			Mr. TAKANO (CA)		X	
Mr. MESSER (IN)	X			Mr. JEFFRIES (NY)		X	
Mr. BYRNE (AL)	X			Ms. CLARK (MA)		X	
Mr. BRAT (VA)	X			Ms. ADAMS (NC)		X	
Mr. CARTER (GA)	X			Mr. DeSAULNIER (CA)		X	
Mr. BISHOP (MI)	X						
Mr. GROTHMAN (WI)	X						
Mr. RUSSELL (OK)	X						
Mr. CURBELO (FL)	X						
Ms. STEFANIK (NY)	X						
Mr. ALLEN (GA)	X						

TOTALS: Aye: 22 No: 13 Not Voting: 3

Total: 38 / Quorum: 13 / Report: 20

(22 R - 16 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of House Joint Resolution 87 is to express congressional disapproval of the DOL rule relating to interpretation of the "advice" exemption in section 203(c) of the LMRDA.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.J. Res. 87 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.J. Res. 87 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.J. Res. 87 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 6, 2016.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 87, providing for Congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor, relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

KEITH HALL.

Enclosure.

H.J. Res. 87—Providing for Congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor, relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act"

H.J. Res. 87 would disapprove a final rule of the Department of Labor relating to the "Interpretation of 'Advice' exemption in section 203(c) of the Labor-Management Reporting and Disclosure Act," which was published in the Federal Register on March 24, 2016. H.J. Res. 87 would invoke a legislative process established by the Congressional Review Act (Public Law 104–121) to disapprove the new rule. If H.J. Res. 87 is enacted, the rule would have no force or effect.

The rule requires employers and their consultants on labor relations to report on their activities and communications if they are undertaken with the direct or indirect goal of affecting the employees' decisions regarding union representation or collective bargaining rights. Under an earlier interpretation of the rule, reporting was required only when consultants communicated directly with employees. The rule also requires electronic filing of the required reports.

The new rule does not apply to government employers. The increase in reporting by private employers and consultants could have a minimal effect on the Department of Labor's operations, but CBO estimates that implementing the legislation would not significantly affect the federal budget. Because enacting H.J. Res. 87 would not affect direct spending or revenues, pay-as-you-go procedures do not apply. CBO estimates that enacting the resolution would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.J. Res. 87 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Christina Hawley Anthony. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.J. Res. 87. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The requirements of clause 3(e) of rule XIII of the Rules of the House of Representatives do not apply to H.J. Res. 87.

MINORITY VIEWS

INTRODUCTION

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

(1) The DOL's persuader rule promotes transparency by closing a massive reporting loophole that has allowed employers to keep *indirect* persuader activity secret. This rule will pull back the curtain on employer arrangements with union avoidance consultants that have been improperly withheld from workers for nearly 50 years.

(2) The rule does not interfere with the attorney-client privilege and is consistent with the Model Rules of Professional Conduct governing attorneys' ethical obligations.

(3) The persuader rule helps level the playing field for workers who want to join together to negotiate with their employer for better working conditions. By requiring employers to disclose the identity of and amounts paid to outside consultants who are responsible for crafting their anti-union messages, employees will be better informed when making decisions during union elections and during collective bargaining.

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

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

WHAT IS A PERSUADER?

When workers seek to organize and bargain collectively, employers often hire union avoidance consultants—also known as "persuaders"—to orchestrate and roll out time-tested, anti-union cam-

paigns. One union avoidance consultant outlined the services he offers to help defeat a union organizing effort:

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

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

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

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

THE DOL PERSUADER RULE CLOSES A LOOPHOLE

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

> undertakes activities where an object thereof, *directly* or *indirectly*, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.[5]

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

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

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

[4] *Id.* at 660.

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

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

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

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

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

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

Under the final rule:

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

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

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

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

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

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

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

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

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

THE REPORTING REQUIREMENTS DO NOT IMPOSE AN ADMINISTRATIVE BURDEN

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

- "Employer's Report" Form LM–10: (4 pages) Employers must submit one annual report listing their persuader agreements over the fiscal year, the dates they entered into contracts, the terms and conditions of these contracts (including the amount employers paid for these services), and a description of the persuader services performed.
- Consultant's "Activities Report" Form LM–20: (2 pages) Labor relations consultants must submit a report within 30 days after entering into each persuader agreement, listing the date they entered into contract, the terms and conditions of the agreement (including the amount employers paid), and a description of the persuader services to be performed.

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

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

- Consultant's "Receipts and Disbursements Report" Form LM–21: (2 pages) Labor relations consultants must submit this report once annually, if any payments were made or received

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

[11] 81 FR 16009–10 (March 24, 2016).

during the fiscal year pursuant to persuader agreements reported in an LM–20.

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

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

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

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

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

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

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

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

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

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

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

[14] Opening Statement of David P. Roe at the April 27, 2016 HELP Subcommittee Hearing entitled "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and

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

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

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

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

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

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

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

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

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

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his . . . agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing

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Employee Free Choice," *available at, http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400635*

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

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

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

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

> to engage in collective bargaining on behalf of such employer[.]

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

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

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

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

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

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

What is it, exactly, that is so objectionable about the disclosure of agreements with a behind-the-scenes union-avoidance consultant? Perhaps, employers do not want to expose their relationships with union busters to their employees. In his book *Confessions of*

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

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

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

[22] Testimony of Sharon Sellers p. 37, 91.

a Union Buster, Martin Jay Levitt—who had been a leader in the union-avoidance industry for twenty years—wrote:

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

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

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

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

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

By enacting the LMRDA, Congress sought to shine a spotlight on the persuader industry. The 1959 Senate Committee Report accompanying the LMRDA stated that persuader activities "are disruptive of harmonious labor relations and fall into gray area" between proper and improper conduct. To address this potential for harm, Congress chose to rely on transparency. As Justice Brandeis famously said, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[25] The DOL's rule brings the regulations back in line with the statutory mandate.

In sum, *direct* persuaders (those who speak directly to employees) have long been disclosing their agreements under the LMRDA, but these disclosures have not chilled employers' efforts to hire them. For example, FedEx Freight Corporation agreed to pay LRI Consulting Services $3,000 per day as a *direct* persuader in April 2016,[26] and the Laboratory Corporation of America agreed to pay

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[23] Martin Jay Levitt, *Confessions of a Union Buster*, 1 (Crown Publishers, 1993).

[24] Testimony of Jonathan D. Newman, Esq., Subcommittee on Health, Employment, Labor And Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016, pp 24, *available at,* http://democrats-edworkforce.house.gov/imo/media/doc/NewmanTestimony_w.Appendix042716.pdf

[25] *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)).

[26] LM–20 Form, *available at,* https://olms.dol-esa.gov/query/orgReport.do?rptId=618922&rptForm=LM20Form

LRI Consulting $375 per hour as a direct persuader.[27] As Mr. Newman testified: "The scope of the information that is being sought in this rule is no different than what the Department of Labor has always sought when the union buster deals directly face-to-face with employees."

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

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

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

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

The ABA's Model Rule of Professional Conduct § 1.6 states that attorneys should not reveal "information relating to the representation of a client" *but makes an exception* for disclosure "to comply with other law"—such as the LMRDA.[30] This exception is what allows attorneys to disclose the identity of clients under other laws, such as the Lobbying Disclosure Act, and to disclose cash transfers from a client in excess of $10,000 on IRS Form 8300.

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

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

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[27] LM–20 Form, *available at,* https://olms.dol-esa.gov/query/orgReport.do?rptId=618921&rptForm=LM20Form

[28] *Humphreys v. Donovan*, 755 F.2d 1211, 1216 (6th Cir. 1985) (emphasis added); *accord Price v. Wirtz*, 412 F.2d 647, 651 (5th Cir. 1969) (en banc).

[29] Statement of Paulette Brown, President of the American Bar Association, April 27, 2016, p 2.

[30] Forty-nine states and the District of Columbia have adopted professional conduct rules patterned on the ABA Model Rules, and California has a substantially similar rule.

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

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

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

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

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

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

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

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

Given that the LMRDA and the DOL's rule ensure adequate protections for attorneys' ethical duties, there is no principled reason why the disclosure of persuader services offered by attorneys should be shielded from employees and the public, while the very

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

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

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

[35] 87 F.R. 16043 (emphasis added).

[36] 87 F.R. 15969–70.

same activities would be reported by their non-attorney colleagues in the union-avoidance industry.

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

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

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

The House version of LMRDA contained a confidentiality exemption almost identical to the ABA's 1959 resolution, which would have foreclosed disclosure of any persuader arrangement if it was conducted by an attorney.[39] However, the House version of the bill was rejected by the Conference Committee, and the Senate version of the bill—which contained the much narrower exemption only for attorney-client privilege, but excluded the ABA-recommended confidentiality provision—was enacted into law as LMRDA section 204. Moreover, an argument that Congress had intended to preclude disclosure of an attorney client relationship was rejected by multiple United States Courts of Appeal when upholding the LMRDA's reporting requirements for attorneys.[40]

PENDING LITIGATION ON PERSUADER RULE

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

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[37] Statement for the Record of Paulette Brown, American Bar Association, submitted to the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, April 27, 2016. at 7 n.9.

[38] *See Humphreys*, 755 F.2d at 1218 (quoting the ABA's 1959 resolution) (emphasis added).

[39] H.R. 8342, 86th Cong., 2d Sess. §204 (1959), U.S. Code Cong. & Admin. News 1959, p. 2318.

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

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

business regulatory impact review; and (6) violates attorney-client privilege and attorneys' ethical duty of confidentiality.

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

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

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

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

AMENDMENTS

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

ROLL CALL VOTE ON H.J. RES. 87

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

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[42] *Labnet*, No. 0:16–CV–00844 (D. Minn. June 22, 2016) at 13.
[43] *Id.* at 33.
[44] *Id.*

CONCLUSION

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

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

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

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MARK DESAULNIER.

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