

KRUCHKO & FRIES
COUNSELORS AT LAW

Suite 400
502 Washington Avenue
Baltimore, Maryland 21204

(410) 321-7310

Suite 560
1750 Tysons Boulevard
McLean, Virginia 22102

Telephone: (703) 734-0554
Telecopier: (703) 734-0876
www.KruchkoandFries.com

Suite 900
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

(202) 347-6550

JOHN G. KRUCHKO

JKruchko@KruchkoandFries.com

September 21, 2011

VIA ELECTRONIC TRANSMISSION

Mr. Andrew R. Davis
Chief of the Division of Interpretations
and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

Dear Mr. Davis:

The National Ready Mixed Concrete Association ("NRMCA"), through its undersigned counsel, submits its formal comment on the above-referenced proposal by the Department of Labor ("Labor" or the "DOL") to revise Form LM-10 Employer Report and Form LM-20 Agreements Activities Report, which are required under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 433, 76 Fed. Reg. 36178 (June 22, 2011). These proposed revisions alter the DOL's long-established interpretation of the "advice" exemption to the persuader reporting requirement. As explained more fully below, the NRMCA believes that the DOL's proposed revisions represent an unwarranted intrusion into the employer's rights under Section 8(c) of the Labor Management Relations Act, 29 U.S.C. § 158(c), as well as under the First Amendment to the United States Constitution, and that the revisions are overly-broad in scope.

I. The Interest of The National Ready Mixed Concrete Association

The National Ready Mixed Concrete Association ("NRMCA") was founded in 1930. NRMCA represents 1300 member companies and their subsidiaries employing more than 125,000 American workers, of which many are unionized. The industry is currently estimated to include more than 65,000 concrete mixer trucks.

Currently, the vast majority of the ready mixed concrete industry is made up of small businesses. As with most small businesses, owning and operating a ready mixed concrete company means that the owner is responsible for everything, whether it is ordering inventory, hiring employees, meeting environmental and safety regulations or dealing with an array of government mandates. Due to the unique features of the ready mixed concrete industry with its isolated plant locations, dispersed employees and unusual business hours, NRMCA and its members bring a unique perspective on the impact of the DOL's proposed amendments to its rules.

The NRMCA believes the DOL's proposed rule will deny its member companies the opportunity to secure legal advice and guidance on many issues which arise in the workplace and which advice is sought in order to ensure that the workplace is one where employees can advance and develop in their line of work. Equally important, the NRMCA believes that the proposed DOL rule, while being lauded by the DOL as providing employees with "essential information regarding the underlying source of the views" presented by their employers, will effectively deny employees access to critical and factual information about unions and allow only a one-sided and self-serving presentation of union representation as presented by the unions themselves. Clearly, such a result will not result in an enlightened employee electorate when it comes time to vote in a representation election.

II. Specific Comments on the Proposed Revisions

Sections 203(a) and (b) of the LMRDA require employers and their labor relations consultants and attorneys to report any agreement or arrangement between the consultants and attorneys that will undertake activities, directly or indirectly, to persuade employees to exercise or not exercise their right to organize and bargain collectively. However, Section 203(c) exempts from these reporting requirements "the services of such [consultant] by reason of [his/her] giving or agreeing to give advice to such employer. Section 204 also exempts certain attorney-client communications from reporting, which is defined as, "information which was lawfully communicated to [an]...attorney by any of its clients in the course of a legitimate attorney-client relationship."

In addition, Section 203(f) of the LMRDA specifically protects the free speech rights of employers. This Section states: "Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 158 (c) of this title." Section 8 (c) of the Labor Management Relations Act, 29 U.S.C. § 158 (c), protects "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form" by employers.

Historically, therefore, the DOL's "persuader" regulations focused on employer arrangements with outside consultants and attorneys where the outside consultant or attorney dealt directly with or

directly contacted potential “bargaining unit” employees and those individuals attempted, through persuasive communication, to influence the employees’ voting decisions. With only minor deviation, since 1962, the DOL interpretation of the “advice” exemption has excluded from disclosure activities where an outside consultant or attorney does not deal directly with employees and limits his/her activities to providing the employer with advice or materials which the employer is free to accept or reject. Under this exemption, therefore, employers have not had to disclose the work of consultants or attorneys who prepare draft materials, including speeches, letters, or other documents, so long as the consultant or attorney does not provide the materials directly to the employees.

Under the proposed revisions, the DOL’s long-standing interpretation of the “advice” exemption, which has almost consistently been followed since 1962, will be tossed aside. In its place, the DOL proposes a sweeping interpretation of what activities constitute “persuader activity”, including activities that do not involve any direct employee contact by the outside consultants or attorneys. There is no justification for the DOL’s proposal and, if adopted, both employers and employees will be greatly disadvantaged.

Due to the expansive view of the term “persuader activity” as proposed in the DOL regulations and the burdensome reporting requirements that will follow from the proposed interpretation, an inevitable result will be that that employers will be discouraged from engaging the services of legal counsel to render advice to them when facing a well-orchestrated union organizing campaign. This will have a chilling effect on the employer’s Section 8(c) rights. The Supreme Court has said the enactment of Section 8(c) “manifested a ‘congressional intent to encourage free debate on issues dividing labor and management.’” *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 68 (2008) quoting from *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). The proposed DOL revision tramples the value of the “free debate” that the Supreme Court recognized. The proposed DOL revisions have the purpose of silencing employers and permitting only a one-sided presentation during a union campaign.

Most employers are not well-informed about unions, in general, or one union in particular, or with the law under the National Labor Relations Act (“NLRA”). Without the assistance of labor attorneys to provide legal counsel during an organizing campaign (which under the proposed National Labor Relations Board’s rules will be greatly condensed), employers will find themselves wading alone through a complicated election process under the NLRA, and will likely be forced to forego certain rights that would otherwise be available to them with the guidance of legal counsel.

Employers seek the advice of legal counsel to guide them through an organizing campaign to ensure that their actions and language are not found to be coercive in nature or illegal. The rules of the National Labor Relations Board that govern what an employer can and cannot say to employees, and what employer conduct is and is not permissible, are complicated and often very confusing to the

inexperienced layperson. Most employers are completely unfamiliar with legal parameters that govern lawful behavior during an organizing campaign. Furthermore, because long-standing Board principles are frequently altered with each new administration, employers can ill afford to forego legal advice.

Numerous examples can be found of the highly-nuanced nature of the interpretations of the National Labor Relations Act. An employer's solicitation policy prohibiting employee solicitation during "working hours" is unlawful, but the same policy applying to "working time" is enforceable. *Essex International, Inc.*, 211 NLRB 749 (1974). Employers may prohibit the distribution of literature during working time and in working areas, but the statute contains no definition of either "working time" or "working areas." Board law allows a union to promise increases in wages and benefits if employees choose to unionize, but prohibits employers from making the same promises if the employees refrain from organizing. An employer may prohibit non-employee access to its premises, but must permit, in most cases, access by off-duty employees. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Board law prohibits surveillance of employees engaging in organizing activity, but permits the observation of picketing or demonstrations that occur on company property if necessary for legitimate purposes, such as security reasons. *Cintas Corp.*, 353 NLRB 752 (2009). These examples are illustrative, but not exhaustive, of the pitfalls which await the unsuspecting employer during a union campaign.

Without the guidance of legal counsel to provide direction during an organizing campaign, employers will inadvertently engage in conduct or make statements that will result in unfair labor practice charges. There will likely be a significant increase in such unfair labor practice charges because employers are not aware that their conduct runs afoul of Board law. Clearly, an increase in unfair labor practice charges is not a result that the DOL should seek to achieve from its proposed regulatory revisions.

In order to avoid the multitude of legal pitfalls that may arise, employers will be forced to take the line of least resistance and remain silent during an organizing campaign. Out of fear that an innocent or innocuous comment will result in an unfair labor practice charge, employers will not express their views on unionization. As a result, employees will only hear one side, and a very slanted, one-sided view, of what it means to be represented by a union. The only voice that employees will hear during an organizing campaign is the union's voice. The proposed revisions will completely eviscerate employer Section 8(c) rights and stifle the "congressional intent to encourage free debate on issues dividing labor and management." *Chamber of Commerce of the United States v. Brown, supra*.

Furthermore, the DOL's proposed revision to its interpretation of the "advice" exemption and what constitutes persuader activity go beyond the scope of organizing and the bargaining context.

Under the proposal, persuader activity would be expanded to include: “providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their right to organize or bargain collectively.”

Under this expanded definition of persuader activity, even such things as the cost of union-free training seminars, the development of personnel policies, and design of personnel systems at times when there is no active union organizing would be reportable as programs to avoid union organizing. Material that is distributed during new employee orientation and which may represent an employer’s opinion on unions will be subject to reporting if outside legal counsel provided advice on or assisted in the drafting of the documents.

Employer personnel policies and procedures concern a multitude of employment-related materials that are unrelated to collective bargaining, but may have the effect of influencing employees in their exercise of collective bargaining rights. For example, in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court encouraged employers to adopt policies that allow employees to report incidents of sexual harassment so that the employer may take immediate corrective action. Seeking legal assistance in the drafting of such a policy and reporting procedure would constitute persuader activity under the proposed regulations.

Clearly, Congress never intended that changes or revisions to personnel policies and procedures to ensure on-going compliance with applicable laws would constitute reportable conduct. The congressional prohibition on persuader activity was certainly never intended to reach every corner of the workplace, as the DOL revisions would do. The scope and coverage of the proposed revisions are completely overbroad and unreasonable.

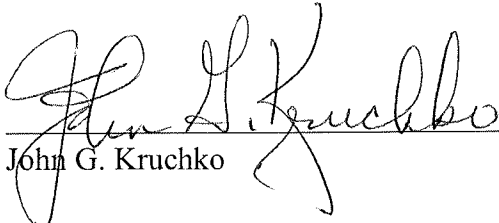
III. Conclusion

The proposed regulations issued by the DOL will serve to discourage employers from seeking competent legal advice during union organizing campaigns. Small employers who have no expertise in the processes and procedures of union campaigns will be given a Hobson’s choice: either they give up their free speech rights and remain silent, or they express their opinions and risk the commission of unfair labor practices. Employees will be denied information which is relevant and necessary to their decision whether or not to be represented by a union for purposes of collective bargaining. The only clear beneficiaries of the proposal are the unions themselves who will have a dramatically easier opportunity to mislead and misinform employees. Finally, the proposed

regulation is overbroad, and would limit legitimate human resource activities that are tangentially, if at all, related to union organizing. For all the foregoing reasons, the NRMCA respectfully requests the DOL to withdraw the proposed revisions.

Very truly yours,

KRUCHKO & FRIES

By:  _____
John G. Kruchko

Counsel for the National Ready Mixed
Concrete Association

JGK:bsp

cc: Robert A. Garbini, P.E., President
National Ready Mixed Concrete Association
Kerri Leininger, Senior Vice President, Government and Political Affairs
National Ready Mixed Concrete Association
Jay R. Fries, Esq.
Kruchko & Fries
Kathleen A. Talty, Esq.
Kruchko & Fries