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May 29, 2013

The Honorable Seth Harris
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Acting Secretary Harris:

In 2011, the committee submitted a comment opposing the Department of Labor's Office of Labor-Management Standards' (OLMS) proposed changes to the Labor-Management Reporting and Disclosure Act (LMRDA) "advice" exception.¹ The committee continues to be concerned about the proposed definition of "advice" under the LMRDA, and its resulting regulatory burdens and negative effects on the confidential attorney-client relationship. As such, we respectfully request documents and communications relating to proposed and final rules' burden analysis, and a briefing on the status of the rulemaking redefining "advice" under 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.² However, almost continuously since 1963, absent some deceptive arrangement between the employer and the consultant and pursuant to the "advice" exception, OLMS has exempted employer and labor consultant reporting if the consultant has no direct contact with employees and the employer is free to accept or reject the consultant's advice or materials.³

On June 21, 2011, OLMS proposed a significant change to the court-approved definition of "advice."⁴ Under the proposal, the "advice" exception would be limited to oral or written recommendations.⁵ If, for example, an employer distributes to employees a document created by

¹ Letter from the Honorable John Kline, Chairman, Education and Workforce Committee, to the Honorable Hilda Solis, Secretary of Labor, U.S. Department of Labor (September 21, 2011) (on file with author).

² 29 U.S.C. § 433.

³ 76 FR at 36181.

⁴ *International Union v. Secretary of Labor*, 678 F. Supp. 4 (D.D.C. 1988).

⁵ 76 FR at 36190-1.

a consultant that describes employee rights, both the employer and the consultant would be required to file a report with OLMS.

OLMS received thousands of comments on the proposed rule.⁶ Of particular concern was a comment submitted by the American Bar Association (ABA). The ABA comment on the proposed rule, dated September 21, 2011, "support[ed] the current interpretation of the advice exemption and oppose[d] the Department's Proposed Rule to the extent it would apply to lawyers representing employer clients."⁷ Among other things, the ABA believed "the Proposed Rule could seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel."⁸

In addition to the confidentiality issues, the department's regulatory burden analysis has also been questioned. The department estimated the total annual cost imposed by the proposed rule on filers to be \$825,886.11.⁹ However, a recent publication by the Manhattan Institute estimated "[t]he proposed rule could cost the economy between \$7.5 and \$10.6 billion in the first year of implementation, and between \$4.3 and \$6.5 billion per year thereafter."¹⁰

The 2012 Unified Agenda stated that final action on this rule would occur in April 2013.¹¹ To date, no final rule has been published. We continue to oppose the proposed changes to the LMRDA definition of "advice" and encourage the department to withdraw this rulemaking. If you choose not to withdraw the rule, to ensure the final rule protects the confidential client-lawyer relationship and has undergone a thorough burden analysis, we request that you provide all documents and communications relating to the proposed and final rules' burden analysis no later than June 12, 2013. Additionally, we request that committee staff be contacted to arrange a briefing on this matter. If you have any questions regarding this request, please contact Marvin Kaplan or Joe Wheeler, House Committee on Education and the Workforce, at (202) 225-7101.

⁶ Regulations.gov, LMSO-2011-0002, RIN 1245-AA03, available at <http://www.regulations.gov/#/docketDetail;dt=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=LMSO-2011-0002> (last visited 5/10/12).

⁷ Letter from William Robinson III, President, American Bar Association, to Andrew Davis, Chief of the Division of Interpretations & Standards, Office of Labor-Management Standards (September 21, 2011) (on file with author).

⁸ *Id.*

⁹ 76 FR at 36203.

¹⁰ Furchtgott-Roth, Diana, *The High Costs of Proposed New Labor-Law Regulations*, Manhattan Institute for Policy Research (April 2013).

¹¹ 2012 Regulatory Plan, Office of Information and Regulatory Affairs, available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1245-AA03>

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Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



PHIL ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

Enclosure

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce
Committee