COALITION FOR A
DEMOCRATIC WORKPLACE

NLRB & DOL
Attack on Business and Workers

Recent Obama appointees to both the National Labor Relations Board (NLRB or Board) and the Department of Labor (DOL) are continuing the Administration's longstanding assault on the Nation's workers and businesses through new regulations and other administrative initiatives. Resigned to the fact that the misnamed "Employee Free Choice Act," won't pass Congress, the Administration continues to push for EFCA-like changes without deliberation and outside the appropriate legislative channels. The Board and DOL have recently renewed their joint efforts to deny employees an informed choice about union representation, silence employers in the process, and facilitate organizing by fracturing workplaces with "micro unions."

Table of Contents

Introduction

The NLRB grabbed headlines in the summer of 2011 for the outrageous actions of its Acting General Counsel, who attempted to mandate where and how one company—Boeing—could operate and expand its business and what the company could tell the public and its employees about costs related to collective bargaining. Those who headed the Board during both the Clinton and Bush administrations have called the NLRB's actions unprecedented.[1] Initially, the attack on Boeing not only threatened to eliminate thousands of jobs in South Carolina but also injected an additional uncertainty into the economy that is sure to cost American jobs. As the Washington Post noted, the NLRB suit in Boeing "substitute[d] the government's judgment for that of the company [and t]his [was] neither good law nor good business." The complaint ultimately proved to be the leverage the union was counting on as the company eventually yielded to other union demands to secure withdrawal of the charge. While the compliant was dismissed, there remains a lingering threat of misguided prosecution and the possibility that the NLRB could at any time thrust itself into ongoing negotiations between a business and a union in an effort to strengthen the union's hand at the bargaining table.

[1]See remarks by former Clinton NLRB Chair William Gould at http://www.slate.com/id/2294834/ and former George W. Bush NLRB Chair Peter Schaumber at http://shopfloor.org/2011/04/former-nlrb-chairman-anti-boeing-move-unprecedented/20267.

The Board followed up on Boeing with two August 26, 2011 decisions—one creating a new standard that permits unions to fracture workplaces into micro-unions and the other stripping workers of the right to demand a secret ballot election in the face of "card check" recognition. Two disturbing proposed regulations were also released that year—one which would have required employers to post a new and very biased notice in the workplace, and another which proposed shortening the time frames for union representation elections and as a result, limit any discussion between employers and employees about the possible disadvantages of union representation. Perhaps the most egregious action, however, was President Obama's three "recess" appointments to the Board while the Senate was still in session in an effort to ensure the Board could follow through on these damaging and controversial policies. In the meantime, the DOL published its proposed "persuader" rule, which has the net effect of interfering with employers', particularly smaller employers, ability to obtain legal counsel and other information about their rights in the course of a union campaign. All of these actions were specifically designed to bring us closer to administrative imposition of the legislatively dormant and grossly misnamed Employee Free Choice Act (EFCA), which would have denied employees the opportunity to a secret ballot election by requiring employers recognize a union based on signed authorization cards, a process known as "card check."

The Board's irresponsible actions have sent devastating ripples through the economy, greatly affecting the estimated six million workplaces that fall within the NLRB's jurisdiction. Congress needs to stop the Board now, before it can do more damage to our job growth and economic recovery.

Economic Data on EFCA

Study Shows EFCA Leads to Chronic Double Digit Unemployment and Millions of American Jobs EFCA would have required employers to recognize a union as their employees' exclusive bargaining representative without a secret ballot election if the union presented the employer with cards signed by employees, a process known as "card check." Card check invites fraud, abuse and intimidation, and EFCA is a naked attempt to increase union density at the expense of employees' rights to vote by secret ballot. Moreover, EFCA would cost millions of jobs and leave the U.S. facing chronic double digit unemployment. That's one reason why 74% of voters and union households oppose EFCA (see polling data at http://myprivateballot.com/polling/). One prominent study estimates EFCA's predicted increase in union density would spike unemployment by as much as 3.5% in one year and by over 9% over 10 years.[2] This would drive the unemployment rate from 6.6% to above 10%, cost millions of jobs in a single year, and lead to persistent double digit unemployment for the next decade and beyond. Congress recognized EFCA would kill jobs and therefore refused to pass the bill.

[2] See AN EMPIRICAL ASSESSMENT OF THE EMPLOYEE FREE CHOICE ACT: THE ECONOMIC IMPLICATIONS, Anne Layne-Farrar, March 3, 2009 available at www.myprivateballot.com. The study states, "The precise effect on unemployment will depend on the degree to which EFCA increases union density, but for every 3 percentage points gained in union membership through card checks and mandatory arbitration, the following year's unemployment rate is predicted to increase by 1 percentage point and job creation is predicted to fall by around 1.5 million jobs…. [if] EFCA were to increase the percentage of private sector union membership by between 5 and 10 percentage points, as some have suggested, my analysis indicates that unemployment would increase by 2.3 to 5.4 million in the following year and the unemployment rate would increase by 1.5 to 3.5 percentage points in the following year." "[T]he effect of this increase in union membership would be to raise the unemployment rate by between 8.6% and 9.2% by 2018."

For several years now, unions and their allies in the Administration have been forcing the real-world equivalent policies of EFCA through the NLRB and DOL, and the intended impact is the same—to force increases in union density at the expense of informed employee choice, jobs, and economic prosperity. Lawmakers must stop this attack on the economy. Jobs should not be sacrificed for political payback or to ensure future political support from unions.[3]

Specialty Healthcare

Gerrymandered Elections, Fractured Workplaces & Micro-Unions The most significant of the Board's relatively recent actions was the August 26, 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, 357 NLRB No. 83 (2011). This ruling sets the stage for the gerrymandering of elections and the fracturing of the workplace through organization of "micro-unions." The Board's decision radically changes the standard for determining an appropriate bargaining unit for all of the estimated six million workplaces covered by the National Labor Relations Act. The key issue is the extent to which a union may organize a group of employees into a bargaining unit without due consideration of interests those employees share with other employees outside the proposed unit. The NLRB has historically applied a clear set of standards in determining a unit appropriate for bargaining. The *Specialty Healthcare* decision turns those standards upside down. The impact on employers, who could face a proliferation of micro-unions with competing needs and demands, and employees, who could lose out on opportunities to build skills and advance their careers, will be significant.

Gerrymandering Elections The decision makes it easier for unions to organize by allowing them to cherry pick a unit composed of a subset of employees most likely to support the union with little regard for whether those employees constitute a practical unit. As a result, unions will often organize by forming more discrete bargaining units that exclude similarly situated employees who oppose unionization, effectively disenfranchising them. For example, a union may choose to organize poker dealers at a casino rather than all dealers, because it knows the poker dealers support the union, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. In a retail store, a union may organize just the "greeters" rather than all employees interacting with customers even though they have similar pay scales and work duties, because those employees do not want a union. This is in direct contrast to previous law, under which bargaining units generally had to include employees that shared a community of interest. Before *Specialty Healthcare*, discrete units were only permissible where the employees in the proposed unit had interests that were "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." This was intended to prevent the proliferation of "fractured bargaining units" or "micro-unions."

Multiple Micro-Unions Fracturing the Workplace Under *Specialty Healthcare* with the potential for micro-unions/fractured units, businesses may have to manage multiple discrete units of similarly situated employees with increased chances of work stoppages and potentially different pay scales, benefits, work rules, bargaining schedules, and grievance processes for similarly situated employees (e.g., different collective bargaining agreements for poker and blackjack dealers, cashiers and stockers, manufacturing production employees with similar skills

[3] Several articles highlight past expense by unions and threats to withhold future political support without sufficient payback. http://www.foxnews.com/politics/2011/05/20/afl-cio-chief-warning-dems-unions-lose-support/

but working on different machines, etc.). This could overwhelm businesses, particularly small businesses, with administrative requirements forcing them into a constant state of bargaining. Imagine a small business franchise owner with four fast food restaurants managing eight or more separate bargaining relationships with different unions or a manufacturer with a different unit for each different piece of machinery in the facility. In addition, any one of these micro-unions could cripple the business with work stoppages, creating a situation where a union representing a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families.

U.S. Competition and Employee Opportunities Crippled as Micro-Unions Prevent Flexible Staffing Fractured units also would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible staffing as employees could not perform work assigned to another unit. The impact on business productivity and competitiveness would be significant. Employees also would suffer from reduced job opportunities as promotions and transfers between different units would be difficult. Global competition is challenging enough without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

In allowing for the formation of micro-unions, the NLRB has overturned precedent that was well established, worked well for employers and workers, and had been virtually unchallenged. Indeed, the ruling goes far beyond what was actually necessary to decide the case. Further, there was almost no urging from any interested party for the sort of sweeping overhaul the Board carried out. The Board, on its own initiative, intending to use the case as a platform for its activist agenda, solicited input from the public as to whether it should overhaul the unit determination process—and received almost no input encouraging such changes. While this clear lack of need and support for changes should have ended the initiative, the Board was determined to turn unit determination upside down and blatantly hand unions an organizing tool that almost certainly violates the NLRA, which states that a union's choice of which employees to organize cannot be the determinative factor in considering unit appropriateness. This is in effect exactly what *Specialty Healthcare* does. In fact, in 1995 a Federal Court of Appeals rejected the very standard put forth by the NLRB in *Specialty Healthcare* for this very reason (the 4th Circuit in *NLRB v. Lundy Packing Company*).

Massive Changes to Established Law The NLRB's new procedure involves first determining that a proposed group is readily identifiable and has a sufficient community of interest among its own members. If so, then in order to challenge the unit determination and have other employees added to the group, an employer has to prove employees in the larger unit "share an overwhelming community of interest," which means the interests of the employee must completely overlap. The majority of the Board characterized that standard as what has always applied outside of the health care industry (which is subject to separate, specific unit determination rules). As dissenting member Brian Hayes pointed out, however, the "overwhelming" component of the standard had previously been applied only in an extremely narrow and rare situation, called an accretion, where the issue is whether a newly established group of employees (a newly-created department in an existing union facility, for example) should be added to an existing represented unit without benefit of a vote. The heightened standard of an "overwhelming" community of interest has been applied to safeguard the inclusion of employees in a unit with no election. In *Specialty Healthcare*, however, the majority glosses over this crucial point to apply the higher standard in situations where employees will be able to vote.

The Supreme Court has not considered the issue presented in *Specialty Healthcare*, but one court in 1995 (the 4th Circuit in *NLRB v. Lundy Packing Company*) struck down application of the "overwhelming community of interest" standard on the grounds that it violated the law and was justifiable only in the context of an accretion. While another court in 2008 (the DC Circuit in *Blue Man Vegas v. NLRB*) indicated application of the "overwhelming" standard was permissible in the case before it, the court did so only because the "Board's finding that the proposed unit was appropriate …was certainly reasonable and supported by substantial evidence" and in applying the standard the Board "did not give controlling weight to the extent of the Union's organization." Furthermore, as member Hayes points out in his dissent in *Specialty Healthcare,* there are flaws in the reasoning of *Blue Man*.

***Specialty Healthcare's* Immediate Impact** Unfortunately, initial hopes for relief through judicial review of *Specialty Healthcare* have not been realized. After the case was originally decided in August 2011, the employer refused to bargain with the union, claiming that the bargaining unit as determined by the Board was inappropriate. The union filed an unfair labor practice charge against the employer and on December 30, 2011, the Board ordered the employer to bargain with the union. A federal appeals court sided with the Board. Largely due to a change in ownership of the health and rehabilitation center, there was no appeal to the Supreme Court.

In the meantime, the Board and its regional offices have already begun implementing this disastrous decision. For example, in *DTG Operations*, the union petitioned for a unit of 31 rental service agents at a car rental facility. The Regional Director dismissed the petition, determining that the appropriate unit for bargaining was a wall-to-wall unit containing all 109 hourly employees due to the employees' functional integration. The Board applied *Specialty Healthcare* and reversed the dismissal, ruling the other hourly workers did not share an *overwhelming* community of interest with the rental service agents.

In his dissent, Member Hayes noted *DTG Operations* provides confirmation that *Specialty Healthcare* will lead to "balkanization" of the workforce. "As long as a union does not make the mistake of petitioning for a unit that consists of only a part of a group of employees in a particular classification, department, or function… it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible."

Other cases are currently pending before the Board. For example, retailer Bergdorf Goodman is fighting a Regional Director's Decision and Direction of Election ruling under *Specialty Healthcare* that sales employees in the women's shoe department—as opposed to all sales employees—constituted an appropriate bargaining unit for purposes of a representation election. In a similar case, Macy's is fighting an Acting Regional Director's ruling that full and part-time employees in the fragrance department of a single store constitute an appropriate bargaining unit. This ruling came approximately a year and a half after the petitioning union had lost an election involving a proposed unit that included all store sales employees. *Macy's* thus makes clear the insidious effect of *Specialty Healthcare*, allowing unions to divide and conquer, picking apart groups of employees who for decades would have been considered a single bargaining unit and focusing on isolated sub-groups.

CDW continues to fight for a return to a more balanced election process by filing *Amicus* briefs with the Board and the courts as these disturbing cases follow a course most likely leading to the Supreme Court.

Lamons Gasket Company - NLRB Strips Away Election Rights

The NLRB issued its decision in *Lamons Gasket Company* on August 26, 2011, over-ruling its 2007 decision in *Dana Corp.* Over the strong dissent of Member Brian Hayes, the majority threw out *Dana,* eliminating the opportunity for an employee to immediately challenge card check with a secret ballot election. Under *Dana*, when an employer voluntarily recognized a union to represent a group of employees via card check and without a secret ballot election, employers were to post a notice (referred to as a *Dana* Notice), telling employees about the recognition and informing them that they (or a rival union) had 45 days to file a petition for a secret ballot election. Employees not wanting a union could seek decertification, and rival unions could seek an election to replace the original. After the 45 days, employees would be barred from challenging the election for up to a year[4] and if a contract was signed, for up to four years.[5]

Over the four years before *Lamons Gasket*, the Board received over 1,300 requests for *Dana* notices, had 102 election petitions filed, and held 62 elections. In 17 of those elections, employees voted to oust the voluntarily recognized union, including two cases where a different union was chosen. The Board's majority contended that 17 elections out of over 1,300 notice requests showed that there was very little need for the *Dana* ruling. Dissenting member Hayes, however, focused on the fact that in about 25% of all elections held, the employees voted against the voluntarily recognized union. This provides a strong indication that many employees who sign recognition cards would vote against unionization if given the chance.

The notices themselves were a point of contention for the majority, which characterized them as contrary to the Board's long-standing practices and improperly implying that the Board was biased against voluntary recognition. In its discussion, the Board overlooked the fact that an official Board notice is required when a union has filed a petition for election, as well as its own recent rule (discussed below) requiring employers to post notices describing organizing rights and explaining how to contact the NLRB. As member Hayes pointed out in his dissent, the Board has no problem requiring postings and upholding traditions only when they are likely to assist in union organizing.

The ruling is all the more significant because the election bar imposed would last from approximately six months to as much as four years after voluntary recognition. The Board ruled that after voluntary recognition an election is barred, in the absence of agreement on a contract, for no less than six and no more than twelve months after the parties' first bargaining session. If an agreement is reached, the bar applies until the agreement expires. For contracts of short duration (under three years), the bar would end at expiration. For contracts longer than three years, the Board applies an "administratively burdensome" rule, under which a petition may be

[4] The National Labor Relations Act imposes an "election bar" where new elections are barred for one year after a conclusive NLRB election. The NLRB has extended this bar in situations where an employer voluntarily recognizes a union based on cards. The *Dana* case ensured employees facing card check were afforded the limited opportunity within the 45 days for a secret ballot election before the bar took effect.

[5] A collective bargaining agreement may serve as a bar to an election for three years.

filed even though the contract has not yet expired. For contracts of three years' duration or longer, this would result in a bar of about four years given that, absent unfair labor practice charges (which would themselves have an effect on the ability to petition for an election), a first agreement would normally be reached within the first year after recognition.

The decision represents another step toward an agency-created EFCA.

Propaganda – The NLRB's Biased Notice Requirement

This issue falls into the category of disaster narrowly averted and illustrates the importance of continued opposition to the Board's anti-employer crusade. In January of 2014, the NLRB announced it would not seek Supreme Court review of 2013 decisions by the federal appeals courts for the D.C. Circuit and the 4th Circuit striking down its attempt to require all employers subject to the NLRA to post detailed notices that amounted to government-sponsored advertisements for unionization.

While the reasoning of the two appellate courts differed slightly, the decisions establish the Board lacks authority to impose requirements on employers generally. The Board may only act with respect to a given employer if an unfair labor practice charge or petition for election has been filed.

NLRB Proposed Rule on Ambush Elections

In December 2011, the Board's two Democratic members, then Board Member and former SEIU lawyer Craig Becker and Chair Mark Pearce issued the "ambush" election rule. The proposed changes to the Board's long-standing (and long effective) election procedures, as described in detail below, were wide-sweeping and universally calculated to impose draconian requirements on employers, including providing unions with comprehensive personal information about employees, while forcing elections on a time table virtually guaranteed to deprive employees of any information beyond union propaganda. After enormous public outcry, the Board implemented a watered-down version of the changes, only to have its actions ruled void for lack of a quorum of its members.

In February of 2014, a newly-constituted Board issued a new Proposed Rulemaking, offering changes to the election procedure almost identical to those originally considered in 2011. The proposed changes are as follows:

- requiring pre-election hearings be held within seven days of the filing of the petition;
- requiring employers to provide the union organizers all eligible employees' names, home addresses, phone numbers, email addresses, work locations, shifts and job classifications;
- requiring employers to draft a "statement of position" to be presented at the pre-election hearing, setting forth their position on all relevant legal issues, with any issues not raised deemed waived;
- limiting the issues that may be litigated before an election, including employee eligibility, and dispensing with post-hearing briefs absent "special permission" from the hearing officer;
- eliminating pre-election Board review of a Regional Director's decision; and

- permitting electronic filing of election petitions, and potentially electronic showing of interest (in other words, dispensing with employee signatures on union cards).

The Board has claimed the proposed changes are intended to streamline procedures to determine whether or not employees wish to be represented by a union. The total effect of the proposed rule, however, would be to drastically alter the entire election process in favor of unions by greatly limiting communication between employers and employees about the general disadvantages of unions or about a specific union attempting to organize the workplace. The proposal would trample businesses' free speech and due process rights while also greatly limiting worker access to information needed to make an informed choice about union representation. The changes are unnecessary and fly in the face of what the Supreme Court has called "congressional intent to encourage free debate on issues dividing labor and management." The proposal is nothing more than a naked attempt to promote unionization by silencing the opposition—a concept former member Becker has now supported in an article he published in the past. The latest proposed rule is open for public comment through April 7, 2014.

More details on the possible impact of the proposal are set forth below.

The Ambush These new procedures could result in union representation elections held in as few as 10 days after the filing of a union petition. The NLRB's own statistics reveal that in 2010, the average time to election was 31 days, with close to 95% of elections occurring within 56 days. The current election time frames are not only reasonable but permit employees time to make an informed decision, which would not be possible under the proposed timetables. In fact, in other situations involving "group" employee issues, Congress requires employees be given at least 45 days to review relevant information in order to make a "knowing and voluntary" decision, such as under the Older Workers Benefit Protection Act when employees evaluate whether to sign an age discrimination release in the context of a program offered to a group or class of employees.

Given that union organizers typically lobby employees for months outside the workplace without an employer's knowledge, these "ambush" elections would often result in employees' receiving only half the story. They would hear promises of raises and benefits unions have no way of guaranteeing, without an opportunity for the employer to explain its position and the possible inaccuracies put forward by the union. Ambush elections would be particularly damaging to small businesses, effectively eliminating any measure of due process by forcing elections before most employers could even understand what was happening, let alone obtain legal advice and representation.

Based on the legislative history of the 1959 amendments to the National Labor Relations Act, it is clear Congress believed an election period of at least 30 days was necessary to adequately assure employees the "fullest freedom" in exercising their right to choose whether or not they wish to be represented by a union. As then Senator John F. Kennedy explained, a 30-day period before any election was a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." Senator Kennedy stated, "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints."

Trampling Due Process Members Miscimarra and Johnson, dissenting to the new NPRM, note "the NPRM would eliminate pre-election hearings as to important issues at the discretion of the hearing officer, and this would be compounded by making any post-election review by the Board discretionary. Thus, the NPRM contemplates the Board may never review pre- or post-election decisions of the hearing officer or the Regional Director." The rule would in many cases result in elections where no one—not the employer, the union, nor the employees—knows which employees will be in any final bargaining unit that could result from the election. In a situation where an employer contends that some employees at issue are supervisors, the effect of the new rule would be to virtually guarantee improper influence on properly eligible employees who would be forced into the polling place along-side their bosses. Miscimarra and Johnson characterize the scheme as "election now, hearing later," and "vote now, understand later."

Invasion of Privacy The Board's proposed rules would require that employers give the union—in addition to names and addresses—employee phone numbers, email addresses, work locations, and shift and classification details. The Board has not specified whether companies would have to supply employees' home or work contact information (or both). Nor has the Board offered protection for employees from being barraged with emails and phone calls from union organizers paid to do so. Many employees have unlisted phone numbers, often due to concerns over harassment or domestic violence, and use personal email addresses for online shopping or banking and don't want these emails publicized for fear of identity theft. Forcing companies to disclose this information is irresponsible, dangerous and unfair to employees. Providing work phone numbers and emails would almost guarantee solicitation and distraction during working time. This has never been allowed in union campaigns and would disrupt and harm business operations and employees' lives. Although the Board justifies the need for this additional information by citing the rise of electronic communications, it is worth noting that while telephones clearly existed in 1966, the Board ruled at that time that names and addresses were sufficient.

Responses to the Board's Attempts to Enact an Ambush Rule In response to the Board's later struck-down implementation of a scaled-back final rule, on February 16, 2012, Senators Enzi and Isakson introduced S. J. Res 36 and Representatives Kline, Roe and Gingrey introduced H. J. Res. 103. Both resolutions provided for congressional disapproval and nullification of the rule.

In addition, on November 30, 2011, the House passed the Workforce Democracy and Fairness Act (H.R. 3094), which addressed some of the major issues resulting from the Board's proposed regulation. More specifically, the bill:

- Provided for a fair hearing process by allowing employers at least 14 days to prepare their case for the Board and allowing employers to raise issues during the hearing;

- Prohibited ambush elections by requiring a campaign period of at least 35 days prior to an election, guaranteeing workers have an opportunity to hear both sides of the unionization debate;

- Reinstated the long-standing criteria the Board has traditionally used for determining the appropriateness of a proposed bargaining unit; and

- Allowed employees to choose how they may be contacted by union organizers.

Unfortunately, after being approved by the House, the bill stalled in the Senate.

On June 13, 2013, Representative Tom Price introduced H.R. 2347, the Representation Fairness Restoration Act, a bill still pending which would:

- Require the Board to determine an appropriate bargaining unit before an election; and

- Set a standard for determining a sufficient community of interest in determining the appropriateness of a unit (addressing *Specialty Healthcare*).

DOL's "Gag" Rule

In the fall of 2013 the DOL announced that in March of 2014 it will issue a final rule with respect to its rules on reporting the use of "persuaders." The announcement refers to a June 21, 2011 Notice of Proposed Rulemaking that would drastically change certain reporting requirements relating to the use of paid "persuaders" by employers. Since 1959 the Labor Management Reporting and Disclosure Act (LMRDA) has contained a requirement that employers file certain reports with the DOL if they use outside labor consultants to "persuade" their employees with respect to collective bargaining issues. The law was adopted in large part to "control the activities of management middlemen who flitted about the country on behalf of employers interfering with retraining and coercing employees in the exercise of the right to organize and bargain collectively…" The law contains an exception under which no reporting is required when consultants or outside attorneys provide "advice" to the employer rather than directly interacting with employees for purposes of persuasion. Since the early 1960s, DOL has taken the position that advice includes situations where consultants or attorneys provide employers with materials and draft speeches to be used to educate employees. In these situations, DOL mandated no reporting requirement, as long as the consultant did not directly interact with the employees. DOL's position has been that the prepared materials constitute "advice," because the employer is free to accept or reject the written material prepared by the consultant. DOL is seeking to reverse this long-held position, narrowing the advice exception (thus broadening the reporting requirement) and expanding the information that must be reported to the government when the reporting requirement is triggered. The DOL also announced that in October of 2014, it would issue a final rule on changes to form LM-21, the form used to carry out required persuader reporting. This, of course, would nonsensically leave a new set of reporting requirements in place with no indication of exactly what would be required on the reporting form.

Interfering with the Right to Legal Counsel The net effect of the proposed rule changes would be to discourage employers, particularly smaller employers, from seeking legal representation in the course of a union campaign. Under the requirements, employers and consultants would need to report details of the agreement, information about the employees affected, and all related financial data. It would also severely penalize employers, consultants, and attorneys who inadvertently fail to report activities and agreements that for nearly five decades had fallen squarely within the advice exception. In fact, certain violations could result in criminal sanctions.

The American Bar Association (ABA) filed comments opposing DOL's proposal for this very reason. The ABA specifically said the following about the rule:

> *The proposed rule threatens to undermine Congress' intent by nullifying the advice exemption included in the original act and, if adopted, the rule would require lawyers to disclose a substantial amount of confidential client information, including the identity of the client, the general nature of the legal representation and a description of the legal tasks performed. The proposed rule also would require lawyers to disclose a great deal of confidential financial information about clients that is unrelated to persuader activities the act intends to monitor.*
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> *The ABA also urges the department to withdraw or modify the proposed rule-and reaffirm its longstanding interpretation of the advice exemption-because the new rule threatens to violate the ethical duties of lawyers outlined in the ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information." ABA Model Rule 1.6 and the many binding state rules of professional conduct that closely track the ABA Model Rule protect the types of confidential client information that the department would have lawyers disclose.*
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> *The department's proposed rule could also seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel. To encourage trust and candor between the client and its lawyer, their exchanges must be confidential. "Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice," ABA President Bill Robinson wrote. By requiring clients and their lawyers to report confidential client information to the government, Robinson warned, "the Proposed Rule could very well discourage many employers from seeking the expert legal representation they need."*[6]

Education is Not Intimidation There is a fundamental difference between intimidation and education. While the LMRDA and NLRA are both designed to address misconduct and intimidation by unions and employers, education about and debate over the advantages and disadvantages of union representation are central to our nation's labor policy. As the Supreme Court has noted, the "NLRA as a whole, 'favor[s] uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" Yet throughout the DOL's proposal it equates any communication by employers about the potential disadvantages of unions with intimidation. In fact, the proposal goes so far that even something as innocuous as training or providing materials in a group seminar or conference for employers, could trigger reporting obligations.

DOL Relies on Defunct EFCA Studies to Support Change In justifying its proposed changes, DOL largely relies on the same union-financed, defunct studies used to support EFCA.[7] Many of the "studies," which claim widespread coercion by employers, rely heavily on anecdotal data obtained from union organizers—hardly an unbiased source. Others seem to suggest any employer communications with employees about unions is coercive, going so far as to condemn

[6] See http://www.abanow.org/2011/09/aba-opposes-dol-proposed-rule-on-persuader-activities/

[7] See www.uschamber.com%2Fsites%2Fdefault%2Ffiles%2Freports%2F0908_unionstudies_coercion.pdf.

employers for informing employees of simple facts such as union dues requirements and other basic consequences of unionization.

Letting Union Lies Go Unanswered What DOL's proposed rules would do is hamstring the legitimate and important rights of employers to communicate with employees about the facts of union representation. The law has traditionally allowed unions to exaggerate, promise benefits they may not be able to deliver, and essentially lie to employees in organizing campaigns. In part this has been justified by the fact that election time-frames and employer free speech rights, together with stricter restrictions on what employers are allowed to say, will ensure that an organizer's inaccurate statements can be countered by employers truthfully conveying the facts. The DOL's proposed rule would effectively allow months of exaggerations, undeliverable promises, and outright lies to precede the NLRB's proposed quickie elections, while putting a gag on law-abiding employers.