The Heritage Foundation
LEADERSHIP FOR AMERICA

BACKGROUNDER

No. 2838 | AUGUST 26, 2013

Labor Department's Persuader Rule Undermines Employers' Rights and Threatens the Attorney–Client Relationship

John G. Malcolm

Abstract

Union membership in America is in decline, plunging from 20 percent of workers in 1983 to 11.3 percent (and only 6.6 percent among private-sector workers) in 2012. It is no secret that the Obama Administration is working overtime to reverse this trend. To this end, the Administration is now pushing a radical reinterpretation of an obscure, 50-year-old labor law that would give unions an edge by making it harder for employers to receive legal advice about labor and employment issues. This new interpretation runs contrary to congressional intent and will impose enormous costs on American businesses. It also poses a serious threat to the confidential nature of the attorney–client relationship and sacrifices the stability, even-handedness, and efficacy of the current rule.

Union membership in America is in decline, plunging from 20 percent of workers in 1983 to 11.3 percent (and only 6.6 percent among private-sector workers) in 2012.[1] It is no secret that the Obama Administration is working overtime to reverse this trend.[2]

The National Labor Relations Board (NLRB) has become a powerful instrument in the hands of an Administration eager to further progressive policies and to support unions that made significant campaign contributions to President Obama's election and re-election efforts.[3] For example, the NLRB promulgated the poster rule requiring employers to post a list of "worker rights" in the workplace that essentially operated as pro-union advertising. This list did not include the workers' right to resist unionization or to object to the use of union dues for political activities.[4] Another

Key Points

- Union membership in America is in decline, plunging from 20 percent of workers in 1983 to 11.3 percent (only 6.6 percent among private sector workers) in 2012.
- To reverse this trend, the Administration is now pushing a radical reinterpretation of an obscure, 50-year-old labor law that would give unions an advantage by making it harder for employers to receive legal advice about labor and employment issues.
- This new interpretation—the persuader rule—runs contrary to congressional intent and will impose enormous costs on American businesses.
- This proposed change also poses a serious threat to the confidential nature of the attorney–client relationship and sacrifices the stability, even-handedness, and efficacy of the current rule.
- The Department of Labor should withdraw its proposal and hold steady to the functional, fair approach that has worked well and has been endorsed by every Administration since 1962.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2838**
Produced by the Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

rule promulgated by the NLRB under the Obama Administration required snap elections for union representation in a mere 15 to 20 days instead of the average of 39 days, making it harder for employers to navigate the election process and easier for unions to deceive workers.[5] Both of these efforts have been blocked by courts.[6]

Similarly, the NLRB issued a ruling last year allowing small, distinct groups of employees within companies (such as the men's clothing department of a large department store) to form "micro unions."[7]

Now the Obama Administration's Department of Labor (DOL) is proposing a radical reinterpretation of a relatively obscure, 50-year-old labor law that would give unions an edge by making it harder for employers to receive legal advice about labor and employment issues.[8] Whether by coincidence or not, the Department first proposed the new rule, known as the "persuader rule," six months after the Employee Free Choice Act failed to pass the Democrat-controlled 111th Congress in 2009–2010.[9] This act would have eliminated a worker's right to cast a secret ballot in union elections and imposed mandatory arbitration for contract disputes between unions and newly unionized firms.

The proposed persuader rule flies in the face of congressional intent and would upend five decades of established federal labor policy.

> **The Department of Labor's proposed persuader rule flies in the face of congressional intent and would upend five decades of established federal labor policy.**

Since 1959, the Labor Management Reporting and Disclosure Act[10] (LMRDA), commonly known as the Landrum–Griffin Act, has protected workers who want to unionize by ensuring that their employer cannot organize a stealth anti-union campaign. Under an administrative rule promulgated by the Department

1. *See* Bureau of Labor Statistics, *available at* http://www.bls.gov/news.release/union2.nr0.htm.
2. *See generally*, Staff Rep., H. Comm. on Oversight & Gov. Reform, President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional Union Advocate (2012), *available at* http://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf; Raymond J. LaJeunesse, *Union Organizing and the NLRB Under President Obama*, Federalist Society (Feb. 6, 2013), http://www.fed-soc.org/publications/detail/union-organizing-and-the-nlrb-under-president-obama.
3. Squire Sanders, *Management, Buckle Up: It's Going to Be a Roller Coaster Over the Next Four Years. A Review of the NLRB's Holiday Gift to Unions and Employees* 1–2 (Jan. 2013), *available at* http://www.squiresanders.com/files/Publication/dd3e29c0-65b9-42b5-b94b-a7fa876f8e91/Presentation/PublicationAttachment/1bd9ccd1-d6c3-465e-b7dc-f0240fbb41b7/A-Review-of-The-NLRBs-Holiday-Gift-to-Unions-and-Employees.pdf.
4. Notification of Employees Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (codified at 29 CFR pt. 104).
5. Representation—Case Procedures, 76 Fed. Reg. 36812 (June 22, 2011) (codified at 29 CFR pts. 101, 102, and 103); Coalition for a Democratic Workplace, *Congressional Review Act and NLRB's Ambush Election Rule*, *available at* http://myprivateballot.com/wp-content/uploads/2012/02/Fact-Sheet-Congressional-Review-Act-and-Ambush-Election-.pdf.
6. In 2012, a federal district court in the District of Columbia struck down the "ambush" election rule because the NLRB did not have a quorum necessary to enact the new rule. Chamber of Commerce v. NLRB, No. 12-5250 (D.C. Cir. 2013). The "ambush" case is now on appeal with the Court of Appeals for the D.C. Circuit. *See* Coalition for a Democratic Workplace, *Congressional Review*, *supra* note 5. On May 7, 2013, the U.S. Court of Appeals for the D.C. Circuit ruled that the entire "poster rule" was invalid because its enforcement mechanisms violated the NLRA. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013).
7. *See* National Labor Relations Board (Region 2) decision in Case No. 02-RC-076954, *available at* http://www.scribd.com/doc/94245228/NLRB-Region-Issues-Micro-Union-Decision-in-Bergdorf-Goodman; Divide, Conquer & Destroy: NLRB Region Unleashes Micro-Unit On Retailer, *available at* http://laborunionreport.com/2012/05/divide-conquer-destroy-nlrb-region-unleashes-micro-unit-on-retailer/.
8. Labor–Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, 76 Fed. Reg. 36178 (June 21, 2011) (to be codified at 29 C.F.R. pts. 405 and 406).
9. *See* Ben James, *Unions May Look to NLRB If EFCA Fails to Pass*, Law360 (July 31, 2009, 1:43 PM), http://www.law360.com/articles/107126/unions-may-look-to-nlrb-if-efca-fails-to-pass; Richard A. Epstein, *One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail* 1 (John M. Olin Law & Economics, Working Paper No. 528, 2010), *available at* http://www.law.uchicago.edu/files/file/528-rae-free-choice.pdf.
10. Labor–Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401–531 (2012)). Federal regulations implementing the LMRDA are found in Chapter IV of Title 29 of the Code of Federal Regulations.

of Labor to implement Section 203 of the LMRDA, an employer must disclose certain information to the DOL when it hires someone to communicate with employees about unionization and labor-related issues.[11] For example, if a company is concerned that its workers might unionize and calls in a consultant to present information to employees that is designed to persuade the employers not to unionize, the company must report that it has hired a persuader and the amount paid to the persuader for his services. In June 2011, the DOL stated its belief that companies have been underreporting those relationships.[12]

The LMRDA's reporting requirements are paired with a broad advice exemption that reflects Congress's intent to safeguard the confidentiality of a lawyer's advice to his employer clients.[13] The Department of Labor now seeks to redefine what has been understood to constitute "advice" for over 50 years and, in the process, thwart the will of Congress and the clear intent of the law.

The proposed rule's dramatic narrowing of exempted communications between lawyers and their clients directly threatens the attorney–client relationship by exposing private and confidential information.[14] Just as troubling, attorneys who fail to comply with the vague provisions of the proposed interpretation will face the threat of civil or criminal penalties.[15]

The impetus behind this maneuver is clear: to force a company and its lawyer-consultant to make public confidential information that could later be used by a union against the employer—something unions do often and well.[16] The net effect of the proposed persuader rule may well be a marked reduction in the willingness of employers to seek legal counsel, leaving employers increasingly vulnerable to costly lawsuits for unwitting violations of labor laws and regulations.[17]

Background

The LMRDA resulted from a series of sensational, often televised hearings of the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee). Although much of its three-year investigation involved exposing evidence of union corruption, the McClellan Committee also heard testimony regarding the use of so-called middlemen, unscrupulous labor consultants who concealed their true identities to spy on pro-union activities.

Middlemen were known to organize "vote no" campaigns, dissuade workers from exercising their statutory rights, and even create purported company unions by steering sweetheart deals or making loans or other direct payments to union organizers and leaders who would then negotiate substandard

11. 29 C.F.R. pts. 405 and 406 (implementing 29 U.S.C. § 433(b) (2012)). It is worth noting that employers are free to express their views about unions to their employees. Section 8(c) of the National Labor Relations Act, codified at 29 U.S.C. § 158(c), provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." The Supreme Court recently reaffirmed in *Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008), that Section 8(c) expresses a congressional policy of "favoring uninhibited, robust, and wide-open debate" on matters relating to unionization so long as that does not include unlawful speech or conduct.
12. 76 Fed. Reg., at 36186–87.
13. *See, e.g.*, Int'l Union, United Auto Workers v. Dole, 869 F.2d 616, 618 (D.C. Cir. 1989) ("Congress intended to grant a broad scope to the term 'advice.'" (citing H.R. Rep. No. 1147 (1959) (Conf. Rep.), *reprinted in* 1959 U.S.C.C.A.N. 2503, 2505)).
14. *See* Price v. Wirtz, 412 F.2d 647, 654 (5th Cir. 1969) (Dyer, J., dissenting); Letter from the American Bar Association to Andrew R. Davis, Chief of the Division of Interpretation & Standards, Office of Labor–Management Standards, U.S. Department of Labor, at 2 (Sept. 21, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011sep21_dolpersuaderrule_c.authcheckdam.pdf.
15. A lawyer and managing partner of a law firm that provides persuader advice can face up to a year in jail and a $10,000 penalty for failure to file the required forms or for filing them incorrectly. 29 U.S.C. § 439.
16. *See, e.g.*, James Sherk, *Unions Use Corporate Campaigns to Circumvent Employees' Right to Vote*, Heritage Foundation WebMemo No. 1418 (Apr. 9, 2007), http://www.heritage.org/research/reports/2007/04/unions-use-corporate-campaigns-to-circumvent-employees-right-to-vote; Carl Horowitz, *Wrecking Sodexo: Another Union "Corporate Campaign*," Townhall (July 30, 2011), http://townhall.com/columnists/carlhorowitz/2011/07/30/wrecking_sodexo__another_union_corporate_campaign/page/full. *See generally* Jarol B. Manheim, The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation (2001); David A. Bego, The Devil at Our Doorstep (2012).
17. *See* Diana Furchtgott-Roth, *The High Costs of Proposed New Labor-Law Regulations*, Manhattan Institute (April 2013), *available at* http://www.manhattan-institute.org/html/ib_21.htm#.Ue7VL22wXjY.

union contracts.[18] This type of stealth anti-union activity had an obvious and negative impact on labor relations.

To correct this problem, Congress drafted reasonable reporting requirements intended to safeguard workers by exposing the sources and any bias of the information they were receiving. As detailed in Section 203(b),[19] these requirements applied to:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly
>
> (1) 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; or
>
> (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.

Under the rules promulgated by the Department of Labor to implement Section 203, an attorney or consultant must file an LM-20 report within 30 days of entering into an agreement to provide persuader activities, as well as an annual LM-21 report including receipts and disbursements.[20] Section 203(a) contains a similar mandate for employers.[21]

Together, these sections lay out a reporting and disclosure scheme with the clear goal of protecting workers from improper or otherwise deceptive labor relations activities. These reports require lawyers and their employer clients to disclose a substantial amount of confidential information, including the existence of an attorney–client relationship, identity of the client, general nature of the legal representation, any fees paid or other disbursements made, and a description of the legal tasks performed.[22]

Congress did not intend to create a reporting scheme of boundless scope. It wisely placed restrictions on this reporting scheme that were intended to protect certain types of communications.

However, Congress did not intend to create a reporting scheme of boundless scope. It wisely placed restrictions on this reporting scheme that were intended to protect certain types of communications. The report of the Senate Committee on Labor and Public Welfare regarding the LMRDA states:

> The committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations and do not engage in activities of the type listed in section [2]03(b).[23]

In short, Congress recognized that labor relations consultants could fall into two camps, and only those actively and directly involved in employee

18. *See, e.g.*, S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2318–27. The evidence of misconduct focused largely on the activities of Nathan Shefferman and his consulting firm, Labor Relations Associates of Chicago, Inc.
19. Codified at 29 U.S.C. § 433(b).
20. 29 C.F.R. § 406.2 (LM-20 30-day Report); 29 C.F.R. § 406.3 (LM-21 Receipts Report).
21. 29 C.F.R. § 405.2–405.3 (employer annual report).
22. *See* U.S. Dep't of Labor, Instructions for Form LM-20 Agreement and Activities Report, *available at* http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-20_Instructions.pdf; U.S. Dep't of Labor, Form LM-20 Agreement and Activities Report, *available at* http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-20p.pdf; U.S. Dep't of Labor, Instructions for Form LM-21 Receipts and Disbursements Report, *available at* http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-21_Instructions.pdf; U.S. Dep't of Labor, Form LM-21 Receipts and Disbursements Report, *available at* http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-21p.pdf.
23. S. Rep. No. 187 (1959), 1959 WL 3884, *reprinted in* 1959 U.S.C.C.A.N. 2318, 2356.

persuasion should be subjected to the added burdens of the new reporting scheme.

To that end, Section 203(c) provided for a broad advice exemption excusing "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…."[24] Section 204 specifically protects the secrecy of the attorney–client privilege by providing that:

> Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney–client relationship.[25]

While the Labor Department's initial 1960 interpretation of Section 203's reporting requirements had been broad and vague,[26] the current interpretation stems from a 1962 memorandum by Solicitor of Labor Charles Donahue (the Donahue Memorandum) that sought to bring clarity and predictability to the reporting requirements.[27] Aside from a brief period in 2001, the Department has consistently interpreted the scope of the reporting requirements in line with the Donahue Memorandum for five decades.

Like many other areas of law, labor law is complicated, highly nuanced, and ever-changing and thus frequently necessitates legal consultation. When an employer retains a lawyer to provide advice and assistance in disputes with its employees—including helping the employer persuade employees about unionizing—the lawyer will ordinarily be asked to provide advice and services that most lawyers would commonly recognize as constituting the practice of law. The Labor Department has long recognized this natural tension between the LMRDA's broad reporting requirements and the equally broad advice exemption.

Seeking to resolve this tension and determine precisely what constituted advice, Donahue considered a range of hypothetical scenarios in which an action could be both a persuader activity under Section 203(b) and exempted advice under Section 203(c). To Donahue, the critical distinction between reportable conduct and exempted advice lay in whether "the employer is free to accept or reject the written material prepared for him and [whether] there is [any] indication that the middleman is operating under a deceptive arrangement with the employer…."[28]

Like many other areas of law, labor law is complicated, highly nuanced, and ever-changing and thus frequently necessitates legal consultation.

This recognition became the core of the Labor Department's two-part test to determine reportable activity. In a 1989 memorandum, Acting Deputy Assistant Secretary for Labor–Management Standards Mario A. Lauro, Jr., asserted that:

> [A] usual indication that an employer-consultant agreement is exempt is the fact that the consultant has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject.[29]

If a consultant–employer relationship is crafted to allow the consultant to engage with and persuade employees directly, the arrangement must be reported, but if the arrangement calls only for advice, it is

24. 29 U.S.C. § 433(c).
25. 29 U.S.C. § 434.
26. *Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption; Proposed Rule*, Lab. Relations Rep. (CCH) ¶ 9303 (June 22, 2011), 2011 WL 2662304.
27. *Id.*
28. 76 Fed. Reg. 36178, at 36180.
29. *Id.* at 36181.

exempt from the reporting requirements even if the "advice is embedded in a speech or statement prepared by the advisor to persuade."[30] In other words, if some action could theoretically be both persuader activity under Section 203(b) and advice as defined in Section 203(c), the advice exemption is the controlling portion of the statute.[31]

This arrangement preserved the confidentiality of contracts with lawyers and consultants who offered advice but did not deal directly with the work force—that is, it did until now.

The Proposed Change

In July 2011, the Labor Department announced a proposed reinterpretation of the advice exemption that would reverse this long-held understanding and drastically increase the types of activities that can be considered persuader conduct.[32] The Department now proposes to reject the current interpretation, "which distinguishes between direct and indirect contact and asks whether or not an employer is 'free to accept or reject' materials provided."[33] Instead, it has proposed redefining reportable persuader activities as "all actions, conduct, or communications that have a direct or indirect object to persuade employees."[34]

According to the Department, this change is necessary because the current interpretation conceals "agreements and arrangements between employers and labor consultants that involve certain persuader activity that Congress intended to be reported under the LMRDA."[35] Despite providing not a single concrete example to support this claim,[36] the Department has proposed the following rule:

> With respect to persuader agreements or arrangements, "advice" means an oral or written recommendation regarding a decision or a course of conduct. In contrast to advice, "persuader activity" refers to a consultant's 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 rights to organize or bargain collectively.*[37]

Under the Department's new interpretation, whether an attorney had any direct contact with employees does not matter; likewise, it is irrelevant whether the employer was free to accept or reject the material provided by the attorney. Further, though the Department is careful to assert that "[n]o report is required concerning an agreement or arrangement to *exclusively* provide advice to an employer, such as when a consultant exclusively counsels employer representatives on what they may lawfully say,"[38] the advice exemption would no longer govern any action that could theoretically qualify as advice and persuasion. Rather, the activity and any related confidential advice would be reportable even if it was intertwined with exempt advice.

For example, suppose an employer contacts his attorney seeking advice about how to deal with

30. *Id.* at 36180.

31. *See*, *e.g.*, Int'l Union, United Auto Workers v. Dole, 869 F.2d 616 (D.C. Cir. 1989).

32. 76 Fed. Reg. 36178. After the Labor Department issued its Notice of Proposed Rulemaking, it received over 6,000 comments from law firms, associations representing attorneys, companies, and other interested parties, and not a single company or business group supported the rule. Michael Lotito, *New Labor Secretary Must Withdraw the Persuader Rule*, Law360 (May 31, 2013, 12:24 PM), http://www.law360.com/articles/445452/new-labor-secretary-must-withdraw-the-persuader-rule.

33. 76 Fed. Reg 36182.

34. *Id.*

35. *Id.*

36. For an analysis of DOL's stated justifications for the proposed persuader rule, as well as a rebuttal of those arguments, see Letter from Bradford L. Livingston, Chair of the Labor and Employment Division of Seyfarth Shaw, LLP, to Andrew R. Davis, Chief of the Division of Interpretation & Standards, Office of Labor–Management Standards, U.S. Department of Labor (Sept. 20, 2011) (on file with author); Letter from Society for Human Resource Management to Andrew R. Davis, Chief of the Division of Interpretation & Standards, Office of Labor–Management Standards, U.S. Department of Labor (Sept. 21, 2011), *available at* http://www.scribd.com/doc/66333026/DOL-Comments-SHRM-Comments-On-The-DOL-s-Proposed-Persuader-Rule.

37. 76 Fed. Reg. 36182. (emphasis added).

38. *Id.* (emphasis added).

flash mobs of community groups and labor officials that have been engaging in demonstrations at its retail stores. The employer wants to know whether it can apply its "no trespass" rules to the demonstrators, seeks guidance for its supervisors as to how to handle the situation lawfully, and needs to devise a communications plan reminding employees of their obligations to customers and fellow workers and setting forth responses to employees' questions regarding the cause of the dispute and customers' questions about the company's position with respect to unions. Under the current interpretation, any advice the attorney provides would not be reportable, but under the proposed persuader rule, such intertwined advice would trigger the reporting requirement.

Proposed Change Inconsistent with Language and Intent of the LMRDA

The Labor Department's proposed persuader rule runs contrary to congressional intent and relies on a distorted reading of the statute itself.[39] In enacting the LMRDA, Congress targeted middlemen who engaged in subterfuge by working directly with employees to discourage their union organizing efforts.[40] There is no evidence that Congress intended to impose a broad and intrusive reporting requirement on attorneys hired by companies to provide advice on labor and employment issues. In order not to interfere with the traditional attorney–client relationship, Congress explicitly provided a broad advice exemption from the disclosure requirements contained in the statute.[41]

Moreover, as the Department of Labor concedes, it is clear that in enacting the LMRDA, "Congress intended to afford the same protection as that provided in the common-law attorney–client privilege…."[42] Yet the proposed rule disregards that the common-law definition of legal advice encompasses advice that is intertwined with non-legal advice. Courts have long recognized that in order to serve the public interest, a lawyer should act as more than just a "predictor of legal consequences." As a federal district court judge stated in the oft-cited opinion *United States v. United Shoe Mach. Corp.*:[43]

> His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

When a court reviews an agency's construction of a statute that the agency is charged with administering, the court must first look at the statutory text "to see whether Congress has spoken directly to the question at hand," and "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as

39. When a court reviews an agency's construction of a statute that the agency is charged with administering, the court first looks at the statutory text to see "whether Congress has spoken directly to the question at hand," and "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

40. S. Rep. No. 187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2318, 2323, 2326–28, 2356, 2388; *id.* at 2326 (The LMRDA was designed to target "middlemen flitting about the country" in order to "work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts.").

41. *See* Donovan v. Rose Law Firm, 768 F.2d 964, 970–71 (8th Cir. 1985) ("Since attorneys at law…do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney…who confined himself to giving advice [would not] be required to report." (citing S. Rep. No. 1684 (1958), Leg. Hist. (Labor) at 390)); Wirtz v. Fowler, 372 F.2d 315, 330 (5th Cir. 1966) (citing legislative history and stating that "[g]enerally it was felt that the giving of legal advice to employers was something inherently different from the exertion of persuasion on employees….").

42. Interpretation of "Advice" Exemption, 76 Fed. Reg. at 36192. Indeed, as discussed later in this paper, in enacting the LMRDA, Congress envisioned protecting confidential communications made in the course of a legitimate attorney–client relationship, not just the more narrow subset of communications recognized and protected by the attorney–client privilege. *But see* Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211, 1216 (6th Cir. 1985) ("Appellant contends that the attorney–client privilege codified in LMRDA section 204 is broader than the traditional attorney–client privilege. We find to the contrary, that in section 204 Congress intended to accord the same privilege as that provided by the common-law attorney–client privilege.").

43. 89 F. Supp. 357, 359 (D. Mass. 1950). *United Shoe* is cited as a leading opinion in Attorney–Corporate Client Privilege, § 3:28, at 201 (John W. Gergacz, ed., 3d ed. 2011).

well as the agency, must give effect to the unambiguously expressed intent of Congress."[44]

> **The proposed persuader rule expands the scope of reportable activities to include persuasive activities related to any "concerted activity," a seemingly broader term without statutory support.**

The fact that Sections 203(c) and 204 recognize that at least some advice that a lawyer provides to an employer client will be designed to help the employer to persuade employees on unionization issues further demonstrates the intent of Congress. If all of a lawyer's advice to an employer client were unrelated to persuader activities, such advice would simply not be covered by the statute; there would be no need to provide an advice exemption or to note that information lawfully communicated in the course of the attorney–client relationship is likewise exempted.

To achieve its goal of broad reporting, the Labor Department proposes in effect to nullify this exemption and excise it from the law. Such an approach, however, would contravene a basic principle of statutory interpretation: Statutes should be construed "so as to avoid rendering superfluous" any statutory language.[45]

Moreover, the LMRDA has traditionally been limited to union organizing and bargaining matters. The proposed persuader rule, however, expands the scope of reportable activities to include not only persuasive activities related to union organizing, as before, but also persuasive activities related to *any* "concerted activity,"[46] a seemingly broader term without statutory support.

Costs of Proposed Change Are Enormously High

Another reason to object to the Department of Labor's proposed rule change is the cost involved. The Obama Administration has estimated the total cost of the reinterpretation to be a mere $826,000 per year.[47] However, the House Committee on Government Oversight and Reform identified the proposed persuader rule as one of a handful of proposed regulations that would likely "choke economic expansion and job growth," potentially costing employers over $200 million a year.[48]

Additionally, Diana Furchtgott-Roth, former chief economist at the Department of Labor, estimates that the proposed rule could cost $7.5 billion to $10.6 billion during the first year of implementation and between $4.3 billion and $6.5 billion each year thereafter, bringing the total to approximately $60 billion over 10 years. And that is not even accounting for the indirect economic costs. The proposed rule would undoubtedly raise the cost of doing business in the United States by requiring employers to spend time, effort, and money learning the rule, researching its nebulous requirements, filling out forms, and reviewing countless business decisions and actions to see whether any of their employees performed a persuader act. Furchtgott-Roth predicts that these new burdens could lead

44. Resident Councils of Wash. v. Leavitt, 500 F.3d 1025, 130 (9th Cir. 2007) (quoting Chevron, 467 U.S. at 842–43).
45. Astoria Fed. Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); *see also* Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").
46. *See* 76 Fed. Reg. at 36191 (describing reportable activity under the proposed reinterpretation as "a lawyer or labor consultant [who] has gone beyond mere recommendation and has engaged in actions, conduct, or communications with the object to persuade employees, either directly or indirectly, about the employees' protected, *concerted activity*" and noting that "these activities, whether or not the consultant is in direct contact with the employees, trigger the duty to report." (emphasis added)); *see also* Mary Swanton, *DOL Proposal Could Force Choice Between Confidentiality and Compliance*, Inside Counsel (July1, 2013), http://www.insidecounsel.com/2013/07/01/dol-proposal-could-force-choice-between-confidenti?t=labor-employment&page=2; Michael Lotito, *New Labor Secretary Must Withdraw the Persuader Rule*, Law360 (May 31, 2013, 12:24 PM), http://www.law360.com/articles/445452/new-labor-secretary-must-withdraw-the-persuader-rule.
47. 76 Fed. Reg. at 36196.
48. Staff Rep., H. Comm. on Oversight & Gov. Reform, Continuing Oversight of Regulatory Impediments to Job Creation: Job Creators Still Buried by Red Tape (2012), at 2, 51, *available at* http://oversight.house.gov/wp-content/uploads/2012/07/Staff-Report-FINAL.pdf.

to businesses moving offshore or shutting down altogether.[49]

What Is Good for Unions Is Not Necessarily Good for Workers

Another biased aspect of the persuader rule is that it is designed to increase the reporting obligations of employer-side labor lawyers but not union-side labor lawyers. For this reason alone, the Labor Department's proposed reinterpretation could constitute unconstitutional viewpoint discrimination.[50]

Seemingly, the Labor Department is signaling that unions may seek the advice of lawyers on how to persuade employees to unionize, but employers may not seek advice about unionization efforts and the ever-changing NLRB rules and regulations. Not only would this change put employers at risk of unwittingly violating the law, but it would also disserve their employees by depriving them of information that would help them make an informed decision about whether to join a union.

> Workers facing the choice to unionize should be able to consider information from both sides in order to make an informed decision.

Union organizers are essentially paid salesmen, expertly trained in the fine art of persuasion. They play up the benefits of unionization while simultaneously concealing the disadvantages.[51] Unions train organizers on how to deflect questions that make workers less likely to unionize, such as strike histories, corruption, and political activism.

Understandably, unions and their allies would prefer any action that makes it harder for employers—their natural opponents—to voice opposing views. A worker who is educated about all of the perks but none of the drawbacks of unionization is far more likely to vote pro-union. Unless the company is able to tell its story and defend its beliefs, workers will cast an uninformed ballot. Discouraging employers from hiring counsel during union drives, however, makes that less likely, which will benefit the unions but not necessarily the workers.

Yet this is precisely the type of situation the Department's proposed persuader rule would facilitate, and once workers unionize, it is exceedingly difficult to decertify the union. Just as in political campaigns or trials where the voters or jury benefit from hearing both sides make their strongest case, workers facing the choice to unionize should be able to consider information from both sides in order to make an informed decision.

Proposed Change Will Harm the Attorney–Client Relationship

The Labor Department's proposed reinterpretation of the advice exemption poses an unnecessary threat to the confidential nature of the attorney–client relationship. Lawyers for employer clients play a key role in helping company officials understand and comply with applicable laws and act in the company's best interest. To perform this important societal function effectively, lawyers must have the complete trust and confidence of the company's officers and directors so that they feel comfortable furnishing

49. Diana Furchtgott-Roth, *New Labor Rule Will Violate Attorney–Client Privilege*, Wash. Examiner (Apr. 16, 2013, 2:45 PM), *available at* http://washingtonexaminer.com/diana-furchtgott-roth-new-labor-rule-will-violate-attorney-client-privilege/article/2527314?custom_click=rss.

50. *See*, *e.g.*, Police Dept. of City of Chicago v. Mosely, 408 U.S. 92, 95–96 (1972) (striking down a city ordinance that prohibited picketing within 150 feet of a secondary school, except for labor picketing; "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.... The essence of this forbidden censorship is content control."); Good News Club, v. Milford Central School, 533 U.S. 98 (2001) (holding it unconstitutional to deny use of school property to a religious group while permitting use by other community groups).

51. *See* James Sherk and Ryan O'Donnell, *EFCA: High-Pressure Spin Selling and Creative Organizing for Labor Unions*, Heritage Foundation WebMemo No. 2335 (March 11, 2009), *available at* http://www.heritage.org/research/reports/2009/03/efca-high-pressure-spin-selling-and-creative-organizing-for-labor-unions; *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor,* 110th Cong. (2007) (statement of Jen Jason), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg32906/html/CHRG-110hhrg32906.htm.

the lawyers with all of the relevant information they need to represent the entity properly. As the Supreme Court of the United States has recognized:

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.[52]

By requiring lawyers and law firms to file detailed reports with the Labor Department,[53] this proposed rule change will seriously undermine the confidentiality of attorney–client relationships. The threat to the attorney–client relationship is further exacerbated by the new LM-20 reports, which will require itemized details exposing the *substance* of the communications between lawyer and client.[54]

The proposed rule is a blatant attempt by the Labor Department to make it harder for companies to get advice about union issues and defend against union attacks.

The proposed rule is clearly aimed at companies that find themselves involved in a union organizing campaign, and it is a blatant attempt by the Labor Department to make it harder for companies to get advice about union issues and defend against union attacks. Further, to the extent the proposed rule serves as a disincentive for employer clients to consult with attorneys, it could well stifle an employer's efforts to remain in compliance with labor and other laws or to foster a more positive workplace environment.

For instance, a company might ask legal counsel to evaluate its practices to ensure compliance with applicable laws and make recommendations for improvement. As a client, the company would reasonably expect this work to be done on a confidential basis, but under the proposed persuader rule, it could no longer be certain that the existence and scope of its relationship with counsel would remain private.

Under the new interpretation, any lawyer who drafts an arbitration agreement or revises an employee handbook or a draft of a letter from the CEO to the company's employees might be deemed a persuader—even if the lawyer's primary motivation was to ensure that the communications and agreements were clear and legal and even if he never had any direct contact with the employees. Unbelievably, even a review of a company's practices or benefits plan designed to improve employee morale might be deemed a persuader activity because improved employee morale would, at least indirectly, decrease the likelihood that those employees would seek outside assistance from a union when it comes to future dealings with their employer.

Lawyers are rarely asked simply to opine about whether a proposed course of conduct is legal or illegal. Rather, corporate clients routinely ask their lawyers to advise them on "best practices" that are

52. Hunt v. Blackburn, 128 U.S. 464, 470 (1888); *see also* United States v. Louisville & N.R. Co, 236 U.S. 318, 336 (1915) ("The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance."); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that the attorney–client privilege serves to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

53. These reports require that the employer disclose the identity of corporate clients, the nature of the representation, the types of legal tasks performed, all receipts of any kind received from all employer clients "on account of labor relations advice or services," and *all* disbursements made in connection with such services (not just those receipts and disbursements that are related to persuader activities).

54. Sections 10 and 11 of the proposed new LM-20 form require attorneys to disclose, in written detail and by categories, a large amount of private information about the attorney's representation of his or her employer client. 76 Fed. Reg. at 36207–15, *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-06-21/pdf/2011-14357.pdf; *see also* 76 Fed. Reg. at 36216–26 (Employer LM-10 form requires even more detailed disclosure). Though the agency does not ask for the actual words of the confidential communications in form LM-20, it does require disclosure of confidential information discussed in those communications, which essentially exposes the communication itself and undermines the confidential nature of the attorney–client relationship.

designed to help them achieve optimal results. Given that reality, almost *any* communication between a labor lawyer and an employer client with respect to a labor and employment matter—such as whom to hire, fire, or promote; how much to compensate; what benefits or amenities to provide—could be characterized as an indirect attempt to persuade and made reportable.

The proposed rule would effectively provide that if an employer hires outside counsel to get advice on a labor issue, he would have to disclose the relationship in a report, detailing whom he hired, why he hired them, and how much he paid them. That report would be available to unions, competitors, and customers. The rule conceivably could also require a company to disclose its otherwise-secret due diligence activities when it hires a lawyer to help evaluate a potential merger or acquisition of another company that is unionized. The net effect will be to cause employers to think twice before seeking legal advice out of fear that doing so might require them to expose strategic details to unions and competitors who could exploit them to their own advantage.

The proposed interpretation makes triggering the reporting requirements incredibly easy—even accidental—because the new interpretation of persuader activity is both vague and broad.

Moreover, under current reporting requirements, once a lawyer or other consultant is labeled a persuader, he must report detailed information about *all* clients to whom he furnished "labor relations advice or services"[55]—not just those clients to whom persuader advice was rendered or for whom persuader activities were performed. In other words, if a business owner consults with a lawyer for a non-persuader purpose that involves labor relations, the normal protections afforded to that business owner's attorney–client communications would no longer apply if his lawyer simultaneously engaged in reportable persuader activities for a different client.

In addition to requiring attorneys, once they trigger the reporting requirements by engaging in even *one* persuader activity for *one* client, to disclose confidential information about *all* of their clients, the proposed interpretation makes triggering the reporting requirements incredibly easy—even accidental—because the new interpretation of persuader activity is both vague and broad.[56] If a client even asked about the ability to persuade employees and the attorney communicated information that even indirectly helped the employer client lawfully persuade employees, the attorney would be a persuader and would trigger the new interpretation's reporting requirements.

Such a broad disclosure requirement encompassing a considerable amount of confidential financial information about non-persuader clients has no reasonable nexus to the persuader activities that the LMRDA seeks to monitor and is entirely unwarranted. Law firms and lawyers who lobby Congress on behalf of clients, for example, must file periodic reports with the Clerk of the House and the Secretary of the Senate disclosing the identity of those clients, the issues on which they lobbied, and the dollar amount received for lobbying.

However, the Clerk and the Secretary have never required—and would never require—a law firm or lawyer to disclose extensive information regarding all of their other clients whom they have advised on governmental issues but for whom they are not registered lobbyists. The reporting of such activities bears no relationship to the evils that Congress was attempting to address when it passed the LMRDA and seems to be designed for no other purpose than to dissuade labor lawyers from providing advice to their corporate clients when those clients might be contemplating activities that would not serve the interests of labor unions.

55. Such advice might include matters related to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Occupational Safety and Health Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act, and related state laws.

56. Persuader activity, under the proposed interpretation, is defined as "a consultant's 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 rights to organize or bargain collectively." 76 Fed. Reg. at 36182.

Proposed Rule Will Leave Lawyers in an Ethical Dilemma

The Labor Department has itself noted that the attorney–client privilege covers only the actual communications between lawyer and client and not the existence of an attorney–client relationship, the identity of a client, the fees paid, or the scope and nature of the employment.[57] However, unlike non-lawyer labor consultants who do not have a confidential relationship with their employer clients, labor lawyers are subject to extensive state regulations and disciplinary authorities, many of which revolve around an attorney's ethical obligations.

The Department of Labor's proposed reinterpretation leaves an attorney guessing as to whether he or she is violating the new persuader rule, a binding confidentiality rule, or both.

The American Bar Association (ABA) Model Rules of Professional Conduct are essentially the national standard for ethics in the legal industry, and lawyers may be sanctioned or disbarred for violating these ethics rules.[58] The Department of Labor's proposed reinterpretation leaves an attorney guessing as to whether he or she is violating the new persuader rule, a binding confidentiality rule, or both.

Rule 1.6 of the ABA Model Rules deals with the confidentiality of client information and provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent" or one or more narrow exceptions apply. The range of client information covered under Rule 1.6 is broader than that covered by the attorney–client privilege, as it prevents a lawyer from voluntarily disclosing other non-privileged information that the client wishes to keep confidential, such as the existence of a professional relationship with the client, the identity of the client, the nature of the representation, facts communicated by the client, and the amount of legal fees paid by the client to the lawyer.[59] Variations of Rule 1.6 have been adopted by virtually every state and the District of Columbia.[60]

Although Rule 1.6(6) allows a lawyer to disclose confidential client information "to comply with other law or a court order,"[61] the Comments to Rule 1.6 muddle the seemingly straightforward "other law" exception by stating that "[w]hether such a law supersedes Rule 1.6 is a question of law beyond the

57. 76 Fed. Reg. at 36192; *see also Humphreys, Hutcheson and Moseley*, 755 F.2d at 1219.

58. *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, ABA (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf. *See generally* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 Geo. J. Legal Ethics 313 (2002).

59. See the ABA Model Rule of Professional Conduct Rule 1.6 and the related commentary, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html.

60. *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, ABA (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf; *Charts Comparing Individual Professional Conduct Rules as Adopted or Proposed by States to ABA Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy.html; *see, e.g.*, Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency); Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party); Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients' identities, which may constitute secret). The only state that has not adopted MRPC 1.6 is California, which has an even stricter rule, Business and Professions Code Section 6068(f), which states: "It is the duty of an attorney…to maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets of his or her client."

61. *See* Model Rules of Prof'l Conduct R.1.6(b)(6)(2013) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary…to comply with other law or a court order").

scope of [the ABA] Rules."[62] Moreover, nothing in the LMRDA expressly or implicitly requires a lawyer to reveal client confidences to the government. To the contrary, Section 204 expressly exempts "information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."

Additionally, the ABA/BNA Lawyer's Manual on Professional Conduct states that:

> [A lawyer] asked under claim of law for information relating to the representation of a client must make all nonfrivolous arguments that the information is protected from disclosure by Model Rule 1.6 and, if applicable, by the attorney–client privilege.... Unless the client has directed otherwise, the lawyer's professional obligation is to resist disclosure unless and until a court...has specifically determined that disclosure is indeed required by law, and thus permitted as a matter of ethics.[63]

Therefore, this rule change will inevitably force labor counsel into an ethical dilemma of violating their duty and ethical obligation to maintain client confidentiality or potentially facing criminal charges and jail time under the newly interpreted LMRDA.[64] This Hobson's choice threatens to upend the attorney–client relationship and all the social benefits that flow from it.

Proposed Rule Inhibits Employers' Free Speech Rights and Right to Choose Counsel

When a statute compels an individual to disclose information to the government, that compelled disclosure can infringe upon First Amendment freedoms.[65] A "mere showing of some legitimate governmental interest" is not enough to justify encroachments on First Amendment rights caused by government-compelled disclosure.[66] Instead, the governmental interest must survive an "exacting scrutiny" standard of review, which means that

62. Model Rules of Prof'l Conduct R. 1.6 cmt. 12 (2013). The comment goes on to explain: "When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law." The ABA has experienced a long history of debate about whether attorneys are exempt from generally applicable disclosure laws in light of their ethical obligation to maintain their clients' confidentiality. *See* Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, 86 Tul. L. Rev. 1055, 1055, 1064–87 (2012) (describing the history of the bar's "unwilling[ness] to acknowledge that lawyers must comply with laws that require the disclosure of client confidences"). There are no known court cases clarifying this debate, and only recently has academic scholarship picked up the topic. Rebecca Aviel, *When the State Demands Disclosure*, 33 Cardozo L. Rev. 675, 679 (2011).

63. Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, at 1084–85 & n.121 (citing *ABA, Disclosure: Required by Law or Court Order*, *in* ABA/BNA Lawyers' Manual on Professional Conduct 55:1201 (Supp. 2006)). For example, several state bar associations have concluded that an attorney should resist revealing the existence of a client relationship, the identity of the client, the nature of the representation, and the fees paid on an IRS Form 8300 even though Section 6050I of the IRS code requires that any person engaged in a trade or business who receives cash in excess of $10,000 in a single transaction or related transactions must complete such a form. *See, e.g.*, Massachusetts Bar Association, Ethics Op. 94-7 (1994); Florida Bar Association, Ethics Op. 92-5 (1993); Washington State Bar Association, Ethics Op. 194 (1997); District of Columbia Bar Association, Ethics Op. 214 (1990).

64. Because the failure to file persuader reports invokes potential criminal sanctions, the DOL's proposed change to the advice exemption may also be unconstitutional under the Fifth Amendment's due process clause because of the vagueness of its parameters. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) (regulations with criminal sanctions "must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"); Forbes v. Napolitano, 236 F.3d 1009, 1011 (9th Cir. 2000) ("If a statute subjects transgressors to criminal penalties...vagueness review is even more exacting"); Chatin v. Coombe, 186 F.3d 82, 86-87 (2d Cir. 1999) (scrutinizing a regulation "closely" because its penalties were more like criminal penalties); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (regulations must "clearly define" all prohibited acts such that the regulated class is given "fair notice that [its] contemplated conduct is forbidden").

65. *See, e.g.*, Gibson v. Fla. Legislative Investigation Comm'n, 372 U.S. 539 (1963); Louisiana v. NAACP, 366 U.S. 293 (1961); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

66. Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002 (BCRA, McCain–Feingold Act), Pub. L. 107–155, 116 Stat. 81 (2002).

interest "reflect[s] the seriousness of the actual burden on First Amendment rights."[67]

Exacting scrutiny requires the government to prove the following requirements if evidence of First Amendment infringement is found:

1. There is a "substantial relation"[68] between the governmental interest and the information required to be disclosed;[69]

2. The government interest is "sufficiently important to outweigh the possibility of infringement";[70] and

3. The disclosure requirements are narrowly tailored; i.e., they are the "least restrictive means" to achieve the stated governmental interest.[71]

The Department of Labor states two main governmental interests for the proposed interpretation:

1. To provide employees with "essential information regarding the underlying source of the views and materials being directed at them" so as to aid them in "evaluating [the materials'] merit and motivation" and assist them in "developing independent and well-informed conclusions regarding union representation and collective bargaining," and

2. To "mitigat[e] the disruptive impact of 'middlemen,' on peaceful and stable labor relations."[72]

Given the broad scope of the proposed rule change and the amount of confidential information that will now have to be disclosed, including information about clients for whom no persuader activities have been provided,[73] it is difficult to imagine that the Labor Department will be able to meet this burden.

Another First Amendment violation may occur if the threat of compelled disclosure of information that an individual would rather keep confidential chills or deters that individual from retaining or engaging in communications with an attorney.[74] The right to "consult an attorney is protected by the First Amendment's

67. Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008); *Buckley*, 424 U.S. at 64. Exacting scrutiny is necessary even if a deterrent effect on the exercise of First Amendment rights occurs not from direct government action but from indirect, unintended causes that are the inevitable result of the government's act of compelling disclosure. *Buckley*, 424 U.S. at 65.

68. *Gibson*, 372 U.S. at 546.

69. *Buckley*, 424 U.S. at 64.

70. *Id.* at 66; *see also* Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981); United States v. Harriss, 347 U.S. 612 (1954).

71. *Buckley*, 424 U.S. at 68; *see also* Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012); *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1221 ("[W]e must look further to determine whether this disclosure legislation is narrowly tailored to serve a compelling governmental interest…."). Though there are not many cases dealing with compelled disclosure of financial information (most deal with compelled disclosure in the realm of political speech and association, *e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)), the disclosure of financial details has been treated as interchangeable with the disclosure of member names of organizations. *Buckley*, 424 U.S. at 66 ("The invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" (citation omitted)); *see also* Bates v. City of Little Rock, 361 U.S. 516, 518 (1960) (reversing convictions for failing to comply with a city ordinance that required disclosures of "dues, assessments, and contributions paid, by whom and when paid.").

72. 76 Fed. Reg. at 36182.

73. While one appellate court has held that the government cannot compel a firm to disclose its services to non-persuader clients (*see* Rose Law Firm, 768 F.2d at 975, in which the court stated that it is "extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders under § 203(b) and (c) to be so broad as to encompass dealings with employers who are not required to make any report whatsoever under § 203(a)(4)."), four others have decided otherwise. *See Humphreys, Hutcheson and Moseley*, 755 F.2d at 1222; Master Printers Ass'n v. Donovan, 699 F.2d 370 (7th Cir. 1983); Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965); Price v. Wirtz, 412 F.2d 647 (5th Cir. 1969).

74. Denius v. Dunlap, 209 F.3d 944, 953–954 (7th Cir. 2000). The First Amendment, rather than the Sixth Amendment, is applicable in the present case because there is no "right to counsel" under the Sixth Amendment for civil matters. ("[A]n individual enjoys no protection provided by the Sixth Amendment until the instigation of criminal proceedings against him."); *see also* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

guarantee of freedom of speech, association and petition."[75] Thus, the government "cannot impede an individual's ability to consult with counsel on legal matters."[76] The ability to maintain confidentiality in attorney–client communications is an important component of the right to obtain legal advice.[77]

The proposed rule change inhibits First Amendment free speech rights all around: those of attorneys, employer clients who receive persuasion-related advice, and employer clients who do not receive persuasion-related advice.

The proposed rule change inhibits First Amendment free speech rights all around: those of attorneys, employer clients who receive persuasion-related advice, and employer clients who do not receive persuasion-related advice. Attorneys will hesitate before providing labor advice to employer clients, especially when it involves their obligations under the National Labor Relations Act, because such advice may compel disclosure, and employer clients will hesitate before seeking labor-related advice from (or will provide incomplete information to) an attorney when doing so might trigger a disclosure requirement regardless of the nature of the advice provided or services rendered.

Either way, the client's fundamental right to effective and zealous representation is compromised, which would both inhibit free speech and likely result in an increasing number of serious labor law violations that otherwise could have been prevented.

Conclusion

For over 50 years, the Department of Labor's interpretation of the Labor Management Reporting and Disclosure Act has been a balanced, carefully considered judgment reflecting the importance of both protecting workers' rights and preserving the confidentiality of the attorney–client relationship. This arrangement has provided stability and predictability to lawyers, employers, and workers alike and, just as important, has been a judicious execution of Congress's intent.

The Labor Department's proposed persuader rule runs contrary to Congress's intent in enacting the LMRDA. It will impose enormous costs on American businesses and serve as a disincentive to others to invest in this country. It poses a serious threat to the confidential nature of the attorney–client relationship and sacrifices the stability, evenhandedness, and efficacy of the current rule, all for the sake of supporting union allies.

The Labor Department should withdraw its proposal and hold steady to the functional, fair approach that has worked well and has been endorsed by every Administration since 1962.

*—**John G. Malcolm** is Director of and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

75. *Denius*, 209 F.3d at 953–54; *see also* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult an attorney… implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech."); Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982).

76. *Denius*, 209 F.3d at 954; *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 376 n.32 (1977); Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 7 (1979) ("A State could not…infringe in any way the right of individuals and the public to be fairly represented in lawsuits…."). The right to obtain legal advice does not depend on the purpose for which the advice is sought, and the right applies equally to legal representation intended to advocate a political or social belief. *See* NAACP v. Button, 371 U.S. 415, 419–20 (1963).

77. *Denius*, 209 F.3d at 954.