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Labor Watch

Unfriendly Persuasion

Will the Labor department disarm employers in their struggle with the unions?

By Diana Furchtgott-Roth

Summary: *At the behest of unions desperate for new members, the U.S. Labor Department plans to make a major regulatory shift. The change has no basis in existing law or precedent, and it will harm labor-management relations while costing billions of dollars.*

Union propaganda equates advice from law firms today with strike-related violence such as this 1934 incident in Minneapolis.

A shocking change in American labor relations is brewing at the U.S. Department of Labor, which is expected sometime soon to alter a major regulation. The change involves a new interpretation of the "advice exemption" of the Labor Management Reporting and Disclosure Act. Specifically, businesses would have to disclose the names of, and fees paid to, attorneys and consultants who advise them on union-organizing activities. In turn, attorneys and consultants providing such advice would be required to disclose their client lists and the fees they receive.

In making this change, the administration would sweep away over a half-century of precedent and contravene both the clear intent of Congress and the law's express language. This new regulation would violate the attorney-client relationship, effectively strip employers of First Amendment rights, compromise companies' ability to seek advice in complying with federal labor law, and deny workers the information they need and to which they are legally entitled before they vote on whether to join a union. The change has been accurately called a "gag rule."

The economic fall-out of the proposed change, termed the Persuader Rule, would also be dramatic. My estimates of the costs are detailed below, but in short, they could be many billions of dollars—perhaps $3.2 to $4 billion for businesses to familiarize themselves with the new rule, and then annual expenditures in the range of $4.3 to $6.5 billion. This rule could cost the economy $60 billion over ten years.

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This potential cost would be tens of thousands of times greater than the administration's $826,000 cost estimate, which was low-balled in order to escape the mandatory cost/benefit review that any new rule costing $100 million or more must undergo.

The existing rule's clear meaning

The Persuader Rule stems from the Labor-Management Reporting and Disclosure Act of 1959, known as the LMRDA or Landrum-Griffin Act. That legislation required secret elections for union officers, made it more difficult for union officials to line their own pockets with members' money, and barred convicted felons and members of the Communist Party, an extremist group then controlled by the Soviet Union, from holding union office.

The act passed as a result of the so-called McClellan hearings, in which Sen. John McClellan (D-Ark.) and his top aide, Robert F. Kennedy, investigated Jimmy Hoffa of the Teamsters Union and other corrupt union bosses. Although primarily aimed at corruption in organized labor, the legislation also affected businesses. The act's stated object was to create reporting requirements for unions, employers, and consultants, in order to make the unionization process more transparent.

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The Persuader Rule was included in the legislation largely because the McClellan investigation exposed the unethical activities of a consulting firm headed by a Nathan Shifferman from Chicago. Shifferman employed about 35 consultants who often concealed their true identity. They would go to a town where union organizing was occurring and, posing as workers, they would form anti-union employee committees. Under that pretense, they would argue against the union and spy on union meetings and other activities, then report back to Shifferman. They had direct contact with employees, and these middlemen, as they were called, concealed their true identity from the workers. (The unions have their own version of this practice, called "salts"—workers paid by the unions to infiltrate workplaces and unionize them.)

The LMRDA section on persuaders was designed to force employers to operate in an open manner, to require consultants to reveal themselves and their agents, and to expose fees paid to consultants, so employees would know the source of their information. Some of these consultants may have been attorneys, but they never acted as attorneys to advise employers; so attorney-client confidentiality was never at issue.

The Persuader Rule required businesses to report the names of hired consultants who make presentations directly to firms' employees. In the more than half a century since the passage of the legislation, firms have never been required to report the names of people who gave them advice but did not interact directly with employees.

Section 203(b) of the act states that consultants who are directly engaged in persuading employees not to join unions must report this information to the Labor Department. The same section of the act exempts from the reporting requirement those who provide advice to firms without any contact with employees. Section 203(c) states, "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer. . . ." That language was a clarification provided by an amendment that Sen. Barry Goldwater (R-Ariz.) offered.

Senator John F. Kennedy (D-Mass.) questioned the need for the Goldwater amendment but went along with it. "There is no doubt in my mind that the bill which was originally drafted by lawyers adequately protected them," he said. "Therefore, I do not feel that the amendment offered by the Senator from Arizona is wholly necessary. But in order that there may be no question about it I will accept the amendment."

The Senate Committee on Labor and Public Welfare reported on the act:

> 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 types listed in [the relevant section].

Since 1962, except for a brief period in 2001 (under a last-minute Clinton administration rule that was quickly dropped by the Bush administration), the interpretation of the section has been consistent: Firms do not have to report their advisors' names if these individuals have no contact with employees.

For decades unions have tried to have the Persuader Rule changed in order

to make it harder for consultants to help businesses avoid unionization. The unions began to be frantic about the issue in the late 1970s. In 1978, their rate of winning elections to represent workers fell to a then-low of 46 percent, just as their efforts to make it easier to unionize were defeated in the Democrat-controlled U.S. Senate. As they searched for a scapegoat, their eyes fell on the consultants—"union busters," they called them.

It was easy to make that connection. *U.S. News & World Report* reported in 1979 that a survey of 800 union representation elections "found that outside consultants were involved in virtually every union defeat." But one could just as easily blame the unions' losses on the fact that the easiest-to-organize workplaces had already been organized; so their success rate was bound to fall eventually. Or one could blame employers for beginning to fight back against unions—a response of which the hiring of consultants was just a part.

Scapegoating, however, is part of the Left's psychology. When the political process goes against them, they assume people have been tricked, or intimidated, or seduced by appeals to baser instincts. In the case of unionization, the presumption is that no one in his right mind would vote to reject a union; so rejection must result from someone's evil deeds.

Admittedly, there was a time when businesses and governments used violence to deny people their right to organize, and strikes were broken using billy-clubs wielded by taxpayer-funded police or private police such as the Pinkertons. And so unions by the 1970s began to equate the techniques of consultants with those of the violent strikebreakers of decades past. The AFL-CIO president, George Meany, admitted the union busters' style had changed: "they carry briefcases instead of clubs and brass knuckles. They leave no visible marks on the victims. But the job is the same." In 1979, Meany's union called for a national campaign to identify consultants as lawbreakers "whose mission is to destroy existing unions and forestall the organization of new ones." In response to the perceived threat of the consultants, one of the unions' key allies on Capitol Hill, Rep. Frank Thompson (D-N.J.), chairman of a subcommittee on labor, summoned consultants to testify in a series of hearings on "worker harassment." (Thompson would later serve prison time for taking bribes in the Abscam scandal.)

Herbert Melnick, head of one labor consulting firm, Modern Management Methods, said at the time, "Unions have recently been losing an increasing number of elections. They would like to have it believed that this has occurred because of unfair tactics against them. Instead, we know that for a large part it is because enlightened companies, some with our assistance, are becoming increasingly sensitive and responsive to employees' needs and aspirations."

(What was the strategy most consultants advised their clients to use in order to forestall unionization? Mainly, it was to keep employees happy by involving them in important decisions, making them feel respected, sharing profits with them, providing competitive pay and benefits and employment security, selecting managers carefully, and promoting from within.)

Unions' plans to change the Persuader Rule were short-circuited by the election of President Reagan, followed by the first President Bush. The so-called "advice exception" was affirmed in a 1989 memorandum by Assistant Secretary for Labor-Management Standards Mario A. Lauro Jr. He wrote 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."

Now the Labor Department argues that regulations need to be changed so that all consultants are reported. The department claims that "the distinction between activities properly characterized as 'advice' and those that go beyond 'advice' has not been made clear," especially when the employer sends his employees material that was written by an advisor. In such cases "it is fair," the department argues, "to infer that reporting is required when a person engages in persuader activities, whether or not advice is also given."

Apparently it doesn't matter that the distinction was clear for 50 years; that the committee report for the bill made Congress's intent clear; that the employer has the choice of whether to convey consultants' prepared information to his employees or not; and that the cost of the new gag rule could be in the billions of dollars.

In 1959, the drafters of the Landrum-Griffin Act understandably worried that employees could be misled if they received materials from a third party without knowing the materials were paid for by the employer. Now, however, the Labor Department wants to regulate communications that are *signed* by the employer, with no doubt in anyone's mind that the material represents the employer's interest. It is hard to see how it's anyone's business whether someone helped the employer craft the words that the employer publicly embraces.

Unions losing ground

To understand the impetus behind the rule change, consider unions' eroding position in America. Workers are voting with their feet, migrating from unionized states to right-to-work states, where employees do not have to pay dues to a union as a condition of working. As a result of population shifts, in 2012 nine congressional seats moved to right-to-work states from forced-unionization states. Winners included Texas, Florida, Arizona, Georgia, and South Carolina, while the losers were New York, Ohio, Michigan, Illinois, and New Jersey.

Why do workers leave forced-unionization states? Because right-to-work states have created more jobs than forced unionization states. Over the past 25 years, the 22 right to work states (not including the newly right-to-work states Indiana and Michigan) created one and a half times as many jobs as the forced-unionization states. More recently, between 2011 and 2012, right-to-work states increased nonfarm payroll employment by 2.1 percent, compared to 1.5 percent in forced-unionization states.

Nor is that the end of the bad news for unions. Over the past decade, union membership has declined

A chilling change in the rules

By Joe Trauger

In June 2011, the Department of Labor proposed sweeping changes to the rules that administer the Labor-Management Reporting and Disclosure Act. The changes, which could take effect as early as May 2013, seek to drastically re-interpret longstanding requirements on how employers can work with legal counsel to comply with labor laws.

► Current law requires employers, law firms, and other labor union experts to disclose when employers have sought assistance from consultants who intend to directly "persuade" employees regarding union members.

► For decades, the law has included a very important exemption: employers were allowed to obtain legal advice from attorneys to remain compliant with current law.

► These new regulations would drastically expand the definition of "persuader" activity to include many activities currently recognized as labor-law advice.

► These proposed changes would make it more difficult for employers, especially smaller-sized businesses, to access necessary legal assistance to help them comply with the complex laws governing labor relations. It would make it more difficult for employers to understand how to legally discuss labor issues with their employees and create an environment where even the most well-intended employers could unknowingly trigger a technical labor violation. This would effectively "gag" employers by preventing access to legal assistance and keep many employees from hearing both sides of the unionization debate.

Activities that would trigger the new reporting requirement are expansive and include training for management and supervisors, employee handbooks and other documents prepared by attorneys, and materials provided at conferences or by trade associations. Specifically, these new Labor Department regulations would require employers and consultants to report such activities as:

- Drafting or revising written materials;
- Drafting or revising remarks employers give to employees;
- Supervisory training;
- Coordinating the activities of supervisors;
- Developing personnel policies or practices; and
- Conducting certain types of training for supervisors.

The bottom line

Many small and medium-sized manufacturers do not have the resources to keep expensive labor attorneys on their payrolls, and they often have to retain outside lawyers to help them understand the complex labor law system. Many times, even larger employers feel the need to rely on outside legal experts to help them with complicated labor issues.

The proposed change virtually eliminates the "advice exemption," so businesses would have to make detailed and confidential information public—including possibly proprietary information about business operations and details about contracts for services, including legal services.

Finally, and most chillingly, under this proposal, employers and attorneys who fail to properly comply with the new regulations would face criminal penalties.

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in both right-to-work states and in forced-unionization states, but while the membership decline has been 4 percent in right-to-work states, the decline in forced-unionization states has been even faster, at 10 percent.

With union membership down, unions are keen to swell their ranks, replenish their treasuries, fund staff salaries, and infuse new money into union-sponsored pension plans, many of which are dangerously underfunded.

Helping unions organize

Given this hemorrhage of membership, the unions were elated when they helped elect Barack Obama in 2008 (the SEIU alone bragged it spent $61 million on his election, and total union contributions were in the hundreds of millions). The union's first effort to reverse their decline was a campaign to pass the Employee Free Choice Act, also known as "card check." That legislation would have taken away workers' right to a secret ballot in elections for union representation and imposed mandatory arbitration in contracts between unions and newly unionized firms. It would have allowed workers to be organized into unions by checking a card that would be circulated and retained by the union—hence the term "card check"—rather than through a secret-ballot election, as required since the 1935 National Labor Relations Act.

Card check would have increased the role of intimidation in unionization. Organizers would know who signed and who refused, and they would know where refuseniks lived. This is precisely the sort of abuse that the secret ballot is supposed to prevent.

The card check gambit failed in Congress during President Obama's first term. Afterwards, the administration sought to use regulatory authority to help unions. The change in the Persuader Rule, officially proposed in June 2011 and due to be finalized this spring, is a part of this effort.

The gag rule

One result of this gag rule would be to make it more difficult for employers to obtain advice when unions attempt to organize a workforce. The rule opens the way for union campaigns not only against individual companies, but also against the law firms that help them and the firms' other clients. It discriminates in favor of big corporations, which can afford in-house lawyers and advisors, against small businesses who can only afford outside experts.

The timing of the gag rule puts companies in a difficult position because it reduces their ability to obtain advice on complex legal issues. When unions want to organize workplaces, firms are already limited in what measures they may take. Some measures known as "unfair labor practices" will result in financial penalties, and they can be tricky to define. Firms need expert advice on what constitutes an "unfair labor practice" so as to be able to comply with the law.

Companies will inevitably make errors and poor decisions if they face constraints on their ability to obtain advice, or if there is a shortage of lawyers available. Some law firms may leave the advisory business, and some may close or consolidate. Those that remain may well charge a premium for their services. (I don't include this effect in my calculation of the cost of the gag rule, so the actual cost may be even higher than projected.)

For an indication of the magnitude of these hidden costs, consider what would happen if the Labor Department required documentation of any attorneys consulted for sex discrimination cases—and then released the names of all the attorneys' other clients. This would lead to a reduction in the use of advisors in sex discrimination cases—and far more errors by businesses, including, perhaps, greater harm to the very employees sex discrimination laws were meant to protect.

This discouragement of the use of expert counsel in legally complex situations has effects that reach farther than those employers who seek advice on how to approach union organization. If a law firm or human resources consultant provides assistance that is construed as "persuasive" under the new rule, it will be required to disclose information concerning all labor-relations-related services it provides, including client names, transaction amounts, and general descriptions of the services provided.

In other words, if a lawyer performs a single persuasive action for a single firm, he or she will be obligated to disclose information about *all* client relationships, regardless of whether those other relationships included persuader services or even services that dealt with unionization issues. All labor relations advice-seekers would be revealed, and thus the use of such services would be discouraged.

The potential to appear as a named client of a law firm—and have details of that relationship reported because of a transaction that had nothing to do with one's own business—makes engaging legal counsel on labor matters less attractive. As the American Bar Association noted in its comments on the proposed rule, these far-reaching reporting requirements "could very well discourage many employers from

seeking the expert legal representation that they need," which "might have the unintended consequence of increasing the number of employers who, without advice of counsel, would engage in unlawful activities."

Confidentiality a necessity

Many legal firms do not want to publicize their list of clients, and many of these clients prefer to remain private. Legal and ethical rules prevent firms from revealing their clients without prior permission. There are many good and honest reasons why confidentiality between a lawyer and a client is preferred. That's why attorney-client privilege goes back to before the time of Queen Elizabeth. The government is chilling the free exercise of citizens' rights when it seeks to invade the confidentiality of the attorney-client relationship.

Although the gag rule purports to help working Americans, it actually does the opposite. By discouraging employers from getting advice, it prevents workers from receiving an unbiased picture of the costs and benefits of joining a union, which is unfair to workers.

In addition, employers face new National Labor Relations Board (NLRB) rules this year. These rules need to be explained by legal professionals. One NLRB rule has reduced the time period for elections for union representation, resulting in so-called "quickie elections" for which employers have little time to prepare. Another NLRB rule will allow portions of companies to be represented by different unions, so that a department store's shoe sellers could be represented by one union and its lingerie salesmen by another.

The National Labor Relations Board (NLRB), an independent agency that is not part of the Labor Department, is already working with the department to make sure firms fulfill the proposed reporting requirement, even though the gag rule is not yet final. Now, when a law firm represents a company before the NLRB, the NLRB sends the name of the firm over to the Labor Department and the Labor Department contacts the firm to ask pointedly if it should be filling out the reporting forms that are supposedly required. (The fact that a supposedly independent agency is working so closely with the politics-driven Department of Labor is troubling in itself.)

In the pro-union environment created by the NLRB under President Obama, businesses are in great need of competent advice on how to defend themselves—advice they would be denied under the new version of the Persuader Rule.

Shocking costs

The proposed rule change threatens not only businesses that face unionization but the entire U.S. economy, thanks to the rule's steep price tag. If implemented as expected, it will drive some business offshore and discourage other businesses from locating here. No other industrialized country has such a requirement that applies to law firms.

I estimate the rule could cost our economy from $7.5 billion to $10.5 billion the first year of implementation, and between $4.3 billion and $6.5 billion per year thereafter. The total cost over a 10-year period could be in the neighborhood of $60 billion. This is an underestimate, because it does not include the indirect economic effects of raising the cost of doing business in the United States. (The more businesses are unionized, the less flexibility there is in the labor market to respond to changing conditions. That's one reason America's fastest-growing states are right-to-work states, where employees do not have to join unions as a condition of employment.)

In sum, whether we consider the rule on grounds of fairness to employers and their advisors, or on economic grounds—where its costs are almost certain to be several orders of magnitude more burdensome than the administration's disingenuous estimate—we find that it fails every test. Workers, employers, and all Americans deserve better.

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Editor's note: On our website, CapitalResearch.org, we have posted the details of the author's calculations, including charts showing the costs of compliance and a discussion of the methodology behind the calculations.

Margaret Thatcher, R.I.P.

Margaret Thatcher died April 8, aged 87. As a Tory Member of Parliament and Prime Minister of Great Britain, she clashed often with labor unions. Historian Paul Johnson recalled these battles in an April 9 essay for the Wall Street Journal*, "The World-changing Margaret Thatcher," excerpted here:*

The 1970s marked the climax of Britain's postwar decline, in which "the English disease"—overweening trade-union power—was undermining the economy by strikes and inflationary wage settlements. The Boilermakers Union had already smashed the shipbuilding industry. The Amalgamated Engineers Union was crushing what was left of the car industry. The print unions were imposing growing censorship on the press. Not least, the miners union, under the Stalinist Arthur Scargill, had invented new picketing strategies that enabled them to paralyze the country wherever they chose.

Attempts at reform had led to the overthrow of the Harold Wilson Labour government in 1970, and an anti-union bill put through by [Tory leader Edward] Heath led to the destruction of his majority in 1974 and its replacement by another weak Wilson government that tipped the balance of power still further in the direction of the unions. The general view was that Britain was "ungovernable."

Among Tory backbenchers there was a growing feeling that Heath must go. Thatcher was one of his critics, and she encouraged the leader of her wing of the party, Keith Joseph, to stand against him. However, at the last moment Joseph's nerve failed him and he refused to run. It was in these circumstances that Thatcher, who had never seen herself as a leader, let alone prime minister, put herself forward. …she won handsomely, thereby beginning one of the great romantic adventures of modern British politics.

The date was 1975, and four more terrible years were to pass before Thatcher had the opportunity to achieve power and come to Britain's rescue. In the end, it was the unions themselves who put her into office by smashing up the James Callaghan Labour government in the winter of 1978-79—the so-called Winter of Discontent—enabling the Tories to win the election the following May with a comfortable majority.

…She tackled the unions not by producing, like Heath, a single comprehensive statute but by a series of measures, each dealing with a particular abuse, such as aggressive picketing. At the same time she, and the police, prepared for trouble by a number of ingenious administrative changes allowing the country's different police forces to concentrate large and mobile columns wherever needed. Then she calmly waited, relying on the stupidity of the union leaders to fall into the trap, which they duly did.

She fought and won two pitched battles with the two strongest unions, the miners and the printers. In both cases, victory came at the cost of weeks of fighting and some loss of life. After the hard men had been vanquished, the other unions surrendered, and the new legislation was meekly accepted, no attempt being made to repeal or change it when Labour eventually returned to power. Britain was transformed from the most strike-ridden country in Europe to a place where industrial action is a rarity. The effect on the freedom of managers to run their businesses and introduce innovations was almost miraculous and has continued.

… In the world beyond she was recognized for what she was: a great, creative stateswoman who left the world a better and more prosperous place, and whose influence will reverberate well into the 21st century.

Students honor former British Prime Minister Thatcher by laying flowers at the base of her statue at Hillsdale College in Michigan.

LaborNotes

President **Obama** nominated **Thomas Perez**, head of the civil rights division of the **Justice Department**, to be Secretary of Labor. As we go to press, Perez's nomination faces hurdles. Sen. **David Vitter** (R-La.) has put a "hold" on the nomination and demanded that Perez answer questions about his failure to enforce requirements in the 1993 **"Motor Voter" law** that keep dead persons and other ineligible people off states' voter rolls.

Meanwhile, congressional Republicans have charged that Perez cut a "secret deal behind closed doors" with officials of **St. Paul, Minnesota**. Allegedly, Perez dropped cases involving bad paperwork on "stimulus" projects—cases that might have returned $200 million to the federal government—in return for the city's dropping its appeal of a housing case.

Why was the housing case important? Because it could have given the **Supreme Court** an opportunity to overturn the doctrine of "disparate impact," which allows the government to make false charges of racial discrimination based on racial bean-counting. (Among other things, Perez has used "disparate impact" to sue banks and force them to make loans to people who aren't credit-worthy.) Leftists like Perez don't want the Supreme Court to hear such a case—at least, not until President Obama gets a majority on the Court.

On March 28, **Michigan** officially became a right-to-work state, although it will take a while for everyone to benefit from the new law as union contracts expire and are re-negotiated. The **Mackinac Center for Public Policy** spearheaded the research that showed the advantages of right-to-work. Now the Center has created a new website on the issue: **MIWorkerFreedom.org**, which includes a feature that lets workers generate a letter invoking their right to stop paying union dues.

In **Wisconsin**, Gov. **Scott Walker** and supporters of state-level union reforms chalked up another victory. Previously, unions targeted Walker, his lieutenant governor, pro-reform state legislators, and even state **Supreme Court** justices who voted not to strike down the reforms. But the reformers have won almost every contest, and the issue appears to have been settled for the near-future by the victory—with 57% of the vote—of Supreme Court Justice **Patience Roggensack**. That means the state's highest court has a 4-3 majority in favor of respecting the reforms, a majority that's likely to continue for some time.

Pro-reform forces also defeated unions in two local elections, including one in the union stronghold of **Milwaukee County**, where membership in the **American Federation of State, County and Municipal Employees** fell from about 9,000 in 2011 to roughly 3,500 now. Statewide, public-sector union membership fell from 50% to 37% in just one year, 2011 to 2012. Nothing reveals more clearly how trapped workers have been by union bosses.

In **Indiana**, the state's **Supreme Court** threw out by 5-0 a teachers' union challenge to the state's voucher program. In **Colorado**, the state **Court of Appeals** upheld that state's only private school choice program, in **Douglas County**.

Many voucher programs across the country target students who attend failing schools, as determined by drop-out rates, test scores, etc. Meanwhile, in some jurisdictions, test scores now help determine teachers' and administrators' salaries. The result? In many places, manipulation of data or outright cheating. As the ***Wall Street Journal*** noted, "When **Florida** passed voucher legislation in 1999, 78 schools received failing grades. The next year, miraculously, there were none and thus no one qualified for a voucher." In **Atlanta**, an investigation caught teachers using X-Acto knives and lighters to open and reseal test booklets, or holding parties where students' answers were corrected. Some 180 teachers and administrators are believed to have participated; 34 have been indicted. **Randi Weingarten** of the **American Federation of Teachers** blamed the *tests*, saying the Atlanta case "crystallizes the unintended consequences of our test-crazed policies."