IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ASSOCIATED BUILDERS AND CONTRACTORS OF ARKANSAS; ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ARKANSAS STATE CHAMBER OF COMMERCE/ASSOCIATED INDUSTRIES OF ARKANSAS; ARKANSAS HOSPITALITY ASSOCIATION; COALITION FOR A DEMOCRATIC WORKPLACE; NATIONAL ASSOCIATION OF MANUFACTURERS; and CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C., on behalf of themselves and their membership and clients Plaintiffs, v. THOMAS E. PEREZ, in his official capacity as Secretary of Labor, U.S. Department of Labor, MICHAEL J. HAYES, in his official capacity as Director, Office of Labor-Management Standards, U.S. Department of Labor Defendants.	Case No.: 4:16-CV-00169 (KGB)

Amicus Brief In Support of Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing

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I. STATEMENT OF AMICUS CURAE

The Employment Law Alliance ("ELA") is an integrated, global practice network whose independent law firm members are well known and well respected for their employment and labor law practices. With more than 3,000 lawyers across more than 120 countries, all 50 U.S. states and every Canadian province, the ELA is the world's largest such network. The following U.S. law firm members of the ELA, each of which has significant expertise in labor matters, hereby submit this brief:

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Collectively, ELA member law firms represent hundreds of employers that will be adversely impacted by the U.S. Department of Labor's (hereinafter "USDOL") promulgation on March 24, 2016, of the final rule entitled "Labor-Management Reporting and Disclosure Act, Interpretation of the Advice Exemption" (hereinafter, the "New Rule") the implementation of which the Plaintiffs in this matter seek to enjoin. Additionally, to the extent that their legal advice pertaining to labor relations would fall within the broad ambit of the New Rule, the undersigned ELA lawyers and their firms would likely be subject themselves to the disclosure requirements of the New Rule, rendering them at odds with their obligations under state law.

As a result, the undersigned respectfully submit this brief to explain the grave impact of the New Rule on practicing attorneys and their clients and to urge this Court to enjoin its enforcement as requested by the Plaintiffs.

II. INTRODUCTION

For 54 years, practicing attorneys like those in the ELA have been exempt from the LMRDA's disclosure requirements based on the "Advice Exemption" - an exemption premised on both the sanctity of attorney-client confidentiality and the common sense notion that legal advice is not the proper target of the LMRDA's existing disclosure requirements. The U.S. Supreme Court has consistently upheld this principle, and held most recently that Section 8(c) of the National Labor Relations Act (NLRA) precludes all regulation of non-coercive speech about unionization. *See, Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

This longstanding principle will change with the implementation of the New Rule. In the USDOL's dramatically altered landscape, attorneys in ELA law firms[1] would be presented with an ethical dilemma: violate their ethical duty to maintain client confidentiality by disclosing information deemed confidential under the various Rules of Professional Conduct adopted in each U.S. state, ***or risk criminal prosecution.***

In its public statements on the New Rule, the USDOL has rather theatrically invoked the film *The Wizard of Oz*, claiming that, like Toto exposing Oz as a con man, the New Rule is intended to "pull back the curtain" on the machinations of professional consultants.[2] However, despite the USDOL's overwrought attempts to impugn practices that have long been approved, it is the USDOL's regulatory overreach that is truly "great and terrible."

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[1] The New Rule does not apply to in-house counsel, thereby creating a disparity between those large companies with access to in-house legal services and smaller companies who often rely on outside counsel such as the ELA firms.

[2] "Lifting the Curtain on Union Organizing Campaigns," U.S. Department of Labor Blog, March 23, 2016, available at https://blog.dol.gov/2016/03/23/lifting-the-curtain-on-union-organizing-campaigns/ (Last visited April 7, 2016).

As discussed below, the New Rule violates the rights of employers and their attorneys without actually advancing the stated policy goals of the USDOL. Moreover, the USDOL's adoption of the New Rule exceeds the agency's statutory authority. For these reasons, the New Rule's enforcement should be enjoined consistent with the Plaintiff's request in its Motion for a Preliminary Injunction.

III. OVERVIEW OF THE LMRDA AND THE USDOL'S NEW RULE

A. Reporting Requirements Under The LMRDA

The purpose of the LMDRA is to, in relevant part:

> [E]liminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended [29 U.S.C. § 141 et seq.], and the Railway Labor Act, as amended [45 U.S.C. § 151 et seq.], and have the tendency or necessary effect of burdening or obstructing commerce . . .

29 U.S.C. §401 (2015).[3]

Section 203(a) of the LMRDA requires employers, including clients of ELA law firms, to report to the USDOL:

- ''[A]ny agreement or arrangement with a labor relations consultant or other independent contractor or organization'' under which such person ''undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise,'' or how to exercise, their rights to union representation and collective bargaining, 29 U.S.C. §433(a)(4)(2015); and
- ''[A]ny payment (including reimbursed expenses) pursuant to such an agreement or arrangement must also be reported. 29 U.S.C. §433(a)(5) (2015).

[3] Notably, under the National Labor Relations Board's new fast-track election procedures, the disclosures required under the New Rule would likely occur well after the campaign and election. Thus, the timing does not even support the USDOL's stated goals.

The report must show "in detail the date and amount of each such payment, . . . agreement, or arrangement . . . and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.'' 29 U.S.C. §433(2015). Under the USDOL's implementing regulations, employers must file a Form LM–10 (''Employer Report'') that contains this information in a prescribed form. *See* 29 C.F.R. Part 405(2015).

Section 203(b) of the LMRDA imposes a similar reporting requirement on labor relations consultants and other persons, including those attorneys who provide advice. Section 203(b) requires that:

- Every person who enters into an agreement or arrangement with an employer and undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or how to exercise, their rights to union representation and collective bargaining ''shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing . . . ***a detailed statement of the terms and conditions of such agreement or arrangement***''; and
- Persons subject to this requirement to report receipts and disbursements of any kind ''on account of labor relations advice and services.''

29 U.S.C. §433(b) (emphasis added). Labor relations consultants and other persons who have engaged in reportable activity, must file a Form LM–20 ''Agreement and Activities Report'' within 30 days of entering into the reportable agreement or arrangement, and a Form LM–21 ''Receipts and Disbursements Report'' within 90 days of the end of the consultant's fiscal year, if during that year the consultant received any receipts as a result of a reportable agreement or arrangement. *See* 29 C.F.R. Part 406 (2015).

B. The DOL's "Bright-Line Rule" (1962 – Present)

The LMRDA specifies that information communicated "in the course of a legitimate attorney-client relationship" is exempt from disclosure, 29 U.S.C. § 434 (2015). The USDOL's rules have long stated, in relevant part that:

> Nothing contained in this part shall be construed to require
> . . .
> (b) Any person to file a report covering the services of such person by reason of his
> (1) giving or agreeing ***to give advice to an employer***; or
> (2) representing or agreeing ***to represent an employer before any court, administrative agency, or tribunal of arbitration***; or
> (3) ***engaging or agreeing to engage in collective bargaining*** on behalf of an employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder;
> . . .
>
> (d) 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 part any information which was lawfully communicated to such attorney by any of his clients **in the course of a legitimate attorney-client relationship**.

29 C.F.R. §406.5 (2012)(emphasis added).

From 1962 until the issuance of the New Rule, the USDOL utilized a "bright-line" test to determine whether particular activities were exempt from reporting obligations because of the "Advice Exemption." Under the "bright-line" test an employer and attorney do not incur any reporting obligations so long as: (1) the attorney providing advice does not directly deliver or disseminate persuasive material to employees; (2) the employer has the ability to reject or modify persuasive material prepared by the attorney providing the advice; and (3) there is no deceptive arrangement between the employer and the attorney providing the advice. *See Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985).

C. The USDOL's New Rule

The USDOL's New Rule rejects this 54-year interpretation of the Advice Exemption and replaces the "bright-line" test with a murky New Rule under which any advice intertwined with other activities triggers the reporting obligations for both the employer and the attorney providing the advice. In order to understand the impact of this change, it is important to understand the broad range of legal activities that are implicated. Consider the following activities:

- Indirect Persuasion - Reporting is required if the attorney – with an object to persuade – plans, directs, or coordinates activities undertaken by supervisors or other employer representatives. *See* Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15,970 (March 24, 2016)
- Materials/Communications - Reporting is required if the attorney provides – with an object to persuade – material or communications to the employer, in oral, electronic (including, *e.g.*, email, Internet, or video documents or images), or written form, for dissemination or distribution to employees. Thus, an attorney "revising employer-created materials, including edits, additions, and translations" with "an object" to "enhance persuasion, as opposed to ensuring legality" would have a reporting obligation. *Id.* at 15,971. But how does one distinguish revisions to "enhance persuasion" from revisions to "ensure legality" when an attorney reviews a persuasive communication to ensure that the employer has avoided statements that could be construed as unlawful threats, interrogation, promises or surveillance under the NLRA?
- Seminars – Attorneys and employees will be required to report seminar

agreements if the attorney develops, or assists the attending employers in developing, anti-union tactics and strategies for use by the employer, the employers' supervisors or other representatives. *Id.* at 15,791-15,792. While this may sound like a bright-line test, it is often the case that the union and the employer do not define "anti-union" in the same manner. Thus, training intended to provide the employer's managers with an understanding of the election process and the permissible scope of speech during a union campaign is often construed as "anti-union" even when such training is primarily educational in nature.

- Personnel Policies/Actions – Attorneys frequently assist in the development and/or review of personnel policies and activities. Such activities are not reportable merely because they improve the pay, benefits, or working conditions of employees. However, if the policies or activities subtly affect or influence the attitudes or views of the employees, they could be reportable if the agreement, any accompanying communication, the timing, or other circumstances suggest the attorney undertook the activities with an object to persuade employees. *Id.* at 15,793-15,794.

Thus, while the USDOL continues to state that no report is required with respect to an agreement or arrangement to "exclusively" provide advice to an employer, the New Rule makes this exclusion illusory and unrealistic given the actual nature of providing legal advice to employers involved in labor relations matters. In fact, the USDOL's regulations specify that:

> Every person required to file any report under this part shall ***maintain records*** on the matters required to be reported which will provide ***in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions***, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

29 C.F.R. §406.9 (2015) (emphasis added). Practically, this means that the USDOL may review an attorney's records to determine if: (a) the services provided by that attorney to an employer qualify as "advice," "representation" or "collective bargaining;" and (b) are consistent with a "legitimate" attorney-client relationship under the "bar of any State." *See* 29 C.F.R. §406.5 (2012).

IV. THE NEW RULE CONFLICTS WITH THE DUTY TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND UNCONSTITUTIONALLY PREEMPTS STATE LAWS GOVERNING THE PRIVILEGE

The USDOL contends that its New Rule does not conflict with the attorney-client privilege because it only requires the disclosure of the identity of the client, the fee arrangement, and the scope and nature of the persuader agreement, and not any communications between the client and attorney in the course of what the USDOL considers "legitimate attorney-client relationship" (i.e. the provision of a legal opinion, legal service or assistance in a legal proceeding). *See* Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15,996 (March 24, 2016). However, the USDOL's New Rule ignores the complex regulatory environment governing the practice of law, and attempts to create a single definition of the "practice of law" which, as set forth below, unconstitutionally preempts state law and is outside of the USDOL's statutory mandate.

A. The New Rule Unconstitutionally Preempts State Law

The New Rule now characterizes information such as the identity of the attorney and the client, the scope, nature, terms and conditions of the agreement, the fee arrangement and specific persuader activities undertaken, as ***outside the scope of the attorney-client privilege***, and thus subject to reporting and disclosure. USDOL, *Persuader Final Rule Questions & and Answers* (Last visited April 8, 2016), http://www.dol.gov/olms/regs/compliance/ecr/Persuader_QA_508.pdf; USDOL, *Persuader Agreements: Ensuring Transparency in Reporting for Employers and Labor Relations Consultants* (Last visited April 8, 2016), http://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf.

However, the definitions of **"**privileged information**"** and the **"**practice of law**"** are determined and administered by each state. *See* Model Rules of Prof**'**l Conduct R. 1.6 (2015); American Bar Association, *State Definitions of the Practice of Law* (April 8, 2016), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf. *See e.g.* CA B&P 6149 (**"**A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code.**"**); *Fought & Co., Inc. v. Steel Engineering*, 87 Haw. 37, 951 P.2d 487 (1998) (Hawai`i Supreme Court recognized that **"**the practice of law is not limited to appearing before the courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party affecting the legal rights **…** of such party, where such advice, drafting or rendition of services requires the use of any degree of legal knowledge, skill or advocacy.**"**) *See also* Ark. Rules of Prof**'**l Conduct R. 1.6 (2015); *see also* American Bar Association, *Alpha List of States Adopting Model Rules* (April 8, 2016).

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (listing the forty-nine states and the District of Columbia adopting the model rules.)

Generally, it is within each State's sovereign power to make and enforce the laws for the benefit of its citizens. *Chicago, B. & Q. Ry. Co. v. People of State of Ill.*, 200 U.S. 561, 592, 26 S. Ct. 341, 349, 50 L. Ed. 596 (1906)(holding that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety). Regulatory power over the practice of law within a state is explicitly reserved to the states:

> [T]he right to practice law in the state courts [is] not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers that was not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

Ex parte Lockwood, 154 U.S. 116, 117, 14 S. Ct. 1082, 1083, 38 L. Ed. 929 (1894)(*citing Bradwell v. People of State of Ill.*, 83 U.S. 130, 133, 21 L. Ed. 442 (1872)).

The power of each state to independently regulate lawyers acting within its jurisdiction has been consistently upheld. As the Supreme Court of the United States noted in *Leis v. Flynt*, there exists no federal or Constitutional basis to require one state to allow an attorney barred in another state to practice law within its jurisdiction. *Leis v. Flynt*, 439 U.S. 438, 443, 99 S. Ct. 698, 701, 58 L. Ed. 2d 717 (1979)(*citing Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (1958); *see also Norfolk & Western R. Co. v. Beatty*, 423 U.S. 1009, 96 S.Ct. 439, 46 L.Ed.2d 381 (1975)(citations omitted); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034, 94 S.Ct. 533, 38 L.Ed.2d 327 (1973)(citations omitted). *Cf. Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2288-89, 45 L.Ed.2d 223 (1975). Thus, any attempt by the USDOL to impose a single

definition of the "practice of law" – such as defining what types of information fall *outside of the attorney-client privilege* – would be an unconstitutional abrogation of rights explicitly reserved to the States.

B. The USDOL's New Rule Constitutes An *Ultra Vires* Act

The USDOL may argue that it has the right to establish regulations interpreting and enforcing the LMRDA. Whether the agency's exercise of power is legitimate is evaluated using a two-step test articulated by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Mosquera v. Solis*, 924 F. Supp. 2d 111, 112 (D.D.C. 2013), *dismissed sub nom. Mosquera v. Perez*, No. 13-5082, 2013 WL 11252450 (D.C. Cir. Oct. 18, 2013). Under the *Chevron* test, this Court must first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. "If 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." *Id.* at 842–43, 104 S.Ct. 2778. If the statute is silent or ambiguous with respect to the specific issue, the second prong of the *Chevron* test requires the Court to determine whether the USDOL bases its New Rule on a permissible construction of the LMRDA. *Id.* at 843, 104 S.Ct. 2778.

Under 29 U.S.C. §438, the Secretary (of the USDOL) has the authority to, "issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this subchapter and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438 (2015). Aside from the form and publication rulemaking abilities, the statute is ambiguous as to what is "necessary to prevent the circumvention or evasion" of the reporting requirements. Similarly, *no language explicitly grants the Secretary the power to reveal information protected*

under the attorney-client privilege. As there is no unambiguous statement of Congressional intent, this Court should address the second prong of the *Chevron* test.

The LMRDA specifies that information communicated "in the course of a legitimate attorney-client relationship" is exempt from disclosure. 29 U.S.C. §434 (2015). However, under the New Rule, information such as the identity of the attorney and the client, scope, nature, terms and conditions of the agreement, the fee arrangement and specific persuader activities undertaken are considered outside of the attorney-client privilege, and thus subject to disclosure. United States Department of Labor, *Persuader Final Rule Questions &and Answers* (April 8, 2016), http://www.dol.gov/olms/regs/compliance/ecr/Persuader_QA_508.pdf; United States Department of Labor, *Persuader Agreements: Ensuring Transparency in Reporting for Employers and Labor Relations Consultants* (April 8, 2016), http://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf. Given the fact that such information is privileged under the laws of the states, the USDOL's approach forces employers and their attorneys to choose between compliance with the New Rule or compliance with state law and professional ethical obligations. Such a construction of the LRMDA is impermissible; it fails both prongs of the *Chevron* test and is an improper use of the Secretary's power.

In summary, the USDOL cannot reconcile its New Rule with the state laws governing the attorney-client relationships. The New Rule requires the USDOL to review privileged documentation without the proper expertise, and then determine what constitutes the "practice of law" based on multiple state law definitions. By making determinations on the "practice of law," the USDOL engages in *ultra vires* acts and unconstitutionally preempts state law.

V. CONCLUSION

Based on the foregoing, the ELA member firms represented here as amicus curiae respectfully urge this Court to enjoin the April 25, 2016 implementation of the USDOL's New Rule as requested by the Plaintiffs to this action.

Dated: April 14, 2016

Respectfully submitted,

By: /s/ Jim L. Julian

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CERTIFICATE OF SERVICE

I, Jim L. Julian, hereby certify that on the 14th day of April 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing and, if designated, by U.S. First Class Mail, postage prepaid, to the following:

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