



LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

Statement of Michael J. Eastman
Public Meeting on Employer and Consultant Reporting Under Section 203
of the Labor-Management Reporting and Disclosure Act
U.S. Department of Labor
May 24, 2010

Good morning, my name is Michael Eastman and I am Executive Director of Labor Law Policy for the United States Chamber of Commerce (Chamber). The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region of the United States. The vast majority of our members are considered "employers" under the LMRDA. The Chamber's membership also includes a significant number of trade associations and law firms that provide advice to employers. Any change to interpretations under section 203 will likely have a significant impact on our membership.

The 1947 amendments to the National Labor Relations Act explicitly recognize employer free speech rights. Employers unquestionably have the right to communicate facts and opinions to employees as long as it is not done in a coercive manner. There are many in the organized labor community who would like to repeal the 1947 amendments and this provision in particular. Legislative proposals to that end failed in Congress 30 years ago. The current debate over EFCA is a less direct approach—enshrining card check would have allowed unions to conduct organizing in secret and could require recognition before an employer had an opportunity to respond.

With the failure thus far of legislative options, many supporters of organized labor are looking to the regulatory process to find new ways to erode employer free speech rights. If the Department wants to have a legitimate debate about the proper scope of the advice exception, it must tread cautiously lest it be used as a tool by those whose legislative efforts to gag employers have been unsuccessful.

Often overlooked in debates over the advice exception is that anyone found to cross the line from advice to persuasion must disclose not only the persuader activity undertaken, but must disclose every client that received labor relations advice. In other words, if I am a partner in a 100 person law firm and one of my partners engages in persuader activity with respect the client A, I will be forced to disclose

non-persuader labor relations clients. Client B and C may not appreciate the fact that their relationship has now been exposed. For this reason, many large law firms have a practice of not doing persuader work, but instead limiting their work to providing advice for clients. Narrowing the advice exception will make it more difficult for employers to obtain answers to basic legal questions regarding their rights and responsibilities not only during an organizing campaign, but in every facet of labor relations. It is important to note that the National Labor Relations Act and its interpretations are highly nuanced and near impossible for a layperson to understand without counsel. Further, a narrowing of the exception will cause some employers to voluntarily gag themselves rather than exercising free speech as the law permits.

We urge the Department to tread cautiously as it considers its options as employer free speech and attorney client privilege are not trivial matters.

I would also like to express our serious concern with possible changes to interpretations under section 203(e). The statute was designed to provide disclosure when employers engage third parties to interact with and persuade employees because employees may not otherwise know such individuals are agents of the employer—this is not true in the case of the employer’s supervisors, managers, and officers. The practical difficulties of accounting and reporting under the so-called split-income theory cannot be justified.

We welcome the opportunity to provide more substantive comments should the Department wish it at a later date.