UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Labnet Inc. d/b/a WORKLAW® NETWORK 3001 Brighton Blvd. Denver, CO 80216 and SHAWE & ROSENTHAL LLP One South Street, Suite 1800 Baltimore, MD 21202 and ALLEN, NORTON & BLUE, P.A. 121 Majorca Ave., Suite 300 Miami, FL 33134 and COLLAZO FLORENTINO & KEIL LLP 747 Third Avenue New York, NY 10017-2803 and DENLINGER, ROSENTHAL & GREENBERG 425 Walnut Street, Suite 2300 Cincinnati, OH 45202 and KAMER ZUCKER ABBOTT 3000 W. Charleston Blvd., Suite 3 Las Vegas, NV 89102 and KEY HARRINGTON BARNES, P.C. 3710 Rawlins Street, Suite 950	*	Civil Action No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Dallas, TX 75219 *
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and *
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& THOMPSON, P.C. *
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and *
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and *
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One Monarch Place, Suite 2000 *
Springfield, MA 01144 *
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and *
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UFBERG & ASSOCIATES, LLP *
310 Penn Ave. *
Scranton, PA 18503 *
*
Plaintiffs *
v. *
*
UNITED STATES DEPARTMENT *
OF LABOR *
Frances Perkins Building *
200 Constitution Ave. NW *
Washington, DC 20210 *
*
and *

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THOMAS E. PEREZ in his official	*
capacity as Secretary of Labor	*
Frances Perkins Building	*
200 Constitution Ave. NW	*
Washington, DC 20210	*
	*
and	*
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MICHAEL J. HAYES, in his official	*
Capacity as Director, Office of	*
Labor-Management Standards	*
U. S. Department of Labor	*
Frances Perkins Building	*
200 Constitution Ave. NW	*
Washington DC 20210	*
	*
Defendants	*
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. Labnet, Inc. d/b/a Worklaw Network ("Worklaw Network") is an association of law firms that represent management exclusively in labor and employment law matters. When a union files a petition with the National Labor Relations Board for a representation election, the employer has only a short time, normally 21-25 days, to educate its management concerning the effect of unionization and to convey that information to its employees so that they can make an informed choice. The employer's communications with workers are subject to numerous non-intuitive NLRB rules, governing the content, location and timing of the communications. Worklaw firms assist management by advising them how to avoid unfair labor practices and by advising how to legally exercise their right to express their own point of view. Worklaw firms do not

communicate directly with their clients' employees. Historically, the Department of Labor ("the Department" or "the DOL") has held that the services provided by law firms such as the Worklaw firms are covered by the advice exemption from the Labor Management Reporting and Disclosure Act's ("LMRDA" or "Act") reporting requirements because the firms do not communicate directly with employees. 29 U.S.C. § 433(c). On March 24, 2016, the Department published a new Interpretation of the advice exemption, eliminating the direct communication test. This new Interpretation should be struck down because:

a. The Interpretation is contrary to the plain terms of the LMRDA, which expressly excludes "the giving or agreeing to give advice" to an employer. 29 U.S.C. § 433(c). The Interpretation is also contrary to the legislative history of the Act and the Department's longstanding Interpretation of the Act. Indeed, the new Interpretation completely guts the advice exemption. Under the Department's reading, the exemption only covers advice that would not be covered by the Act in the first place, rendering the exemption meaningless.

b. The Interpretation replaces a bright line test with a vague and subjective distinction that would be impossible to administer.

c. The Interpretation is an impermissible viewpoint-based regulation of speech. Although Worklaw firms assist clients with all sorts of communications to employees, the DOL's Interpretation singles out for regulation communications that are "anti-union." "As a general matter…government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v.*

Entertainment Merchants Assoc., 131 S.Ct. 2729, 2733 (2011). "Nor may [government] discriminate against speech on the basis of ... viewpoint." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 685 (2010). "Viewpoint discrimination is…an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

The Interpretation is neither narrowly tailored nor necessary to protect a compelling governmental interest. To the contrary, the Interpretation is an election year favor to organized labor, a favor designed to suppress speech that opposes organized labor.

d. The Interpretation impermissibly infringes upon the attorney-client relationship by requiring the reporting of confidential and privileged information and driving a wedge between lawyers and their clients concerning reporting requirements.

PLAINTIFFS

2. Worklaw Network is an association of independent law firms representing management exclusively in all facets of labor and employment law. It is headquartered in Denver, Colorado.

3. Shawe & Rosenthal LLP is a law firm located in Baltimore, Maryland. The firm has thirteen attorneys and has represented management in all facets of labor and employment law since 1947. The firm is a member of Worklaw Network.

4. Allen, Norton and Blue, P.A. has five offices located throughout the State of Florida. The firm employs twenty-six attorneys. Since its formation in 1968, Allen,

Norton and Blue has represented management in all phases of labor and employment. The firm is a member of Worklaw Network.

5. Collazo Florentino & Keil LLP is located in New York City. The firm employs eight lawyers and devotes its entire practice to providing advice to management on a full range of labor and employment matters. The firm is a member of Worklaw Network.

6. Denlinger, Rosenthal & Greenberg is located in Cincinnati, Ohio. The firm employs seven lawyers and devotes its entire practice to providing advice to management on a full range of labor and employment matters. The firm is a member of Worklaw Network

7. Kamer Zucker Abbott is located in Las Vegas, Nevada. The firm was founded in 1986 and employs nine attorneys. The firm's practice is devoted exclusively to representing management in all facets of labor and employment law. The firm is a member of Worklaw Network.

8. Key Harrington Barnes is located in Dallas, Texas. The firm employs ten attorneys. The firm represents management in all phases of labor and employment law. The firm is a member of Worklaw Network.

9. Lehr Middlebrooks Vreeland & Thompson, P.C. employs ten attorneys and is located in Birmingham, Alabama. The firm represents management in all phases of labor and employment law. The firm is a member of Worklaw Network.

10. Neel Hooper & Banes, P.C. has its offices in Houston, Texas. The firm was established in 1972 and employs nine attorneys. The firm represents management in

all aspects of labor and employment law. The firm is a member of Worklaw Network.

11. Seaton, Peters & Revnew, P.A. was founded in 1995, has eleven attorneys and is located in Minneapolis, Minnesota. The firm's practice is devoted exclusively to the representation of management in labor and employment matters. The firm is a member of Worklaw Network.

12. Skoler, Abbott & Presser, P.C. has two locations in Massachusetts and one in Meridian, Connecticut. The firm was founded in 1964 and has eight lawyers. The firm's practice is devoted solely to representation of management in the areas of labor and employment law. The firm is a member of Worklaw Network.

13. Uffberg & Associates is located in Scranton, Pennsylvania. The firm employs three attorneys. The firm's practice is devoted exclusively to the representation of management in labor and employment matters. The firm is a member of Worklaw Network.

DEFENDANTS

14. The United States Department of Labor (hereafter "Department") is a department within the executive branch of the federal government. The Department administers, interprets, and enforces approximately 180 federal laws, including the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 401, et seq.

15. Thomas E. Perez is the Secretary of Labor. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

16. Michael J. Hayes is the Director, Office of Labor-Management Standards. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

JURISDICTION AND VENUE

17. The Court has jurisdiction over this matter pursuant to 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331 and § 1337.

18. Venue is proper in this district under 28 U.S.C. § 1391(e) because named Plaintiff Seaton, Peters & Revnew is located within this district.

19. The Court is authorized to award declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Declaratory Judgment Act, 28 U.S.C. §2201-2202.

STATEMENT OF FACTS

20. Section 203(a) of the LMRDA requires employers to report agreements and payments with a consultant or independent contractor when the agreement or payment's "object thereof, directly or indirectly, is 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." 29 U.S.C. § 433(a). This is commonly referred to as the Act's "reporting requirement." Employers fulfill this statutory requirement by filing LM-10 forms with the Department.

21. Section 203(b) of the LMRDA imposes this same "reporting requirement" on consultants and independent contractors, including attorneys. 29 U.S.C. § 433(b). These parties fulfill this statutory requirement by filing LM-20 forms (within 30 days of the agreement) and LM-21 forms (annually) with the Department.

22. Section 203(c) of the LMRDA states, in part, that "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 . . ." 29 U.S.C. § 433(c). This is commonly referred to as the "advice exemption."

23. Section 204 of the LMRDA states that, "Attorneys in good standing in any state are not required to include in any report information lawfully communicated to them by their clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434.

24. The Department's longstanding Interpretation of the "advice exemption" is contained in a 1962 Memorandum from then Solicitor of Labor, Charles Donahue (hereafter "Donahue Memo"). According to the Donahue Memo, the "dividing line" between what must be reported and what is subject to the advice exemption depends upon whether the consultant directly communicates with employees. Direct communication with employees is subject to reporting under Sections 203(a) and (b). When a consultant or lawyer prepares a communication for the employer to deliver to employees, the communication is considered advice "where the employer is free to accept or reject the written material prepared for him." See 81 F.R. 15931.

25. The LMRDA's Interpretative Manual, which guides Department staff in implementing the LMRDA, has adopted the Donahue Memo's Interpretation.

26. The Donahue Memo's Interpretation was upheld by the D.C. Circuit as lawful in *UAW v. Dole*, 869 F.2d 616 (D.C. Cir. 1989) (Ginsberg, J.).

27. On June 11, 2011, the Department issued a Notice of Proposed Rulemaking (NPRM) by the Office of Labor-Management Standards. The NPRM was published in

the Federal Register at 76 F.R. 36178-36230 (June 21, 2011) and invited interested parties to comment.

28. The NPRM stated that the Office of Labor-Management Standards intended to implement a revised Interpretation of Section 203(c). The NPRM set forth the Interpretation and its rationale. *Id.*

29. After receiving 8,872 comments on the proposed revised Interpretation, the Department issued the Interpretation on March 23, 2016. The Interpretation was published in the Federal Register on March 24, 2016. 81 F.R. 15923.

30. The new Interpretation eliminates the "accept or reject" test for advice. Exempt advice "does not include persuader activities, i.e. actions, conduct or communications by a consultant on behalf of an employer with an object, directly or directly, to persuade employees concerning their rights to organize or bargain collectively. If the consultant engages in both advice and persuader activities, however, the entire agreement or arrangement must be reported." 81 F.R. 16042

31. The Interpretation also amends both the instructions on the LM-10 and LM-20 forms and the forms themselves. The new instruction for the LM 20 form (81 F.R. 16042) state that:

> Reporting of an agreement or arrangement is triggered when:
>
> (1) A consultant engages in direct contact or communication with any employee with an object to persuade such employee; or
>
> (2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employees:
>
> (a) plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and

interactions with employees;

(b) provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;

(c) conducts a seminar for supervisors or other employer representatives; or

(d) develops or implements personnel policies, practices, or actions for the employer.

Specific examples of activities that either alone or in combination would trigger the reporting requirements include but are not limited to:

- planning or conducting individual employee meetings;
- planning or conducting group employee meetings;
- training supervisors or employer representatives to conduct such meetings;
- coordinating or directing the activities of supervisors or employer representatives;
- establishing or facilitating employee committees;
- conducting a union avoidance seminar for supervisors or employer representatives in which the consultant develops or assists the attending employers in developing anti-union tactics or strategies for use by the employers' supervisors or other representatives ("reportable union avoidance seminar");
- drafting, revising, or providing speeches, written material, website, audiovisual or multimedia content for presentation, dissemination, or distribution to employees, directly or indirectly (including the sale of "off-the-shelf" materials where the consultant assists the employer in the selection of such materials, except as noted below where such selection is made by trade associations for member-employers);
- developing employer personnel policies designed to persuade, such as when a consultant, in response to employee complaints about the need for a union to protect against arbitrary firings, develops a policy under which employees may arbitrate grievances;
- Identifying employees for disciplinary action, reward, or other targeting based on their involvement with a union representation campaign or perceived support for the union;
- Coordinating the timing and sequencing of union avoidance tactics and strategies.

> To be reportable, as noted above, such activities must be undertaken with an object to persuade employees, as evidenced by the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.

32. The Department's new LM-10 and LM-20 forms require that filers complete a detailed checklist of specific activities.

33. The requirement to file an LM- 20 form will also trigger the obligation to file an LM-21 form. Part B of the LM-21 requires the filer to disclose "all receipts from employer in connection with labor relations advice or services regardless of the purposes of the advice or services," including the name of the employer and the amount received. It also requires the filer to disclose its disbursements to officers and employees "in connection with labor relations advice or services render to the employers listed in Part B."

34. As used herein, the term "Interpretation" means the Interpretation issued by the Department on March 4, 2016, 81 F.R. 15923 along with the associated instructions on Forms LM-10, LM-20, and LM-21.

STANDING

35. The Interpretation constitutes a final agency action.

36. Plaintiffs intend to continue advising their clients in ways that will trigger coverage under the Department's new Interpretation of the advice exemption.

37. As a result the Department will view them as being required to make burdensome and intrusive disclosures on the LM-20, including the names of their client, the terms of their retainer, what activities they performed, what employees were

involved, and what union was involved.

38. Even more burdensome and intrusive, the Department will view the firms as being required to file LM-21 forms, listing (in part B) "all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services" and all disbursements (i.e. Salary and expenses) to officers and employees "in connection with labor relations advice or services rendered to the employers listed in Part B."

39. Plaintiffs that fail to file the required disclosures, or to fail to file them to the Department's satisfaction, face civil and criminal penalties.

40. The Interpretation will require Plaintiffs to violate their ethical obligations to clients. American Bar Association Model Rule of Professional Conduct 1.6 provides that "a lawyer shall not reveal information related to the representation of a client unless the client gives informed consent..." or unless one or more of the narrow exemptions listed in the Rule is present. Most states in which Worklaw firms practice have similar rules. Such confidential information can include the existence of an attorney-client relationship, and the identity of the client and the amount paid. The Interpretation would require Plaintiffs to list "Report all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services." LM-21 Form, p. 2. As the Eighth Circuit has confirmed, 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)." *Donovan v. Rose Law Firm*, 768 F.2d 964,

975 (8th Cir. 1985).

41. The Interpretation will also invade the privacy of the labor lawyers who provide services no longer covered by the advice exemption. The LM-21 form requires filers to disclose the salaries paid to officers and employees "in connection with labor relations advice or services rendered to the employers listed in Part B."

COUNT I
THE INTERPRETATION IS CONTRARY TO STATUTE

42. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 41.

43. The Interpretation is contrary to the plain meaning of the Act and should be set aside pursuant to 5 U.S.C. § 706. The Act expressly excludes the giving of advice. 29 U.S.C. § 433(c). Consistent with the legislative history, the Department has historically, and correctly, interpreted this to mean that a law firm is covered if it communicates directly with employees, but not if it provides recommendations that the client is free to accept, modify or reject.

44. The new Interpretation is contrary to the terms of the statute, and is not entitled to deference. Indeed, the Interpretation completely destroys the advice exemption. The only services that are covered in the first place are services with the object to persuade employees. Thus, the advice exemption would be meaningless if it did not cover advice with the object to persuade employees. Yet the new Interpretation specifically states that advice does not include communications "that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights to organize

or bargain collectively." In other words, the new Interpretation eviscerates the Advice exemption by reading it to cover only activities that are not covered in the first place. The Department's old interpretation of the advice exemption recognized this. "The very purpose of section 203's exception prescription, the Secretary maintains, is to remove from the sections coverage certain activity that otherwise would have been reportable." *UAW v. Dole*, 869 F.2d at 618.

45. To the extent there is a tension between the reporting requirement and the advice exemption, the exemption must control. Because the Act's reporting requirements carry criminal penalties, and regulate speech, they must be narrowly construed. On the other hand, "Congress intended to grant broad scope to the term 'advice.'" *UAW v. Dole*, 869 F.2d at 618. Thus, the new Interpretation is not entitled to deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron* Step One, the Interpretation is contrary to Congress's intention on the precise question at issue. Under *Chevron* Step Two, the Interpretation is not a "permissible" or "reasonable" construction of the statute, particularly in view of the First Amendment considerations discussed below.

46. The Interpretation is not entitled to *Chevron* deference for another reason of critical importance to Plaintiffs.

47. All members of the Worklaw Network and individual Plaintiff law firms are attorneys in their respective states.

48. As such, all attorneys are required to abide by the Rules of Professional Conduct promulgated by each state.

49. The regulation of attorneys "is traditionally the province of the states" and "if Congress intends to alter the 'usual constitutional balance between the States and Federal Government,' it must make its intention to do so "unmistakably clear in the language of the statute." *American Bar Ass'n v. F.T.C.*, 430 F.3d 457, 471-72 (D.C. Cir. 2005).

50. In addition to state Rules of Professional Conduct, the American Bar Association has adopted Model Rules of Professional Conduct.

51. Rule 1.6 of the Model Rules of Professional Conduct states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." MODEL RULES OF PROF'L CONDUCT R. 1.6.

52. This confidentiality rule is broader than the attorney-client privilege and encompasses all information relating to the representation of a client. *Id.*

53. Paragraph 4 of the Comments states, "This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third party." *Id.*

54. Paragraph 12 of the Comments states, "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules." *Id.*

55. Paragraph 13 of the Comments states, "The disclosure of any information is prohibited if it would . . . prejudice the client (e.g., the fact that a corporate client is

seeking advice on a corporate takeover that has not been publicly announced . . . or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge.). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent." *Id.*

56. State Rules of Professional Conduct for each of the named Plaintiffs have adopted the language set forth in ABA Model Rule 1.6 and many have offered commentary similar to the Model Rule, stressing the importance that all information must remain confidential. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 1.6; FLA. RULES OF PROF'L CONDUCT R. 1.6; MD. LAWYERS RULES OF PROF'L CONDUCT R. 1.6; MD. LAWYERS RULES OF PROF'S CONDUCT R. 1.6 CMT. ("the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients . . ."); MASS. RULES OF PROF'L CONDUCT R. 1.6; MINN. RULES OF PROF'L CONDUCT R. 1.6; MO. RULES OF PROF'L CONDUCT R. 4-1.6; N.Y. RULES OF PROF'L CONDUCT R. 1.6 (broadly defining confidential information as any "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."); OHIO RULE OF PROF'L CONDUCT R. 1.6; NEV. RULE OF PROF'L CONDUCT R. 1.6; TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.05; TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT 1.05 CMMT. ("Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system.").

57. In these commentaries, at least two states have stated that while "other laws" can compel disclosure and supersede 1.6, a "presumption exists against supersession." ALA. RULES OF PROF'L CONDUCT R. 1.6, CMT.; FLA. RULES OF PROF'L CONDUCT R. 1.6.

58. The Interpretation will require Plaintiffs to divulge confidential information within 30 days of an agreement or arrangement to provide certain representation to a client through the LM-20 form, and at year's end through the LM-21 form.

59. For example, the new LM-20 "Persuader Activities Checklist" will require attorneys to reveal precise information about the type of persuader activity undertaken (i.e., "Conducting a seminar for supervisors or employer representatives"; "Developing employer personnel policies or practices"). 81 F.R. 16040-51.

60. The fact that the attorney is engaging in this type of activity for a client is confidential under Rule 1.6.

61. Such disclosure will prejudice Plaintiffs and their clients. *Id.*

62. Congress did not "explicitly" or "implicitly" delegate the authority to the Department to violate attorney-confidentiality rules, or regulate attorney conduct in this fashion, nor did it do so in the required "unmistakably clear" language. *American Bar Ass'n*, 430 F.3d at 471-72.

63. In comments submitted to the Department concerning the proposed Interpretation, the American Bar Association opposed the proposed Interpretation because of concern that the Interpretation conflicts with Rule 1.6 (*see* American Bar

Association Comments submitted to Department concerning 76 F.R. 36178 (September 21, 2011, attached as Exhibit 1)).

64. The Interpretation therefore must be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(c).

65. Unless implementation of this Interpretation is enjoined, Worklaw, its members and all attorneys subject to the revised interpretation will suffer immediate, irreparable harm for which no adequate remedy at law exists.

66. Enjoining the Interpretation is in the public interest and presents no harm to the Department.

COUNT II
THE INTERPRETATION VIOLATES THE FIRST AMENDMENT

67. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1 through 66.

68. The Interpretation undeniably targets those who communicate a particular message conveying a particular viewpoint—it uses the term "anti-union" 55 times. It uses the words "message" 63 times. "As a general matter…government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merchants Assoc.*, 131 S.Ct. 2729, 2733 (2011). "As a result, the Constitution 'demands that content-based restrictions on speech be presumed invalid…and that the Government bears the burden of showing their constitutionality.'" *United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012).

69. The giving and receipt of legal services is protected by the First Amendment. *Legal Services Corp. v. Velazquez*, 531 U.S. 553, 546 (2001). Speech concerning unions and unionization is protected by the First Amendment. *Harris v. Quinn*, 134 S. Ct. 2618 (2014). See also 29 U.S.C. § 158(c) ("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 Act, if such expression contains no threat of reprisal or force or promise of benefit."). The First Amendment protects a speaker's right to remain anonymous. *McIntryre v. Ohio Elections Comm.*, 514 U.S. 334 (1995). Reporting and disclosure requirements impose a burden on First Amendment activity. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986). Disclosure of individuals' salaries also invades a substantial privacy interest. *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991). As a result, disclosure requirements are subject to close scrutiny, and "cannot be justified by a mere showing of some legitimate governmental interest." *Davis v. Federal Election Commission*, 554 U.S. 724, 744 (2008). And even if a kind of activity, e.g. political campaigns, can be subjected to a disclosure requirement, e.g. *Buckley v. Valeo*, 424 U.S. 1 (1976), those requirements must always be applied neutrally. A disclosure requirement that targets speakers because of their viewpoint could never survive scrutiny. *Brown*, 131 S.Ct. at 2733.

70. Union attorneys and their clients are not required to fill out the same type of forms about their "pro-union" speech.

71. Burdening speech that is disfavored by government officials under the guise of "transparency" is an old ruse. *NAACP v. State of Alabama*, 357 U.S. 449 (1958). The Department's rationale for the new Interpretation is make-weight. The Department claims that "Transparency promotes worker rights by creating a more informed electorate." 81 FR 15932. This rationale is neither compelling nor genuine. The instructions for the LM-20 form require the form to be filed within 30 days of the agreement or arrangement to perform reportable activities. The LM-10 and LM-21 forms are not due until 90 days after the filer's fiscal year. By that time, under the NLRB's time targets for elections, the vote will have already taken place. Moreover, the "transparency" theory appears to be based on the unrealistic idea that law firms somehow dominate or control their clients. In fact, clients choose their objectives; lawyers simply help them achieve their objectives. In any event, the transparency rationale for the new Interpretation does not rise to the level of a compelling governmental interest for First Amendment purposes. The First Amendment does not permit the government to burden speech based on its distaste for the message. That distaste is manifest in the Department's new Interpretation.

COUNT III
THE INTERPRETATION IS VOID FOR VAGUENESS

72. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1 through 71 as if fully rewritten herein.

73. The Interpretation should be set aside because it is vague, pursuant to 5 U.S.C. § 706. The LMRDA carries criminal penalties for failure to properly complete

the LM-10, LM-20 and LR-21 forms. 29 U.S. C. § 439. "Vague" laws "offend important values" by "impermissibly delegating policy matters to policemen, judges, and juries for resolution on an ad hoc basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (emphasis original). Vague laws that either regulate the right to free speech or carry criminal sanctions are subject to a strict application of the vagueness test. *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Laws that are impermissibly vague must be invalidated. *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317, 183 L.Ed.2d 234 (2012). Here, the Department replaces a clear and bright line test—direct contact with clients' employees—with a vague and subjective distinction that will be impossible to administer. As an example of vagueness, the Interpretation states that reporting is required if one "conducts a seminar for supervisors" or "develops …personnel policies" "with an object to persuade employees." 81 F.R. 16043. In practice, every policy and procedure designed to ensure that employees are treated fairly also reduces an employer's vulnerability to union organizing. Attorneys frequently review and draft a host of policies, all of which might influence an employee's views on unions. The Department seeks to gloss over this critical vagueness problem, raised in numerous comments to the NPRM, by claiming that only those activities with the object to persuade are reportable, but provides scant guidance as to how such an objective is determined other than to say is depends on the facts and circumstances.

COUNT IV
THE INTERPRETATION IS ARBITRARY AND CAPRICIOUS

74. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1 through 73 as if fully rewritten herein.

75. The Interpretation is arbitrary, and capricious and should be set aside pursuant to 5 U.S.C. § 706. An administrative action is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action." *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Here, the Department has failed to examine all relevant data for its action. In fact, the Department acknowledges that it conducted no research of its own before adopting the new Interpretation. 81 F.R. 15962. Nor could the Department rely on its own experience--the Department has no first-hand experience with union organizing drives and NLRB elections. Those matters are regulated by the National Labor Relations Board, an independent agency outside the Department. 29 U.S.C. §§ 153, et seq. In the absence of first-hand experience, the Department's explanation for its drastic Interpretation relies entirely on a mishmash of out-of-date scandal mongering and exposés. However, even the Department admits that "most employers and their consultants, like most unions, conduct their affairs in a manner consistent with federal law." 81 F.R. 15927.

COUNT V
THE INTERPRETATION IS OVERBROAD

76. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1 through 75 as if fully rewritten herein.

77. Even if the Interpretation is determined to be valid as applied to advice given to a particular client, the ensuing reporting requirement, under the LM-21, is overbroad, because it requires disclosures concerning all receipts from all clients "regardless of the purposes of the advice or services" and because it requires the filer to disclose all disbursements to its officers and employees.

78. Form LM-21 will require Plaintiffs to disclose confidential information about clients who bear no relationship to the persuasive advice that triggered the report.

COUNT VI
THE DEPARTMENT'S CERTIFICATION UNDER THE REGULATORY FLEXIBILITY ACT IS ARBITRARY AND CAPRICIOUS AND VIOLATES THAT ACT

79. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1 through 78 as if fully rewritten herein.

80. Plaintiffs are small businesses as that term is defined in the Small Business Act and applicable regulations. *See* 13 C.F.R. 121.201 (Sector 541110). The Regulatory Flexibility Act ("RFA") requires an agency promulgating a rule to consider the effect of the proposed regulation on small businesses and to design mechanisms to minimize any adverse consequences. *See* 5 U.S.C. § 601; *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998). The RFA exempts an agency from the requirement to publish an Initial Regulatory Flexibility Analysis and a Final Regulatory Flexibility Analysis if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). The Small Business Regulatory Enforcement and Fairness Act of 1996

authorized judicial review of an agency's compliance with the RFA and final certification under the arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(a). 5 U.S.C. § 611(a)(1).

81. In its Final Rule, the Department certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. 81 F.R.16001. In reaching that conclusion, the Department purported to compare the cost of compliance in relation to the revenue of the entity. The Department stated that the cost of compliance would be an average of $107.68. The average was based on a non-filing cost of $92.53 and a filing cost of $1,771. The average gross revenue was estimated to be $734,058. The average cost for a filing consultant "is not significant because it represents only a 0.24% share of a consultant's average annual gross revenue." 81 F.R. 16018.

82. The Department's estimate of the cost to small entities is wrong. A subsequent independent analysis by Diana Furchtgott-Roth, the former Chief Economist at the Department, concluded that the first-year cost alone for firms would be $10,433 per firm. See Diana Furchtgott-Roth, *The High Cost of Proposed Labor Law Regulations*, Manhattan Institute Issue Brief #21, April 2013) (hereafter "*High Cost*"). In subsequent years, the cost of compliance is estimated at $5,216.50 per firm. *Id.* at 11.

83. Firms that file LM-20 forms are also required by law to file LM-21 forms. See LM-20 Instructions. Many law firms have never filed an LM-21 form because of the previous Interpretation from the Department. Now, such firms will be required to file LM-21 forms with the Department. The Department's certification ignores the cost of

new LM-21 filings. Ms. Furchtgott-Roth estimates that the LM-21 form will also result in first year costs of $10,433 per firm and subsequent years' costs of $5,216.50 per firm. *High Cost* at 10, 11.

INJUNCTIVE RELIEF

84. Unless implementation of the Interpretation is enjoined, Worklaw, its members and all attorneys subject to the revised Interpretation will suffer immediate, irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment against Defendants:

A. Declaring that the Department's Interpretation is unlawful under 5 U.S.C. § 706(2)(a)-(c).

B. Preliminarily and permanently enjoining enforcement of the Interpretation and the associated instructions on the LM-10, LM-20 and LM-21 forms.

C. Vacating and setting aside the Interpretation.

D. Awarding Plaintiffs their attorney's fees and costs of this litigation.

E. Granting such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

Dated: March 31, 2016

SEATON, PETERS & REVNEW, P.A.

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