

**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-169 (KGB)**

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND EXPEDITED HEARING**

COMES NOW Plaintiffs Associated Builders and Contractors of Arkansas (“ABC Arkansas”), Associated Builders and Contractors, Inc. (“ABC National”) Arkansas State Chamber of Commerce/Associated Industries of Arkansas (the “Chamber/AIA”), The Arkansas Hospitality Association, Inc. (“AHA”), the Coalition for a Democratic Workplace (“CDW”), the National Association of Manufacturers (“NAM”), and the law firm of Cross, Gunter, Witherspoon & Galchus, P.C. (“Cross Gunter”) (collectively referred to as “Plaintiffs”), and for their Motion for

Preliminary Injunction and Expedited Hearing (“Motion”), pursuant to Rule 65 of the Federal Rules of Civil Procedure, state:

1. On March 30, 2016, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief against Defendants Thomas E. Perez, in his official capacity as Secretary of Labor for the U.S. Department of Labor, and Michael J. Hayes, in his official capacity as Director of the Office of Labor-Management Standards, U.S. Department of Labor (collectively referred to as “Defendants” or “DOL”), to enjoin DOL from enforcing its new Rule, titled “Labor-Management Reporting and Disclosure Act; Interpretation of the Advice Exemption,” 81 Fed. Reg. 15924 (March 24, 2016) (to be published at 29 C.F.R. Parts 405 and 406) (the “Rule”). Plaintiffs incorporate by reference the allegations set forth in that Complaint.

2. Absent injunctive relief, the challenged Rule, which is otherwise scheduled to take effect on April 25, 2016, will cause a radical change in the well-settled application of Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA” or the “Act”), 29 USC § 433(c), which 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.”

3. The Rule would effectively and unconstitutionally repeal the statutory advice exemption by sweeping aside more than fifty (50) years of consistent, judicially approved enforcement of the LMRDA’s reporting requirements applicable to millions of employers represented by the Plaintiffs, both in Arkansas and nationally, and their advisors, including trade associations, lawyers, and other consultants who are also represented by the Plaintiffs in this lawsuit. Essentially, under the Rule, employers who receive previously exempt guidance from Plaintiffs on how to communicate lawfully with their employees on labor issues, will be required—

under threat of criminal penalty—to file public reports with DOL regarding the arrangement with their advisor(s), the nature of the advice provided to them, and the fees paid for such advice (the LM-10 report). Plaintiffs will also be required for the first time to file public reports with DOL, under threat of criminal penalty, disclosing the nature of their advice to employers that DOL has newly characterized as “persuader” activity (the LM-20 report). Similarly, advisors who are deemed to be “persuaders” must also file a greatly-expanded number of reports of non-persuader “labor relations advice and services” provided to employers (the LM-21 report). The challenged Rule must be enjoined because DOL has exceeded its statutory authority under the LMRDA. Similarly, the Court should grant Plaintiffs’ Motion because the Rule, which casts aside over fifty (50) years of enforcement precedent without any rational explanation, is arbitrary and capricious.

4. The challenged Rule must be enjoined because it irreparably harms Plaintiffs’ First Amendment rights by coercing speech in the form of the newly required public reports and by chilling lawful speech and membership rights of the Plaintiffs and their advisors on labor relations issues, which would now have to be *publicly* reported for the first time in the LMRDA’s history. The Rule burdens Plaintiffs’ speech and cannot satisfy the strict scrutiny of this Court’s analysis of a content-based restriction on their speech. The challenged Rule also violates the First Amendment because it is overbroad and punishes a substantial amount of protected free speech.

5. This Court should also grant injunctive relief because the challenged Rule irreparably and impermissibly intrudes into confidential attorney-client communications and confidential client information, forcing lawyers to breach their ethical obligations to preserve client confidences under Rule 1.6 of the Arkansas Rules of Professional Conduct. LMRDA Section 203 protects privileged communications. By requiring attorneys and their employer clients to file detailed reports regarding the advice arrangements that exist between them and regarding the

nature of the advice provided, the Rule contravenes the LMRDA and, therefore, DOL has acted *ultra vires* in exceeding the scope of its authority.

6. Injunctive relief is also appropriate because the Rule violates Plaintiffs' Fifth Amendment rights to due process under the U.S. Constitution. The challenged Rule—which imposes significant criminal penalties—is fatally deficient in clarity and thus suffers constitutional defect under the vagueness doctrine. The Rule's test for distinguishing between reportable persuader activity and non-reportable advice is so vague and confusing that it violates the Due Process Clause of the Fifth Amendment, as it fails to provide fair warning to Plaintiffs as to what activities will trigger criminal liability, thereby causing further irreparable harm.

7. Finally, injunctive relief is proper under the Regulatory Flexibility Act, 5 U.S.C. § 611, because DOL failed to conduct a sufficient cost-benefit analysis pertaining to the adverse impact of the Rule on small businesses.

8. As more fully explained in the accompanying Memorandum of Law in Support of Plaintiffs' Motion ("Memorandum"), filed simultaneously with this Motion, Plaintiffs are likely to succeed on the merits of this action, and—absent injunctive relief—will suffer irreparable harm. Plaintiffs have no other remedy to cure the Rule's chilling effect on their First Amendment rights.

9. Accordingly, this Court should grant Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing. An order for injunctive relief in the present case will simply preserve the status quo and temporarily retain the same interpretation of the advice exemption that has been in effect for more than fifty (50) years, and therefore, DOL will not be harmed by a preliminary injunction. An order for preliminary injunction will additionally serve to protect the public interest, because public policy demands that a governmental agency be enjoined from acting in a manner contrary to the law.

10. Therefore, Plaintiffs are entitled to a preliminary injunction from the Court ordering that the Rule's effective date be delayed until the conclusion of this matter.

11. This Motion is supported by the accompanying Memorandum and the following Exhibits, incorporated herein by reference:

- Exhibit A** Affidavit of Bill Roachell, President of ABC Arkansas
- Exhibit B** Affidavit of Ben Brubeck, Vice President of Regulatory, Labor, and State Affairs of ABC National
- Exhibit C** Affidavit of Richard Roderick, Managing Director of Cross, Gunter, Witherspoon & Galchus, P.C.

12. Plaintiffs request an expedited hearing on this matter.

WHEREFORE, Plaintiffs ABC Arkansas, ABC National, Chamber/AIA, AHA, CDW, NAM, and Cross Gunter respectfully request that the Court grant their Motion for Preliminary Injunction and Expedited Hearing.

Respectfully submitted,

/s/ J. Bruce Cross

J. Bruce Cross, Ark. Bar No. 1974028  
Abtin Mehdizadegan, Ark Bar No. 2013136  
**CROSS, GUNTER, WITHERSPOON &  
& GALCHUS, P.C.**  
500 President Clinton Avenue, Suite 200  
Little Rock, AR 72201  
Phone: (501) 371-9999 / Fax: (501) 371-0035  
bcross@cgwg.com | abtin@cgwg.com

– and –

/s/ Maury Baskin

Maurice Baskin, DC Bar No. 248898\*  
**LITTLER MENDELSON, PC**  
815 Connecticut Ave., N.W.  
Washington, DC 20036  
(202) 772-2526  
mbaskin@littler.com  
*\*pro hac vice pending*

**ATTORNEYS FOR THE PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I, J. Bruce Cross, hereby certify that on this **1st day of April, 2016**, one true and exact copy of the foregoing **Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing** was filed electronically with the Clerk of Court using the CM/ECF system, which shall send notification of such filing, and via U.S. Mail, to the following:

Thomas E. Perez  
Secretary of Labor  
Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Michael J. Hayes  
Director, Office of Labor-Management Standards  
Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Christopher Thyer  
U.S. Attorney, Eastern District of Arkansas  
425 W. Capitol Avenue, Ste. 500  
Little Rock, AR 72201

Channing D. Phillips  
U.S. Attorney, District of Columbia  
555 4th Street N.W.  
Washington, DC 20210

Loretta Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20210

*/s/ J. Bruce Cross*

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J. Bruce Cross