PEOPLE'S PARITY PROJECT

30 June 2021

The Honorable Patty Murray
Chair, Senate HELP Committee
The Capitol
Washington, D.C. 20510

The Honorable Richard Burr
Ranking Member, Senate HELP Committee
The Capitol
Washington, D.C. 20510

Delivered via Electronic Mail

Dear Chair Murray, Ranking Member Burr, and Members of the Committee:

Our organizations are staffed by attorneys who represent and advocate for working people who are underpaid, harassed or discriminated against, forced to work in dangerous conditions, or whose rights are otherwise violated at work. We are writing on behalf of our attorneys, our clients, and our worker partners across the country who strongly support Section 202 of S. 420 and H.R. 842 (the PRO Act), which would reinstate the "Persuader Rule," which would establish long-overdue transparency and disclosure requirements for the growing anti-union consultant industry.

Today, union elections are neither free nor fair. The Department of Labor estimates that between 71 and 87 percent of employers hire professional "union avoidance" consultants—euphemistically known as "persuaders"—to run sophisticated campaigns to hinder workers' organizing.[1] As former union organizer and Representative Andy Levin explains, anti-union consultants' goal is not to have an honest debate about having a union: it "is to create so much pressure, anxiety and fear," with "a suffocating, all-encompassing cloud of anti-union propaganda" that workers feel they have no choice but to vote against a union.[2] These consultants are unregulated and under-reported, threatening workers' right to organize and vote freely in union elections.

As organizations and attorneys, we strongly support the PRO Act and Section 202's disclosure requirements, which will shed long overdue light on anti-union activity that undermines workers' right to free and fair union elections.

I. A Rapidly Expanding "Union Avoidance" Industry Trains Employers to Suppress Worker Organizing and Deny Workers a Free, Fair Vote.

Today, 65% of voters support labor unions[3] and nearly half of nonunion American workers say that they would join a union tomorrow if they could[4]—but union membership is falling steadily, with only 10.8% of private-

[1] 76 Fed. Reg. 36,178, 36,185–98 (June 21, 2011).
[2] Rep. Andy Levin (@Andy_Levin), Twitter (Apr. 8, 2021, 4:18 PM), https://twitter.com/andy_levin/status/1380253711314862084 (last visited June 1, 2021).
[3] Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, Gallup Polls (Sept. 3, 2020), https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx.
[4] Thomas A. Kochan, et al., *Worker Voice in America: IS There a Gap Between What Workers Expect and What They Experience* (Oct. 11, 2018).

sector American workers in unions this year.[5] That gap exists, in part, because of the $340 million per year "union-avoidance industry" of consultants who show employers how to run sophisticated, relentless campaigns to oppose a representation election, in which workers vote on whether or not to join a union. Union avoidance consultants' job is to pressure workers into vote against unions, often with misinformation, ominous "predictions" about slashing benefits or shutting down warehouses if workers unionize,[6] and by helping employers just barely toe the legal line between pressure and illegal intimidation. The union-avoidance industry is notoriously secretive, but available reporting and research shows that employer campaigns against unions have become standardized, almost formulaic" because of how often employers hire union avoidance "consultants, including law firms, to manage their efforts to oppose unionization."[7]

Anti-union campaigns are often scripted by consultants, but workers hear the anti-union speeches from their CEOs, sit through mandatory captive-audience meetings run by their supervisors, and read anti-union emails and letters written by their managers. Because of wide loopholes in LMRDA reporting, workers often have no idea that anti-union talking points are crafted by third-parties—information that, like disclosure requirements on campaign advertisements, informs workers' votes.

II. Section 202 Would Close a Longstanding Loophole Allowing Employers to Evade Their LMRDA Reporting Requirements.

The Labor-Management Reporting and Disclosure Act (LMRDA) established transparency and disclosure obligations for two groups: first, labor organizations and their employees, who are governed by Sections 201 and 202 of the Act; and second, employers who hire union-busting consultants and the consultants themselves, who are governed by Section 203 of the Act. Section 203(b) of the LMRDA clearly states that employers who hire anti-union consultants and attorneys, as well as the consultants and attorneys themselves, must disclose activities that "directly or indirectly" aim to persuade employees not to organize, vote for a union, or bargain collectively.[8] Section 203(c) of the law exempts from these reporting requirements any "advice" provided to an employer by anti-union consultants,[9] but the law does not define the term "advice."

As the Department of Labor itself explained in 2016, the Department's regulations defining the term "advice" are so overbroad that only a "small fraction" of employers who hire anti-union consultants have to comply with the LMRDA's disclosure requirements.[10] From the 1960s through the 1980s, DOL steadily revised employers' reporting requirements downwards until employers only had to report union-busting consultants that had direct contact with workers[11]—effectively undercutting the LMRDA's clear language requiring employers and anti-union consultants to report activities that "directly *and indirectly*" push workers not to organize or

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[5] *Union Members Survey*, Bureau of Labor Statistics (Jan. 22, 2021), https://www.bls.gov/news.release/union2.nr0.htm.
[6] *Income Inequality Crisis in America: Hearing Before the S. Budget Comm.*, 117th Cong. (2021) (testimony of Jennifer Bates, worker, Amazon Bessemer warehouse), https://www.budget.senate.gov/imo/media/doc/Jennifer%20Bates%20-%20Testimony%20-%20U.S.%20Senate%20Budget%20Committee%20Hearing.pdf.
[7] 81 Fed. Reg. 15,924, 15,927 (Mar. 24, 2016).
[8] 29 U.S.C. § 433(a)(4); 29 U.S.C. § 433(b)(1).
[9] 29 U.S.C. § 433(c).
[10] 81 Fed. Reg. 15,924, 15925–26 (Mar. 24, 2016)
[11] 81 Fed. Reg. 15,924, 15,925 (Mar. 24, 2016).

collectively bargain.[12] In 2016, DOL issued new regulations to expand reporting requirements for persuader activity—but in early 2017, under the Trump Administration, DOL rolled these regulations back.[13]

DOL's definition of "advice" allows employers to evade the LMRDA's reporting requirements. For example, under DOL's current regulations, employers can hire anti-union consultants for behind-the-scenes anti-union activity such as: planning a union-busting pressure campaign; scripting the campaign by writing employer speeches or mass emails designed to intimidate workers (while falling just short of being clearly illegal under federal labor law); training supervisors to conduct "captive audience meetings" in which employer representatives inundate workers with anti-union propaganda, but bar union advocates from speaking; identifying employees for disciplinary action or targeting. As long as consultants don't *directly* contact workers, they can direct every piece of a union-busting campaign—and legally, have no obligation to report it.

Section 202 of the PRO Act would close this loophole by specifying that the LMRDA's "advice" exception does not cover:

> any arrangement or part of an arrangement in which a party agrees, for an object described in subsection (b)(1), to plan or conduct employee meetings; train supervisors or employer representatives to conduct meetings; coordinate or direct activities of supervisors or employer representatives; establish or facilitate employee committees; identify employees for disciplinary action, reward, or other targeting; or draft or revise employer personnel policies, speeches, presentations, or other written, recorded, or electronic communications to be delivered or disseminated to employees.

In simpler terms, Section 202 would close the loophole created by DOL's lax regulations by ensuring that employers and third-party consultants must disclose the most common types of anti-union campaign activities—transparency and context that allows workers to better assess anti-union messages. Like voters who rely on campaign finance disclosures to inform their political participation, workers deciding whether to vote for or against a union should know whether their supervisors' talking points or emails were written by a third-party. Section 202's enhanced transparency requirements are a modest step towards combating the misinformation and intimidation employers use to crush union drives.

III. Section 202 Maintains the Traditional Boundaries Associated With the Attorney-Client Relationship.

Some opponents of the Persuader Rule argue that Section 202 would infringe on attorney-client privilege.[14] These opponents are wrong: Section 202 does not apply to pure legal advice, and instead requires disclosure of persuader activity that was never protected by attorney-client privilege in the first place. In reality, the proposed

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[12] 29 U.S.C. § 433(a)(4); 29 U.S.C. § 433(b)(1).

[13] Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 83 Fed. Reg. 33,826 (Aug. 17, 2018).

[14] Letter from American Bar Association to Senate HELP Committee (Apr. 20, 2021), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/senate-letter-opposing-persuader-rule.pdf?logActivity=true.

language specifically identifies a narrow set of activities that are commonly deployed in union-busting campaigns—none of which involve providing legal advice, which necessarily must be performed by attorneys, or which are typically associated with legal practice. Some law firms maintain a "union avoidance" practice which may, in addition to legal services, sell a comprehensive anti-union campaign package—and attorneys who work there may provide some of the services covered by Section 202's limited disclosure requirements. But as the Department of Labor noted in 2016, there is no reason to treat anti-union consulting services differently simply because an attorney is providing them.[15]

Section 204 of the LMRDA explicitly provides that any information communicated by an attorney to their clients, including employers, "in the course of a legitimate attorney-client relationship" is exempt from the LMRDA's reporting requirements.[16] The PRO Act's Persuader Rule does not amend Section 204. Thus, not only does Section 202 exempt from disclosure information that is generally protected by attorney-client privilege, the Act specifically shields from disclosure legal advice or other privileged information. The mere fact that some attorneys may be required to report non-privileged information—for example, the fact that they provided managers with a script to interrogate workers about their support for the union—does not affect that balance. As federal courts have affirmed, "the [disclosure] requirement is directed to labor consultants," which "is not necessarily a lawyer's" and would be unrelated to legal advice.[17] If employers hire law firms or attorneys to provide persuader activity, rather than pure legal advice, both the employer and "the attorney must balance the benefits with the obligations incident to the undertaking," including the LMRDA's disclosure requirements. Other circuit courts of appeals have echoed similar sentiments in writing that the LMRDA's reporting requirements are consistent with attorney-client privilege.[18]

Moreover—contrary to some opponents' claims—the proposed language of Section 202 is not at odds with the attorneys' professional responsibility of confidentiality. Attorneys owe a duty of confidentiality to their clients, but as the ABA's Model Rules of Professional Conduct explain, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: including *to comply with other law or a court order*."[19] And Section 202 is not the first law to require attorneys to report information needed to promote transparency. For example, the Lobbying Disclosure Act of 1995 mandates that individuals, including attorneys, disclose things like client names and payment information, when engaging in certain activities.[20]

The proposed language of Section 202 takes great care and attention to ensure that disclosure requirements are targeted and in alignment with the principles of attorney-client privilege and confidentiality, while also closing a longstanding and harmful loophole that has allowed employers to covertly and insidiously quash the collective power of employees in the workplace.

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[15] 81 Fed. Reg. 15,924, 15,992 (Mar. 24, 2016).
[16] 29 U.S.C.A. § 434.
[17] Douglas v. Wirtz, 353 F.2d 30, 33 (4th Cir. 1966).
[18] See, e.g., *Humphreys et al v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985); *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), rev'd in part on other grounds, *Price v. Wirtz*, 412 F.2d 647 (1969)
; *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965).
[19] Rule 1.6(b)(6).
[20] Lobbying Disclosure Act, 109 Stat. 697, Sec. 5(b), https://lobbyingdisclosure.house.gov/lda.html

PEOPLE'S PARITY PROJECT

We strongly support Section 202 and the PRO Act as a whole, and urge you not to weaken this critical transparency protection for workers facing anti-union campaigns.

Sincerely,

People's Parity Project
American Federation of Teachers
Impact Fund
National Employment Law Project
National Employment Lawyers Association
National Women's Law Center
Service Employees International Union
Workplace Fairness