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September 20, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
Room N-5609
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Via Electronic Delivery

Re: Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, RIN 1245-AA03

Dear Mr. Davis:

Con-way Inc. respectfully submits the following comments in response to the Department of Labor's (Department) proposed rulemaking, Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, 76 Fed. Reg. 36178 (June 21, 2011), including its proposed interpretation of the "advice exemption" under the Labor-Management Reporting and Disclosure Act ("LMRDA") and the proposed revisions to Forms LM-10 and LM-20.

Con-way is a $5 billion freight transportation and logistics services company, whose subsidiaries operate from 500 locations across North America and in 18 countries. Con-way's three primary operating companies, Con-way Freight, Menlo Worldwide Logistics, and Con-way Truckload, provide high-performance, day-definite less-than-truckload, full truckload and multimodal freight transportation, as well as logistics, warehousing and supply chain management services and trailer manufacturing. Con-way was founded in 1929, and currently employs nearly 28,000 people. With a workforce of this size, labor and employment issues, and the ability to seek guidance and advice related to these issues without restriction, is a critical matter for the Company.

The Department's proposed revisions jeopardize employers' ability to seek and to provide full, fair and accurate information for our workforces—and may in fact cause employees to be misled; undermine the attorney-client privilege and employers' ability to openly seek and receive candid and complete advice from legal counsel; and impose significant and unnecessary administrative burdens. At the same time, the Department has not offered any convincing reason supporting the need for this sweeping change. Should the Department proceed with its proposed revisions, we are deeply concerned about the significant legal and practical consequences impacting our business and our employees.

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The Department's proposed revisions essentially eliminate the "advice exemption" under the LMRDA and mislead employees in the process.

The LMRDA requires reporting and disclosure by unions, employers, and labor consultants (including law firms) in an effort to bring about greater transparency in labor-management relations. Under the current rules, employers must disclose any agreement or arrangement with a labor relations consultant in which the activities undertaken by the consultant include so-called persuader activity (activity designed to persuade employees to exercise or not exercise their rights to organize and collectively bargain).

However, the LMRDA has always included an exemption from the reporting requirement for "advice" provided by an attorney or consultant to an employer. The purpose of the exemption is to ensure that employers can freely seek advice related to effectively and appropriately managing their workplaces and complying with complicated labor and employment laws. This exemption has been consistently interpreted, as well as easily and effectively applied, for the past fifty years.

Under the current rule, if a communication, for example between an employer and its legal counsel, involves advice, the advice exemption applies and disclosure under the LMRDA is not required. The Department's proposed interpretation drastically changes the scope of the rule, and essentially eliminates the advice exemption to require reporting:

> "in any case in which the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, regardless of whether or not advice is also given." (76 Fed. Reg. 36182 (emphasis added)).

In other words, protection of the advice exemption is unavailable if any part of a communication is deemed "persuader activity," no matter how small.

Under the proposed regulations, "persuader activity" is defined as:

> "[a] consultant's providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively." (76 Fed. Reg. 36182 (emphasis added)).

According to these definitions, if a law firm or consultant engages in any activity that even arguably has an object to persuade, then all of that law firm's or consultant's work is subject to the disclosure requirements under the LMRDA, even if the vast majority of that work constitutes advice that has no relationship to persuader activity. The proposed standard is vague and needlessly broad, and the Department acknowledges that it potentially calls for disclosures related to a long list of core human resources functions which generally have no tie to persuader activities, such as meeting with employees, training employees, surveying employees for their feedback and preparing or reviewing human resources policies. The disclosure requirements, when coupled with the reporting forms, further require that consultants and law firms disclose all client relationships—not just those as to which persuader services were performed.

The net effect of the Department's proposed interpretation is to essentially eliminate an employer's ability to freely seek advice and counsel on labor and employment issues and best practices, without risk of public disclosure of those perfectly legitimate activities, along with criminal penalties for incomplete reporting.

The Department takes the position that this updated interpretation is needed to advance the LMRDA's goals of transparency and improved employee relations, and will function to provide:

> "essential information regarding the underlying source of the views and materials being directed at them, as aiding them in evaluating their merit and motivation, and as assisting them in developing independent and well-informed conclusions regarding union representation and collective bargaining." (76 Fed. Reg. 36182 (emphasis added)).

This is extremely troubling for employers, as the vast majority of information reported using the Department's proposed standard is unlikely to have any relation to persuader activity. As a result, the reporting requirement will create a false and misleading (or at best confusing) picture of employers' practices and intentions with respect to labor relations. Con-way prides itself on open and accurate communications with our employees. A reporting standard that would systematically mislead our workforce simply is unacceptable to Con-way and to any employer (and it undermines the purposes of the LMRDA).

The Department's proposed interpretation of the advice exemption, when combined with proposed revisions to the disclosure forms, undermines the attorney-client privilege and employers' ability to seek legal counsel.

Of at least equal, and possibly even greater concern, is the fact that the proposed interpretation of the advice exemption undermines the attorney-client privilege and the ability of employers to freely seek advice from legal counsel.

The attorney-client privilege applies anytime legal guidance is provided in confidence by an attorney to a client. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[1] Moreover, the privilege covers not only the legal "advice" contained within a privileged communication, but also any unprivileged statements that accompany it.[2]

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[1] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence 2290 (McNaughton rev. 1961)).

[2] Wholesale Corporation v. Superior Court, 101 Cal.3d 758 (2009) ("The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material.")

Under the Department's current interpretation of the advice exemption, when legal advice is provided to an employer, that advice is protected from disclosure. Under the proposed interpretation, any time a communication from legal counsel may include persuader activity (which essentially is defined as any communication that even possibly, in whole or in part, has some arguable intent to persuade)[3] the law firm and employer are expected to disclose the relationship, all fees paid (whether or not expended on persuader activities) and the nature of the legal advice being provided.

The Department suggests that merely requiring disclosure of the fact of the relationship and the costs associated with the relationship places no burden on the attorney-client privilege or the attorney-client relationship. However, the proposed forms go far beyond these areas. For example, proposed Form LM-10 Part C (to be completed by employers) requires employers to detail any agreement or arrangement with a labor relations consultant, including legal counsel, that is involved in any persuader activity, including details about items such as the following (which are described below as they are described by the Department in the Federal Register):

- " The date of the agreement or arrangement and its terms and conditions would be reported [by the employer] in Items 13.a and 13.b, respectively."
- "Item 14 calls for detail concerning the agreements undertaken."
- "A proposed Item 14.a, as described above regarding the proposed Form LM-20, would require filers to check boxes indicating specific activities undertaken or to be undertaken." (Note, these check boxes ask that the specific types of advice at issue be provided).
- " There is also an 'other' box, which requires the filer to provide a narrative explanation for any activities not specified on the list provided on the form."
- " Items 14.b, 14.c, and 14.d, respectively, require, as before, the employer to indicate the period during which the activity was performed, the extent of performance, and the name and address of persons through whom the activity was performed."
- "Finally, the employer must provide detailed information concerning any payment(s) made pursuant to the agreement or arrangement: The date of the payment(s) (Item 15.a); the amount of each payment(s) (Item 15.b); the kind of payment(s) (Item 15.c); and a full explanation for the circumstances of the payment(s) (Item 15.d). Information reported in Part C is required by LMRDA sections 203(a)(4) and (5)." (76 Fed. Reg. 36195-196 (emphasis added)).

These requirements call for detailed information about services provided, which, as drafted, almost certainly call for disclosure of privileged information. This is particularly true when read in conjunction with the proposed interpretation of the advice exemption—which requires

[3] It is not clear from the Department's proposal who would decide whether there is some intent to persuade. Nor is it clear whether the employer must actually possess the intent, or whether an employee must only believe that the employer's intent was to persuade.

employers and law firms to make required disclosures not only as to persuader communications provided by an attorney or law firm, but also as to advice offered by that attorney or law firm. These disclosure requirements threaten to eviscerate the attorney-client privilege for employers seeking advice from legal counsel related to labor and employment matters. This is an unacceptable and impermissible result.[4]

As noted above, Con-way has a large employee population (almost 28,000 employees across our enterprise); our employees are located in nearly every state across the nation and are engaged in a wide array of job functions. We view our employees as our greatest resource and we dedicate significant time and effort to ensuring that our employment standards are in compliance with legal requirements and reflect best practices. As a result, we regularly seek advice from legal counsel regarding labor and employment matters. Our ability to freely seek skilled and market-competitive legal advice on these critical items is essential to the day-to-day success of our business and our workforce. The current interpretation of the advice exemption, when combined with the revised reporting requirements, will undoubtedly chill our ability to seek and receive candid advice from legal counsel, which is needed to support our workforce. We are further concerned that the proposed interpretation of the advice exemption and all of the consequences that flow from it, will ultimately cause legal counsel to begin to limit the kinds of labor and employment services they provide, making it even more difficult for employers like Con-way to seek and receive this essential support.

In addition, under the proposed rules, law firms that engage in any persuader activity for any client would likely be required to disclose their representation arrangements and fees for all of their clients—whether or not any persuader work has been provided for a particular client. As a result, information about Con-way may have to be shared publicly in an LMRDA disclosure by a law firm we use for compliance advice, but which we've never used for persuader activity, which needlessly creates an inaccurate impression among our workforce about our labor related efforts.

The proposed disclosure requirements also threaten to undermine attorneys' other ethical obligations to their clients. The Rules of Professional Conduct for attorneys in a number of states prohibit attorneys from disclosing the identities of their clients, the services rendered to them, or the fees paid by the clients. In states that do not recognize an attorney's ability to waive ethical obligations in order to satisfy legally required disclosures, attorneys may be faced with choosing between their ethical duties to their clients (and the serious sanctions that may come along with a violation) and their LMRDA reporting obligations (which may result in criminal penalties for incomplete reporting). This does an obvious disservice to employers as well, by

[4] Note also that in 1959, the American Bar Association ("ABA") considered a proposed Senate bill that would have required anyone advising an employer with respect to labor relations advice to reveal client identities, services rendered, and financial arrangements with employer-clients. To the extent the bill required attorneys to disclose this information, the ABA determined such a disclosure would violate the attorney-client privilege, as it would essentially force attorneys engaged in the legitimate practice of the law to reveal what is traditionally considered confidential information between an attorney and a client. Given that the ABA's determination was based on disclosure requirements remarkably similar to the Department's current proposal, the current proposed requirements would likewise constitute a violation of the attorney-client privilege. Proceedings of the House of Delegates, 45 A.B.A. J. 413 (Apr. 1959).

placing our labor and employment counsel in an untenable position, which may impact their representation and their ability to keep commitments of confidentiality.

The Department has failed to clarify the impact of its proposed regulations on employers' in-house resources.

Section 203(a)(2) of the LMRDA calls for employers to report certain payments made to their own employees related to persuader activities. As a result, the Department's proposed regulations have a significant potential impact on employers' own employees—in particular our managers and our Human Resources and in-house Legal staff. A core job function for these individuals is to provide sound advice to the business about compliance with labor and employment obligations, as well as about best practices for our workplace. The Department's proposed interpretation of the advice exemption suggests that any time one of these critical in-house resources were to offer information about the Company's labor practices (even in response to an employee inquiry), the work of the individual may arguably be subject to the LMRDA disclosure requirements.

A rule that would call for Con-way's internal advisors to take their attention away from our employees, and instead focus on attempting to track and parse projects to determine what is, or is not, reportable undermines our business and our employee service goals. With the still struggling economy, Con-way already has lean management and administrative resources. Placing significant additional administrative burdens on Con-way, and other employers, can function only to direct these limited resources away from growing our business and reinvesting in our workforce. We also are concerned that broad reporting requirements for our internal advisors may create a disincentive among our employees to seek guidance from these critical resources—which may result in the business launching workplace initiatives and practices without appropriate information or support. Again, such requirements will not foster employee engagement and will only cause confusion.

Early on, LMRDA Section 203(a)(2) was interpreted to require reporting of compensation for employees who were performing their regular job duties. That interpretation resulted in numerous complaints to the Department, for the same kinds of reasons described in this letter. As a result, the Department reviewed the matter and determined that reporting is not required under the LMRDA when the services rendered are part of an employee's regular duties. That decision by the Department was later upheld by the U.S. Court of Appeals for the District of Columbia.[5] The proposed changes to the advice exemption make this limitation even more critical, and we would ask that the Department clarify and reaffirm that it remains the case that employers are not required to report compensation paid to our own employees performing their regular job duties.

The proposed Department requirements impose significant administrative burdens.

The Department's proposal greatly underestimates the time and cost associated with the revised reporting requirements. As stated above, because of the ambiguity as to the scope and application of the proposed advice exemption, it is possible that any number of day-to-day

[5] See Int'l Union, United Auto Workers v. Dole, 869 F.2d 616 (D.C. Cir. 1989).

human resources matters may need to be examined to determine whether there is some arguable persuader implication, be it intended or unintended, direct or indirect, in whole or in part (according to the proposed interpretation). As a result, Company representatives may be called upon to spend countless hours reviewing internal and external labor and employment matters to determine whether any aspect of those matters involves persuader activity that would call for disclosure, in order to avoid the significant penalties associated with non-disclosure. The Department's estimate that completing the forms will require a burden of only 120 minutes per filer lacks foundation under the circumstances and does not account, in any manner, for the additional time it will take filers to attempt to understand and identify reportable conduct in light of the ambiguity of the proposed interpretation.

These limitations on employers' resources are particularly troubling when coupled with the NLRB's recently proposed election rule.

The timing of the Department's proposed interpretation is also particularly troubling. The changes were issued alongside the National Labor Relations Board's ("NLRB") proposed rule to expedite union elections. If both rules are implemented, employers will be left with less time and fewer resources to be used to educate employees about their rights. Employers may also feel compelled to handle elections without obtaining any legal advice or support, and thereby risk violating complex NLRB rules about what is permissible and impermissible in communications with employees. Either result runs counter to the purposes of the LMRDA and would be detrimental to both the employer and its employees.

This proposal further has a chilling effect on employers' ability to freely communicate with employees regarding an election, and as such would impermissibly interfere with the employers' rights provided under Section 8(c) of the National Labor Relations Act (NLRA) which favors "uninhibited, robust, and wide-open debate in labor disputes" in light of the manifested "congressional intent to encourage free debate on issues dividing labor and management".[6] Such a robust debate cannot occur in circumstances where the employer is substantially limited in its ability to engage its employees in meaningful discussion because of concerns regarding the potential violation of a disclosure rule which is vague, needlessly broad and interferes with the attorney-client privilege.

Con-way's primary concern is that what is lost in all of this is our employees' interest in and right to full and complete information from both the union and the employer, in order to have an opportunity to understand and make a meaningful choice about representation.

The Department's interpretation cannot withstand legal challenge.

Con-way also concurs with the position taken by other groups that the Department's vague and broad re-interpretation of long standing rules, with no clear justification in support of the change, violates the Administrative Procedure Act (APA) and conflicts with the language of the LMRDA Clearly, the Department's proposed changes are arbitrary, capricious and contrary to law. (See 5 U.S.C. § 706(2)(A)).

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[6] Chamber of Commerce of the United States v. Brown, 554 US 60, 60-68 (2008).

In summary, it is our view that the proposed rulemaking should be withdrawn, or significantly limited and clarified. There are serious practical and legal flaws with the suggested changes, which will impermissibly impact both the rights of employers and employees under the law, as well as make it more difficult for employers to provide critical information to their employees and to freely and openly seek advice from legal counsel on issues of importance to the business. We sincerely hope that our comments will be received in the spirit submitted. Our objective is to assist the Department in avoiding changes which would have unintended consequences for employers and employees and be inconsistent with the objectives of the LMRDA, the attorney-client privilege and other applicable law.

Respectfully submitted,

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