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# Labor Regulation in the 21st Century Economy

*The Honorable Steven J. Law*

I'm going to talk to you today about three things: the phenomenon of change in America's workforce and economy, right responses to change, and the alternative of resisting change at any cost.

Well over a decade ago, the Department of Labor commissioned a study of trends that would affect and shape the workforce of the future. Much of that report reads as if it were written yesterday. Among the trends it identified were the transition to a worldwide economy, the widespread use of technology, and diversity in the workforce. The Department recently did another study of workforce trends that confirmed the accelerating impact of these trends—changing our economy and our workforce.

Today, labor markets look nothing like they did two centuries ago, when most Americans were employed in agriculture. In just the last 60 years, our labor force has remade itself again. As jobs in manufacturing declined during the second half of the 20th century, workers transitioned to a booming service sector that continues to grow.

In the 21st century workforce, change is the norm. People change jobs an average of nine times during their career. In 2002 alone, there were 50 million job separations—and 50 million new hires. That is over one-third of the entire workforce, and even in a challenging economy, the majority of these job separations involved workers who left their jobs *voluntarily* to seek better opportunities.

## The Positive Impact of Change

Change is an uncomfortable word to some, but the truth is that, for the most part, the impact of the changes shaping our 21st century workforce is posi-

## Talking Points

- For the most part, the transition to a worldwide economy and the use of technology have reduced the cost of consumer goods for families. They have made our economy and workforce more productive—and that has helped raise our overall standard of living.
- The right response to powerful economic trends is to constructively engage them, modify our laws and regulations to ensure that we are reaping the maximum benefit from them, and reach out compassionately to those in our workforce who need assistance in managing the transition.
- Anyone has the right to oppose stronger overtime protection for millions of American workers, but it's wrong to scare workers with false information.
- Our world continues to change. If we respond to these changes by making our economy and workforce more competitive, and help those who are negatively affected, America will continue to be the economic leader of the world.

This paper, in its entirety, can be found at:
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tive. The transition to a worldwide economy and the use of technology have reduced the cost of consumer goods for families. They have made our economy and workforce more productive—and that has helped raise our overall standard of living.

In most recessions, for example, wages fall considerably. Yet in the 2000–2001 recession, the exact opposite happened: Real wages continued to climb, probably buoyed by record-high productivity.

Some people also assume that the transition from manufacturing to services means nothing but low-wage, low-skill, no-benefit jobs. Again, the opposite is coming true.

*First,* manufacturing itself is evolving, using applied technologies to maximize productivity, quality, and competitiveness.

*Second,* many of the jobs of the future are in services that require a high degree of training, that pay well, and that offer opportunities for long-term advancement. Over the next decade, we will need a million more nurses. We will need thousands of workers trained in biotechnology, information technology, and geospatial engineering. By the year 2012, we will also need over a million more workers in the skilled trades—jobs that pay well and often have good benefits.

One of the great advantages that American workers possess over their foreign counterparts is flexibility. We have adapted to these massive economic changes, transitioned to new careers and fields, and taken advantage of the benefits of technology and worldwide trade.

As a result, our workforce is better off than the change-resistant workforces of other modern economies. For example, while the unemployment rate in the United States is now 5.7 percent, it is above 9 percent in both France and Germany.

An even better measure of economic vitality is how long workers stay unemployed. In the U.S., 8.5 percent of workers were unemployed for a year or longer. That compares with 34 percent in France and a stunning 48 percent in Germany. That is clear evidence that though change is hardly risk-free, the price of resisting change is much higher.

## The Right Response to Economic Trends

We believe that the right response to powerful economic trends is to constructively engage them, modify our laws and regulations to ensure that we are reaping the maximum benefit from them, and reach out compassionately to those in our workforce who need assistance in managing the transition. That has been the guiding philosophy of this Administration and this Department of Labor, but in pursuing these goals, we have encountered a very different response to change.

Change comes infrequently to the world of labor and employment law because it is a highly polarized and politicized environment. There are entrenched constituencies on either side, and they have opposing views on just about everything.

When my predecessor, Cam Findlay, came here to speak a couple of years ago, he referenced the Seal of the Department of Labor as a symbol for the lack of dynamic change in this area. The Seal has not been modified in many, many years, and most of the images of work depicted on the Seal are from a bygone era.

## A Different Department of Labor

I'm here to confess today that we still have the same Seal—but behind that Seal is a very different department.

We have pursued dramatic, positive reforms of our programs and regulations to ensure that America's economy continues to grow and American workers continue to benefit. But it hasn't been easy, and we are not all the way there, because at every step of the way we have encountered intense resistance—not just to the specific reforms we were pursuing, but also to the underlying currents of change that necessitated them.

Let me give you a couple of examples. Over the last three years, there has been a wave of financial scandals and a corresponding demand for increased financial transparency and accountability. The Sarbanes–Oxley Act imposed a panoply of new financial and governance controls on public companies, following the collapse of Enron and other high-profile cases.

The Department of Labor is the only government entity—the only one—that regulates the financial integrity of unions. Most labor leaders, like their corporate counterparts, are people of integrity, but there are bad apples, and weak financial reporting requirements have enabled them to conceal misconduct until the damage was beyond repair.

In recent years, our Office of Labor Management Standards has averaged 11 criminal convictions for

union corruption per month. The recent Washington Teachers Union case shows the harm that can be done to union members when there is no transparency or accountability.

Late last year, we issued new transparency reforms that will give union members meaningful information about how their dues money is being spent. In the past, union members had to ask the head of their local for a copy of the union's disclosure form; now they will be able to access it on the Internet.

Sadly, these needed reforms have been blocked every step of the way. Staggering amounts of misinformation were disseminated to union locals. Massive comments were submitted to the *Federal Register*, not just arguing against specific changes or constructively suggesting alternatives, but insisting that the Department of Labor had no right to improve financial transparency on behalf of rank-and-file union members.

When we issued our final rules, we were taken to court—and we won, hands down, in front of a judge that many assumed would be skeptical of our approach. The most significant part of the judge's opinion was its explicit recognition of the reality of change: The financial regulation of institutions has changed. We now have higher expectations of transparency and accountability, and when we see financial misconduct, stronger disclosure is a reasonable antidote.

Change necessitated financial transparency reform for unions. Many individual unions have embraced these reforms and are preparing to comply. They deserve a lot of credit. But we expect opposition to these reforms will continue as well.

## Modernizing White-Collar Overtime Rules

We have faced similar epic battles over our reforms to workplace regulations—in particular, our modernization of the "white-collar" overtime rules.

When Secretary Elaine Chao came to the Department of Labor over three years ago, one of her chief goals was to ensure that our programs and regulations reflect the realities of the 21st century economy. American workers are among the most productive in the world, but outdated, excessive workplace regulations can hamper that productivity and make us uncompetitive.

The right response to the new worldwide economy should not be isolationism. The world will not go away, even if we wanted it to. Instead, we need to do everything we can to make our economy and our workforce more competitive.

At the Department of Labor, that means reforming our job training programs to ensure that we are producing the most highly skilled and adaptable workers in the world. It also means bringing our workplace regulations, most of which were conceived before the Second World War, into the 21st century.

Nowhere is the dichotomy between our regulations and current reality starker than in the "white-collar" overtime rules. These rules have not been substantially updated since 1949—more than 50 years ago. They reference jobs that no longer exist and use tests that have become badly outdated.

This confusion has created a legal nightmare. In fact, overtime class actions are among the fastest growing areas of employment litigation today. Class-action lawsuits under the Fair Labor Standards Act have more than tripled since 1997, and overtime class-action lawsuits in federal court now outnumber class actions for discrimination.

The explosion in overtime litigation is taking place at the state level as well, with cases increasing into the tens of millions of dollars. In 2002, Pacific Bell paid $35 million for allegedly misclassifying employees as exempt professionals. In 2002, Starbucks paid $18 million to settle lawsuits alleging that managers and assistant managers were misclassified as exempt from overtime. In 2004, a $90 million overtime judgment was rendered against Farmers Insurance, with no finding of malicious conduct or intentional wrongdoing.

All of this litigation benefits plaintiffs' lawyers, but is it really helping workers? The reality is that workers typically have to wait two years to get their overtime when they go to court, and that's only after the plaintiffs' lawyers take their share.

In a recent set of cases involving Taco Bell, Oregon workers each received only about $1,300 while their lawyers took away $1.5 million. Taco Bell workers in California each got about $2,800, while their lawyers received close to $4 million. That's why some lawyers recently described overtime litigation as a "gold mine" and a "sleeping giant" and

boasted that defendants are usually willing to "roll over and pay." That's also why there is so much resistance to any changes that would clarify the rules and reduce the potential for litigation.

One plaintiffs' lawyer went so far as to say that he wasn't worried about terrorists, but was worried about those who were proposing changes to the overtime rules. He said this: "That's exactly what the terrorists…want to do, degrade our standard of living." Another overtime lawyer called our initial overtime proposal "an obscenity." And a third forward-thinking lawyer had this choice observation: "The mere fact that something was enacted in 1938 does not make it bad policy. The regulations do not need changing."

We strongly disagree. It is simply wrong for people to be making thousands of dollars an hour in legal fees off of workers who make less than ten dollars an hour. For the sake of American workers, the regulations need to change.

## Bringing Certainty and Clarity to Overtime Security

The new rules we announced yesterday will strengthen overtime security for workers while giving employers needed certainty and clarity regarding their legal obligations. The new rules expand the number of workers eligible for overtime by nearly tripling the salary threshold: 1.3 million workers who did not have the right to overtime will gain that right under our rules, regardless of their job title or duties. An additional 5.4 million workers, whose overtime rights were ambiguous, can now be certain they are entitled to overtime without having to hire a lawyer or go to court.

But that's only part of the story. In fact, the new rules clarify overtime rights for workers in *all* income categories. And we believe that, when workers clearly understand their rights and employers understand their responsibilities, everybody wins.

We also took the extra step of spelling out who is *not* affected by the new rules. For the first time in the history of the Fair Labor Standards Act, the overtime rights of police officers, fire fighters, paramedics, emergency medical technicians, and licensed practical nurses are explicitly guaranteed in the regulations. Blue-collar workers, such as construction workers, longshoremen and factory workers, members of unions, veterans, and others who currently receive overtime will continue to receive overtime under the new rules.

You would think that everyone would embrace stronger overtime protection for millions of American workers, but the department's stronger overtime rules are not good news to plaintiffs' lawyers who have profited under the old system.

In addition, as I pointed out earlier, the world of labor policy is a highly polarized and politicized environment. Just as we saw with our proposed rule, we expect there will be the same kinds of false attacks and misinformation about our final overtime security rule. Of course, anyone has the right to oppose stronger overtime protection for millions of American workers, but it's wrong to scare workers with false information.

Some of the outlandish charges we have heard recently include the following: "within weeks, the Bush administration is set to dismantle overtime pay protections"; our new rules "could even discourage military recruitment"; the department is "effectively [gutting] the 40-hour workweek"; "[t]his has to be one of the biggest pay cuts in American history."

And this quote, I think, betrays the real partisan animus behind much of the opposition: "I don't trust anything this administration does…. I know that if this is their proposal, there has got to be something badly wrong with it."

## Conclusion

Not surprisingly, even before the final rule was released—before anyone had any details about it—one organization had already cut a TV ad attacking it and has been soliciting money on the Internet to put it on the air. That's certainly resourceful.

But American workers deserve better than false information and partisan attacks. They deserve workplace regulations that reflect the realities of the 21st century economy—and that protect their rights effectively and efficiently.

Our world continues to change. If we simply resist it, working families will suffer in the long run. On the other hand, if we respond to these changes by making our economy and workforce more competitive, and help those who are negatively affected, America will continue to be the economic leader of the world.

*—The Honorable Steven J. Law is Deputy Secretary of Labor.*