S. HRG. 108–328

NOMINATION OF HOWARD M. RADZELY

HEARING

BEFORE THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

HOWARD M. RADZELY TO SOLICITOR OF THE DEPARTMENT OF LABOR

JULY 29, 2003

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C O N T E N T S

STATEMENTS

TUESDAY, JULY 29, 2003

ADDITIONAL MATERIAL

NOMINATION OF HOWARD M. RADZELY TO BE SOLICITOR FOR THE DEPARTMENT OF LABOR

TUESDAY, JULY 29, 2003

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:02 a.m., in room SD–430, Dirksen Senate Office Building, Senator Gregg (chairman of the committee) presiding.

Present: Senators Gregg, Enzi, Kennedy, Harkin, Murray, Reed, and Clinton.

OPENING STATEMENT OF SENATOR GREGG

The CHAIRMAN. We will get started. Senator Kennedy is on his way, and I can make my statement and then he can make his and then we can hear from the witness and that will expedite the process.

Today, we are participating in a hearing on the nomination of Howard Radzely to be Solicitor of the Department of Labor. He is joined today by his wife, Lisa, and his son, Brendan, and other members of his family. We very much appreciate their taking the time to come and appreciate Mr. Radzely's willingness to participate in this hearing and to be willing to serve his government and his country, which is sometimes a financial sacrifice, but it is very much appreciated.

The hearing will focus, of course, on the office of Solicitor, which is an extremely important office in the Department of Labor because it is basically the office that protects working Americans.

Mr. Radzely's career is exemplary. I believe he brings to the office a tremendous amount of knowledge, capability, and certainly expertise. Prior to joining the Department of Labor, he was with the Law Office of Wiley, Rein and Fielding, concentrating on labor and employment law. He graduated summa cum laude from the University of Pennsylvania, Wharton School of Business, and magna cum laude from Harvard Law School, where he was on the Harvard Law Review. Prior to his going into the Labor Department and his private practice, he was a clerk for the Honorable Judge Michael Lutek of the Fourth Circuit Court of Appeals and for Antonin Scalia, of course, of the U.S. Supreme Court.

We are fortunate, in my opinion, to be able to attract to public service people of the caliber of Mr. Radzely. As I mentioned earlier, he makes a sacrifice financially to do this type of a job, but that

sacrifice is to our benefit because he brings with him such exceptional talent, ability, and capability.

So it is a great privilege to have a chance to hear from Mr. Radzely and get his ideas on what the Solicitor's Office should involve and how it should work.

I would now turn to Senator Kennedy, who I note today has reached the ultimate in acknowledgment of career success as he is a question on the Washington Post crossword puzzle.

Senator KENNEDY. There you go. [Laughter.]

Depending on what the question was. [Laughter.]

Skilled legislator, bipartisan——

The CHAIRMAN. Koppel or Kennedy? [Laughter.]

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Thank you very much, Mr. Chairman, for calling this hearing on Mr. Radzely's nomination to be the Solicitor of the Labor Department.

As the number three official in the Department of Labor, the Solicitor provides advice and guidance on virtually every policy and enforcement initiative of the Department on issues of vital importance to working families. Since many of the key protections in labor laws do not include a private remedy, the Solicitor of Labor is their lawyer, too. So his decisions on how vigorously to enforce specific rights affects millions of workers every year.

Mr. Radzely has been serving as Deputy Solicitor and Acting Solicitor in the Department for the past 2 years and had key roles in initiatives of the Department that are a major concern for working families.

The Department's proposed overtime regulation would deny overtime protections to more than eight million hard-working men and women, including 200,000 workers in Massachusetts. Firefighters, police officers, nurses, retail clerks, medical technicians, military reservists, tech workers, and many others would be affected by the regulations. With a failing economy and more than nine million Americans out of work, with so many of our other families working to make ends meet, cutbacks in overtime are a sudden unfair burden that American workers should not have to bear.

The Fair Labor Standards Act was enacted in the 1930s to create a 40-hour work week and require workers to be paid fairly for any extra hours. Especially in times like these, it is an incentive for job creation because it encourages employers to hire more workers instead of forcing current employees to work longer hours.

We know that today's economy is continuing to hemorrhage jobs. It makes no sense for the administration to propose a regulation that will discourage new hiring and hurt those who do have jobs. How can the Labor Department approve a rule that so clearly benefits employers at the expense of working American men and women?

The unemployment rate is at a nine-year high. Three-point-four million Americans have lost their jobs since the administration took office. Long-term unemployment, those out of work for more than 6 months, has tripled. The administration has only grudgingly approved an extension of the unemployment benefits for some workers, but 1.1 million of the long-term unemployed are out of

work and out of benefits. And despite repeated attempts in Congress to provide assistance for these workers, the administration insists on continuing to leave them out in the cold.

Another important mission of the Department of Labor is to ensure that workplaces are safe and healthy. Once again, the administration refuses to face the most serious aspect of that problem, the ergonomic injuries reported by nearly two million American workers every year. Five-hundred-thousand lose time at work because the injuries are so debilitating and cost our economy $50 billion a year.

The Department's comprehensive plan to deal with these injuries is supposed to include rigorous enforcement of current law, but the Solicitor's Office has issued only nine citations in this area in the last two-and-a-half years. None of them have been for the meat packing, hospitals, and automotive parts, three of the industries with the highest incidence of ergonomic injuries. Particularly online, we could only find actually six cases that were brought, but maybe you will be able to clarify. I know you refer to this in your testimony.

In addition, this Department has failed to finalize safety regulations that have gone through the rulemaking stage. It has announced plans to withdraw regulations to protect health care workers against tuberculosis. That has been some 10 years, and we still have 16,000 people that die from tuberculosis every year, a very modest decline in that. Just because the CDC issues a regulation, it is not mandatory for the Department to withdraw theirs with all of the other kinds of protections on it. At a time when we are looking at airborne diseases, pathogens, SARS, and others, I hope the nominee will be able to talk about the reasons for it.

The Solicitor's job is to oversee and enforce these rules to protect the health and safety of workers every day. It is hard to see how withdrawing regulations or failing to enforce existing protections is in compliance with that responsibility.

There is one area where the Department has not hesitated to regulate, imposing new reporting requirements on unions. The Department has asked them to file schedules that could be hundreds of pages long with itemized lists of all payments above $2,000. It is absurd to pretend these requests are supposed to help union members. They are intended to help union breakers by imposing millions of dollars of new costs on unions.

Agencies are supposed to issue regulations only after careful consideration of their burdens and their benefits. For small entities like local unions, the regulations are supposed to be the least burdensome way to achieve the goal. The Department today has ridden roughshod over these protections, ramming through a regulation to force unions to wallow in red tape and distract them from seeking better wages, benefits, and better working conditions.

Issues like these and many others are vital for every hard-working man and woman. We need to explore them in detail with the nominee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kennedy.

Mr. Radzely, we would be happy to hear your thoughts, however you wish to present them, either in a written statement or orally.

STATEMENT OF HOWARD M. RADZELY, NOMINEE TO BE SOLICITOR OF LABOR

Mr. RADZELY. Thank you, Mr. Chairman, Senator Kennedy, distinguished members of the committee. With your permission, I would like to summarize my written statement and I request that my written statement be included in the record of these proceedings.

The CHAIRMAN. It will be.

Mr. RADZELY. Thank you. It is an honor to appear before you today as you consider my nomination to be the Solicitor of Labor. At the outset, I would like to express my gratitude to the President of the United States for nominating me for this position and to the Secretary of Labor, Elaine Chao, for the support and confidence she has demonstrated in recommending me for this position. I would also like to thank the committee for considering my nomination and holding this hearing today.

Finally, I would like to thank my wife, Lisa, and three-and-a-half-year-old son, Brendan, for all the sacrifices they have made to allow me to serve in the government and for the sacrifices they will make if I am confirmed to be the Solicitor.

Prior to joining the Department of Labor, I was in private practice here in Washington, DC. The main focus of my practice was advising clients, primarily employers, how to comply with the various labor and employment laws, such as the Fair Labor Standards Act, Executive Order 11246, the Family and Medical Leave Act, the Occupational Safety and Health Act, the Service Contract Act, and many others.

Since coming to the Department in June 2001, I have had the opportunity and privilege of working with the employees of the Solicitor's Office, some of the finest attorneys and public servants I have known. In my view, the Solicitor's Office has two distinct but vitally important roles.

First and foremost, the Solicitor's Office has the important responsibility of working in tandem with the individual agencies of the Department to vigorously enforce the laws under the Department's jurisdiction. Unlike most cabinet agency general counsel's offices, the Solicitor's Office has the authority to litigate cases in a wide variety of areas.

Second, the Solicitor's Office provides legal advice to the Secretary and the agencies in the Department on a wide array of legal matters that arise under the nearly 200 laws that the Department administers and enforces.

With regard to enforcement, it is important for the Solicitor's Office to vigorously prosecute cases and to use the full range of legal tools at its disposal. Through judicious use of all of its enforcement tools, the Department can obtain justice for those who have been treated unfairly in violation of the law and can deter those who might choose to violate the statutes and regulations enforced by the Department.

For example, I have urged Solicitor's Office attorneys to make expanded use of Section 11(b) of OSH Act, a provision which had been rarely used. This statutory authority allows the Department to seek contempt and significantly greater sanctions, rather than

filing a failure to abate proceeding, in the event the employer violates a Commission order.

I also believe that it is especially important for the Department to focus enforcement efforts on employers who exploit, among others, low-wage and vulnerable workers, as well as on employers who repeatedly violate the laws enforced by the Department. Low-wage and vulnerable workers are the workers who most need our assistance and who can most benefit from the Department's aggressive actions to protect their rights.

In the 7 months since I became Acting Solicitor in January of this year, the Solicitor's Office has initiated a number of major enforcement actions in various program areas. For example, last month, the Department filed suit against Enron and various individuals for breach of fiduciary duty. In the OSHA area, since I became Acting Solicitor in January of this year, the Department has issued nine ergonomic citations in a variety of industries under the OSH Act's General Duty Clause.

To take one other example, from the civil rights area, as Acting Solicitor, I recently authorized the filing of the second systemic compensation discrimination case by the Department in over 25 years. The only other systemic compensation discrimination case filed by the Department in the last quarter-century was one that I authorized while Acting Solicitor in 2001.

In addition to approving enforcement actions and working with attorneys to strengthen those actions, I have also intervened in cases when such intervention would facilitate reaching favorable settlements. For example, I worked with career civil servants in the Solicitor's Office and Wage and Hour Division to negotiate one of the largest wage and hour settlements ever, a $10 million settlement with Perdue for failing to compensate employees for donning and doffing.

Regarding the second important mission of the Solicitor's Office, the legal advisory functions, I believe that attorneys must provide their clients with clear, concise, easy-to-understand legal advice that is based on a careful review of all relevant legal authorities. Whether it is legal advice on a newly-passed statute, an ethics issue, a proposed or final regulation, or any other question, attorneys must inform their clients of the range of options that are legally available and the legal risks attendant to or prohibitions on a particular course of action.

In conclusion, the Department of Labor's Solicitor's Office has a long and proud tradition of protecting America's workers and providing sound legal advice to its client agencies. I appreciate the great responsibility that I will bear if confirmed for the difficult and challenging job as Solicitor and understand the need to carry on the office's great tradition.

Thank you again for considering my nomination and I would be pleased to answer any questions that you may have.

The CHAIRMAN. Thank you, Mr. Radzely, for that excellent statement.

I am going to reserve my questions and yield to Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would first like to get to the issue on the development of the overtime regulations. As we know, going back to 1938 when the Fair Labor Standards Act was enacted, the basic read-through of the history on this, the basic application of the overtime was virtually for all the workers except for the very high management group that was defined, that was put in sharper focus later on in the 1940s and 1950s. This is the area of the duties test. You had the two different aspects. One, you had what the salaries are going to be in terms of eligibility for overtime, then in the duties.

It was quite clear that the spirit of that act was very clear, and that is that the great numbers of workers who are going to be working ought to be entitled for the overtime, and what has happened now is under the current administration, under the rules which have been accepted by the Department of Labor which you have been involved in now, the levels have been raised to some extent, but the duties have been redefined, which some estimates report will affect up to eight million workers. I know the Department of Labor doesn't accept those figures because they look at the figures of only those that are receiving overtime, as I understand it, not those that are eligible.

But the message that is going out to all those workers, those eight million workers, they better understand that if this rule goes on through, the day after, school is going to be out and employers are going to be able to raise the requirements of those workers and they are not going to get it. They are not going to be able to get the overtime. These are scores of different kinds of occupations, and I think the eight million, quite frankly, is an underestimation of the total number.

So this has major, major impact in terms of the workers in this country, and all this is at a time when workers in America are working a lot harder and a lot longer. We work, average workers are working 12.5 weeks more a year than the Germans, 6.5 weeks longer than the Brits, 5 weeks longer than the Canadians, 3.5 weeks longer than the Japanese, 2.5 weeks longer than the Australians. American workers are working longer, harder, and they are not only working, but their wives are working longer and harder now.

And now, along comes the administration with their proposal, which I think is a serious undermining of this commitment that was made years ago in terms of assuring both workers that they were going to be treated fairly on the issue of the 40-hour work week and undermines the commitment that those that are going to have the management skills would be excluded but others would be covered.

I think it is very clear what the direction is, and that effectively, at least as far as I am concerned—as far as I am concerned—is the emasculation of the 40-hour work week. We have seen it come in other forms, comp time, other ways, but clearly, this is where it is going.

Now, I am interested, did the Department follow the requirements of that Regulation 12866?

Mr. RADZELY. Yes, Senator. The Department did follow Executive Order 12866.

Senator KENNEDY. Which requires that you review the cost assessments both in terms of business and workers?

Mr. RADZELY. Yes, Senator, the Department did.

Senator KENNEDY. Do you have that material with you? Can you share that with us?

Mr. RADZELY. Senator, I don't have the material with me, but that was—the Department's analysis was laid out in the analysis as part of the Notice of Proposed Rulemaking.

Senator KENNEDY. But can we have that in this committee? Will you submit that for us to review?

Mr. RADZELY. I would be happy to, Senator.

Senator KENNEDY. And did you also follow that in terms of your issuing of your regulations on the L2?

Mr. RADZELY. Yes, Senator. We followed all applicable statute, rules, and regulations——

Senator KENNEDY. And you gave what the impact was going to be on business and workers?

Mr. RADZELY. Yes, the Department—the Employment Standards Administration for both regulations did do that analysis.

Senator KENNEDY. Do you remember what you did with regard to workers, because I have gotten a record with regard to what the implication was going to be in terms of the overtime to businesses, but I wasn't able to find anything on what the impact was going to be for workers.

Mr. RADZELY. Senator, again, this would have been analysis prepared by the Employment and Standards Administration, but I believe the analysis indicated that 1.3 million low-wage workers would be guaranteed overtime under the Department's proposal.

Senator KENNEDY. I am talking about the L2 regulations now, the L2, which requires you to get the impact on both the employers and the workers. I am familiar with what your submission was in terms of how it would reduce the burden on employers, but I didn't find the analysis of what the impact would be on the workers.

Mr. RADZELY. Senator, with regard to the LM2, and I apologize if I misunderstood your question earlier, the Department did prepare a detailed analysis as part of the Notice of Proposed Rulemaking. Again, that would have been prepared by the Employment Standards Administration. And in addition to that, there was a separate Paperwork Reduction Act analysis prepared, both of which were published in the Federal Register for comment.

Senator KENNEDY. Now, as I understand, you referred to the materials that you submitted with written responses, but those materials only included the unsupported numbers from the Office of Labor Management Standards. They don't have any information obtained directly from the unions about their finances or their technological or accounting abilities.

Mr. RADZELY. Senator, the Department's analysis was based on the best available information at the time. The Department, as this committee is aware, has received a substantial number of comments on the LM2 proposal. We are currently in the process of analyzing those comments, the Employment Standards Administration——

Senator KENNEDY. That is not my question. I know they are getting a number of comments. I am talking about when you issued

it, what efforts you made in terms of it. We have seen, for example, in the SEC, before the SEC began its electronic filing, it spent 5 years developing the system, tested the system through a pilot program, finally adopted a phased-in schedule over 2 years. The process took nearly 10 years from adoption to final implementation and the SEC's implementation period after the software was already completed still took 4 years.

I want to know what you did or the Labor Department did. The only previous agency that has followed these kinds has been with the SEC and this is the extent that they went to. I can't find in reviewing the documents where you made any survey at all or any assessment about the capability or the competency of unions to be able to deal with these areas in terms of the computers.

Mr. RADZELY. Senator, the Employment Standards Administration and the Office of Labor Management Standards did an extensive outreach to unions prior to promulgating the Notice of Proposed Rulemaking, invited in a number of unions, many of whom took up the Department and met with the Department in a series of meetings in an effort to obtain information.

Senator KENNEDY. So the point is that you don't have—your answer is that they did, Employment Standards did outreach to them, but you don't have any of the kinds of surveys that were done about the number of unions and the rest, about how many unions are affected. I think it is 5,500 that are affected, 141 of them are national. You are talking about reports in the L2 of $200,000 or more. Do you know whether these regulations were consistent with the Generally Accepted Accounting Principles?

Mr. RADZELY. Senator, again, as I indicated in my written response, my involvement in the proposed stage was limited. I don't know specifically——

Senator KENNEDY. Well, they weren't.

Mr. RADZELY. —whether they are consistent——

Senator KENNEDY. They were not. They are not consistent at all with the Generally Accepted Accounting Principles. These are the accepted accountability procedures for all the regulatory agencies and the L2 are not. I am just trying to understand what the basis for this was. There are some very, very clear requirements that have to be followed. There are requirements, for example, unions that have $6 million or less in terms of total assets. There is also the Small Business Regulatory Flexibility Act. Did you comply with that, do you know?

Mr. RADZELY. Yes, Senator, we did. The Department did comply with SBRFA in preparing the LM2 regulations.

Senator KENNEDY. Maybe you can distinguish about how the compliance with the Regulatory Flexibility Act and the rest of the L2 requirements, what is the distinction that you had in terms of the compliance figures, the requirements that you had?

Mr. RADZELY. I am sorry, Senator. I am not sure I understand the question.

Senator KENNEDY. Well, under the Regulatory Flexibility Act, that applies under the Small Business Act for entities that are $6 million or less. That has very specific requirements. You say that your L2 requirements have taken those into consideration. I am asking you how.

Mr. RADZELY. Senator, the Employment Standards Administration prepared a detailed regulatory flexibility analysis which was part of the Notice of Proposed Rulemaking.

Senator KENNEDY. We don't have them. They are not up here. You are the man in charge. You are the man.

The CHAIRMAN. No, he is not. Let me just note for the record that this gentleman is in an acting position right now and is the Solicitor, not the operational side of the Department. But I understand the Senator's desire to get these issues on the record. I have no problem with that and I am happy for him to continue.

Senator KENNEDY. Well, these have enormous impact on working families at a time, an extremely difficult time in terms of our economy. When we have the situation where, in terms of the accounting, we have very specific lessons that have been learned when there was a similar effort made with the SEC and the time that they took and the effort they made and the surveys they followed and the requirements that they had in order to get an accepted program and how they followed the Generally Accepted Accounting Principles that are applicable to all of the agencies, and then to find out that the Department of Labor went off entirely differently, didn't follow those Generally Accepted Accounting Principles, didn't follow the practice on all of these, and it is difficult to find out what the basis for making these judgments and decisions were.

They said, well, they have complied with the regulatory Order 12866, which is very specific on what the burdens are going to be and the benefits are going to be, both on the employer and the worker. I have asked what they are here today and I hear that there is some other agency that has done that in this. It makes it very difficult.

Let me just move to another area, and then I know my time—I have taken a good deal of time. This is on the citations on the ergonomic issues and plans. You mentioned that there were nine examples. I could only find six on the website. I could only find six. You have got your nine there. This is Alpha Health Services, Alpha Health Services, Alpha Health Services, Security Metal Products, Super Value, and Brown Printing. Those are the six that I found.

Mr. RADZELY. Senator, I believe——

Senator KENNEDY. You have three others?

Mr. RADZELY. Yes. I believe there were three that were recently issued, one against two nursing homes in Denver, Colorado, Mariner Health Care——

Senator KENNEDY. You have got the times and the dates of those?

Mr. RADZELY. I don't recall the time of Mariner Health Care. It would have been probably within about the last month, I am assuming, and there were two citations for facilities in the Denver, Colorado, area. About 2 weeks ago, I think, there was a citation issued against Tri-State Coca-Cola, a beverage distribution facility in Cincinnati, Ohio.

Senator KENNEDY. Let me mention these. This is an Alpha Health Services. This is Alpha Health Services. This is one of the nine, February 21. Proposed penalty, $900. Final penalty, $270. Alpha Health Services, second one, $900. Final penalty, $265.

Again, Idaho, Alpha Health Services, $900, again, $265. Security Metals Products, Oklahoma, $5,600. Final penalty, $2,800.

I draw the difference between what was done in OSHA under the general duty ergonomics citation during Bush I, and I would like to include both of these in the record, Mr. Chairman.

[The information of Senator Kennedy follows:]

OSHA General Duty Citations Under Current Bush Administration's Comprehensive Ergonomics Plan

Date	Company	Location	Proposed Penalty	Final Penalty
02/21/2003	Alpha Health Services	Idaho	$900	$270
02/21/2003	Alpha Health Services	Idaho	$900	$265
02/21/2003	Alpha Health Services	Idaho	$900	$265
02/26/2003	Security Metal Products	Oklahoma	$5600	$2800
05/22/2003	Supervalu	Missouri	$6300	(not available)
05/27/2003	Brown Printing	Pennsylvania	$4500	(not available)

Senator KENNEDY. You had Empire OSHA penalty, an $640,000 initial penalty. ConAgra Poultry, Missouri, $1 million. Ford Motor Company, $1.9 million. The list goes down, hundreds of thousands of dollars, and we are talking about nine cases, six of which we got online. Three of these were $900 reduced to $260. Not a strong record.

I do that against a background of changing the forms that the Department has done on ergonomics, and I would like to put these in the record, Mr. Chairman.

[The information of Senator Kennedy follows:]

A sample of OSHA General Duty Ergonomic Citations During The 1988-1992 Bush Administration

Date	Company	Location	Initial Penalty
02/28/1989	Empire Kosher	Pennsylvania	$640,000
06/12/1989	ConAgra Poultry	Missouri	$1.0 million
07/07/1989	Ford Motor Company	Pennsylvania	$1.9 million
10/23/1989	Cargill Poultry	Georgia	$242,000
06/11/1990	General Motors	Oklahoma	$70,000
08/24/1991	Samsonite	Colorado	$1.5 million
12/05/1991	Farmland National Beef	Kansas	$100,000
12/21/1991	General Motors	Michigan	$540,000

Senator KENNEDY. We had the old OSHA on repeated trauma and they had, even under the—that goes back to—I will put in the exact date, but it was prior to President Clinton. The Clinton administration shortened it, but they also had musculoskeletal disorders and they had the listing down there so that they would know the numbers of days, the number of incidents. What they have is the log of work-related injury and illnesses and that was

listed, as it had been listed under the old order, under the old order. What do you know, the Bush administration reissued the Clinton with all but one line, musculoskeletal disorders.

Now, how can we possibly take seriously, as I want to do and as I do, Secretary Chao indicating to us that she is going to be serious about dealing with the problem in the workplace, when we have an enforcement record like we have and when we have this kind of—and I didn't submit these to you prior to the record. You may be familiar with it. If not, you can take a look at it.

How can we be reassured, and more importantly, how can the workers of this country be reassured that you are serious about dealing with this when they see this kind of record?

Mr. RADZELY. Senator, regarding the recordkeeping, I believe you are referring to a decision made by OSHA, I believe in June, regarding whether or not to have a separate column on the recordkeeping requirement where there would be a check if the employer thought it was an MSD. I would like to make a couple comments on that.

First, the column is not needed for enforcement. Under the recordkeeping, employers are still required, as they have been, to report all injuries, including MSDs. And when OSHA goes in to do an enforcement action, OSHA would not have ever looked at a particular column. OSHA looks very specifically at the injury and illness logs and makes a very specific determination about what the particular MSDs are, and that is what OSHA uses and the Solicitor's Office uses in enforcement.

Moreover, Senator, the data currently kept by BLS allows for much more data in the sense that you can sort it by industry, you can sort it by specific body type, and the checkoff column would not have allowed for that information to be gathered or analyzed.

Senator KENNEDY. Well, it is still the only way for the public to get information, the aggregation of the data. This was the only column that was eliminated. It is the only column that was eliminated from this and I find it troublesome.

On overtime, we have looked at the Federal Register and we see nothing that fully describes the impact on various job classifications. You do talk about the effect on businesses, but not on worker classifications. I mean, what is the effect on legal aides, lab workers, airline ticket agents? Isn't this your responsibility?

Mr. RADZELY. Senator, again, that analysis would have been prepared by the Employment Standards Administration and I don't believe there is any requirement that they analyze specific industry by industry or State by State under the law, and the analysis that they would do is within the Employment Standards Administration.

Also, Senator, I should add that we are currently in the rulemaking process——

Senator KENNEDY. I understand that.

Mr. RADZELY. —for analyzing and so it remains to be seen what the final rule will look like, because under the APA, as you are aware, it has to be based on the rulemaking record.

Senator KENNEDY. I think you are absolutely right, but I am trying to find out, when you issued it originally, what the basis of it. You have a requirement under the Regulation 12866 to do the cost

to workers, and in looking at the Federal Register, I don't see it on the cost to workers.

I just have one final question in this area, Mr. Chairman—I have taken a good deal of time—and that is on the tuberculosis record. This one was in effect for ten to 11 years. The Centers for Disease Control, Dr. Gerberding is one of the outstanding public health officials in our country, of which we have several, and we had them before this committee recently and she has just done an extraordinary job.

But tuberculosis is a killer. I believe it is 15,000. It has gone from 17,000 to 15,000 over the last 3 years, but it is 15,000, and in a number of communities, like the District of Columbia, it is going up.

When you have that requirement about the rule, you have important kinds of protections that exist in there and you have enforcement and you have information and the workers get that information and we have enforcement requirements. The Department effectively vitiates that rule and says, we are going to use the Centers for Disease Control, which is not necessary embraced, not required, accepted in some places, not accepted in others, as the principal protector for workers. What was your reaction to that?

Mr. RADZELY. Senator, you are, I believe, referring to OSHA's decision announced in the regulatory agenda that it is going to withdraw the TB rule. I believe the Department has and will continue to have a vigorous enforcement in the area of tuberculosis. Under Directive 2.106, the Department has very specific means of enforcing this. There have been over 150 citations in tuberculosis over the last, I believe it is—I am not sure of the exact time, and 40 General Duty Clause citations.

In addition to that, as part of OSHA's national emphasis programming in the nursing industry, TB is one of the main things that they are looking for. In addition to that, Senator, there are some 80 local emphasis programs that are in place for TB.

Senator KENNEDY. Well, from 1999, 17,531, 16,377 for 2000, 15,989, I mean, it is down a trickle. These are cases, not deaths. But in 20 States, they have increased. In 20 of the 50 States, they have increased, and increased here in the District of Columbia. Asthma has increased dramatically. Children dying of asthma has increased dramatically.

When we have these airborne diseases and pathogens, SARS out there, monkeypox out there—SARS certainly is—and with all of the dangers that we are having out here in terms of these airborne pathogens, the threat is still out there. This agency is to be protecting workers, protecting workers, both their health and their safety as well as their wages. These are just indicators that I find distressing.

We didn't have a chance to go through some of the other parts of your record which have, I must say, been positive. I have used a good deal of my time, so I thank the chair.

The CHAIRMAN. Thank you, Senator. Senator Murray?

Senator MURRAY. Thank you, Mr. Chairman. I appreciate the opportunity, Mr. Radzely.

Let me start with the personal protective clothing rule under the Department. For several rules, OSHA has had a rule pending that

would require employers to pay for OSHA-required personal equipment, such as hard hats, safety gloves, protective eyewear, those kinds of things. Paying for that kind of safety equipment is particularly hard, I think we all know, for a lot of our low-income workers in hazardous industries—construction, poultry plants, garment shops.

The rulemaking record overwhelmingly supported OSHA's determination that a rule was needed to protect workers from the risks posed by their employers' failure to pay for protective equipment. Workers who are required to purchase and pay for their own safety equipment are put in a position of making decisions that may compromise their own health and safety to avoid personal economic loss. In fact, the agency found that issuance of a rule requiring employer payment for protective equipment would significantly reduce the risk of injuries, preventing over 47,000 injuries and seven fatalities every year.

In your testimony, your written testimony, you point to the fact that low-wage and vulnerable workers are the workers who most need our assistance. We know they need protection because they often work in dangerous jobs and industries. We also know that fatalities and injuries have risen 15 percent among immigrant and Hispanic workers, while the rate decreased by 15 percent for other groups of workers.

So given the overwhelming weight of evidence in support of a rule, why haven't you been more assertive in your role as Acting Solicitor to move forward with the policy decision and rule that has been supported by the record?

Mr. RADZELY. Senator, as you are aware, that is a decision that initially is made by the Occupational Safety and Health Administration and I have not reviewed the record so I do not know what the contents of that record are, whether it would or would not support a final rule. I do know that OSHA is studying the issue and is working on this——

Senator MURRAY. Well, to your knowledge, is there a legal impediment to OSHA's proceeding with the final rule?

Mr. RADZELY. Senator, I do not know whether there is or is not a legal impediment since I am not aware of the comments that have been made under the rule, and under the APA, any final rule would have to be responsive to those comments.

Senator MURRAY. Well, in the past 3 years, has OSHA cited any employer for failing to pay for required safety equipment?

Mr. RADZELY. Senator, I am not aware of any citations. There may have been, as you may be aware, under—there are specific standards which do require payment of certain PPE, and there may have been citations under that, but I am not aware if there was a citation for failure to pay for PPE, no.

Senator MURRAY. For the record, could you get responses back to those questions for me?

Mr. RADZELY. Sure.

Senator MURRAY. Let me then follow up. Senator Kennedy asked you about ergonomics guidelines, and I think when the Secretary of Labor announced her plan following the repeal of OSHA's rule, she committed the Department to a comprehensive approach. Senator Kennedy focused on some of the reporting and forms. I wanted

to ask you, I thought there were six, too, but apparently you are saying there are nine Duty Clause citations by the Department of Labor, is that correct?

Mr. RADZELY. Yes, Senator.

Senator MURRAY. And my understanding is that some of the highest-risk industries, like meat packing, auto parts, and hospitals, haven't been included in any of those citations?

Mr. RADZELY. Senator, there are no citations. OSHA does have local emphasis programs in those industries that you mentioned, but there are no citations.

Senator MURRAY. In any of the high-risk industries. Can you tell me how many cases DOL inspected for ergonomic hazards and considered issuing a citation?

Mr. RADZELY. I don't—that would be a question you would have to direct to OSHA. I am not aware specifically of the number of cases. I do know that OSHA has reviewed it as part of its nursing home national emphasis program and a number of local emphasis programs, but I don't know the number that you are asking.

Senator MURRAY. Well, we are asking because we have been told we are going to have a comprehensive force on this and I am just trying to get the scope of it from your perspective as Acting Solicitor.

Can you tell me if the Department is currently conducting targeted inspections and tell me which industries are being targeted?

Mr. RADZELY. Yes, Senator. In addition to the nursing home that I mentioned earlier, the targeted local and regional programs are in auto parts, meat packing, hospitals, and warehousing.

Senator MURRAY. But you don't know if any of those have been issued any citations or——

Mr. RADZELY. Senator, the citations that have been issued since January of this year, when I became Acting Solicitor, are the nine that I mentioned and I don't believe any of the nine were in those——

Senator MURRAY. Do you know how many have been inspected?

Mr. RADZELY. No. That would be a question that OSHA would have the information on.

Senator MURRAY. OK. Well, you do cite in your statement the final settlement that was negotiated with the Beverly Nursing Homes as an accomplishment during your tenure as Acting Solicitor. Beverly has finally identified the first 60 facilities in the process of adopting ergonomics programs. Can you tell us why Beverly or the Department of Labor has failed to provide a copy of the facilities list to the Service Employee International Union, which represents the workers at Beverly and was a party to those proceedings and the settlement of the case?

Mr. RADZELY. Senator, I have recently been made aware of the SEIU's request and have been very supportive of it, and in fact, we have notified the company about 7 days ago that unless they file a legal action to prevent us from doing it under a reverse Freedom of Information Act, that we want to turn that over. The SEIU has been a full partner in that nursing home case and we have been very supportive of them getting the data.

Senator MURRAY. OK. So you are committing to this committee that you will provide that information to the union, to the SEIU?

Mr. RADZELY. We are, again, just so I am clear, in the event that Beverly does not file a reverse FOIA lawsuit, we will provide it probably this week or early next week. If they do file a reverse FOIA lawsuit, we will have to evaluate their claims. But I am committed to trying to get the information to them as quickly as possibly because they were a full partner in that resolution.

Senator MURRAY. General Duty Clause cases are often very expensive and time consuming and difficult. You cited the Beverly case in your statement. That is a case that took 10 years before the Solicitor's Office was able to reach any kind of settlement. Would you agree that enforcement under the General Duty Clause is no substitute for a strong enforceable standard?

Mr. RADZELY. Senator, I believe enforcement of the General Duty Clause will protect American workers and I believe the Department has learned a significant amount in terms of its prior experiences on ergonomics——

Senator MURRAY. Even though it takes 10 years to reach any kind of decision on it?

Mr. RADZELY. Senator, I think any time you are filing new cases, it takes longer. Once the case law is developed, it is much easier and much quicker to file cases. And I have no assurance under any particular standard that it would go quicker. There are cases under OSHA standards that take years to resolve themselves.

Senator MURRAY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Enzi?

Senator ENZI. Thank you, Mr. Chairman, and I appreciate your holding this hearing. I think it is extremely important that we get this nominee confirmed. Seldom do we have an opportunity to have someone come before us that has actually been doing the job. I have heard no fault with the job that he is doing. I am pleased with the record he developed in his previous position and the job that he is doing now.

I do have a complete statement that I would like to be made part of the record.

The CHAIRMAN. Of course.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

Mr. Chairman, one of our most important duties on this Committee is to fulfill our Constitutional duty to provide our advice and consent to the President's nominees for those positions that fall under our jurisdiction. Today we will be reviewing the qualifications of his nominee for the Solicitor of Labor, Howard Radzely. This position is of great interest and importance to me personally because of my service as Chairman of the Subcommittee on Employment, Safety and Training.

The Department of Labor plays a critical role and has a great effect on the day to day lives of the American workforce as well as the operations of our business community. The Solicitor of Labor serves in a key position that ensures the Department is functioning effectively, efficiently, and on firm legal footing. As I reviewed Mr. Radzely's record, I was pleased to note his outstanding background that makes him highly qualified to continue to face the rigors of this position.

Mr. Radzely is a magna cum laude graduate of Harvard Law School who worked in private practice, concentrating on labor and employment law, prior to joining the Department of Labor. He has been Acting Solicitor from June 2001 to January 2002, and again, since January 2003. During his service at the Department of Labor, Mr. Radzely has demonstrated his ability to be an effective Solicitor of Labor.

As our Committee considers this important nomination, we have to keep in mind the role of the Solicitor and his qualifications relative to the position he has been asked to fill. Therefore, we must note what the role of Solicitor is and is not.

The Solicitor of Labor serves two primary functions. First of all, the Solicitor is responsible for enforcing the nearly 200 statutes that fall under the Department's jurisdiction. Secondly, the Solicitor provides legal advice to the Secretary and agencies within the Department of Labor. The Solicitor monitors agency activities and provides legal advice to ensure that the Department's agencies and employees comply with applicable laws and regulations. The Solicitor advises rulemaking agencies about the legal implications of the rules they propose. The Solicitor's position is not a policy position. The Solicitor does not advise from an ideological viewpoint, but from a legal perspective.

As we consider Mr. Radzely's nomination, we couldn't have a better or more complete record. From his previous service we know the kind of individual Mr. Radzely is, and we also know how well he handles the responsibilities of a very demanding job. As Acting Solicitor, he has shown that he is indeed well-qualified to perform the functions that this position demands.

Mr. Radzely's has demonstrated his commitment to vigorously enforce the laws within the Department's jurisdiction. I believe his record speaks for itself on this key point.

During his service as Acting Solicitor, the Department of Labor filed suit against Enron, the Administrative committee, Kenneth Lay, Jeffrey Skilling and the outside members of the Enron Board of Directors for breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA).

Part of the Department of Labor's comprehensive approach to reducing ergonomic injuries in the workplace is an enforcement program under the OSH Act's 'general duty' clause. Since becoming Acting Solicitor earlier this year, the Department has issued nine ergonomics citations under the general duty clause against companies in a wide variety of industries.

As I completed my review of the materials on Mr. Radzely's nomination and his already impressive track record of service, there was only one conclusion that could be drawn about his ability to continue to serve in this important capacity. Simply put, he has done and will continue to do an excellent job if given the chance. He knows the law and he knows the importance of enforcing it.

During today's hearing I look forward to evaluating this nominee based on his qualifications and suitability for office, not on policies developed outside of the Solicitor's purview. Our evaluation of Mr. Radzely's qualifications should not be confused with our evaluation of policies on which the Solicitor provides legal advice.

The President has chosen an individual with excellent qualifications and sent him to us for our review and consideration. His choice of Howard Radzely is a good one, and I strongly support his nomination and confirmation by the full Senate.

Senator ENZI. I am impressed with your qualifications and suitability for the job. I do realize that your job is not the head of OSHA. Your job is not the head of the Department of Labor. I realize that, or I am pretty sure that you are not the one who is supposed to develop the policies or come up with initiating new regulations. Am I correct on that?

Mr. RADZELY. Yes, Senator.

Senator ENZI. Can you tell me what role you do play in the rulemaking process?

Mr. RADZELY. Yes, Senator. The Solicitor's Office's role in the rulemaking process is to ensure that all applicable rules, regulations, executive orders are complied with in the Notice of Proposed Rulemaking stage and that in any final rule, those statutes are complied with and the comments are carefully considered in developing a final rule.

Senator ENZI. Thank you. I appreciate some of the comments that the Senator from Massachusetts had earlier. It particularly caught my attention when he mentioned the Department of Labor and Generally Accepted Accounting Principles. I have been a little disappointed in all Federal agencies in their Generally Accepted Accounting Principles and with the audits that have been done in agencies and departments. I think we have a lot of room for improvement there.

We have subjected the corporations of this country to some real scrutiny, but we have kind of passed over our own, and by our own, I mean even the accounting that deals with the budgets for our offices. I tried doing some things when I first got here with that and found that that is kind of difficult.

I appreciate your putting the forms into the record. Since I have been here, I have mentioned that I wished that there was a lot more done with the forms. I have tried to get some compiled numbers. We require the businesses to make some compilations, but when it gets to the Federal level, there is not much done with them after that. I think that it would be a tremendous help when you are doing auditing and accounting, you try and find the worst first and I think there is some potential there for doing that and pursuing it. But in the 7 years I have been here through two administrations, I think there could be some room for improvement in that, drastic improvement.

I am glad you brought up uniformity of fines. I know that has been a tremendous difficulty. I have asked that there be some published fines so that we would have some uniformity across the Nation. Different States, especially State plan States, have different methods of evaluating it, and then, of course, in the non-State plan States, there is just a tremendous range also. I think there ought to be a little bit more uniformity in that and I think it would help in the enforcement. It would also help the companies, because they would have a little better idea of really what they are dealing with. Sometimes it would be easier to understand the penalties than it would be the rules, and then we could work backwards from there.

When you mentioned TB tests, what it brought to mind was when I was in grade school, we used to get TB tests. They used to come in and put some little pin pricks on the back of our hand and then the next week when we went to school, they would have some nurse there that would evaluate whether the lump had grown or receded. I do recall that we don't do that anymore. I suspect that it is because there is less TB. So sometimes if we change it in the schools, we probably change it in the workforce, as well, not that it isn't an important thing to watch out for, but that there are changes.

Of course, the comments by the Senator from Washington about protective gear, I used to work with some of those safety issues and the difficulty wasn't as much in getting the safety gear for the employees as it was getting the employees to wear the safety gear when they had it. Of course, when an employee doesn't wear the safety gear, it isn't the employee that gets fined, it is the employer that gets fined, and if the employee doesn't wear it twice and they are inspected, then the employer is the bad actor.

So there need to be some things done on a responsibility area there, too, that I hope is built in at the same time that we work on who provides the equipment. I never ran into a problem with anybody understanding who was buying what, but I am glad that there is some work being done on clarifying that.

Again, I thank you for being here today to testify. It was delightful to look at your record and I look forward to your speedy confirmation.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Harkin?

Senator HARKIN. Thank you very much, Mr. Chairman.

Mr. Radzely, I apologize for being a little late. I did look over your statement earlier, however. I just wanted to cover a couple of areas with you, one being the issue of overtime.

Again, before I do that, I again want to stress that the Solicitor is not only the Department's lawyer but the workers' lawyer, and you don't disagree with that. You are the Department's lawyer, but you are the workers' lawyer, also.

Mr. RADZELY. Senator, yes. The Solicitor's Office brings cases on behalf of workers.

Senator HARKIN. Exactly. On workplace safety and health, workers depend on the Department of Labor because the laws do not provide workers with a private right of action to enforce their statutory rights. The Solicitor acts as the top legal advisor to the Secretary on virtually every policy, legislative, regulatory, and enforcement initiative of the Department or its agencies.

So again, I have some concerns about the role the Solicitor's Office has played—not you, since you haven't been there—but has played, specifically on the law that protects a 40-hour work week and overtime pay.

In March, DOL proposed a new rule that would essentially take away the overtime pay protection from millions of working Americans who currently have it. DOL officials said they simply wanted to simplify and update the rules that were part of the FLSA in 1938, but it appears they didn't just simplify the rules, they made them more vague than ever, allowing employers to easily reclassify

workers to disqualify them from overtime pay protection and require them to work longer hours with pay.

Again, I don't understand how the Solicitor, who is supposed to be the workers' lawyer, would allow such an extreme proposal to go forward. Again, I am also concerned with the dropping enforcement and compliance of civil rights laws on Federal contractors, and I want to talk about that also.

But again, on the issue of overtime, wasn't it the intent of Congress and the President in 1938 to establish a 40-hour work week with few narrow exceptions under the Fair Labor Standards Act? That is my question. Wasn't that the intent? And isn't it your job as an advocate for the workers to insist that any exceptions to the 40-hour work week be narrowly limited as Congress intended?

Mr. RADZELY. Senator, Congress in enacting the Fair Labor Standards Act gave the Secretary of Labor authority to define these three particular exemptions, administrative, executive, and professional. I believe that as such, terms are defined and delimited from time to time by regulations of the Secretary of Labor. It is the Office of the Solicitor's job to ensure that any regulations, both the Notice of Proposed Rulemaking and any final rule, are consistent both with the Fair Labor Standards Act and, in particular, the phrase I just read, as well as the Administrative Procedures Act and some of the other Executive Orders and statutes that Senator Kennedy mentioned earlier.

Senator HARKIN. Let me see if I understand what you just said. You said you are to make sure that what they are doing is consistent with the exemptions of administrative, executive, and professional.

Mr. RADZELY. I apologize if I gave a confusing answer, Senator. No, the job of the Solicitor's Office is to make sure that any proposed regulation is consistent with the language, quote, "as such terms are defined and delimited from time to time by regulations of the Secretary of Labor." In that, Congress essentially delegated to the Secretary of Labor decisions as to how those three particular exemptions should be defined.

Senator HARKIN. But again, I go back to what I initially asked. Was it not the intent of Congress at that time to narrowly limit—I mean, it wasn't a broad exemption, it was to narrow them down at that time, and that is the way it has—has that not been the way it has been implemented since 1938? A narrow exception is put in there by Congress.

Mr. RADZELY. Senator, the exception—the words of the language give the Secretary of Labor the authority to define those terms.

Senator HARKIN. In your written responses, you said you reviewed the proposed regulations for compliance with the Fair Labor Standards Act, is that correct?

Mr. RADZELY. Yes, Senator. That is correct.

Senator HARKIN. In your written responses, you also say that the Secretary of Labor has authority to define the terms executive, administrative, and professional employees, what you just said here. Are you suggesting that the Secretary has unlimited authority to define those terms?

Mr. RADZELY. Senator, I am not suggesting that the Secretary of Labor has unlimited authority, but what I did indicate in my writ-

ten responses was that the Solicitor's Office did review the proposed——

Senator HARKIN. Mr. Radzely, if the Secretary does not have unlimited authority to define what is executive, administrative, or professional, what are the limits?

Mr. RADZELY. Senator, again, I would have to react to a specific proposal. The Solicitor's Office did review the proposed regulation and determined that it was consistent both with the Fair Labor Standards Act and other applicable laws, Executive Orders, and other regulations.

Senator HARKIN. Well, again, I have got to figure out, what are the limitations? If it is not unlimited, you are saying the limitations are what you define them to be at any point in time, is that right?

Mr. RADZELY. No, Senator. Again, we would have to take a look at a specific proposal and——

Senator HARKIN. Well, we have a specific proposal.

Mr. RADZELY. And the Solicitor's Office did look at that specific proposal and determined that the proposal was consistent with the Fair Labor Standards Act. And again, we are in the comment period now. We have received, I believe it is some 78,000 comments——

Senator HARKIN. A lot of comments.

Mr. RADZELY. —and the Employment Standards Administration will be reviewing that and the Solicitor's Office will review any decisions that they make for consistency with all applicable rules and regulations, most particularly the Administrative Procedure Act.

Senator HARKIN. I know this is not within your purview, but this is just my comment, the fact that I find it very strange, indeed, that a rule that affects so many people in this country—a proposed rule that affects so many people in this country, not one hearing was held on it. Not one public hearing was held by the DOL anywhere in the United States on this. I find that just astounding. I mean, I can see some rules that don't affect a lot of people that are minor in nature, you don't have to have public hearings. But something like this, I find almost to the point of being bizarre that not one hearing was held.

But let me get back to the limitations, Mr. Radzely. Isn't one limitation on this authority, one limitation on the authority of the Secretary to define this, isn't one limitation the fact that Congress clearly did not intend for the FLSA's 40-hour work week to be limited only to low-income workers? Do you agree that it would be inconsistent with the FLSA, for example, for the Secretary to issue regulations that have the effect of bringing every worker earning more than $22,100 within the exceptions to the 40-hour work week? Do you want me to repeat that?

Mr. RADZELY. Yes, would you.

Senator HARKIN. Do you agree that it would be inconsistent with the FLSA for the Secretary to issue a regulation saying that every worker in America who earns over $22,100 a year is in the exception to the 40-hour work week?

Mr. RADZELY. And thus would not be entitled to overtime?

Senator HARKIN. Yes.

Mr. RADZELY. You are saying every worker earning over $22,100?

Senator HARKIN. Yes.

Mr. RADZELY. Senator——

Senator HARKIN. Would that exceed her authority or his authority?

Mr. RADZELY. I would want to think about it more, but yes, I believe it likely would. If it were just anyone over $22,100, that probably would exceed the Secretary's authority.

Senator HARKIN. So that would be a limitation. Isn't another limitation the fact that Congress clearly did not intend for these exceptions to be based solely on income? Again, do you agree that it would be inconsistent with the FLSA, for example, for the Secretary to issue regulations that disqualify from overtime protection every worker earning more than, say, $65,000, regardless of the worker's job duties?

Mr. RADZELY. Again, Senator, I would want to specifically study any particular proposal, but my initial reaction is if the only requirement were making $22,100 or whatever the dollar figure was, that likely would be inconsistent with——

Senator HARKIN. So someone earning more than $65,000 a year is not just automatically disqualified from overtime? It depends, again, upon what their job is?

Mr. RADZELY. Yes, Senator, I think that likely is right. Again, I would want to look at——

Senator HARKIN. So that would be a limitation. OK. I have just one more. Isn't another limitation the fact that Congress intended for these exceptions to apply only to a narrowly-limited class of individuals? Again, do you agree, Mr. Radzely, that it would be inconsistent with the FLSA, for example, for the Secretary to issue regulations that disqualify from Federal overtime protection 90 percent of workers earning more than $22,100 a year? Again, do you agree it would be inconsistent for the Secretary to issue regulations that would automatically disqualify from overtime protection 90 percent of workers earning more than $22,100 a year?

Mr. RADZELY. I am sorry, Senator. I am not sure I understand how you get to the 90 percent of workers over $22,100——

Senator HARKIN. Well, what I am saying, Congress intended for exceptions to apply to a narrowly-limited class. I am asking you, do you agree that it would be inconsistent with FLSA if the Secretary were, for example, to issue regulations that would just disqualify 90 percent of people earning more than $22,100 a year?

Mr. RADZELY. Again, Senator, I am not sure I understand your question. I believe, and again, I would want to study it more, but I think that a pure salary test, accepting the hypothetical of your earlier questions, $22,100 or whatever it is, would likely be inconsistent with the authority in the Fair Labor Standards Act. But I am not sure I understand——

Senator KENNEDY. Would the Senator yield?

Senator HARKIN. Yes.

Senator KENNEDY. He is talking about the duties requirement. You can emasculate the overtime provisions by altering and changing the duties requirement. You have two different items. One, you have the level of the wages, and two, you have the duties requirement, and if you redefine those duties requirements, you can redefine overtime right out of the Act. That is what I think is beginning

to happen. I mean, we have a difference on that, but at least that is what I thought that the Senator was trying to ask.

You say that you have the authority to issue the regulations. You have the power to do it. You have compliance requirements, which I don't think have been myself lived up to, which we have been over earlier and I won't go over now. But if you keep redefining the duties requirement, you can effectively emasculate the whole overtime issue.

I apologize——

Senator HARKIN. No, the Senator correctly sort of embellished what I was saying, and he is right. If the Secretary issued a rule that redefined these duties to the point where 90 percent of the workers making more than $22,100 a year were barred from overtime, do you feel that would be inconsistent with the FLSA?

Mr. RADZELY. Senator, again, accepting the premise of your hypothetical, I would need to look at how that rule was defined. The Fair Labor Standards Act isn't in terms of percentages. It talks about as the terms executive, administrative, and professional are defined and delimited from time to time, so I would need to know how the proposal attempted to define those——

Senator HARKIN. But if we looked at the effect of it, I think that is what we were saying. If we looked at the effect of it and the effect was to exclude 90 percent or 80 percent or 70 percent or whatever automatically, again, it is my feeling that it would be inconsistent with the FLSA. The rule sort of swallows up or does away with the FLSA by changing the rule, as Senator Kennedy said, and I just wanted to get your thoughts on that.

Again, I think you see where I am coming from. I just think that the proposed rules that came out and the reason they got so many comments on it is an overreaching. It is something that Congress never clearly intended. We limited the power of the Secretary. And by changing this, it just basically makes her power, or his power, whoever the Secretary is, unlimited in this area. And yet, you say, and my question to you did say that there were limitations. It is not an unlimited power. But if the Secretary redefines the duties so that it exempts 90 percent of the workers, that is almost an unlimited power.

The CHAIRMAN. I think he responded to your point and I think you made the point.

Senator HARKIN. I appreciate it. Thanks, Mr. Chairman.

The CHAIRMAN. And I think you have got a hearing to make your point again on Thursday.

Senator Clinton?

Senator CLINTON. Mr. Chairman, I think, Mr. Radzely, that you understand our concerns, because clearly, we are a nation that believes in the rule of law. It is very difficult to follow the logic behind this rule change, which seems to be a grab for power by the Secretary, albeit on behalf of the administration, with respect to issues that have not been legislatively addressed.

The Fair Labor Standards specific language seems to run absolutely counter to what the implications and effects of this rule change would be in the real world, and that is very troubling, because if you look at the people who do work overtime in our country, police officers and firefighters and health technicians and

EMTs and paralegals and all kinds of people, millions and millions of people, for people who do work overtime, their overtime pay constitutes 25 percent of their wages.

I don't think anyone in this Congress believes we should in any way diminish the income by 25 percent of literally millions of people on the basis of a rule change. That is not the appropriate province of the Secretary, and as the nominee for Solicitor, we view your responsibility in this matter to be paramount. I mean, you are the Secretary's lawyer, in effect, as well as the defender and enforcer of workers' rights.

We are talking about eight million people being affected by this rule, and I know that the Department has put out other figures, but any independent analysis about who will be affected with, in effect, these changes is as high as eight million people, and I don't think any of us want to face our firefighters and our police officers, to say nothing of reporters, who are going to have 25 percent of their income at risk.

So this is an incredibly serious matter, and as the questioning from both Senators Kennedy and Harkin suggested, it is very difficult to understand where the Secretary is getting the authority to do this, to, in effect, through rule changes, redefine executive, administrative, professional, the duty test, the salary limits. It is just not in there.

So we will look for cooler heads to prevail on this matter, although I suppose if you want the administration and the President to stand for reelection with eight million folks, including a lot of police officers and firefighters, being told their income has been cut by 25 percent, I suppose that is a choice you can make. I would not advise it.

I have a very specific question, and that is concerning the New York City Employment and Training Administration Office, which oversees job training programs for approximately 200,000 people annually at one-stop job centers and manages as many as 400,000 unemployment insurance claims per week. The Department of Labor has decided to subsume this office into the Boston office, and with all due respect to my colleague, the ranking member, I am not at all convinced that this will be the best decision on behalf of the people and the workforce in New York.

It seems inefficient and inexcusable to relocate the ETA office that serves New York City more than 200 miles away. There are a lot of people who are dependent on public transportation in that city. There are people who cannot possibly afford to get on an airplane, a train, or a bus to go to Boston to deal with their unemployment claims.

I have written to Secretary Chao twice to ask her to reconsider this ill-conceived idea. She has responded that the move will not affect service but instead will make the offices more effective, but she does not cite any analysis to really back up this point.

Now, I realize you may not have been directly involved in this decision, but I would appreciate it if you would explain to me in writing, in response to this question, how this move could possibly make the office more effective for the people of New York City, the hundreds of thousands of them who are under the supervision or at least required to deal with this Department, and I would like

to know why the Department thinks it is an appropriate move, given that New York City has been in recession since September 11, has an employment rate of 8.1 percent citywide, higher than that in several of our boroughs, and directly and direly needs the employment and training services provided by the ETA. So I would appreciate that response in writing, Mr. Radzely.

And on another issue, with respect to the LM2 regulations, you have said that lawyers in the Solicitor's Office have been working with the Office of Labor Management Standards on the LM2 rules to ensure that any decisions regarding the final rule consider all the comments in the record, that they are supported by the record, consistent with the Labor Management Reporting and Disclosure Act, the Administrative Procedures Act, and all other applicable statutes, regulations, executive orders, and case law.

I assume the Regulatory Flexibility Act, which looks at the impact of rules on small entities, and Executive Order 12866, which requires agencies to describe the costs and benefits of proposed rules for rules with an economic impact of $100 million or more, the Executive Order requires a formal economic analysis, are two of those laws. So I would look to you to assure that the Regulatory Flexibility Act and Executive Order 12866 are part of your analysis.

Let me ask you, why hasn't the final rule been issued? Any insight you could give us on that?

Mr. RADZELY. Yes, Senator. The Department is currently reviewing the some 36,000 comments that it received on the rulemaking and is carefully analyzing them. The Office of Labor Management Standards and the Employment Standards Administration are working on that, and I don't have a timetable for when they are going to complete that.

Senator CLINTON. Do you know if the proposed rule has been reviewed for its conformance with the Regulatory Flexibility Act or the Executive Order I referred to?

Mr. RADZELY. Yes. Attorneys in the Solicitor's Office did review that analysis prepared by the ESA for compliance with those acts and the Executive Order.

Senator CLINTON. And will you provide that analysis to this committee so that we could also review it?

Mr. RADZELY. Senator, I believe in response to a written question from the committee, I did provide the analysis that the Solicitor's Office reviewed from the Employment Standards Administration.

Senator CLINTON. But in our review of that, there were no specific studies or estimates on the economic impact of the rule on small entities, so perhaps there is some additional information that has been developed that could be provided.

Mr. RADZELY. Senator, there undoubtedly will be additional information prepared with the final rule because there were a significant number of comments, obviously, on some of the analyses that you mentioned.

Senator CLINTON. We have no evidence in your testimony or in any other submission from the Department that there was an economic analysis conducted in conformance with Executive Order 12866.

Mr. RADZELY. Senator, I believe the determination by the Employment Standards Administration was that it would not have an effect of more than $100 million, and therefore——

Senator CLINTON. But there are two different standards, Mr. Radzely. There is a small firm or entity impact standard and then there is a larger standard.

Mr. RADZELY. Yes, Senator. I believe the larger standard you are referring to would be the Regulatory Flexibility Act and the Regulatory Flexibility Analysis, which the Department, and the Employment Standards Administration in particular, did prepare. I believe there were specific costs and estimates in those and we did receive comments on whether those estimates were consistent with what the experience of the commenters.

Senator CLINTON. Well, if I could, I would like to submit in writing our assessment and analysis of what we have received from you and on behalf of the Department raising some additional questions, because that is not my perspective on what has been done. So we will submit that to you and expect to have answers with respect to our questions.

[The information was not received by press time.]

Senator CLINTON. Thank you.

The CHAIRMAN. Senator Reed?

Senator REED. Thank you very much, Mr. Chairman. Welcome, Mr. Radzely.

I just want to go back to some of the regulatory analysis that is underlying the overtime rule that Senator Clinton, and I think others have talked about also. First, is it your view that, generally, people who work overtime should receive additional compensation and that exceptions to that general rule should be narrowly construed?

Mr. RADZELY. Senator, the Secretary of Labor, as defined in the Fair Labor Standards Act, has the authority and responsibility to delimit from time to time the terms administrative, executive, and professional.

Senator REED. Thank you, but that doesn't respond to the question. Do you think the presumption is that most people should be granted overtime if they work over 40 hours a week and that there are certain limited exceptions, so those exceptions have to be narrowly construed? It is this issue of construction, not what her authority is.

Mr. RADZELY. Senator, again, it is the Congress specifically stated that the Secretary of Labor needs to define and delimit executive, professional, and administrative, and those positions are exempt from the overtime requirements.

Senator REED. So the Secretary can say, anyone who makes over $50,000 a year basically must be an executive, since I would suspect that is high above the average wage in America.

Mr. RADZELY. Senator, again, I think that there would need to be—a pure salary test likely would not be consistent with the Secretary's statutory authority because that is limited to defining administrative, executive, and professional employees.

Senator REED. So someone who supervises one other person can be an executive?

Mr. RADZELY. Senator, I believe under the Department's proposal, which didn't change this requirement, it is one of the tests for executive is supervise two or more individuals.

Senator REED. So you could be making $35,000 a year, supervising two people, a wage earner, and be denied overtime.

Mr. RADZELY. Senator, there are other requirements in both the current rule and the proposed rule.

Senator REED. OK. Very good. That just goes back to the question I asked initially. How broad is the ability of the Secretary to include people as executives or exclude them, which goes to the basic sort of premise, is this a narrowly construed exception that deals with very special cases where someone has all of these characteristics, relatively high salary, significant responsibilities, or is this something that is so amorphous the Secretary can sort of at whim say, well, that is an executive, that is an administrator——

Mr. RADZELY. Again, Senator, any decisions made by the Secretary are reviewed—would be potentially reviewable in court——

Senator REED. That is obvious, but what is the answer to the question? What is your view about whether this is an exception that should be narrowly construed or whether it is one that should be broadly construed, because that is at the heart of what the Secretary is doing.

Mr. RADZELY. Senator, I believe that Congress, in drafting the statute and this particular exemption, gave the Secretary the authority to define those terms.

Senator REED. Broadly.

Mr. RADZELY. Those terms were not defined. Senator, I believe legally, the Secretary could define it broadly, again, accepting the hypothetical. Obviously, the Department believes there are substantial benefits to its proposal by employees.

Senator REED. Well, I would think the Department might find that for thousands and thousands of wage earners, they would find that to be very unattractive. Senator Clinton mentioned firefighters and police officers, many of whom supervise several people. Many of them have reasonably good compensation levels but see themselves as protected by this law. In my view, you keep referring to what Congress says, in my view, this should be a narrowly construed exception generally providing that people who work for wages and who work overtime, past 40 hours a week, should get overtime pay, and obviously, you don't think the Secretary has that view.

Mr. RADZELY. Senator, I think as the Secretary has indicated and the Department has indicated, the Secretary believes that the proposal has substantial benefits for employees. And again, I should caution——

Senator REED. For the employees who lose their overtime?

Mr. RADZELY. Senator, the Department did an analysis and it determined that 1.3 million low-wage workers would be guaranteed overtime under this proposal.

Senator REED. All right. According to your analysis, as I read it, there are 645,000 paid hourly workers working overtime in occupations with exempt administrative and professional duties that could be converted to salaried employees. Is that correct?

Mr. RADZELY. I believe that is part of the Department's analysis, yes, Senator.

Senator REED. Right. But it just strikes me in terms of just the analytical approach here is that those are the people, as I read this, that are currently receiving overtime. Isn't there a logical category of people that are entitled to overtime that don't receive it, and why shouldn't that number, rather than the 644,000, be the figure that you use to do your analysis?

Mr. RADZELY. Senator, I am not sure I understand specifically what all of these numbers mean. Again, that analysis would have been prepared by the Employment Standards Administration.

Senator REED. OK. As I understand, also, in terms of the analysis, Deputy Assistant Secretary for ESA Mark Wilson and Fred Reuter, the chief analyst for CONSAD, which is the DOL contractor that prepared the regulatory analysis of the proposed rule, claim that the Solicitor of Labor prevented them from answering questions about the rule's regulatory impact, talking about numbers. Can you tell us why you or your staff prevented the agency and CONSAD from answering factual questions such as which occupations are included in the estimate of professional employees who would lose overtime protection?

Mr. RADZELY. I am sorry, Senator. I am not sure I understood your question. Can you repeat it?

Senator REED. Certainly. Deputy Assistant Secretary for ESA Mark Wilson and Fred Reuter, chief analyst for CONSAD, the DOL contractor that prepared the regulatory analysis of the proposed rule, claim that the Secretary of Labor—Solicitor of Labor, excuse me, prevented them from answering questions about the rule's regulatory impact. Can you tell us why you or your staff prevented the agency and CONSAD from answering factual questions such as, quote, "Which occupations were included in the estimate of professional employees who would lose overtime protection?"

Mr. RADZELY. I am sorry, Senator. I am just not aware of what they are referring to. That was—I don't believe that was any advice that I personally gave.

Senator REED. Well, can you make yourself aware of what they are talking about and inform the committee of why you would, at least under their view, interfere with the simple fact gathering?

Mr. RADZELY. I would be happy to, Senator.

Senator REED. Thank you.

The CHAIRMAN. Thank you. Senator Kennedy has a couple of follow-up questions and then we will finish the hearing up.

Senator KENNEDY. Just in response to the question of Senator Clinton, you said that the effect would be less than $100 million, so a full economic analysis is not necessary. But your submissions to OMB indicate that this is an economically significant rule. I have got it right here, economically significant rule.

Mr. RADZELY. Senator, are you referring to the LM2?

Senator KENNEDY. Yes. This is on the L2.

Mr. RADZELY. Well, Senator, I may have misspoken. Again, I didn't prepare that analysis. My recollection was that it was a significant rule, which there are two—my understanding is there are two criteria under which under 12866 there would be OMB review. One is an economically significant rule, which I believe is $100 mil-

lion or more standard, and another is just if it is a significant rule under certain standards.

My understanding was, and I could be mistaken, was that it was the latter of those two categories, not the $100 million, but if you have that document, then I must have been mistaken and——

Senator KENNEDY. Well, this gets to what we are talking about, and that is whether the Department did fully comply with the Executive Order.

The CHAIRMAN. Is that $100 million?

Senator KENNEDY. This says economically significant, and he is defining that as—he is saying it is $100 million. All the other analysis indicates it is much more than $100 million, but on his application, he recognizes that it is economically significant on this, and if it is economically significant, then there has to be a full analysis, which they had not provided.

Mr. RADZELY. Again, Senator, as I think I indicated earlier, I had limited involvement in the preparation of the rule, but the rule was reviewed by the Solicitor's Office and whatever the Employment Standards Administration did was consistent with SBRFA and—was consistent with SBRFA.

Senator KENNEDY. Well, just to come back to points that have been asked here about the power, the authority, this has been really the most distressing part of your testimony, quite frankly. We went through some of these related areas, but I have a lot of difficulty certainly supporting you if you think that power is unlimited in terms of the Department of Labor to define what are these areas of overtime.

Historically, it has been about 80 percent of the workers. It has been 80 percent of the workers. That has been since the Fair Labor Standards Act. I am not going to support a Solicitor or anybody else that thinks that you have an opportunity to go far beyond that in terms of their definition. Your testimony is that whatever the Secretary decides is executive or professional or administrative, anything, school is wide open. I don't hear you saying anything that there has been a long-time historical balance, and it has basically been about 80 percent. I think you are changing that significantly with these other rules and regulations.

That has been the figure. It has been now for whatever number of years it has been in there, 70 years. And you are telling this committee you think, well, wait a minute, it might have been 80 percent for 70 or 80 years, but my understanding as the principal advisor for the Secretary is that it is open-ended.

Mr. RADZELY. Senator, I apologize if I left any misimpression, but I believe in response to Senator Harkin's questions I said that it was not open-ended, and clearly, I think I said that, likely, the salary, just a salary, $22,100, would not be consistent with the Act.

Also, again, I would need to look at a specific proposal and the Department's Notice of Proposed Rulemaking, based on the analysis the Department did, and I understand there is a disagreement between you and the Department over that analysis. But the Department believed that 1.3 million workers would be guaranteed overtime who didn't have it and something on the order of, I believe it was Senator Clinton said 645,000 could potentially lose it.

Thus, the Department believes under its proposal more workers will actually gain overtime, so——

Senator CLINTON. Mr. Chairman, since I have been referred to, could I ask you to yield for just a second, Senator?

Senator KENNEDY. Yes.

Senator CLINTON. I want to be really clear about this, because it was actually Senator Reed who specified it. This is where I think the Department's actions just don't inspire confidence. You are, I understand, in a tough spot, because you are not the person promulgating these rules, but you are the person who we look to to make sure that what is done in that Department is done legally.

The 644,000 number, if you take your analysis at face value, refers to people who are currently receiving overtime. That does not count the millions of people who are eligible if they are asked to and have to work overtime. The difference is that some people on a regular basis work overtime who fall in that 645,000 number, but there are up to eight million people who have historically been eligible for overtime who, by the rule's wording, would no longer be eligible for overtime.

So it is just not a fair statement to say that this rule is going to give more people overtime. That is not a fair statement. You are going to be taking away a right that, as Senator Kennedy has said, has been accepted as precedent for 70 years and you are going to say that even if you never got a chance to work overtime or never were asked to work overtime, if at any time in the future you are, you are no longer eligible.

So that is a very significant difference, and I think it is quite disingenuous for the Department or for you on behalf of the Department to say that, well, we think because we are going to add low-wage workers, we have a net increase. You have a net decrease of the people eligible for overtime. That is our point.

The CHAIRMAN. I think the Senator has made that point. I think all the Senators on that side have made that point ad nauseam.

Senator KENNEDY. Mr. Chairman——

The CHAIRMAN. We are not going to just continue to debate for the sake of debate. I yield to Senator Kennedy for a couple of additional questions. He can ask those questions and then we are going to wrap the hearing up. I didn't have any time limit on questioning. People have had lots of time to ask questions.

Senator KENNEDY. I think we are really getting——

The CHAIRMAN. We are replowing the ground rather extensively here.

Senator KENNEDY. I just wanted to cover the civil rights area in one area, if we can and then we will wind it up.

Senator HARKIN. Mr. Chairman——

Senator KENNEDY. We give you assurance that in 10 minutes, that we will be——

The CHAIRMAN. We will give Senator Harkin one last question, but first, Senator Kennedy, complete your questioning.

Senator KENNEDY. Is it on this point?

Senator HARKIN. It is on—just one clarification.

Senator KENNEDY. And then I will just do the civil rights.

Senator HARKIN. It is a very simple question. It is my understanding that, periodically from 1938 to now, that the income level

has been raised but the duties test has always remained the same. Is this the first time that there has been an expansion of the duties test?

Mr. RADZELY. Senator, I don't believe that the duties test has been revised in probably 50 years. I am not sure it is the first time. There may have been some revisions in 1938. But I think that is probably correct.

Senator HARKIN. OK. That is the only question I had. Thank you.

Senator KENNEDY. Just in the area of civil rights enforcement, why has the Department's civil rights enforcement declined under your watch and how do you plan to improve the enforcement of affirmative action nondiscrimination requirements for Federal contractors? As I understand, your office has filed only six administrative complaints against Federal contractors for violating civil rights. It is down between 50 and 80 percent from complaints filed during the previous administration. Your reaction?

Mr. RADZELY. Yes, Senator. I am very committed to civil rights enforcement. As I indicated in my opening statement, the first two systemic compensation discrimination cases filed in nearly a quarter century were filed while I was Acting Solicitor. In addition to that, Senator, recoveries by OFCPP and the Solicitor's Office this year are up 40 percent based on where we were this time last year.

In addition to that, I understand that this calendar year, we filed six cases against six different companies, which is—we are on pace to equal or exceed a number of years during the prior administration. For example, in 2000, I believe, the OFCPP filed cases against four companies. In one of the four, I think there were multiple cases against.

In addition to that, Senator, something that I have personally insisted upon since becoming Acting Solicitor is that when there have been violations of conciliation agreements entered into by OFCPP, I have insisted that there be substantial penalties paid by the companies in resolving any violations of conciliation agreements with consent decrees up to and including debarment of the contractor.

Senator KENNEDY. Just in this one last area, the target of the administration has been the delay of the Equal Opportunity Survey, as I understand it, a data collection instrument that requires contractors to provide data on the demographic composition of the workforce, including data on compensation practices broken down by sex and race. Such information is obviously critical to uncovering illegal pay disparity and remedying wage discrimination.

The survey was finalized after a lengthy and comprehensive review process. It represents a balanced approach to further the purpose of the OFCPP without unfairly burdening the employers. I believe that any change in the survey would undermine enforcement efforts. It would be highly premature, given that the survey has not been fully implemented, and it would send a troubling signal about the administration's commitment to fundamental equal opportunity principles. I strongly support the survey, and just your reaction.

Mr. RADZELY. Yes, Senator. The Department and this administration does, as well, support the survey, and, in fact, has contracted with Apt Associates from Cambridge, Massachusetts, to provide a detailed study of the ability of the EO survey to target individual companies. We are interested in improving our enforce-

ment targeting mechanisms and we are very hopeful that the study will tell us what parts of the EO survey are, in fact, useful in targeting companies.

Senator KENNEDY. Well, to whatever extent you can keep that on the move. I understand it had been slowed down, but if you can look into that.

Could we welcome your wife, Lisa, and I understand you have got a three-year-old son Brendan.

Mr. RADZELY. Running around——

Senator KENNEDY. We want to tell him what a patient and well-behaved young man he is. [Laughter.]

Senator KENNEDY. I will tell you, to have to go through this and listen to your father be questioned by all of these older grumpy people up here— [Laughter.]

Senator KENNEDY. But we are very glad to see you and we welcome you here to the committee.

I thank the chair for all of the time that you have given us on these kind of things.

The CHAIRMAN. Thank you, Senator, and I want to thank you, Mr. Radzely. I think your presentation today has reflected your expertise and your professionalism and has reinforced why you should be confirmed. You certainly have the talent and the ability to do the job. Your answers were very professional and on point.

You got caught, unfortunately, and you have been caught, unfortunately, and the only reason we are having this hearing, unfortunately, is because you are in the middle of a cross-fire between some of my colleagues on the other side and the Secretary of Labor and the administration, which is—that is the way it works. But I think it does not reflect on your talent and ability, which I greatly admire and I think we are fortunate to have you as a nominee. Thank you very much.

[The prepared statement of Mr. Radzely may be found in additional material.]

Senator KENNEDY. Thank you very much.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF HOWARD M. RADZELY

Thank you Mr. Chairman, Senator Kennedy, and distinguished Members of the Committee. It is an honor to appear before you today as you consider my nomination to be the Solicitor of Labor. At the outset, I would like to express my gratitude to the President of the United States for nominating me for this position and to the Secretary of Labor, Elaine Chao, for the support and confidence she has demonstrated in recommending me for this position. I would also like to thank the Committee for considering my nomination and holding this hearing today. Finally, I would like to thank my wife Lisa and my 3½-year-old son Brendan for all the sacrifices they have made to allow me to serve in the government and for the sacrifices they will make if I am confirmed to be the Solicitor.

Prior to joining the Department of Labor, I was in private practice here in Washington, D.C. The main focus of my practice was advising clients, primarily employers, how to comply with the various labor and employment laws such as the Fair Labor Standards Act, Executive Order 11246, Family and Medical Leave Act, Occupational Safety and Health Act, Service Contract Act, and many others.

Since coming to the Department in June 2001, I have had the opportunity and privilege of working with the employees of the Solicitor's Office—some of the finest attorneys and public servants I have known—on a wide range of legal issues. In my view, the Solicitor's Office has two distinct but vitally important roles.

First, and foremost, the Solicitor's Office has the important responsibility of working in tandem with the individual agencies of the Department to vigorously enforce the laws under the Department's jurisdiction. Unlike most cabinet agency general counsel's offices, the Solicitor's Office has the authority to litigate cases in a wide variety of areas including the Occupational Safety and Health Act, Mine Safety and Health Act, Employee Retirement Income Security Act, Fair Labor Standards Act, Davis-Bacon Act, Service Contract Act, and Executive Order 11246, to name a few.

Second, the Solicitor's Office provides legal advice to the Secretary and the agencies in the Department on rulemakings, ethics laws, procurement, permissible interpretations of various statutes and regulations, and the wide array of other legal matters that arise under the nearly 200 laws that the Department administers and enforces.

With regard to enforcement, it is important for the Solicitor's Office to vigorously prosecute cases and to use the full range of legal tools at its disposal. Through judicious use of all of its enforcement tools, the Department can obtain justice for those who have been treated unfairly in violation of the law, and can deter those who might choose to violate the statutes and regulations enforced by DOL. For example, I have urged Solicitor's Office attorneys to make expanded use of Section 11(b) of the OSH Act, a provision which had rarely been used. This section of the OSH Act allows the Department to have orders of the OSH Review Commission (including settlements) entered as orders of the courts of appeals. This statutory authority allows the Department to seek contempt and significantly greater sanctions, rather than filing a failure to abate proceeding, in the event that the employer violates a Commission order. To take one other example, since I became Acting Solicitor, I have refused to settle cases in which employers have violated OFCCP conciliation agreements without obtaining additional penalties—which has included debarment from contracting with the Federal Government.

I also believe it is especially important for the Department to focus enforcement efforts on employers who exploit, among others, low-wage and vulnerable workers as well as on employers who repeatedly violate the laws enforced by the Department. Low-wage and vulnerable workers are the workers who most need our assistance and who can most benefit from the Department's aggressive actions to protect their rights. For example, the Solicitor's Office has been aggressively using the Fair Labor Standards Act's hot goods provision, which prevents the shipment of goods in interstate commerce produced in violation of the Act, often in industries that have a high percentage of low-wage workers. In addition, I have placed a premium on swift action by attorneys in the Solicitor's Office in all enforcement cases, and in particular in those cases in which the Department determines that an employer retaliated against an employee for exercising his or her rights, such as under the Mine Safety and Health Act.

In the 7 months since I became Acting Solicitor, the Solicitor's Office has initiated a number of major enforcement actions in various programs. For example, last month, the Department filed suit against Enron, the administrative committee, Kenneth Lay, Jeffrey Skilling, and the outside members of the Board of Directors for breach of fiduciary duty. Attorneys in the Solicitor's Office continue to support

the Employee Benefits Security Administration as it investigates a number of other corporate fraud cases.

In the OSHA area, since I became Acting Solicitor in January, the Department has issued nine ergonomic citations under OSHA's general duty clause. These citations were issued in a variety of industries, including nursing homes, the printing industry, warehousing, and the beverage distribution industry. Solicitor's Office attorneys throughout the country are prosecuting these cases. In the wage-hour area, we are continuing our efforts to ensure that poultry workers are compensated for donning and doffing by litigating against two poultry producers and by filing, last month, an amicus brief in the First Circuit Court of Appeals in support of private poultry plaintiffs' petition for rehearing in Tum v. Barber.

To take one last example, from the civil rights area, as Acting Solicitor I recently authorized the filing of the second systemic compensation discrimination case by the Department in over 25 years. The only other systemic compensation discrimination case filed by the Department in the last 25 years was one that I authorized while Acting Solicitor in 2001.

In addition to approving enforcement actions and working with attorneys to strengthen those actions, I have also intervened in cases when such intervention would facilitate reaching favorable settlements. I believe it is important for the Solicitor, or the Acting Solicitor, to demonstrate to attorneys in the Solicitor's Office, to investigators in the client agencies, and to the regulated community his or her commitment to enforcement by personal involvement when such intervention can improve the chance for favorable results. For example, as Acting Solicitor in 2001, I worked with lawyers in the National Office and the Philadelphia Office to negotiate a final settlement of the Beverly Nursing Home ergonomics case. One significant feature of this settlement is that the terms extend beyond the cited facilities to a nationwide agreement. Similarly, I worked with career civil servants in the Solicitor's Office and the Wage and Hour Division to negotiate one of the largest Wage-Hour settlements ever, a $10 million settlement with Perdue for failing to compensate employees for donning and doffing.

Regarding the second important mission of the Solicitor's Office, the legal advisory functions, I believe that attorneys must provide their client agencies with clear, concise, easy-to-understand legal advice that is based on a careful review of all relevant legal authorities. Whether it is legal advice on a newly passed statute, an ethics issue, a proposed or final regulation, or any other question, attorneys must inform their clients of the range of options that are legally available and the legal risks attendant to or prohibitions on a particular course of action. As with any legal organization, Solicitor's Office attorneys must be responsive, thorough, and objective. They must have the confidence and trust of their client agencies.

In addition to enforcement and legal advice functions, the Solicitor of Labor also manages one of the nation's largest law firms—a staff of approximately 700 employees including some 500 attorneys working throughout the country. Throughout my tenure at the Department, and particularly since I became Acting Solicitor in January 2003, I have stressed the need to share cases, experiences and work among the various offices. For example, a number of OFCCP cases have been shifted among regions and the national office to ensure that they would be handled more quickly.

Close coordination among offices also enables the Solicitor's Office to properly staff major cases, such as Enron, with attorneys in multiple offices helping to litigate against teams of lawyers on the other side. Close coordination also facilitates the ability of the Solicitor's Office to shift work if one office becomes overloaded and to more effectively deploy the legal talent in the various offices. Shortly after arriving at the Department in 2001, I requested that the Solicitor's Office set up a nationwide internal brief bank to ensure that all of our offices had access to key briefs and legal memorandum. This internal database should continue to help increase the efficiency of the Solicitor's Office. If confirmed as Solicitor, I will continue these efforts to improve the Office of the Solicitor's ability to litigate all cases, including the increasingly complex cases against defendants with numerous lawyers.

To mention one last management principle that is important to me, as Acting Solicitor I have worked hard to give a greater role to the Associate and Regional Solicitors in the overall management of the office. These dedicated senior career civil servants have tremendous substantive knowledge and a keen sense of what is needed to improve the management of the Solicitor's Office and thus enhance the Solicitor's Office's ability to bring strong enforcement actions and render high-quality legal advice.

In conclusion, the Department of Labor Solicitor's Office has a long and proud tradition of protecting America's workers and providing sound legal advice to its client agencies. I appreciate the great responsibility that I will bear if confirmed for the difficult and challenging job as Solicitor and understand the need to carry on the

office's great tradition. Thank you again for considering my nomination, and I would be pleased to answer any questions that you may have.

RESPONSE TO QUESTIONS OF SENATOR KENNEDY FROM HOWARD RADZELY

541 Regulations

The Department of Labor's proposed overtime regulations changes have been controversial among a number of critics. There are concerns that they will weaken overtime pay protections and exclude hundreds of thousands of workers from receiving overtime pay.

1. Has the Solicitor's office had any involvement in proposed modifications to the FLSA "white collar" exemption regulations? Please describe.

Answer: Yes, the Solicitor's Office has been providing legal advice to the Employment Standards Administration's Wage and Hour Division (WHD) throughout the ongoing rulemaking process. The Solicitor's Office has had a number of lawyers, principally led by the Associate Solicitor far the Fair Labor Standards Division, who have been advising the WHD and who reviewed the draft Notice of Proposed Rulemaking, which was largely completed last year. Specifically, the Solicitor's Office reviewed the policy decisions of the WHD for compliance with the Fair Labor Standards Act, the Administrative Procedure Act, and all other applicable statutes, regulations, executive orders and case law. Once the comment period closes on this Notice of Proposed Rulemaking at the end of this month, the Solicitor's Office will work with the WHD to ensure that any final rule that the WHD may choose to promulgate considers all comments in the record, is supported by the-record, and is consistent with all applicable statutes, regulations, executive orders, and case law. As Acting Solicitor, and if I am confirmed as Solicitor, I will work with the attorneys in the Solicitor's Office to ensure the integrity of the rulemaking process and to ensure that the Department's policy decisions are supported by the record and consistent with all applicable legal authorities.

2. Was anyone in Congress consulted before these changes were proposed? If not, why wasn't Congress consulted about these major changes? Will you and the Wage and Hour Division commit to consulting with Congress before you further develop this rule?

Answer: I am aware that the WHD had a number of stakeholder meetings before it proposed changes to the "white collar" exemption regulations. I not aware whether the WHD consulted with any Members of Congress before these changes were proposed. The comment period is currently ongoing and the record will remain open until June 30, 2003. All comments received by that date, including comments from Members of Congress, will be considered by the WHD when drafting any final rule. Under the Administrative Procedure Act and applicable case law, any final rule promulgated by the WHD must be based on the rulemaking record. Should the Department decide to finalize a new "white collar" exemption regulation, as Acting Solicitor, and if I am confirmed as Solicitor, I will work with the attorneys in the Solicitor's Office to ensure the integrity of the rulemaking process and to ensure that the Department's policy decisions are supported by the record and consistent with all applicable legal authorities.

LM-2 Initiative

The Department of Labor has proposed a major expansion of the LM-2 financial reporting requirements for labor organizations. I understand that the Department's justification for the rules is that they will enhance financial transparency and accountability. Critics are concerned that therules dramatically expand the record-keeping and reporting burden on labor organizations, at a cost of hundreds of millions of dollars, with questionable benefits to workers.

1. What has been the involvement of the Solicitor's office in this rulemaking? What has been your involvement?

Answer: The Solicitor's Office has had a number of lawyers, principally led by the Associate Solicitor for the Labor Management Laws Division, providing legal advice to the Employment Standards Administration's (ESA) Office of Labor-Management Standards (OLMS) during the promulgation of the proposed rule and during OLMS's ongoing review of the comments received during the comment period. The Notice of Proposed Rulemaking (NPRM) was published on December 27, 2002. My involvement at the proposal stage was limited. Since the comment period closed on March 27, 2003, as Acting Solicitor, I have been working with the Associate Solicitor for Labor Management Laws and other attorneys in the Solicitor's Office to ensure that any decisions regarding the final rule made by the Department consider all comments in the "record, are supported by the record, are consistent with the Labor-Management Reporting and Disclosure Act of 1959, as amended, the Administrative

Procedure Act, and all other applicable statutes, regulations, executive orders, and case law. As Acting Solicitor, and if confirmed as Solicitor, I will work with attorneys in the Solcitor's Office to ensure the integrity of the rulemaking process and to ensure that the Department's policy decisions are supported by the record and consistent with all applicable legal authorities.

2. The major burden of the rules will be borne by small labor organizations, many of which are run by volunteers. More than 90 percent of affected unions fall within the Small Business Administration's definition of "small entities." Yet the proposed financial reporting rule makes no attempt to distinguish between the requirements imposed on small entities as cot pared to larger organizations. Did the Office of the Solicitor review the proposed file for its compliance with the various statutes; regulations, and executive orders requiring agencies to take special account of the impact of their rules on small entities? If so, who conducted that review, what did it entail, and what were the conclusions reached? Please provide copies of any reports or documents provided to your office regarding the impact of the rules on small entities.

Answer: Yes, prior to publication of the NPRM on December 27, 2002, lawyers in the Solicitor's Office reviewed the proposed rule for its compliance with all legal authorities requiring agencies to take special account of the impact of the proposed rule on small entities and insisted that ESA include an initial regulatory flexibility analysis in the NPRM. The Associate Solicitor for Labor Management Laws, with the assistance of attorneys in her office and attorneys in other divisions who have experience in drafting and reviewing regulations, reviewed the analysis performed by ESA, as well as the entire NPRM, for compliance with all legal authorities that require agencies to take special account of the impact of the proposed rule on small entities. Following this review, the Solicitor's. Office concluded that the NPRM published in the Federal Register last December complied with all relevant legal authorities. I have attached behind Tab A copies of the following reports and documents, which reflect ESA's analysis of the impact of the proposed rule on small entities and which were reviewed by the Solicitor's Office prior to publication of the NPRM: the Initial Regulatory Flexibility Analysis section of the NPRM and the Technical Feasibility Study for an On-line Financial Downloading System prepared for OLMS by SRA International, Inc.

3. The Department states that the rules will not have an economic impact of more than $100 million, and as a result, has not performed an economic analysis of the benefits and burdens of the proposed rule as required by Executive Order 12866. Did your office review that determination? If so, who conducted that review and what did it entail? What documentation was your office provided concerning the likely economic impact of the rules? Please provide copies.

Answer: Yes, the Solicitor's Office last year reviewed the determination required by EO 12866 that the proposed rules will not have an economic impact of more than $100 million. That review was conducted by the Associate Solicitor for Labor Management Laws in consultation with attorneys in her Division and other divisions. I understand that the review entailed an examination of the NPRM, particularly the section concerning the Paperwork Reduction Act, and the additional analysis contained in the full Paperwork Reduction Act package submitted to the Office of Management and Budget (OMB). The NPRM is attached in response to the prior question behind Tab A. I have attached behind Tab B a copy of the Department's Paperwork Reduction Act package submitted to OMB.

Ergonomics Enforcement

When the Secretary of Labor announced her plan on ergonomics following the repeal of OSHA's ergonomics rule, she committed the Department to a vigorous enforcement initiative under the OSH Act's "general duty" clause. The Office of the Solicitor obviously plays a key role in designing such an enforcement program.

1. What has been your involvement in developing a general duty enforcement program on ergonomics?

Answer: I have worked closely with attorneys in the Solicitor's Office's Occupational Safety and Health Division as well as with attorneys in regional offices throughout the country to develop for prosecution ergonomics cases under the OSH Act's "general duty" clause. For example, in the five months since becoming Acting Solicitor in January 2003, I have personally reviewed and approved eight general duty clause ergonomics citations in a number of different industries. (See answer number 3 below for further details.) In addition, while I was Acting Solicitor from June 2001 through January 2002, I was personally involved in the Beverly Enterprises nursing home ergonomics case and was able to negotiate a settlement which provided for nationwide abatement of ergonomics hazards at all facilities within OSHA's jurisdiction, even though the citations involved only five facilities in Penn-

sylvania. Moreover, at my request, attorneys from the OSH Division of the Solicitor's Office provided training and continue to provide assistance to state attorneys in state plan states concerning prosecution of ergonomics citations under the general duty clause. I have also worked closely with attorneys in the OSH Division and the Regional Solicitors' offices to develop procedures that will ensure successful prosecution of ergonomics cases under the OSH Act general duty clause. Additionally, I worked with OSHA and; "attorneys from the OSH Division to develop ergonomics emphasis programs in several industries. (See below for more details.) As Acting Solicitor, and if I am confirmed as Solicitor, I intend to work closely with OSHA and attorneys throughout the Solicitor's Office to ensure successful prosecution of ergonomics cases.

2. Please describe the Department's general duty enforcement program on ergonomics. Is the Department conducting targeted inspections? If so, which industries and employers are being targeted? What standards or criteria is your office using to determine whether or not to bring a general duty enforcement case on ergonomics, e.g., number/type of injuries, presence of serious hazards, etc.? What is the Department's definition of a "recognized" ergonomics hazard? Please provide any documents describing the Department's general dirty enforcement program on ergonomics.

Answer: The Department's general duty clause enforcement strategy for ergonomics is based on its prior experience in ergonomics cases, including the successful resolution of the Beverly Enterprises case, the Occupational Safety and Health Review Commission's decisions in the Beverly Enterprises and Pepperidge Farms cases, and the Department's efforts under the general duty clause for other workplace hazards. Specifically, the Department is focusing on cases in which it can meet the four prongs of the general duty clause-the existence of an ergonomics hazard; whether the hazard is recognized; whether the hazard is causing or is likely to cause serious physical harm to employees; and whether a feasible means exists to reduce the hazard. As part of the Department's enforcement program, specialized training has been provided to OSHA inspectors and attorneys from the Solicitor's Office on how to inspect a workplace for ergonomics hazards, how to prepare a citation for ergonomics hazards, and how to prosecute a citation to successful resolution. The Department's general duty clause enforcement program on ergonomics includes inspections scheduled in several ways: targeting workplaces in industries with relatively high rates of injuries thought to be related to ergonomics hazards and where feasible means to reduce those hazards are available; reviewing ergonomics conditions during inspections conducted as part of OSHA's regular inspection program; and responding to specific complaints.

As part of the Department's general duty clause enforcement program, OSHA has one National Emphasis Program in the nursing home and personal care industry. Additionally, OSHA has fourteen Regional Emphasis Programs and three Local Emphasis Programs that target ergonomics hazards in four industries: meatpacking, auto parts, hospitals, and warehousing.

The criteria that the Solicitor's Office uses in deciding whether to bring an ergonomics case are whether the Department can establish the four criteria necessary to prove a general duty clause violation: the existence any one ergonomics hazard; whether the hazard is recognized; whether the hazard is causing or is likely to cause serious physical harm to employees; and whether a feasible means exists to reduce the hazard.

The Department's definition of "recognized" hazard is taken from well established case law detailing what OSHA must establish to demonstrate that a hazard is "recognized" for purposes of the general duty clause. OSHA has had success in general duty clause cases, including those involving citations for ergonomics hazards, establishing recognition of a hazard on the basis of industry recognition, employer recognition, and, in some cases, commonsense recognition. How the Department will prove recognition of the hazard necessarily depends on the facts of each individual case, including the specific ergonomics hazard which is causing serious injuries. Among the specific means OSHA has used in the past are 4igh rates of work-related injuries recorded by the company, internal company investigations, reports from experts, and recommendations by insurance companies on how to reduce injuries/illness rates.

I have attached behind Tab C the following documents describing the Department's general duty enforcement program on ergonomics. I have attached OSHA Directive Number: 02-03 (CPL-2), OSHA's National Emphasis Program-Nursing and Personal Care Facilities SIC 8051, 8052, 8059 (July 17, 2002). I have also attached OSHA Instruction CPL 2.103, Field Inspection Reference Manual (FIRM), September 26, 1994 (pp. III-8 to III-13) which provides guidance on application of the general duty clause in OSHA inspections and is referenced in the National Emphasis

Program. I have also attached documentation on twelve of the seventeen Regional and Local Emphasis Programs provided to me by OSHA. An additional document, the Ergonomic Case Development Procedures, is an internal privileged and confidential document developed by attorneys in the Solicitor's Office OSH Division and 08HA employees to ensure that the Solicitor's Office can successfully prosecute ergonomics citations. Because release of this internal document could seriously compromise the Department's enforcement efforts, I have not attached this document

3. How many general duty ergonomics enforcement cases have been brought since the repeal of the ergonomic rule? Please provide information on all such cases, including the employer cited, the nature of the citations, the penalty assessed, and the outcome of the cases in terms of penalties and abatement.

Answer: Since becoming Acting Solicitor in January 2003, I have approved and the Department has issued ergonomics citations against six facilities and I have approved two additional citations which are expected to be issued shortly. The issued citations, which are described as requested in the chart below, are against three nursing homes, a manufacturer of heavy doorframes, a printing, company; and a food distribution warehouse facility: (The citations I have approved, but which have not yet been issued, are also against nursing homes.) Between early 2001, when the ergonomics regulation was repealed under the Congressional Review Act, and January 2003, OSHA issued a number of ergonomics hazard alert letters, but brought no ergonomics cases.

OSHA Ergonomics Enforcement Actions 2001-June 9, 2003

Alpha Health Services.—Three nursing homes located in Idaho. Employees were experiencing back injuries from resident handling activities.

Nursing Home NEP inspection.—Ergonomics citations (one to each nursing home) issued February 21, 2003, settled March 13, 2003. The penalty proposed for the ergonomics citation for each location was $900. The settlement provided for payment of penalties of $265 for each of two locations and $270 for the third. The nursing homes agreed to implement a policy for transferring and lifting non-weight-bearing and partial-weight-bearing residents that mandates the use of appropriate mechanical lift assist and transfer devices to the extent possible.

Security Metal Products.—Clinton, Oklahoma—manufactures custom door frames. Employees were experiencing back injuries due to lifting, pulling and pushing of heavy doorframes during the assembly, finishing and painting process.

Ergonomics citation issued February 26, 2003, settled March 18, 2003 (together with nine other nonergonomics citation items). A penalty of $5,600 was proposed. The employer agreed to a program providing for the implementation of all feasible engineering controls by November 17, 2003. The penalty for this citation was reduced to x2,800 in the settlement.

Brown Printing Co.—East Greenville, Pennsylvania—lithographic printing of catalogs and magazines. Employees were experiencing back and shoulder injuries from reaching, pulling, lifting and flipping stacks of printed material.

Ergonomics citation issued May 27, 2003. The proposed penalty is $4,500. The company has contested the citation.

Supervalu Holdings, Inc.—Hazelwood, Missouri—supermarket food distribution warehouse facility. Employee/order selectors experiencing back and shoulder injuries from reaching, pulling and lifting heavy grocery packages.

Ergonomics citation issued May 22, 2003. A penalty of $6,300 was proposed for this citation. The company has 15 working days after receipt of the citation to file a notice of contest.

Payment for Personal Protective Equipment

For several years, OSHA has had a rule pending that would require employers to pay for OSHA-required personal safety equipment, such as hard hats and safety gloves. Paying for this safety equipment is particularly hard on low-income workers. OSHA initiated the rulemaking after the Occupational Safety and Health Review Commission decided that OSHA's policy requiring employers to pay for this equipment was not entitled to deference. The rulemaking record closed several years ago, but the rule has languished and is listed as "next action undetermined" in the most recent Regulatory Agenda.

1. Has your office been consulted about proceeding with a final rule on payment for personal protective equipment? Have you been involved in such consultations? Please describe.

Answer: Attorneys in the Solicitor's Office's OSH Division have been providing legal advice to OSHA as the Department considers what action to tine next in response to the comments received on OSHA's Notice of Proposed Rulemaking. Solicitor's Office attorneys have been working with OSHA to ensure that any Depart-

mental decision is consistent with the rulemaking record, the OSH Act, the Administrative Procedure Act, and all applicable statutes, regulations, executive orders and case law and they have kept me apprised of their work. When the Department makes final decisions on personal protective equipment (PPE) and a draft Federal Register notice is completed, I will, as Acting Solicitor, and if I am confirmed as Solicitor, work with attorneys in the OSH Division to ensure that the Department's decisions consider the comments in the rulemaking record, are based on the rulemaking record, and are consistent with all applicable legal authorities.

2. Is there a legal impediment to OSHA's proceeding with a final rule requiring employer payment for PPE? If so, please explain.

Answer: As noted above, the Department's final decision must be consistent with the rulemaking record and applicable legal authority. I have not had the opportunity to review the comments to the proposed rule; therefore I do not at this time have any opinion about whether there are any legal impediments to OSHA proceeding with a final rule requiring employer payment for PPE.

3. In the past three years, has OSHA cited any employers for failing to pay for required safety equipment? Has your office been involved in any such cases? Please provide details about any such cases, including the nature of the case and its outcome.

Answer: I am unaware whether OSHA has cited any employers for failing to pay for required safety equipment in the past three years. However, a number of specific standards require-employers to pay for certain PPE, and OSHA may have cited employers under these standards. I have consulted with the Associate Solicitor for Occupational Safety and Health and the eight Regional Solicitors and they were not aware of any litigated cases in the past three years which, if successful, would require employers to pay for PPE.

Tuberculosis Rule

I understand that the Department of Labor does not plan to pursue the tuberculosis (TB) regulation that was previously on the OSHA agenda.

1. Was your office involved in this decision? Was a decision made that TB does not pose a significant risk to workers who experience occupational exposure?

Answer: The Department announced in its Spring Regulatory Agenda that it intends to withdraw the TB regulation. Before the agenda was published, OSHA consulted with attorneys in the Solicitor's Office's OSH Division to ensure that the Department's decision withdrawing the rule was consistent with the rulemaking record and in accord with the OSHA Act and all applicable statutes, regulations, executive orders and case law. I am advised that the Solicitor's Office's OSH Division advised OSHA that OSHA's decision was, in its view, consistent with the rulemaking record and in accord with all applicable legal authorities. I am not aware of any decision, based on the rulemaking record, regarding whether TB poses a significant risk to those workers who experience occupational exposure. Because any final decision closing a rulemaking must be based on the rulemaking record and because the Federal Register notice withdrawing the proposed rule has neither been completed nor reviewed by me, I do not know at this time the specific bases on which the rule is proposed to be withdrawn. I understand that OSHA has publicly stated its rationale in a press release dated May 30, 2003.

2. Does the Department have plans to protect against occupational exposure to TB under the general duty clause? If so, what criteria have been established to determine whether a recognized hazard exists?

Answer: Yes; the Department has a plan in place to protect against occupational exposure to TB under the general duty clause. Although OSHA does-not have a specific TB standard, it does have a number of other standards relevant to TB exposure. Since 1996, OSHA has had in place Directive CPL 2.106, Enforcement Procedures and Scheduling for Occupational Exposure to Tuberculosis (February 06, 1996). This Directive remains in effect. I understand that OSHA has issued approximately 150 citations pursuant to this Directive, including some 40 general duty clause citations. Moreover, one of the components of the National Emphasis Program or nursing homes, described above, is inspecting for occupational exposure to TB. I am also aware that TB is a component of several regional and local emphasis programs.

As noted above, the Department's definition of "recognized" hazard is taken from well-established case law detailing what OSHA must establish to demonstrate that a hazard is "recognized" for purposes of the general deity clause. OSHA has had success in general duty clause cases establishing recognition of a hazard on the basis of industry recognition, employer recognition, and, in some cases, common sense recognition. In case of TB, the Department has also utilized guidelines published by the Centers for Disease Control and Prevention. How the Department will

prove recognition of the hazard necessarily depends on the facts of each individual case.

Statutory Authority for Proposed 541 Regulation

What is ;our understanding of the intent of the Fair Labor Standards Act (FLSA)? Now is the proposed 541 regulation consistent with this legislative intent?

Answer: As the Supreme Court has indicated on a number of occasions, the Fair Labor Standards Act (FLSA) was intended to establish minimum wage standards and to more widely distribute work among more employees. Regarding the exemptions for administrative, executive and professional employees, Congress expressly provided the Secretary of Labor with authority to define these terms. See 29 U.S.C. 213(a)(1) ("as such terms are defined and delimited from time to time by regulations of the Secretary").

In Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295 (1959), the Court stated that exemptions to the FLSA must "be narrowly construed." Do you believe that the proposed regulation meets that standard? Please explain.

Answer: Yes. The Solicitor's Office, principally led by the Associate Solicitor for the Fair Labor Standards Division, reviewed the notice of—proposed rulemaking and determined that the proposal was consistent with the Fair Labor Standards Act. Section 13(a)(1) of the Act expressly provides the Secretary with the authority to define the terms "executive," "administrative," and "professional." See 29 U.S.C. 213(a)(1) ("as such terms are defined and delimited from to time by regulations of the Secretary").

Aren't the proposed changes in the duties tests uniformly favorable to employers and unfavorable to employees?

Answer: No. In addition to increasing the salary level below which a worker is automatically entitled to overtime from $155 to $425 per week, the Wage and Hour Division's (WHD) proposal would, for example, make it more difficult than it, is under current law to qualify as an exempt executive. The standard test in the proposed rule, which applies to all employees earning less than $65,000 per year, adds a third requirement that the employee "has the authority to hire or fire other employees or whose suggestions and recommendations to the hiring, firing, advancement, promotion or any other change of status of other employees will be given particular weight"—to the two requirements oft he existing short test, which is used today to test nearly all employees for the executive exemption.

Isn't, creating a new exemption of "highly compensated employees" in clear violation of legislative intent to create only three exemptions? Didn't Congress reject a salary ceiling in 1938?

Answer: As proposed by the WHD the test for highly compensated employees contains the requirements that employees perform non-manual work, that employees perform an identifiable executive, administrative or professional function, and is consistent with the Fair Labor Standards Act. As I understand, since at least the 1950s the regulations have contained a different duties test for highly compensated employees. For example, the current section 541.119 is entitled "Special proviso for high salaried executives." See also current Section 541.214 ("Special proviso for high salaried administrative employees") and current Section 541.315 ("Special proviso for high salaried professional employees"). The WHD Notice of Proposed Rulemaking (NPRM) does not contain a salary ceiling because it has a duties test in add non to a salary level and thus many employees earning over $65,000 will be non-exempt under the Department's proposal.

I have heard the argument that it is necessary to relax the duties test in order to increase the minimum salary test. Why is that the case?

Answer: There is no legal reason why the salary levels cannot be changed without changing the duties test or vice versa.

Impact of Proposed 541 Regulation

I understand that the Solicitor's Office has been providing legal advice to the Wage and Hour Division throughout the ongoing rulemaking process on the 541 regulation. Were you involved in the decision to promulgate a new regulation?

Answer: In conjunction with a team of attorneys led by the Associate Solicitor for the Fair Labor Standards Division I have provided legal advise to the WHD on its NPRM.

What is the goal of the new regulation.

Answer: Tammy McCutchen, Wage and Hour Administrator, has explained that the goal of the WHD'S new regulation is to strengthen protections for low-wage workers and to make the rules easier to understand, apply, and enforce.

What legal and/or Policy parameters did the Solicitor's Office impose, recommend, and/or, suggest during the rulemaking process?

Answer: During the preparation of the NPRM, which was largely completed last year, the Solicitor's Office reviewed the policy decisions of the WHD for compliance with the Fair Labor Standards Act, the Administrative Procedure Act, and all other applicable statutes, regulations, executive orders and case law.

Did you advise against any proposal that would have exempted fewer workers?

Answer: The Solicitors Office reviewed the WHD's NPRM for compliance with all applicable legal authorities. The role of the Solicitor's office is to advise rulemaking agencies about the legal ramifications and sustainability of specific proposals.

Did you advise in favor of any of the provisions that have the effect of exempting more workers?

Answer: The Solicitor's Office reviewed all of the provisions of the WHD's NPRM to ensure that they were consistent with all applicable statutes, regulations, executive orders and case law.

Is there any reason—statutory, regulatory, policy, or otherwise?—why the benefits to employers of any revision to the 541 regulation must be greater than benefits to employees?

Answer: Accepting the premise of your question, I am not aware of any legal reason why the benefits to employers of any revision to the 541 regulations mast be greater than the benefits to employees or vice versa. However, as ESA/WHD have stated, the Department obviously believes that there are substantial benefits for employees in this NPRM.

Isn't it possible to "clarify" rules without exempting any more workers?

Answer: it would be nearly impossible, as a practical matter, to make clarifying changes to the rules without affecting the status of any non-exempt or exempt employee. However, it is the job of the Solicitor's Office to advise on legal requirements and sustain ability.

Isn't it possible to "avoid litigation" without exempting any more workers?

Answer: It would be nearly impossible as a practical matter, to make changes to the rules to "avoid litigation" without affecting the status of any non-exempt or exempt employee. However, it is the job of the Solicitor's Office to advise on legal requirements and sustain ability.

Does "modernizing" and "updating" the regulations necessarily require exempting more workers?

Answer: It would be nearly impossible, as a practical matter, to modernize" and "update" the rules without affecting the status of arty non-exempt or exempt employee. However, it is the job of the Solicitor's Office to advise on legal requirements and sustainability.

The proposed regulation claims that a greater increase in the minimum salary test would cause job loss in the South. Was there any economic analysis support conclusion.

Answer: Yes. I understand that the Employment Standards Administration (ESA) prepared an economic analysis to support this conclusion.

Did you analyze how many Wage and Hour opinion letters ruling that particular employees are non-exempt would be reversed by the proposed regulation?

Answer: I am not aware of any analysis regarding whether, and if so, boor many, opinion letters would be affected by the proposed regulation.

Would you please explain why 1.5 to 2.7 million on currently exempt workers who would otherwise become non-exempt due to the increase in the salary test

ill continue to be exempt due to changes in the duties test. Wouldn't workers making over $22,100 fall under the short test?

Answer: Under the proposed regulation, all workers earning less than $22,100 will automatically be non-exempt irrespective of their duties. I understand that the Department's economic analysis shows that 1.5 million to 2.7 million currently exempt salaried workers will become more readily identified as exempt salaried workers as a result of clarifying the duties tests. I have been informed by ESA/WHD that the Department's analysis shows that these 1.5 million to 2.7 million workers, all of whom earn in excess of $22,100, are not eligible for overtime under the current rules and will remain exempt salaried workers under the proposed rule.

I have been informed by ESA/WHD that one sentence in the preamble to the NPRM is apparently creating some confusion. This sentence states: "The PRIA [preliminary regulatory impact analysis) indicates an additional 1.5 million to 2.7 million employees will be more readily identified as exempt from the overtime requirements of the FLSA because the updated duties tests will replace the duties tests in determining their exemption." This sentence would have been clearer if it had said: "The PRIA indicates an additional 1.5 million to 2.7 million currently exempt salaried employees will be more readily identified as exempt from the over time requirements of the FLSA because the updated duties tests will replace the duties tests in determining their exemption."

What is the minimum amount of education required red to qualify as a professional under the proposed regulation?

Answer: The minimum education requirement to qualify as a professional is the same under both the current and proposed professional exemption. Both the current and proposed rules require, among other things, that the employee be performing work in a field of science or learning that "customarily" requires an advanced, specialized degree. Since 1949; section 541.301(d) has explained that "customarily" means that employees with equal status and attainment, but without a degree—such as "the occasional chemist who is not the possessor of a degree in chemistry"—"are not barred from the exemption." The proposed rule continues this standard, as proposed section 541.301(d) states that "customarily" "generally restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession."

What is the minimum amount of education required to qualify as an employee with a high level of skill or training under the administrative exemption in the proposed regulation?

Answer: Neither the current nor the proposed administrative exemption contains an education requirement.

Poultry and Meatpacking Industries

A recent court decision held that some work activities—in particular, waiting in line for necessary equipment and walking to workstations to receive necessary equipment—may not be compensable activities. Do you agree, and if not, will you consider filing an amicus to the expected appeal?

Answer: I do not agree with the First Circuit's recent decision in Tum v. Barber Foods, Inc. On June 17, the Department of Labor, under my direction as Acting Solicitor, filed an amicus curiae brief in support of the plaintiffs' motion for panel rehearing and rehearing en banc. Among other things, the brief argues that: "The time spent by the poultry processing employees waiting and walking after performing their first principal activity and before performing their fast principal activity is compensable 'hours worked' . . . ."

In the settlement with Perdue, and the subsequent litigation with Tyson, the Department of Labor took a very principled stand in support of ensuing that poultry workers were paid for all time worked. In the opinion letter issued by the Wage and Hour Administrator (which invalidated a prior opinion Letter) regarding workers in meatpacking, however, the Department reached a very ?different decision by declining to ensure that all workers in meatpacking were similarly protected. Please discuss the contradiction in these policies, and the reasons why poultry workers are, in the view of Department of Labor, more worthy of FLSA coverage than meatpacking workers.

Answer: First, to clarify; while I was personally involved in the Perdue negotiations, the Tysons negotiations and subsequent litigation, and the decision to sue George's Processing for, among other things, failing to compensate employees for donning and doffing, I was recused from consideration of the opinion letter you referenced until a few days before it was issued by the WHD. The opinion was requested by a then-partner at my prior law firm while I was under a one-year bar from consideration of particular matters invoking my prior firm.

The opinion letter you referenced concerns the issue whether section 3(o) of the FLSA could apply to employees "putting on [or] taking off" "protective equipment" in the meat packing industry. As you know, Section 3(o) provides that "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of, or by custom or practice under a bona fide collective bargaining agreement applicable to that particular employee."As the Department has indicated in discovery of the Tysons case, depending on the facts of the particular case, the WHD's opinion letter applies in poultry, as well as meat packing, cases. Moreover, the Department's position that donning and doffing is compensable in the poultry industry applies to similarly situated workers in meat packing and other industries.

H-2A and H-2B workers

In 2001, the Department of Labor failed to publish the adverse effect wage rates that apply to H-2A temporary foreign agricultural workers until a lawsuit was filed to enforce the Department's own regulation. Why did the Department decide not to publish the adverse effect wage rates in 2001 until sued, and to delay publication in 2002 until a court heating was scheduled—and what role did the Solicitor's office play in these decisions? Why did the Department decide to appeal the decision of

the District of Columbia federal district court and what role did the Solicitor's office have in deciding to make (and later, drop) the appeal?

Answer: During the litigation, the government submitted a declaration by Christopher T. Spear, Assistant Secretary for Policy, explaining the reasons for its actions. The Declaration explained that while the Department usually publishes the adverse effect wage rate (AEWR) in February or March, the regulations require the Department to publish the AEWR "at least once in each calendar year, on a date or dates to be determined by the Director" and "unusual circumstances" caused the Department "to delay its publication." The Declaration noted, among other things, that the Department "ha[s] received correspondence from a number of members of Congress from both parties which indicate that the Congress is examining various legislative options to reform or replace the H-2A program. These legislative options include possible adjustments to the nature and scope of an employer's wage obligation. These members of Congress requested that the Department refrain from publishing an AEWR for the current calendar year until Congress has had an opportunity to address the issue since the issuance of an AEWR for this calendar year may negatively impact the progress and resolution of this legislative endeavor." Lawyers from the Solicitor's Office's Employment Training and Legal Services Division worked closely with the Justice Department throughout this litigation.

As is common in cases in which the government receives an adverse civil decision from a federal district court, the Department of Justice filed a protective notice of appeal on behalf of the Department of Labor. The Solicitor's Office made a confidential recommendation to the Justice Department concerning whether appeal was warranted in this case.

Under the FLSA, an employer must pay all workers the minimum wage, over and above the costs of transportation and other costs incurred for the primary benefit of the employer. The Eleventh Circuit, relying on Department of Labor opinion letters, held in Armada v. Florida Pacific Farms that this means an employer must reimburse temporary nonimmigrant workers for transportation and visa costs to the extent these expenses reduce workers' wages below the federal minimum. What steps is the Department or the Soficitor's office taking to enforce this decision in administering the H-2A and H-2B programs in the Eleventh Circuit and in other circus?

Answer: The WHD is currently analyzing the Eleventh Circut's decision in Arriaga v. Florida Pacific Farms. The WHD, supported by the Solicitor's Office, has an active agriculture enforcement program. One of the WHD's national initiatives is in agriculture. I understand that during every agriculture investigation Wage-Hour investigators look for, among other things, violations by employers of H-2A and H-2B workers of various statutes, such as the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act, including minimum wage violations. I have been informed that the WHD has one investigation from Florida which raises, among other things, the issues considered by the court in Arriaga. I am not aware of any cases referred to the Solicitor's Office that raise these issues.

In how many instances has the Department of Labor documented non-compliance with the FLSA minimum wage rules for H-2A or H-2B workers? Has use Department of Labor pursued enforcement of these rules? Has our office been involved in any such cases? Please provide the number of such cases, and the details of any such cases you have handled, including the nature of the case and its outcome.

Answer: The Department has an aggressive program to combat minimum wage violations against H-2A and H-2B workers, and works to remedy any such violations as a major component of its agricultural initiative. I do not have statistics on the number of cases in which the WHD has documented non-compliance with the FLSA minimum wage rules for H-2A or H-2B workers. However, the WHD specifically investigates to determine if there are any such violations and is often successful at recovering back wages without the direct intervention of the Solicitor's Office. While I do not have exact statistics on cases riled by the Solicitor's Office in the last few years, I am aware of the following three cases involving FLSA minimum wave or overtime violations: pending litigation against the North Carolina Grower's Association where the employers failed to pay overtime to H-2A forestry workers; pending litigation against Sun and Moon Construction for failure to pay minimum wage to H-2B workers; and a January 2002 injunction and unpaid minimum wage and overtime compensation of $33,392 against Color Spot Christmas Trees which employed H-2A, workers. As Acting Solicitor, and if confirmed as Solicitor, I stand ready to assist in these efforts.

[Whereupon, at 11:34 a.m., the committee was adjourned.]

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