Labor and Employment

Labor Law for the 21st Century

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Hon. Ann Combs, *Assistant Secretary for Pension Welfare Benefits, U.S. Department of Labor*
Mr. Andrew Siff, *Counselor to the Secretary, U.S. Department of Labor (introduction)*
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MR. SIFF: Thank you all for joining us here today for our panel, Labor Law for the 21st Century. As we stand here on the threshold of the 21st Century, we can look back and certainly say that the 20th Century was a wonderful success for our country, particularly its economy. And today, many countries shake and scratch their heads as we in America are gnashing our teeth over the fact that we have unemployment hovering at six percent, which in most countries is their greatest dream of full employment.

But, if we are going to continue the incredible economic growth and vitality that our country has had, certainly one aspect of that is going to be having American workers, employers and the American Government anticipate and figure out how to respond to some of the many changes that are taking place within the American workforce. That is what today's panel is all about.

Today's panel is a group of people who have some very well-informed views on what it will entail to anticipate and address many of the changes taking place in the American workplace and the extent to which the regulatory regime that governs the American workplace would either have to be amended, updated or radically overhauled.

We are fortunate to have with us today leading this discussion Deputy Secretary of Labor Cameron Findlay. I will refer to him more casually, since I work with Cam every day. In my day job, when I'm not at the Federalist Society, I serve as Counselor to Secretary of Labor Elaine Chao. For those of you who don't know me, I am Andrew Siff, a long-time member of the Federalist Society, and I have very much enjoyed working with Cam at the Department of Labor.

Cam has a distinguished history of government service that began when he clerked for Judge Steven Williams on the United States Circuit Court of Appeals for the District of Columbia. He then went on to clerk for Justice Antonin Scalia. Following his clerkship with Justice Scalia, in 1989, Cam went to work for the prior Bush Administration as a Special Assistant to the Secretary of Transportation. And he was so fantastic that they made him Counselor to the Secretary of Transportation. At some point, Cam was so fantastic that they decided to promote his boss to White House Chief of Staff, and so Cam went over to the White House and had an opportunity to serve as Deputy Assistant to the President and Counselor to the Chief of Staff. Following his stint at the White House, Cam was further sensitized to the plight of the regulated community while working at the Chicago office of Sidley and Austin, where he had an eclectic practice that ranged from complex commercial litigation, to antitrust, telecommunications and appellate litigation.

At the Department, Cam is not only our Chief Operating Officer, in essence, but he is also the Secretary's key advisor on a range of matters. He is the Chair of the Department's Policy and Planning Board, which oversees the planning and implementation of Agency regulations, and he is also responsible for the Department's budget process.

Cam's formidable intellect is matched only by his irrational enthusiasm for the Chicago Bears and the Northwestern Wildcats, so please join me in welcoming Deputy Secretary of Labor Cameron Findlay.

HON. FINDLAY: I apologize for my voice. I think I have been cheering too much for the Bears lately and bemoaning the Wildcats.

Before I introduce our panelists, I wanted to take a few minutes to set up the discussion and some of the provocative questions that I am going to pose to them. The premise that I would like our panelists to address is that the labor laws of the United States and the programs and policies of the U.S. Department of Labor need to be dramatically updated to address the challenges of the 21st Century workplace.

The Department of Labor, as some of you probably know, was established before World War I, and most of the laws that we enforce were enacted in the 1930s or through the 1970s. The Wagner Act was enacted in 1935; the Fair Labor Standards Act, in 1938; Davis Bacon passed in 1931. And even ERISA, which is one of our most up-to-date laws, was passed in 1974. This, of course, when polyester was considered high fashion.

Well, in the earlier half of the century, the workplace looked very different than it does today. Most Americans were working on farms at this time, and those who did not work on farms were working in factories. It was very easy to tell apart professionals who were exempt from wage and hour laws from the workers who were not exempt.

At that time, nearly all families had just one wage earner, and it was usually Dad, who went off to work for a nine-to-five week. And we didn't have the 24-7 orientation we do now, and there was no such thing as a service industry. So, really, the laws were enacted to address very different workplace problems than we have today. Let me give you just a

couple of examples, and maybe our panelists will address these.

Under the wage and hour laws, it's currently illegal for a worker and his or her employer to agree that the worker can take comp time instead of time and a half, if the worker works overtime. It's illegal, even though Federal workers have this option, and Federal workers love the option.

Another example: The Department of Labor's regulations that distinguish exempt professional employees from non-exempt blue-collar employees were written for a manufacturing economy, in which it was very easy to distinguish the two. In a manufacturing economy, the professional employees are the guys — and it was guys — behind those glass windows in the offices. And the blue-collar workers were the ones who wore blue collars and worked on the shop floor.

The workplace has changed, and these old distinctions do not seem quite relevant. How do you classify a Blockbuster assistant manager who runs the store when the manager isn't there, but also works the cash register or actually re-shelves videos? How do you classify a stock analyst at Merrill Lynch who makes $150,000 a year but doesn't have anybody working for him or her? How do you classify the guy at the Saturn plant who is a team leader, directs other employees' work, but also installs engines himself?

So, these are the questions that I want to pose to our panelists: Are the labor laws well adapted to our current workplace? Isn't it time to rethink everything we do to determine whether it's relevant anymore?

Let me introduce the panelists who will be addressing these questions.

Don Keniewski is the Legislative and Political Director of the Laborers' Union. Don has been roaming Capitol Hill for three decades.

From 1971 to '77, he worked on the House Education and Workforce Committee. In 1977, he began working for his current union, and has risen through several jobs to his current position. And during that time, he's been at the center of every major legislative battle on the Hill on labor issues, including debates on the Service Contract Act, the Davis-Bacon Act and the Fair Labor Standards Act. He also has been an architect of the coalition with some unions that have been come to be known as the Labor Republicans. So, he's well-known and well-liked on both sides of the aisle. Most recently, he's been working with the Bush Administration to pass the Energy Bill, which would allow drilling in Alaska, but would also provide a lot of jobs for union members.

And Ann Combs, who's to my immediate left, is the Assistant Secretary of the Pension and Welfare Benefits Administration. Ann has an agency which oversees approximately 700,000 pension plans, with nearly $5 trillion in assets. She also oversees over 6 million health and welfare benefits plans.

She is basically the ERISA maven of our department, which is one of our most important statutes. Because most people who encounter ERISA eventually commit suicide, she's probably the most knowledgeable person in America on ERISA. Before her appointment, Ann was the Vice President and Chief Counsel of the American Council of Life Insurers. And she also served as a principal of Mercer Consulting. During the Reagan and Bush 41 Administration, she spent six years as the Deputy Assistant Secretary at her current agency.

Ann is, I regret to say, a Domer — a graduate of the University of Notre Dame, and she got her J.D. from George Washington University Law School.

So I think what I'll do is ask Don to address the rather provocative questions I posed, and then I will ask Ann to talk, and then we'll take some questions.

MR. KANIEWSKI: Oh, good. I get to go first. Thank you very much, Cam. We will get to the questions you posed.

I do want to take a moment to do a couple of things. One of the pieces of paper I handed out that I think wound up in your packet — you may not have it with you — was a document that was produced about six months after our union was founded. Our union was founded April 13, 1903. This document was to be put in pamphlet form to promote the union and its aims and ends. It dealt with a number of issues that still are relevant to the work we do and how we conduct our business.

I included this for another reason. And that is because, with readily identifiable crafts, like the carpenters, the plumbers, sheet metal, iron — you can go down the list. Everyone knows, or thinks they know, or has some idea of who they are and what they do. When it comes to the "laborers", we seem to be such a generic-named union that the ability to identify our craft is somewhat lacking.

But I will tell you that we do a wide range of work, and have since our founding as the International Hod Carriers Union. No one carries a hod anymore, but we now do everything from ditch-digging to dynamiting. We are the people who do hazardous waste remediation on superfund sites, as well as asbestos abatement and elsewhere. We represent 60,000 postal workers through our mail handlers division. We have a large number of public employees in a variety of states and counties, and we are a diverse union representing a diverse membership.

I also want to refer briefly to this document, and just highlight a very few sentences. On page one, it talks about, "Since organizing, we have lessened the working hours of our members; increased their wages; and secured for them their just rights by the arbitration of disputes between employers and employees." It goes on to say, "Our first calling is to create general agitation for the purpose of making a universal eight-hour day, to increase the wages of the members of the

craft, to establish a system of arbitration and conciliation in the different sections of our land, to help the members of the craft in securing lawful and profitable employment."

And two other brief comments on this document. "As an international union, we propose to act along conservative lines" — I thought there would be applause at that moment —"having ever in mind the best interest of our members. We intend to ensure a uniform rate of hours, wages, throughout the country, wherever a local can be established."

And finally, "Without thorough organization of the members of our calling, wages would be forced down so low that our liberties and our rights as free Americans would be crushed, for none but an organized body of workmen of any craft or calling could hope to enter into agreements with their employers with any expectancy whatever of securing terms and maintaining a share of the fruits of their labors." I think that might answer all of the issues raised by Cam earlier.

I mainly work in the legislative and political area. I will tell you a quick story.

Two guys went hunting — Cam and Chris. I don't know where I got those names. And they were on this hunting trip in Upstate New York and a terrible snow storm develops. They saw a light in the field. They drove there and they found a farm house.

A woman answers the door, and she says, "I'm just a poor widow woman and I don't think it would be appropriate for me to have you in the house, but you're welcome to stay in the barn." So, they stay the night in the barn. The next day, the weather clears up, they bid their adieu and they are on their way.

Nine months later, they get together. Cam says to Chris, "Do you remember that hunting trip we took?"

He say, "Sure do."

He says, "Remember how it snowed real bad that one night?"

He said, "Oh, yeah. We took refuge in that widow woman's barn."

He says, "Yeah, I remember that."

He says, "Did you sneak out that night?"

"Well, yeah I did."

He says, "Did you visit with that widow woman?"

He says, "Yeah, I did."

He says, "Did you have sex with that widow woman?"

He says, "Yeah, I did that, too."

He says, "Did you tell her you were me?"

He says, "Yeah, but I can explain it."

He says, "No, no, no. No need to explain. She just died and left me all her money."

That sort of describes my life, in a way. We set goals. We think we know where we are going and what we are trying to do. Throughout the effort, we encounter a number of problems along the way, and often we meet with surprising results at the end of our efforts.

Our job is to put our members to work. Our job is to put them to work in a safe environment that protects their wages, hours, working conditions, and their health and safety. We also owe a duty to our contractors to make sure they are the best-trained workforce we can provide. So, our contractors are competitive and construction owners get value for their money.

In doing all of that, we engage a lot in work on some of the issues mentioned, like the Energy Bill. We were out there on T21 and Air 21, along with our partner contractors. And unlike that cult that masquerades as a trade association that did nothing on this legislation, our partner contractors, in fact, are there. And we are there, delivering product to market, whether it is clean water, infrastructure in T21 or Air 21. We are there to provide job opportunities for our members.

Along the way, we want to make sure the labor standards in 70-year old statutes like the Davis-Bacon Act are maintained because they assure our contractors a level playing field. So, we are not in this just for ourselves. Our contractors need a level playing field to enter into this debate. And when it comes to Davis-Bacon, that is what they get.

We need to deal both with the substantive and political arguments that attend to these issues, whether they are infrastructure issues or labor standards issues, or a wide range of things like Brownfields, where we think we have reached an interesting agreement with the Administration and some of the House Republicans.

Our union is diverse in its makeup, as well, with respect to who our people are. We are the largest minority union in the building trades, and the largest immigrant union in the building trades, in terms of the makeup of our membership. So we have a keen and deep abiding interest in that ever-changing workforce, and who is a part of it, and who is making that contribution to this economy. We have been very involved in the immigration debate.

I am not going to go on too much longer, but will end with one brief story. And I'll get back to a phrase Andrew used in describing the work some of you all do. When he referred to the so-called "plight of the regulated community"; oh, the poor, suffering regulated community.

I was on the Hill just a week or two ago to have a discussion with a staff member about an amendment to the Service Contract Act. Our union was instrumental in 1965 in seeing its enactment, and also with '72 amendments. And I had the privilege of writing the last amendment in 1976.

I had to remind the staff person — I said, why did you come up with this remedy for these problems? Well, the Agency said and the procurement people said and the DOD said. I wanted to remind her, and I'll remind all of you, these laws, whether they're 70 years old or 20 years old or 27 years old, were designed not to make the life of the bureaucrat easier, nor to solve the plight of the regulated community. They were designed to protect working men and women, and that is where my job comes in, in the work I do on Capitol Hill legislatively and politically. We are pleased, in doing that job, to have a good relationship with a good number of Republicans, as well as Democrats, to try and accomplish our ends on a bipartisan basis.

But, at heart, that's what we are about — advancing the economic cause of our members, to provide them opportunity, protecting them as they perform those jobs, training them in that process, and for making sure that, throughout, working men and women have a fair shot at doing a job, doing it well, and doing it safely. And to see to it that they're not subjected to the kind of competition that can destroy any advances they might have made.

So, with that, I want to thank you. I hope we'll have a lively question session, and I look forward to hearing from my colleagues on the panel. Thank you very much.

MR. SIFF: Thank you very much, Don. Now I'd like Ann to address several topics. And I'm also hoping that she can explain how that widow story plays in. I'm still waiting to hear that.

HON. COMBS: There's a connection — tenuous. Thank you. I was going to start out by explaining to the audience about PWBA because many of you in the employment labor law area don't necessarily practice in the ERISA field. So, we really are the agency that regulates or administers ERISA. Now, I've been dubbed the ERISA maven, which I hope does not stick among my DOL colleagues in the audience — you know who I am.

I wanted to talk for a few minutes about the 21st Century workforce and how it has changed, and how that has affected employee benefits, which is really what my agency is all about.

Undoubtedly, you are all familiar with some of the changes in the workforce. Cam laid them out. There are more job changers. People have less attachment to their employer than they used to. There are more part-time workers and independent contractors. There's a lower incidence of unionism. And more and more in compensation is being paid in the form of non-taxable benefits, and in recent years there has been a real attempt to link pay to performance, and that has led to the rise in stock options, which may be less popular in the coming years than they have been in the last five or six. But that is a whole new area in the employee benefits field, as well.

ERISA was passed in 1974. Despite being the new kid on the block, quite a bit has changed since its enactment. At the time, I think it really was a more paternalistic world. Defined benefit plans were the norm. Employer-provided health care was typically fee-for-service, with very limited cost sharing, if at all, among larger employers. It really was a situation where people went to work for an employer for a long career, and the employer assumed a lot of these responsibilities.

Since then, there's been a dramatic shift, and I think it really can be summed up as a shift of responsibility away from the employer and towards the individual. We have seen tremendous growth in defined contribution plans, for instance.

In the healthcare arena, we have seen the growth in managed care and in substantial cost-sharing among workers and the employers with the workers. There has been a growing interest in recent years in moving to a defined contribution model in healthcare. It started in the retiree health area, where people want to have a defined dollar that they are promised that they will have each year, as opposed to a defined benefit such as paying all your healthcare costs.

We are seeing an interest in medical savings accounts, and even in defined dollar arrangements for active employees. These are what's on the drawing board in the consulting firms and among the larger employers, and what benefits managers are talking about — how to limit their liability; how to put a cost limit around, a parameter around, their promises. And all of this is taking place in an environment in the financial services industry which provides a lot of these products, particularly in the retirement area, of massive consolidation, which creates problems with the way ERISA is structured.

So, I want to talk to you for just a few minutes about a couple of the items that are on our agenda, that I think reflect these trends. First, I will talk to you about some legislation that is actually pending on the House floor. They were voting as we arrived here today, dealing with investment advice in retirement plans.

I'll talk to you a few minutes about one of my priorities, which is looking at the whole exemption process in ERISA. And then, in the healthcare area, talking very briefly about the Patients' Bill of Rights legislation and association health plans, which are a new form of group purchasing arrangements for small businesses.

The investment advice debate is really extremely timely. This is a situation that really reflects the shift from defined benefits to defined contribution plans.

Recently — the last two quarters, really — workers for the first time since defined contribution plans really took off have seen their quarterly statements show negative returns. The growth of 401(k) plans really neatly coincided with the growth in the stock market, so people just thought these things went up, up and up. And in the last two quarters, they've

seen that the stock markets, in fact, do go down. And so, there is a lot of concern and interest in helping people make better decisions about how to invest their money.

Under ERISA, the Department has said is perfectly acceptable to offer investment education. That is, telling people about risk return characteristics; how to allocate and diversify their accounts. That is distinguished from investment advice, when someone says, “All that’s well and good, but what should I do?” And Don says — this is my hook — “What should I do with all that money I inherited”, somebody wants to sit down and tell him how to invest it. That was weak.

Currently, ERISA prohibits financial institutions that have an interest in any of the investment options that are being made available from giving investment advice for a fee. There’s legislation on the Hill that was sponsored primarily by Mr. Boehner in the House that would create a statutory exemption from ERISA to allow those institutions to give advice to participants in 401(k)-type plans, as long as they assume fiduciary responsibility for that advice and there were significant disclosures accompanying that advice.

This Administration, in contrast to the previous administration, strongly supports this idea. We have endorsed the Boehner Bill, which has been passed by the Educational and Workforce Committee, the Ways and Means Committee and is on the House floor as we speak.

Today, with 80 percent of workers enrolled in defined contribution plans — we’re told they’ve invested about $1.7 trillion — you really can’t over-state the need for people to get advice as to how to manage this money. They have been given the responsibility; they really need the tools to assume that responsibility.

On the exemption process, generally, advice is one example of a transaction that is prohibited, but there are many. ERISA was set up as a prophylactic statute that basically says, “Thou shalt not deal with a party in interest, someone with whom you have a relationship, or deal in a manner which benefits you, unless you come to the Department of Labor and get permission to do so.” It has created a tremendous bottle-neck for a lot of innovation in the marketplace. It results in fewer services and products being made available to participants in pension plans.

So, we are in the process of looking at that whole system and seeing what we can do to streamline it; to make it more flexible and responsive; to get the Department out of the business of designing products, which is what they have tended to do. They put so many constraints on how someone wants to structure a product or a service that they are actually helping to design it and eliminate the conflict.

What we are trying to see is if there are ways we can make sure we have protections in place so that the plan participants are protected, yet, at the same time, have enough flexibility that we can get products and services to market quickly. People will have more options available to them, and it will bring down costs. So, that’s a major priority for PWBA at this time.

Switching, briefly, to the healthcare side, the Patients Bill of Rights is an interesting example of legislation that is addressing a problem that arose in the marketplace about five years ago — maybe a little longer — when managed care took hold in an attempt to control costs and to provide more consistent quality of care. As in many things, there was a perception that the insurance companies went too far and the pendulum swung too far toward restrictions on peoples’ access to physicians, access to specialists, and other patient protections.

This bill, in various forms, has been considered in Congress for the last six years. A bill passed the House this year, which the President supports, that would include a lot of patient protections, but also establish a system of external review, so that claims would be heard by an independent third-party physician, and then, for the first time, establish extra-contractual remedies in ERISA for denied benefit claims.

Our goal is to make sure that people get fair determinations on their benefit claims quickly through this external review process, and to limit litigation. We need to hold down costs. Healthcare costs are going up 20 percent this year; small businesses are talking about 30 percent increases. So, we really have to fight against a bill that’s going to turn loose the trial lawyers — with all due respect — on the healthcare system and on the managed care companies, at the expense of delivering care quickly. That is what people need; they need healthcare. They do not need more access to court. So, we are working on that bill. It is the end of the session, and we’ll see what happens. More likely than not, we’ll be back, still talking about it, next year.

Meanwhile, healthcare costs keep going up and access to healthcare is a real problem. So, in order to address that, the Republicans in the House have included in the Patient’s Bill of Rights a proposal to allow small businesses to band together and use their clout as a larger group to purchase more affordable health insurance. These are called association health plans, and they would have two options. If they wanted to fully insure, they would be able to be exempt from state benefit mandates. Many different states have imposed individual benefit mandates, i.e., services that must be covered. Association health plans would be free from those mandates, but would buy an insured product that would keep costs down. That is the hope.

They would also have a self-insured option, where they would come to the Labor Department and be certified and have to meet certain solvency standards. It really would be a vast expansion of the Department’s regulatory scope. We would be asked to, in effect, act as a state insurance commission for these self-insured association health plans.

So, while the goal is to expand access to and lower the cost of health insurance, it really does mean a growth in the regulatory reach of the Department of Labor, which is contrary to what Cam has posed as one of our questions.

I think, in sum that in the areas the PWBA is focusing on in the 21st Century, the mission has changed because, when ERISA was passed, its focus was retirement, defined benefit plans, and fiduciary oversight of the assets held in defined benefit plans.

Today, we're about 50 percent retirement, 50 percent health. More and more of the assets are held in defined contribution plans and, in fact, for the first time, the majority of the assets aren't even in 401(k) type plans. They're in IRAs. People are taking rollovers and moving them into IRAs, which is under yet another completely different regulatory structure.

So, there's a lot going on in the marketplace. We, as I think often happens with government, are playing catch-up, to some extent. But we're really trying to be more market-focused and make sure protections are in place, but also to make sure that people also have access to lower-cost services and products, and to help people manage a financially secure retirement and healthcare situation.

HON. FINDLAY: Thanks, Ann. Let me pose the first question, and I pose this one to Don. When you hear Republicans talk about compliance assistance, does it sound to you like Republicans are just trying to strip away protections for workers and let the big corporate fat cats do what they want? Is that what this is really about?

MR. KANIEWSKI: Yes. Thank you. Next question. I should elaborate. It sounds that way, but I understand what you are trying to do here because we have established in our union three funds. We have a traditional training fund that does training; a health and safety fund and a third, a labor management cooperation and education trust. These latter two funds are designed to do just that, to work with our employers, to help us meet their needs, and to help them meet the market's needs in making them competitive.

What I think scares people most about that in the context of the government doing it, in the context of Republicans doing it within the government, is, traditionally, it has not had a good — how quite to put this? It has not had a good reputation of just how far people are willing to go and, depending on which laws you are looking at, how much you will diminish actual enforcement over assisted compliance, if you will.

I think if everybody were complying with the law, we'd all be fine, and assisting employers to do so is a useful thing. But, dealing with the people I deal with on a daily basis on that side of the aisle, there is a tendency to let the market be a little freer and looser than it might to protect workers.

HON. FINDLAY: Ann, I wanted to ask you, when you talk about the move from defined benefit plans to defined contribution plans, it sounds like we are putting a lot more power and responsibility in the hands of individuals than has traditionally been the case. What do you say at PWBA to a person who foolishly fails to max out on their 401(k) or who invests all their 401(k) in a completely speculative and ridiculous stock, like, say, Hewlett-Packard or Cisco?

HON. COMBS: We spend quite a bit of time and effort in outreach activities to try to help spread the message about the need to take advantage of the opportunities to save for your retirement through a 401(k) plan. We do a lot of outreach with community groups, with employers, with service providers, with others.

We received over 170,000 phone calls last year, from people asking about their healthcare and their retirement benefits and what they should do. Actually, that is where we get a lot of our enforcement activity. "Money was withheld from my paycheck and it didn't show up in my 401(k) account". So, we support that effort.

We also support the efforts of employers. The way the law is structured, it is actually in an employer's interest to have more people covered under their pension plan because of the non-discrimination rules that are in the Tax Code. So, there is an incentive there for them to go out and encourage people to take advantage of these opportunities.

There are guidelines under ERISA. Employers have a fiduciary responsibility for selecting the investment options. Under one of the Department's regulations, they can escape liability for the actual investment decisions their employees make only if they offer them a broad range of investment options and have adequate disclosure, and there are some other safeguards in place.

So, we try to create a framework within which to provide people with reasonable choices, to help educate them and to encourage employers' efforts to educate them. And I think the House investment advice bill fits nicely with PWBA's ongoing effort to make sure people really can understand and maximize their retirement savings.

HON. COMBS: I can just say, as a line manager in the Department who went through the Policy Planning Board process, I found it very valuable and really welcomed the opportunity to put forward an agenda that I thought was realistic, and to have it vetted and have it stress-tested.

I mean, it's good to have people ask the obvious question, what the heck is that? Why are you doing it?

Is it necessary? Do you really, realistically, think those timeframes make sense? Can you get all that done this year? Those are really good push-backs to receive as a manager, to make you go back and rethink it and put forward a much more realistic picture to the world about what we're going to work on this year.

We took some items off the agenda, where we have a statutory mandate to do something within three or five years. We're not going to work on them this year; we'll work on them next year. They'll be on next year's agenda. This agenda reflects what our priorities are for the next 12 months, what we're going to be working on. I think that's very helpful out in the community.

HON. FINDLAY: Don, I wanted to ask you one more question, and then I think I'll throw it open to the audience.

You had said that your union's charters really protect the working men and women of the union. But I think it's not an exaggeration to say that those of us in the Department see that as our job as well. But we sometimes feel as if organized labor is unwilling to consider different means to that shared end. How open do you think labor unions are to considering alternative ways of get to the same goal of making sure that the workforce is protected and they have good jobs and good wages?

MR. KANIEWSKI: The charter spoke not only to the union's desire to protect its members, but also our desire to work with our employers. We are very proud of the work we do with our employers in making them competitive and providing them with a quality workforce that gets the job done on time under budget, and with highly skilled people.

Our willingness to be open to new ways of doing things falls in two categories. What does it do to the competitiveness of our signatory contractors? And, what will it do to our ability to represent our membership and maintain the level of standards and benefits which they have achieved.

No one would reject out of hand any approach from the Department or from Congress in looking at a different way to do something, to accomplish the same end. We would come to the table with a lot of questions, "Well, what about this and what about that?"

In reality, in terms of the industry or on the job, in terms of safety issues that arise on the job, in terms of issues that arise in the benefit world, and elsewhere — we're not closed to those things. But it has to be an open discussion. Some of these things are long-term. Ergonomics took 15 years to get into place, despite its fate.

But these things are long-term projects, and we're willing to enter those discussions and we're willing to look at things with people of good will. I think that's an easy one.

HON. FINDLAY: Can you see ways in which the Fair Labor Standards Act could be modernized to be more in line with the sorts of changes we've been talking about today, or is it really kind of like amending the Ten Commandments?

MR. KANIEWSKI: Well, I wouldn't be that extreme, that it's like amending the Ten Commandments. But it is crafted to protect workers. And your client is probably a good employer who's doing the right thing by their workers.

Yet, there exists out there a class of people who would take advantage of certain worker classification schemes to get out from under not only the FLSA but a number of other laws, and to create a series of independent contractors or other things that put workers at risk.

FLSA is a challenge. It's a heavy lift. I don't know how we attack that animal. But, again, people of good will wanted to sit down and talk to the AFL-CIO and hear about the kinds of things they're concerned about and what can be scrapped — I think everybody, if they thought they could limit the damage, would find something to agree with, but I don't think everybody trusts each other. And trust is the foundation of any changes you're going to make in FLSA. Right now, that trust isn't there.

AUDIENCE PARTICIPANT: I'm Bill Adamson from Philadelphia. I'm a registered Libertarian who was attracted to the Federalist Society by the Society's claim to be a Conservative/Libertarian organization.

I am not a labor lawyer, but I have heard nothing from this Panel that questions the underlying validity of having such things as Fair Labor Standards Acts and other labor laws that you all assume should remain in effect and simply be tweaked.

This is my first convention, so I'm kind of feeling my way here. I'm wondering why the Federalist Society doesn't have anybody on the Panel who actually takes a Libertarian position with respect to the Department of Labor or ERISA or OSHA or the Fair Labor Standards Act.

MR. KANIEWSKI: Well, I am not a member of the Federalist Society, but I'm honored to be their guest here today.

Libertarian principles are something I have done some reading about and understand a little bit. I hope people aren't sitting here saying, get rid of OSHA, get rid of FLSA, we don't need this kind of stuff. The real-world experience tells us that people will abuse people in this employee-employer relationship, and there is a role for the federal government

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to afford protections there.

Whether we have a greater or lesser degree of regulation in that process is a healthy debate we engage in as a civil society. But, I would just say to you that I am glad that we are not diminishing the role of the Department and its agencies and the very real, hard work they have to do to deal with the history that we know.

HON. FINDLAY: Something I'd say is that I've worked in different departments. There was economic regulation in the last department where I worked, which was DOT. They had finally achieved a consensus as to the right answer, which was that economic regulation is a terrible idea. Deciding what airplanes fly what routes, what their service levels ought to be — that sort of thing decreases economic welfare.

Some of the regulatory responsibilities in our place are different. OSHA, for example, is intended to address a market failure. If one company provides a safe workplace at some expense to itself and another one doesn't, the one that will win in the marketplace is the one that doesn't. There are some market protections built in. I think workers do not want to go to work in an unsafe workplace.

But I think that there is regulation, and then there is regulation. And it's impossible to make a sweeping statement that all regulations are exactly the same, and equally good or bad.

AUDIENCE PARTICIPANT: Hi. Theresa Parante from the Department of Justice. And, perhaps going to the other end of the spectrum, you mentioned that there is no choice right now for private employers for comp time and overtime. I know in my department the only people who have a choice of comp time and overtime are represented employees. And since most employers do not have unions, are private employers, what protection, if any, are you proposing to give employees this choice?

MR. KANIEWSKI: I'm glad you raised that because I thought all the comp time stuff in the federal government took place in the context of collective bargaining and the represented employees.

What we worry about in the outside world — the legislation that's been proposed so far does not distinguish between and among industries. How are you going to enforce a comp time law, in terms of the abuses that may occur? You have good faith and good intentions but they'll be *de minimis* in this context.

But there are bad employers out there. And in our industry — in the construction industry, in particular — we would think this would be prime for abuse in this area. But we can have a debate about that.

HON. COMBS: It is interesting for me because I come from a slightly different field. The history of ERISA is one that is largely bipartisan. There are differences of opinion, certainly, and there are flare-ups. But generally, the two sides of labor and management have worked relatively well together and have come up with solutions that are acceptable.

What do you need, Don, to build the trust that you say we need to deal with these very real issues? I think there is a trust. You and I were talking about your counterpart in collective bargaining. We work together; we have for years. How are you guys going to build up the trust that you need?

MR. KANIEWSKI: I don't know. As a student of the Congress, I think we're the victims of the terrible historical wrong that came about in the 1980s with the shrill political atmosphere that was created on the Hill, that degenerated into abuses in the political process on both sides; a name-calling vengeful spirit that has to be quelled in some fashion. I don't see that it has, yet, and I don't know how to quell it.

But I was around in 1974 when ERISA was enacted. I knew Vance Anderson and a whole host of people that worked on the legislation. I knew about how it worked across the aisle. When I did the last service contract amendment, I worked with John Ashbrook — my candidate for President, and you could work in trust across the aisle. That seems to have been destroyed since the 1980s, and I don't know how we restore it not only to the body politick, where I think it's epidemic, but the campaign industry and this viciousness industry that exists on both sides of the aisle. It's tit-for-tat and it's a war all the time. I don't know how we get back to a reasonable dialog. I hope we could.

AUDIENCE PARTICIPANT: I'm Mark Levine. What are you doing at the Labor Department to protect union employees from their unions? What are you doing to investigate corruption and send cases over to the Justice Department for prosecution? And as for the poor labor movement that's put upon, what are you guys doing with your 990s, where you put zero on line 81 for political activities? The AFL-CIO has put it on there since 1994; the NEA's put it on there since 1994. Do you spend not one penny of general revenues on political activities? Or, does it all go through your PACs?

HON. FINDLAY: Who wants to start? We're going to have give Don a chance.

MR. KANIEWSKI: I have a little bit of experience with a union and corruption. My union, quite frankly, has had problems.

We have addressed those problems aggressively.

When the Justice Department came knocking on our door in 1994 and threatened us with a RICO suit, we went back to them with a proposal to allow us to remedy this problem, under their supervision. We are proud of the results we have achieved in ridding ourselves of corruption and in introducing a mechanism to protect our members and to protect the people we represent from any abuse by anyone in the union.

We have independent hearing officers — effectively we have a prosecution team. We have cops, prosecutors and judges. And this has worked well for us. But let me point something else out to you.

Just in today's paper, McDonnell-Douglas was alleged to have enriched themselves to the tune of $21 million . I go to this wonder website. I'm sure you've all seen it — the National Legal and Policy Center. They have this wonderful little thing they update biweekly, called the Union Corruption Update. I commend it to you; I want you to go look at it.

I want you to look at and add up all the money these thieving union bosses allegedly stole, some of whom were no longer employed by the unions, but they wind up there anyway. Some of them were removed by their unions, but they wind up there anyway. Add up all the money, and I'll bet you money today, it doesn't equal what Archer-Daniels-Midland stole from the American consumer and the companies they dealt with.

Who's policing the crime in the suites? Unions get blamed for the abuses of their members. We have a mechanism to deal with it. We put that mechanism out there in public, and we'll defend it and we'll take on anyone who wants to attack it.

Our members, if they're not getting good representation, they have a mechanism to deal with it. They have a democratic election process to remove people who are not doing their jobs. And they have an internal process to do the same thing, if someone is abusing or not doing their job. But this is not just a one-sided union boss thing.

I tell all the Republicans on the Hill, there's going to come a day when you're going to be dealing with me and you're going to wish I was a union boss. You are going to wish I didn't have to go back to my members in your district and tell them you're a good guy. You're going to wish I could do that for you.

I can't do that for them. Our political program is membership-driven. Who we endorse, who we support, doesn't come from somebody sitting in Washington. It comes from people sitting back in Illinois, in Missouri and elsewhere. You know, if we were the union bosses we are painted to be, I think the Republicans would be a much happier group of people in the House and Senate, but we are simply not that way.

HON. FINDLAY: Don, what about the question about disclosing political activity? That's something one reads about in the paper all the time. Why does it say zero on the form?

MR. KANIEWSKI: I don't know what it says on my form. I don't quite look at it; that's done by others. And I can't answer for other unions. But the activity we do is lawful. We comply with all the laws that we're asked to. I don't know what's on our 990. That's not in my department.

HON. FINDLAY: Ann, do you want to talk a little bit about what the Department is doing in terms of Union democracy?

HON. COMBS: Well, there are multi-employer plans, which are jointly trusteed union/management plans. We do police those and we have a very active enforcement program, as well as a compliance assistance program, in terms of training trustees about their responsibilities. We are working with some partners to do that. OLMS is really the overseer of the union activity, and that's not in my purview.

MR. KANIEWSKI: We are pro-disclosure. We completely comply with the law, as does the AFL-CIO with respect to informing our members of their *Beck* rights. I can't tell you that I am aware of five people — and that is probably high — ever running to the union to seek reimbursement.

The principle here is balance. Sure, *Beck* is out there and it prevails as a Supreme Court decision. Workers are informed of their rights by their unions. The President is taking that a step further and requiring the posting, under the Executive Order, of broader notice.

All we are saying is, give us some balance. Let's give workers in non-union workplaces their rights to join and form unions. Let's tell them what they're able to do under the law. Let us tell them it's illegal if they are fired for joining or forming a union. Let's tell them they have the right to get together with their coworkers to form a union, to engage in an election and collective bargaining.

The beginning of the National Labor Relations Act says it is the policy of the United States to promote the practice and procedures of collective bargaining. That ought to be foundation enough to post a notice. It is about balance, and I think that is part of the reason why the AFL is in court on the *Beck* notice. Because it is unbalanced.

But there was also another Executive Order issued, I believe, on the same day, that was illegal. And we're

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quite pleased that the court saw to overturn the PLA Executive Order.

HON. FINDLAY: Well, it hasn't made it to the court of appeals yet.

MR. KANIEWSKI: We'll see if it goes there.

HON. FINDLAY: Wait and see — exactly. I think this will probably have to be our last question.

AUDIENCE PARTICIPANT: Yes. I'll try to be brief. I'm Joel McCune with Reed Smith in Pittsburgh.

Why do unions view favorably so many of these federal regulations and statutes, which have to a large extent reduced the relevance of unions? Why aren't unions capable of privately negotiating with employers in getting types of benefits? Why aren't unions capable of using money from their general funds to run commercials at eight o'clock at night, where they tell folks about their rights to form a union? Why do unions feel a need to have the federal government so involved and so supportive of all of these things that they should be able to do on their own?

A hundred years ago is a different story. Unions were just getting started. They had a lot of issues, a lot of problems. But since the topic of today is the 21st Century, and there have been a lot of changes, and most folks know that they can join unions, why is there still such a need for a federal rule?

HON. FINDLAY: Put another way, Don, haven't unions put themselves out of existence or nearly out of existence by achieving many of the same protections through federal law that should be the subject of collective bargaining?

MR. KANIEWSKI: There's a great debate about that in the labor movement, whether we sought and gained protections under law that should have been rightly at the collective bargaining table, that would have enabled us to be the more attractive alternative to workers in a variety of workplaces. That debate goes on, but let me address a couple of things you have mentioned.

We have sought these things because we are not just a labor movement solely concerned with the welfare and benefit of our members. We are a social movement that fought for civil rights, that fought to better the lot of all workers in this society. We have taken that mission of social justice into the arena of broader workplace protections, and I think that is what got us to endorsing a number and different kinds of regulation and legislation that regulate our industries.

As much as we would like to be more visible in the public media marketplace, we are not for-profit organizations and do not have that kind of income. We can not generate the kind of income that it would take to run the kind of media campaigns you have to run.

As we have proved, though, in our political programs, we're best when we're talking member to member. When our members are talking to each other about candidates and issues, that is our most effective communication. And when there is an organizing campaign going on, I think there's a belief that we're better off not with some air attack but rather looking at the workforce we are trying to organize and trying to go member to member. There have been a number of attempts to try and explore other ways to get at some of these issues, and I think that exploration continues to find an effective way to do it.

HON. FINDLAY: I want to thank everybody. I wanted to particularly thank Don for coming into this room. I was once a student at Harvard Law School, so I know what it's like to have one opinion in the room when everyone's against me. So, thank you very much.