



REMARKS BY SECRETARY EUGENE SCALIA
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As Prepared For Delivery



Thank you for that introduction, Mark. And let me say—if you will leave this statement off the record—how pleased I am to be among so many lawyers. I spent nearly 30 years as a labor and employment lawyer—experience that I do not believe has been brought previously to the position of Secretary of Labor. I am also the first Labor Secretary to have served as Solicitor—general counsel—of the Labor Department.

Given my background and yours, I thought this conference would be a good occasion to speak at a little more granular level about legal and regulatory policy during my time at the Department. And since this week marks the start of my second year as Labor Secretary, I thought I would spend some time reflecting on the first year and current priorities.

“Take Care”

A point I have emphasized at the Department since my arrival is my constitutional responsibility, as I see it, to “take Care that the Laws be faithfully executed.” That is the President’s responsibility under Article II of the Constitution, which I consider myself to hold derivatively with respect to laws administered by the Department. These are of course important laws, affecting countless workers, employers, and retirees across the country. I regard myself as ultimately accountable—answerable—for every action the Department takes to administer and enforce these laws. I should also add that because of my background practicing labor and employment law as well as administrative law, I view my engagement on legal questions as a “value add” I can bring as Secretary.

It was my belief in the Secretary’s responsibility for actions of the Department that underlay the first “Secretary’s Order” I issued. Secretarial Orders are policy pronouncements on administrative matters within the Department. The first Order I issued gave the Secretary authority to review cases decided by the Department’s Administrative Review Board, or ARB. At the same time, I took similar action with respect to the Board of Alien Labor Certification Appeals, known as BALCA, which hears cases involving our foreign labor certification programs.

The ARB was created by Secretary’s Order in 1996 to handle cases that are decided in the name of the Secretary. Those cases involve a range of matters, from employment discrimination to immigration to whistleblower protection. The story, as told to me when I was Solicitor, is that the Secretary at that time was giving speeches on certain matters, and was told he should stop because those matters

were coming to him for decision as Secretary. Rather than give up the speeches, he gave up the decisionmaking authority.

My priorities are different—although not, I hope, because I’m lousy at speeches. But that is going to be for you to decide.

Under the Order I signed, the Secretary has discretionary review of decisions of the ARB—a certiorari process, essentially. Some have said this authority “politicizes” actions of the Department. That objection fails Democratic Government 101. The Founding Fathers did not launch a revolution, a new nation, and a new vision of government so that executive authorities could render important, final decisions through officials who are answerable to no one. Rather, the Constitution secures better government through political accountability—my accountability to the President for actions of the Department, and the President’s accountability to the voting public for the actions of his appointees.

My provision for review of decisions by the ARB and BALCA is part of a larger, cross-agency review we have been making of the Department’s adjudicative and enforcement functions. I’m grateful for the leadership in this area of the Department’s Deputy Secretary, Pat Pizzella.

Justice delayed is often justice denied. For this reason, the Deputy Secretary and I are interested in guarding against excessive delays in adjudications at the Department. Earlier this year, we began asking the Department’s Administrative Law Judges, and members of boards like the ARB and BALCA, to submit periodic case inventory reports. We want to monitor how promptly cases are resolved and closed, as one part of furthering fair and just treatment. As many of you know, Congress requires similar reports from the federal courts.

We’re also looking at ways to refine how enforcement agencies in the Labor Department target their investigations. The Department’s investigative resources are limited; we should direct them to places where there’s likely to be a prosecutable violation of a law we administer. To that end, we’re working with the enforcement agencies to develop investigative strategies that use data and analysis to direct resources toward industries, companies, unions, and practices where we know, from experience, that violations—and potentially serious ones—are particularly likely. Targeting our efforts in this way furthers two goals: It makes us better at holding accountable those who violate the law; and for those who comply with the law, it means they’re less likely to be burdened by government inspectors.

Fair Notice and Rulemaking

Another principle that's guided the Department this past year is "fair notice." As Justice Kennedy wrote for the Court in the 2012 *FCC v. Fox* case, "regulated parties should know what is required of them so they may act accordingly; . . . precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." When businesses know what the law is and how to satisfy it, they can act more quickly and decisively to invest, grow, and create jobs.

Fair notice is a priority for President Trump. Last year he issued two Executive Orders to help better apprise the American people how the federal government will enforce the law. The Orders require agencies to post all guidance documents online; to rescind those that are no longer effective; and to put all significant guidance documents through public notice-and-comment. Under those Orders, the Labor Department reviewed 11,000 guidance documents, discarded 3,200, and put the rest in an online, searchable database.

A number of our recent rulemaking actions reflect this belief that legal requirements should be set down firmly and clearly.

Earlier this year, we adopted a Joint Employer rule. As this group knows, joint employment under the Fair Labor Standards Act is a circumstance where two companies are both responsible for ensuring that workers are paid the federal minimum wage, are paid overtime, and that proper payroll records are kept. Joint employment does occur; but when companies are wrongly deemed joint employers, two companies are saddled with compliance costs that properly are borne by only one. In recent years, the test for joint employment under the FLSA has been unclear, varied, and too dependent on what judicial circuit you're in. We used notice and comment rulemaking to codify a clear, reasonable standard that can better guide employers, employees, and the courts.

I note that we were sued over the rule, and a judge in the Southern District of New York recently issued a decision that struck parts of the rule. We disagree with that decision, and are evaluating next steps. One thing we certainly will not do is abandon our commitment to making the law clearer through rules informed by public notice and comment.

That commitment is reflected in the Department's recent proposed rule on Independent Contractor status under the FLSA. Part of what's notable about this

rule is simply that we're doing it—in the 80 years since enactment of the FLSA, the Department has never adopted a rule interpreting the term under the Act for general industry. The Supreme Court last spoke to the issue nearly 60 years ago. Since then employers and workers have had to parse the sometimes-divergent decisions of federal courts of appeals, and opinion letters and other sub-regulatory guidance documents issued by the Department without public notice or input.

Our proposal aims to clear away the cobwebs and inconsistencies that have grown up around the analysis by offering an interpretation of independent contractor that simplifies, clarifies, and harmonizes the principles federal courts have used for decades. In determining a worker's classification, our test focuses first on a worker's control over her own work, and her opportunity for profit or loss resulting from her own initiative or investment. Other familiar factors are also considered under our proposal, but get less weight. The end-game is determining whether a worker is economically dependent for work on a putative employer, or instead whether she's in business for herself.

Substantively, our proposal aims to ensure that FLSA-covered employees are treated accordingly, while respecting that many Americans in fact want to be in business for themselves—their own boss.

Our Inclusive Economy

At this conference over the next couple of days, you'll hear some important points about “Pay Equity and Issues of Equality at Work,” the subject of the conference. These issues often implicate the law and legal policy, and it's appropriate to examine how the law treats these matters and how it might be improved. I wanted to take a moment to offer an additional perspective, from the vantage-point of my non-lawyer job at the Labor Department.

The single best thing the government can do for workers, I believe, is establish conditions for a flourishing economy. There's more the government can and must do, of course—but there's nothing that has the impact of a booming job market. We have powerful evidence of that from the economy we enjoyed pre-Covid. You probably know that the unemployment rate in February was 3.5%, tying a 50-year low. Seven million jobs had been created since January 2017 and wages had risen 3% or more for more than a year-and-a-half.

What I wish to emphasize is how this economy benefited those who often have not received the equal opportunity they're entitled to in the workplace. Much

of what I'm about to say comes from two recent, and very significant, economic reports—the Census Bureau's Report on Income and Poverty in the United States, which was issued two weeks ago, and The Federal Reserve's Survey of Consumer Finances, from earlier this week. Here's what these reports tell us, together with data from the Labor Department's Bureau of Labor Statistics: The unemployment rate, *and the poverty rate*, for African-Americans, Asian-Americans, and Hispanic-Americans hit record lows last year. Unemployment for Americans with disabilities, and for those who don't have a high school diploma, also hit record lows.

Low unemployment drives wages higher. It also drives employers to extend opportunities to applicants they might otherwise overlook—including those with disabilities to accommodate, or who've had a brush with the criminal justice system. So in last year's tight labor market, real median pre-tax household income saw its largest increase ever recorded—6.8%. And when it comes to poverty, 2019 saw the largest *decrease* in the poverty rate in 50 years.

The wage gains in 2019 were larger for Black, Hispanic, and Asian-American wage-earners. And the gains were much larger for women than for men—a nearly 8% increase in real median earnings for women, versus 2.5% for men. Last year unemployment for adult women hit a nearly 70-year-low; more than 70 percent of new jobs last year went to women.

The result of changes like this, the Federal Reserve report tells us, is that in the last 3 years income inequality decreased—the opposite of what happened in the years immediately preceding, as the Fed report also shows. Lower income families—families in the lowest quintile of income earners—saw their net worth *decline* between 2010 and 2016, by two percent. But from 2016 to 2019, those families saw real net worth increase by 32%. A 32% increase in three years! Meanwhile, wealthy families—families in the top decile—saw a 24% increase in net worth between 2010 and 2016. But they saw a decline in net worth (of 9%) from 2016 to 2019.

I believe the exceptional economic progress I've described—these gains in equality—were results of policies that are often portrayed as benefiting the wealthy: cuts in taxes and in unnecessary regulatory burdens. But those cuts incentivize businesses to invest, grow, and create jobs. That was President Trump's intent when he put those policies in place and it's the effect that I, as Labor Secretary, believe they've had. Consider this: Before the President took office, the Congressional Budget Office forecast that we'd add 1.9 million jobs by February

2020; in fact we added 7 million. And the CBO projected 5% unemployment; in February, we were at 3.5%. In the first two months of this year, the U.S. economy added 100,000 more jobs than the CBO projected would be created in all of 2020.

What has been happening in our economy since February could make for a whole separate speech—although that also is now encouraging news, as we rebound economically much more quickly than virtually anyone projected. And I should add, there’s an additional speech to be given, as well—and I’ve given it many times—about the many urgent priorities the Department has been pursuing since Covid-19. If there are questions on that, I would be pleased to answer them. My point this morning is simply this: As you discuss pay equity and equality at work in this conference, I hope you will bear in mind how the economic policies I’ve described can further those objectives.

Retirement Plans

I will close today by addressing one more regulatory priority at the Department. It concerns the responsibility fiduciaries have under ERISA to discharge their duties “solely in the interest” of providing benefits to the men and women who, altogether, have \$10.7 trillion of retirement funds in private-pension plans.

That enormous sum has caught the attention of some who view pension assets as capital that can be used to fund a variety of goals, some of them social or political. I’m reminded of the union leader who once explained how unions were beginning to use union pension fund assets to advance their organizing objectives. “We decided,” he said, “to organize our money essentially the way we organize workers.”

That money is the retirees’ money, of course, not anyone else’s. And it must be used solely to provide for their retirement. So-called environmental, social, and corporate governance factors—ESG—can sometimes bear on an investment’s value. Take the obvious case of a factory leaching toxic chemicals into groundwater, and the lawsuits and regulatory action likely to follow. ERISA fiduciaries can and should consider the full range of factors that a prudent investment professional would consider as bearing on the financial performance of a portfolio. But their goals must be pecuniary—they must act with an “eye single,” as the courts say, to the financial performance and security of plan assets. Collateral goals may not be pursued at the expense of pension fund performance.

That is the purpose of the rule we proposed earlier this year on “Financial Factors in Selecting Plan Investments under ERISA,” which addresses so-called ESG investing. We are currently considering comments, and preparing a final rule. Some commenters have objected to our proposal by saying that ESG funds actually perform better. If that’s the case, and those ESG funds are selected based on performance, then under our proposal fund managers have nothing to worry about. But managers will have to beware funds that sacrifice performance for other goals. And they will have to beware funds that make dubious ESG claims for marketing purposes, or whose costs outweigh any performance advantage they legitimately can claim.

We have another proposed rule that addresses issues somewhat related to our ESG rule. This is our proposal on proxy voting. Here too, we begin with the premise that retirement plan assets are for the retiree; they’re not a pot of money—or a collection of votes—to be harvested to advance other people’s interests. Accordingly, our proposed proxy rule tells fiduciaries that they should only vote proxies when it’s in the interest of the plan; there’s no requirement that they expend plan resources to evaluate and vote on proposals that will not have an economic effect on the plan.

We hope that, when finalized, these two rules will help further one very important social policy, the one that underlies ERISA: retirement security for American workers.

It’s been a pleasure to be with you—well, sort of—today. And it’s been a great pleasure and honor to serve as Labor Secretary this past year. I’ve gained new insights, applied some old lessons, and been tested in unexpected ways. The same as the Nation as a whole. Thanks for joining, and I’d be happy to take a few questions.