

WINSTON
& STRAWN
LLP

e Lunch Briefings



North America Europe Asia

www.winston.com



The Department of Labor, 2010 and Beyond: *Change You Can Predict*

Brought to you by Winston & Strawn LLP's Labor & Employment and
Executive Compensation and Employee Benefits Departments

Today's eLunch Presenters



Joan Fife

Labor & Employment
San Francisco, CA

JFife@winston.com



Greg Jacob

Labor & Employment
Washington, D.C.

GJacob@winston.com



Personnel & Policy: *Brace for the Coming Tide*

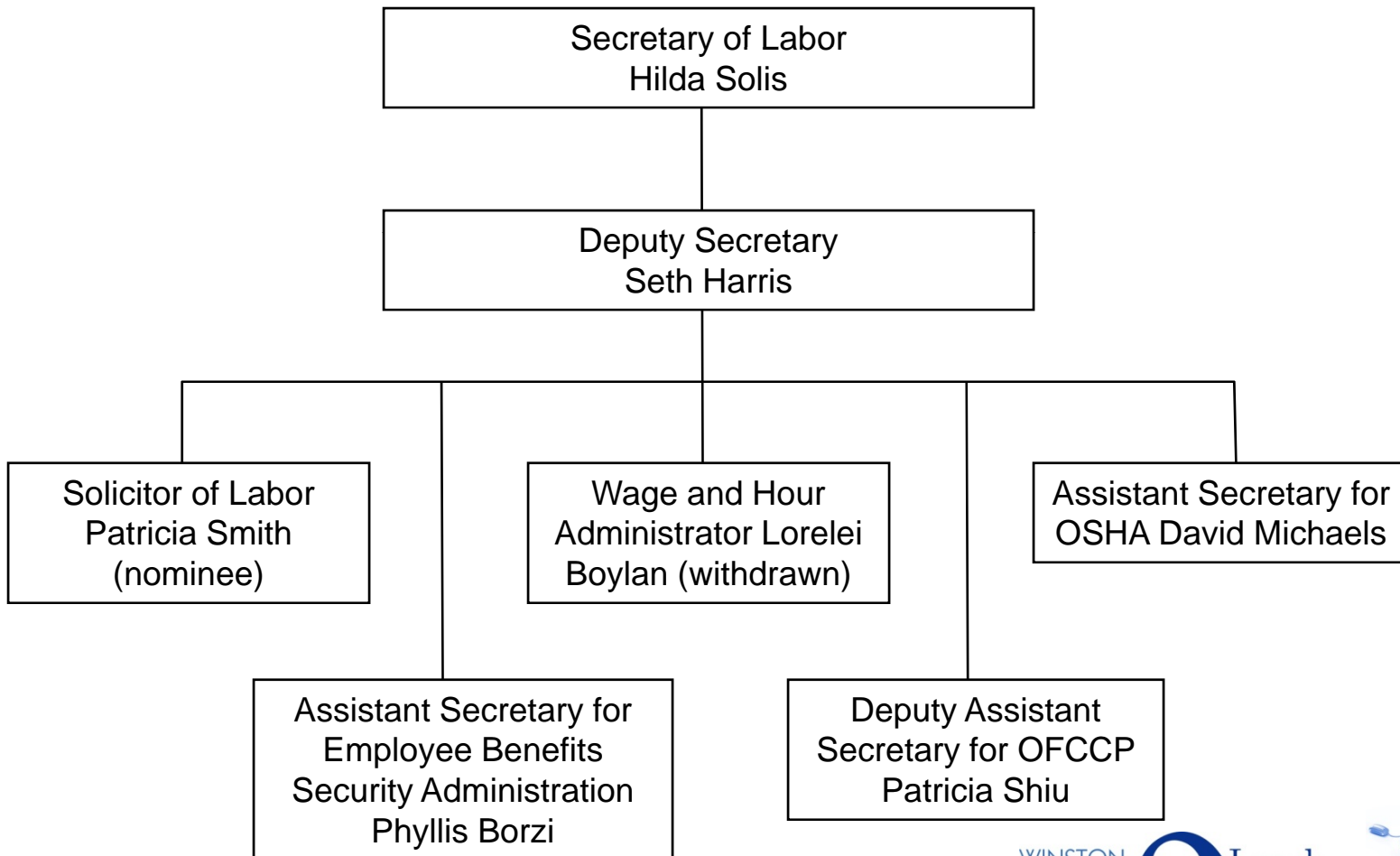
Departmental Budgets

- Wage and Hour Division: 15% FTE increase 2009, 28% increase 2010
 - 1,208 ('08); 1,283 ('09); 1,399 (stimulus); 1,558 ('10)
- OFCCP: 9% FTE increase 2009, 25.8% increase 2010
 - 585 ('08); 585 ('09); 635 (stimulus); 740 ('10)
- Solicitor's Office: 18.6% budget increase 2009, 29% increase 2010
 - 97 mil ('08); 108.3 mil ('09); 115 mil (stimulus); 125.2 mil ('10)
 - 580 FTE ('08); 597 FTE ('09); 637 FTE (stimulus); 679 FTE ('10)

Departmental Budgets *(continued)*

- OSHA: 7% inspector FTE increase 2009, 11% increase 2010
 - 1,525 ('08); 1,557 ('09); 1,633 (stimulus); 1,693 ('10)
 - Reg. writers up 32% in the 2010 budget (from 78 to 103)
- Employee Benefits Security Administration: stable 2009, 6% FTE increase 2010
 - 855 ('08); 835 ('09); 865 (stimulus); 905 ('10)
 - 28% budget increase 2010 for executive leadership and program administration

Key DOL Leadership



DOL's New Policy Orientation

"[T]here is a new sheriff in town." —Sec. Solis

- Stepped-up enforcement
- Less emphasis on compliance assistance
- Very aggressive from the top down in pushing legal interpretation and authority
 - Attempted suspension of regulations
 - Non-enforcement policy on certain union disclosure requirements
 - Withdrawal of 18 wage and hour opinion letters
- Tilted toward meeting the demands of organized labor



What to Expect from the Wage & Hour Division

Overtime Exemptions: The Power of DOL Guidance

- DOL efforts account for less than 10% of total wage & hour enforcement, but DOL has tremendous power to influence federal courts on exemption issues
 - Courts will defer to DOL positions even when newly announced in amicus briefs (*See Auer v. Robbins*, 519 U.S. 452 (1997))
 - DOL has even succeeded in reversing the decision of a federal Court of Appeals based on a guidance memorandum it issued after the court's decision (*See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. ____ (2007))
- Where the fact pattern is within the four corners of an opinion letter, “good faith reliance” protection may apply
- Otherwise, DOL can retroactively change the rules simply by issuing new interpretive guidance



Overtime Exemptions

- Expect to see DOL take much narrower positions on:
 - Administrative exemption
 - Outside sales exemption
 - Salary basis test
- DOL's recent Second Circuit amicus brief in *Novartis* opined that pharmaceutical sales reps are non-exempt:
 - Not outside sales because no good or service is actually sold
 - Although reps worked with very little supervision, specific instructions were provided for each aspect of the job
 - "Nature and level" of decisions was too low to qualify as matters of significance
- Be very cautious about asking for opinion letters!



Independent Contractors

- Misclassification of employees as independent contractors is not itself an FLSA violation, but expect DOL to look aggressively for opportunities to weigh in on misclassification matters
- Consequences can be significant:
 - Overtime and record-keeping violations, liability for failure to include in benefit plans, tax liability, unemployment
- Every agency and every state uses a different multi-factor test, but FLSA “economic realities” test is broadest
 - Some key factors: Right to control manner and means or performance, personal investment in equipment, length of employment, right to terminate at will, basis of payment (per job?), whether work is part of employer’s core business



Technology & Off-the-Clock Issues

- DOL and plaintiff's attorneys are beginning to focus on compensation issues created by advancing technology:
 - Computer log-in
 - BlackBerries and home e-mail
 - Associated commuting and travel issues
- The core set of issues to be considered:
 - Does the “de minimis” doctrine apply?
 - How does the concept of the continuous workday apply?
 - Are employees engaged to wait, or are they waiting to be engaged?
 - Has the employer suffered or permitted the employee to work beyond scheduled work hours?

Self-Auditing

In light of the foregoing, if you haven't conducted a self-audit recently to assess your risk exposure, you should!

- Where you find significant exposure, you have four basic choices:
 - Do nothing, hoping DOL never investigates and nobody sues
 - Fix the problem going forward, hoping the fix doesn't tip your hand and provoke a backward-looking lawsuit
 - Fix the problem going forward, and also pay reasonable compensation looking backward
 - Go to DOL and ask them to supervise a settlement



Considering a DOL-Supervised Settlement

- Advantages:
 - Definitely cuts off future litigation over the issues covered by the settlement... which means no attorneys' fees!
 - Certainty as to cost
 - Appears progressive and forward-leaning
- Things to think about:
 - DOL will not make any firm commitments on press
 - DOL will want to thoroughly review the underlying records to make sure that the employees at issue are being fully compensated
 - If you do not include a third year of liability in the settlement, it could theoretically still serve as the basis of a future lawsuit
 - Use outside counsel to approach DOL anonymously





What to Expect from OFCCP

OFCCP's New Focus on Compensation Discrimination

- Approximately one third of OFCCP's enforcement personnel will now be devoted to compensation cases
- Compensation cases are much more subjective than hiring cases, because "similarly situated employee groupings" require judgment calls
- Subjectivity is worst in the early stages of investigations, when OFCCP may apply pay-grade or cohort analyses to determine potential liability
 - For employers that want to settle up early with OFCCP, this means that individual OFCCP auditors have a tremendous amount of discretion in seeking conciliation!



OFCCP's New Focus on Compensation Discrimination *(continued)*

- The keys to limiting exposure:
 - Do a self-audit, document it, and document the steps you took in response to it
 - Put your own similarly situated employee groupings together, collect data according to your SSEGs, and then submit the data to OFCCP in your format
 - Establish record-keeping practices that clearly document all legitimate factors that explain pay disparities, such as work experience





New Statutes with Pending Regulations

Key Pointers: Health & Disability Discrimination

- The Genetic Nondiscrimination Act of 2008 (GINA)
 - Cannot hire, fire, or set terms or conditions of employment on basis of genetic information, or even request such information
 - “Genetic Information” includes family history, manifestation of disorder
 - Must protect the confidentiality of genetic information
 - Generally prohibits health plans for collecting or using genetic information as well: be careful with health risk assessments!
- The ADA Amendments Act of 2008
 - Vastly expands definition of “major life activity”
 - Disability is now assessed without regard to mitigating measures
 - Employer actions in response to an “impairment” now count as the employer “regarding” the person as disabled





Pending Legislation

Pending “Investor Protection Act”

- Extends SOX whistleblower coverage to subsidiaries
- Creates new whistleblower provision for:
 - Employees who provide “original information” to SEC
 - Employees who aid in SEC investigations or proceedings
- New whistleblower protections include:
 - Reinstatement, double back pay, all litigation expenses
 - Six-year statute of limitations, up to ten years with discovery rule
- New financial incentives for whistleblowers:
 - Where SEC sanctions exceed \$1 million, may award up to 30%
 - Currently, incentives are limited to 10%, only for insider trading
 - Availability of large awards skews incentives?



The Paycheck Fairness Act (PFA)

- On the same day the House of Representatives passed the Lilly Ledbetter Fair Pay Act, it also passed the PFA
- The PFA would radically reshape litigation under the Equal Pay Act:
 - Adds unlimited punitive damages for Equal Pay Act (EPA) claims
 - Changes EPA class actions from opt-in to opt-out
 - Employers would no longer be able to defend pay disparities based on “any other factor than sex”: all explanatory factors would have to be job-related and consistent with business necessity (thus, market wages would no longer be a defense!)
 - Broadens definition of “establishment” to include all facilities in a county or similar subdivision, with potential broadening by EEOC



Immigration and Outsourcing: Legislative Outlook

- White House will push for a comprehensive bill in 2010
 - Hoping to win passage with a combination of border security and a path to citizenship
 - Probably can't get needed votes without a temporary worker program, but politically untenable because unions oppose
- Look for Durbin/Grassley legislation to require pre-hiring advertising for all H-1B employers
 - Provides for additional DOL scrutiny of H-1B applications
 - Imposes a 180-day "no lay-off" window around filing date
 - Raises wage requirements for H-1B workers
- "Anti-outsourcing" legislation mostly confined to states — limits grants, contracts, and other state benefits





Discrimination Law Developments

The Supreme Court's decision in *Ricci v. DeStefano*

- The basic facts: The city of New Haven, Connecticut declined to certify test results for firefighter promotions after learning that the results, combined with the City's "rule of three" ranking system, would have a serious, disparate impact on minority applicants

The Supreme Court's decision in *Ricci v. DeStefano* (continued)

- The holding: New Haven unlawfully discriminated against white firefighters under a Title VII *disparate treatment* theory of liability, because the city did not have a “strong basis in evidence” to believe that it would have been liable under a Title VII *disparate impact* theory of liability if it had certified the results

Ricci, Grutter, and diversity hiring

- *Grutter v. Bollinger* (2003) approved of using diversity in university admissions, BUT:
 - May be limited to the special context of education
 - Limited to Equal Protection Clause (not a Title VII ruling)
 - Requires race to be one factor among many – no point systems
- After *Ricci*:
 - Employment decisions that overtly disfavor non-minorities because of their race violate Title VII unless the employer has a “strong basis in evidence” to believe not only that there is a substantial statistical disparity, but that the disparity could give rise to liability under a Title VII disparate impact theory
 - Possibly some wiggle room where race is not clearly the deciding factor? There’s an argument, but plenty of risk.



The impact of *Ricci* on employment tests and employee selection criteria

- DOL has publicly stated that *Ricci* has no effect on the rules governing testing requirements, and that the Uniform Guidelines for Employee Selection Procedures (UGESP) continue to apply
- The UGESP states that testing or screening requirements that have a disparate impact are per se discriminatory unless they have been validated in accordance with the UGESP
- DOL's position cannot be squared with the *Ricci* holding, however:
 - New Haven did not pre-test for disparate impact
 - New Haven did not examine alternatives with less disparate impact
 - New Haven did not justify its ranking system as necessary for job performance
- Unless you are willing to litigate with DOL and the EEOC, however, assume that the UGESP still fully applies!





Questions?

Contact Information

Joan Fife
Labor & Employment
San Francisco, CA
(415) 591-1513
JFife@winston.com

Greg Jacob
Labor & Employment
Washington, D.C.
(202) 282-5769
GJacob@winston.com



Thank You.