New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

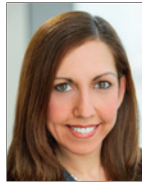
VOLUME 257—NO. 23

FRIDAY, FEBRUARY 3, 2017

Labor Relations

Expert Analysis

Anticipated Changes Under President Trump: NLRB, DOL, EEOC



By **John P. Furfaro** And **Risa M. Salins**

The Trump administration is uniquely positioned to effect major changes in labor and employment law. This is the first time since President Dwight D. Eisenhower that a Republican president has taken office with a Republican-controlled House of Representatives and Senate. This week President Donald Trump announced his nominee for U.S. Supreme Court justice, conservative Tenth Circuit Judge Neil Gorsuch, who would restore the United States' highest court to a Republican majority. He also has the opportunity to fill many vacancies within the labor and employment agencies and divisions of the federal government. It is expected that the Trump administration will, without much difficulty, be able to undo a number of employee protections put in place under the Obama administration because President Barack Obama often relied on executive orders and administrative rulemaking instead of Congressional lawmaking. These factors have provided President Trump with the opportunity to scale back many of President Obama's efforts. This month's column focuses on significant changes that may occur at four key federal labor and employment agencies.

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* KIMBERLY A. FRANKO, *an associate at the firm, assisted in the preparation of this article.*

NLRB

In his first week in office, President Trump appointed Republican Philip A. Miscimarra, the sole Republican member of the National Labor Relations Board (NLRB), as the agency's Acting Chairman, taking over from Democrat Mark Gaston Pearce. There currently are two vacant seats on the five-member NLRB which President Trump also is expected to fill with Republicans. In addition, in November 2017, NLRB General Counsel Richard F. Griffin Jr.'s term will expire. With the new makeup of the NLRB, a number of controversial NLRB rulings during the Obama administration may be reversed. One issue in particular that is expected to be revisited by a newly composed NLRB is the 2015 ruling in *Browning-Ferris Indus. of Cal.*, 362 NLRB No. 186 (2015), which significantly broadened the joint employer standard to include relationships where the potential joint employer has the ability to control an employee's essential terms and conditions of employment, even if it never actually exercises such control. Nevertheless, with the *Browning-Ferris* decision on appeal, and oral argument scheduled for March, the D.C. Circuit may weigh in on this issue before the NLRB has the opportunity to do so.

> Many expect the Trump administration will be more employer-friendly than the last.

Another controversial NLRB ruling during the Obama administration is *D.R. Horton*, 357 NLRB No. 184 (2012), which held the National Labor Relations Act prohibits arbitration

agreements that require employees to waive the right to pursue labor-related class and collective actions. Last month, the Supreme Court granted certiorari in a trio of cases presenting this issue, and it has been reported that the court will likely hear the case in June. See *Epic Sys. v. Lewis*, No. 16-285 (U.S. Jan. 13, 2017); *Ernst & Young v. Morris*, No. 16-300 (U.S. Jan. 13, 2017); *NLRB v. Murphy Oil USA*, No. 16-307 (U.S. Jan. 13, 2017). It is too early to predict how President Trump's Supreme Court nominee, Judge Gorsuch, if confirmed, would come out on this important issue, which will affect millions of employees in both union and non-union settings.

DOL

The U.S. Department of Labor's (DOL) overhaul of overtime pay regulations, in a manner that would nearly double the minimum salary level at which an employee can be exempt from overtime pay, was a major accomplishment of the Obama administration. However, just days before the final rule's Dec. 1, 2016 effective date, a federal judge in the Eastern District of Texas entered a nationwide preliminary injunction blocking implementation of the overtime rule. The DOL appealed the injunction, and the appeal was fully briefed last month. In the meantime, the district court denied the DOL's request to stay the case pending the appeal and, with dispositive motions fully briefed, the district court can enter a permanent injunction at any time. President Trump's nominee for Secretary of Labor, Andrew F. Puzder, whose confirmation hearing has been indefinitely postponed, has criticized the overtime rule. He argued in a May 2016 op-ed in Forbes that it will "simply add to the extensive regulatory maze the Obama Administration has imposed on employers, forcing many to offset increased labor expense by cutting costs elsewhere." With Puzder expected to lead the DOL, the Trump administration likely will not pursue the appeal and, on the other hand, could begin the administrative rulemaking process to change the regulation. Alternatively, the new Congress may pass legislation nullifying the regulation.

Under President Obama, the DOL also finalized the new so-called persuader rule, which would require employers to report actions or communications undertaken to directly or indirectly affect an employee's decisions regarding his or her union representation or collective bargaining rights. However, in November 2016, a federal judge in the Northern District of Texas issued a nationwide permanent injunction blocking implementation of the rule. See *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 16-00066 (N.D. Tex. Nov. 16, 2016). One week before President Obama's term ended, the DOL appealed the injunction. See *Perez v. Nat'l Fed'n of Indep. Bus.*, No. 17-10054 (5th Cir. Jan. 13, 2017). It is questionable whether the Trump administration will pursue the appeal, especially if Sen. Jeff B. Sessions III is confirmed as Attorney General, as last year Sessions co-sponsored a joint resolution disapproving the persuader rule.

On another front, during his campaign, President Trump unveiled several policies crafted by Ivanka Trump, including six-weeks paid maternity leave for new mothers funded through an employer's unemployment insurance contributions and increased childcare in the workplace to be achieved by offering additional incentives to employers. It remains to be seen whether the new administration embraces these items.

OFCCP

The DOL's Office of Federal Contract Compliance Programs (OFCCP) was very active during the Obama administration. Among the Obama initiatives that could be repealed under President Trump is the Fair Pay and Safe Workplaces executive order, known by its opponents as the "blacklisting" order. The order requires prospective federal contractors and subcontractors to disclose

A number of executive orders issued by President Obama may be scrutinized, including the executive order that raised the minimum wage contractors pay employees performing work on covered federal contracts and the executive order that requires federal contractors to provide paid sick leave to employees working on government contracts.

labor and employment law violations that occurred during the previous three years and to give wage statements detailing pay and hours to employees and independent contractors; it also prohibits arbitration agreements relating to Title VII of the Civil Rights Act or sexual assault. However, because the Federal Acquisition Regulatory Council issued a final rule implementing this order, it will take further steps for the rule to be changed. Litigation to enjoin the final rule is pending. In the meantime, on January 30, Republican lawmakers introduced a joint resolution of disapproval which would permanently block implementation of the final rule under the Congressional Review Act (CRA), a law that allows Congress to repeal new rules on an expedited basis through a resolution of disapproval, as long as the regulations were issued within 60 legislative days of the new Congress. The joint resolution will require only a simple majority of the House and the Senate and President Trump's signature.

A number of other executive orders issued by President Obama may be scrutinized, including the executive order that raised the minimum wage contractors pay employees performing work on covered federal contracts ($10.20 per hour as of Jan. 1, 2017) and the executive order that requires federal contractors to provide paid sick leave to employees working on government contracts. Because the sick time rule was published this past September, the Trump administration also could ask Congress to pursue repeal of this rule through the fast track procedures of the CRA. On the other had, a White House statement issue on January 31 stated that President Trump will continue to enforce President Obama's executive order barring discrimination against LGBT people working for federal contractors.

EEOC

President Trump has appointed Victoria A. Lipnic, who has been a commissioner of the Equal Employment Opportunity Commission (EEOC), as the EEOC's acting Chair. Lipnic's appointment may signify impending changes to the EEOC's positions on sexual orientation discrimination and equal pay. Lipnic joined the EEOC in 2010 and during her tenure she was one of two commissioners who voted against the EEOC's July 2015 decision that sexual orientation discrimination is gender discrimination prohibited by Title VII.

Although Lipnic currently is the only Republican on the five-member EEOC, Trump can immediately fill the one open seat and, with former-Chair Jenny R. Yang's term expiring this July, President Trump will have a second opportunity to appoint a commissioner. He also can immediately nominate the EEOC's new general counsel, as the departure of David Lopez in December 2016 left this position open.

Under the Obama administration, the EEOC made equal pay a priority, recently announcing final changes to the Employer Information Report (EEO-1) effective March 2018. The final changes require employers to annually report aggregate compensation data for all employees by gender, race and ethnicity across pay bands. These new requirements, however, can be revised by the EEOC under the leadership of Lipnic, who voted against the original EEO-1 proposal, because formal rulemaking was not conducted to implement the changes.

Conclusion

President Trump has offered little during his first two weeks in office with respect to plans for addressing labor and employment issues, but many expect his administration will be more employer-friendly than the last. Indeed, the president's recent appointments signal he is moving in that direction. Also, a top priority of the Trump administration is to foster government-sponsored infrastructure projects, which has left employers interested to see the scope of federal protections for employees the administration will require for new government funded projects and if the Davis-Bacon Act (setting minimum labor standards) will apply.

Reprinted with permission from the February 3, 2017 edition of the NEW YORK LAW JOURNAL © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-02-17-08