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LABOR RELATIONS

Expert Analysis

Labor-Related Legislative Developments

Since taking office in January, President Donald Trump and his administration have not taken significant action to change the landscape of labor and employment laws and regulations that many anticipated. On Feb. 15, 2017, Andrew Puzder, President Trump's first nominee for Secretary of Labor, withdrew his nomination following growing concerns that he lacked enough Republican support in the Senate to be confirmed. President Trump subsequently nominated Alexander Acosta, former Department of Justice official and National Labor Relations Board member, for the position. On March 30, 2017, the Senate Committee on Health, Education, Labor and Pensions voted to advance Acosta's nomination to the full Senate for final confirmation.

By **David E. Schwartz**

And **Risa M. Salins**

Without new leadership in the Department of Labor, the Republican-controlled Congress has taken the initiative. It passed joint resolutions of disapproval of certain Obama-era labor regulations and introduced legislation aimed at changing labor and employment law policy. This month's column discusses the Obama-era labor regulations that have been targeted and current legislative initiatives regarding unions, class actions and family leave.

CRA Resolutions

In the past several weeks, Congress has used the Congressional Review Act (CRA) to nullify two Obama-era labor regulations, the Federal Acquisition Regulatory Council's "Fair Pay and Safe Workplaces" rule (H.J. Res. 37) and the Occupational Safety and Health Administration's (OSHA) "Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness" rule (H.J. Res. 83), referred to as the "Volks" rule. The CRA, used only once prior to President Trump taking office, allows Congress with a simple majority to repeal regulations authorized by the previous administration, as long as the regulations were issued within 60 legislative days of the new Congress. Also, if a regulation is repealed under the CRA, future administrations are prohibited from enacting a similar rule without authority from the legislative branch.

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The Fair Pay and Safe Workplaces rule, scorned by critics as the

DAVID E. SCHWARTZ *is a partner at the firm of 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.*

"blacklisting rule," required, among other things, that prospective federal contractors and subcontractors disclose labor law violations that occurred during the previous three years. In early February, the joint resolution easily passed the House, and on March 6, 2017, it passed the Senate by a vote of 49 to 48. On March 27, 2017, President Trump signed the joint resolution repealing the rule and also issued Executive Order 13782 officially revoking President Obama's Executive Order 13673, as amended by Executive Orders 13683 and 13738, that authorized the rule. As a result, federal contractors will not be mandated to report alleged labor violations to federal agencies when bidding on contracts, will not be required to implement the paycheck transparency requirements of the rule, and will not be prohibited from entering into mandatory arbitration agreements concerning Title VII claims.

The Volks rule, published in December 2016, gave OSHA the power to issue citations and levy fines for violations dating back as far as five years to employers who do not properly track and report work-related injuries and illnesses. OSHA published the rule in response to a 2012 decision by the D.C. Court of Appeals in *AKM LLC dba Volks Constructors v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012), that applied a six-month statute of limitations to OSHA's power to issue citations for violations of its recordkeeping regulations. On March 1, 2017, the House easily passed the joint resolution to nullify this rule under the CRA, and on March 22, 2017, the Senate also passed the joint resolution, but by a vote of 50 to 48. The joint resolution disapproving of the Volks rule is awaiting President Trump's signature; his administration previously announced that it strongly supported the resolution.

Labor Legislation

Legislators of the 115th Congress have introduced legislation targeting union-friendly laws. Republicans in both the House and Senate introduced the National Right-to-Work Act on Feb. 1, 2017 (H.R.785) and March 7, 2017 (S.545), respectively. The legislation seeks to amend the National Labor Relations Act (NLRA) and the Railway Labor Act to restrict the use of union security clauses—clauses that require an employee to pay union dues as a condition of work—in labor agreements. Similar legislation had been introduced in previous Congresses, but with more than 20 co-sponsors in each the House and Senate and 28 states having now enacted similar laws, many proponents of the bill believe it may have the momentum to become federal law.

Legislators also have introduced other legislation seeking to amend the NLRA. The Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act, introduced in both the House and Senate earlier this year, would amend the NLRA to allow an employer to pay an employee higher compensation than that provided for in a collective bargaining agreement (H.R.987; S.155). Additionally, in the House, Congressman Steve King (R-Iowa) re-introduced the Truth in Employment Act of 2017 (H.R.744). This bill would allow employers not to hire "salts"—individuals seeking employment for the primary purpose of organizing a non-union employer's workforce.

Furthermore, legislators have targeted restrictions placed on federal contractors. On Jan. 30, 2017, Republicans introduced companion bills in the House and Senate (H.R.743; S.244) to repeal the Davis-Bacon Act, a federal law which requires contractors and subcontractors performing work on federally funded or assisted construction contracts for public buildings to pay certain workers at least the locally prevailing wage. Additionally, in mid-March legislators in the House and the Senate introduced similar bills, entitled the Fair and Open Competition Act (FOCA Act) (H.R.1552; S.622). These bills would prevent federal agencies and those receiving federal funds from requiring (or even requesting) that a contractor enter into a project labor agreement (PLA)—a pre-hire

agreement with one or more labor organizations establishing the terms and conditions of employment for a specific construction project. The FOCA Act is aimed at combatting federal agencies' preference for PLAs since President Obama's 2009 Executive Order 13502 encouraging their use of PLAs. All of these labor-related bills remain in committee.

Class Actions

On March 9, 2017, the House passed legislation that would make it more difficult for employees to proceed with a class action. The stated purpose of the legislation, the Fairness in Class Action Litigation Act of 2017, is to "assume fair and prompt recoveries for class members" and "diminish abuse in class action and mass tort litigation" (H.R.985). The bill puts additional restraints on federal courts before they could certify a class, including requiring a finding of proof that each class member suffered the same type and scope of injury as the named class representative(s). Additionally, the legislation makes an order granting or denying class certification immediately appealable and requires a stay of discovery during the pendency of all preliminary motions. The Senate has referred the bill to committee and not taken any other action on it to date. Representative Jamie Raskin (D-Md.), a strong opponent of the bill, argued that with respect to the class-action mechanism, the bill is "not the guillotine, but it's a straight jacket."

Paid Leave

President Trump endorsed paid family leave during his campaign under a policy crafted by Ivanka Trump that would provide new mothers with six weeks of paid leave funded through an employer's unemployment insurance contributions. In his first joint address to Congress this past February, President Trump again endorsed paid maternity leave, hinting at possible support of paid paternity leave, stating: "My administration wants to work with members in both parties to make childcare accessible and affordable, to help ensure new parents have paid family leave." Even though no proposal has been released by President Trump, in February legislators, led by Sen. Kristen Gillibrand (D-N.Y.), introduced the Family and Medical Insurance Leave Act (FAMILY Act) into Congress (H.R. 947; S.337). The FAMILY Act would offer two-thirds of an employee's wage during family leave for up to 12 weeks, funded by both employer and employee payroll contributions.

Moreover, legislators from both sides of the aisle have introduced legislation seeking to expand the protections of the Family and Medical Leave Act of 1993 to include grieving parents (H.R.1560; S.528). Known as the Parental Bereavement Act of 2017, or the Sarah Grace-Farley-Kluger Act, this bipartisan bill would entitle an employee to 12 weeks of unpaid leave for the death of a son or daughter.

Conclusion

With these pending bills, Congress has provided insight into what its and the administration's top priorities may be going forward, including reducing federal regulation of employers and cutting back protections for unions. In addition, there is bipartisan support for helping and protecting working parents. When a new Secretary of Labor is confirmed, the pace of change may accelerate. Employers are advised to keep abreast of these legislative developments.

Author's Note: Loyal readers of this Labor Relations article may notice a new author on the scene. John P. Furfaro, who co-authored this column since 1988, retired from Skadden, Arps, Slate, Meagher & Flom last week. John's astute, thought-provoking and practical articles set a standard of excellence. David E. Schwartz, a partner at Skadden, Arps, joins Risa M. Salins as the new co-author of this column. Together, David and Risa will strive to live up to John's legacy.