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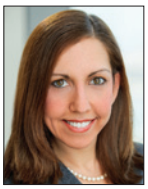
Labor Relations

Expert Analysis

NLRB's Acting GC, ERISA-Exempt Church Plans, FCA Seal Requirements



By **David E. Schwartz**

And **Risa M. Salins**

This is the second of two columns discussing U.S. Supreme Court decisions from the 2016-17 term impacting employers. This month we review decisions regarding whether the former acting general counsel of the National Labor Relations Board (NLRB) properly served in that role after his nomination to serve as the NLRB's general counsel on a permanent basis; whether pension plans maintained by certain church-affiliated employers, but not established by a church, qualify for the church plan exemption under the Employee Retirement Income Security Act (ERISA); and whether qui tam whistleblower suits brought under the False Claims Act (FCA) are subject to mandatory dismissal when the FCA's requirement to keep such complaints under seal is violated. These cases have far-reaching implications.

Acting Officials

In *N.L.R.B. v. SW General*, 137 S. Ct. 929 (2017), the Supreme Court ruled 6-2 that the NLRB's prior acting general counsel, Lafe Solomon, improperly served in that role from January 2011 through October 2013 while awaiting Senate confirmation to serve as the NLRB's general counsel on a permanent basis. The court concluded, based on the Federal Vacancies Reform Act (FVRA), that any person nominated to serve in an acting office could not also serve as the permanent nominee. However, it left open the possibility that not all of Solomon's actions as acting general counsel are void.

The FVRA permits three categories of government officials to perform acting service in a vacant office that requires Presidential appointment and Senate confirmation (a PAS office): the first assistant to that office, a person already serving in another PAS office, or a senior employee in the relevant agency. In June 2010, when the NLRB general counsel office became vacant, President Barack Obama directed Solomon, who spent the previous 10 years as director of the NLRB's Office of Representation Appeals, to serve as acting general counsel. In January 2011, President Obama nominated Solomon to fill the general counsel position on a permanent basis. However, the Senate never took action on the nomination. President Obama ultimately withdrew Solomon's nomination and a new nominee, Richard F. Griffin Jr., was confirmed by the Senate in October 2013. Solomon continued to serve as acting general counsel until that time.

> Parties who were the subject of complaints issued during Lafe Solomon's invalid tenure, or who currently face NLRB proceedings based upon purported precedent from that period, should review legal options in light of 'N.L.R.B. v. SW General'.

In January 2013, an NLRB Regional Director, exercising authority on Solomon's behalf, issued an unfair labor

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practice complaint against an ambulance service company. The NLRB affirmed the Administrative Law Judge's decision that the company committed an unfair labor practice by failing to pay certain bonuses to long-term employees. The company appealed to the D.C. Circuit, arguing the unfair labor practice complaint was invalid under FVRA subsection (b)(1), which prohibits a person who the president nominates to permanently fill a vacant PAS office from temporarily carrying out the duties of that office as an acting officer. The NLRB countered that FVRA subsection (b)(1) applies only to an individual who previously served as first assistant to the applicable office, not to a senior employee in the agency like Solomon. The D.C. Circuit rejected the NLRB's argument and held Solomon became ineligible to perform the duties of general counsel in an acting capacity once the president nominated him to fill that post.

The Supreme Court affirmed the D.C. Circuit's decision. After analyzing the plain language of the FVRA, the court concluded subsection (b)(1) clearly prohibits any person nominated to fill a vacant PAS office from serving in that office in an acting capacity, and rejected the NLRB's assertion that guidance from the Office of Legal Counsel and the Government Accountability Office construing such provision to apply only to first assistants trumps that plain language. The court also rejected the argument that Congress had acquiesced to this practice by failing to "speak up" to prior circumstances where permanent nominees served as acting officers. On the other hand, Justice Sonia Sotomayor, in dissent, contended, "Congressional silence in the face of a decade-plus practice of giving subsection (b)(1) a narrow reach casts serious doubt on the broader interpretation."

Notably, while most actions taken in violation of the FVRA are void ab initio, a statutory exception for the NLRB general counsel led the D.C. Circuit to opine Solomon's actions as acting general counsel are voidable, not void. The Supreme Court recognized the D.C. Circuit's conclusion in this regard, but declined to consider it further because the NLRB did not seek certiorari on the issue. The court also did not decide whether ratification of Solomon's actions by the current general counsel is sufficient. Thus, parties who were the subject of complaints issued during Solomon's invalid tenure, or who currently face NLRB proceedings based upon purported precedent from that period, should review legal options in light of this ruling.

> Church-affiliated employers should continue to monitor developments in this area in the event Congress attempts to limit the scope of ERISA's church plan exemption in light of the court's decision in 'Advocate Health Care Network v. Stapleton'.

Church Plans

In *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), the Supreme Court ruled 8-0 that ERISA's church plan exemption applies to a pension plan sponsored by a church-affiliated organization, even if the plan was established by a non-church entity. This decision is a victory for church-affiliated employers such as hospitals and schools which historically have relied on the exemption from ERISA and its strict reporting, disclosure and funding obligations.

In *Stapleton*, current and former employees of three church-affiliated nonprofits that operate hospitals and other health care facilities filed separate class actions alleging the hospitals' pension plans did not meet the statutory definition of an ERISA-exempt church plan. While the plans were not established by a church, each of the defendants had received confirmation from the Internal Revenue Service (IRS) that their plans were exempt from ERISA because of the entities' religious affiliation.

The employees relied on a specific reading of a 1980 amendment to ERISA. Pre-1980, an ERISA-exempt church plan was defined as a plan that was both established and maintained by a church for its employees. 29 U.S.C. §1002(33)(A). However, in 1980 Congress explicitly expanded such exemption to "include[] a plan maintained by an organization … the principal purpose or function of which is the administration or funding of [such] plan … for the employees of a church … if such organization is controlled by or associated with a church … ." 29 U.S.C. §1002(33)(C)(i). The longstanding interpretation of the IRS, Pension Benefit Guaranty Corporation and Department of Labor has been that an employee benefit plan maintained by such a "principal-purpose organization" is exempt from ERISA, regardless of whether the plan was established by a church. However, the employees here

argued the 1980 amendment expanded on the maintenance requirement only, and that the church plan exemption only applies if the plan being maintained by the principal-purpose organization was established by a church. The employees' interpretation was upheld by the Third, Seventh and Ninth Circuits. See *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016); *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016).

The Supreme Court consolidated the appeals and reversed the Circuit Court decisions in all three cases. The court focused primarily on ERISA's statutory construction and held that because Congress specified that a plan "established and maintained by a church" "includes" a plan "maintained by" a principle-purpose organization, a plan maintained by a principle-purpose organization is necessarily a "church plan" exempt from ERISA's pension plan rules.

Justice Sotomayor wrote a concurring opinion in which she agreed with the court's statutory interpretation of ERISA, but expressed concern regarding the outcome of these cases. She cautioned that, despite their relationship to churches, organizations such as petitioners "operate for-profit subsidiaries," "employ thousands of employees," "earn billions of dollars in revenue," and "compete in the secular market with companies that must bear the cost of complying with ERISA." Church-affiliated employers should continue to monitor developments in this area in the event Congress attempts to limit the scope of ERISA's church plan exemption in light of this decision.

FCA Whistleblowers

In *State Farm Fire and Casualty Company v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016), the Supreme Court ruled that a whistleblower's violation of the FCA's requirement that certain complaints be sealed does not require dismissal of the suit.

The FCA permits private whistleblowers, often called "relators," to bring qui tam actions on behalf of the federal government, alleging fraud against government contractors, and to receive a share of any recovery from such suits. The FCA requires such a complaint to remain under seal for at least 60 days, and not be served on the defendant until the court so orders. 42 U.S.C. §3730(b)(2). This seal requirement allows the government time to investigate the relator's allegations and decide whether to intervene before the case becomes known to the defendant.

In *Rigsby*, former insurance company employees filed an FCA qui tam complaint under seal, alleging their former employer directed them to misclassify wind damage caused by Hurricane Katrina as flood damage to shift liability from the insurance company to government-backed flood insurance policies. While the complaint was under seal, the relators' counsel disclosed the suit and its allegations to several national media organizations. The company filed a motion to dismiss the action on the ground the seal had been violated deliberately.

The Supreme Court held mandatory dismissal of the employees' complaint was not required, reasoning that if Congress intended automatic dismissal for a seal violation, it would have said so explicitly in the statute. The court further explained "it would make little sense to adopt a rigid interpretation" that "prejudices the Government by depriving it of needed assistance from private parties." Rather, it held district courts have the flexibility to impose sanctions, including those short of dismissal, based on the circumstances of the particular situation.

By not requiring dismissal, the court's decision may encourage some whistleblowers to disclose details about a qui tam case to pressure defendants to settle before the government decides whether to intervene. However, the court noted dismissal remains a possible form of relief at the district court's discretion. The court found the district court did not abuse its discretion by denying the motion to dismiss in this case, but left unanswered the appropriate test for determining whether dismissal is warranted.