

**Labor & Employment Law 2017: Brave
New World?
Alabama State Bar
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Labor & Employment Law in Trump Era

Areas of Potential Change

- * Agency Appointments
- * Agency Rulemaking
- * Proposed Legislation
- * Judicial Appointments

Alexander Acosta – New Sec. of Labor Nominee

- * Nominated February 16
- * Dean of Florida Int'l Univ. School of Law
- * Chairman of U.S. Century Bank
- * NLRB Member 2002-2003
- * Ass't Atty Gen. Civil Rights 2003-2005
- * U.S. Atty S.D. Fla. 2005-2009
- * Harvard Univ., Law, Kirkland & Ellis



Trump Critics Approve Acosta

- * Wilma Liebman: “Even though we often came out differently on policy conclusions or the outcome of a case, he was a good colleague and he was always willing to talk and bounce around ideas, I would say he’s very smart and he’s an independent thinker.” While unions may not “be thrilled with every decision he’ll make...they’ll get a good hearing.”
- * Marco Rubio: “I know Alex Acosta well, and he is a phenomenal choice to lead the Department of Labor.”

Alexander Acosta

- * Richard Trumka, President of AFL-CIO: “Unlike Andy Puzder, Alexander Acosta’s nomination deserves serious consideration. In one day, we’ve gone from a fast-food chain C.E.O. who routinely violates labor law to a public servant with experience enforcing it.”
- * Acosta is believed to be more “mainstream” and more predictable than Puzder. “At the same time, most pundits believe that Acosta has the unique ability to take both employer and employee points of view into account when making decisions, which makes him particularly qualified for this position.”
- * Delay in Sec. of Labor confirmation has caused continued delay in implementing conservative changes to Obama policies and agencies.

Agency Appointments



President Appoints Philip A. Miscimarra NLRB Acting Chairman

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Washington, DC -- President Donald J. Trump has named Board Member Philip A. Miscimarra Acting Chairman of the National Labor Relations Board.

"It is an honor to be named NLRB Acting Chairman by the President," Miscimarra said. "I remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act in an even-handed manner that serves the interests of employees, employers and unions throughout the country."

A Fresh Set of Faces And Policies--Maybe

- * Appointments Are A Coming!
 - * 2 Appointments to fill vacancies
 - * Expect the composition of the Board to swing more Republican (will take time)
 - * Current members (Republican – term expires 2017, Democrats – 2018, 2019)
- * General Counsel—Not So Fast
 - * Keep in mind, however, change at the NLRB may be slow.
 - * The term of the current General Counsel does not expire until November 4, 2017.

Paths for Labor Rule Changes

- * Congressional action
 - * New statutes
 - * Defunding enforcement
- * Revising and/or rescinding rules
- * Board decisions

Possible Reversals of Obama Board Agenda

- * Bargaining units – “micro units”
- * Joint employment
- * Temporary employees
- * Quickie rules?
- * Concerted protected activities
- * Class action waivers
- * Social media clarification



Victoria A. Lipnic Acting Chair

Victoria A. Lipnic was named Acting Chair of the U.S. Equal Employment Opportunity Commission by President Donald J. Trump on January 25, 2017. She began her service as a Commissioner of the EEOC in April 2010, having been confirmed by the Senate for an initial term ending on July 1, 2015. In November 2015, she was confirmed by the Senate for a second term ending on July 1, 2020.

Acting Chair Lipnic has brought to the EEOC a breadth of experience working with federal labor and employment laws. From 2002 to 2009, she served as the U.S. Assistant Secretary of Labor for Employment Standards, where she oversaw the Wage and Hour Division, the Office of Federal Contract Compliance Programs, the Office of Workers' Compensation Programs, and the Office of Labor Management Standards. She has also worked on Capitol Hill as Workforce Policy Counsel to the Committee on Education and the Workforce in the U.S. House of Representatives. Before her work for Congress, she acted as in-house counsel for labor and employment matters to the U.S. Postal Service for six years. She also served as a special assistant for business liaison on the staff of then U.S. Secretary of Commerce, Malcolm Baldrige. Immediately prior to her service at the Commission, she was of counsel to the law firm of Seyfarth Shaw LLP in its Washington, D.C., office.

Since joining the Commission, Acting Chair Lipnic has played a key role in a wide variety of Commission activities and policies. Immediately upon her arrival, she was integral in the Commission's development of regulations under the bipartisan ADA Amendments Act of 2008. Throughout her tenure, she has worked to promote the Commission giving public hearing, and often guidance, to important workplace issues such as the [use of leave as a reasonable accommodation under the ADA](#), [employer-provided wellness programs](#), [harassment prevention](#), and the use of [social media in the workplace](#) and [big data in employment](#). In 2014, she helped lead the agency's celebration of the 50th anniversary of the Civil Rights Act of 1964, including organizing an event in Chicago, Illinois, to recognize the [pioneering role of female flight attendants in the early enforcement of Title VII's prohibition of sex discrimination](#). From 2015 to 2016, she co-chaired the EEOC's [Select Task Force on the Study of Harassment in the Workplace](#), culminating in the co-chairs issuing their [final report](#) at a [Commission meeting in June 2016](#). She has also taken great interest in issues relating to equal pay, the good governance of the Commission, increased transparency and public participation in policymaking, and the proper role of the EEOC as a regulatory enforcement agency.



A Fresh Set of Faces And Policies--Maybe

- * Appointments

- * 1 Appointment currently vacant

- * 1 Appointment expiring July 2017

- * Expect the composition of the Commission to swing more Democrat (Lipnic is currently the only Republican)

- * General Counsel — Any Day Now!

- * The term of the former General Counsel, David Lopez, expired December, 2016.

Possible Changes Under Trump's EEOC

- * Sexual Orientation Discrimination
- * Equal Pay
- * LGBT issues
- * Leave as an accommodation
- * Background checks

Agency Rulemaking

FLSA Rules Increasing Salary Threshold

- * Final rule was scheduled to go into effect Dec. 1, 2016.
- * Nationwide preliminary injunction issued by federal court in Texas on November 22nd.
- * DOL appealed; will Trump administration continue appeal?
- * DOL had until May 1 to file brief with 5th Circuit
- * Acosta opposes rule

Proposed Legislation

Trump Has Expressed Support

- * Paid Maternity and Paternity Leave
- * Incentivized employer-provided childcare
- * Minimum wage increases
- * Equal pay
- * LGBT rights

TRUMP AND THE COURTS

Gorsuch Impact on Court

- * Conservative jurist in Scalia mold
- * Restores 4 to 4 conservative to liberal with Kennedy swing vote
- * Strong on:
 - * Religious expression
 - * Free speech
 - * Judicial checks on excessive regulatory state
- * DNC: raises some serious questions whether he would interpret the Constitution for all of us and no just wealthy and whether he can make fair decisions based on facts of the case



Judicial Appointments

- * One Supreme Court nominee-Gorsuch
- * More than 80 federal district court vacancies (38 considered “emergency”)
- * Only 22 district or circuit court confirmations since 2014

Other Areas of Update

Title VII/42 U.S.C. 1981

Green v. Brennan

136 S. Ct. 1769 (May 23, 2016)

- * In a constructive discharge case resulting from a period of discriminatory harassment, the employee's resignation begins the running of the statute of limitations, not the last act of discrimination.
- * A constructive-discharge claim accrues -- and the limitations period begins to run -- when the employee gives notice of his resignation, not on the effective date thereof.
- * Judgment: Vacated and remanded, 7-1, in an opinion by Justice Sotomayor on May 23, 2016. Justice Alito filed an opinion concurring in the judgment. Justice Thomas filed a dissenting opinion.

CRST Van Expedited, Inc. v. EEOC **136 S. Ct. 1642 (May 19, 2016)**

- * Sexual harassment suit on behalf of 270 female employees.
- * EEOC had to identify those who still wanted to participate but did not fully comply.
- * CRST filed seven motions to dismiss-six were granted.
- * \$4M bill of costs filed by CRST.
- * Court held that defendant may be “prevailing party” for the purpose of a fee award even without a ruling on the merits.

EEOC v. Catastrophe Management Services

837 F.3d 1156 (11th Cir. Sept. 15, 2016)

- * Job offered to African-American female, rescinded when she refused to cut off her dreadlocks; she sued, arguing the enforcement of this policy constituted race discrimination.
- * Case proceeded under disparate treatment theory only.
- * Eleventh Circuit refused to adopt what it called a cultural, as opposed to biological, definition of “race”.
- * Dreadlocks are not an “immutable characteristic of black persons”.

Evans v. Georgia Regional (11th Cir. March 10, 2017)

- * Plaintiff alleged she was discriminated against on basis of sexual orientation and terminated after complaining of same.
- * Eleventh Circuit finds that sexual orientation discrimination is not prohibited discrimination on the basis of sex under Title VII, citing prior binding precedent (*Blum v. Gulf Oil*, 5th Cir. 1979). Employee had argued it was dicta.
- * Affirmed that “discrimination based on failure to conform to a gender stereotype is sex-based discrimination.” (citing [Glenn v. Brumby](#), 663 F.3d 1312, 1316 (11th Cir. 2011)(citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

USERRA

Bodine v. Cook's Pest Control, Inc. **830 F.3d 1320 (11th Cir. July 29, 2016)**

- * Non-waiver provision of USERRA had to be interpreted, as it related to the Federal Arbitration Act.
- * USERRA has provision preventing contractual agreements from reducing, limiting, or eliminating rights protected under the Act.
- * Court ultimately ruled that FAA and USERRA's non-waiver provisions were not in conflict.
- * District court properly compelled arbitration.

Age Discrimination

Villarreal v. RJR Tobacco

839 F.3d 958 (11th Cir. Oct. 5, 2016)

- * Addressed question of whether ADEA allows an unsuccessful job applicant to make a disparate impact claim.
- * Undisputed that ADEA allows for disparate treatment claim for applicant.
- * Reading whole text of act results in finding that there is no claim for disparate impact by applicant because there is no “status as an employee.”

FMLA , ADA & ALABAMA WORKERS' COMPENSATION

Jones v. Gulf Coast Health Care of Delaware, LLC **(11th Cir. April 19, 2017)**

- * One month after returning from leave for surgery, Jones was suspended and subsequently fired from his Activities Director job.
- * District court granted summary judgment on interference and retaliation claims.
- * Eleventh Circuit reversed on retaliation claim.
- * Temporal proximity was one factor, with the Court stating it should be measured from last date of FMLA leave until date of adverse employment action.

EEOC v. St. Joseph's Hospital

842 F.3d 1333 (11th Cir. Dec. 7, 2016)

- * Addresses reasonable accommodation provision.
- * Disabled nurse required use of cane.
- * Sought job reassignment because cane posed hazard in her current assignment in psychiatric ward.
- * Allowed to apply for different positions but not selected and ultimately terminated.
- * Cross motions for summary judgment
- * Jury trial

Nora Clower v. CVS Caremark

- * Circuit Court of Jefferson County
- * Judge Pat Ballard held AWCA unconstitutional
- * Employee had earned \$355/week; max recovery was \$220/week.
- * Judge Ballard stayed his order for 120 days so the Alabama Legislature could address the “magnitude” of this ruling.



QUESTIONS?