Revue de droit comparé du travail et de la sécurité sociale

4 | 2017
English Electronic Edition

School of Industrial and Labor Relations

Risa L. Lieberwitz

Electronic version

URL: <https://journals.openedition.org/rdctss/2494>

DOI: 10.4000/rdctss.2494

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2017

Number of pages: 232-233

ISSN: 2117-4350

Electronic reference

Risa L. Lieberwitz, "School of Industrial and Labor Relations", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2017, Online since 01 November 2021, connection on 04 December 2021.

URL: <http://journals.openedition.org/rdctss/2494> ; DOI: <https://doi.org/10.4000/rdctss.2494>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

RISA L. LIEBERWITZ

CORNELL UNIVERSITY

SCHOOL OF INDUSTRIAL AND LABOR RELATIONS

The election and inauguration of Donald Trump as president of the United States has been followed by conflict and instability in the arenas of politics and law. Almost immediately, the Trump administration took actions aimed at carrying out its preelection threats against immigrants. The administration's strategy relies on a dual-pronged attack: creating broad bans on entry into the United States from certain Muslim-majority countries and escalating US Immigrations and Customs Enforcement (ICE) raids and deportations of undocumented persons residing in the United States. A federal appellate court upheld a nationwide temporary restraining order against the president's first executive order travel ban, based on evidence of the administration's discriminatory intent against Muslims. After the administration responded with a revised executive order with a 90-day ban on approving new visas from six Muslim-majority nations, two federal courts relied on the same evidence of discrimination to issue preliminary orders against enforcement. The US Department of Justice plans to continue to litigate to defend the second executive order.¹ There has been broad opposition to the president's executive orders, including from businesses unable to employ individuals coming from the affected countries.

With the current control of the executive and legislative branches of the federal government by the Republican Party, plans are underway to appoint conservatives to judicial and federal agency positions. There are two vacancies in the five-member National Labor Relations Board (NLRB). Once these positions are filled through nominations by the president and confirmations by the Senate, the NLRB will have a conservative majority who may look for opportunities to reconsider decisions by the more liberal Board under the Obama administration. Such decisions include *Columbia University*,² finding that private university teaching and research assistants are employees under the National Labor Relations Act (NLRA), and *Browning Ferris Industries of California*,³ broadening the definition of joint employers under the NLRA.

The process of making federal agency appointments will be affected by a March 21, 2017 decision by the U.S. Supreme Court. In a 6-2 decision in *National Labor Relations Board v. SW General, Inc.*,⁴ the Court held that under the Federal Vacancies Reform Act of 1998 (FVRA),⁵ an individual nominated by the president to fill a federal agency position requiring Senate confirmation may not hold the position in an "acting capacity." The Court rejected a long-time interpretation of FVRA by both Republican and Democratic presidential administrations that this rule applied only to individuals had been "first

1 Kartikay Mehrotra, "Trump Travel Ban Blocked for as Long as Court Battle Goes On," 60 Daily Labor Report A-5 (March 30, 2017).

2 364 NLRB No. 90 (2016).

3 362 NLRB No. 186 (2015).

4 197 L. Ed. 2d 263 (2017).

5 5 U.S.C. §3345 et seq.

assistants” to the position that was vacated. The Court’s decision is politically significant, as it will affect decisions for filling vacancies in federal agencies during the nomination and Senate confirmation process. As in the current Trump administration, there are often many vacancies in federal agencies during the transition after a presidential election, including the NLRB, the Department of Labor, the Equal Employment Opportunity Commission (EEOC), and the Justice Department.

While still functioning with only eight justices, due to the vacancy created by the death of Justice Scalia last year, the Court reached a unanimous decision on the standard to be applied by a federal circuit court of appeals in reviewing a district court’s decision to enforce or quash an EEOC subpoena seeking evidence from an employer relevant to a pending investigation under Title VII of the Civil Rights Act. The Court concluded that the appellate court should use a limited standard of review of whether the district court abused its discretion.⁶

On January 31, 2017, President Trump nominated and on April 7, 2017, the Senate confirmed Neil M. Gorsuch to the U.S. Supreme Court. Labor advocates opposed Gorsuch’s appointment based on his record as a judge on the federal Circuit Court of Appeals, including judicial opinions favoring business and narrowly interpreting employment rights legislation. Consumer, environmental and labor advocates are concerned, as well, with Gorsuch’s position that the courts should not defer to federal agency interpretations of the statutes enforced by the agencies, including legislation protecting workers’ rights and the environment, and laws regulating financial institutions. Were the Supreme Court to adopt this position, it would have to overrule its 1984 precedent in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁷ which requires judges to defer to federal agencies’ reasonable interpretations of ambiguous language in the statutes they enforce.

At the level of state legislation, there are continued enactments of “right to work” laws, which prohibit unions and employers from bargaining for contract clauses obligating employees who are not union members to pay a fair share of the costs of bargaining for the benefits they receive under the collective bargaining agreement. With the addition of Kentucky and Missouri, there are now 28 states that have enacted “right to work” laws.

⁶ *McLane Company, Inc. v. EEOC*, 2017 U.S. LEXIS 2327 (2017).

⁷ 467 U.S. 837 (1984).