OFCCP Week In Review

By: John C. Fox & Candee Chambers

The "OFCCP Week in Review" is a simple, fast and direct summary of relevant happenings in the OFCCP regulatory environment published every Monday.

OFCCP Week in Review: January 9, 2017

Week of January 2, 2017: Senate Set the Following Confirmation Hearings for Trump Appointees

Note: Various Senate Committees hold confirmation hearings of about 1,100 of the approximately 4,000 political appointees the Trump Administration will appoint to public office to run the federal Executive Branch of government. The 1,100 are the most important of the appointees and pursuant to the balancing of power among the three Branches of the federal government our country's Founders installed in the Constitution was the right of the Senate to provide its "Advice and Consent" to the President as the head of the Executive Branch of the federal government as to treaties, and numerous public servants the President appoints to run the Executive Branch of the federal government:

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." ***See Article II, Section 2, Clause 2 of the United States Constitution***

As a practical matter, the coming "confirmation hearings" of the 1,100 top Trump Administration political appointees serve many important purposes, including to allow the Senate to voice its confidence or displeasure with a particular appointment and thus seek to influence coming policy decisions, provide a platform for the political party out of power in the Senate to ask questions of the nominees designed to put on the record that party's policy views, to introduce the public to the federal government's coming leadership team and to educate the public about the pressing policy issues of the day as the new Administration takes its seat and picks up the reins of power. Most Confirmation Hearings last a few hours, or a day for an important position or a controversial nominee. A two-day Hearing is a trail sign of an important position and a controversial nominee.

The Senate divides its work by subject matter. Accordingly, the Senate Committee on the Judiciary (led by Chairman Sen. Chuck Grassley (R-IA) and Ranking (minority) Member Sen. Patrick Leahy (D-VT) will hold hearings as to all appointees responsible for enforcing the federal government's civil and criminal laws. The Senate Committee on Health, Education Labor & Pensions (H.E.L.P.) chaired by Sen. Lamar Alexander (R-TN) and joined by Ranking Member Sen. Patty Murray (D-WA) will hold hearings as to all employment-related nominees. Having prepped many Republican and Democrat nominees for Senate Confirmation Hearings, I can tell you the prep is grueling, lasts weeks and is fraught with surprises. Many candidates the White House sends up to The Hill for courtesy preliminary interviews come back uncertain as to whether they want to continue. With some regularity, the Senate privately advises the White House that the candidate is just not up to the task and should be withdrawn, and the candidate is silently withdrawn. This does not happen so much with the top 100 "Big Dogs", but does happen regularly to those seeking to fill lesser positions. Recruiters know that trying to fill 4,000 positions is a big job and that not all candidates will be suitable.

The timing of those Confirmation Hearings after the first wave will be uncertain as tradition requires the appointees to FIRST undergo a Top Secret background security check (many including "Yankee White" clearance checks allowing access to The President). With the "War on Terror" and the "War on Drugs" in full force, and with many e-mails still to read, the FBI is currently stretched to the limit. Security check completions will likely dictate schedules for the months after January.

Note: Any "fireworks" you may see in the televised Hearings are merely for public consumption since the conclusion as to almost all of the Hearings is a

certainty since Republicans have enough votes on each Committee to "confirm" (that's the verb) the nominee for office.

Committee on the Judiciary

Tuesday and Wednesday January 10-11 beginning each day at 9:30am: Sen. Jeff Sessions to be Attorney General of the United States

Trail signs: Early start to the day suggests LOTS of questions anticipated; 2-day Hearing. VERY controversial Nominee. Watch for fireworks and much media coverage at these Hearings

Committee on Homeland Security and Government Affairs

Tuesday January 10 beginning at 3:30pm: General John F. Kelly, USMC (Ret.), to be Secretary of Homeland Security

Trail Signs: Short Hearing. Afternoon start. A "walk in the park", unless he unexpectedly says something off-script

Committee on Health, Education, Labor & Pensions

Wednesday January 11 beginning at 10am: Betsy DeVos, of Michigan, to be Secretary of Education

Trail signs: reasonable mid-morning start, but could go the entire day suggesting Democrats have some questions…meaning policy points they want to impress on Ms. DeVos and the public

Committee on Science and Transportation

Wednesday January 11 beginning at 10:15am: Elaine L. Chao

Trail signs: Late morning start; Former Secretary of Labor under George W. Bush (#43); married to Senate Majority Leader Mitch McConnell; first Asian female Cabinet Member in U.S. history; Harvard MBA. Done by lunch

OFCCP Week in Review: January 23, 2017

January 17, 2017: Puzder Confirmation Hearing Set for Thursday, February 2, 2017

The Senate Health, Education, Labor and Pensions Committee will hold the nomination hearing for Andrew Puzder to be the next Secretary of the U.S. Department of Labor.

January 18, 2017: EEOC Released its FY2016 Enforcement and Litigation Report–Highlights Include:

- **The number of Charges filed with state and federal human rights agencies/EEOC was 91,503, but the agency resolved a whopping 97,443 Charges and thus lowered its FY2015 backlog of slightly over 76,000 Charges by 3.8% to 73,508, but decreased its back pay collections by almost 20% from FY2015 by collecting only a bit more than $482M in back pay under all of the statutes the EEOC enforces.**
- **Florida (with 8.3% of all Charges), California (6.4%), Georgia (5.8%) and Illinois (5.5%) led the country (in that order) with the highest number of Charges filed. Alaska, Idaho, Maine, Montana, New Hampshire, North Dakota, South Dakota, Vermont, and Wyoming all weighed-in at the other end of the Charge-filing spectrum with only double digit Charge filing numbers (only 1/10 of one percent or less in each state).**
- **Equal Pay Act Charges continued to be few in number despite the political hue and cry about perceived compensation discrimination: Charging Parties filed only 1,075 EPA Charges nationwide. The EEOC/state Human Rights agencies "Administratively Closed" (usually for want of jurisdiction) 202 (16.8%) of those Charges and found "No Reasonable Cause" to believe a pay violation existed (i.e. employer's position upheld that no unlawful discrimination had occurred) in an additional 772 (64.3%) of the Charges, and found "Reasonable Cause" to believe a violation had occurred (i.e. employee's claim upheld) in only**

57 cases (4.7%) resulting in back pay collections totaling $8.1M, nationwide.

- **The big surprise was the EEOC's publication for the first time of LGBT Sex-based discrimination Charges now that the EEOC has taken the legal position that sexual orientation and gender-identity discrimination are both independently unlawful pursuant to Title VII. The EEOC reported 1,768 LGBT Charges nationwide (many more Charges than the Equal Pay Act generates annually, for example) of which there were 282 "Administrative" Closures (17.1%), 1,114 (67.6%) "No Reasonable Cause" Determinations and 61 (3.7%) "Reasonable Cause" Determinations.**

January 18, 2017: EEOC Released Eight Q&A's Regarding "Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights"

While intended for rejected applicants and employees, this new informal guidance is a quick read and a useful and faithful summary of the law under the Americans with Disabilities Act prohibiting discrimination against those individuals impaired by a variety of mental health disabilities.

January 19, 2017: Jenny Yang, Punches Out as the EEOC's Chair with a "Progress Report" = Looking Back at the 8 Years of the Obama EEOC: Term Not Yet Expired So She is Hanging Around as a Commissioner

While Ms. Yang's term on The Commission is not set to expire until July 1, 2017, The President has the right to identify the Chair of the EEOC from among the EEOC's Commissioners. Ms. Yang is a Democrat. It is widely expected that President Trump will appoint existing EEOC Commissioner Victoria Lipnic (Republican) to be the next Chair of the EEOC even as The President searches for a Republican to fill an empty Republican Commission Chair. The President may appoint up to three Members of his own political party affiliation if he cares to do so when Commission seats become available. The Commission currently has three Democrat Commissioners and one Republican Commissioner and 1 vacant Republican Commission seat. When Ms. Yang's term expires July 1, 2017, President Trump can then appoint a third Republican and presumably may then control the political agenda of the Commission. This has important implications for the EEO-1 Report Summary Pay Data Revision which Republican lawmakers have targeted for repeal. Employers will have to be patient since it will thus take until probably early Fall 2017 for The EEOC to withdraw its EEO-1 compensation data reporting

requirement (as is widely expected). No worries, though: the 2017 EEO-1 Report with the compensation data report (if it does somehow survive) is not due to be filed until March 2018. Lots of time.

January 20, 2017: Donald J. Trump Took the Oath of Office to Become the 45th President of the United States

January 20, 2017: Senate Confirmation Votes for Trump Senior Nominees Began

Our January 9, 2017 WIR reported the then upcoming dates of *Confirmation Hearings* for Trump nominees to high government posts affecting Employment and Civil Rights issues, including Sen. Jeff Sessions for Attorney General of the United States; General John F. Kelly USMC (Ret) to be Secretary of the Department of Homeland Security; Betsy DeVos to be Secretary of Education and Elaine Chao to be Secretary of Transportation. All Trump Administration nominees subject to the Senate's right of *"Advice and Consent"* not only must first undergo Confirmation Hearings before the various Committees of the Senate responsible for the subject matter of the nominee's federal agency to be, but hereafter they must stand for a *"Confirmation Vote"* of the Senate which must vote its approval of the Nominee by majority vote. There is always political drama as to the order of the nominees the White House presents since each Senate vote creates an opportunity for Senators to make floor speeches about the Nominees, public policy issues the Nominees will be responsible to handle, the President, and the economy. Senators often see Confirmation votes also as yet another opportunity to influence public opinion on matters of public policy, and to show themselves at the heart of the debate…often makes for biting, and sometimes, even scathing TV soundbites.

- **General John F. Kelly USMC (Ret): Confirmed. General Kelly is now Secretary Kelly, Secretary of the Department of Homeland Security**
- **Elaine Chao: Pending, to be Secretary of Transportation. Could come today, Monday.**
- **Sen. Jeff Sessions: Controversial vote to come this week to become Attorney General**
- **Betsy DeVos: Controversial vote *likely* to come this week to become Secretary of Education**

OFCCP Week in Review: January 30, 2017

Monday, January 20, 2017: Trump Froze New Regulations Pending Review

In a Memorandum for the Heads of Executive Departments and Agencies, President Trump's Chief of Staff, Reince Priebus on the President's first day in office ordered all federal Executive Branch agencies as follows (in an effort to stop all pending, proposed or Rules heading to the Office of the Federal Register (OFR) other than emergency Rules affecting national security, public safety and/or health so the new Trump political team could get into their offices and make informed decisions about the pending Rules):

1. **"…send no regulation to the Office of the Federal Register (the "OFR") until a department or agency head appointed or designated by the President * * * reviews and approves the regulation…"** *[DE Members: this does not affect OFCCP]*
2. **"… With respect to regulations that have been sent to the OFR but not published in the Federal Register, immediately withdraw them from the OFR for review and approval…".** *[DE Members: this does not affect OFCCP and misses the EEOC's EEO-1 Revision]*
3. **" … With respect to regulations that have been published in the OFR but have not taken effect, as permitted by applicable law, temporarily postpone their effective date for 60 days from the date of this memorandum, subject to the exceptions described in paragraph 1, for the purpose of reviewing questions of fact, law, and policy they raise. Where appropriate and as permitted by applicable law, you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking…"** *[DE Members: This affects the Fair Pay and Safe Workplaces Rules]*

Monday, January 20, 2017: AAAED Published Notice of an Overlooked Heritage Foundation Report from July 2016 Proposing to Eliminate OFCCP

The American Association for Access, Equity and Diversity (formerly AAAA) published its report titled: "Heritage Foundation Urges the Elimination of OFCCP and Other Civil Rights Programs" on President Trump's first day in

office. AAAED, whose Executive Director is Shirley J. Wilcher (formerly the Director of OFCCP during both terms of the Clinton Administration) has published two links to two Heritage Foundation Reports setting forth suggested "blueprints for reform" of the federal government regulatory agencies in the Administration following the Obama Administration. The Heritage Foundation is a prominent and very conservative "think tank" founded in Washington D.C. in 1973. The Heritage Foundation's views are given serious review in every Republican Administration. It is little remembered now, but John Fox unexpectedly ended up spending about one-third of his time while helping to run OFCCP in the early 1980s fending off a similar contractor-community inspired initiative to streamline and merge the OFCCP into the EEOC. The then Secretary of Labor opposed that plan, and after four years of struggle, the merger plan failed. However, this is a popular idea which never seems to die, so the new Secretary of Labor will undoubtedly dust off the various merger or elimination ideas (remember the "Mend it; Don't End it" campaign President Clinton started by coining the phrase and which Shirley championed?) and then make a policy determination about how to proceed.

Tuesday, January 24, 2017: Money Magazine Reported that the USDOJ Division of Civil Rights May be on the Budget Chopping Block

Quoting and confirming The Hill newspaper's report of the week before that budget documents leaking out on Capitol Hill identify 17 federal agencies some Members of Congress and reportedly the Trump White House favor eliminating entirely to reduce the federal deficit including the Division of Civil Rights ("DCR") at the U.S. Department of Justice. OFCCP is not on this list. The Congress and the Obama White House last year budgeted DCR at $156M and is considered one of the three leading civil rights agencies in the country (along with the EEOC and the OFCCP). The DCR employs only about 750 employees, although most of them are lawyers. While Government contractors subject to OFCCP's jurisdiction rarely see or tangle with DCR, OFCCP has recently referred one case (Entergy) to DCR for enforcement and for defense of a lawsuit Entergy filed against OFCCP seeking a Declaratory Judgment whether OFCCP had properly selected it for audit. Otherwise, DCR's primary focus is non-discrimination in the states and federal government as to employment, education, hate crimes, and famously recently investigations into complaints alleging that local police departments were using excessive force as to people of color allegedly because of their race. There is scant chance Republicans will seek to abolish DCR, although all federal budgets of civil agencies of the Executive Branch will face challenge for FY2017 (budget overdue) as

President Trump now begins to try to wrestle to a lower number the ever-expanding budget of the federal Executive Branch of government.

Wednesday, January 25, 2013: Trump Named EEOC Commissioner Victoria A. Lipnic Acting Chair of the Commission

While we would like to say we were prescient in our prediction in last week's WIR that President Trump would name Commissioner Lipnic to be the Chair of the EEOC, it was inevitable once one understands how The Commission works. While the EEOC's Press Release reporting Ms. Lipnic's nomination mentions that President Obama twice nominated Ms. Lipnic to sit as a Commissioner of the EEOC, she is a Republican and served as a political appointee at USDOL in the George W. Bush Administration.(the son #43). The Obama appointments came because The President has authority only to appoint three of the five EEOC Commissioners from his own political party, making The Commission one of the more challenging federal Executive Branch agencies for each White House to manage and control. Commissioner Lipnic is only the "Acting" Chair until the Senate HELP Committee can hold Confirmation Hearings and the Senate can thereafter hold a Confirmation Vote about her nomination pursuant to the Senate's constitutional role to provide the Executive Branch of government it's "Advise and Consent."

Thursday, January 26, 2017: Puzder Confirmation Hearing Now Pushed Back to Tuesday February 7

Amid continuing rumors from Mr. Puzder's friends and close Republican allies that he may now not want the job as U.S. Secretary of Labor given the pushback and harsh criticism he has engendered from Democrats and labor unions, the Senate HELP Committee has delayed Mr. Puzder's confirmation Hearing for a third time. (HELP = Health, Education, Labor and Pensions). The new date is Tuesday February 7 after previous re-sets from January 12, to January 17 to February 2. This is somewhat extraordinary handling for a Cabinet-level position so the process is now garnering as much attention as the initial controversy of Mr. Puzder's nomination. The latest re-set came following a demand from Patty Murray (D-WA), the Ranking Member of the Democrats on the Senate HELP Committee for submission of Mr. Puzder's "paperwork." The so-called paperwork includes voluminous candidate disclosures to assist the Senate HELP Committee formulate questions to Mr. Puzder at his Confirmation Hearing. Mr. Puzder, however, is a prolific and thoughtful writer about human resources and government regulatory issues and is also the CEO of a large company and an investor and entrepreneur making his "paperwork" somewhat larger than the public footprint of many

candidates for cabinet positions. The delay in confirming Mr. Puzder is now causing a noticeable delay in transition at USDOL as all employees at the Department now await a new leader, new directions and new political appointees to carry out those new instructions and new missions.

Monday, January 30, 2017: Trump Executive Order Calls for 2 Fewer Federal Rules for Each New Rule, and a Zero Sum Game

Taking a novel approach to the reduction of federal regulations, President Trump today issued an Executive Order to all federal Executive Branch Agencies titled "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs." This new EO requires federal agencies to [DE Members: we have yellow highlighted the most important new requirements]:

1. **"... In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process."**
2. **"Regulatory Cap for Fiscal Year 2017.**

    a. **Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.**
    b. **For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).**
    c. **In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this**

subsection shall do so in accordance with the Administrative Procedure Act and other applicable law."

3. **"Annual Regulatory Cost Submissions to the Office of Management and Budget.**

    a. **Beginning with the Regulator *** for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.**
    b. **Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.**
    c. **Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.**
    d. **During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.**

OFCCP Week in Review: February 6, 2017

Monday, January 23, 2017: OMB Approved OFCCP'S Old Section 503 Self-Identification Form for Continued Use Without Change

Pursuant to the Paperwork Reduction Act, the Office of Management & Budget ("OMB") must review and approve all paperwork federal executive agencies

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(like OFCCP) send to 10 or more members of the public or require 10 or more companies in its regulated community to use (like Government contractors subject to one or more of the three "statutes" OFCCP enforces). OMB usually authorizes the agency to continue to use the requested paperwork for three years before again reviewing and re-authorizing the agency to continue to use it and to continue to impose cost and time impacts on the regulated community through the requested paperwork. It is hard to believe that three years have now already gone by since OMB first approved for use on March 24, 2014 OFCCP's mandatory "self-identification form" (known technically as form CC-305) to invite job-seekers, applicants and employees with disabilities to self-identify. Here is a link to the Employer Assistance and Resource Network report of OMB's action: http://www.paproviders.org/archives/Pages/MR_Archive/OMB_Form_Approved_022414.pdf. You may find the newly approved form (making no changes to the form Government contractors have used for the past three years) here.

Tuesday, January 30, 2017: White House Press Office Written Statement Says Trump Will Leave Intact Obama LGBT Executive Order

Amid White House leaks that originally reported The White House was drafting an Executive Order to withdraw former President Obama's Executive Order 13672 which Obama had signed into law on July 21, 2014, the White House strongly and categorically dismissed the suggestion that President Trump favored a roll back of LGBT rights. President Obama's 2014 EO recognized legal protections for Lesbian, Gay and Transgender workers and citizens. The Trump White House Press Office published the following statement reiterating President Trump's campaign statements that he favored both gay rights and "had no problems with" gay marriage to put the rumor to rest of an impending Executive Order to roll back such rights. You may read the full text here of the White House's statements or you may read the key content as follows:

"President Donald J. Trump is determined to protect the rights of all Americans, including the LGBTQ community. President Trump continues to be respectful and supportive of LGBTQ rights, just as he was throughout the election. The President is proud to have been the first ever GOP nominee to mention the LGBTQ community in his nomination acceptance speech, pledging then to protect the community from violence and oppression. The executive order signed in 2014, which protects employees from anti-LGBTQ workplace discrimination while working for federal contractors, will remain intact at the direction of President Donald J. Trump."

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Having briefly covered the White House as a news reporter and having worked with the White House for four years as a political appointee at OFCCP, the trail signs left from the two differing reports and the Press Office's written refutation of the early leaks strongly suggests a deep rift had occurred among key advisors to the President. The President then decided to quickly end the debate in one fell stroke though the simple written statement his Press Office released. This statement also signals that President Trump is willing to stand up to conservative Republicans, evangelicals, and the Catholic and Baptist Churches on issues about which he feels strongly. Nonetheless, there are powerful Democrat and Republican political forces on the other side of the LGBTQ issue as ENDA (the Employment Non-Discrimination Act) has failed to pass the House and Senate 41 times in a row over the last 42 years (there was one year it was not introduced), including during terms when Democrats had control of the House, Senate and White House all at the same time. Whether President Trump can now combine his trademark stubbornness with his prowess for deal making to convince the House and Senate to follow him and enact ENDA will be a fascinating study in the collision of politics, power, deal making and religion.

Tuesday, January 31, 2017: Senate H.E.L.P. Committee Delayed Mr. Puzder's Confirmation Hearing, Indefinitely

The Senate Health, Education, Labor and Pensions Committee (H.E.L.P.) delayed its confirmation Hearing for the fourth time after Ranking Member Patty Murray (D-WA) complained that Secretary of Labor nominee Andrew Puzder had not yet turned in all of his financial "paperwork." The HELP Committee has stated it will wait to reschedule Mr. Puzder's Confirmation Hearing until the Office of Government Ethics receives and submits to the Committee all the usual conflicts of interest paperwork (which in Mr. Puzder's case is apparently voluminous because of his substantial business ownerships). Four re-sets and an indefinite delay of a confirmation hearing is unprecedented in modern history for cabinet nominees and is definitely a significant event.

In unrelated, but highly politically relevant actions, two moderate Republican Senators (Lisa Murkowski of Alaska and Susan Collins of Maine) on Wednesday February 1, 2017 stated they might break ranks with the Republican leadership and vote against President Trump's nominee, billionaire Betsy DeVos, to be Secretary of the U.S. Department of Education. Republicans control the Senate by a slim majority (see below story concerning the "Beginning of the End of the Blacklisting Rule") and can afford to lose only three votes on the Senate floor. The Murkowski/Collins announced defections

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from Republican voting ranks was the opening bell signaling that intense lobbying is indeed underway on Capitol Hill to defeat several of the more controversial of the President's nominees, including DeVos and Puzder. It is entirely possible, too, that Mr. Puzder will simply choose to "take his ball and go home" fed up with the politics of Washington and feeling he could do more on the outside through his prolific writings on the current poor state he perceives of Labor policies in the United States. What this continued delay in the seating of a new Secretary of Labor means for the Labor Department is that the Department is having a slow transition to the Trump Presidency. Indeed, most of the former Obama Administration policies and operations day-in and day-out continue as before without the Trump influence. "Business as usual."

Tuesday, January 31, 2017: Trump Nominated Conservative 10th Circuit Judge Neil Gorsuch to the U.S. Supreme Court_Fist Fight to Follow

While Democrats and political commentators in the press complained that President Trump was "changing the channel" so quickly in his blitz of daily new Executive Orders and policy initiatives, The President nominated conservative and distinguished 10TH Circuit Judge Neil Gorsuch (49 years of age) to sit on the Supreme Court of the United States ("SCOTUS"). If confirmed, Judge Gorsuch would fill the seat of former SCOTUS Justice Antonin Scalia who died in office last year. Judge Gorsuch has sat on the Tenth Circuit bench for 10 years (since 2006). (The United States Court of Appeals for the Tenth Circuit covers the western states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming). Judge Gorsuch is an ivy-leaguer who graduated from Columbia University, the Harvard Law School class of 1991 (where he was a classmate of Barack Obama), went on to a prestigious Scholarship to attend Oxford after his legal education, and then clerked on the SCOTUS for both former Justice Byron White and then currently sitting Justice Anthony Kennedy. Like the Tenth Circuit Court generally, Judge Gorsuch is known as a reliably employer-friendly judge. Nonetheless, Judge Gorsuch has also ruled in favor of two employees in retaliation cases, one pregnancy discrimination case and one political bias case (state employee). Judge Gorsuch's two most important case decisions have come in the Administrative Law arena and in interpreting the federal Religious Freedom Restoration Act in the famous "Hobby Lobby" case which eventually went to the U.S. Supreme Court. Burwell (Secretary of HHS) v. Hobby Lobby Stores, Inc. , 573 U.S. ___ (2014). The U.S. Supreme Court affirmed Judge Gorsuch's concurring opinion in favor of Hobby Lobby. (Hobby Lobby upheld a business owner's religious objection to pay for workers' contraception costs the Affordable Care Act (i.e. Obamacare) requires employers to pay.

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If confirmed to a seat on the SCOTUS, however, Judge Gorsuch could have the greatest impact of federal administrative law to reign in the era of federal executive agency dominance of the Congress. (The Congress passes about 100 statutes per year into law while the federal Executive Branch agencies issue an average 4,000 final Rules (i.e. regulations) per year). Indeed, Judge Gorsuch appears to have come to the attention of the Trump Administration because of his lead opinion in Gutierrez-Brizuela v. Lynch , 834 F. 3d 1142 (August 2016). Even *The Washington Post* **took notice of Judge Gorsuch's concurring decision and the day after the Court reported the decision** *The Post* **ran an article specifically about Judge Gorsuch's opinion and the battle-on for** *Chevron deference***....a key concept underlying the work of almost every** *Washington Post* **subscriber.** *The Washington Post* **instantly understood that the legal battle of our decade and the threat to Washington's power was now front and center. This very recent case decision involves head-on the very important (although obscure to even lawyers unfamiliar with Administrative Law) legal issue of so-called "Chevron deference." Just prior to his death, Justice Scalia wrote in an important USDOL case before the SCOTUS that he was hopeful to bring on a case finally challenging "Chevron deference" to administrative regulations and overturning the** *Chevron* **case holding. Judge Gorsuch may well be the torchbearer to carry that flame forward. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc , 467 U.S. 837 (1984) established the Administrative Law principle that courts interpreting a Congressional statute could not overrule an administrative agency interpretation of the statute it was charged to enforce if the agency's interpretation, embodied in a Rule (i.e. regulation) was not plainly in error. In other words, an agency could enlarge or even ignore Congressional direction in a statute so long as there was some plausible basis for the agency's position and interpretation, however unlikely and far-fetched that interpretation might be. Rather, the Courts had to "defer" to the agency's even head-scratching and hard to imagine interpretation and the Court could not substitute it's reading of the statute for that of the agency's interpretation unless the agency was just plainly wrong. Huge power shift to the federal agencies and the President. Then along came the case of National Cable & Telecommunications Assn. v. Brand X Internet Services , 545 U.S. 967 (2005) which shocked to their core those who advocate limited government. The SCOTUS held in** *Brand X* **that a federal agency could even overrule a SCOTUS' decision interpreting a statute differently than the agency IF the agency merely issued a final Rule after the SCOTUS' opinion interpreting the statute at issue differently than the SCOITUS had previously interpreted the statute. WHOA! Gasoline on the fire for small government advocates. The SCOTUS says the statute means X. The agency then issues a Final Rule that the statute means anti-X and the SCOTUS cannot over-rule the agency unless there is no possible way to read the statute to mean anti-X? The Obama**

Administration, interested in expanding the reach of the federal government, then came along and took *Brand X* and ran with it, causing numerous judicial collisions with companies over the last 8 years upset that federal regulators were making our laws and not the federal Legislature. Then, along came Judge Gorsuch last year during the Presidential political campaign in the *Gutierrez* case. Here is Judge Gorsuch in his own plain (no pun intended) words commenting on how he feels about Chevron deference and *Brand X:* and how he understands the role of the federal Executive Branch of government.

***"Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design….**

In enlightenment theory and hard won experience under a tyrannical king the founders found proof of the wisdom of a government of separated powers. In the avowedly political legislature, the framers endowed the people's representatives with the authority to prescribe new rules of general applicability prospectively. In the executive, they placed the task of ensuring the legislature's rules are faithfully executed in the hands of a single person also responsive to the people. And in the judiciary, they charged individuals insulated from political pressures with the job of interpreting the law and applying it retroactively to resolve past disputes. This allocation of different sorts of power to different sorts of decision makers was no accident…. [T]o resolve cases and controversies over past events calls for neutral decision makers who will apply the law as it is, not as they wish it to be.

Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights. What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts? They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice. Effectively leaving parties who cannot alter their past conduct to the mercy of majoritarian politics and risking the possibility that unpopular groups might be singled out for this sort of mistreatment—and raising along the way, too, grave due process (fair notice) and equal protection problems…It was to avoid dangers like these, dangers the founders had studied and seen realized in their own time, that they pursued the separation of powers….

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Yet this deliberate design, this separation of functions aimed to ensure a neutral decision maker for the people's disputes, faces more than a little pressure from *Brand X*. Under *Brand X*'s terms, after all, courts are required to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies. [case omitted] By *Brand X*'s own telling, this means a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' ... but is instead subject to revision by a politically accountable branch of government....

Quite literally then, after this court declared the statutes' meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals. If that doesn't qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might."

Chevron Deference is one of the most important legal issues of our day and addresses one of the defining core differences between Democrats and Republicans harking back to the 1790s to the days of Jefferson (small federal government states' rights advocate and leader of the Anti-Federalists movement) and Hamilton (strong central government advocate and leader of the Federalists movement). Watch for Democrats to try to stall Judge Gorsuch's nomination so that this issue can hopefully be decided in his absence (and thus not cycle through the court again for another 10 years or so). The ultimate problem, though, for big government advocates is that Judge Gorsuch is only 49 years old and Ruth Bader Ginsburg (a big government advocate) is almost 84 years old (and will be 88 before President Trump's 4 year term of office is complete). So, even apart from attempting to delay Judge Gorsuch's arrival at the SCOTUS, the Democrats will dig in for a ferocious toe-to-toe dirt fight to try to keep Judge Gorsuch off the court since he represents a bigger threat to big government advocates than does even President Trump.

Wednesday, February 1, 2017: Senate Judiciary Committee Sends Senator Sessions Nomination to be Attorney General to Senate for Full Vote

Senate Majority Leader Mitch McConnell has not yet scheduled the date of the Senate vote to confirm Senator Jeff Sessions (R-AL) to be the next Attorney General following the Senate Judiciary Committee's February 1 vote (along party lines) to send Senator Session's name to the full Senate for a Confirmation vote. While the median time from Committee approval to full Senate floor vote confirming the nominee has historically been one day,

Senator McConnell chose to proceed cautiously as to Senator Sessions given the continuing unrest and public discourse throughout the country about President Trump's Executive Order banning travel into the United States from seven Middle Eastern countries with known terrorist populations and reportedly poor internal terrorist vetting policies and procedures. The Justice Department has a central role in immigration policy and enforcement and is already in federal court litigation over the travel ban. As of press time, Democrats in the U.S. Senate have been very successful in delaying Committee and floor votes to advance into office Trump nominees subject to the "Advise and Consent" of the Senate. At press time, the Senate had confirmed only six Cabinet nominees [Mattis (98-1); Haley (96-4); Chao (93-6); Kelly (88-11); Pompeo (66-32) and Tillerson (56-43), each with a shrinking margin of success.].While it seems like it has been longer, the President has been in office slightly more than only two weeks, however. Nonetheless, six Senate confirmations in two weeks is a far cry from the "six or seven" Senator McConnell hoped to have the full Senate confirm on Inauguration Day. Moreover, this is the slowest start in seating Cabinet nominees in modern history and foreshadows probably another two months of head-knocking on Capitol Hill over Trump Administration nominees subject to "Advice and Consent."

Thursday, February 2, 2017: The Beginning of the End of the "Blacklisting Rule" Began with a House Vote to End It; Now Goes to the Senate for a Vote

The Final Rule in question is technically known as the "Fair Pay and Safe Workplaces" Rule, although federal contractors pejoratively have called it the "Blacklisting Rule" even before the FAR Council (i.e. U.S. Department of Defense, General Services Administration and the National Aeronautical and Space Administration) published it's Rule in Final form August 25, 2016, along with U.S. Department of Labor "Guidance" *(see August 29, 2016* ***WIR****)***. The FAR Council and the USDOL drafted their Final Rule and Guidance, respectively, pursuant to former President Obama's direction to do so contained in his July 31, 2014 Executive Order 13673. The Executive Order, Final Rule and Guidance became the number one legislative target for the business lobby to defeat last year so it comes as no surprise the House has now passed—almost as the first order of substantive business in the new Congress– along party lines (236-187) its half of a Joint Resolution (disapproving this highly controversial Final Rule). Click here for a link to the Congress.gov report of the House vote. Click here for a copy of the text of H.J. Res 37 as The House passed it to forward to The Senate for a vote. Click here for the House Education and The Workforce Committee Press Release slamming the Fair Pay**

and Safe Workplaces Final Rule led by a stinging statement from Committee Chair Virginia Foxx (R-NC).

The measure now goes to the Senate for a vote, which was not yet scheduled at press time. A simple majority vote would then send the measure forward to President Trump to sign into law repealing the FAR Council Final Rule. Because Republicans now control the Senate 52-46 (with two independents who caucus with the Democrats), supporters of the Final Rule would have to cause three Republicans to vote against the Joint Resolution (NOTE: that math works out once you recall that the Vice President votes in case of a tie) AND hold all Democrats in opposition to the measure (even though many Democrat Senators expressed their discomfort about the Final Rule to former President Obama). Withdrawal of the FPSW Rule thus seems momentarily inevitable. President Trump is expected to sign the measure into law if and when it reaches his desk and to also issue an Executive Order repealing and withdrawing former President Obama's Executive Order 13673. If the President does sign the measure into law, its immediate effect would be two-fold:

- **to immediately dismiss and end the "Paycheck Transparency" and anti-arbitration components of the Final Rule, along with all other parts of the Fair Pay and Safe Workplaces Final Rule; and**
- **to cause the U.S. Department of Justice to withdraw its defense of the litigation it is currently defending and affirmatively ask the Court to dismiss the pending case in Texas (as now moot) currently challenging the Final Rule and Executive Order 13673 on several different legal grounds. NOTE: On October 24, 2016, an Obama appointed federal District Court Judge in the federal District Court in Beaumont, Texas enjoined** *(see October 31, 2016 WIR)* **all parts of the FAR Council Final Rule OTHER THAN the "Paycheck Transparency" and anti-arbitration components which components went into legal effect January 1, 2017. The federal District Court would then undoubtedly dismiss the lawsuit to bring a final end to all aspects of the so-called "Blacklisting Rule" (including the "Paycheck Transparency and anti-arbitration components: see #1 above)**

Federal Contractors which complied with the January 1, 2017 deadline to initiate the Paycheck Transparency and anti-arbitration components of the Final Rule will have to consider whether to cease doing so after the President signs H.J.Res 37 into law, or whether to continue to comply given the changes the company has already accomplished to its pay stubs in compliance with the

Paycheck Transparency Final Rule and the changes it may have made as to its arbitration clauses, if any.

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