

Smoother Road To Confirmation Seen For New DOL Chief Pick

By **Vin Gurrieri**

Law360, New York (February 16, 2017, 10:12 PM EST) -- President Donald Trump's nomination of former U.S. Attorney Alex Acosta to head the U.S. Department of Labor drew praise from management-side attorneys who believe he will adhere to the administration's less aggressive regulatory posture, while also garnering cautious optimism from unions who see his past public service as a sign he will dutifully enforce labor laws.

In nominating Acosta, who would be the first Hispanic member of Trump's cabinet, the president chose an individual who is no stranger to public service. In addition to serving as U.S. attorney for the Southern District of Florida, the Harvard-educated Acosta held roles under the George W. Bush administration as a member of the National Labor Relations Board and as head of the U.S. Department of Justice's Civil Rights Division.

In the years since, he has also been dean of the Florida International University School of Law, giving him a unique blend of academic and practical legal experience that experts say will likely garner him a far smoother confirmation process than the one that ultimately sunk fast-food executive Andrew Puzder, Trump's first pick for the position who withdrew Wednesday.

When combined, his public and private experiences make Acosta "a well-rounded nominee who presumably has taken into account many different perspectives in all these roles," said Philip Rosen, co-leader of Jackson Lewis PC's labor and preventive practices group, who additionally noted that Acosta has already been confirmed by the Senate on three prior occasions for other positions.

While the outspoken Puzder drew heat over his harsh anti-regulatory positions and a host of controversies relating to his personal life, becoming the first and so far only Trump cabinet pick to not be confirmed, management-side lawyers say the same fate is not likely to befall Acosta.

"He's a much different pick than the first [nominee] for sure," said David Garland of Epstein Becker Green. "Puzder had an extensive record on issues the labor secretary addresses and [he was] a nominee that we could look at and evaluate on those issues. [Acosta's] views aren't as well known as [those espoused by] Puzder."

When it comes to their actual policy positions, Nancy Ross of Mayer Brown LLP like Garland acknowledged that Acosta "is less of a known commodity than Puzder," who was well known for holding strong views against government intermeddling in business, but added that Acosta "will be primarily driven by his boss," referring to Trump and his stated priorities.

So far in the early days of the administration, those priorities have included a less aggressive stance toward regulations, with Trump having called on agencies to review existing rules and issued an executive order mandating that executive agencies eliminate two regulations for every new one they issue.

“That said, he has a reputation of being a champion of diversity, which we may see influence his decisions as secretary,” Ross said.

Steven W. Sufas of Ballard Spahr LLP, for one, said he would categorize Acosta’s potential impact less in terms of outright deregulation and more along the lines of “a re-examination of a number of things the DOL has recently done and whether they went too far.”

But Harold P. Coxson of Ogletree Deakins Nash Smoak & Stewart PC, a longtime labor lawyer who knows Acosta personally, said he believes the major difference between Puzder and Acosta will actually be in style and not necessarily in substance.

“He’s not too different than Puzder as far as his views on current issues, but perhaps he will [approach those issues] in a more acceptable manner,” Coxson said. “His pro-free-market, pro-free-enterprise history is similar to Puzder.”

One area where Puzder and Acosta do sharply differ is in the reaction their nominations have elicited from unions, which came out far more strongly against Puzder than they did Acosta.

For instance, AFL-CIO President Richard Trumka gave Acosta a tentative green light, calling him a nominee that “deserves serious consideration.”

“In one day, we’ve gone from a fast-food CEO who routinely violates labor law to a public servant with experience enforcing it,” Trumka said, while cautioning that “we will of course review Mr. Acosta’s record as thoroughly as we did the previous nominee’s.”

Meanwhile, Mary Kay Henry, president of the SEIU, struck a far less combative tone in her reaction to Acosta’s nomination than the instant criticism she levied toward Puzder when he was nominated in December.

“We will hold Mr. Acosta to the same high standards the American public rightfully expects of our nation’s labor secretary: to advance the interests and needs of wage earners in our economy,” she said in a statement Thursday, a marked departure from her declaration that Puzder was “dead wrong” for working families in a statement she issued when that nomination was announced.

The “less visceral” reaction among labor unions to Acosta’s nomination may be attributable in part to the fact that he is “more of a mainstream nominee” than Puzder and because Acosta “will be more predictable,” according to Sufas.

That predictability, he says, “will give comfort to employers” and, when combined with Acosta’s background and agency bona fides, make the new nominee “immediately confirmable.”

For Coxson, the generally positive reaction toward Acosta lies in his humble upbringing and the fact that, if confirmed, he has ability to take both employers’ and employees’ points of view into account when

making decisions. That perspective, Coxson says, may garner Acosta some Democratic votes during the confirmation process.

“He was the first in his family to attend college and has been a success throughout his career in government,” Coxson said. “He understands wage earners and the aspiration of people to better themselves. He’ll be balanced.”

--Editing by Philip Shea and Aaron Pelc.

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