

Trump administration makes big changes in employment and labor law

■ BENNETT LOUDON

The new administration of President Donald Trump signals significant changes in federal labor and employment issues for businesses that also must cope with New York state's much different set of policies.



Scott Piper

"It seems to me that the federal government, with the Trump administration, is going one way, and New York continues to go the other," said Scott Piper, a partner at Harris Beach Murtha, who participated in an online panel discussion Thursday, hosted by The Rochester Business Journal.

Piper was joined by Jacob Lewis and James R. O'Connor, attorneys at Phillips Lytle LLP. The panel discussion was sponsored by Harris Beach Murtha and Phillips Lytle LLP.

O'Connor discussed changes at the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB).

The EEOC is a bipartisan panel with five presidentially appointed members, including a chair, a vice chair, and three commissioners, O'Connor explained.

The chair, the vice chair, and one of the commissioners are from the majority party. The other two members are from the minority.

"We've got a shakeup in the makeup of the EEOC," O'Connor said.

Andrea Lucas, a commissioner on the minority side during the Biden administration, has been appointed acting chair by Trump, who also took steps to remove the two Democratic commissioners, Jocelyn Samuels, and Charlotte Burrows, O'Connor said.

As a result, the Commission does not currently have a quorum for conducting business.



James R. O'Connor

In her role as chairperson, Lucas, is responsible for administering and implementing policy, while the general counsel, who is not a commissioner, conducts the litigation.

"So, we have the commission that votes, whether or not to sue things, and then the general counsel that actually does the suing," O'Connor said.

Trump fired the Joe Biden-era general counsel Carla Gilbride, and appointed Andrew Rogers in her place.

Burrows has hired a legal team and is expected to sue and challenge her removal.

Former members of many government agencies have sued to challenge their removal, and on Tuesday, a federal judge ruled that the Trump

administration must reinstate one of them, the chair of the Merit Systems Protection Board.

"Whether or not Ms. Burrows or Ms. Samuels ... will sue remains to be seen. And whether or not those suits are successful remains to be seen," O'Connor said.

"But this recent decision from this week should indicate ... that they do have some merit if they want to bring a claim," he said.

O'Connor said that, when Lucas was appointed three weeks ago, she announced her priorities: Rooting out unlawful diversity, equity and inclusion (DEI) motivated race and sex discrimination; protecting workers from anti-American national origin discrimination; defending the biological and binary reality of sex; and protecting workers from religious bias and harassment.

"She controls what the EEOC votes on, and can prevent, litigation from being presented for an approval vote. She can issue, on her own authority, technical assistance documents," O'Connor explained.

The new general counsel will conduct the ongoing litigation, but there are many things that cannot be done without a quorum, he said.

Changing EEOC's strategic plans or enforcement plans would require a vote which can't happen without a quorum, O'Connor said.

But even without a quorum, EEOC can investigate potential violations and prepare those cases right up to the point when full vote would be needed, he said.

When there is a quorum, “those priorities will be carried out rather swiftly, and some of them have already begun,” O’Connor said.

Last week, the EEOC began moving to dismiss six of its lawsuits that were filed under the Biden administration.

That does not require a vote and can be done by the authority of the new general counsel. The six lawsuits, including one in New York, alleged various violations on the basis of transgender, or gender nonconforming workers claiming that their rights had been violated.

“What does it mean for you and your business? You can expect fewer investigations and enforcement actions when the discrimination at issue relates to a person’s transgender status or gender identity,” O’Connor said.

“They are making it very clear that they will no longer be pursuing transgender discrimination complaints and they will be focusing instead on anti-American national origin discrimination, and religious discrimination,” he said.

But the changes at the EEOC do not impact an employer’s legal obligations to comply with New York State law.

“In New York state the Division of Human Rights and the Human Rights Law very explicitly cover transgender employees and protect those employees from discrimination and harassment on the basis of their gender identity,” O’Connor said.

He also touched on changes at the NLRB, which enforces the National Labor Relations Act, that deals with employee rights to organize, seek bet-

ter working conditions and negotiate with their employer.

The NLRB is also a five person board with a general counsel, like the EEOC, and it also lacks a quorum.

The NLRB currently has only two members. There is a chairperson, Marvin Kaplan, a Republican, and David Prouty, a Democrat.

The NLRB needs three members to constitute a quorum.

“So right now the NLRB cannot issue decisions, engage in rulemaking or enforce its decisions until another member is seated,” O’Connor said.

Gwen Wilcox, one of the members removed by the Trump administration, is suing to be reinstated.

The general counsel at the NLRB has more power than the general counsel at the EEOC. The NLRB general counsel has the authority to issue a complaint based on an unfair labor practice and they control what issues are presented to the full board for decisions.

The Trump administration last month fired the Biden-era general counsel and the new acting general counsel, Michael Cohen, issued memos rescinding 15 previous guidance memos issued by the former general counsel.

The prior general counsel took the position that stay or pay provisions are unlawful and violate the NLRA. Stay or pay means that if you are given a benefit by your employer when hired, such as tuition reimbursement, or training, you agree to stay employed for a period, and if you don’t, you’re required to pay back that benefit.

Memos that said that’s a violation of law have been rescinded. The memo from the new general counsel also revoked many memos regarding the rights of student athletes to bar-

gain, or unionize, as well as memos, addressing the NLRB’s aggressive use of injunctive relief.

The memos that alleged that employer use of electronic monitoring violated the NLRA have also been rescinded.

“If you have a unionized workforce or a workforce that is potentially going to organize in the future you are pretty happy right now. And the lack of a quorum means that many enforcement actions can’t go forward for now,” O’Connor said.



Jacob Lewis

Lewis discussed changes to diversity, equity and inclusion (DEI) programs.

Trump signed an executive order on Jan. 20 that directed federal agency heads and commissioners to terminate DEI programs, committees, and positions to the extent possible.

The next day, Trump signed a similar executive order that directed changes to the federal contracting process.

The order demanded that the Department of Labor cease promoting diversity and allowing federal contractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.

The order also requested that the Attorney General submit a report to the President’s office within 120 days, on ways to encourage the private sector to end DEI practices.

“So, while it is permissible to have a DEI program, it’s not permissible to use that program as a means to make employment decisions based solely on a person’s status in a protected class,” Lewis said.