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Changes may be on the way for class, collective actions

The nation may only be a few months into the Trump Administration, but it could shape up to be a fairly good year for employers, particularly those worried about class actions.

So far, President Trump has put forward two pro-employer candidates for Secretary of Labor and a Supreme Court candidate likely to uphold the enforceability of arbitration agreements challenged by collective actions, and republican lawmakers have taken steps to make it more difficult to pursue class action lawsuits.

On the appointment side, President Trump's choice of Neil Gorsuch makes it more likely that the Supreme Court will find that a valid arbitration agreement can bar a wage and hour collective action. If confirmed, Gorsuch, whose history on the 10th Circuit Court of Appeals shows his general support for upholding arbitration agreements, will take the seat left vacant by the death of Justice Antonin Scalia and hear the consolidated cases of *Lewis v. Epic Systems Corp.*, *Morris v. Ernst & Young*, and *Murphy Oil USA, Inc.*, during the 2017-2018 to determine whether agreements that require collective complaints to be arbitrated individually are enforceable.

While President Trump's first choice for Secretary of Labor, former restaurant franchise CEO Andrew Puzder, would likely have supported the rollback of the U.S. Department of Labor's joint employer liability expansions and was a vocal critic of the Affordable Care Act, much less is known about his second candidate's views. After Puzder withdrew his name from consideration, President Trump proposed R. Alexander Acosta, the son of Cuban immigrants who served on the National Labor Relations Board under President George W. Bush and is now the dean of Florida

International University College of Law. If Acosta is approved by Congress, he will be tasked with considering whether to roll back some of the more aggressive reforms made under the Obama Administration, such as the changes to the Fair Labor Standards Act salary threshold and exemption requirements, the implementation of which were stalled by court injunction last November.

On the legislative side, House Judiciary Committee Chairman Bob Goodlatte, R-Va., has introduced legislation aimed at curbing class action lawsuits. H.R. 987, the Fairness in Class Action Litigation Act, increases the burdens placed on plaintiffs to prove that they are a class and forbids attorneys pursuing these cases from previously representing their clients. Several bills bearing the same name have previously passed the House, only to fail in the Senate.

Attorney Glenn Grindlinger of Fox Rothschild's New York office says if the bill passes it will likely "knock out the serial litigators and greatly diminish the ability of class counsel to consistently bring the same type of action with the same plaintiff" against different businesses. While this won't affect collective actions under the FLSA, the legislation could affect class actions alleging wage and hour violations, harassment or discrimination.

Attorney Randi Kochman, the chair of the Employment Law Department at law firm Cole Schotz, P.C., says now it's just a matter of waiting and seeing what happens. In the meantime, she urges employers to audit their pay practices at least annually and make sure they're paying everyone properly and that their paperwork is in order so that they can avoid class action issues in the first place. ■