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## Acosta Hearing Expected To Drill Down On DOJ Tenure

By **Braden Campbell**

Law360, New York (March 21, 2017, 7:31 PM EDT) -- Compared to the acrimony that has met many of President Donald Trump's cabinet-level appointees, the response to Alexander Acosta's nomination to serve as secretary of labor has been unique in its absence of major controversy, with Wednesday's confirmation hearing likely to focus on minor issues from his stints as assistant attorney general and U.S. attorney in Florida's Southern District.

Far less immediately offensive to workers' advocates than the administration's first pick for labor secretary, Carl's Jr. CEO Andrew Puzder, the Washington, D.C., veteran and Florida International University College of Law dean has even won modest praise from labor groups and others predisposed to oppose a Republican president's nominee for secretary of labor.

Thanks to his sterling resume and relatively clean track record, Acosta shouldn't face too many tough questions at his confirmation hearing Wednesday, experts say. But, of course, he will face some.

The biggest knock against Acosta will likely be his subordinate's improper consideration of job applicants' political beliefs when Acosta was assistant attorney general in charge of the U.S. Department of Justice's Civil Rights Division between 2003 and 2005, attorneys say. According to a 2008 report from the DOJ's Office of the Inspector General, deputy assistant attorney general Brad Schlozman violated post-Watergate government accountability reforms by giving a hiring preference to Republican and conservative candidates.

Though the inspector general did not accuse Acosta of signing off on or directing Schlozman's conduct, it criticized him for not keeping a closer eye on his deputy. Acosta opponents could use this oversight to criticize Acosta's fitness to head the DOL, attorneys say.

"Even if he was not found to be liable for anything with respect to his deputy's actions ... the fact that it happened under his watch, he presumably should take some blame for," Foley & Lardner LLP employment partner Don Schroeder said. "I would think [he should] just own it during the confirmation process."

Attorneys speculate that liberal members of the U.S. Senate Health, Education, Labor and Pensions Committee — including Sens. Elizabeth Warren, D-Mass.; Bernie Sanders, D-Vt.; Al Franken, D-Minn.; and Patty Murray, D-Wash. — will lead the opposition to Acosta's nomination. Warren has already drawn battle lines around the politicized hiring, saying Acosta's DOJ tenure "raises serious concerns about whether [he is] capable of running a large government agency independently and without undue political influence."

A letter Acosta sent to a federal judge during his time with the Civil Rights Division will also likely be fodder for his opponents, attorneys say.

In 2004, Acosta weighed in uninvited on an Ohio federal court case over Republicans' attempt to purge from voter rolls of tens of thousands of voters, most of whom were black. That Acosta, then a high-ranking member of the DOJ, would chime in on a case he wasn't personally involved in to bolster a political party's case could be a point of criticism for committee Democrats.

"I could see them trying to get some mileage out of that," said Joseph Greenwald & Laake PA employment litigator Brian J. Markovitz. "It seems like, given that he was in the executive branch, he shouldn't have been reaching out to the judicial branch. In other words, [critics might argue] he doesn't know appropriate boundaries between different branches."

The last on the list of potential improprieties from Acosta's DOJ tenure stems from his stint as U.S. attorney for the Southern District of Florida after leaving the Civil Rights Division. In 2008, Acosta reportedly agreed not to file federal charges against financier Jeffrey Epstein over his alleged role in a prostitution ring in exchange for his copping to state charges that he solicited a minor for prostitution.

Opponents have argued that Acosta let Epstein, who served 13 months in prison, off easy. Murray signaled last week that this deal might be part of the Democrats' line of attack, writing the DOJ to request several sets of documents, including "any communications authored by or referencing Mr. Acosta related to the investigation of Jeffrey Epstein."

Yet whereas Puzder, a lawyer-turned-businessman with no experience in Washington, had questionable bona fides for leading the DOL, Acosta's list of qualifications is nearly airtight. The son of Cuban immigrants, Acosta would be the Trump administration's sole Hispanic member if confirmed. He earned his undergraduate degree at Harvard University and his law degree at Harvard Law School before clerking for future U.S. Supreme Court Justice Samuel Alito when he was a judge for the Third Circuit.

Acosta was an employment attorney with Kirkland & Ellis before making the rounds in Washington D.C., first as a deputy assistant attorney general with the DOJ, then as a member of the National Labor Relations Board, and then back to the DOJ as head of the Civil Rights Division.

But his enviable resume has one hole that will likely draw questions from supporters and detractors alike: He has never served in the agency he's now nominated to head. Because of this, there's little evidence available that can shed light on his labor policy views.

Acosta's eight-month **tenure with the NLRB** certainly evinces the pro-management slant desired by Republican administrations, but members of the HELP Committee will likely want to know how that translates to areas of DOL purview, such as wage-and-hour administration and the previous administration's interest in expanding joint employer liability.

"The Obama administration had been extraordinarily aggressive in protecting low-wage workers ... the [Thomas] Perez administration was extremely aggressive in pushing an agenda to expand the state of the law regarding joint employer relationships and single-employer relationships," Ballard Spahr Denver office managing partner Steven W. Sufas said. "I think you'll get some questions there."

Republican Sen. Lamar Alexander, the HELP Committee's chairman, is expected to plumb Acosta's policy views. According to Press Secretary Taylor Haulsee, Sen. Alexander, R-Tenn., will ask about

Acosta's "views on creating an environment for American workers to succeed ... and the importance of rolling back ... Obama-era regulations."

Attorneys told Law360 they're eager to hear how Acosta will handle specific pieces of Obama-era policy now imperiled by private suits and the Trump White House. Key rules include the DOL's fiduciary rule, which elevates standards for retirement advisers; the persuader rule, which requires companies to disclose when they receive advice on union campaigns even if advisers don't speak directly to workers; and the doubling of the salary threshold for the white-collar overtime pay exemption.

The DOL is also one of a number of agencies facing steep cuts under Trump, who last week unveiled a budget blueprint slashing the department's funding by 21 percent to \$9.6 billion. Aside from listing several grant programs set to be scaled back or cut, **the budget says little** about how the agency is supposed to shave \$2.5 billion off its current budget. As the man who may be tasked with making ends meet, Acosta will likely be quizzed on his priorities, attorneys say.

"I don't know how Alex is going to handle these things," Littler Mendelson PC shareholder and Workplace Policy Institute co-chair Michael Lotito said. "He probably hasn't been briefed on them, perhaps deliberately. I think the issue of these cuts that have been proposed with respect to job training will be of some interest."

Puzder, who on Tuesday abruptly left his job as CEO of Carl's Jr. parent company CKE Restaurants Holdings Inc., drew a torrent of criticism over his alleged abuse of his ex-wife, his perceived sexism and his company's history of labor violations. There's comparably little with which Acosta's opponents can impugn him, attorneys say.

Because the bar was set so low by Puzder, attorneys predict Acosta has a much clearer road to confirmation. That his resume is exemplary by career public servant standards makes him almost a shoo-in for the job, they say.

"Democrats, I think, will feel that they got a pound of flesh for Puzder's abrupt withdrawal," Schroeder said. "This nominee seems to have all the requisite talents that you would want in somebody as a secretary of the cabinet ... his resume kind of speaks for itself, so I think it'll be a tough road for Democrats to really mount any challenge."

A representative for Murray did not respond to a request for comment Tuesday.

--Additional reporting by Vin Gurrieri. Editing by Philip Shea and Catherine Sum.