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Loophole Lets DOL Install Wage Chief While Nomination is Pending

Rebecca Rainey

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A law aimed at checking the executive branch's ability to install temporary leaders at federal agencies would have prevented Jessica Looman from continuing to lead the US Labor Department's Wage and Hour Division as "acting" administrator when she was tapped to head the division permanently.

So when the White House officially nominated Looman July 27 to serve as administrator of the DOL's wage arm, the Biden administration dropped that "acting" name and "delegated" the duties of the position to her under a new title, allowing her to lead the agency while her nomination is pending in the Senate.

The maneuver, while legal, dances around the intent of the Federal Vacancies Reform Act of 1998, which was passed to give the president some time to install acting leadership while nominations go through the at-times lengthy Senate confirmation process, lawyers and academics said.

"Just because something is legal doesn't make it desirable," [Anne Joseph O'Connell](#), a law professor at Stanford Law School, said of the arrangement, adding that it couldn't have been Congress' intention at the time "that delegation would serve such a large workaround to the constraints on acting officials."

A DOL spokesperson said after Looman's nomination to be administrator, "she will continue to serve in the capacity of Principal Deputy Administrator at the Wage and Hour Division, in which role she may perform all the delegable duties of the Administrator position."

The non-delegable duties will "revert to the Secretary of Labor," the spokesperson said. "The Wage and Hour Administrator position is vacant, and no official is serving in an acting capacity."

'No Practical Difference'

The Federal Vacancies Reform Act prohibits officials from serving as an "acting" officer in the position for which they're nominated. [Looman was appointed](#) principal deputy administrator in January 2021, the second-highest ranking position at the agency, which doesn't require Senate confirmation. She had been serving as "acting" administrator of the wage division since June 2021.

Even though Looman can no longer hold the “acting” title, she will continue to lead the agency largely uninterrupted. Only actions that are considered “exclusive” or “non-delegable” functions of a particular office can be invalidated under the Vacancies Act, meaning Looman can still perform all “delegable” functions of the Wage and Hour Administrator without technically violating the law.

“In this case for the administrator, you can simply say, ‘Oh, we’re not making you officially the acting officer under the Vacancies Act, which comes with all these limitations, we’re simply going to give you all of the delegable duties that this position has,’” said [Thomas Berry](#), a research fellow at the Cato Institute. He added that the courts typically have taken a broad view of what job duties can be passed down to temporary officials.

“And if all of those delegable duties are, in fact, all of the duties of the position, then there’s no practical difference between someone in terms of the powers they have,” he added. “The only difference is they don’t have any of the limitations that the Vacancies Act was intended to place on them.”

Berry said that while he’s seen federal agencies find similar workarounds to avoid time limits on “acting” officials under the Vacancies Act, he’s never seen it used to avoid the law’s restriction on someone serving as both the acting officer and the nominee to the office.

“If the president can select someone to have all the powers of an office, but without Senate consent, then you essentially have the system that the framers rejected,” he said, “which is a system where the President is the only person who matters and people are making policy decisions that affects people’s lives, even though the Senate has never vetted those people.”

Delegating Authority

Courts have split on whether these arrangements are legal.

Separate rulings in [Gianforte v. Bureau of Land Management](#) at the US District Court for the District of Montana and [Public Employees for Environmental Responsibility v. the National Park Service](#) at the US District Court for the District of Columbia have found that agencies can’t delegate authority around the requirements of the Vacancies Act.

But the US Court of Appeals for the Federal Circuit in [Arthrex, Inc. v. Smith & Nephew, Inc.](#) upheld the legal argument being used in the current scenario at the Wage and Hour Division, that the limitations on who can serve under the Vacancies Act only apply when a temporary official is performing “exclusive” or “non-delegable” duties of the position.

Agencies and courts also have taken a broad view of what top agency position’s job duties are “non-exclusive,” both Berry and O’Connell said, meaning that under the exception, officials like Looman essentially have all the authority they would if they were fully confirmed.

Previous administrations have made similar arrangements. During the Trump administration, [the Government Accountability Office](#) said Social Security Administration Acting Commissioner Nancy A. Berryhill couldn’t continue serving under the title of “acting” after running up the 210-

day limit under the FVRA. Instead, agency officials could “provide for performance of the delegable functions and duties of the Commissioner position,” the GAO’s legal counsel said.

Need for Reform

Gray areas in the law, like the delegation clause, have raised concerns about whether it should be reformed, especially given several high-profile nomination disputes during the Trump administration.

“I think it has been really puzzling to certainly folks like me that we haven’t seen the Senate more concerned about or prioritizing Vacancies Act reform,” said [Liz Hempowicz](#), director of public policy at the Project On Government Oversight. “Because we get instances like this, we have somebody who is now essentially serving without Senate advice and consent, in that position that clearly requires it.”

“If I was a member of the Senate, I would be outraged, regardless of the individual nominee,” she said.