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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Biden Immigration Plans Likely Shielded From ICE Union Deal

By **Asher Stockler**

Law360 (February 4, 2021, 8:22 PM EST) -- The outgoing Trump administration may have tried to hamstring incoming immigration officials with a last-minute union contract, but the effort could run up against constraints in the U.S. Constitution and federal labor-management law.

The agreement between a federal employee union and the U.S. Department of Homeland Security, signed in the waning days of President Donald Trump's presidency, was contained in a whistleblower's report obtained by Law360. On its face, it would allow the union for U.S. Immigration and Customs Enforcement officials to veto any changes to personnel placement or working conditions.

However, several practical and legal considerations threaten to frustrate the Trump administration's last-ditch effort.

Attorneys say that the most immediate remedy newly confirmed DHS Secretary Alejandro Mayorkas could take advantage of is a 30-day review period set out in the Federal Service Labor-Management Relations Statute. Within that 30-day period, set to expire in mid-February, Mayorkas would have wide latitude to cancel any collective bargaining agreement entered into with the department.

The ICE union could still challenge such a move, but it would likely be tied up in litigation for years and DHS may prevail during the pendency of the litigation, according to Joseph Swerdzewski, founder of labor-management consulting firm Joseph Swerdzewski & Associates LLC and general counsel at the Federal Labor Relations Authority during the Clinton administration.

"If Mayorkas disapproves it, depending upon what the ground rules say, it goes back to the parties and they have to renegotiate," Swerdzewski told Law360. "If the union disagrees with this determination, they can file an appeal."

But even after the 30-day period, Mayorkas would likely be able to sweep aside any objection to his implementation of Biden's immigration policy changes, running into more basic constitutional and statutory protections that a private agreement cannot override.

A 1999 opinion from the Office of Legal Counsel on the attorney general's ability to make use of private settlement agreements concluded that these agreements must be rooted in existing statutes. The Federal Service Labor-Management Relations Statute, which outlines the collective-bargaining rights of federal employees, states that nothing in its text can affect the ability of an agency "to determine the mission, budget, organization, number of employees, and internal security practices of the agency."

"The statute has very strong management-rights provisions," Swerdzewski noted. "The union can bargain, but it can only do so after a mission-related decision is made. This deal says they would have the opportunity to say, 'No, we don't want to do that mission.' I've never heard of anything like that."

The agreement, first obtained by The New York Times, would provide union officials with the ability to object to any change in the "policies, hours, [and] functions" of ICE employees. DHS, which oversees

ICE, would not be able to shift its approach to any of these areas without the union's prior consent.

"Let's assume for instance the Biden administration wants to change immigration priorities and just go after hardened criminals, and to do that it makes sense to put two ICE officers in every patrol car," David Seide, the whistleblower's attorney, said. "Putting two people in one car may be a change in working conditions. The agreements appear to give the union the power to approve that change."

The fear, as Seide explained, is that a generous reading of the agreement could stretch into policy reforms that would otherwise be the purview of any administration, including President Joe Biden's campaign promise to roll back the Trump administration's immigration agenda.

"I've never seen anything like that in my 40 years that I've worked on these issues," Swerdzewski said. "Not even anything close to that. No agency has agreed to anything like that. It's outrageous."

Ken Cuccinelli, a noted immigration restrictionist who previously served as the second-highest-ranking DHS official, was responsible for entering into the agreement with the ICE union, the whistleblower's report said. His signature appears on the documents alongside that of National ICE Council 118 President Chris Crane.

"If the union doesn't agree in writing, it may be able to stop [a] change from being implemented," Seide explained. "In other words, their actions (or non-actions) may affect the agency's proposed changes to programs and policies."

In a statement to Law360, a DHS spokesperson said the department takes whistleblower complaints seriously "and supports the rights of whistleblowers to engage in this protected activity."

"As provided for by statute, the department is reviewing the terms of the agreement," the spokesperson said.

According to Neal Devins, professor of constitutional law at William & Mary Law School, a long-standing "sovereign breach" doctrine protects the federal government when it breaks private agreements on pure public-policy matters.

"Presidents have a certain amount of policy discretion, and that policy discretion is embedded in the separation of powers," Devins told Law360. "No administration can prevent a successor administration from being able to exercise what the U.S. Constitution provides each president, which is the ability to be the head of the executive branch with discretion about what the policy priorities are."

Additionally, Swerdzewski said that a provision in the agreement may be in violation of procurement language, if it hampers DHS from contracting out jobs to third parties.

Cuccinelli's former role as "senior official performing the duties of deputy secretary" could also complicate claims the ICE union may have, as the U.S. Government Accountability Office determined in August that Cuccinelli assumed that position unlawfully.

Cuccinelli defended his role in the process in a statement to Law360, characterizing the whistleblower's report as an indication that "I did my job well, to the chagrin of the complainer."

"The union in question has had a significant number of issues that have gone unresolved through multiple administrations," he added. "The process was properly managed and executed under the proper authority and funds were properly stewarded."

Some provisions, though, may be here to stay. One part of the agreement gave ICE employees substantially more time to conduct union business while at work. According to the whistleblower's complaint, the ICE union received about $3 million worth of work-hours for union business. By contrast, one of ICE's sister unions only receives $1.6 million for this "official time."

"This is a sweetheart deal," Swerdzewski remarked. "But that's not necessarily something that the new administration can overturn following agency review."

--Editing by Breda Lund.