

Personnel Moves May Expose Pruitt To Whistleblower Claims

By **Juan Carlos Rodriguez**

Law360 (April 8, 2018, 3:18 PM EDT) -- U.S. Environmental Protection Agency Administrator Scott Pruitt's deregulatory push has spawned a predictable flurry of lawsuits from green groups, but Pruitt may face legal battles on a different and perhaps unexpected front if agency workers who reportedly took flack after raising concerns about his actions decide to file whistleblower claims.

The New York Times last week said that five top advisers and security personnel who questioned some of Pruitt's expenditures, travel habits and security-related moves — such as using a vehicle's emergency lights and sirens to go to dinner — were either demoted to jobs with less responsibility, transferred to jobs further out of Pruitt's orbit, placed on administrative leave without pay, asked to resign, or investigated.

The EPA defended the actions that were questioned and disputed there was any link between challenges to those actions and employment changes, according to the Times. The agency did not respond to a request for comment from Law360.

The Times report raised questions about whether those employees, or possibly others not named in the story and placed elsewhere in the agency but who've faced similar treatment, could have claims under the Whistleblower Protection Act, said Nicholas Woodfield, a principal at The Employment Law Group PC and the firm's general counsel.

The WPA says an agency can't materially change employees' working conditions — by demoting them, firing them or transferring them to an inferior position, for example — if they engage in protected activity, he said.

"It looks like that's what's going on here," Woodfield said. "I would take these cases, based on what I've seen. This is so overt. I think these are great cases."

And while the WPA, enacted in 1989, isn't new, the Pruitt seems to be particularly prone to getting caught up in controversy.

"It's usually not someone who's just sort of got landmines all over the yard and are involved in one melee after another. As dysfunctional as the federal government can be, this is taking it to a new level," Woodfield said. "Having done this for 20 years, I have not seen someone with this dramatic a track record in one year."

He explained that the WPA protects federal employees who face retaliation when they lawfully disclose violations of a law, rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

Retaliation doesn't have to rise to the level of firing or demotion to be problematic; more subtle actions like written reprimands and decreases in pay can qualify as retaliation, noted Eric Bachman, a principal with Zuckerman Law and chair of the firm's discrimination and retaliation practices.

To successfully establish a WPA claim, an employee must show the U.S. Office of Special Counsel, an independent federal investigative agency, that she made a protected disclosure, that the agency took

or threatened to take a personnel action against her, that the relevant officials knew about the whistleblowing activity, and that there's a causal connection between that whistleblowing and the personnel action that was taken.

If the employee can show those things, it becomes the agency's burden to provide "clear and convincing" evidence disproving the claim.

"That burden is significantly higher than the normal, civil 'preponderance of evidence' standard," Bachman said. "So if you make that initial showing as a whistleblower, it really puts the onus on the agency to come forward with pretty convincing evidence to show it would have treated you the same even if you had never blown the whistle."

And even if the EPA doesn't end up having to fend off whistleblower claims, the agency could still take a hit. Stories like the ones filtering out about Pruitt can be "a morale disaster," said Joseph Greenwald & Laake PA principal Brian J. Markovitz.

"The super talented employees who have been there for years leave, so you have an institutional brain drain, which is terrible," Markovitz said. "And everybody else just keeps their heads down. They just do enough of their job to try to keep their job and feed their families. Nobody's going to stick their neck out, creatively or otherwise."