



## Decision

**Matter of:** U.S. Department of Labor—Legality of Service of Acting Secretary of Labor

**File:** B-335451

**Date:** September 21, 2023

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### DIGEST

The Federal Vacancies Reform Act of 1998 (Vacancies Act), 5 U.S.C. §§ 3345–3349d, is the exclusive means for an acting official to serve in a vacant executive branch position that requires presidential appointment and Senate confirmation unless another statutory provision expressly designates an acting officer or authorizes the President, a court, or the head of an executive department to make a designation. Section 552 of title 29, United States Code, is such a provision. It provides that, if the Secretary of Labor resigns, the Deputy Secretary of Labor shall perform the duties of the Secretary until a successor is appointed. On March 11, 2023, the prior Secretary of Labor, Martin J. Walsh, resigned, and the Deputy Secretary of Labor, Julie A. Su, assumed the role of Acting Secretary of Labor pursuant to 29 U.S.C. § 552, not the Vacancies Act. Therefore, the Vacancies Act’s time limitations on acting service do not apply to the Acting Secretary’s service.

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### DECISION

This responds to a congressional request regarding the legal authority governing Julie A. Su’s service as Acting Secretary of Labor of the U.S. Department of Labor (Labor), and whether any time limitations apply to her service.<sup>1</sup> As explained below, we conclude that Ms. Su is lawfully serving as the Acting Secretary under 29 U.S.C. § 552 (section 552).<sup>2</sup> We also conclude that the Vacancies Act’s time limitations on acting service do not apply to the Acting Secretary’s service.

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<sup>1</sup> Letter from Chairwoman Virginia Foxx, House Committee on Education and the Workforce, to Comptroller General (July 6, 2023).

<sup>2</sup> Section 1 of the Act of April 17, 1946, 60 Stat. 91, is codified, as amended, in section 552. Section 1 was amended in 1986, in relevant part, to rename the position of “Under Secretary” to “Deputy Secretary”. Department of Labor Executive (continued...)

In accordance with our regular practice, we contacted Labor to seek factual information and its legal views on this matter.<sup>3</sup> Labor responded with its explanation of the pertinent facts and legal analysis.<sup>4</sup>

## BACKGROUND

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require presidential appointment and Senate confirmation. 5 U.S.C. §§ 3345–3349d. The Vacancies Act is the exclusive means for an acting official to serve in a covered position unless another statutory provision expressly designates an officer or employee to temporarily serve in an acting capacity in a specified position or authorizes the President, a court, or the head of an executive department to make such a designation. 5 U.S.C. § 3347.

Labor is an executive department in the executive branch and is responsible for fostering the welfare of wage earners in the United States, improving their working conditions, and advancing their opportunities for profitable employment. 29 U.S.C. § 551. The Secretary of Labor is the head of the agency and is a presidentially appointed, Senate-confirmed (PAS) position. *Id.*

On July 13, 2021, Julie A. Su was confirmed as Deputy Secretary of Labor.<sup>5</sup> On March 11, 2023, the Secretary, Martin J. Walsh, resigned, creating a vacancy in the position.<sup>6</sup> According to Labor, Ms. Su began serving as Acting Secretary of Labor, as of that date, pursuant to 29 U.S.C. § 552.<sup>7</sup> Section 552 states, in relevant part:

The Deputy Secretary [of Labor]<sup>8</sup> shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties

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Level Conforming Amendments of 1986, Pub. L. No. 99-619, § 2(a)(1), 100 Stat. 3491 (Nov. 6, 1986).

<sup>3</sup> GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* <https://www.gao.gov/products/GAO-06-1064SP>. Letter from Assistant General Counsel for Appropriations Law, GAO, to Solicitor, Labor (Aug. 4, 2023).

<sup>4</sup> Letter from Solicitor, Labor, to Assistant General Counsel for Appropriations Law, GAO (Aug. 25, 2023) (Labor Response)

<sup>5</sup> PN122 – Julie A. Su – Department of Labor, 117th Congress (2021-2022), *available at* <https://www.congress.gov/nomination/117th-congress/122>.

<sup>6</sup> Labor Response, at 1.

<sup>7</sup> *Id.*

<sup>8</sup> The Deputy Secretary of Labor is a PAS position. 29 U.S.C. § 552.

of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate.

29 U.S.C. § 552.

Ms. Su is the only official who has served as Acting Secretary since the vacancy began.<sup>9</sup> Ms. Su was nominated to serve as Secretary of Labor on March 14, 2023.<sup>10</sup> Her nomination remains pending with the Senate.<sup>11</sup>

## DISCUSSION

At issue here is whether 29 U.S.C. § 552 or the Vacancies Act governs Ms. Su's service as Acting Secretary, and whether there are any time limitations on her acting service.

### Authority Governing Ms. Su's Acting Service

The Vacancies Act is the exclusive means for temporarily authorizing an acting official to perform the functions and duties of most vacant PAS positions in executive agencies unless an exception applies. 5 U.S.C. § 3347(a). In particular, an official may act under a statutory provision other than the Vacancies Act if that provision either expressly "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," or expressly "authorizes the President, a court, or the head of an Executive department" to make such a designation. 5 U.S.C. § 3347(a)(1); B-331650, Aug. 14, 2020.

The Secretary of Labor is a PAS position subject to the Vacancies Act.<sup>12</sup> According to Labor, Deputy Secretary Su began serving as Acting Secretary pursuant to 29 U.S.C. § 552, when Martin J. Walsh resigned from the position on March 11, 2023.

Section 552 directs that in the event of a vacancy the Deputy Secretary of Labor shall perform the duties of the Secretary until a successor is appointed or, in the

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<sup>9</sup> *Id.*

<sup>10</sup> PN388 – Julie A. Su – Department of Labor, 118th Congress (2023-2024), available at <https://www.congress.gov/nomination/118th-congress/388>.

<sup>11</sup> *Id.*

<sup>12</sup> See 5 U.S.C. §§ 3345(a), 3347(a); 29 U.S.C. § 551 ("There shall be an executive department in the Government to be called the Department of Labor, with a Secretary of Labor, who shall be the head thereof, to be appointed by the President, by and with the advice and consent of the Senate, and whose tenure of office shall be like that of the heads of the other executive departments.").

case of absence or sickness of the Secretary, until the absence or sickness has terminated. Because section 552 expressly requires the Deputy Secretary to perform the duties of the Secretary temporarily in an acting capacity, the provision provides authority, independent of the Vacancies Act, for an official to serve as the Acting Secretary. See 5 U.S.C. § 3347(a)(1)(B); S. Rep. No. 105-250, at 16 (1998) (expressly identifying section 552 as falling within a similarly-worded exception in an earlier version of the bill); see also *Noel Canning v. NLRB*, 705 F.3d 490, 511 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014) (citing section 552 as an example of Congress “provid[ing] for the temporary filling of a vacancy in a particular executive office by an ‘acting’ officer” authorized to perform all of the duties and exercise all of the powers of that office”).

Next, we turn to whether Ms. Su is authorized to serve under this position-specific authority. Section 552 states that the Deputy Secretary of Labor becomes the Acting Secretary when there is a vacancy in the position. See 29 U.S.C. § 552. Because Ms. Su began serving as Deputy Secretary on July 13, 2021, she became eligible to serve as Acting Secretary under section 552 on March 11, 2023, when the former Secretary resigned. See *id.*

Even if section 552 did not authorize Ms. Su’s service, Labor notes that Ms. Su may also serve under the Vacancies Act, even though she has been nominated to the Secretary position, because she is the “first assistant” to the Secretary and the first assistant position required presidential appointment and Senate confirmation.<sup>13</sup> We agree. See 5 U.S.C. § 3345(a)(1), b(1), (b)(2); 5 U.S.C. § 3346(a)(2) (authorizing acting service while a first nomination is pending in the Senate). However, there is no need to address Ms. Su’s potential eligibility for service under the Vacancies Act here because Ms. Su is lawfully serving as Acting Secretary pursuant to section 552.

#### Time Limitations on Ms. Su’s Acting Service

We next consider whether there are any time limitations on Ms. Su’s service as Acting Secretary.

Section 552 expressly limits the period of acting service after the Secretary of Labor resigns to the time at which a successor is appointed. See 29 U.S.C. § 552. The Vacancies Act also sets forth specific time limitations for acting service in various circumstances. See 5 U.S.C. § 3346.<sup>14</sup> However, we have previously held that

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<sup>13</sup> Labor Response, at 3.

<sup>14</sup> If no nomination has been submitted, the allowable period of acting service is generally 210 days beginning on the date the vacancy occurs. 5 U.S.C. § 3346(a)(1). If a nomination has been submitted, acting service is permitted during the pendency of a first or second nomination and for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned. 5 U.S.C. § 3346(a)(2), (b).

when an officer is serving under a position-specific authority in accordance with section 3347, the time limitations in section 3346 do not apply to their acting service. B-333543, Feb. 1, 2022. Accordingly, if Ms. Su continues to serve as Acting Secretary pursuant to section 552, she may continue to serve in that position until a successor is appointed.

#### CONCLUSION

As the Deputy Secretary of Labor, Ms. Su may serve as Acting Secretary under section 552 until a successor is appointed. The Vacancies Act's time limitations do not apply to her service.

A handwritten signature in black ink, reading "Edda Emmanuelli Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez  
General Counsel