Employment Law Daily Wrap Up, TOP STORY—Trump's High Court nominee sparks sharp controversy, (Feb. 1, 2017)

Employment Law Daily Wrap Up

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By Pamela Wolf, J.D.

Eleven days into his presidency, Donald Trump announced his choice to fill the empty seat on the Supreme Court left by the well-respected legal giant Antonin Scalia—Tenth Circuit Judge Neil Gorsuch. Praise for the nominee mounted as quickly as did the opposition, with protesters outside the Supreme Court immediately holding up signs and voicing their objections, and pundits declaring that it would be hard for Democrats to oppose the pick because of his impressive credentials and the unanimous confirmation vote that had put him on the Tenth Circuit.

The controversy over Gorsuch's nomination quickly became very sharp, with questions centering mostly on his prior opinions, predictions about the decisions he would support if confirmed, and the process that led to his nomination, most prominently that Republicans had changed the rules when they unfairly refused to even consider President Obama's March 16, 2016, nominee for the vacancy, Merrick Garland.

Qualifications. Before his appointment to the Tenth Circuit in 2006, Gorsuch was a practicing attorney and then served in the Department of Justice as the Principal Deputy Associate Attorney General in 2005, according to the White House. At the DOJ, Gorsuch worked in areas such as constitutional law, counterterrorism, environmental regulation, and civil rights, the Trump Administration pointed out. The nominee earned his J.D. from Harvard Law School and a Ph.D. in legal philosophy from Oxford. Gorsuch then clerked for two Supreme Court Justices, Byron White and Anthony Kennedy, who still sits on the High Court.

Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) noted that Gorsuch was confirmed to the Tenth Circuit by unanimous voice vote in 2006. Thirty-one of those senators are currently serving in the legislature, including 11 Democrats. That also means, of course, that 69 senators have never before vetted Gorsuch as a judicial candidate.

Mainstream or conservative? There is already a growing party-line split as to whether Trump's nominee is a "mainstream" or "conservative" jurist. "Judge Gorsuch is universally respected across the ideological spectrum as a mainstream judge who applies the law without regard to person or his own preferences," according to Grassley. "By all accounts, he has a record of deciding cases based on the text of the Constitution and the law."

But Senator Patrick Leahy (D-Vt.) sees the nominee as outside the mainstream: "I had hoped that President Trump would work in a bipartisan way to pick a mainstream nominee like Merrick Garland and bring the country together. Instead, he outsourced this process to far-right interest groups. This is no way to treat a co-equal branch of government, or to protect the independence of our Federal judiciary."

Litmus tests. Many believe that the nominee was chosen because he passed an ideological litmus test and can be expected to carry on Scalia's conservative bent on the High Court. Grassley's counterpart on the Judicial Committee, Senator Dianne Feinstein (D-Calif.), characterized the nomination along those lines: "I am deeply concerned that throughout his campaign the president promised to use litmus tests when choosing his nominee. Last October, when asked about the Supreme Court overturning *Roe v. Wade*, then-candidate Trump said 'That will happen automatically, in my opinion, because I am putting pro-life justices on the court.'

"Then tonight, President Trump declared, 'I am a man of my word,'" Feinstein continued. "That's exactly what I'm afraid of. Judge Gorsuch voted twice to deny contraceptive coverage to women, elevating a corporation's religious beliefs over women's health care," she explained.

Marcia D. Greenberger and Nancy Duff Campbell, Co-Presidents of the National Women's Law Center, echoed Feinstein's concerns about *Roe v. Wade*, adding that Trump "vowed to nominate a Supreme Court justice in the mold of Justice Antonin Scalia, who not only voted to overturn *Roe*, but also rejected the application to women of the Constitution's guarantee of equal protection of the law." The two NWLC presidents also pointed out that Scalia is known for voting to narrow interpretations of key antidiscrimination laws, stripping protections from women and girls at work, at school, and in their communities. "President Trump has promised to select his nominee from a list provided by right-wing organizations to fulfill his pledge—and he did," Greenberger and Campbell said.

More like Justice Elena Kagan? Not everyone sees Gorsuch is fitting neatly into the mold of Justice Scalia. Neal K. Katyal, who was an acting solicitor general in the Obama administration, and is now a law professor at Georgetown and a partner at Hogan Lovells, had this to say in a New York Times opinion article: "Judge Gorsuch's record suggests that he would follow in the tradition of Justice Elena Kagan, who voted against President Obama when she felt a part of the Affordable Care Act went too far. In particular, he has written opinions vigorously defending the paramount duty of the courts to say what the law is, without deferring to the executive branch's interpretations of federal statutes, including our immigration laws."

Katyal cited two immigration cases, *De Niz Robles v. Lynch* (10th Cir. 2015) and *Gutierrez-Brizuela v. Lynch* (10th Cir. 2016), in which the nominee "ruled against attempts by the government to retroactively interpret the law to disfavor immigrants." In *Gutierrez-Brizuela*, Gorsuch wrote a separate opinion in which he "criticized the legal doctrine that federal courts must often defer to the executive branch's interpretations of federal law, warning that such deference threatens the separation of powers designed by the framers," Katyal said. "When judges defer to the executive about the law's meaning, he wrote, they 'are not fulfilling their duty to interpret the law.' In strong terms, Judge Gorsuch called that a 'problem for the judiciary' and 'a problem for the people whose liberties may now be impaired' by 'an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.' That reflects a deep conviction about the role of the judiciary in preserving the rule of law."

Many, of course, would argue that what Katyal sees as positive in an era of executive overreach, also foreshadows the demise of *Chevron* deference, which can be seen as supporting the notion that judges, with no specialized knowledge about certain industries and the problems they face, know better than highly specialized federal government experts who are well informed about the issues in particular industries.

Tainted process? Adding to the controversy surrounding the nomination is the bad feeling that remains over the hard stance that Republicans took in refusing to take up President Obama's nomination of Merrick Garland—or any nominee, for that matter—for the Scalia vacancy. The move left the Court with a vacancy since February 13, 2016, when the jurist died unexpectedly. It also resulted in 4-4 decisions that left important issues unresolved at the High Court level, for example in the labor and employment landscape, on questions of President Obama's executive immigration action, public-sector agency fees, and tribal jurisdiction.

New York Times writer David Leonhardt pointed out that the Republican "obstruction" came when Obama had 10 months left in his term. Moreover, other Justices, including Anthony Kennedy, had been confirmed in the last year of a presidency, he said.

"Before Senate Republicans waged the unprecedented blockade of Chief Judge Garland's nomination to the Supreme Court last year, the Senate took seriously its constitutional duty to provide advice and consent on nominees to the highest court in the land," according to Senator Leahy. "But Republicans abdicated the Senate's constitutional role by choosing politically-charged obstruction, so that a president who lost the popular vote could nominate extreme candidates to the Supreme Court."

And there were Republicans, such as Senator John McCain (R-Ariz.), who argued that the Scalia vacancy should be filled by the next White House Administration, yet also vowed to block *any* nomination made by Hillary Clinton, should she win the national election, as the media reported last fall.

Labor and employment implications. What does the nomination of Neil Gorsuch mean for the labor and employment landscape? Ryan Mick, a partner at the international law firm Dorsey & Whitney, said that employers that have been hoping President Trump would pick a nominee in the mold of Justice Scalia generally should be pleased.

"Judge Gorsuch's published opinions on employment-related issues tend to favor employers, with many decisions upholding summary judgment for employers," Mick explained. "Further, his record shows a tendency toward narrow opinions which, along with his overall judicial conservatism, suggests that Judge Gorsuch would not readily expand burdens on employers through Court rulings."

"He has been critical of overreaching class actions and written favorably about arbitration," Mick continued. "He also has been critical of undue judicial deference to administrative agencies, which would be in line with the Trump administration's approach to federal regulation and would be a welcome relief to employers that dealt with particularly active administrative agencies under the Obama administration."

According to the management-side employment law firm Jackson Lewis, LLC, Judge Gorsuch has applied discrimination charge filing deadlines strictly against plaintiffs, rejecting arguments that would expand those time periods. He also has not hesitated to reject federal whistleblower claims. In doing so, he has looked at the plain language of the statute and rejected plaintiffs' arguments that coverage would serve the greater purpose of the statute at issue.

Collin O'Connor Udell, Of Counsel at Jackson Lewis, noted with respect to leave-management issues, that Judge Gorsuch authored the 2014 decision in *Hwang v. Kansas State Univ.*, in which the Tenth Circuit determined that a leave of absence of more than six months was an unreasonable accommodation. Gorsuch wrote, "It's difficult to conceive how an employer's absence for six months … could be consistent with discharging the essential functions of most any job in the national economy today."

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