



How Will Kagan Treat Employers?

Insights

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Even The Magic Eight Ball Can't Begin To Predict...

Over the past several years, we have relied upon the tried-and-true method of asking our Magic Eight Ball to help predict how newly-nominated Supreme Court Justices would treat employers once seated on the bench. In retrospect, the Magic Eight Ball turned out to be a fairly accurate predictor in examining Justices Alito and Sotomayor and their handling of labor and employment law matters.

Now that President Obama's nomination of Solicitor General Elena Kagan appears to be nearing a successful conclusion, it is time once again to examine the next Justice of the Supreme Court to determine how she will treat employers. But because her background takes a somewhat different path than the other nominees we have examined, every question we asked came back "situation cloudy, ask again later." We'll need to put the Magic Eight Ball on the shelf and instead take our best guesses about her future.

Who is Kagan Replacing, And Why Does That Matter?

Before we begin, a bit of context is helpful. Ms. Kagan will be replacing the retiring Justice John Paul Stevens, who turned out to be one of the most liberal and employee-friendly Supreme Court Justices of the modern era. Although considered to be a moderately conservative judge when nominated by Republican President Gerald Ford in 1975, Justice Stevens authored dozens of pro-union and pro-employee opinions in his 35 years on the bench.

In other words, even if Ms. Kagan turns out to be another liberal member of the Court who gives the benefit of the doubt to employees and unions, she really can't get much worse than Justice Stevens. Substituting one liberal Justice for another will not have a dramatic impact on the day-to-day doings of the Supreme Court.

But it's certainly worth noting that Ms. Kagan's appointment to the bench will have a dramatic impact on the future of the Supreme Court because of her age. At 50 years old, she will become the youngest member of the Court by a good 5 years, with only Chief Justice Roberts, 55, Justice Sotomayor, 56, and Justice Alito, 60, within 10 years of her. Before Justice Stevens' retirement, the average age of the liberal bloc of Justices was 74 years old, because Justices Stevens, Ginsburg, and Breyer counteracted the relative youth of newly-appointed Justice Sotomayor.

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Once Ms. Kagan replaces Justice Stevens, the average age of the four liberal Justices will be lowered a full 10 years to 64 years old. By comparison, the employer-friendly bloc of Justices, including Chief Justice Roberts and Justices Alito, Scalia, and Thomas, has an average age of 63 years old. It is obvious to see that Ms. Kagan's appointment could solidify the core bloc of employee-friendly jurists for years to come.

What Can Kagan's Background Tell Us About Her Future?

Like all recent appointments to the Supreme Court, Ms. Kagan has an Ivy League education including an undergraduate degree from Princeton in 1981, a graduate degree from Oxford in 1983, and her law degree from Harvard in 1986. However, like no appointment since Justices Rehnquist and Powell were nominated in 1971, Ms. Kagan has no prior experience as a judge. For this reason, prognosticators are at a decided disadvantage when trying to predict how Ms. Kagan will handle labor and employment cases at the Supreme Court.

Her formative years as a lawyer were spent clerking for various judges, including legal giant Justice Thurgood Marshall. She then began teaching law for the University of Chicago before shifting to a political career, serving as counsel for then-Senator Joe Biden in 1993, followed by a stint as Associate Counsel in the Clinton White House from 1995 to 1999. In 2001, she returned to the academic world as a professor at Harvard, and was named the first female Dean of Harvard Law in 2003. She worked in that role for 6 years before being appointed as the Obama Administration's Solicitor General in 2009, also the first female to hold this prestigious and important post.

Kagan's Recent Role As Solicitor General Offers Some Clues

The Solicitor General is the person appointed to represent the federal government before the Supreme Court, and generally determines the legal position that the United States will take in front of the Court and whether a particular case will be appealed. For these reasons, the Solicitor General is sometimes referred to as the "tenth Justice" of the Supreme Court. However, an examination of the work of the Solicitor General is not always an accurate indicator of the individual's legal philosophy, since she is supporting the policies and practices of the President and the entire Administration. Although we can examine Ms. Kagan's work as Solicitor General for clues as to her future judicial philosophy, we would need to do so with a healthy dose of caution.

In her 14 months as Solicitor General, Ms. Kagan has submitted eight briefs in labor and employment cases pending before the Supreme Court. While recognizing that these legal opinions are formed by the White House's stance on matters and not necessarily her own personal views, they reflect a consistently pro-employee philosophy. For example, in *Lewis v. Chicago*, Ms. Kagan appealed a lower court decision which favored employers in a Title VII case dealing with the calculation of statutes of limitation in disparate impact cases. The Supreme Court eventually agreed with Ms. Kagan and reversed the decision, handing employees a unanimous victory.

In *New Process Steel v. NLRB*, Ms. Kagan argued that the NLRB had sufficient authority to operate despite the fact that it had only a two-member quorum, contradicting the employer's challenge to

the agency's authority to issue unfair labor practice findings and other orders. The Supreme Court disagreed with Ms. Kagan's position and ruled in favor of the employer.

Of the eight briefs submitted by Ms. Kagan during her tenure as Solicitor General, she only argued in favor of the employer on one occasion, in the case of *City of Ontario v. Quon*. That case involved an employer's right to monitor an employee's text messages sent and received on an employer-issued device; Ms. Kagan argued that the employer had a valid basis for searching the text messages, and that the employee did not have a reasonable expectation of privacy. The Supreme Court agreed with her and ruled in favor of the employer.

What Else Can We Glean From Kagan's Background?

Knowing that we need to view Ms. Kagan's role as Solicitor General with a grain of salt as we attempt to predict the future, we can dig back a bit further into her background in an attempt to gauge what life will be like for employers with Ms. Kagan on the bench. The most remarkable event which occurred while she was Dean of Harvard Law School was her 2003 opposition of the Solomon Amendment, which required educational institutions to provide access to military recruiters or else lose federal funding.

Since Ms. Kagan believed that the military's "don't ask, don't tell" policy was discriminatory towards gays and lesbians, she joined a group of other school administrators and asked the Supreme Court to scale back the Solomon Amendment. The Court eventually rejected this challenge and upheld the policy, which forced Ms. Kagan to rescind Harvard's policy of disallowing military recruiters. One could view this episode as evidence that Ms. Kagan will be protective of minorities and not afraid to uphold challenges to the establishment.

But some commentators have wondered whether Ms. Kagan's role as Dean might have made her somewhat sympathetic to employers, since she was charged with the responsibility of facing many of the same workplace challenges – managing strong personalities, making difficult hiring and firing decisions, finding a balance between competing interests – that employers face on a daily basis. Employers can only hope that this experience might lead to them finding an understanding member of the bench when they argue their cases in front of Ms. Kagan.

Going back even further, to her time as a student, we can conclude that Ms. Kagan has an interest in labor and employment law, since she has often written on the topic. She wrote an article during her final year of law school on the topic of certifying classes in Title VII class action discrimination lawsuits, and her senior thesis at Princeton examined the labor activities of New York socialists. We feel comfortable that Ms. Kagan knows her stuff when it comes to this field, as her law school report card (which became public during her confirmation proceedings) revealed that she earned an A+ in Labor Law during her final year at Harvard.

Boiling It All Down

After scouring Ms. Kagan's background for clues, most commentators have settled on this general prediction: Ms. Kagan will be an assuredly intelligent and thoughtful jurist who will most likely

prediction. Ms. Kagan will be an assuredly intelligent and thoughtful jurist, who will most likely support employees and unions in the average case. However, most analysts believe that she is an independent thinker and will not be afraid to rule for the employer if the situation warrants. While employers should not be celebrating Ms. Kagan's appointment, this is not necessarily the time to fear any sort of impending catastrophe.

Although we can't be sure exactly how Ms. Kagan will treat employers when she becomes a Justice on the Supreme Court, you can be sure that Fisher Phillips will continue to monitor all of the activities on the Court, and will help employers react to any new developments. And of course, the next time there is an appointment to the Supreme Court, you can bet that we'll grab the Magic Eight Ball from the shelf and make some fearless predictions.

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