



What Employers Need To Know About SCOTUS Nominee Amy Coney Barrett

Insights

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President Trump officially selected Judge Amy Coney Barrett to fill the empty seat on the Supreme Court bench, filling the vacancy caused by Justice Ruth Bader Ginsburg's death. Assuming she is confirmed by the Senate, Judge Barrett's appointment will have a long-lasting impact on the future of the SCOTUS, cementing a six-Justice majority of conservative jurists. There is a great deal of emotion and controversy surrounding this selection, but employers may still be curious about how Barrett would treat workplace law cases that come before her if she is elevated to the Supreme Court. Similar to the way we examined the nominations of Justice Sonia Sotomayor in 2009, Justice Elena Kagan in 2010, Justice Neil Gorsuch in 2017, and Justice Brett Kavanaugh in 2018, we now turn our attention to Judge Barrett.

Background Of Amy Coney Barrett

Before examining her potential path to the Supreme Court and judicial track record, let's take a quick look at her biography. She was born in Louisiana in 1972, meaning she would be the youngest Justice on the Court if confirmed. She graduated from Rhodes College in Tennessee with high honors and studied law at Notre Dame Law School where she graduated first in her class in 1997.

She began her legal career as a judicial clerk, including a stint with conservative icon Supreme Court Justice Antonin Scalia from 1998 to 1999. She then practiced law for several years in Washington, D.C. before joining the academic world in 2002. She taught federal courts, constitutional law, and statutory interpretation at Notre Dame Law for 15 years and consistently won awards as a top professor.

In 2017, President Trump appointed her to the 7th Circuit Court of Appeals – though her Senate confirmation hearing became controversial when several Democratic Senators scrutinized her religious faith and its role in her judicial philosophy. Barrett is a practicing Catholic and has been an active participant in the nondenominational Christian community People of Praise. During those hearings, she said that her "personal church affiliation or my religious belief would not bear on the discharge of my duties as a judge, and that "it is never appropriate for a judge to impose that judge's personal convictions, whether they arise from faith or anywhere else, on the law."

Upcoming Confirmation Hearings

Judge Barrett's nomination sets up a bitter clash in the Senate. Republicans have promised to push

for the confirmation vote to take place before the upcoming November 3 election, and despite strong public sentiment that the winner of the election should make this choice, it appears that there is little Democrats can do to delay a vote.

It appears that the Senate will hold hearings for Judge Barrett in mid-October with a full Senate vote tentatively planned for the week of October 26. Given the way that Republicans unified behind controversial nominee Brett Kavanaugh two years ago, it appears likely that Barrett will be confirmed by the Senate in 2020.

Barrett's Overall Record In Employment Law Cases

Employers will probably fare very well in front of Barrett should her nomination be confirmed by the Senate. She has been described as very similar to her former boss, the late Justice Scalia, in her judicial philosophy. Although she has only been a judge on the 7th Circuit Court of Appeals for a relatively short time, her track record to date supports the supposition that she will most often side with the Court's current five-member, pro-business bloc.

Notably, Judge Barrett will be replacing liberal icon Justice Ruth Bader Ginsberg, one of the most employee-friendly Supreme Court Justices of the modern era. Justice Ginsberg authored many pro-union and pro-employee opinions — and perhaps more famously, dissents — in her 27 years on the Court. Given Judge Barrett's relative youth and well-known social conservatism, her appointment will no doubt have a meaningful impact on the future of the Supreme Court.

Barrett Closely Scrutinizes Retaliation Cases

Employers can most likely count on Judge Barrett to take their interests into consideration when it comes to retaliation lawsuits. An ever-growing area of litigation, retaliation claims are a constant threat to today's employers and Judge Barrett has consistently found in favor of the defense on such claims.

For instance, in a 2018 case, a plaintiff complained about her manager's supervision and threatened to file an EEOC complaint, though she did not specify the basis. After plaintiff's complaint, two other employees left plaintiff's department and their workload was redistributed. Thereafter, plaintiff filed a charge with the EEOC alleging that her employer retaliated against her for her earlier complaints with extra work. About nine months after plaintiff's EEOC filing, plaintiff's former employer eliminated her position.

Judge Barrett's opinion affirmed the district court's ruling in favor of the employer. Specifically, she affirmed the lower court's ruling that plaintiff had no evidence that her manager knew about her complaints; plaintiff's manager assigned plaintiff additional work because two employees had left the department; her manager reduced the additional work after plaintiff complained about it; and plaintiff's former employer eliminated all positions like plaintiff's. Judge Barrett also declined to permit plaintiff to introduce new allegations on appeal that her manager had verbally abused her.

Judge Barrett made an aggressive procedural decision in another 2018 case. A former stock exchange employee brought an action against his employer alleging that he was fired in violation of

Dodd-Frank's whistleblower protection section after he complained internally about a supervisor's directive. Despite being within the time to amend as a matter of right under federal procedural rules, the lower court judge granted the exchange's motion to dismiss and did not permit the former employee to take another crack at the lawsuit.

Judge Barrett, along with two other circuit judges, affirmed the lower court's decision, finding that plaintiff failed to identify a rule that either required or protected his internal complaint. Therefore, she concluded, the plaintiff was not prejudiced by the district court's order because the "judge would have dismissed the amended complaint immediately after its filing."

Barrett Seems Likely To Uphold Religious Freedoms

Judge Barrett will likely play a major role in broadening the scope of religious-based protections for employers. While a professor of law at Notre Dame, Judge Barrett signed a 2012 "statement of protest" condemning the accommodation that the Obama administration created for religious employers who were subject to the Affordable Care Act's birth control mandate. The statement bemoaned that the accommodation "changes nothing of moral substance and fails to remove the assault on individual liberty and the rights of conscience which gave rise to the controversy."

In a 2018 case against an educational institution, Judge Barrett's opinion for the 7th Circuit affirmed the lower court's use of the "ministerial exception" under the Americans with Disabilities Act (ADA) that permits religious-based employers great leeway in certain employment decisions involving religious personnel. In so doing, she eschewed a formulaic application of the four-factor test established by the SCOTUS, which would have resulted in a "draw" with two factors going each way. Instead, Judge Barrett adopted a totality-of-the-circumstances test and determined that, although factual disputes existed in the case, they were insufficient to preclude a ruling in favor of the employer.

Barrett Takes Balanced View Of Discrimination Claims

Just because Judge Barrett typically sides with employers doesn't mean she will always give them a free pass. When it comes to discrimination claims, Judge Barrett has demonstrated herself to be equally balanced, rendering rulings in favor of both employers and employees and basing her decisions on a close examination of the facts in each case.

In a 2020 decision, Judge Barrett affirmed a jury verdict in favor of a Hispanic park district employee on her Title VII claim for national origin discrimination. Judge Barrett examined the respective standards for causation under Title VII and Section 1983, explaining that while a plaintiff "has 'plenty of room' to convince the jury that a causal link exists" under Title VII, the standard for proving a "widespread custom" of discrimination under Section 1983 is more challenging to meet. Accordingly, Barrett affirmed both the jury's verdict in favor of the park employee on her Title VII claim and the trial court's dismissal of the Section 1983 claim because the employee had not met her burden.

Similarly, in a 2018 case, the 7th Circuit upheld a jury's determination that a male Chicago butcher had presented sufficient evidence to find that he was sexually harassed by male coworkers based on sex. Judge Barrett noted that Title VII is an anti-discrimination statute, not an anti-harassment statute. If the employee had worked in all-male environment, she said, the fact that only men were touched and groped would not raise an inference of sex discrimination. But he did not, and his female co-workers did not experience the same harassment. In Barrett's view, this left the jury free to reasonably conclude that he was subject to discrimination on the basis of sex.

By contrast, in a recent 2020 opinion, Judge Barrett affirmed a lower court ruling dismissing gender discrimination claims by a corrections department employee who was fired after she falsely claimed that a prisoner had struck her with a box he had thrown from his cell. The prison guard claimed that the termination resulted from sexual discrimination but could not provide sufficient evidence of any such discrimination. Judge Barrett found that the employee failed to present evidence sufficient evidence for a reasonable jury to "infer that [the employer] discriminated against her because of her sex, so the district court was right to enter summary judgment in favor of the defendants."

Likewise, in a 2019 case, the 7th Circuit sided with an employer in response to its argument that an allegedly wrongful termination was in fact lawfully motivated by poor performance. Despite the lack of underlying documentation, Judge Barrett wrote that "the employee's premise seems to be that by not addressing the issues earlier, [the employer] somehow forfeited its right to count these problems as black marks on his record. Not so. The employer's decision to let something slide without a formal response does not mean that it went unnoticed or untallied. And even minor grievances can accumulate into a record that justifies termination."

One discrimination case that will undoubtedly come up during the upcoming Senate confirmation hearings is Judge Barrett's decision to join the majority of the 7th Circuit judges in refusing to rehear a controversial race discrimination case on an *en banc* (full appeals court) basis in June 2017. In that case, a three-judge panel (without Judge Barrett) affirmed a ruling in favor of the employer after the Equal Employment Opportunity Commission claimed that the plaintiff, an African-American sales manager, was discriminated against because of his race in violation of Title VII of the Civil Rights Act. The plaintiff was transferred to a different location in the Chicago area because his store had a predominantly Hispanic clientele and his boss wanted the store to be "Hispanic." It was undisputed that the store manager didn't mind the transfer, and that he had suffered no loss of pay, benefits, or responsibilities. The panel decision concluded that a business's policy of segregating employees and intentionally assigning members of different races to different stores does not necessarily tend to deprive any individual of employment opportunities.

Barrett Has Shown She Favors Arbitration And Disfavors Class/Collective Action Issues

Judge Barrett has demonstrated a solid preference in favor of arbitration and against class/collective actions. In a 2018 decision, for example, Judge Barrett authored an opinion overturning the lower court's decision to invalidate a class waiver in the parties' arbitration agreement and to order the employees to arbitrate — a decision which ultimately resulted in the

arbitrator issuing a \$10 million award to the employees. Citing the Supreme Court's 2018 landmark decision in *Epic Systems Corp. v. Lewis*, the 7th Circuit held that the district court must conduct the threshold inquiry of whether the arbitration agreement authorized class arbitration as part of the foundational question of arbitrability. Judge Barrett explained that this threshold question is pivotal, as it could result in sacrifice of the advantages of arbitration.

In a 2018 case involving a national retailer, Judge Barrett considered a plaintiff's argument that the arbitrator's award for the employer should be vacated because the arbitrator excluded certain relevant evidence and fell asleep during the arbitration hearing. Judge Barrett rejected plaintiff's arguments and affirmed the arbitrator's award for the former employer. Specifically, she determined that the evidence that the arbitrator excluded did not go to the "ultimate issue" of plaintiff's workplace claims, and that the arbitrator had not actually missed any evidence while he was allegedly asleep. Additionally, the court confirmed the Federal Arbitration Act's (FAA's) guidance that courts may not engage in a "plenary review of the sufficiency of evidence supporting the arbitrator's decision."

A major issue currently in flux across the country is whether delivery drivers, including gig economy drivers, fall under the narrow "transportation worker" exemption in Section 1 of the FAA. Where the exemption applies, drivers cannot be compelled to arbitrate disputes with their employer and are entitled to pursue class or collective claims in court. In a recent opinion from August 2020, Judge Barrett found in *Wallace v. Grubhub Holdings, Inc.* that the transportation worker exemption did not apply to drivers who make local food deliveries from restaurants to homes and, thus, they could be compelled to arbitrate their claims. She explained that "transportation workers" are those who are "actually engaged in the movement of goods in interstate commerce" and the fact that Grubhub drivers carry goods that *had* moved across state lines was insufficient to bring these drivers within the narrow exemption.

Judge Barrett seemingly flip-flopped the reasoning she applied in the *Grubhub* decision in another August 2020 case involving truck drivers. In that case, plaintiffs brought individual, collective, and class action claims against their former employer for failing to provide overtime pay in violation of the Fair Labor Standards Act. But the FLSA exempts employees who are subject to the Secretary of Transportation's jurisdiction under the Motor Carrier Act (MCA), and the 7th Circuit this time found the exception applied. Judge Barrett found that the employer had successfully shown that at least some of the plaintiffs drove trailers carrying finalized goods destined for out-of-state delivery.

She held that this service, even if purely intrastate and interrupted briefly, would nevertheless constitute driving in interstate commerce because it would be part of the goods' continuous interstate journey. And while some of the plaintiffs' runs may have been purely local, "the sheer volume of the interstate commerce through these facilities, combined with the fact that the plaintiffs were assigned to their spotting duties indiscriminately, demonstrates that the plaintiffs had a reasonable chance of being called upon to make some drives that were part of a continuous interstate journey."

Barrett On Campus Sexual Violence Issues

In another case likely to garner attention during the Senate confirmation hearings, Barrett wrote for a three-judge panel in 2019 that reinstated a lawsuit filed against a public university and its officials by a student who had been found guilty of sexual violence under the university's student discipline program. The student was suspended from school, which in turn led to his expulsion from the Navy ROTC program, the loss of his scholarship, and the end of his plans to join the Navy after graduation.

The 7th Circuit agreed with the student that he should be allowed to pursue his claim alleging that the process used to determine his guilt or innocence violated the Constitution. "The university's process," Barrett wrote, "fell short of what even a high school must provide to a student facing a days-long suspension."

Barrett May Hold A Hard Line On Immigration Issues

Judge Barrett appears likely to support the vigorous use of the Immigration and Naturalization Act (INA) to block immigration, which will affect employers nationwide. Earlier this year, the 7th Circuit blocked the Trump administration's latest immigration rule to exclude potential immigrants from green cards if they were likely to require public assistance.

In a strong, 40-page dissent, Judge Barrett emphasized the new rule's narrow scope and argued that it represented a reasonable interpretation of the of the INA statutes. In August 2020, the 2nd Circuit limited the scope of the injunction, effectively allowing the administration to largely proceed with the rule at issue.

Barrett Scrutinizes Plaintiffs' Ability To Bring Claims In Federal Court In The First Place

In several recent cases, Judge Barrett has signaled that employers will likely be able to rely on her to limit plaintiffs' ability to initiate and continue litigation in the federal courts. For example, in a 2019 case, she carefully analyzed a plaintiff's standing to bring a claim under the ADA alleging that a financial institution's website was not accessible to him through screen reader software. The plaintiff, an ADA website "tester," alleged both dignitary and informational harm, but the lower court dismissed the case. On appeal, the 7th Circuit affirmed, holding that neither of these alleged harms satisfied the injury-in-fact requirement necessary to sustain a case in federal court. The plaintiff had no relationship with the defendant financial institution, and because he lived outside Illinois, could not have even opened an account. Accordingly, Judge Barrett held that "Illinois law prevents his dignitary harm from materializing into a concrete injury."

On a related point, Judge Barrett recently addressed an employer's opposition to class certification where the claims of the named plaintiffs had already been resolved. In a 2019 case, the employer argued that neither of the plaintiffs had a concrete interest in certification in a wage and hour case because they went to trial on their individual time-rounding claims and lost. Judge Barrett explained that the 7th Circuit has held that the possibility of an "incentive award" — which they could receive in their case — could be enough of an interest to keep the claim justiciable. Notably, however, Judge Barrett signaled that this legal principle may soon be in the wind, providing a well-placed comment in her opinion: "note, though, that Supreme Court Chief Justice Roberts disagrees" with it

in her opinion. Note, though, that Supreme Court Chief Justice Roberts disagrees with it.

Barrett Will Have A Lasting Impact On The SCOTUS

One of Judge Barrett's greatest assets is her youth. At only 48 years old, she will likely ensure that judicial conservatives have a strong advocate on the Court for decades to come. Her appointment to the Court would mean that the conservative bloc would be, on average, a full decade younger than the liberal bloc.

And now a word of warning: predicting future judicial opinions based on a judge's prior rulings is notoriously difficult. Few would have predicted that Republican-appointee Chief Justice John Roberts would have cast the deciding vote saving the Affordable Care Act in 2012, or that Trump-appointee Justice Neil Gorsuch would have bucked the administration in 2020 by ruling that Title VII covers sexual orientation and gender identity. This means that nobody can be exactly sure of how a Justice Barrett would rule on cases that come before the Supreme Court if she is confirmed to the bench.

What we can predict with absolute certainty, however, is that Fisher Phillips will continue to publish same-day alerts when the Supreme Court releases workplace law opinions. If you aren't receiving them, you can subscribe here. If you have any questions about this development or how it may affect your business, please visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court nominee. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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