

Which Election Will Really Affect Labor, Employment and Safety Regulation?

Insights
10.28.16

While the bulk of our attention has been focused on the troubling **Presidential race**, employers would be well advised to more closely watch the **US Senate races**. As I type, the current Senate of 41 Republicans and 46 Democrats could shift to a Democrat body after the election. Nevada, Missouri, Indiana, Pennsylvania, New Hampshire and North Carolina Senate races are classified by the *Wall Street Journal* as "too close to call." (Graphic below from *WSJ*, only better at *WSJ*!)

36 Democrat seats not up for election 30 Republican seats not up
10 Democrat seats up 24 Republican seats up



I strongly recommend that *Wall Street Journal* subscribers click to the "[Senate Races to Watch in 2016](#)," which analyzes crucial races in Arizona, Colorado, Florida, Illinois, Indiana, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, and Wisconsin.

This year the Republicans have a whopping 24 seats in play compared to 10 Democratic seats. 32 Democrats hold 32 seats not up for election as opposed to 32 for the Republicans.

Republican incumbents are bit risk in Arizona, Florida, Illinois, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, and Wisconsin. Some of these close elections are surprising, including John McCain's race, as well as Sen. Marco Rubio's reelection effort. *(As a side note, one has to ask how it is that the Democrats have managed to get several Iraqi war veterans to run for their party, and the Republicans have apparently been less successful.)*

It's about the Supreme Court ...

We must fill Scalia's missing Justice seat and at least two more openings will likely occur in the next four years. Historically, republican nominees have sometimes waived or in the case of Justice Souter, done more than waiver. Democrat nominees, by comparison have voted in ideological lock step. We've already seen employment-related decisions affected by Scalia's absence and the 4 -4 split.

As an example, see the [New York Time's graphical illustration from June 23, 2016](#) (excerpts below):

Affirmative Action

Decided June 23, 2016 4 - 3

In [Fisher v. University of Texas](#), the court decided that the race-conscious program used to admit students to the University of Texas at Austin does not violate the Constitution's equal protection principles. The case was decided by **seven members of the court** because Justice Elena Kagan had recused herself. Had Justice Scalia have joined the dissenters, a tie would have most likely resulted in an affirmance of the lower court decision upholding the program, but no precedent would have been set.

Public Unions

Decided March 29, 2016 4 -4

In a win for organized labor, a tie in [Friedrichs v. California Teachers Association](#) effectively decided that public employees who choose not to join unions may be required to pay fees for the union's collective bargaining activities. **Without a ninth justice**, a tie affirmed the appeals court's decision favoring the unions but set no precedent. Had Justice Scalia have joined the conservative bloc, the court would have ruled against the unions.

Our system depends upon checks and balances and has arguably done best when the branches of government have been held by different parties. Democrats and Republicans should be concerned about one party having the Presidency, the Senate and the opportunity to stack the highest court with ideologues.

Employment, Labor and Safety Law

The changes in Senate leadership would be less dramatic for labor and employment law issues than for financial regulation if the Senate goes Democrat. Expect Elizabeth Warren and --to have huge roles. Nevertheless, Ms. Clinton is going to beholden to the teachers union and other anti-business groups. A Democratic Senate would likely support a continuation of the outgoing President's efforts to use federal government contractor status as a back door to impose new employment and labor law obligations on employers.

One can expect that a Democratic Senate would be responsive to efforts to create antidiscrimination protections for the gay and lesbian community. Sadly, while Democrat politicians talk a good game about safety. I would not look for a Democratic president and Senate to actually provide OSHA with

the resources to adequately enforce safety requirements, let alone to also engage in the consultation efforts which demonstratively improve employer compliance. Instead, we would see a continued march toward enhancing whistleblower and retaliation claims, as well as a continued misguided focus on supposed employer under recording of workplace injuries and illnesses.

We will leave more detailed analysis to future posts, but in the interim, get out and vote.

Howard

Related People



Howard A. Mavity

Partner

404.240.4204

Email