Classifying Gorsuch's Views On Misclassification

Insights
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With the recent confirmation of Neil Gorsuch, the Supreme Court is now back up to its full complement of nine justices. While the current Court term has largely been devoid of blockbuster workplace law decisions – which could be the product of the sitting justices not wanting to resolve significant cases with only eight members – observers are already looking forward to what many believe will be a scintillating 2017-2018 term. The Court has already agreed to rule upon whether mandatory class action waivers are valid in an employment context (the consolidated cases of *National Labor Relations Board v. Murphy Oil USA*, *Ernst & Young LLP v. Morris*, and *Epic Systems v. Lewis*), and we could also see action on sexual orientation discrimination claims (*Hively v. Ivy Tech Community College*, or *Evans v. Georgia Regional Hospital*) and a re-visitation of the crucial agency shop fee conflict (*Friedrichs v. California Teachers Association*) beginning in October 2017.

Misclassification Remains In The Spotlight
But perhaps no bigger modern workplace law conflict screams out for resolution more so than the issue of independent contractor misclassification. Conflicts over whether a worker is an employee or a contractor have led to countless lawsuits, arbitration claims, and administrative proceedings, sometimes with millions of dollars at stake. And despite the fact that no single decision from the Supreme Court could put the issue to rest for good given that the regulatory framework over the issue spans many federal, state, and local laws, some overarching words of wisdom from the high court would be welcome indeed.

Although the issue impacts businesses across all industries, nowhere is this issue more concerning than in the sharing economy arena, where ride-sharing giants Uber and Lyft battle through costly large-scale class action proceedings over classification questions. Just about every other business in the gig economy has kept an eye on the way courts are treating these companies in these kinds of claims, recognizing that the guidelines created by federal courts could directly impact the way they do business.

Looking ahead to the next term and beyond, several current misclassification cases have bubbled up from the appellate ranks and could soon be ripe for SCOTUS review. Just last month, for example, the 2nd Circuit Court of Appeals concluded that ride-share drivers were properly classified as contractors and rejected their wage lawsuit (*Saleem v. Corporate Transportation Group, Ltd.*), and in just this year alone, state courts in both Florida (*McGillis v. Department of Economic Opportunity*) and California (*Uber Technologies Inc. et al. v. Y.E.*) have issued similar opinions.

While we are by now very familiar with the SCOTUS justices who have been on the bench for years and might be able to predict with a reasonable degree of accuracy how they would rule on independent contractor classification cases, most of us are still unfamiliar with Justice Neil Gorsuch. Just how might Justice Gorsuch rule if one of these cases worked its way up to the high court? Would he be more apt to find a worker was a contractor or an employee? An examination of his previous judicial record offers two significant clues.

Is Utah Case A Preview Of Things To Come Or Judicial Anomaly?

Gorsuch served as a judge on the 10th Circuit Court of Appeals for over 10 years, and although he authored at least 240 opinions during that time, there only appears to be one unpublished opinion related to the issue of independent contractor misclassification with his name on it. And in that 2014 decision, he ruled in favor of the worker (*Hogan v. Utah Telecommunication Open Infrastructure Agency*).

The case involved a man named Chris Hogan who worked for UTOPIA, a Utah state agency that helped developed telecommunications infrastructure for local municipalities. The trouble began when Hogan suspected his boss had a potential conflict of interest in the form of a brother who was bidding to do work for UTOPIA. He wanted a complaint lodged with the Executive Board, but his boss allegedly learned of the plan and forced him out of the agency. Hogan then brought a lawsuit against UTOPIA, including a claim for wrongful discharge. The trial court concluded that he was not an employee and dismissed the claim, and Hogan appealed.

Writing for a three-judge panel, then-Judge Gorsuch reversed the lower court and sent the case back to trial with instructions that Hogan be treated as an employee. Gorsuch noted that Utah state law – much like federal law and the laws of just about every state in the country – considers whether a business "had the right to control the worker" in determining whether the worker is a contractor or an employee. He said that many factors play into the determination, such as whether the business actually supervises the worker, the extent of such supervision, the method of payment, the furnishing of equipment, and the right to terminate services, but the touchstone question is whether the business "had the right to control the worker's manner or method of executing or carrying out the work."

Then examining the realities of the working relationship, and not simply judging the case based on written agreements and job descriptions, Gorsuch concluded that they "suggest UTOPIA's relationship with Hogan involved a considerable degree of control." He pointed to the fact that, according to the operative complaint, Hogan had no other clients and worked only for UTOPIA. He needed no trade license to do his work and the agency provided all of the equipment necessary to do his job. Hogan hired and trained UTOPIA employees. He worked out of UTOPIA's offices. Most importantly, Hogan had to submit to UTOPIA's direction when completing his work. "All this suggests that, though he was hired as an independent contractor, in reality Hogan served as an employee," Gorsuch said.

Some businesses may develop a dim view of Justice Gorsuch given his ruling in this case. Perhaps, however, this decision is not instrumental in assessing whether he would favor businesses or workers in the average misclassification case. After all, the allegations noted above would most likely lead even the most conservative jurist to find in favor of employee status.

And although gig economy companies may be particularly worried about how Justice Gorsuch might rule in future misclassification cases given the importance of the concept to their way of doing business, perhaps this case is not one they should fear. The working relationship between worker and business in this case is unlike most of what you would find in the typical sharing economy enterprise: most gig workers are free to do work for multiple companies, are required to provide the necessary equipment to do the job, and have the entrepreneurial freedom to complete the work when and how they want to complete it.

So perhaps instead of examining this isolated case, we should remember that bad facts make bad law, and instead look to some other better gauge of Gorsuch's judicial philosophy. And perhaps another case from Gorsuch's past – one of the final opinions he authored before ascending to the Supreme Court – provides the perfect opportunity to do just that.

Chevron In The Crosshairs: Gorsuch Calls For Regulatory Revolution

In August 2016, the 10th Circuit Court of Appeals issued a lengthy and somewhat dry ruling in an esoteric non-employment immigration matter. It is doubtful that many businesses took note of the decision, especially those working for employers and sharing economy companies. Fewer still took the time to wade through the 37-page written opinion to read a dense 23-page concurring opinion authored by a relatively unknown judge named Neil Gorsuch. After all, at the time, Gorsuch's name had not yet appeared on then-candidate Donald Trump's list of possible Supreme Court nominees that would be considered should he capture the White House. Yet this concurring opinion could hold the key in predicting how the U.S. Supreme Court might one day decide a case involving the misclassification question.

Gutierrez-Brizuela v. Lynch presented the 10th Circuit Court of Appeals with a question over the lawful residency status of an immigrant given that two separate federal statutes provided two directly contradictory answers. In order to resolve the case, the three-judge panel needed to weigh the significance of policy guidance offered by the Board of Immigration Appeals (BIA), which ran counter to an earlier 10th Circuit decision attempting to interpret the statutes in concert. On appeal, the BIA contended that the federal appeals court should follow the lead of the agency given the U.S. Supreme Court's 1984 pronouncement on regulatory deference – the infamous *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, which gave rise to the even more infamous *Chevron* doctrine. That doctrine holds that courts should largely defer to agency interpretations of federal statutes unless they are deemed unreasonable.

The majority opinion, authored by then-Judge Gorsuch, rejected the government's argument and remanded the case to the agency for further proceedings. The real sizzle, however, is found in the

concurring opinion.

There, then-Judge Gorsuch took a judicial flamethrower to the *Chevron* doctrine, mercilessly attacking it over the course of 23 pages. "There's an elephant in the room with us today," he writes. This doctrine "permits executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth." He called for a revolution, of sorts, where Congress accepts responsibility by doing the heavy lifting to pass federal laws, courts fulfill their duties by exercising independent judgment and interpret the law, and regulatory agencies cease filling what they perceive to be legislative voids.

The concurrence opines that the *Chevron* doctrine "seems to have added prodigious new powers to an already titanic administrative state." Gorsuch describes how the doctrine places impermissible powers in the hands of administrative agencies, allowing them to act as a de facto legislature by setting and revising policy, while also serving as a glorified judiciary by overriding adverse federal court determinations. "Add to this the fact that today many administrative agencies wield vast power and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix."

He faults both the judiciary branch and Congress for allowing *Chevron* to grow so dramatically over the past 30 years. He acknowledges that remedying issues through legislation can be an arduous process, but says "that's no bug in the constitutional design: it is the very point of the design." He also says that judges have all too often abdicated their duty and permitted agencies to wield such power, and calls on courts to insert themselves more readily into the interpretation of federal statutes.

Gorsuch concludes with a philosophical musing about what the world would look like without the *Chevron* doctrine. He speculates that courts would once again fulfill their duty to "exercise their independent judgment about what the law is" without so broadly deferring to the executive branch, thereby limiting the ability of an agency to alter and amend existing law and promoting reliance by allowing citizens to "organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election."

Gorsuch's final words send a clear message as to what he would do should the opportunity fall before him to rule on the future of the *Chevron* doctrine. "We managed to live with the administrative state before *Chevron*," he says. "We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change — except perhaps the most important things."

Misclassification Cases In A Gorsuch World

If Gorsuch's revolution were to take hold on the Supreme Court, his judicial philosophy could be a great asset to employers. There are numerous examples of federal regulatory agencies creating new obligations for employers, at times supplementing existing law, and at times seemingly creating new law. No employer would disagree that the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), the Department of Justice, and

numerous other federal agencies have created a thicket of regulatory law through which employers must navigate on a daily basis.

For those businesses with independent contractor relationships, however, the Department of Justice's interpretive guidance on misclassification issues is the thorniest of the bunch. In July 2015, the agency issued Administrator's Interpretation No. 2015-1, subtitled "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." This document pronounced misclassification as a "problematic trend" and sought to limit the number of businesses using independent contractors. In it, the Department of Labor said that the test that should be used to determine whether an individual was misclassified should be applied in a "broad" manner, and, once applied, most individuals would be considered employees. The agency essentially boiled the issue down to a single question: is the worker in business for himself (which makes him an independent contractor) or is he economically dependent on the business (which makes him an employee)?

The problem with such a test is that it would always leave a lingering question in the mind of a business about possible misclassification problems, preventing the certainty that the law should provide and that a business deserves. After all, the business could take all of the typical steps necessary to readily safeguard contractor status – drafting a comprehensive and easy-to-understand contractor agreement, permitting workers the freedom to work for competitors, allowing them to choose their own schedules, requiring them to make a substantial investment in their own enterprise, forcing them to use their own tools and equipment, etc. – but yet the Department of Labor could still determine that the worker was economically dependent on that business, through no fault of the company, and therefore considered an employee. If the worker chooses to cast his lot fully with that one company and not take advantage of the freedom that a contracting model provides, especially the special kind of freedom that sharing economy companies offer, it is conceivable that an overzealous court could follow the Department of Labor's Interpretation to its (il)logical extreme and find the worker to be an employee.

But not if Justice Gorsuch has his way. If the legal system were to adopt his call-to-arms, we would see Congress step in and pass legislation regarding contractor status, perhaps even laws directly speaking to the sharing economy similar to state laws passed in Utah and Florida over the past year; we would see courts stepping in and making sometimes-difficult decisions about misclassification allegations without overreliance on federal agency pronouncements; and we would see federal agencies rescinding existing regulations and other guidance while refraining from meddling where they shouldn't.

At 49 years old, Justice Gorsuch is the youngest member to join the Supreme Court in over 25 years. He will most likely remain on the bench for several decades, offering him the opportunity to shape federal law in many respects. For businesses across the country, and especially those in the nascent sharing economy, we can only hope that he will lead a revolution on regulation that will provide the necessary certainty when it comes to independent contractor classification.

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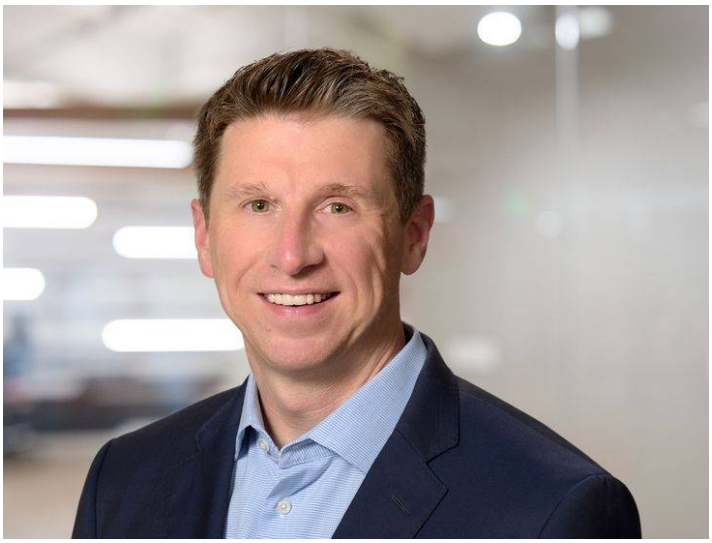

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