

What Does Merrick Garland Have To Do With The Gig Economy?

Insights

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Last week, Charlotte Garden wrote [a fascinating piece](#) for The Atlantic asking the question, “What would a Merrick Garland confirmation mean for the future of gig work?” I’ve got to admit, even though I’m a pretty devout SCOTUS junkie, and even though I spend a lot of time thinking about workplace law and the gig economy, I never before connected the two in the same thought. It’s a pretty good read, and raises some interesting questions.

The author sums up the misclassification battle being waged in the ride-sharing arena for those readers who may not be familiar with the class action litigation and the recent attempts to settle the Uber and Lyft cases. She then pivots to a discussion about why individual arbitration agreements have been so important for businesses, especially ones that bar class litigation, following the premise that plaintiffs’ lawyers “who work on a contingency basis will rarely be attracted to individual misclassification claims.” And that’s where the Supreme Court hook comes in. The author delves into a discussion of the recent history at the SCOTUS involving the [robust enforcement of arbitration agreements, especially those involving class waivers](#), and how many of [these cases were decided by a five-to-four vote](#).

Of course, with [the untimely death of Justice Scalia](#), the Court currently sits at a deadlocked four-four scenario, with liberal justices evenly balanced against conservative justices. The author points out that several new challenges on the subject of arbitration agreements are poised to work their way up to the Supreme Court in the near future, and without a majority of conservative justices, the question of whether arbitration agreements will be as robustly enforced could be at play.

The author concludes by addressing the fact that Judge Merrick Garland – whose confirmation to the Supreme Court is being [held up in the Senate](#) – has historically deferred to federal agencies in his opinions with lower courts. This center-left attitude could mean that he would be more willing to allow agencies like the NLRB and the EEOC to take positions chipping away at the pervasive power of arbitration agreements. For gig economy employers relying on arbitration agreements, especially those barring class litigation, the confirmation of Judge Garland to the SCOTUS could spell trouble.

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