



# Justice Scalia's Death Leads To Employer Uncertainty

Insights

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The tragic passing of Supreme Court Justice Antonin Scalia throws employers into a world of uncertainty. While Supreme Court jurisprudence is often unpredictable – see the 2012 decision upholding the Affordable Care Act to the surprise of many – Justice Scalia's death will no doubt lead to an unusual amount of turmoil for the foreseeable future. Employers are one of many interested groups who will be impacted by his demise.

## Death Will Upset Precarious Court's 5-4 Balance

For several decades, the Supreme Court has maintained a reliable 5-4 split that has generally been kind to employers and business interests. As the Court currently stands, Justice Scalia formed a steady conservative bloc with Chief Justice John Roberts, Justice Clarence Thomas, and Justice Samuel Alito, with Justice Anthony Kennedy a frequent swing vote on their side. That five-Justice majority paved the way for many decisions favorable to management.

Meanwhile, a group of four equally reliable liberal Justices counterbalanced that alliance, currently comprised of Justice Ruth Bader Ginsberg, Justice Stephen Breyer, Justice Elena Kagan, and Justice Sonia Sotomayor.

Obviously, Justice Scalia's death throws this balance off-kilter for the time being. If President Obama selects and the Senate approves an employee-friendly Justice to fill Justice Scalia's vacant slot, the 5-4 balance will tilt in the other direction for the first time in decades. Whether that occurs is an open question, however. Republican Senators have already announced that they will block any President Obama appointee given that he is in his final year of office.

## What Happens When A Supreme Court Slot Is Vacant?

Even if the President and Senate cooperated to fill Justice Scalia's slot on the bench, a typical appointment and confirmation process takes about three months. The Court is currently in the middle of its 2015-2016 term, which typically wraps up in June. Therefore, given the ideological divide that exists between the President and the Republican-controlled Congress, it is probable that the current term will proceed and conclude with only eight Justices.

If the Supreme Court cannot generate a five-Justice majority in any existing case – for example, if the case is decided by a 4-4 tie vote – the lower court's decision that had been appealed will remain valid. However, such a situation will not carry with it the precedential value that a typical Court decision holds, meaning that the decision will not necessarily be the "law of the land."

Instead, the decision will simply carry weight in the appellate circuit from which the case emanated (or the state, if the case was appealed from a state supreme court), which could lead to a patchwork of legal standards that differ throughout the country. An employer with operations in several states could face several legal standards and could have differing compliance obligations depending on the circumstances.

### **What Will Happen With The Cases Currently On The Court's Docket?**

As of the time of writing, there is no clear answer as to what will happen with respect to the dozens of cases currently on the Court's docket. A large number of them have been through oral argument and many would-be decisions are most likely well along in the drafting process. However, without Justice Scalia present to affix his name to the decisions, his vote will no longer count.

Of course, a number of the cases will still generate at least five votes to affirm or overturn the lower court, and the eight-Justice Court will still operate as usual in those situations. Such decisions will be the law of the land and will control throughout the country. But for those cases where a 4-4 split exists, the Court may decide to table the decisions until a ninth Justice is sworn in, or, as described above, issue a 4-4 written opinion effectively maintaining the status quo.

### **What Does All This Mean For Employers?**

That being said, there are no clear answers as to how employers will be impacted by Justice Scalia's death. Several high-profile and significant labor and employment decisions await the Court's determination this term, and their future remains in doubt.

The most noteworthy labor and employment case sitting on the Court's active docket is *Friedrichs v. California Teachers Association*. This case will decide the future of "agency shop fees" in public sector union settings. A victory for appellants would prohibit public sector unions from forcing its members to pay dues, leading to reduced financial strength and diminished clout for Big Labor across the country. Many employers and employer advocacy groups have been looking forward to a decision on this subject for years, and most thought the *Friedrichs* case was their chance to strike the fatal blow in this area of law.

While a minority of Court prognosticators believed there was a chance that Justice Scalia could actually be an unlikely vote for public sector unions, scouring his prior writings and a few questions at oral argument for support, most Court observers believed that a 5-4 decision striking down the legality of the fees was the most likely outcome. His death brings uncertainty to the process: Will the Court delay a decision in the case and hope that Justice Scalia's replacement shares his conservative worldview? Or will the decision be published with a 4-4 split and retain the status quo, amounting to a union victory? The answer may not be known for some time, at least until the inevitable drama in the Senate plays out.

Another contentious case before the Court impacting employers is the latest challenge to the Affordable Care Act (*Zubik v. Burwell*). Actually, the matter before the Court is a collection of several distinct cases consolidated together, all of which present the issue of whether religiously-affiliated

distinct cases consolidated together, all of which present the issue of whether religiously affiliated entities are required to provide contraceptive coverage for their workers through health care plans. While most of the existing cases decided by lower courts sided with the Administration and mandated employer coverage, one case did not. If the Court cannot muster a five-Justice majority for one side or the other, the nation's employers will face conflicting obligations depending on their location.

Employers also face an uncertain future with respect to immigration action that shields millions of undocumented workers from deportation (*United States v. Texas*), whether and how employers can recover their fees if they defeat the Equal Employment Opportunity Commission in a discrimination lawsuit (*CRST Van Expedited, Inc. v. EEOC*), how to calculate the statute of limitations clock for certain kinds of wrongful termination claims (*Green v. Brennan*), and several other decisions that were expected to lead to a closely divided Court.

## Conclusion

Fisher Phillips will continue to provide same-day analysis of every Supreme Court case impacting the workplace, explaining the practical ramifications for employers. We will also offer our predictions for how the next Supreme Court Justice will treat employers once he or she is confirmed. To ensure you receive these publications, please sign up for our mailing list [here](#).

If you have any questions about this developing situation, or how it may affect your business, please contact your Fisher Phillips attorney.

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

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