# What Do Employers Need To Know About Justice Kennedy's Retirement?

Insights
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Supreme Court Justice Anthony Kennedy's announcement of his impending retirement, effective the end of next month, provides President Trump with the opportunity to reshape the Court in a manner not seen in decades. If the president selects (and the Senate approves) a nominee in the model of the two most recent GOP selections—Justices Neil Gorsuch and Samuel Alito—the Court will shift from usually conservative to reliably conservative overnight. This promises to be the biggest seismic swing in Supreme Court dynamics since President George H.W. Bush replaced outgoing liberal Justice Thurgood Marshall with conservative Clarence Thomas in 1991. What do employers need to know about this imminent shift?

**First Assumption: Trump's Selection Approved Before Mid-terms**
Before we delve into specifics, let's make two big assumptions. The first assumption is that President Trump will rapidly nominate a replacement for Kennedy and the Senate will vote to approve the nominee before the mid-term elections in November. That's what Senate Majority Leader Mitch McConnell promised within hours of Kennedy's announcement on June 27, and there's no reason to think he wouldn't try his hardest to fulfill that promise.

Many Republicans are fearful that a "blue wave" could sweep across Capitol Hill this fall, bringing many more Democratic lawmakers to Congress and ousting many members of the GOP. It is common for the first mid-term elections after a presidential election to see a shift in the existing balance of power, and Democrats seem particularly galvanized for change given the many controversial positions taken by the president in his first 18 months in office. For this reason, it would behoove Republicans in power to get a new Justice seated before the elections take place and Democrats have a shot at taking control of the Senate.

While Democratic opposition has already begun to try to pressure Senate Republicans to refrain from approving a nominee until after the mid-term elections (raising the doomed Merrick Garland nomination from 2016 as an example of how they believe this nomination should proceed), it may be difficult for Democrats to prevent Trump's choice from getting seated. That's because Republicans have a slim majority in the Senate—plus the vice president as a tie-breaker—in the event of a 50-50 split. Moreover, three red-state Democratic Senators voted to approve Neil Gorsuch in 2017 and could offer a similar cushion this year. While it is possible that a moderate Republican senator might

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break ranks and throw a monkey wrench in the process, let's assume they stay solid as they did with the Gorsuch nomination proceedings.

**Second Assumption: Trump's Nominee Is More Reliably Conservative Than Kennedy**
The second assumption is a safer theory: the president will select a judicial candidate who can be counted on to be more reliably conservative than Justice Kennedy was during his 30 years on the Court. Trump has already announced that he will choose someone from the initial list of potential candidates he released in November 2017, and most analysts agree that everyone on that list has demonstrated more consistent conservative credentials than Justice Kennedy.

While the president has proven unpredictable, there seems little chance that he veers from this list. Even if he does, he would almost certainly select someone with similar philosophical leanings, so it seems a fairly safe assumption that the Court will tilt to the right if another Trump nominee gets seated.

**What Did Kennedy Bring To The Court?**
The easiest way to determine how the Court will change is to examine what we will lose with Kennedy's departure. The two hallmarks of his tenure on the Court have been his moderate tendencies—which led him to become a consistent swing vote in 5-4 decisions—and his championing of social rights. Both have had impacts on employers, and a replacement for Kennedy will almost certainly lead to big changes for the Court in these two areas.

***Reliable Swing Vote***
As for his moderate viewpoint, Justice Kennedy took over Justice O'Connor's role as swing vote following her 2006 retirement, meaning he established himself as perhaps the most important of all the Justices time and time again. In fact, of the 276 majority opinions Kennedy wrote in his 30 years on the bench, 92 of them—exactly one out of three—were in cases decided by a 5-to-4 vote.

Kennedy was rarely typecast as someone who would always side with conservatives, however. For example, in 2014-2015, he sided with the liberal Justices in eight cases decided 5-4 while only five times with the conservative wing. The next year, he was the only Justice to win every 5-4 decision, and was on the winning side of over 97 percent of the Court's decisions.

But that doesn't mean he was wishy-washy when it came to workplace law decisions. Even during the times he worked hard to cobble together a majority of 5 votes, he could be counted on to rule in favor of employers on a consistent basis. In fact, he may have actually become more conservative with time: in the term that just concluded, the Court voted 5-to-4 in 13 cases, and Justice Kennedy voted with the conservatives all 13 times. Several of those were key employer victories, such as the *Janus* agency-shop fee case, the *Epic Systems* class waiver case, and the *Encino Motorcars* service advisors FLSA case.

His departure will mean that Chief Justice John Roberts will be the Court member most likely to be viewed as a moderating figure for the foreseeable future. Roberts values unanimity and

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compromises and has aimed to stitch together larger majorities than his predecessors have, so there is a chance that he could become more moderate with Kennedy's departure. He has already demonstrated a willingness to side with the liberal Justices in tight cases, most famously as he cast the deciding vote to save the Affordable Care Act in 2012's *NFIB v. Sibelius*, so it's possible that he could take over the Kennedy swing vote role.

***Defender Of Social Rights***

While he was reliably conservative and could usually be counted on to rule in a pro-business style, the one area where Kennedy stood out was his fight for social rights. Some identified this as a libertarian "live-and-let-live" streak, and some called it socially liberal; however you characterize it, this tendency saw him side with the liberal Justices more frequently than some on the right would have liked.

Besides his votes on such hot-button (and non-employment law) topics such as abortion and the death penalty, he made his mark in the workplace law arena with his votes on LGBT rights cases. In 1996, he sided with the majority in a case (*Romer v. Evans*) that struck down a Colorado law preventing sexual orientation from being recognized as a protected class. In 2013, he helped fashion a majority that ruled the provisions of the Federal Defense of Marriage Act barring same-sex married couples from being recognized as "spouses" for purposes of federal laws violated the Fifth Amendment (*United States v. Windsor*). And, most notably, in 2015 he authored the 5-4 opinion that decided the Constitution requires states to recognize same-sex marriages. As a result, state bans against same-sex marriage were wiped off the books and all states were required to recognize same-sex marriages that took place in other states (*Obergefell v. Hodges*).

Many believed that Justice Kennedy would wait to retire until after he secured a victory for LGBT workers in a case that would have confirmed that Title VII of the Civil Rights Act covers claims for sexual orientation discrimination. In fact, several such cases are bubbling up in the lower appellate courts and seem primed for review by the Supreme Court. However, now that Kennedy is departing the Court and will probably be replaced by a more socially conservative jurist, the future for this issue seems quite uncertain.

Similarly, at least one of Justice Kennedy's decisions protected affirmative action programs at institutions of higher learning. He appeared to be the only Republican appointee at the Court who was open to colleges and universities using race-based criteria in their admissions processes. While he did not necessarily embrace affirmative action programs as readily as his liberal colleagues, he did author the 4-3 decision in 2016's *Fisher v. University of Texas* that permitted a state university to use racial preferences in undergraduate admissions despite a robust Equal Protection challenge.

**Conclusion**

You should expect to see swift action from the president and the Senate when it comes to replacing Kennedy on the Supreme Court. Just as we have done with the last several nominees, we will

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produce a preview and predictions alert when the name of the next nominee is revealed, informing employers about what they need to know about our next Supreme Court Justice.

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