Will SCOTUS Justice Kavanaugh Treat Employers Well? The Magic 8-Ball Says: "You May Rely On It"

Insights
7.10.18

Late yesterday, President Trump selected Judge Brett Kavanaugh to fill the vacant seat on the Supreme Court (SCOTUS) bench. Assuming he is confirmed by the Senate, Justice Kavanaugh would solidify the pro-business bloc of Justices on the Court, seemingly creating an impenetrable five-Justice majority of conservative jurists. The question on the mind of employers: how would Justice Kavanaugh treat workplace law cases that come before the Supreme Court? To answer that question, we once again turn to the Magic 8-Ball.

We first used the Magic 8-Ball in 2006, examining the future of the Court when Justice Samuel Alito was appointed; we did the same for Justice Sonia Sotomayor in 2009, Justice Elena Kagan in 2010, and Justice Neil Gorsuch in 2017. We now ask the same question of the Magic 8-Ball that we asked of previous appointees: if confirmed, will Justice Kavanaugh be kind to employers? The answer: "You May Rely On It."

Will Judge Kavanaugh Be Confirmed By The Senate?
Magic-8 Ball Says: "Reply Hazy, Try Again"

Before we examine the impact that Judge Kavanaugh would have on the SCOTUS, we need to examine whether he will even make it to the bench. That's because the confirmation process for Judge Kavanaugh promises to be a knock-down, drag-out battle between Senate Democrats and Republicans.

Immediately after Justice Kennedy announced his retirement, Democratic members of Congress began calling upon the Republican majority to postpone the nomination process until after the November midterm elections. They hope to recapture the Senate majority—which sits precariously at 51-49 in favor of the GOP and could swing in the Democrats' favor come November—and have the final say on President Trump's selection. Obviously, Republican senators want to push the nomination process forward quickly while they still hold a slim majority in that chamber and can control the process. "I will move heaven and Earth to see that he is confirmed," said Senator Orrin Hatch (R-Utah) last night after Kavanaugh's name was revealed as the president's choice.

The Senate Democrats have no procedural mechanism available to them to postpone the nomination process, however, so they will wage an old-fashioned public relations battle to pressure moderate Republicans to withhold their support. "I will oppose Judge Kavanaugh's nomination with everything

I have," said Senate Minority Leader Chuck Schumer (D-N.Y.) right after the selection was announced. They have already targeted several Republican senators they think could vote against Kavanaugh due to concerns over abortion rights and other hot-button issues. They could also see the Republicans lose a valuable vote if Senator John McCain (R-Ariz.) cannot cast his ballot due to his continuing battle with cancer.

However, Senate Democrats have two concerns when it comes to counting Kavanaugh votes. First, there are several moderate Democratic senators up for reelection this fall in Trump-leaning states, any of whom could decide it would help them politically to vote for the president's pick in order to remain in the good graces of conservative voters. Second, in the event of a tie vote, Vice President Pence would cast the tie-breaking vote—and he would certainly support the president's selection.

The Republicans have promised a swift confirmation process, and unless a skeleton emerges in Kavanaugh's closet that derails the proceedings, we can expect to see an up-or-down vote on his confirmation by September. The result of that vote, however, is too murky for our Magic-8 Ball to predict at present. While the prospects certainly seem promising for Kavanaugh's confirmation, don't be surprised if several twists and turns emerge and throw the process into a state of uncertainty.

Should Kavanaugh's Background Give Employers Reason For Hope?
Magic-8 Ball Says: "Without A Doubt"

If someone is looking for the ideal candidate for a conservative jurist, Brett Kavanaugh's biography reads straight out of central casting. His credentials are rock-solid for most Republicans and have given Democrats cause for concern.

He's only 53 years old, meaning he could be on the bench for decades if approved by the Senate (since SCOTUS Justices receive lifetime appointments to prevent political pressure from influencing their rulings). After receiving his undergraduate degree from Yale College in 1987, he graduated from Yale Law School in 1990. After several clerkships with prominent conservative appellate court judges, he was awarded a fellowship with the U.S. Solicitor General's office, led by Kenneth Starr. He then was rewarded with perhaps the most plum assignment any young attorney could aspire to hold: a clerkship with a Supreme Court Justice. During the 1993 term, he clerked for Justice Anthony Kennedy and made a name for himself as a rising star in the conservative ranks.

His status was solidified thereafter when he rejoined Starr at the Office of the Independent Counsel and eventually operated as the principal author of the Starr Report, which outlined 11 grounds for impeachment of President Clinton as a result of the Monica Lewinsky scandal. He then had a brief but remarkable career in private practice, where, among other things, he represented Elian Gonzalez during the conservative fight to keep him from returning to Cuba, and was one of the Republican lawyers in the 2000 Florida election recount.

Having demonstrated his conservative bona fides, he returned to public service under President George W. Bush by working as a Senior Associate Counsel and Associate Counsel to the President. He then ascended through the White House hierarchy by serving as Assistant to the President and White House Staff Secretary.

In 2003, President Bush tapped Kavanaugh for a seat on the D.C. Circuit Court of Appeals—sometimes referred to as the second-most important federal court in the country (after the Supreme Court, of course). However, his nomination was stalled for three years because Senate Democrats believed his background rendered him too partisan a selection for federal judicial service. He was eventually approved for judicial service by a 57-36 vote and assumed the bench in May 2006. There he has served as a very active federal appellate court judge, authoring over 285 cases and weighing in on many others.

His lengthy track record means we have a lot of evidence to examine when it comes to speculating about what kind of Supreme Court Justice he would make. After examining that record, the Magic 8-Ball is confident he would slot right in as the fifth member of a conservative, pro-business bloc.

Will Kavanaugh Side With Employers In Typical Workplace Law Cases?
Magic 8-Ball Says: "It Is Decidedly So"

The Magic 8-Ball has reviewed a number of employment law decisions issued by Kavanaugh, and in virtually every published opinion, he has ruled in favor of the employer. In one of his earliest decisions, he ruled in favor of the Bureau of Prisons after a worker filed an action alleging that his non-selection for a promotion was the result of racial discrimination in violation of Title VII. The employee argued that the employer made its hiring decision based on a factor not expressly listed in the job description, which should have led to a finding of discrimination. Kavanaugh wasn't having it. His 2007 opinion concludes: "The fact that an employer based its ultimate hiring decision on one or more specific factors encompassed within a broader and more general job description does not itself raise an inference of discrimination sufficient to overcome summary judgment."

In a 2008 case, Kavanaugh sided with the District of Columbia public school system in a disability discrimination case brought by a hearing-impaired applicant. He concluded that the employer's proffered reason for not hiring the applicant withstood scrutiny, and that the interviewer was permitted under the ADA to ask the applicant how he communicated in workplaces where no one knew sign language. Later that year, he denied a doctoral candidate's appeal following a jury trial loss in another disability discrimination case. Although that candidate had raised several technical issues that might have otherwise warranted a retrial, Kavanaugh gave the employer the benefit of the doubt and rejected the appeal.

2008 was a busy year when it came to workplace law cases involving Judge Kavanaugh; he also ruled in favor of the Bureau of Indian Affairs in a case alleging race, religion, age, and disability discrimination. He concluded the employee suffered no adverse employment action, the employer

had legitimate reasons for its performance-based decisions, and there was no hostile work environment at the organization.

In 2010, he upheld the dismissal of another disability discrimination claim, concluding that the employer hospital did not deny the employee's request for reasonable accommodation. The next year, he ruled in favor of an employer and upheld the dismissal of race and gender discrimination claims brought against an organization and its CEO. Kavanaugh found that the CEO's decision to fire the employee due to incompatible working styles was sufficient justification, especially given the HR manager's documented history of complaints about her performance.

There were a smattering of other pro-employer decisions over the next several years. More recently, in 2017, Kavanaugh ruled for an employer in a case where a worker alleged he was terminated in retaliation for complaining to the Occupational Safety and Health Administration (OSHA) and for filing an employment discrimination complaint with Equal Employment Opportunity Commission (EEOC). Kavanaugh concluded that the anti-retaliation provision of the OSH Act does not provide for a private cause of action for employees, and that the employer's proffered reason for terminating the employee was legally acceptable. Also in 2017, he ruled in favor of the Department of Homeland Security after a former employee alleged it violated her Privacy Act rights by disclosing an investigative report on her past misconduct to her subsequent employer. Kavanaugh concluded the disclosure was not inappropriate and rejected her claim.

Kavanaugh has proven himself, however, to not be afraid to rule in favor of workers in the more egregious cases. In a 2013 case, for example, where an employee alleged he had had been called the n-word by a supervisor, Kavanaugh had no problem finding that single verbal incident of such severity could sustain a hostile work environment claim. And in 2016, he agreed that a worker could bring a valid Title VII claim when an employer rejects a lateral transfer application for reasons based on race or gender.

Will Kavanaugh Go The Extra Mile For Employers?
Magic 8-Ball Says: "Signs Point To Yes"

At least twice in his tenure on the D.C. Circuit, Kavanaugh had the opportunity to rule in favor of workers in their employment law claims but seemed to go the extra mile to issue a ruling in favor of the employer. In 2008, he ruled in an employer's favor in a high-profile case that could have easily gone the other way. The U.S. House of Representatives' Office of the Sergeant at Arms demoted a supervisory employee after another supervisor concluded the worker grabbed his crotch in front of other employees and thereby violated the applicable sexual harassment policy. The worker sued and alleged Title VII race discrimination violations, but Kavanaugh ruled in the employer's favor. He concluded that the employer's justification was sufficient to lead to a dismissal of the case, *regardless of whether the incident had actually occurred*. Kavanaugh said that the employer honestly and reasonably believed that the incident had occurred (given the fact that three employees

provided accounts of it and a thorough and independent investigation confirmed its probability) which was enough to satisfy him.

In another case, a former employee sued the Small Business Administration (SBA) and alleged it discriminated against him because of his race and retaliated against him for his complaints. The parties reached a settlement agreement, but the former employee soon alleged that the SBA breached the agreement by revealing information about him to a subsequent prospective employer; he sought to have the underlying claims reinstated and tried to a jury. In 2011, Kavanaugh dismissed his claims and concluded that any breach of the settlement agreement was not material. He ruled that the offending comments made by an SBA worker may have technically breached the employee's settlement agreement, but the negative comments (including a discussion of him being involved in "an internal battle" with his supervisor) were essentially outweighed by other positive statements.

Will Kavanaugh Side With Management In Labor Cases?
Magic 8-Ball Says: "Don't Count On It"

During his time on the D.C. bench, Kavanaugh has also had ample opportunity to weigh in on traditional labor matters. While most of his decisions have fallen in favor of employers, he has also demonstrated an independent streak and sided with unions on occasion. Let's first examine his labor rulings that can be characterized as pro-employer:

- In 2008, the National Labor Relations Board (NLRB) concluded that only a certain group of meat department employees should be considered a proper unit for bargaining purposes, and the United Food and Commercial Workers AFL-CIO representing the meat department employees petitioned for review of that ruling. Kavanaugh rejected the union's complaints and ruled that the employer had no general duty to bargain with the union on that issue.
- In a 2012 decision, Kavanaugh ruled on a case brought by a labor union unhappy with the way a lower federal agency had resolved a dispute involving parking spaces at a union shipyard. He denied the labor union's request for a review of that agency's order, and essentially ruled that the union did not have a say in how such matters were handled.
- Kavanaugh was forced to weigh in on a particularly nasty union dispute in 2015 when a telecommunications company barred its workers from wearing union shirts that said "Inmate" on the front and "Prisoner of (Company)" on the back. The NLRB concluded that the company committed an unfair labor practice, but Kavanaugh ruled that employers may lawfully ban union messages on publicly visible apparel on the job when the company reasonably believes the message may harm its relationship with its customers or its public image.
- In another case from 2015, Kavanaugh was faced with a dispute involving hospitality workers who participated in a union demonstration by temporarily walking away from their jobs in front of an employer's building. The lower court found that the employer's response to the situation amounted to an unfair labor practice, but Kavanaugh decided that the employer was entitled to summon police officers to enforce state trespass law.

- In 2016, Kavanaugh again overruled an NLRB decision; this time the federal agency had concluded another telecommunications company should not have ordered workers from displaying pro-union signs in their vehicles. Kavanaugh said that the signs should be considered a form of picketing and therefore barred by the collective bargaining agreement, handing another win to employers.

But as noted above, Kavanaugh has occasionally sided with unions in their legal disputes, proving that he is not necessarily an automatic "rule-for-management" judge when it comes to labor disputes:

- In 2008, after the NLRB concluded an employer committed an unfair labor practice by unilaterally changing the scope of the bargaining unit to exclude certain workers and withdrawing recognition from a successor union following a merger, Kavanaugh upheld the NLRB's decision and rejected the employer's appeal. He concluded the union should have been permitted to be the exclusive representative of all of the employees, and that the employer was precluded from withdrawing recognition of union and had a continuing obligation to bargain with the successor union after the corporate merger.
- A similar conclusion was reached in a 2012 case involving a healthcare entity. The NLRB determined the employer was in the wrong by refusing to collectively bargain with the union, and Kavanaugh swept aside the employer complaints and ruled for the union. He concluded that the pro-union conduct of supervisory charge nurses did not rise to the level of interference with the registered nurses' exercise of free choice in the election.

Will Kavanaugh Hold A Hard Line On Immigration Issues?
Magic 8-Ball Says: "As I See It, Yes"

There haven't been many immigration cases to come across Kavanaugh's desk while on the D.C. Circuit, but in the small sample size the Magic 8-Ball has reviewed, we feel comfortable saying that he has expressed a restrictive view toward immigration in general.

Soon after joining the bench, he was faced with a case involving whether undocumented workers could be considered "employees" who can help to form a union under the NLRA. The employer discovered the workers were not legally permitted to work in the country after they cast votes in a union election and terminated them as required by federal immigration law. The company then sought to overturn the union election results, alleging it was tainted. The NLRB ruled that the union election should stand because the undocumented workers should be considered "employees" under federal labor law. A two-judge majority of the D.C. Circuit agreed and upheld the election results; Kavanaugh strongly dissented. "I would hold that an illegal immigrant worker is not an "employee" under the NLRA," he said, "for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful "employee" in the United States."

In 2014, the D.C. Circuit ruled that employers can properly sponsor immigrants for "specialized knowledge" visas if those workers have a particular "cultural knowledge." Kavanaugh also dissented from this decision, penning an opinion that showed strong support for American workers. He wrote that the majority opinion seemed to be perpetuating a stereotype that American workers could not learn the skills to perform the work at issue, and faulted the employer for using the "specialized knowledge" justification as a smokescreen to simply cut labor costs. "Mere economic expediency does not authorize an employer to displace American workers for foreign workers," he said.

If Confirmed, Will Judge Kavanaugh Have A Lasting Impact?
Magic 8-Ball Says: "It Is Decidedly So"

There is little doubt that Judge Kavanaugh's relative youth (age 53) was one of the factors that played into President Trump's decision to select him as his nominee. If confirmed, Kavanaugh could easily enjoy 20 to 30 years on the Supreme Court bench, taking part in dozens of cases that shape our workplace laws.

His confirmation to the Supreme Court would dramatically lower the average age of the conservative group of Justices; it currently sits at just over 66 years old, but replacing 81-year-old Justice Kennedy with 53-year-old Kavanaugh would lower it to 60 years old. This is a full decade younger than the average age of the four liberal Justices: just over 71 years old.

What would a Justice Kavanaugh mean for employment law decisions at the Supreme Court? In sum, he would transform the Court from being reliably pro-business to solidly pro-business. Retiring Justice Kennedy was often seen as a moderating force on the Court, requiring those Justices who wanted his vote to temper their majority opinions to suit his style. And he often turned out to the swing vote in such situations, sometimes siding with his liberal colleagues. While it is impossible to predict with absolute certainty whether Kavanaugh will display the same judicial philosophy he has demonstrated thus far if he is seated on the Supreme Court, it seems quite likely that the Court will tilt to the right if he is approved by the Senate.

What we can predict with absolute certainty, however, is that Fisher Phillips will continue to publish same-day alerts when the Supreme Court releases workplace law opinions. If you aren't receiving them, you can subscribe here. And if you ask the Magic-8 Ball whether we will return with another preview when, at some point in the future, the next Supreme Court Justice is nominated, its answer will be: "It Is Certain."

If you have any questions about this development or how it may affect your business, please visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney.

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

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