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WHO IS NEIL GORSUCH AND WHERE DOES HE STAND ON LABOR AND EMPLOYMENT ISSUES?

President Donald Trump has promptly nominated a potential successor—Judge Neil M. Gorsuch—to fill the Supreme Court seat left vacant by Justice Scalia’s unexpected death nearly a year ago. Since Scalia’s death, the High Court has functioned with only eight members. Judge Gorsuch currently sits on the U.S. Court of Appeals for the Tenth Circuit, in his home city of Denver. He has consistently demonstrated conservative legal reasoning while on the Tenth Circuit and appears a natural choice to succeed Justice Scalia. Indeed, in April 2016, Judge Gorsuch delivered a law school lecture that in many ways eulogized Justice Scalia and promoted his judicial approach, particularly the belief that judges should look backward when interpreting the law, rather than relying on their own moral convictions or considering potential policy consequences.¹

Judge Gorsuch’s Background

Judge Gorsuch, age 49, received his undergraduate

degree from Columbia University, Phi Beta Kappa, in 1988 and his law degree from Harvard Law School, with honors, in 1991. He later earned a doctorate of legal philosophy from Oxford University, where he studied as a Marshall Scholar. He began his legal career as a law clerk for Judge David B. Sentelle in the D.C. Circuit and then clerked for Supreme Court Justices Byron R. White and Anthony M. Kennedy during the 1993-1994 term.

Following his clerkships, Judge Gorsuch worked in private practice for about 10 years, specializing in complex litigation. In 2005, he entered public service as Principal Deputy Associate Director at the Department of Justice. The following year, he was appointed to the Tenth Circuit by President George W. Bush. His circuit court nomination was confirmed unanimously. In recent years, Judge Gorsuch has

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lectured as a visiting professor at the University of Colorado Law School, teaching courses in antitrust law as well as legal ethics and professionalism.

Positions on Labor & Employment Issues

On the whole, Judge Gorsuch's written opinions on labor and employment issues do not appear to contain any unpleasant surprises for employers. His opinions—which, by and large, are clear and easy to read—have not expressed any new interpretations of existing law that would disadvantage employers. In a recent dissent, for example, he defended the employer's decision to terminate a truck-driver employee who had violated protocol, and he criticized the majority's expansive statutory interpretation in holding otherwise.²



Judge Gorsuch's analysis of traditional labor questions also reflects a disciplined approach. In another 2016 dissent, he shot down each argument advanced by the National Labor Relations Board in support of a new policy concerning the calculation of backpay in specific scenarios.³ While the majority upheld the Board's position, Judge Gorsuch considered the Board's interpretation to exceed the scope of its authority.

In a 2014 dispute over the appropriate remedy for an unlawful practice during a lockout, Judge Gorsuch sided with the Board and the employer.⁴ There, the employer had threatened to hire permanent

replacements for union employees during a lockout. The Board found this conduct unlawful and ordered the employer to desist and to post a notice. The employer promptly complied, but the union suggested that the entire lockout was tainted by the threat and sought backpay. Judge Gorsuch rejected this theory, however, and upheld the Board's ruling.⁵ These opinions indicate that Judge Gorsuch is willing to support the Board where appropriate, as long as it does not attempt to overreach.⁶

The question of the Board's potential overreach could eventually become an issue for the Supreme Court. In August 2015, the Board issued a pivotal decision in *Browning-Ferris Industries*,⁷ which fundamentally and profoundly changed the joint-employer standard under the National Labor Relations Act (NLRA). Whether an employer is deemed a joint employer has significant repercussions for liability purposes. Judge Gorsuch's position on this issue, therefore, is key, as the *Browning-Ferris* decision is currently on appeal before the D.C. Circuit, and could wind its way to the High Court. Given his track record, Judge Gorsuch might not be inclined to support the Board's reversal of decades of precedent.

A more immediate issue before the Court this term is the validity of class and collective action waivers in arbitration agreements under the NLRA. The Supreme Court recently agreed to consolidate and review three cases that raise this question.

In 2012, the Board issued a contentious decision in *D.R. Horton*,⁸ holding that an arbitration agreement under which employees were required to waive the right to bring class or collective actions violated the NLRA. Since that decision, courts have struggled to reconcile this interpretation of the NLRA with other decisions finding class action waivers legal under the Federal Arbitration Act (FAA). The circuit courts of appeals are split on this issue.⁹

In two of the cases granted review—*Epic Systems Corp. v. Lewis*¹⁰ and *Ernst & Young v. Morris*¹¹—the

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Seventh and Ninth Circuits agreed with the NLRB's position that waivers in mandatory, pre-dispute arbitration agreements restrained employees' rights to engage in concerted activity. The Fifth Circuit, however, held in *NLRB v. Murphy Oil USA, Inc.*,¹² that arbitration agreements must be enforced per their terms under the FAA. The court reasoned that because the NLRA, which was enacted after the FAA, did not contain a congressional mandate to override the FAA, arbitration agreements must be enforced under the FAA.

It is too early to predict how Judge Gorsuch, if confirmed, would come out on this issue, but it is instructive that, as noted above, he has shown reluctance to support possible Board overreach.

Views on Administrative Agencies

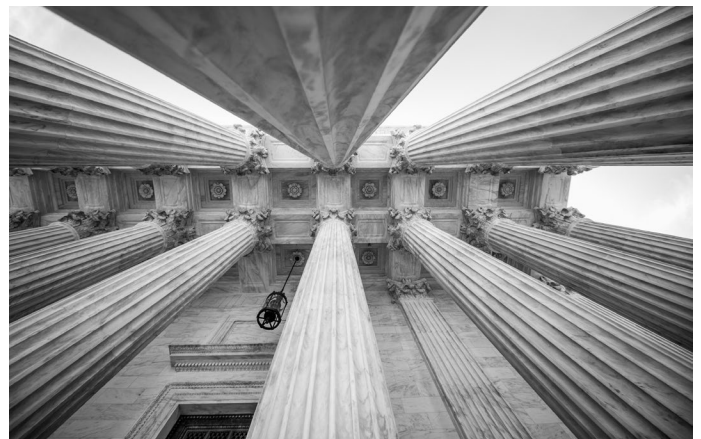
Of particular interest to employers, a noticeable theme running throughout Judge Gorsuch's work is his distrust of the power entrusted to administrative entities—whether the NLRB, the Department of Labor, or the Board of Immigration Appeals.¹³ Indeed, Judge Gorsuch recently authored a concurring opinion in an immigration case, along with his own majority opinion, to underscore his views on this topic.¹⁴ In that concurrence, Judge Gorsuch advocates that the deference afforded to administrative agency interpretations and regulations (known as “*Chevron* deference”)¹⁵ is unwarranted and arguably unconstitutional. The opinion covers a lot of ground, but, in short, Judge Gorsuch proposes to eliminate *Chevron* deference and independently review all laws and regulations without giving weight to agency interpretations (a standard known as *de novo* review).

According to Judge Gorsuch, closer review by the courts would alleviate a number of his concerns by reining in executive branch agencies that lack both public accountability and constitutional authority to make or interpret laws. Moreover, *de novo* review of agency action could also eliminate the dilemma that arises when citizens (including employers) organize

their affairs consistent with an agency interpretation, only to have that agency position change, leaving citizens exposed to liability despite their efforts to comply with the law. If Judge Gorsuch is confirmed and maintains these principles, employers can safely assume he will be critical of agency action.

What's Next?

The Senate Judiciary Committee will now take up the task of vetting Judge Gorsuch by conducting interviews and a hearing. That committee will vote on the nomination, which then moves to the full Senate for debate and a vote. Sixty votes are needed for confirmation, meaning that Republicans will need to garner support from Democrats to confirm Gorsuch. Bearing in mind the time required for this process, as well as the Senate's and the Supreme Court's calendars, it is possible that Judge



Gorsuch, if confirmed, could take the bench in time to hear oral arguments later this term, perhaps in April.¹⁶

Of course, it is unclear whether enough Senate Democrats will support Judge Gorsuch to overcome a filibuster. Senate Democrats are already promising a fight over the confirmation. Although President Obama nominated Judge Garland to fill the open position in March 2016, Senate Republicans refused to consider him. Senate Democrats may respond by filibustering a vote on Judge Gorsuch's nomination, which many have already threatened

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to do. Although the Senate under prior Democrat control eliminated the filibuster option for judicial nominees to lower courts, the filibuster is—as of now—on the table for Supreme Court nominees. Whether Senate Republicans will attempt to amend

the rules to eliminate the filibuster (a move known as the “nuclear option”) remains to be seen. In any event, we will continue to monitor the confirmation proceedings closely.

1. Hon. Neil M. Gorsuch, *2016 Sumner Carnary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. L. Rev. 905 (2016), available at: <http://scholarlycommons.law.case.edu/caselrev/vol66/iss4/3>.
2. *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1215–17 (10th Cir. 2016). In *TransAm Trucking*, the majority deferred to the Department of Labor’s interpretation of the whistleblower provisions of the Surface Transportation Assistance Act. The majority agreed that “operating” a vehicle—in this instance, driving a truck but abandoning the trailer in an unsafe situation, against company policy—could constitute the protected whistleblowing activity of “refusing to operate” due to a safety issue. Judge Gorsuch argued that this interpretation (*i.e.*, that “operating” a vehicle could mean more than “driving” it) was unreasonable and that the court should not enforce terms that Congress did not imagine.
3. *N.L.R.B. v. Comm. Health Servs., Inc.*, 812 F.3d 768, 780–86 (10th Cir. 2016) (addressing the Board’s rule about backpay where an employer illegally reduces the hours available to unionized workers).
4. *Teamsters Local Union No. 455 v. N.L.R.B.*, 765 F.3d 1198 (10th Cir. 2014).
5. *Id.* at 1204–05 (explaining that the Board’s reasoning was consistent with its administrative precedents and not arbitrary, as the union contended).
6. *See, e.g., Comm. Health Servs., Inc.*, 812 F.3d at 786 (commenting that the Board’s position there stemmed from “a frustration with the current statutory limits on its remedial powers” but that only legislation could resolve the Board’s frustration).
7. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (Aug. 27, 2015).
8. 357 NLRB No. 184 (2012).
9. In addition to the Fifth Circuit’s *NLRB v. Murphy Oil USA, Inc.*, case in which *cert* was granted, the Second and Eighth Circuits have also rejected the NLRB’s *D.R. Horton* reasoning and enforced class action waivers in arbitration agreements. *Cellular Sales of Mo., L.L.C. v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young L.L.P.*, 726 F.3d 290 (2d Cir. 2013); *Patterson v. Raymours Furniture Co., Inc.*, 659 F. App’x 40, (2d Cir. 2016). Three other cases involving this issue are also subject to *cert* petitions pending before the Supreme Court.
10. 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285 (Jan. 13, 2017).
11. No. 13-16599 (9th Cir. Aug. 22, 2016), *cert. granted*, No. 16-300 (Jan. 13, 2017).
12. 808 F.3d 1013 (5th Cir. 2015), *cert granted*, No. 16-307 (Jan. 13, 2017).
13. *See, e.g., Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *N.L.R.B. v. Comm. Health Servs., Inc.*, 812 F.3d 768 (10th Cir. 2016); *Teamsters Local Union No. 455 v. N.L.R.B.*, 765 F.3d 1198 (10th Cir. 2014); *Compass Env’tl, Inc. v. O.S.H.R.C.*, 663 F.3d 1164 (10th Cir. 2011).
14. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016).
15. *See Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1985) (describing analysis for agency actions and generally deferring to such actions where a statute is ambiguous and the agency’s interpretation is reasonable).
16. New justices traditionally do not vote on cases if they were not present for the oral arguments. Additionally, cases resulting in a tie vote among the sitting eight justices could be re-heard next term.