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# Senate Judiciary Committee and the Supreme Court Vacancy Following Justice Scalia's Death

The Senate Judiciary Committee announced that it does not intend to hold confirmation hearings this year to consider any President Obama Supreme Court nominee to fill the vacancy created by Justice Antonin Scalia's death. In this edition of *Legislate*, we reflect on the committee's action and the potential impact it may have on certain employee benefits and labor/employment related cases pending before the High Court.

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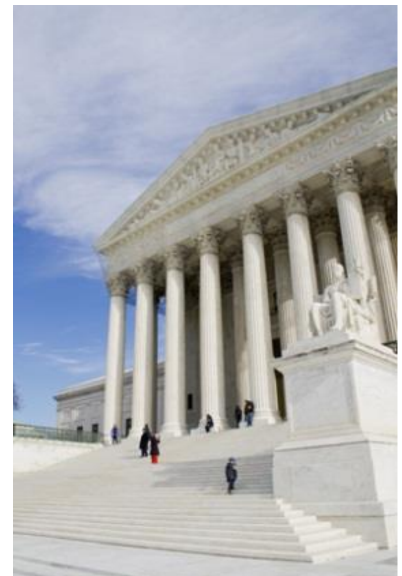
## Senate Judiciary Committee

As noted in our February 22 *Legislate*, once a president nominates an individual to be Supreme Court justice, the Senate has the responsibility to review and approve (or reject) the nominee. The first step in the Senate is handled by the Senate Judiciary Committee. The committee holds confirmation hearings and, at the conclusion of such hearings, decides whether to order the nomination to be considered by the full Senate. For a nominee to be presented to the Senate, the committee does not need to be in favor of the nominee.



With no constitutional mandate on scheduling, the Republican-controlled committee has vowed not to hold confirmation hearings to consider any yet-to-be-named Obama nominee. According to a letter addressed to Senate Majority Leader Mitch McConnell (R-KY), the committee's 11 Republican members, including Senator and presidential candidate Ted Cruz (R-TX), stated that no hearings on any Supreme Court nominee will be held "until after our next president is sworn in on January 20, 2017."

To address any suggestion that the committee's decision is partisan, Sen. Chuck Grassley (R-IA), the current committee chairman, noted that Vice President Joe Biden took a similar stance in 1992. At that time, the then committee chairman Biden said that, should a Supreme Court vacancy "occur in the full throes of an

election year," it would be "pragmatic" for the president's nomination and the committee's confirmation hearings to be delayed until after the election process is complete.

> **Comment.** The current Republican-controlled Senate Judiciary Committee may reconsider its decision to delay review of a nominee. First with 34 senators (10 Democrats and 24 Republicans) up for re-election in November 2016, including six committee members (divided evenly between Democrats and Republicans), the Republicans may lose control of the Senate. In addition, even if the next president nominates a justice with conservative views, there is no assurance that such justice would cast votes that support a traditional Republican agenda.

**Jurisprudence and Party Affiliation**

A justice's jurisprudence is not necessarily influenced by his or her party affiliation. For example, Chief Justice Roberts, a George W. Bush nominee confirmed by a Republican-controlled Senate, wrote the 2012 majority opinion in the Supreme Court **decision** upholding the constitutionality of the **Patient Protection and Affordable Care Act** — a law that reached President Obama's desk without any House or Senate Republican vote in favor of the bill and which the current Republicans in Congress have vowed to repeal and replace.

## An Eight Justice Bench

A Supreme Court bench of eight does not operate the same as one with nine. Moreover, with a vacancy on the bench, rulings may have different results and impacts. Below is a short list of some of the interesting outcomes that may arise as a result of a vacancy.

- The Supreme Court may decide a case with eight justices or it may choose to delay a decision until after a ninth is confirmed. It also may choose to rehear a case after the new justice is appointed.
- If a vote is a 4:4 tie, the Supreme Court decision will:
  - Leave the lower court's ruling intact as if the Court had never heard the case
  - Not create precedent in any of the circuits
  - Be binding only on the parties to the actual dispute
  - Not resolve a split in the circuits (if there was one)

## Pending Employee Benefits Related Cases

The Supreme Court currently has two significant pending employee benefits cases that may be affected by Scalia's absence. One has already been heard by the Court; the other has not.

**ACA and Contraception:** ***Zubik v. Burwell.*** This case is a consolidation of seven lawsuits. At issue is the Affordable Care Act (ACA) requirement to provide prescription contraceptives to women as a preventive service. Regulations provide an accommodation to religiously affiliated nonprofits. Specifically, they are permitted to use a certification and/or notice procedure that shifts the financial burden of providing the coverage to the insurer or the third-party administrator. The Supreme Court agreed to consider whether the accommodation violates the religiously affiliated nonprofits' rights under the Religious Freedom Restoration Act (RFRA). Oral arguments are currently scheduled for next month. (See our November 16, 2015 *For Your Information.*)

**Justice Scalia and Religion**

While others may disagree, some suggest that his commitment to Roman Catholic religious beliefs did not interfere with his jurisprudence. By way of example, in his majority opinion in ***Employment Division v. Smith***, Justice Scalia made clear his view that the First Amendment does not require the government to grant religious exemptions from generally applicable laws or civic obligations.

**Comment**. If the Supreme Court's decision is a tie, the lower court decisions will stand. Moreover, because some (but not all) lower courts have ruled that the accommodation violates the religiously affiliated nonprofits' rights under the RFRA, uncertainty would remain for those employers that operate nationwide.

**ERISA Preemption: *Gobeille v. Liberty Mutual.*** This past December, the Supreme Court heard oral arguments in the case. At issue is a 2nd Circuit Court of Appeals decision that determined ERISA preempted a Vermont state law requiring third-party administrators for self-funded ERISA plans to submit health care data to a Vermont database.

**Comment.** The Supreme Court has considered the breadth of ERISA preemption on more than one occasion. Justice Scalia, who interpreted ERISA preemption very broadly, would most likely have voted to uphold the 2nd Circuit Court of Appeals decision (that the Vermont law is preempted by ERISA). However, since he may have been the swing vote, the Supreme Court decision may result in a tie. Should this be the outcome, employers will not need to comply with the Vermont law. Moreover, although the decision would not set a precedent, it may have a chilling effect and discourage other states from passing legislation that may be found to "relate to" employee benefits plans.

## Pending Employment and Labor Cases

A handful of cases on the Supreme Court's docket involve employment issues. We review three of them.

**Constructive Discharge: *Green v. Brennan.*** This case involves a federal employee who filed a constructive discharge claim. At issue is whether the claim is time barred under Title VII. Lower court decisions have reached different conclusions as to when the applicable time period begins. Five circuit courts of appeals ruled that the applicable time period starts when an employee resigns. However, courts in three other circuits, including the 10th Circuit where the *Green* case was decided, ruled that the applicable period starts when the last act occurs that gives rise to the allegedly bad act.

**Justice Scalia – What would he have done?**

Justice Scalia would probably have voted to overturn the lower court's ruling in *Green.* During oral arguments, he appeared to make his views known when he said, "I would take the term constructive discharge to refer not to the notice of quitting, but rather to the acts of the employer that forced the quitting." Indeed, he noted that an employee will have been constructively discharged because the employer "made his life miserable."

**Comment.** Although *Green* raises the constructive discharge question in the context of federal employment, its outcome may have implications beyond the federal sector (e.g., for private and other nonfederal public employees). Specifically, other courts deciding constructive discharge cases outside the federal employment setting may draw upon the Court's reasoning and apply it in such cases.

**Agency Fees v. Direct Payment**

If the lower court opinion is overturned and the agency fee model is prohibited, public sector employers and unions may be able to switch to a direct payment alternative. Under this alternative model, the employer could directly compensate the union for the cost of representing nonmembers and shift the financial burden back to the employees by salary reductions. However, switching could prove to be challenging, as some state laws prohibit the direct payment model.

**Public Sector Unions: *Friedrichs v. California Teachers Association.*** Oral arguments were heard in this case a few days prior to Justice Scalia's death. At issue is whether public employees who are not members of the union can be required to pay a "fair share" or "agency" fee to the union to cover collective bargaining costs. The plaintiffs in *Friedrichs* allege that mandatory agency fees violate their First Amendment rights.

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**Comment.** Without Justice Scalia, this case will in all likelihood result in a tie and the lower court decision — that ruled that public employees who are not members of the union can be required to pay the agency fee — will be upheld. Had Justice Scalia remained on the Court, the case may have been decided differently.

**Class Actions: *Tyson Foods, Inc. v. Bouaphakeo.*** This case addresses whether a class can be certified or maintained if potential class members had varying degrees of injuries, or none at all, arising out of an alleged failure by Tyson Foods to properly pay overtime wages. Tyson Foods' alleged failure to maintain proper records to calculate eligible overtime pay added complexity to the question of whether the workers could be certified as a class.

**Comment.** Without Justice Scalia, the case may end up in a tie and translate to a lost vote in opposition to class certification. In that case, there may be an indirect impact on all employers as it may signal to employers that the bar is low (or lower) for classes to be certified. Perhaps a tie would invite more lawsuits seeking class certification and increase pressure on employers to settle lawsuits seeking class action status — even for lawsuits that arguably have little merit. Given the great cost typically associated with defending and litigating class action lawsuits, employers would have to consider how a tie shifts the risk/reward analysis.

**Justice Scalia and Class Certification**

During the November 2015 **oral arguments**, Justice Scalia did not seem convinced that a class could be certified with members "some of whom have not been injured at all." As noted in his majority opinion in ***Wal-Mart Stores, Inc. v. Dukes***, Justice Scalia believed that "class members [must] 'have suffered the same injury,'" and class certification cannot rely simply on the fact that "they have all suffered a violation of the same provision of law."

## In Closing

Soon, the Supreme Court will rule on these cases, or provide an update on how they will be handled. In the meantime, once President Obama announces a nominee, pressure on the Senate Judiciary Committee to hold (or not hold) confirmation hearings will escalate. Importantly, whoever is confirmed will live in Justice Scalia's shadow.

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