

Supreme Court Nominee Neil Gorsuch An Encouraging Pick For Employers

by Melissa Raphan and Ryan E. Mick

On Tuesday evening, President Donald Trump nominated Tenth Circuit Court of Appeals Judge Neil Gorsuch as the next Justice of the United States Supreme Court. While his opinions, speeches and other information will be reviewed closely in the coming weeks, employers generally should be encouraged by Judge Gorsuch's nomination at the outset.

Employers who were hoping for a Supreme Court pick in the mold of Justice Scalia generally should be pleased with this selection. Although Judge Gorsuch has not authored many significant employment-related decisions while on the Tenth Circuit Court of Appeals (his opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 N.3d 1114 (10th Cir. 2013), being a notable exception) his published opinions on employment-related issues tend to favor employers, with multiple decisions upholding summary judgment for employers. Further, his record shows a tendency toward narrow opinions, which suggests Justice Gorsuch would not readily expand burdens on employers through Court rulings. He has been critical of overreaching class actions and written favorably about arbitration agreements. He also has been critical of undue judicial deference to administrative agencies, which would be a welcome relief to employers that dealt with particularly active administrative agencies under the Obama administration.

Notable opinions reflecting Judge Gorsuch's judicial tendencies on issues of concern to employers include:

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016). In a concurring opinion, Judge Gorsuch criticized the *Chevron* doctrine which provides for significant deference to administrative agencies' interpretations of federal law within their enforcement authority. Judge Gorsuch wrote that the doctrine turns administrative agencies into "super court[s] of appeals" in violation of separation of powers principles. Of particular note to employers, Judge Gorsuch has expressed reluctance to defer to the National Labor Relations Board in recent cases. See *NLRB v. Cmty. Health Servs.*, 812 F.3d 768, 780 (10th Cir. 2016); *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198

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(10th Cir. 2014). Given the aggressive stances on numerous issues of concern to employers taken by the NLRB, DOL and EEOC under President Obama, as well as the increasing frequency of conflicting agency interpretations depending on the administration in office, employers looking for consistent guidance on their obligations under federal law may find Judge Gorsuch's views on deference refreshing.

Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc., 567 F.3d 1191 (10th Cir. 2009). Judge Gorsuch expressed a clear preference for enforcing arbitration agreements, agreeing with Supreme Court precedent that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." As such, he explained that the court's job "is always to enforce the parties' intent and, absent such clear intent, apply the presumption of arbitrability." Employers who have relied on arbitration agreements to resolve disputes with their employees (which often include class action waivers to protect the employer against frivolous class claims), should be encouraged by Judge Gorsuch's published views.

Hobby Lobby Stores, Inc. v. Sebelius, 723 N.3d 1114 (10th Cir. 2013). Judge Gorsuch wrote a concurring opinion agreeing with the majority of the Tenth Circuit that the Religious Freedom Restoration Act and Free Exercise clause protected Christian business owners from the Affordable Care Act's contraceptive mandate. The following year, the Supreme Court agreed with the Tenth Circuit's decision in *Burwell v. Hobby Lobby Stores, Inc.* In his concurrence, Judge Gorsuch focused on the personal faith of the business owners as integral to the legal analysis and espoused the view that the court's analysis should not inquire into the sincerity of those beliefs. Emphasizing the role of the courts, Judge Gorsuch explained that "It is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct." Notably, he emphasized that the Religious Freedom Restoration Act, "doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."