Legal Update Article

President Trump Nominates Amy Coney Barrett to U.S. Supreme Court

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In the wake of Justice Ruth Bader Ginsburg's death, President Donald Trump has nominated the Honorable Amy Coney Barrett, who sits on the federal U.S. Court of Appeals for the Seventh Circuit, to the U.S. Supreme Court. A conservative jurist and self-described "originalist" and "textualist," Barrett previously clerked for the late-Justice Antonin Scalia of the U.S. Supreme Court.

Barrett was widely considered to be a leading candidate to succeed Justice Scalia in 2018, but the nomination ultimately went to Justice Brett Kavanaugh. Her name quickly resurfaced as a top contender for Trump's third Supreme Court appointment.

President Trump announced the selection on September 26, 2020. The Republican-majority Senate is expected to move quickly to a confirmation vote. If confirmed by the Senate, Judge Barrett will be one of the youngest Justice to ever sit on the Supreme Court.

Barrett's Career

A deeply religious conservative, Barrett attended St. Mary's Dominican High School, an all-girls Catholic school in New Orleans, before receiving a B.A., *magna cum laude,* from Rhodes College in 1994 and her J.D., *summa cum laude,* from Notre Dame Law School in 1997. She went on to clerk for Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit from 1997 to 1998, and for the late-Justice Scalia of the U.S. Supreme Court from 1998 to 1999.

After her clerkships, Barrett worked briefly in private practice at Miller Cassidy Larroca & Lewin in Washington, D.C., from 1999 to 2001. She then taught successively at George Washington University Law School, Notre Dame Law School, and University of Virginia Law School.

President Trump nominated Barrett to the Seventh Circuit on May 8, 2017, and she was confirmed by the Senate on October 31, 2017. The 55-43 Senate vote fell largely along party lines with three Democrats voting to confirm Barrett and two not voting.

Barrett has been prolific in her short tenure at the Seventh Circuit, issuing nearly 100 written opinions. Her numerous employment law opinions provide a solid roadmap to how Barrett as a Supreme Court Justice likely would address these matters on the high court. Combined, the decisions reflect a nuanced approach to workplace law, shaped less by dogma than by the text of the relevant employment law statutes.

Employment Law Decisions

Arbitration and Class Actions

Class action waivers contained in arbitration agreements governed by the Federal Arbitration Act (FAA) have been a focus of several Supreme Court decisions in recent

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years. The decisions affirmed by the high court have focused on the right of parties to enter into contracts that provide for individual arbitration of disputes.

A related question has been the subject of much litigation in the lower courts: Who can decide whether the parties, through their arbitration agreements, have consented to class or collective arbitration? Judge Barrett contributed to the growing body of case law on this question, which was a matter of first impression for the Seventh Circuit, by authoring the opinion in *Herrington v. Waterstone Mortgage Corp.*, No. 17-3609 (Oct. 22, 2018), which held that a court, not an arbitrator, must decide.

In *Herrington*, the district court had invalidated a class waiver in the parties' arbitration agreement and then ordered the employees to arbitrate. The arbitrator conducted a collective arbitration over the employer's objections and issued a $10 million award to the employees. Writing for the appeals court, however, Judge Barrett stated the district court erred in striking the class waiver, noting that the Supreme Court had upheld the validity of such provisions in its landmark decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and held the court must conduct the threshold inquiry of whether the arbitration agreement authorized class arbitration as this question involves a foundational question of arbitrability. In arriving at this opinion, Judge Barrett explained that this threshold question is of great importance as it could sacrifice the advantages of arbitration.

Judge Barrett's opinion on a court's ability to determine significant threshold questions of arbitrability may affect another key issue in arbitration that is winding its way through the federal courts: whether delivery drivers, including drivers in the expanding "gig" economy, fall under the narrow "transportation worker" exception or exemption in Section 1 of the FAA. If the exception is held to apply, drivers cannot be compelled to arbitrate disputes with their employer and would be entitled to pursue their class or collective claims in court. Judge Barrett's opinion in *Wallace v. Grubhub Holdings, Inc.*, Nos. 19-1564 & 19-2156 (Aug. 4, 2020), held that the transportation worker exception did *not* apply to drivers who make local food deliveries from restaurants to homes and thus they could be compelled to arbitrate their claims. To determine whether the exception applies, Judge Barrett explained that "transportation workers" are those who are "actually engaged in the movement of goods in interstate commerce," which is determined by whether the interstate movement of goods is a central part of the drivers' job description. While the *Grubhub* drivers argued they carried goods that *had* moved across state lines, Judge Barrett explained that this was insufficient to bring these drivers into the Section 1 exception, which must be "afforded a narrow construction."

Both the First and Ninth Circuits have also ruled on the transportation worker exception in recent months; the First Circuit held the exception applied thereby foreclosing arbitration, while the Ninth Circuit found it inapplicable, allowing arbitration. Given the growing significance of the gig economy and the circuit split on a key issue arising under the FAA, the Supreme Court may soon take up the question, where Judge Barrett may apply her reasoning in *Grubhub* to any decision.

Employment Discrimination

Judge Barrett's decisions in cases alleging discrimination reflect a restrained approach to statutory interpretation, a careful adherence to procedural rules, and a

straightforward application of law to facts. The result has been a fairly balanced win rate for employers and employees. For example, her opinion in *Smith v. Rosebud Farm, Inc.*, No. 17-2626 (Aug. 2, 2018), held that a reasonable jury could find a male employee was sexually harassed by male coworkers based on sex, given the "ample" evidence that only male employees, and not female employees, had been subjected to the harassing conduct.

In *Vega v. Chicago Park District*, Nos. 19-1926 & 19-1939 (Apr. 7, 2020) (one of Judge Barrett's lengthier opinions, at 21 pages), the Seventh Circuit upheld a jury verdict in favor of a Hispanic park district employee on her Title VII claim for national origin discrimination. Judge Barrett rejected the park district's contention that there was insufficient circumstantial evidence for the jury to find for the employee on her Title VII claim. Judge Barrett wrote, "What matters is whether she presented enough evidence to allow the jury to find in her favor—and she did." Judge Barrett wrote in similarly lenient terms about an employee's burden to establish causation with respect to claims under Title VII of the Civil Rights Act. She explained that a plaintiff "has 'plenty of room' to convince the jury that a causal link exists," and that the employee did so here. She emphasized, however, that the standard for proving a "widespread custom" of discrimination under Section 1983, is a good deal higher, and dismissed the Section 1983 claim as the employee did not meet this higher burden.

In Judge Barrett's opinion in *Purtue v. Wisconsin Department of Corrections,* No. 19-2706 (June 26, 2020), the Seventh Circuit affirmed a district court ruling dismissing the discrimination claims by a corrections employee who was fired after she falsely claimed that a prisoner had struck her with an empty snack-cake box he had thrown from his cell. Again, Judge Barrett stressed that employees have numerous avenues to make their case. The familiar *McDonnell Douglas* burden-shifting approach is not the only way to establish a discrimination claim, she wrote, and an employee may have other available evidence to establish intentional discrimination. No such evidence existed in this case, Judge Barrett ultimately concluded, and no reasonable jury would find that the employee was subjected to gender discrimination.

Religion and LGBTQ Rights

When President Trump first floated Barrett's name as a candidate to fill the seat vacated by Justice Scalia, her opponents feared that her conservative Catholicism would unduly shape her views on abortion and LGBTQ rights. In response, Republican leaders accused Democrats of applying a religious test to her nomination, which Article VI of the U.S. Constitution forbids. During her confirmation hearing before the Senate Judiciary Committee for her Seventh Circuit nomination, Barrett was questioned directly about how her personal religious convictions would affect her impartiality as a judge. Barrett confirmed her deeply held religious beliefs, but assured the Committee that she would separate her personal beliefs from her jurist role. Nonetheless, she quickly drew opposition from a broad coalition of LGBTQ rights organizations.

In its decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), the Supreme Court held that Title VII's proscription against sex discrimination in employment was applicable to discrimination based on sexual orientation and transgender status. The landmark holding was heralded as a significant advancement for LGBTQ rights. Still, *Bostock* was a divided decision, and other cases (such as under

Title IX of the Education Amendments Act, restroom and locker room usage, Affordable Care Act, and sex segregation) are likely to land before the Supreme Court to round out the jurisprudence in this area. In addition, *Bostock* left open the issue of religious exemptions and religious and religious-affiliated employers. Given Barrett's deeply held Catholic beliefs and her commitment to a textualist interpretation of the law, her presence on the Court will be impactful in securing a conservative majority on these issues.

Judge Barrett is expected to favor a broad interpretation of the First Amendment's religious freedom guarantees, to staunchly uphold protections from employment discrimination based on religion, and to safeguard the rights of religiously affiliated employers to hire and fire free from government interference. The Supreme Court has significantly expanded the scope of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S.Ct. 2049 (2020). What remains to be seen is just how expansive this exception may be, such that it becomes the majority rule in cases involving religious affiliated employers. Will it continue to expand on the fourth factor in the *Hosanna* case — whether the employee's job duties included "important religious functions" and not apply the remaining three factors with the emphasis on the job title of "minister"? To what extent could the exception be cited by some employers as a defense to discrimination claims brought by LGBTQ employees? Given Justice Barrett's religious beliefs, she is expected to play a pivotal role in limiting the reach of *Bostock* and broadening the scope of religious-based protections.

Employee Benefits

The survival of the Affordable Care Act (ACA) is one of the largest issues teed up at the Supreme Court in the coming term. *California v. Texas* (No. 19-840), cons. with *Texas v. California* (No. 19-1019), the latest ACA challenge pending at the Court, is scheduled for oral argument on November 10. At issue is the ability of the ACA itself to survive after lower court rulings that the individual mandate portion of the ACA is unconstitutional following the elimination of any penalty associated with a failure of individuals to maintain minimum essential coverage. Judge Barrett has publicly criticized the ACA, as well as the high court's 2012 decision upholding the law's constitutionality. Were Barrett to be seated before November 10, she will likely participate in a highly divided decision that could invalidate much, if not all, of the ACA and lead to a complex reaction in the nation's healthcare system, including significant impacts for employer-sponsored group health plans.

Confirmation Battle Looms

The latest political indicators, however, suggest that absent extraordinary circumstances, President Trump has the votes to confirm Judge Barrett swiftly.

Regardless of how Judge Barrett's nomination fares, or whether President Trump will secure four more years to nominate judges, he will have left an indelible mark on the federal judiciary, including the nation's highest court, impacting every aspect of workplace law.