



How Will Kagan Treat Employers?

Even The Magic Eight Ball Can't Begin To Predict...

By Rich Meneghello (Portland, OR)

Over the past several years, we have relied upon the tried-and-true method of asking our Magic Eight Ball to help predict how newly-nominated Supreme Court Justices would treat employers once seated on the bench. In retrospect, the Magic Eight Ball turned out to be a fairly accurate predictor in examining Justices Alito and Sotomayor and their handling of labor and employment law matters.

Now that President Obama's nomination of Solicitor General Elena Kagan appears to be nearing a successful conclusion, it is time once again to examine the next Justice of the Supreme Court to determine how she will treat employers. But because her background takes a somewhat different path than the other nominees we have examined, every question we asked came back "situation cloudy, ask again later." We'll need to put the Magic Eight Ball on the shelf and instead take our best guesses about her future.

Who is Kagan Replacing, And Why Does That Matter?

Before we begin, a bit of context is helpful. Ms. Kagan will be replacing the retiring Justice John Paul Stevens, who turned out to be one of the most liberal and employee-friendly Supreme Court Justices of the modern era. Although considered to be a moderately conservative judge when nominated by Republican President Gerald Ford in 1975, Justice Stevens authored dozens of pro-union and pro-employee opinions in his 35 years on the bench.

In other words, even if Ms. Kagan turns out to be another liberal member of the Court who gives the benefit of the doubt to employees and unions, she really can't get much worse than Justice Stevens. Substituting one liberal Justice for another will not have a dramatic impact on the day-to-day doings of the Supreme Court.

But it's certainly worth noting that Ms. Kagan's appointment to the bench will have a dramatic impact on the future of the Supreme Court because of her age. At 50 years old, she will become the youngest member of the Court by a good 5 years, with only Chief Justice Roberts, 55, Justice Sotomayor, 56, and Justice Alito, 60, within 10 years of her. Before Justice Stevens' retirement, the average age of the liberal bloc of Justices was 74 years old, because Justices Stevens, Ginsburg, and Breyer counteracted the relative youth of newly-appointed Justice Sotomayor.

Once Ms. Kagan replaces Justice Stevens, the average age of the four liberal Justices will be lowered a full 10 years to 64 years old. By comparison, the employer-friendly bloc of Justices, including Chief Justice Roberts and Justices Alito, Scalia, and Thomas, has an average age of 63 years old. It is obvious to see that Ms. Kagan's appointment could solidify the core bloc of employee-friendly jurists for years to come.

What Can Kagan's Background Tell Us About Her Future?

Like all recent appointments to the Supreme Court, Ms. Kagan has an Ivy League education including an undergraduate degree from Princeton



in 1981, a graduate degree from Oxford in 1983, and her law degree from Harvard in 1986. However, like no appointment since Justices Rehnquist and Powell were nominated in 1971, Ms. Kagan has no prior experience as a judge. For this reason, prognosticators are at a decided disadvantage when trying to predict how Ms. Kagan will handle labor and employment cases at the Supreme Court.

Her formative years as a lawyer were spent clerking for various judges, including legal giant Justice Thurgood Marshall. She then began teaching law for the University of Chicago before shifting to a political career, serving as counsel for then-Senator Joe Biden in 1993, followed by a stint as Associate Counsel in the Clinton White House from 1995 to 1999. In 2001, she returned to the academic world as a professor at Harvard, and was named the first female Dean of Harvard Law in 2003. She worked in that role for 6 years before being appointed as the Obama Administration's Solicitor General in 2009, also the first female to hold this prestigious and important post.

Kagan's Recent Role As Solicitor General Offers Some Clues

The Solicitor General is the person appointed to represent the federal government before the Supreme Court, and generally determines the legal position that the United States will take in front of the Court and whether a particular case will be appealed. For these reasons, the Solicitor General is sometimes referred to as the "tenth Justice" of the Supreme Court. However, an examination of the work of the Solicitor General is not always an accurate indicator of the individual's legal philosophy, since she is supporting the policies and practices of the President and the entire Administration. Although we can examine Ms. Kagan's work as Solicitor

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Are You Saving On Wage Costs By “Rounding” Worktime?

Then You Might Be Doing It Wrong!

By John Thompson (Atlanta)

For many years, some employers have chosen to “round” non-exempt employees’ worktime in computing wages. This is emerging as another recurring claim in the continuing flood of lawsuits filed under the federal Fair Labor Standards Act. If you believe that ending such a procedure would cause your wage costs to increase, this is a danger signal.

A Little Background

As an enforcement policy, the U.S. Labor Department says that it will not challenge an employer’s practice of rounding starting and stopping times to the nearest 5 minutes or to the nearest tenth or quarter of an hour in calculating an employee’s pay. However, DOL cautions that this is acceptable only if the practice averages out so that employees are properly paid for all of the time they actually work. The agency emphasizes that rounding does not excuse arbitrarily failing to record or properly pay for any amount of an employee’s fixed, regular, or practically-ascertainable worktime.

Different employers handle timekeeping in different ways, of course. But the upshot of DOL’s position is that, under any rounding system, employees must be paid for *at least* as much time as they have actually worked overtime over the long-term. Put differently, rounding should favor employees as much as or more than it does the employer. Rounding scenarios in which an employer consistently eliminates recorded time for weeks or months on end might well not do this. So how could that happen?

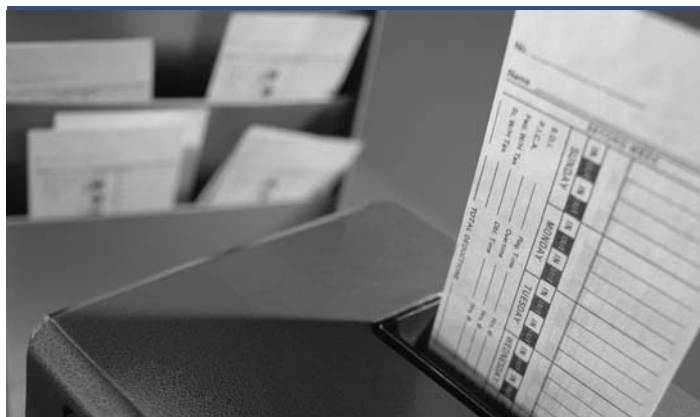
How To Do It Wrong

One illustration is failing to round to the *nearest* increment. For example, rounding to the nearest quarter-hour typically means that the employee’s starting time-entry is rounded back for up to 7 minutes after the quarter-hour and forward for 8 minutes or more past the quarter-hour. As applied to an employee whose scheduled starting time is 8 a.m., punching in at 7:52 a.m. would be rounded to 7:45 a.m.; punching in at 7:53 a.m. would be rounded to 8 a.m. By contrast, a practice of always rounding to 8 a.m. if the employee punches in at any point after 7:45 a.m. could cause the employee not to be paid for all hours worked over a period of time.

Another source of potential trouble is rounding an employee’s meal-period time entries, particularly if the workday’s beginning and ending times are also rounded. The danger could be even greater if this is done with respect to relatively short meal breaks, such as 30-minute ones.

In addition, the chosen rounding-interval’s length could increase the system’s vulnerability to a challenge. For instance, this risk is probably higher if the employer rounds to the nearest 15 minutes rather than to the nearest 5 minutes.

Even if rounding is appropriate under the circumstances, it should be limited to the clerical handling of *exact times already recorded*. Using rounding to restrict the recording of those times in the first place, or changing original records to show only rounded times, could lead to trouble. Neither is it wise to rely upon rounding as a substitute for managing employees’ attendance or worktime, such as by instructing employees to record their working times so as to correspond exactly to



certain intervals, or prohibiting them from recording their beginning and ending times outside of certain timeframes.

Be certain that electronic or computerized timekeeping systems operate lawfully. Even elaborate and expensive devices and software could still expose you to liability if you round employees’ hours worked in an impermissible way, or otherwise improperly modify the amount of worktime that is transmitted to an employer’s payroll software. Programmed timekeeping procedures could make perfect sense to a software designer but still not square with the FLSA’s requirements.

Why It Matters

DOL’s enforcement policy does not prevent current or former employees from suing over rounding, and they are doing so. In addition to making the kinds of claims mentioned above, some are arguing that employers using computerized timekeeping systems and payroll software programs have no justification for rounding at all. Groups of employees are alleging that rounding resulted in their being unlawfully unpaid for tens of thousands of minutes of worktime.

It’s conceivable that, after investing extensive time, money, and other resources, an employer might prove in a DOL investigation or in a lawsuit that its rounding practice did not cause it to pay less than what the FLSA requires. Then again, maybe not. It would be prudent to evaluate this before the wolf is at the door.

As always, take into account whether and how state or local laws have an impact. Some jurisdictions are now addressing rounding under their own wage-hour rules. They can (and sometimes do) take a more employee-favorable stand.

This is one of those many areas of wage-hour law that can trip up even the most careful employers. There are lots of others. That’s one reason Fisher & Phillips has started a blog aimed specifically at wage-hour topics. John Thompson, the author of this article, is also the editor of our Wage and Hour Laws blog, which you can access at www.wage-hour.net. For more information on this and other topics please visit our blog or contact John directly at jthompson@laborlawyers.com or 404.231.1400.

Part 1: Are Your Employees Really Important Business Partners?

Or Are You Just Kidding?

By John McLachlan (San Francisco)

Most employers say they value their employees. After all, it would sound pretty harsh for an employer to say that its employees are, with a few exceptions, a bunch of idiots who can seldom do anything right. Besides, what would such a statement say about the company itself?

Aside from avoiding shooting themselves in the foot, employers who say they value employees generally believe what they are saying. But how often do employers really take the actions that prove they value employees' contributions to the business. Most of the time employees do not have any opportunity to make contributions to the business beyond performing their assigned duties. Employers who care often have high-performance organizations that excel in delivering their products or services to the intended end-user, with high levels of customer satisfaction.

Unfortunately, more frequently than is desirable, an employer's claim about how it values its employees doesn't stand up to scrutiny. Why? Because it's much easier to say it than it is to do it. The primary reason that employee contributions are cut off at the expected and routine level is that it is very, very difficult to treat your employees as valued business partners on a consistent and habitual basis.

It's much easier, and (apparently) more efficient in the short run, to issue directives about what has to be done, when it has to be done, and how it has to be done, so that management can spend more time worrying about the slow pace of change and the ever increasing inroads of the competition. As Harry Truman correctly said: "When you have an efficient government, you have a dictatorship." We believe the same holds true in business, although efficiency alone is no more a reason to embrace the dictatorship model in commercial activity than in the governance of nations. We prefer Winston Churchill's choice between efficiency and democracy: "It has been said that democracy is the worst form of government – except for all the others."

Are You Willing To Take The Time?

Certainly the pace of modern business and the challenges of local and world competition do not leave a great deal of time for theoretical discussions of work place enrichment, consensus building or structural organizational development. Often those considerations seem like luxuries for another day when the pace slows a little. Right

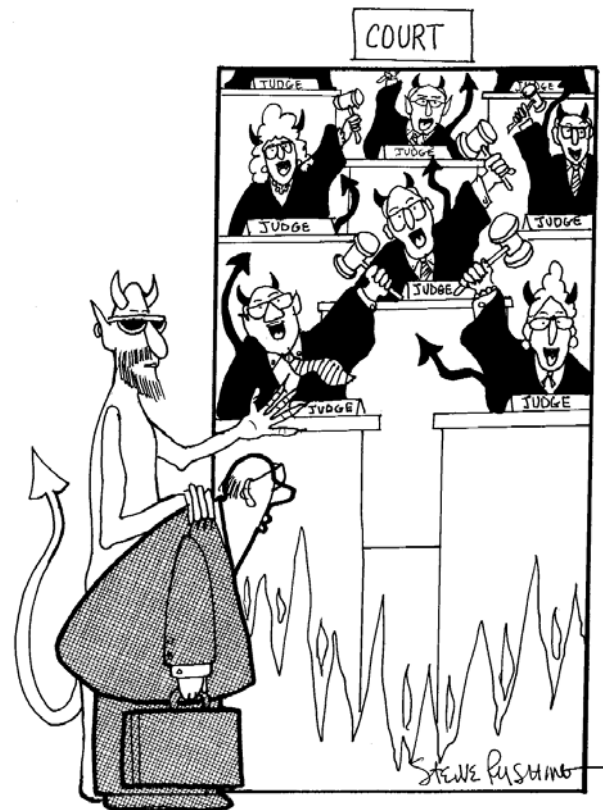
now we have to get our costs down and our manufacturing improved, we have to figure out how to get better performance from our suppliers and how to improve our customer satisfaction scores, and we also have to figure out how to retain our market share against other lower cost competitors, etc.

While there is never enough time, fortunately you don't have to change your organization in a week, a month or a year. But it is important, if you wish to make a better use of the resource for which you pay considerable sums each week, to assess where you are on the employee-involvement curve, and to decide for yourself whether it is worth the time and effort to try to make care and respect for employees a more obvious and central part of your operation. Stated another way, you have to do the analysis – and leadership has to make the decision – whether or not the investment of time, resources and effort of developing a closer relationship between employees and management is an objective the business wishes to pursue.

It is important that this decision not be taken lightly because, once you start down the path of greater employee participation and involvement, employee perceptions of deviation from that course are likely to cause strong negative reactions. If there is not the will to persevere, to stay the course until you succeed, and the commitment to continue the effort even after you are succeeding, it's better not to begin at all and to just continue paying lip service to the corporate commitment to employee involvement.

That's all the space we have for this topic right now, but in the next issue we'll take a look at some specifics about what it means to treat employees as valued business partners.

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General for clues as to her future judicial philosophy, we would need to do so with a healthy dose of caution.

In her 14 months as Solicitor General, Ms. Kagan has submitted eight briefs in labor and employment cases pending before the Supreme Court. While recognizing that these legal opinions are formed by the White House's stance on matters and not necessarily her own personal views, they reflect a consistently pro-employee philosophy. For example, in *Lewis v. Chicago*, Ms. Kagan appealed a lower court decision which favored employers in a Title VII case dealing with the calculation of statutes of limitation in disparate impact cases. The Supreme Court eventually agreed with Ms. Kagan and reversed the decision, handing employees a unanimous victory.

In *New Process Steel v. NLRB*, Ms. Kagan argued that the NLRB had sufficient authority to operate despite the fact that it had only a two-member quorum, contradicting the employer's challenge to the agency's authority to issue unfair labor practice findings and other orders. The Supreme Court disagreed with Ms. Kagan's position and ruled in favor of the employer.

Of the eight briefs submitted by Ms. Kagan during her tenure as Solicitor General, she only argued in favor of the employer on one occasion, in the case of *City of Ontario v. Quon*. That case involved an employer's right to monitor an employee's text messages sent and received on an employer-issued device; Ms. Kagan argued that the employer had a valid basis for searching the text messages, and that the employee did not

have a reasonable expectation of privacy. The Supreme Court agreed with her and ruled in favor of the employer.

What Else Can We Glean From Kagan's Background?

Knowing that we need to view Ms. Kagan's role as Solicitor General with a grain of salt as we attempt to predict the future, we can dig back a bit further into her background in an attempt to gauge what life will be like for employers with Ms. Kagan on the bench. The most remarkable event which occurred while she was Dean of Harvard Law School was her 2003 opposition of the Solomon Amendment, which required educational institutions to provide access to military recruiters or else lose federal funding.

Since Ms. Kagan believed that the military's "don't ask, don't tell" policy was discriminatory towards gays and lesbians, she joined a group of other school administrators and asked the Supreme Court to scale back the Solomon Amendment. The Court eventually rejected this challenge and upheld the policy, which forced Ms. Kagan to rescind Harvard's policy of disallowing military recruiters. One could view this episode as evidence that Ms. Kagan will be protective of minorities and not afraid to uphold challenges to the establishment.

But some commentators have wondered whether Ms. Kagan's role as Dean might have made her somewhat sympathetic to employers, since she was charged with the responsibility of facing many of the same workplace challenges – managing strong personalities, making difficult hiring and firing decisions, finding a balance between competing interests – that employers face on a daily basis. Employers can only hope that this experience might lead to them finding an understanding member of the bench when they argue their cases in front of Ms. Kagan.

Going back even further, to her time as a student, we can conclude that Ms. Kagan has an interest in labor and employment law, since she has often written on the topic. She wrote an article during her final year of law school on the topic of certifying classes in Title VII class action discrimination lawsuits, and her senior thesis at Princeton examined the labor activities of New York socialists. We feel comfortable that Ms. Kagan knows her stuff when it comes to this field, as her law school report card (which became public during her confirmation proceedings) revealed that she earned an A+ in Labor Law during her final year at Harvard.

Boiling It All Down

After scouring Ms. Kagan's background for clues, most commentators have settled on this general prediction: Ms. Kagan will be an assuredly intelligent and thoughtful jurist, who will most likely support employees and unions in the average case. However, most analysts believe that she is an independent thinker and will not be afraid to rule for the employer if the situation warrants. While employers should not be celebrating Ms. Kagan's appointment, this is not necessarily the time to fear any sort of impending catastrophe.

Although we can't be sure exactly how Ms. Kagan will treat employers when she becomes a Justice on the Supreme Court, you can be sure that Fisher & Phillips will continue to monitor all of the activities on the Court, and will help employers react to any new developments. And of course, the next time there is an appointment to the Supreme Court, you can bet that we'll grab the Magic Eight Ball from the shelf and make some fearless predictions.

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