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4 Supreme Court Cases Justice Gorsuch Could Sway

By **Aebra Coe**

Law360, New York (April 7, 2017, 7:30 PM EDT) -- After a number of deadlocks in the past year, the U.S. Supreme Court now has a ninth justice and a long list of cases awaiting its input for which the vote of Justice-designate Neil Gorsuch could prove consequential.

Last year's 4-4 decisions — handed down amid a fierce battle in the Senate over replacing Justice Antonin Scalia — included one on Texas' challenge to an Obama immigration policy and another on the ability of unions to collect fees. Experts say upcoming cases in which the newly minted justice could tip the scales also largely focus on employment and immigration, although other topics, including religion, have proven to be contentious as well.

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According to Christopher L. Sagers, a law professor at Cleveland State University, there are numerous "potentially explosive" cases in which certiorari has already been granted, and, he predicts, Justice Gorsuch will likely land solidly on the conservative side of the ideological spectrum when deciding those matters.

"In those, Justice Gorsuch will, in my humble opinion, be a reliably doctrinaire, very conservative force, largely in keeping with Justice Scalia's approach," Sagers said.

University of Massachusetts at Amherst law professor Paul M. Collins Jr. said he too expects the associate justice will be a "pretty reliable conservative vote."

Here, we dig into the details of four cases that could be swayed by Justice Gorsuch.

Epic Systems Corp. v. Lewis

On Jan. 13, the Supreme Court agreed to hear Epic Systems v. Lewis, in which the justices will consider a

question that has divided circuit courts: whether the National Labor Relations Board is correct in its position that federal labor law bars arbitration agreements that contain class action waivers.

The court also agreed to hear two other cases that hinge on the same issue — Ernst & Young LLP v. Morris and NLRB v. Murphy Oil USA Inc. — which were consolidated with the Epic Systems case.

The NLRB has over the past few years issued an avalanche of decisions invalidating arbitration agreements because they contained class waivers. Since a 2012 decision involving homebuilder D.R. Horton, the labor board has stood its ground and routinely stated that such waivers violate employees' rights under the NLRA and are unenforceable.

According to Harold Pinkley, an employment and appellate partner at Butler Snow LLP, Justice Gorsuch could very likely be the deciding vote in favor of employers' use of such arbitration agreements.

"I would expect a 5-4 decision," Pinkley said. "I expect, he has been very assiduous in upholding arbitration agreements, closely following Justice Scalia's lead. And he is not going to be as inclined to give as much deference to the NLRB's interpretation of labor law as other justices might."

Angela Cornell, director of the labor law clinic at Cornell University Law School, said she sees Gorsuch's appointment to the Supreme Court as a setback for workers and a "boon for corporate interests," predicting he will side with employers on the issue of arbitration agreements.

Trinity Lutheran Church of Columbia v. Comer

On April 19, a nine-justice court will hear Trinity Lutheran Church of Columbia v. Comer, one of the most closely watched high court cases of the year and one close to the hearts of many conservative groups.

It involves a Missouri grant program that provides recycled tires to schools for resurfacing playgrounds, and a challenge to the state's exclusion of a Lutheran church based on a state constitutional ban on public money going to religious institutions. The court granted the petition for review shortly before Justice Scalia's death in February 2016.

The question at issue is whether excluding churches from an otherwise neutral and secular aid program violates the free-exercise and equal-protection clauses of the U.S. Constitution when a state has no valid establishment clause concern, according to Trinity Lutheran's petition for certiorari.

"Establishment clause cases invariably generate awful splits among the justices, which will make Gorsuch's views particularly important because he either will cause the court to fracture more by using some new approach no one else is using or by agreeing to an existing approach," said Carter G. Phillips, a Sidley & Austin LLP partner who has practiced extensively before the Supreme Court.

Abner Greene, a professor at Fordham School of Law, says it's a case the court has been "sitting on for a while," possibly waiting for a ninth justice.

"I think people assume that the left of the court is going to vote for the state and that the right of the court is going to vote for the church, and that Gorsuch is going to be the deciding vote and people think he'll probably side with the conservatives," Greene said. "But everyone is guessing here."

Maslenjak v. U.S.

The Supreme Court on Jan. 13 agreed to hear the case of Divna Maslenjak, a Bosnian refugee who admitted to lying during her naturalization process and was subsequently stripped of her citizenship rights.

In a March 29 brief to the court, the government contended it was not required to prove the false statements by Maslenjak were material in order to convict and deport her. The government said it is enough that she lied during the process.

In her own brief in February, Maslenjak said the standard for stripping a citizen of naturalization should be narrowly defined and that the appeals court that previously reviewed the case didn't uphold that standard. Maslenjak is asking the court to read the criminal provision for denaturalization in conjunction with a civil provision that includes an express materiality requirement as a single statutory scheme for denaturalization.

According to Mayer Brown LLP partner Paul Virtue, former general counsel at what was then the U.S. Immigration and Naturalization Service, in order to overturn the decision of the Sixth Circuit in Maslenjak, the Supreme Court must find that "materiality" is an implied element of the applicable statute, which the First, Fourth and Ninth circuits have done.

"Based on his reputation for strictly construing statutory language, Judge Gorsuch would be unlikely to vote to do so," Virtue said, pointing to Gorsuch's dissent in Wilson v. Workman, an en banc decision by the Tenth Circuit that read an exception into what the associate justice felt was an unambiguous federal statute.

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission

The Supreme Court has been considering for an "unusually long time" a certiorari petition in Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, according to Richard L. Heppner Jr., a senior associate in Reed Smith LLP's appellate group.

"The court has put off deciding whether to hear the case, which could indicate that the justices are waiting for a ninth justice," Heppner said.

In Masterpiece Cake Shop, a Colorado baker whom the Colorado Court of Appeals found in violation of a state discrimination law for refusing to make a wedding cake for a same-sex couple has asked the court to determine that his cakes are art protected by the First Amendment.

Jack C. Phillips, owner of Masterpiece Cakeshop Inc. and a self-described cake artist, said the state couldn't force him to make a cake for Charlie Craig and David Mullins "promoting a morally objectionable message," as several federal courts have held that the state can't force speech on an artist. The Colorado court had found in August 2015 that he violated the Colorado Anti-Discrimination Act.

Heppner pointed to Justice Gorsuch's concurring opinion in Burwell v. Hobby Lobby Stores Inc. when it was before the Tenth Circuit as an indication of where he may land in the cake shop case. In Hobby Lobby, the Tenth Circuit found in favor of employers who wished to opt out of the contraceptive mandate of the Affordable Care Act.

If the case is heard by the Supreme Court, Heppner said, “Given Judge Gorsuch’s opinion in the Hobby Lobby case when it was before him, he is likely to rule in favor of the petitioner and find that the law violates religious liberty."

--Additional reporting by Vin Gurrieri, Andrew Strickler and Kelcee Griffis. Editing by Mark Lebetkin and Kelly Duncan.
