

Labor of Law: Your Predictions (And a Few Questions) About a Justice Kavanaugh

Brett Kavanaugh elevation to the U.S. Supreme Court would put on the bench a veteran judge with deep experience on labor and employment issues. Here's a snapshot of some questions and predictions. Thanks for reading Labor of Law.

By [Erin Mulvaney](#) ([/nationallawjournal/author/profile/Erin Mulvaney/](/nationallawjournal/author/profile/Erin%20Mulvaney/)) | July 12, 2018 at 12:00 PM

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Welcome to Labor of Law. The track record of Trump's Supreme Court pick—Brett Kavanaugh—skews pro-employer. We've rounded up some early observations and expectations. Plus: the NFL players union sues over the league's anthem strategy. Microsoft defeats class action certification in a gender bias suit, and Donald Trump's personal driver takes his old boss to court. Scroll down for who got the work and notable moves.

➤➤ *I'm Erin Mulvaney in Washington, D.C., covering labor and employment from the Swamp to Silicon Valley. **Follow this weekly newsletter***

([emulvaney@alm.com](http://link.law.com/click/12395116.268/aHR0cHM6Ly93d3cubGF3LmNvbS9zdGF0aWMvYnJpZWZpbmdzP2V0PWVka>et=&bu=&cn=&src=&pt=) for the latest analysis and happenings. If you have a story idea, feedback or just want to say hi, I'm at <a href=) (<mailto:emulvaney@alm.com>) and on Twitter [@erinmulvaney](https://twitter.com/erinmulvaney) ([<https://www.law.com/2018/07/12/labor-of-law-your-predictions-and-a-few-questions-about-a-justice-kavanaugh/>](http://link.law.com/click/12395116.268/aHR0cHM6Ly90d2l0dGVyLmNvbS9lcmlubXVsdmFuZXk_ZXQ9JmJ1PSZjbj0mc>et=&bu=&cn=&src=&pt=). Thanks for reading.</i></p></div><div data-bbox=)



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Searching Kavanaugh’s Record for Labor Clues

Judge Brett Kavanaugh’s opinions—collected here

<http://link.law.com/click/13840807.432/aHR0cHM6Ly9kY2NpcmN1aXRicmVha2VyLm9yZy9rYXZhbmcF1Z2gtb3Bpbml>

the new website D.C. Circuit Breaker—show he’s a fairly consistent vote for business. Of course, that won’t particularly rock the persuasions of the current court, as the retiring Anthony Kennedy wasn’t always ruling for the little guy.

Unlike recent nominees to the high court, Kavanaugh would arrive with a substantial experience presiding in labor and employment disputes—particularly the National Labor Relations Board and the Labor Department. The early criticism of Kavanaugh—depending, of course, on your vantage—is that he’s bent over backwards for employers. Kavanaugh would get an early test as major workplace LGBT cases **are arriving at the court**

<http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cubGF3LmNvbS9uYXRpb25hbGxhd2pvdXJuYWwvMjAxOC>

as Kennedy is punching the clock.

Kavanaugh’s nomination was resounding good news for the employment-side. Still, there are caveats and questions about how a Justice Kavanaugh might handle labor and employment issues before the high court.

I reached out this week asking about what questions you’d want to hear asked and answered at Kavanaugh’s confirmation hearing and what are some predictions about his would-be appointment. I want to hear more—so shoot me a note! Here’s a roundup of some of what I heard:

- **Fisher Phillips partner Richard Meneghello** told me one prediction: “This court will go from a reliably pro-business court to being solidly pro-business. It will be an uphill battle for employees to win many cases, if he

gets confirmed. He looks for ways to rule for employers." Still, Kavanaugh hasn't always ruled for employers. In [Ayissi-Etoh v. Fannie Mae](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb), [\(http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb\)](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb) said the single instance of a racially charged word was enough to constitute a hostile work environment. Yet, in another case, Meneghello said he seemed to swing the other way and "bend over backwards" for the employer in [Brady v. Sergeant at Arms](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb), [\(http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb\)](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb) a dispute over the demotion of an employee who grabbed his crotch in front of other workers. Questions for Kavanaugh? "If I were an employer I'd be curious about hearing him articulate the concept of deference to agencies. We found several cases in favor of the union in traditional labor cases. Some he agreed with the NLRB, some he did not."

► **Brian Markovitz**, an employment attorney at **Joseph, Greenwald & Laake**, says he would ask Kavanaugh if the Civil Rights Act of 1964 was a proper exercise of the commerce clause. "It was a controversial decision. They were trying to end discrimination but there were roadblocks from private companies to get them to do it. From reading his opinions, he seems to want to bring us back to the 1950s." Markovitz predicted an even more political Supreme Court—marked by more regular 5-4 rulings. "That's the real travesty of this situation. There was a point in time where the court viewed and based decisions on judicial scholarship and thought. Now, it's almost full politics."

► **Mark Shoffner**, employment partner at **Bell, Nunnally & Martin**, wants to hear Kavanaugh explain his thinking in the [2013 case](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb), [\(http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb\)](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb) *Etoh v. Fannie Mae*. Kavanaugh, writing in a concurrence, said a single instance of an employee being called a racially charged word by a supervisor "suffices by itself to establish a racially hostile work environment." Shoffner told me: "That's an opinion out of the mainstream. I would like to see how he interprets statutes when the statute isn't clear. We see a lot of ambiguity in labor and employment law. I would like to drill down on what tools he uses to interpret vague statutes."

► **Pat Lundvall**, chair of the litigation practice group at **McDonald Carano**, didn't predict much change. "The current makeup of the SCOTUS has been protective of employer's rights and stringent in its interpretation of the plain meaning of legislative enactments. I would not expect to see much change, if any at all, with the confirmation of Judge Kavanaugh," she told me.

► **Igor Timofeyev**, litigation partner at **Paul Hastings**, who clerked for Kennedy—as did Kavanaugh—said he would expect the new justice to add value to the high court on administrative law matters. "Brett is a very principled jurist. He will apply the applicable statute," Timofeyev says. He points to Kavanaugh's [2016 decision](http://link.law.com/click/13840807.432/aHR0cHM6Ly93d3cuY2FkYy51c2NvdXJ0cy5nb3YvaW50ZXJuZXQvb3Bpbmlvb)