

Legal world awaits Trump's impact

President could shift high court by picking multiple justices

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With President-elect Donald J. Trump assuming office on Jan. 20, changes are coming to the legal world — it's just a matter of when.

Most prominently, an initial task for the new Republican commander-in-chief will be nominating a replacement for the late Antonin Scalia on the U.S. Supreme Court. His impact will intensify if he gets the chance to nominate a second — or even a third — justice and shift the high court to the right.

Lawyers are engaging in some speculation on how their profession — and their clients — will be impacted, but they also are taking a wait-and-see approach. They provided commentary on the potential high court makeup, employment law and marijuana legalization, but that's just a sampling of the storyline that will play out during this term.

"President Trump seems to present the other side of the legal spectrum from his predecessor, President Obama, on almost every legal issue that will or may arise during the next four years," said Lawrence A. Dubin, a professor at the University of Detroit Mercy School of Law.

High court changes

Court observers agree that Trump's first selection for the high court — no matter how conservative he or she may be — won't result in a substantial shift.

"The first justice that President Trump nominates to the U.S. Supreme Court is unlikely to result in major doctrinal changes," said John J. Bursch, of Bursch Law PLLC, who has argued before the high court on many occasions. "It is

widely expected that he will choose someone in the mold of Justice Scalia, and if that happens, the court will be in the same ideological place it was before Justice Scalia's unfortunate death.

"While there may be some small changes around the edges, the court's decisions will generally look very much like they have for the past several terms."

Dubin said even the appointment of a very conservative justice "will not greatly alter the balance of the court from when Justice Scalia was alive."

"Justice [Anthony] Kennedy will remain as the wild card on the high-profile cases," he said.

But if Trump is able to appoint a second or third justice, then "dramatic change is possible," Bursch said.

"Justice [Ruth Bader] Ginsburg is nearly 84 years old, and Justice Kennedy is 80. If either of them were to be replaced with a justice who follows Justice Scalia's originalist philosophy, we could see modifications to the court's precedents regarding abortion, affirmative action, class-action litigation, and religious liberty, among other things," Bursch said. "It is less likely that the court will revisit its decisions regarding the Affordable Care Act given the incoming Congress's expressed intent to repeal the act as its first item of business."

Dubin said further selections of conservative justices beyond Trump's initial pick "will change the balance between the conservative and moderate justices and make the reversal of *Roe v. Wade* likely to happen, leaving the abortion issue as a states' rights matter."

Robert A. Sedler, a distinguished professor of law at Wayne State University Law School, said federal courts will halt new abortion restrictions, such as the Ohio law banning abortions after 20 weeks.

"As long as federal courts strike down these laws, the cases won't get to the Supreme Court," he said. "The court won't overrule *Roe v. Wade* in the remotely foreseeable future."

Under a new administration, the solicitor general — serving under the attorney general — may change the position of the United States in cases before the high court, Sedler said.

Trial lawyers "will likely suffer" as a result of legislation that may be coupled with the repeal of the ACA, Dubin said.

"In an effort to cut costs, further limits might be imposed on personal injury, wrongful death and medical malpractice claims," he said.

Employment law

Uncertainty.

That's how management-side practitioner Terry W. Bonnette summarized the mood of clients regarding the Trump administration's impact on employment law.

"It's not really a question for them of whether the impact will be favorable or unfavorable," said Bonnette of Nemeth Law PC in Detroit. "They want to be compliant with the law, and not knowing what the law is going to be a year, six months or even six weeks from now makes their jobs challenging.

"So far there has been a lot of guessing about what the president-elect and what Congress might do based on what they oppose — but there's been very little conversation about specific policies, plans or regulations that they actually support and plan to implement.

"For example, I think it's likely that health care regulations are probably going to change. The question is how."

Executive orders are the means through which the new administration can affect the most immediate change, Bonnette said, citing Vice President-elect Mike Pence's statement that the administration will quickly eliminate an "avalanche of regulations" that stifle the economy.

"The focus is most likely going to be on health care, trade and the environment," he said. "It would not surprise me, though, if some executive orders involving federal contractors are rescinded, starting with the requirement for federal contractors to provide paid sick leave. Whether this is a priority for the new administration or not is the question.

"Given that it applies to contracts entered after Jan. 1, 2017, it would certainly be easier to rescind sooner rather than later."

As for the rule that would have made millions of Americans eligible for overtime pay on Dec. 1 — until it was blocked by a federal court late last year — Bonnette said the issue isn't going away.

"The court action stopping implementation of the rules was a preliminary injunction to preserve the status quo until the court can decide the case and issue a final order. So, even absent any action from the new administration, this issue remains unresolved," he said. "What will be telling is whether the new administration will continue to litigate the case in the trial court, and if it does, and then loses, whether it will appeal that decision."

The overtime exemption threshold would have risen from \$23,660 annually or \$455 a week to \$47,476 annually or \$913 a week.



War on marijuana use?

Survival of the medical and recreational marijuana movement depends on the Department of Justice continuing its hands-off approach to state-level legalization efforts, said Thomas E. Howard of Howard & Howard Attorneys PLLC, which has headquarters in Royal Oak.

"Worst case scenario: All-out war on any form of cannabis," he said, citing Attorney General nominee Jeff Sessions' vehement opposition to the drug. "Best case, the status quo. More realistically, it will probably be cracking down on adult use and also medical use."

Medical marijuana businesses complying with their state law have a legal defense against federal interference due to the Department of Justice being defunded from enforcing the Controlled Substances Act, Howard said.

Howard expects the Republican-led Congress to halt the budgetary defunding, "thus signaling a resumption of the war on drugs against state law-compliant medical marijuana businesses."

"The Democrats could fight back on this issue, and it may well begin the swing to the other side that often results in off-year elections after a new president comes to power," said Howard, who is based in his firm's Peoria, Illinois, office. "But the biggest federal development will be the status of Section 542 of the budget that currently defunds DOJ action against state law-compliant medical marijuana businesses."

As for recreational adult use, Howard said there is nothing to stop the justice department from "shutting down Colorado, Nevada, the rest of the West Coast and the couple states out East."

"Of course, the current DOJ has not done so, but a new sheriff will be in town," he said.

Polls show more than 60 percent of Americans support adult use of marijuana, while more than 80 percent support medical marijuana use, Howard said.

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