What the US Election Means for Labor and Employment Legislation

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Potential Election Outcomes

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- Trump won the 2016 electoral vote 304-227.

- According to an election forecast by *FiveThirtyEight*, Vice President Biden is favored to win the election. Out of 40,000 simulations based on current polling (with individual polls given different quality weights), Biden currently has an 89% chance of winning the election. *The Economist*'s model gives Biden a 96% chance of winning.

- Biden currently enjoys an 8 average point lead in national polling. National polls, however, are not a direct indicator of outcome in the electoral college; Biden's chances are high due to sustained leads in key battleground states:

State (EC votes)	Michigan (16)	Pennsylvania (20)	Wisconsin (10)	Florida (29)	Arizona (11)	North Carolina (15)	Georgia (16)	Ohio (18)
2016 Trump victory margin	Trump +0.3%	Trump +0.7%	Trump + 0.7%	Trump +1.2%	Trump +3.5%	Trump +3.6%	Trump +5.1%	Trump +8.1%
2020 chances of winning	Biden 94% chance	Biden 86% chance	Biden 93% chance	Biden 65% chance	Biden 67% chance	Biden 65% chance	Biden 57% chance	50 - 50
2020 category	Biden clearly favored	Biden favored	Biden clearly favored	Biden slightly favored	Biden slightly favored	Biden slightly favored	Biden slightly favored	Toss-up

Source: FiveThirtyEight and The Economist – last updated October 29, 2020

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The following are the easiest paths to 270 for each candidate, along with a chance for an electoral tie.

Scenario one (most likely path for Biden victory):

- Biden flips PA (20), MI (16), and WI (10) (all else stays same)
- *Result:* Biden victory, 278-260

Scenario two:

- Biden flips PA (20), MI (16), and FL (29) (all else stays same)
- *Result:* Biden victory, 297-241

Scenario three:

- Biden flips MI (16), WI (10), and FL (29) (all else stays same)
- *Result:* Biden victory, 287-251

Scenario four (most likely path for Trump victory):

- Biden flips WI (10) and MI (16) (all else stays same)
- *Result:* Trump victory, 280-258

Scenario five:

- Biden flips PA (20) and MI (16) (all else stays same)
- *Result:* Trump victory, 270-268

Scenario six:

- Biden flips MI (16), WI (10), and AZ (11) (all else stays same)
- *Result:* ELECTORAL TIE 269-269

1. Biden is ahead due to his lead in key battleground states and the fact that he has several realistic paths to victory.

2. Trump only needs one or two come-from-behind victories in key states to *dramatically* alter Biden's paths to victory.

   – *Example one:* If Biden wins MI and PA, and Trump holds WI, Biden now needs to win another key battleground state (FL, AZ, NC, GA, or OH).

   – *Example two:* If Trump wins PA, Biden almost certainly has to win FL, a much more difficult state for him.

3. Biden must win *either* Pennsylvania *or* Florida but does not need to win both states. It is virtually impossible for Biden to win the election if he loses both states.

4. No polling or analysis can account for the effects of COVID-19 on the election. Mail-in ballots, USPS controversies, and uncertainty around in-person voting could lead to prolonged legal battles for <u>weeks</u> after November 3.

Two most likely scenarios:

Scenario 1: The Presidency flips, everything else stays the same.

House ➡ **Senate** ➡ **President**

Political impact: Increased regulatory reforms but limited opportunities for Democrats to pass large legislative initiatives

Scenario 2: Democrats control the Presidency and Congress.

House ➡ **Senate** ➡ **President**

Political impact: Democrats reverse many Trump Administration policies. The absence of a Super Majority in the Senate (60 seats) would block some large initiatives unless Democrats end the legislative filibuster.

In either scenario:

- Joe Biden is favored to win the general election.

- With a Biden victory, Senate Democrats need a net gain of three seats to secure a majority. In reality, this means Democrats will need to flip four Republican seats, since Sen. Doug Jones (D-AL) is likely to lose.

- Control of the House of Representatives is unlikely to change

Scenario 3: Medium Probability

House ➡ **Senate** ➡ **President**

Political Impact: An extension of the same political dynamics and legislative gridlock as today.

Scenario 4: Low Probability

House ➡ **Senate** ➡ **President**

Political Impact: Wide ability for the GOP to push its agenda, though absence of Super Majority in the Senate would block some large initiatives.

- Trump's 13% chance of re-election increases dramatically if he repeats a surprise victory in MI, WI, or PA.

- If Trump wins re-election, Senate Democrats need a net gain of four seats, meaning they really need to flip five since Sen. Doug Jones (D-AL) is likely to lose.

- Republican chances of flipping the House are extremely unlikely

There are 35 Senate seats up for election

- Republicans currently hold 23; Democrats currently hold 12
- President Trump in 2016 carried all but two states where Republicans are defending Senate seats in 2020; he won 15 of those states by at least 14 percentage points
- *FiveThirtyEight* gives Democrats a 78% chance of retaking the Senate; *The Economist* gives Democrats a 75% chance.

Senate Incumbents Up for Re-Election in 2020			
Doug Jones (D-Ala.)	Dick Durbin (D-Ill.)	Cindy Hyde-Smith (R-Miss.)	Jack Reed (D-R.I.)
Dan Sullivan (R-Alaska)	Joni Ernst (R-Iowa)	Steve Daines (R-Mont.)	Lindsey Graham (R-S.C.)
Martha McSally (R-Ariz.)	Open (R-Kan.)	Ben Sasse (R-Neb.)	Mike Rounds (R-S.D.)
Tom Cotton (R-Ark.)	Mitch McConnell (R-Ky.)	Jeanne Shaheen (D-N.H.)	Open (R-Tenn.)
Cory Gardner (R-Colo.)	Bill Cassidy (R-La.)	Cory Booker (D-N.J.)	John Cornyn (R-Texas)
Chris Coons (D-Del.)	Susan Collins (R-Maine)	Open (D-N.M.)	Mark Warner (D-Va.)
Kelly Loeffler (R-Ga.)	Ed Markey (D-Mass.)	Thom Tillis (R-N.C.)	Shelley Moore Capito (R-W.Va.)
David Perdue (R-Ga.)	Gary Peters (D-Mich.)	Jim Inhofe (R-Okla.)	Open (R-Wyo.)
Jim Risch (R-Idaho)	Tina Smith (D-Minn.)	Jeff Merkley (D-Ore.)	

Source: Bloomberg Government

Democrats need a net gain of 3 seats with a Biden victory, and 4 seats with a Trump victory. The following GOP-held seats are competitive.

Arizona (Sen. Martha McSally v. Mark Kelly)

- *FiveThirtyEight: Kelly 80% chance (Oct. 29)*
- *Cook Political Report: Lean Democrat (Oct. 29)*
- *Sabato Crystal Ball: Lean Democrat (Oct. 29)*

Colorado (Sen. Cory Gardner vs. former Gov. John Hickenlooper)

- *FiveThirtyEight: Hickenlooper 85% chance*
- *Cook: Lean Democrat*
- *Crystal Ball: Likely Democrat*

Maine (Sen. Susan Collins vs. State Speaker Sara Gideon)

- *FiveThirtyEight: Gideon 60% chance*
- *Cook: Toss-up*
- *Crystal Ball: Lean Democrat*

North Carolina (Sen. Thom Tillis vs. Cal Cunningham)

- *FiveThirtyEight: Cunningham 64% chance*
- *Cook: Toss-up*
- *Crystal Ball: Lean Democrat*

Iowa (Sen. Joni Ernst vs. Theresa Greenfield)

- *FiveThirtyEight: Greenfield 55% chance*
- *Cook: Toss-up*
- *Crystal Ball: Lean Democrat*

Montana (Sen. Steve Daines vs. Gov. Steve Bullock)

- *FiveThirtyEight: Daines 65% chance*
- *Cook: Toss-up*
- *Crystal Ball: Lean Republican*

Georgia (Sen. David Perdue vs. Jon Ossoff)

- *FiveThirtyEight: Perdue 57% chance*
- *Cook: Toss-up*
- *Crystal Ball: Toss-up*

Georgia (Sen. Kelly Loeffler)

- *So-called "Jungle election" featuring Rep. Doug Collins (R), Rev. Raphael Warnock (D), and Matt Lieberman (D). Will likely result in runoff.*
- *FiveThirtyEight: 64% chance Warnock to win, though this will lead to a runoff*
- *Cook: Toss-up (after runoff)*
- *Crystal Ball: Toss-up (after runoff)*

South Carolina (Sen. Lindsey Graham vs. Jaime Harrison)

- *FiveThirtyEight: Graham 76% chance*
- *Cook: Toss-up*
- *Crystal Ball: Lean Republican*

Kansas (open – Rep. Roger Marshall vs. State Sen. Barbara Bollier)

- *FiveThirtyEight: Marshall 74% chance*
- *Cook: Lean Republican*
- *Crystal Ball: Lean Republican*

The following Democratic-held seats are competitive.

Michigan (Sen. Gary Peters vs. John James)

- *FiveThirtyEight: Peters 82% chance*

- *Cook: Lean Democrat*

- *Crystal Ball: Lean Democrat*

Alabama (Sen. Doug Jones vs. Tommy Tuberville)

- *FiveThirtyEight: Tuberville 80% chance*

- *Cook: Lean Republican*

- *Crystal Ball: Likely Republican*

House control is unlikely to shift, as the Democratic party's 2020 strategy builds on its 2018 strategy which flipped many R districts to D. Voters in these districts were disillusioned with Trump and are unlikely to support the President or a GOP nominee this cycle. *FiveThirtyEight* gives Democrats a 96% chance of maintaining control of the House; *The Economist* gives Democrats a 99% chance.

COMPETITIVE RACES

*Italicized name denotes Freshman member

LIKELY DEMOCRATIC 16 Dem • 2 Rep	LEAN DEMOCRATIC 16 Dem • 2 Rep	DEMOCRATIC TOSS UP 11 Dem • 0 Rep	REPUBLICAN TOSS UP 0 Dem • 14 Rep	LEAN REPUBLICAN 0 Dem • 14 Rep	LIKELY REPUBLICAN 0 Dem • 16 Rep
CA-10 Harder	AZ-01 O'Halleran	CA-21 Cox	AZ-06 Schweikert	AK-AL Young	CA-04 McClintock
CA-39 Cisneros	CA-48 Rouda	FL-26 Mucarsel-Powell	CA-25 Garcia	AR-02 Hill	CA-22 Nunes
FL-27 Shalala	GA-06 McBath	IA-01 Finkenauer	IN-05 Open	CO-03 Open	CA-50 Vacant
IL-14 Underwood	GA-07 Open	IA-02 Open	MO-02 Wagner	FL-15 Open	FL-16 Buchanan
IL-17 Bustos	IA-03 Axne	MN-07 Peterson	NE-02 Bacon	IL-13 Davis	FL-18 Mast
KS-03 Davids	MI-08 Slotkin	NM-02 Torres Small	NJ-02 Van Drew	MI-03 Open	KS-02 Open
ME-02 Golden	MI-11 Stevens	NY-11 Rose	NY-02 Open	MI-06 Upton	KY-06 Barr
NC-02 Open	MN-02 Craig	NY-22 Brindisi	NY-24 Katko	MN-01 Hagedorn	NC-09 Bishop
NC-06 Open	NJ-03 Kim	OK-05 Horn	OH-01 Chabot	MT-AL Open	OH-10 Turner
NH-01 Pappas	NJ-07 Malinowski	UT-04 McAdams	PA-10 Perry	NC-08 Hudson	OH-12 Balderson
NJ-05 Gottheimer	NV-03 Lee	VA-02 Luria	TX-21 Roy	NC-11 Vacant	PA-16 Kelly
NV-04 Horsford	OR-04 DeFazio		TX-22 Open	NY-01 Zeldin	TX-02 Crenshaw
NY-18 Maloney	PA-08 Cartwright		TX-24 Open	PA-01 Fitzpatrick	TX-06 Wright
NY-19 Delgado	PA-17 Lamb		VA-05 Open	TX-03 Taylor	TX-25 Williams
PA-07 Wild	SC-01 Cunningham			TX-10 McCaul	TX-31 Carter
TX-07 Fletcher	TX-23 Open				WA-03 Herrera Beutler
TX-32 Allred	VA-07 Spanberger				
WA-08 Schrier	WI-03 Kind				

Source: Cook Political Report – last updated: Oct. 8

Potential Labor Legislation Changes

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Trump	Biden
• Maintain $7.25/hour • While the minimum wage is an issue that states and municipalities should determine, Trump recently suggested that he would "consider" raising the federal minimum wage to $15/hour. • Trump has proposed alternatives to raising the minimum wage, such as allowing families to deduct childcare expenses on their income taxes, or expanding the earned income tax credit to offset childcare expenses. The EITC "boosts pay through the tax code rather than a mandate on employers."	• Increase to $15.00/hour and eliminate the reduced minimum wage for tipped employees • Biden also supports indexing the minimum wage to the median hourly wage so that low-wage workers' wages keep up with those of middle income workers. Under this plan, the minimum wage would automatically increase to keep pace with "the typical worker's wage." • Increase the salary threshold for wage-and-hour exemptions under the Fair Labor Standards Act (FLSA).

Trump	Biden
Opposes bans on pre-dispute mandatory arbitration agreements, and has indicated he would veto the House-passed Forced Arbitration Injustice Repeal (FAIR) Act, which would prohibit mandatory pre-dispute arbitration agreements for consumer, employment, antitrust, and civil rights claims.	Proposes enacting legislation to ban employers from requiring their employees to agree to mandatory individual arbitration that includes class- and/or collective-action waivers.

Trump	Biden
• President Trump has not specified his healthcare priorities for his second term, though he is opposed to the Affordable Care Act and would likely continue to dismantle it in favor of a different healthcare system. • In 2019, President Trump finalized a rule to expand Health Reimbursement Arrangements (HRA), aimed at allowing employers to indirectly offer healthcare coverage to their employees by providing employees with tax-preferred funds to purchase their own health insurance in the individual marketplace.	• Biden has indicated he would roll back Trump Administration policies that loosened rules on health insurers and allowed some to offer limited insurance policies that cap benefits and exclude coverage for some diseases and pre-existing conditions. • Biden proposes to keep employer-sponsored insurance plans, but also create a public option like Medicare that would be available to anyone, whether they are covered through their employer, buying their own insurance, or uninsured. Biden believes this will help small businesses that are struggling to afford coverage for their employees. • Cap premiums at 8.5% of a family's income, meaning that those who currently receive employer-sponsored health insurance for which the employee share is more than 8.5% of their income may switch to a plan on the individual marketplace for a lower rate. • Biden has also proposed lowering Medicare eligibility to 60 years old and allowing younger individuals to buy in to Medicare. This may reduce employer spending if, for example, fewer retirees remain in employer-sponsored plans under COBRA upon retiring before age 65.

Trump	Biden
• In 2019, Trump signed a defense bill that guarantees 12 weeks of paid parental leave for federal workers. • In his 2020 State of the Union address, Trump endorsed the bipartisan Advancing Support for Working Families Act, which would extend paid leave to families after the birth or adoption of a young child. This would allow parents to draw on future child tax credits to pay for the leave, and then receive commensurately smaller tax credits later.	• Biden supports 12 weeks of paid family and medical leave similar to the Democrat-proposed Family and Medical Insurance Leave (FAMILY) Act, which would likely be funded by a payroll tax borne by both employers and employees. • Supports universal paid sick days.

Trump	Biden
Trump's Department of Labor has been working to finalize a new rule governing the classification of workers as employees or independent contractors. While many details are not yet available, it seems that the rule would expand the definition of "independent contractor" and define employee more narrowly than the Democratic plan.	• Biden proposes to make employee misclassification an enforcement priority. He would direct the Department of Labor to engage in enforcement partnerships with other federal and state governmental agencies, and would fund a large increase in the number of investigators in labor and employment enforcement agencies. • Biden also proposes enacting legislation that makes worker misclassification a substantive violation of law under all federal labor, employment, and tax laws, with additional penalties beyond those imposed for other violations. • Biden favors establishing a federal standard modeled on the ABC test (a test for classifying workers as employees or independent contractors that generally favors classification as employees) for all labor, employment, and tax laws.

Trump	Biden
• Under President Trump, the Department of Labor has strengthened its suspension and debarment program, increasing the number of suspensions and debarments of federal contractors. Between 2016 and 2017, it increased the number of suspensions from zero to eight, and debarments from one to 17. In 2018, it imposed a total of 21 suspensions and 15 debarments. • The Department of Labor also started a pilot program to make the suspension and debarment process more efficient. In December 2018, the inspector general and the Secretary of Labor signed protocols to enhance information sharing between the IG's office and the agency that handles its discretionary suspensions and debarments. • Following the implementation of this program, the Department of Labor issued 125 suspensions and 130 debarments in 2019.	• Biden proposes to institute a multi-year federal debarment for all employers who illegally oppose unions, building on debarment efforts pursued in the Obama Administration. • Biden also proposes to restore and build on the Obama Administration's Fair Pay and Safe Workplaces executive order, which Trump revoked, requiring that employers' compliance with labor and employment laws be taken into account in determining whether they are sufficiently responsible to be entrusted with federal contracts. Biden plans to ensure that every federal investment in infrastructure and transportation projects or service jobs is covered by prevailing wage protections.

Trump	Biden
Trump does not appear to have expressed an intent to prohibit or otherwise restrict the use of restrictive covenants in employment agreements.	Biden proposes to work with Congress to eliminate all non-competition agreements, except those that are necessary to protect a narrowly defined category of trade secrets, and to categorically ban no-poaching agreements.

Trump	Biden
- Consistent with Trump's overall philosophy, Trump appears to support a deregulatory approach to workplace safety. - Under Trump, OSHA has the lowest level of inspections in its 50-year history, while the economy has grown. - The Trump Administration has taken initiatives begun under the Obama Administration for OSHA to develop comprehensive infectious disease standards off the rulemaking agenda and put them on the backburner. - The Trump Department of Labor has stated that "an emergency temporary standard" by OSHA to prevent the spread of COVID-19 in the workplace "is not necessary at this time."	- Biden plans to reinstate regulations requiring that companies report workplace injuries so they're disclosed to the public. - Biden seeks to emphasize the need to have functional safety standards in place, and supports OSHA's establishing a mandatory emergency standard that would require employers to submit workplace-safety plans to OSHA for review. - Biden plans to direct OSHA to substantially expand its enforcement efforts. - Biden proposes increasing the number of investigators in OSHA and the Mine Safety Health and Administration (MSHA). - Biden also plans to direct OSHA, the U.S. Department of Agriculture, MSHA, and other relevant agencies to develop comprehensive strategies for addressing the most dangerous hazards workers encounter in the modern workplace.

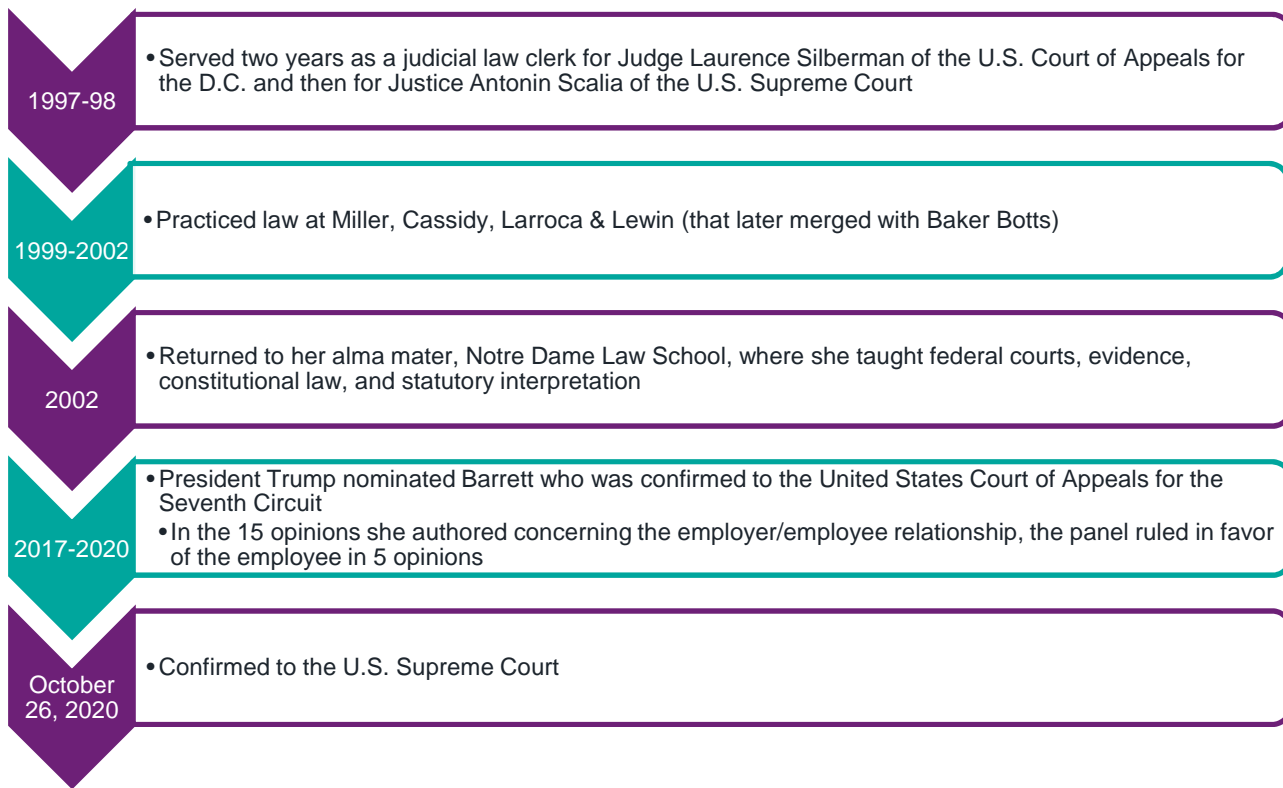| Trump	Biden
• Encourage cooperation, not conflict, between management and workers. His platform views unions as more of a hindrance on employees than support • Supports the ability of states to enact right-to-work laws. • Does not want to infuse capital into enforcement proceedings or financial penalties • The Trump Administration and NLRB proposed reversing the *Browning-Ferris Industries* decision that allows unions to collectively bargain with the employer that actually controls their wages, benefits, and working conditions, which is often not the staffing company or franchisee that employs them, but a larger corporation or franchisor.	• Strongly supports the Protecting the Right to Organize Act's (PRO Act) provisions imposing financial penalties on companies that interfere with workers' organizing efforts • Proposes empowering the NLRB to force any employer found to be bargaining in bad faith back to the negotiating table • Codify into law the Obama era's NLRB rules allowing for shortened timelines of union election campaigns • Supports the "card check" process as an initial option for forming a union (not just when employer has illegally interfered) • In the first 100 days of office, he will create a cabinet-level working group to deliver a plan to increase union density and address economic inequality

Trump	Biden
• Trump strives to level the international playing field by lowering the corporate tax rate to be no higher than the rates of other industrial nations. He supports switching to a territorial system of taxation so that profits earned and taxed abroad may be repatriated for job-creating investment in the U.S. • Trump would like to lower the corporate tax rate from 21% to 20%.	• Biden plans to reverse some of Trump's tax cuts for corporations and increase the taxes paid by wealthier individuals. • Biden would like to raise the corporate tax rate from 21% to 28%. • Biden proposes offering tax credits to companies that expand and hire more employees in the U.S., while imposing tax penalties on companies that manufacture products in other countries for importation to the U.S. • Biden also proposes creating a workplace childcare facility tax credit of up to 50% of an employer's first $1 million in costs for qualified onsite childcare.

Amy Coney Barrett's Labor Stance

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1997-98
- Served two years as a judicial law clerk for Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. and then for Justice Antonin Scalia of the U.S. Supreme Court

1999-2002
- Practiced law at Miller, Cassidy, Larroca & Lewin (that later merged with Baker Botts)

2002
- Returned to her alma mater, Notre Dame Law School, where she taught federal courts, evidence, constitutional law, and statutory interpretation

2017-2020
- President Trump nominated Barrett who was confirmed to the United States Court of Appeals for the Seventh Circuit
- In the 15 opinions she authored concerning the employer/employee relationship, the panel ruled in favor of the employee in 5 opinions

October 26, 2020
- Confirmed to the U.S. Supreme Court

Overall:
Described as very similar to her former boss, the late Justice Scalia, and thus, on balance, is more likely to side pro-employer

Retaliation
Looks closely at the evidence to determine whether those making adverse action decisions knew of the employee's complaint

Immigration
Likely to support the INA to block immigration as her Court blocked the Trump administration from imposing rule to exclude potential immigrants from green cards if they needed public assistance

Class Actions
Authored 5 class action opinions while on the 7th circuit where employees lost in all but one. Her stance reflects the current law which some believe is unfriendly to class actions

Arbitration
Regularly finds in favor of arbitration clauses and in $10M case, overturned lower court's ruling and ordered employees to arbitration

Discrimination
• Balanced decisions based on examination of the facts at summary judgment.
• Often affirms jury verdicts in favor of employees if there is any evidence in support

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