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Gerald Maatman, Partner, Seyfarth Shaw L.L.P., discusses Scalia's death

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The vacancy on the U.S. Supreme Court created by the death of Associate Justice Antonin Scalia could pose a roadblock to significant employer-friendly rulings on issues that include the Affordable Care Act and class-action litigation.

The conservative justice's opinions frequently were pro-employer, but not always, said Gerald L. Maatman Jr., a partner at Seyfarth Shaw L.L.P. in Chicago. They were based on a "faithful reading of the statute and a view of the limited role of government."

Since Justice Scalia was found dead in Texas Feb. 13, Senate Democrats and Republicans and President Obama have sparred, with Republicans vowing not to consider any nominee by the

president, and the president vowing to propose a successor before he leaves office.

The impasse could lead to 4-4 rulings by the court, on which parties could seek a rehearing when a successor is chosen. But that also means that appeals court splits on critical employer issues could stand for more than a year.

"I don't think the president is going to get anyone confirmed this year, so we're going to have to wait until the next Congress and the next president to get anyone confirmed," said Walter K. Olson, senior fellow at the Washington-based Cato Institute's Center for Constitutional Studies. "Almost any type of Supreme Court justice is a possibility within the next year."

Justice Scalia's demise is "an earthquake on a lot of levels," said M. Miller Baker, a partner at McDermott Will & Emery L.L.P. in Washington and co-head of its appellate practice group.

"It affects everything at a very basic level." Even parties seeking certiorari, which requires four votes to have cases accepted by the high court, will find it more difficult with only eight justices, he said.

It prompted Dow Chemical Co. on Friday to agree to pay $835 million to settle a decadelong class-action lawsuit on price fixing,

saying it has less chance of winning without Justice Scalia on the court.

Several other cases of concern to employers are pending with the Supreme Court, which has heard arguments but not issued opinions. In cases where the court is deadlocked 4-4, it could issue rulings that would uphold the lower court decisions or hold the cases for new arguments once a ninth justice is confirmed, experts said.

The cases include *Spokeo Inc. v. Thomas Robins* and *Tyson Foods Inc. v. Peg Bouaphakeo et al.*

In *Spokeo*, which was argued in November, the issue is whether a consumer who did not suffer actual injury can file a class action based on a technical statutory violation.

Tyson, also argued in November, is a class action on whether employees should be paid for all the time they spend donning and doffing protective gear.

Another case in which the high court heard arguments in January, *Rebecca Friedrichs et al. v. California Teachers Association et al.*, concerns whether nonunion members can be required to pay union dues.

A major issue on which oral arguments are scheduled for March 23, *David A. Zubik et al. v. Sylvia Burwell et al.*, consolidates seven cases brought by nonprofit religious organizations, challenging ACA-related Department of Health and Human Services rules that require employers to cover prescription contraceptives as part of their benefit plans. Under those rules, such organizations must notify HHS in writing of their objections to the coverage.

Justice Scalia's stance was expected to be pivotal in *Burwell*.

Scheduled for a March 28 argument is *CRST Van Expedited Inc. v. EEOC*, which focuses on whether the Equal Employment Opportunity Commission must pay $4.7 million in legal fees that the trucking firm spent defending itself from sexual discrimination charges by hundreds of workers, a case largely won by the employer.

In the near term, other issues likely to be brought before the high court include equal pay, procedural standards, arbitration, privacy and affirmative action.

In addition, the Obama administration is likely to issue a “whole slew of regulations” between now and Jan. 20, 2017, when the next administration takes office, said Michael Lotito, co-chair of Littler Mendelson P.C.'s Workplace Policy Institute in San Francisco. “Many of those situations are going to end up litigated.”

Having too many 4-4 votes once cases reach the court is a “poor idea,” said Donna Ferrara, Itasca, Illinois-based senior vice president and managing director at Arthur J. Gallagher & Co.

“If you have to go through the trouble and expense and the uncertainty of bringing a case before the Supreme Court, only to potentially have nothing happen, I just think that's systemically bad,” she said.