Was The Supreme Court Term Actually Boring?

Insights
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A Review of the 2011-2012 Supreme Court's Labor & Employment Decisions
In the same year that the Supreme Court issued one of the most important decisions in its history, which ended up being the biggest employment law news story since the passage of the Civil Rights Act in 1964, it would seem odd to label the just-concluded 2011-2012 term as "boring." After all, for the past month, it seems that every news outlet has debated and parsed the healthcare decision upholding the Affordable Care Act *ad infinitum*, and each employer has been inundated with instructions and advice on how best to comply with its accompanying obligations. And that's not even mentioning the ground-breaking immigration decision out of Arizona that came down a few days before the healthcare decision.

But taking a step back from these two hot button decisions, the remainder of the employment cases decided by the Supreme Court will barely impact employers. In fact, unless you are a religious organization, pharmaceutical company, or public employer, this past term might have absolutely no impact on the labor and employment world in which you live. Compared to years past, when the Court issued major decisions on discrimination cases, retaliation claims, class-action lawsuits, arbitration agreements, and labor unions, this past term might actually be considered boring for the average employer.

Here's a quick recap of the seven decisions that were published by the Supreme Court this year, along with a preview of what to expect in the 2012-2013 term.

Employers Can Claim Victories In Almost All Decided Cases
Setting aside the healthcare and immigration decisions, both of which contained a mixed bag of results for employers and both of which were hailed as victories or derided as defeats depending on individual or corporate perspectives, the other five decisions published in this term were all considered victories for employers. This continues the somewhat unpredictable nature of the current Roberts Court as it relates to employment law.

Over the last five years, only one other year (2009) saw an overwhelming number of victories for employers. Another year (2008) saw almost all victories in the employee/union column. And the last two years (2010, 2011) have seen mixed results for employers. Although the current composition of the Court (five GOP appointees) and judicial philosophies of the majority of Justices would have you

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believe that it should be business-friendly, it's important to realize that employer-side victories are not the slam dunks that some may expect. A year with five out of five decisions for employers should be celebrated, even if the decisions are of limited application.

Religious Organizations, Drug Companies, Public Employers: Celebrate Your Wins

The 2011-2012 session, in employment law terms, got off to a good start for employers in January 2012 when the Supreme Court blocked a discrimination lawsuit against a Lutheran school on the theory that religious organizations have the right to make certain employment decisions without regard to employment discrimination laws (known as the "ministerial exception"). In *Hosana-Tabor v. EEOC*, the Court applied the exception to ensure that those acting in a ministerial capacity could not bring employment concerns to court, but made clear that lay employees could still seek judicial relief.

Near the end of the term in June 2012, the Court also okayed the dismissal of a wage claim brought by a pharmaceutical sales rep, agreeing with the employer that such salespersons were exempt from overtime pay under the Fair Labor Standards Act (FLSA). Although *Christopher v. SmithKline* only applies to the drug industry, the reasoning behind the decision may end up being applied to other fields in the future.

This term also saw the Court rule in employers' favor in three public sector cases. In *Coleman v. Maryland*, the Court held that public employers could not be involuntarily subjected to private lawsuits under the self-care provision of the Family and Medical Leave Act (which allows employees to take unpaid leave if they are suffering from a serious health condition); in *Filarsky v. Delia*, the Court held that public agencies that retain private employees to assist in certain functions could shield those employees from claims under a qualified-immunity theory; and in *Knox v. SEIU*, the Court rebuked public sector unions that tried to assess fees to nonunion members without providing proper notice and the opportunity to opt out, which ultimately could further weaken labor's influence in the workplace.

Hot Button Issues: Healthcare and Immigration

The big one that overshadowed them all was decided on the last day of the Supreme Court's term, the decision upholding the Affordable Care Act (*NFIB v. Sebelius*). Most Court observers were surprised that the individual mandate was upheld, and many employers had largely ignored the healthcare statute assuming that it would be declared unconstitutional. What's clear for employers now, whether happy with the decision or not, is that it is time to get to work and comply with the law.

The good news is that employers have some time to get into compliance with the most significant changes (those that go into effect in 2014 include the "Pay or Play" mandate, the Nondiscrimination Requirements, and the Automatic Enrollment provision), but should start working to determine their impact immediately so as to plan for any resulting additional economic burdens. There are also a whole host of immediate compliance issues that should be addressed as well, including disposition of Medical Loss Ratio Rebates, reporting the cost of coverage on 2012 W-2 forms, and new limitations on Medical Flexible Spending Accounts.

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Employers will not have to face new state-mandated immigration requirements, however, after the Supreme Court struck down Arizona's attempt to regulate immigration issues on its own (*Arizona v. U.S.*). The Court held that states do not have the right to insert themselves into certain areas of immigration law, ruling that such decisions are the province of the federal government alone. Arizona had passed a law which made it a criminal offense for undocumented workers to solicit, apply for, or perform work in the state, among other things, but the Court wrote that the law went too far.

On the other hand, the Court did make clear that there are certain immigration laws that individual states could pass if they so chose – such as regulating business and requiring state employers to use E-Verify when hiring – so employers will still need to be aware of the patchwork quilt of immigration laws that exist from state to state.

What's On Deck for 2012-2013?

As noted above, it has now become all but impossible to predict whether employers will be happy with the Supreme Court's decisions in the coming term (which kicks off in October 2012), but we can at least take a look at the issues that the Court has decided to take up in its next term. At first glance, it certainly appears that those cases pending on the Supreme Court docket, have the potential for widespread impact on all employers.

- **Discrimination and Harassment:** The Court will decide whether an employee who oversees other employees' daily work but lacks the authority to hire and fire is considered a "supervisor" under Title VII. This decision will have a direct impact on many harassment and discrimination cases, since employers are deemed liable for the actions of "supervisors" but can escape liability in certain instances when other employees are the perpetrators. *Vance v. Ball State University*.
- **Class-Action Litigation:** Two cases on the Court's docket will play a role in shaping future class action litigation. In *Genesis Health Care Corp. v. Symczyk*, the Court will determine whether an FLSA collective action becomes moot if the lone plaintiff receives an offer of judgment from an employer that satisfies all of his or her individual claims. And in *Comcast v. Behrend*, we will learn whether a class action can be certified without resolving whether the plaintiffs have introduced evidence to show that the whole class of plaintiffs can be awarded damages.
- **Benefits Law:** The subject of another case accepted for review by the Supreme Court is ERISA and whether certain defenses can be applied to limit a benefit plan's recovery, even if the plan itself plainly says that the plan would be entitled to full reimbursement. *U.S. Airways, Inc. v. McCutcheon.*
- **Education/Affirmative Action Law:** In what may end up being the blockbuster case of the 2012-2013 term, at least in terms of media coverage, the Court will rule whether a college can take race into account when making undergraduate admissions decisions. *Fisher v. Univ. of Texas at Austin*.

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Invariably the Supreme Court will accept other labor and employment cases for review and decision in the 2012-2013 term, and when it does, Fisher Phillips will be there to summarize the holdings in these cases to provide employers with timely and practical advice.

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