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A SERIES OF TICKING TIME BOMBS – A REVIEW OF THE SUPREME COURT'S 2013-2014 TERM

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The Supreme Court recently wrapped up its 2013-2014 term, and management can count it as another successful year in front of the High Court. Of the nine decisions impacting labor and employment law, seven of them should have positive implications for American businesses for years to come. And even though most of the decisions will have only a limited impact in the near term, there is a chance that the Court lit the fuse on a series of ticking time bombs which will one day explode and reshape the labor and employment landscape as we now know it.

Overview: Almost A Clean Sweep, Still Contentious

Before examining the specifics, it's always interesting to look at the overall trends once a session is finished. There were two overriding themes in the labor and employment field that shaped the term. First and foremost, employers continued their winning ways that have marked the last three sessions. Although the years 2008-2011 were mostly barren for employers, business have enjoyed a resurgence of success the last three terms that has seen them barely lose a case in front of the Supreme Court. As noted below, there were only two cases that could be counted in the loss column in the 2013-2014 term, and one of them was more of a case of wishful thinking because the loss was mostly expected.

Second, labor and employment remains a contentious and

divisive field of law. Chief Justice Roberts has made it a priority to usher in a new era of harmony at the Supreme Court and has publically stated he wants to see as many unanimous decisions from his fellow justices as possible. He has generally been successful, with an unprecedented 65% of cases decided this past term with a 9-0 vote count. In fact, only 10 of the 72 cases published this year were decided by the notorious 5-4 score line. However, it just so happens that two of those 10 were in the labor and employment field, and those decisions just happened to be two of the most well-publicized and important cases decided on the final day of the term.

In other words, although harmony is the new name of the game, labor and employment remains one of the last bastions of true knockdown, drag-out in-fighting at the Supreme Court.

Two Biggest Ticking Time Bombs: *Harris* and Hobby Lobby

The Court planted seeds with two of their biggest cases of the term, and employers can hope that these will one day sprout into even bigger gains for management. In the 5-4 *Harris v. Quinn* decision, the Supreme Court struck down an Illinois law that required a certain class of quasi-public homecare providers to pay dues to a public-sector union, ruling that mandatory union fees were impermissible in these circumstances. The immediate applicability of this decision is narrow, to say the least, as it only applies to those employees who fall into a unique category of being both public and private workers.

But most Court observers believe that the *Harris* decision is little more than an invitation for others to challenge the mandatory union dues arrangement in a larger context. After all, this was the first time the Supreme Court rejected any kind of compulsory fair-share fee arrangement, and the majority opinion called these kinds of payments "questionable on several grounds." There is already a case at the U.S. Court of Appeals for the 9th Circuit that appears to be fast-tracked to appear before the Supreme Court one day soon (*Friedrichs v. California Teachers Ass'n*), and this may be the case that strikes down forced union dues for all public employees.

Such a decision would be an absolute game-changer in this country, severely weakening the labor movement and

proving to be a boon for management.

In the other 5-4 decision, *Burwell v. Hobby Lobby Stores*, the Supreme Court ruled that closely-held for-profit corporations providing group healthcare benefits to their employees could, on religious grounds, be exempted from providing coverage for contraception as otherwise required under the national healthcare law. This decision, again, appears to be very narrowly focused, and the majority opinion took great pains to say that the holding was "very specific" to the situation at hand.

But many observers already see ways in which this decision could be interpreted to offer additional defenses to employers facing employment discrimination claims in other situations. The dissenting opinion, in fact, opined that this ruling could see other employers claiming that their religious beliefs should trump other employment laws and labeled the ruling "a decision of startling breadth." The EEOC has often reaffirmed the fact that *employees'* religious beliefs should be afforded great deference when it comes to obligatory accommodations in the workplace (days off for religious observances, exceptions to uniform or dress code policies, etc.). Now that the Supreme Court has indicated that *employer's* religious beliefs should be given some weight in workplace decisions, it will be interesting to see what happens if and when the federal agency is forced to reconcile this shift in perception.

The Labor Board's Worst Nightmare: Noel Canning's Impact

The Supreme Court stepped on some toes in the White House and the National Labor Relations Board when it issued the 9-0 decision in *NLRB v. Noel Canning*, which invalidated over 600 decisions from a pro-worker panel of the Labor Board issued between January 2012 and July 2013. The reasoning behind the decision itself won't have any sort of lasting impact on the world of labor and employment law, as it focused on the intricate (and very dry) mechanics behind Presidential recess appointments and executive powers. However, the impact of the decision could benefit employers in two ways.

First, the Board will now have to revisit each of the 600+ invalidated decisions with a new and legitimate set of panel members. It stands to reason that some of the decisions will

now be handled by a set of Board members with more employer-friendly leanings, and therefore the outcomes of these decisions could favorably assist management. These could include decisions on hot-button topics like employee handbooks or social-media terminations.

Second, the Board will no doubt be distracted and bogged down by the additional work these re-hearings will require, which could hamper the Board's ability to swiftly move forward with its pro-Labor agenda (read: quickie elections).

When Does A Win Feel More Like A Loss? *Sandifer's* Donning & Doffing

Back in January 2014, the Supreme Court handed employers the first big win of the term by issuing a 9-0 ruling in their favor with the *Sandifer v. United States Steel Corp.* decision. This case held that time spent by employees "donning and doffing" their protective gear before and after work is not compensable under wage and hour law. It was generally hailed by employers as an obvious victory, and was expected to generally stem the tide of costly wage and hour litigation. However, the ticking time bomb planted by the Court might come back to haunt employers and make this victory feel more like a loss.

Somewhat hidden in the dense thicket of the written opinion are a few sentences which should strike fear into management's collective heart. The Court stated that the closely-related *de minimis* doctrine – which has long held that small and trivial amounts of time spent preparing for and concluding work are not compensable work time – appeared to be out of touch with reality. Although not ruling on or striking down the doctrine, the majority opinion said that there was no good reason to disregard such time, which severely undermines the oft-used defense on a go-forward basis.

Many observers believe that these words signaled a call to plaintiff's attorneys to attack the *de minimis* defense directly, and it appears workers could have a sympathetic ear in the courts following this ruling.

When A Loss Feels Like A Loss: *Lawson's* SOX Retaliation

In the only pure loss of the term, the Supreme Court handed a 6-3 decision in favor of whistleblowers in the March 2014

decision of *Lawson v. FMR, LLC*. This case held that the Sarbanes-Oxley Act (also known as SOX) allows employees of private entities who happen to contract with publicly-traded companies, to also bring costly whistleblower retaliation claims under the federal statute. By greatly expanding the reach and scope of this statute, the Court opened the door for numerous additional lawsuits.

The dissenting opinion painted a bleak view of exactly how far this decision could reach, theorizing that even a nanny to a CEO of a public company could find room to sue under the statute. Although most believe that such a scenario is far-fetched, there is no doubt that employers should be concerned about the ever-expansive manner in which this statute is being interpreted.

A Smattering Of Other Decisions

There were four other Supreme Court decisions, which could impact the world of labor & employment law in a more limited way. The most high-profile of these – *Schuette v. Coalition to Defend Affirmative Action* – upheld a Michigan state statute which prohibits racial preferences in admissions to public schools and government programs. Although this case directly and immediately impacts educational law, the reasoning behind this decision could allow states to ban affirmative action in certain public hiring situations.

Two other benefits cases offered a mixed bag of results for employers: *Heimeshoff v. Hartford Life* allows employers to limit the time in which plan participants can bring lawsuits against them pursuant to a long-term disability policy, but *U.S. v. Quality Stores* rejected employers' attempts to collect refunds from certain severance payments paid out under FICA (a disappointing but expected loss). And finally, in *BG Group v. Argentina*, the Court broadened arbitrators' authority when deciding preliminary issues in arbitration agreements, which should ultimately aid employers in the context of alternative dispute resolution.

What's On Tap For 2014-2015?

In a few short months, the Supreme Court will be back at it again with a brand-new slate of cases for the upcoming term, and there are already several labor and employment cases on the docket for what promises to be an exciting

year. Even if the *Friedrichs* case discussed above doesn't make it to main stage in the coming term, the following cases will be decided between October 2014 and June 2015:

- *Young v. United Parcel Service*: will decide whether and to what extent employers need to accommodate pregnant workers under federal anti-discrimination law;
- *Mach Mining v. EEOC*: the Court will rule whether employers and courts can challenge an EEOC's pre-litigation conciliation efforts, offering an opportunity for the justices to rein in the federal agency;
- *Integrity Staffing Solutions v. Busk*: another wage-and-hour case, where the Court will determine whether time spent by workers in pre-work security screenings is compensable;
- *Perez v. Mortgage Bankers Assoc.*: whether mortgage loan officers are exempt from minimum wage and overtime pay requirements (the decision could end up being broad enough to apply to many other jobs and industries); and
- *M&G Polymers USA v. Tackett*: a benefits case impacting the drafting of collective bargaining agreements and whether employee benefits survive the expiration of a union contract absent specific language.

In each of this term's decisions, Fisher Phillips issued same-day summaries of each of the cases, explaining the decision in plain English, putting the case in context, and exploring the possible impact on employers. Decisions on next term's cases will be issued before you know it, and Fisher Phillips will be there to issue same-day summaries and analyses as always.

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