WEB EXCLUSIVE: Supreme Court Review: Mixed Bag For Employers

Insights
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The 2016-17 Supreme Court term was truly a mixed bag for employers. The Court limited presidential power, reined in the appellate courts' authority to review and overturn trial court decisions regarding EEOC subpoenas, increased procedural burdens for the certification of class actions, and provided a favorable ruling for plaintiffs bringing claims under the WARN Act.

Fortunately, the decisions with the greatest impact on employers can be considered victories: the limitations to the EEOC's subpoena power and increased procedural burdens for class action certification. Because of several niche decisions, however, the 2016-17 term resulted in uncertainty for schools and Native American tribes and could lead to increased litigation.

Court Limits Executive Power
In April 2017, the Supreme Court (SCOTUS) ruled in favor of employers in *McLane v. EEOC*, deciding 7-2 that courts of appeal should largely defer to the lower court's decision when policing subpoenas issued by the Equal Employment Opportunity Commission (EEOC). The Supreme Court's decision keeps a more sensible, reasonable limit on the EEOC's investigatory powers because lower court rulings will be reviewed for abuse of discretion rather than under a *de novo* review standard.

The SCOTUS held that trial judges are better positioned than appellate judges to consider the variety of issues in play when the EEOC issues a subpoena seeking information for an investigation. The Court noted that these types of decisions are fact-intensive and will turn on whether the evidence sought is relevant to the specific charge, or whether the subpoena is unduly burdensome.

A month prior, in a 6-2 decision, the Supreme Court held in *NLRB v. SW General* that the text of the Federal Vacancies Reform Act of 1998 (FVRA) clearly prohibits individuals nominated to fill a vacant position in the executive branch from performing that position's duties in an acting capacity. The ruling resulted in the dismissal of an unfair labor practice charge against an employer because Lafe Solomon, President Obama's nominee for General Counsel of the National Labor Relations Board (NLRB), continued to serve in an acting capacity as General Counsel prior to being confirmed by the Senate. The SCOTUS decision restricts the president's ability to fill high-level administrative positions without the Senate's advice and consent

Church-Affiliated Organizations Earn Major Victory

The Court provided much needed clarity in June 2017 when it ruled by an 8-0 margin that employee benefit plans sponsored by church-affiliated organizations qualify for the "church plan" exemption under the Employee Retirement Income Security Act (ERISA), regardless of whether the plan was originally adopted or established by a church (*Advocate Health Care Network v. Stapleton*). This decision is a win for those church-affiliated employers such as hospitals and schools that have historically relied on the exemption from ERISA in the design and administration of their benefit programs. While the decision brings clarity and support to the very broad scope of the church plan exemption, church-affiliated employers should continue to monitor further developments in the event Congress attempts to set limitations.

Class Action Hopefuls Dealt Procedural Setback

In June 2017's *Microsoft Corp v. Baker*, the Supreme Court handed employers and others facing costly class action litigation a unanimous 8-0 victory. The ruling confirmed that plaintiffs cannot immediately appeal when the named plaintiffs voluntarily dismiss their claims following denial of class certification by a federal court. This decision maintains the status quo, and continues to deny the plaintiffs' bar the ability to do an end-run around the general prohibition barring provisional "interlocutory" appeals brought while the underlying litigation is still being maintained.

Court Issues Warning To Companies Declaring Bankruptcy

In a 6-2 decision issued in March 2017, the Court rejected a structured Chapter 11 bankruptcy dismissal that left a group of WARN Act plaintiffs without any compensation. The court's ruling in *Czyzewski v. Jevic Holding Corporation* means that a company in Chapter 11 bankruptcy must ensure that all its creditors and potential creditors given priority under the Bankruptcy Code – which could include current or former employees – agree to the terms in order for a structured settlement to be approved.

By expanding the requirements for reorganization or liquidation plans to apply to structured settlements, this holding will significantly change how most companies in Chapter 11 approach them, and will provide affected workers with more leverage at the settlement table.

2 Decisions Result In Increase For Student Rights

In *Fry v. Napoleon Community Schools*, the SCOTUS ruled that the parents of a disabled child were not legally required to exhaust administrative remedies under the Americans with Disabilities Act and the Rehabilitation Act prior to suing a school for damages in a dispute over a service dog. The Court's February 2017 decision reasoned that "exhaustion is not necessary" because the substance of the lawsuit was not based on an alleged denial of free appropriate education under the Individuals with Disabilities Education Act (IDEA), but rather compensatory damages for emotional distress.

The unanimous 8-0 opinion instructs lower courts to "look to the substance, or gravamen" of a disability discrimination lawsuit when determining whether exhaustion of administrative remedies is required. The impact of this decision for schools and school districts could be significant because of the potential increase in lawsuits filed by plaintiffs prior to exhausting their administrative remedies offered under IDEA.

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In another unanimous 8-0 decision likely to lead to increased litigation for public schools, the *Endrew F. v. Douglas County School District* ruling issued in March 2017, held that IDEA requires public schools to craft individualized education programs (IEPs) to provide a heightened level of educational benefits for children with disabilities. IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Schools will be required to provide enhanced services, not just designed to provide "some benefit," but that are reasonably calculated to keep track with grade progress. For those who cannot be fully integrated into the classroom, services must be designed such that the educational program is "appropriately ambitious."

Tribal Sovereign Immunity Dealt Setback

The Supreme Court unanimously ruled in *Lewis v. Clarke* that tribal sovereign immunity does not apply to employees who are sued in an individual capacity, even if the alleged wrongdoing occurs while the employee is acting within the course and scope of employment by the tribe, and even when the tribe has agreed to indemnify the employee. Stated differently, the Court ruled that the doctrine of tribal sovereign immunity does not extend to tribal employees who are not being sued in their official capacity as agents of the tribe.

The April 2017 decision is a wake-up call for tribes across the country and somewhat reduces their power to immunize tribal employees from suit using tribal sovereign immunity. However, left intact is the shield protecting employees who are sued in an official capacity as agents of the tribe.

Supreme Court Sidesteps Gender Ruling

In March 2017, the Court remanded *G.G. v. Gloucester County School Board* back to the 4th Circuit Court of Appeals for further consideration, thereby avoiding a ruling on the matter. The Court took this step in light of the Trump administration's decision to withdraw federal guidance that had instructed public schools to allow students to use the bathroom that corresponds to their gender identity.

By remanding the matter, the Supreme Court managed to dodge the issue of transgender rights for another term. However, other legal challenges are vying for the Court's attention on whether the term "sex" includes transgender status. This issue could make an appearance on the Supreme Court docket before long. Employers of all sizes would be wise to stay ahead of the curve by proactively addressing issues related to a transgender workforce.

2017-18 Promises More Fireworks

In a few short months the Supreme Court will begin a new term, and several labor and employment cases are on the docket that we will monitor closely. Now that Justice Gorsuch has been confirmed by the Senate and the Court's typical nine-justice complement has been restored, we anticipate the Court will be more willing to issue final decisions on cases that are sure to impact employers. The following cases have been accepted for review for the 2017-18 SCOTUS term:

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- ***Lewis v. Epic Systems Corp.*** **–** The Supreme Court will decide whether mandatory class and collective action waivers are permissible, allowing employers to avoid costly litigation in favor of individual arbitration proceedings.
- ***Trump v. International Refugee Assistance Project*** – The Court will examine the merits of President Trump's Executive Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," and could issue a definitive ruling upholding the executive order, striking it down, or finding a compromise.
- ***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*** – The Court will determine whether Colorado's public accommodations law requires the owner of Masterpiece Cakeshop, Ltd. to "create expression" – make a cake for a same-sex wedding – causing what the bakers believe would a violation of their free speech and free exercise rights under the First Amendment.
- ***Hamer v. Neighborhood Housing Services of Chicago*** – At issue is whether federal appellate rules permit a lower court to extend appeals court deadlines in an employment discrimination setting.
- ***Artis v. District of Columbia*** – The SCOTUS will decide whether a tolling provision suspends the statute of limitations clock on a state whistleblower claim while the claim is pending and for 30 days after the claim is dismissed, or whether the tolling provision merely provides 30 days beyond the dismissal for the plaintiff to refile.
- ***Digital Realty Trust v. Somers*** – The decision in this case will resolve whether the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 protects whistleblowers who have not reported alleged misconduct to the U.S. Securities and Exchange Commission (SEC).

Conclusion

Following each of last term's decisions, Fisher Phillips issued same-day summaries of each case, 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 we will once again be there to issue same-day summaries and analyses.

If you receive this newsletter via email, you should already be receiving Supreme Court alerts automatically. If you aren't, or if you're not sure whether you've signed up or not, contact your regular Fisher Phillips attorney.

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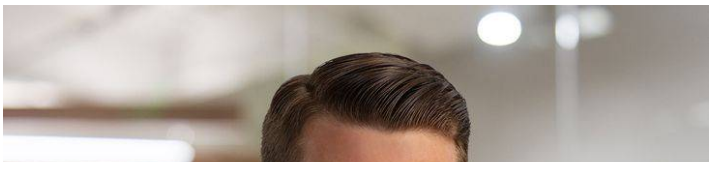

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