SCOTUS Feeds Cake To Employers

WORKPLACE LAW REVIEW OF 2017-2018 TERM

Insights
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Pick a favorite flavor, abandon all beach body goals, and disregard whether it's anyone's birthday: the 2017-2018 Supreme Court term saw employers having their cake and eating it, too (with only a few minor exceptions). Overall, the Court rejected plaintiffs' quests for more favorable applications of wage and hour, retaliation, and arbitration laws. And the few decisions that could negatively impact employers are largely procedural or very limited in their application. Think of them as unappetizing vegetables along what was otherwise a cakewalk term.

Part One: Sweet Treats From SCOTUS
There were several massive wins for employers this term that should taste like sweet victory.

Justices Shut Down Attempt To Expand FLSA To Auto Dealer Service Advisors
Fisher Phillips' Automotive Dealership and Appellate practice groups took part in a case in which the Supreme Court ruled 5-4 that service advisors are exempt from the Fair Labor Standards Act's (FLSA's) overtime pay requirements as salesmen who primarily engage in servicing automobiles.

The relevant portion of the statute exempts "salesm[en] . . . primarily engaged in . . . servicing automobiles." After years of treating service advisors as exempt despite the fact that they never go under the hood of the vehicle, the U.S. Department of Labor (USDOL) completely reversed course and issued an interpretation that concluded service advisors were generally not exempt.

The Supreme Court initially reviewed this case in 2016 but simply remanded it to the 9th Circuit Court of Appeals with instructions to interpret the exemption without any deference to the USDOL's interpretation. After that lower court again sided with the workers, the case wound up back at the Court one more time. On its second look at the case, the Court, in Justice Thomas' majority opinion, held that the plain language of the statute covered salesmen who primarily engaged in servicing automobiles, which is what service advisors do in selling services.

In what can only be described as icing on the cake, the Court also dismissed the frequently cited principle that FLSA exemptions should be interpreted narrowly. Rather, the Court stated that a court's reading of the exemptions should be fair, not narrow, which should be of benefit to all employers across the country.

Class Action Waivers In Employment Arbitration Agreements Live On

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The Court's super-sweet decision in three consolidated cases (*Epic Systems Corporation v. Lewis*; *Ernst & Young, LLP v. Morris*; and *NLRB v. Murphy Oil, USA, Inc.*) upheld class action waivers in arbitration agreements. In a 5-4 decision, the Court concluded that these waivers do not violate the National Labor Relations Act (NLRA) and are enforceable under the Federal Arbitration Act (FAA).

Under the NLRA, contracts that conflict with workers' "concerted activities for the purposes of collective bargaining or other mutual aid or protection" are unenforceable. Justice Gorsuch's majority opinion concluded that the right to bring a joint, collective, representative, or class-based claim is not a "concerted activity" and is therefore not protected under the NLRA.

Although employees can still attack arbitration provisions using traditional contract-based theories such as unconscionability, the decision affirms an employer's ability to incorporate and enforce mandatory class action waivers in employment arbitration agreements under the NLRA and FAA.

SCOTUS Rejects Attempt To Expand Retaliation Law

In *Digital Realty Trust, Inc. v. Somers*, the Court issued a unanimous decision (plain vanilla, you could say) that rejected an attempt to broaden the definition of "whistleblower" under the Dodd-Frank Act's anti-retaliation provisions. The Dodd-Frank Act protects employees who provide information relating to a possible violation of securities law to the SEC. Additionally, the Sarbanes-Oxley Act (SOX) protects whistleblowers who provide information to federal agencies, Congress, or a person with supervisory authority over the employee. SOX also requires certain employees to internally report suspected securities law violations.

Somers, a company vice president, reported alleged securities law violations to senior management (while claiming he was compelled to do so under SOX), and then alleged that his subsequent termination was motivated by retaliation in violation of the Dodd-Frank Act. On appeal to the 9th Circuit, the court determined that although Somers did not fit within Dodd-Frank's narrow definition of whistleblower, it would disregard the plain language and rule that Somers was protected because to do otherwise would yield an absurd result.

SCOTUS shot down the 9th Circuit's ruling and clung to the clear definition of "whistleblower" as set forth in Dodd-Frank, which requires the reporting employee to notify the SEC. In order for the anti-retaliation provisions of Dodd-Frank to apply, the Court held, an employee who raises an internal complaint of securities law violations must also raise said complaints to the SEC.

Public Sector Labor Takes A Hit To The Wallet

The Court went out with a bang on the last day of the term and served organized labor what some might say was its just desserts in *Janus v. AFSCME*. The Court ruled that the First Amendment prohibits public sector entities from collecting fees from non-union members. The ruling addresses the previous requirement that non-union employees pay mandatory fees that financed union campaign efforts and sponsored anti-employer legislation.

Prior to this decision, employees who were covered by a collective bargaining agreement had to pay "agency shop" fees or "fair share" fees even if they chose not to join the union. Now, the union fees may only be deducted if the employee "affirmatively consents to pay." This ruling could have a devastating impact on the finances of public sector unions and the worker-friendly causes they generally support across the nation at all levels of government.

Part Two: Small Slice Of Cake—Cake Baker Earns Second Bite At The Apple

There was one decision from the Court that reversed a loss for a business at the lower courts, but, due to the unique circumstances of the situation, should not necessarily be considered an outright win for businesses.

In the high-profile *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission* case, the Court issued a 7-2 decision rebuking the Colorado Civil Rights Commission (CCRC). The majority held that CCRC failed to give due deference to a baker's religious beliefs when it determined that the baker was required to bake and sell a wedding cake for a same-sex couple.

The bakery owner argued that compelling him to make a cake for a same-sex marriage violated the free speech clause of the First Amendment, and requiring him to design a cake for a same-sex marriage would violate his free exercise of religion. Specifically, he argued that the government singled him out because of his sincerely held religious beliefs against same-sex marriage.

Justice Kennedy's majority opinion hinged on evidence that the CCRC treated the *Masterpiece* case differently than other cases where bakers had refused to perform work, and he explained that the CCRC did not approach the case "with the religious neutrality that the Constitution requires." The Court thus reversed the CCRC's previous decision and sent the matter back to the agency for review. It strongly cautioned, however, that this decision does not give businesses the right to discriminate against LGBT customers and patrons.

Part Three: Businesses Must Also Eat Vegetables, Too

It wasn't all sweet desserts for employers this term, though. There were at least three decisions that taste the way overcooked vegetables must taste to a young child eager for yummy cake.

Plaintiffs Get Two Shots With Supplemental State Claims

The *Artis v. District of Columbia* decision held by a 5-4 vote that the statute of limitations on an employee's state law claims is tolled while a federal lawsuit in which those claims are included is pending. Specifically, the Court held that "tolling" the statute of limitations suspends the statute of limitations (i.e., stops the clock) while the federal lawsuit is pending.

The practical application of this ruling is tough for employers to digest, as it means that employees can refile their claims in state court later on if the federal court declines to decide them. Thus, the employer can find itself rehashing the same issues that it litigated in federal court already.

Appellate Extension Deadline is More Flexible

The Court determined that a Federal Rule of Appellate Procedure prohibiting extensions of appeal deadlines beyond 30 days is a mandatory claims processing rule. In its unanimous decision that will probably only appeal (pun intended) to procedural nerds, the Court determined that the deadline can be modified by court order or otherwise excused if the court believes it is warranted.

A jurisdictional rule, which is the opposite of a mandatory claims processing rule, would preclude the lower court from making any modifications. The Court's opinion did not elaborate on whether a district court can grant a longer extension than 30 days.

Trump's Travel Ban 3.0 Upheld

After the President's first two travel bans were blocked by federal judges in multiple states, he issued a Presidential Proclamation that provides for travel and immigration restrictions on individuals from Iran, Libya, Syria, Yemen, Somalia, North Korea, and Venezuela. In upholding the ban by a 5-4 count, the Supreme Court gave due deference to the president's authority under the Immigration and Nationality Act and determined that President Trump's restrictions were a lawful exercise of his authority. Employers who employ nationals of banned countries are affected and should caution those employees to avoid unnecessary travel outside of the United States.

Part Four: Get Ready To Spoil Your Appetite

The Court has already set out the ingredients for what will surely be some interesting confections in the next term, especially if a new Justice is included in the mix. Note also that pundits believe SCOTUS could take up the issue of whether Title VII includes claims of sexual orientation discrimination, although it is not included in any of the cases that the Court has accepted for review at this time.

- *New Prime Inc. v. Oliveira*: If two parties to an agreement disagree about whether they need to arbitrate a dispute, should an arbitrator of a court resolve that threshold disagreement?
- *Lemmon Fire District v. Guido*: Does the Age Discrimination in Employment Act's 20-employee minimum also apply to local governments?
- *Lamps Plus v. Valera*: Does the FAA foreclose a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language that is commonly used in arbitration agreements?
- *Henry Schein Inc. v. Archer and White Sales Inc.*: Do courts have the power under the FAA to refuse to enforce agreements that delegate questions of arbitrability to an arbitrator if the court determines that the claim of arbitrability is "wholly groundless"?

What should be particularly appetizing to employers is the fact that Fisher Phillips publishes same-day alerts summarizing each and every Supreme Court case and presenting them in an easily digestible bite-size format. If you aren't receiving them, you can subscribe here.

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