SCOTUS 2018-2019 Year In Review: "It Means What It Says. . . ."

Insights
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Perhaps the most shocking aspect of employment-related cases from the 2018-2019 Supreme Court term that just wrapped up was the number of unanimous decisions – seven of the eight rulings – were agreed upon by all of the Justices. And most them contained similar reasoning to reach the unanimous result. Whether addressing the Age Discrimination in Employment Act, arbitration agreements under the Federal Arbitration Act, Title VII of the Civil Rights Act of 1964, and even the Outer Continental Shelf Lands Act, SCOTUS's recent decisions indicate a strong theme: it means what it says. Don't imply exemptions in the statutes that don't exist; don't use ambiguities to waive rights, and only read statutory exemptions and limitations as they were intended to be interpreted.

Court Takes Deep Dive Into Arbitration Issues
As arbitration becomes more popular, SCOTUS is stepping up to define the parameters of the Federal Arbitration Act (FAA). Though each of its three arbitration decisions this term involved a separate section of the FAA, SCOTUS is sending a clear message: clarity rules.

First, in *Henry Schein Inc. v. Archer and White Sales Inc.*, the Supreme Court unanimously held that arbitration agreements may include provisions confirming that an arbitrator will decide whether a dispute is arbitrable. SCOTUS explained that federal policy favoring enforcement of arbitration agreements also applies to the parties' delegation of arbitrability. In so holding, SCOTUS rejected the judicially created "wholly groundless" exception that many courts invoked to "spot-check" whether a claim of arbitrability was plausible before compelling arbitration.

SCOTUS's opinion reiterated that the FAA does not include a "wholly groundless" exemption, and courts are not at liberty to rewrite the statute. Allowing courts to do so would diminish the fact that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." This case is certainly a win for employers whose arbitration agreements delegate the question of arbitrability to arbitrators.

While the *Henry Schein, Inc.* decision was certainly a win to employers, SCOTUS dealt a blow to transportation employers in *New Prime Inc. v. Oliveira*. While interpreting two exemptions from the Federal Arbitration Act – the interstate transportation workers exemption and the contract of employment exemption – SCOTUS once again issued a unanimous decision, but this time in favor of employees.

The key portion of the decision saw SCOTUS holding that the contract of employment exemption applies to employment contracts with interstate transportation workers and independent contractor agreements. In so holding, SCOTUS again focused on the plain language of the statute and harkened back to the meaning of words when the FAA was originally enacted. Reasoning that "contract of employment" simply meant an agreement to perform work, SCOTUS greatly expanded the scope of the exemption. Such an expansion means that many of arbitration provisions in independent contractor agreements signed by any of the 500,000 truck drivers in the United States may be unenforceable or called into question.

The third arbitration case involved the role of the courts in addressing ambiguous arbitration agreements. In *Lamps Plus Inc. v. Valera*, SCOTUS held that unless an arbitration agreement clearly provides for class arbitration, courts cannot compel it. Valera worked for Lamps Plus, Inc., which was the victim of phishing scheme that led to the exposure of employees' personal data. Valera filed a class action suit, claiming that the company failed to adequately protect employee information. Lamps Plus sought to compel arbitration based on Valera's signed arbitration agreement. Because the agreement did not explicitly mention class arbitration (either by a waiver or consent), the 9th Circuit Court of Appeals found the agreement ambiguous. It concluded that state law required the ambiguity to be construed against the drafter (Lamps Plus), and thus reasoned that the agreement allowed class arbitration.

In a 5-4 decision – the only decision impacting workplace law this term not decided unanimously – SCOTUS rejected the 9th Circuit's reasoning, instead holding that state law contract interpretation provisions cannot be used to resolve ambiguous provisions against the drafter and "cannot be applied to impose class arbitration in the absence of the parties' consent." In other words, any agreement to engage in class arbitration must contain the clear, unambiguous consent of the parties. While the *Lamps Plus* case is a clear win for employers seeking to avoid class arbitration, it further underscores SCOTUS's recent trend to interpret the FAA – and its breadth and limitations – according to clear and plain language of both the Act and the agreements.

Discrimination Cases Run The Gamut

The Court decided three cases implicating discrimination law this past term, each focusing on a different federal anti-bias statute. Though the facts of *Mt. Lemmon Fire District v. Guido* relate to only small, public sector employers, the impact of the decision may be felt by many more. In *Guido*, two firefighter captains in the Mt. Lemmon Fire District in Arizona sued their employer under the Age Discrimination in Employment Act (ADEA) claiming that they were terminated based on their age. The ADEA defines "employer" as private entities "who have 20 or more employees," and "also" includes "any state or political subdivision of the state." So, does that mean *all* political subdivisions of a state regardless of size? Though many courts applied the ADEA's requirements to only those state and political subdivisions with 20 or more employees, SCOTUS smacked down the limiting interpretation. In yet another unanimous decision, SCOTUS reasoned that the term "also" was additive in nature, so the 20-person minimum does not apply to small, public sector employers.

More importantly for employers is the question SCOTUS raised but did not address. SOCTUS included a footnote acknowledging that it was not addressing whether individual liability under the agent clause may be imposed under the ADEA. SCOTUS essentially invited employees to pursue individual agent liability theories when filing age-based claims. It is likely that more liberal circuit courts may take SCOTUS's suggestion to begin imposing liability on individuals who are found in violation.

In the widely reported *Fort Bend County v. Davis* decision, SCOTUS unanimously held that Title VII's administrative exhaustion requirement is merely a claim-processing rule. Title VII requires employees to file claims with either the EEOC or a similar state agency within 180 days of any unlawful employment practice. But what happens if an employee doesn't file a timely charge identifying all claimed discriminatory actions? Courts have been split on whether the 180-day timeframe is a jurisdictional requirement (meaning that the court has no authority to hear a case unless compliance is established) or procedural (simply a claims-processing rule).

In resolving the split, SCOTUS held that Congress did not clearly state that Title VII's requirement is jurisdictional, so courts must treat it as non-jurisdictional in nature. In other words, a court may retain jurisdiction over an employee's claim even if the employee fails to allege the basis for his discrimination claims in his charge. Though SCOTUS's decision may open doors for employees in certain circumstances, the decision does not deprive employers of the defense requiring an employee to exhaust his administrative remedies. Rather, the *Davis* decision clarifies that you should immediately raise the defense or risk waiving it.

Finally, in an unsigned, unanimous decision that caught many by surprise, SCOTUS took the unusual step of vacating a 2018 appeals court Equal Pay Act decision because one of the judges counted in the majority was deceased by the time the decision was published. This ruling reversed a landmark equal pay ruling that concluded employers could not justify wage differentials between men and women by relying on prior salary. Although the justices did not examine the merits of the 9th Circuit's *Yovino v. Rizo* ruling in its opinion, their decision plunged employers back into a state of uncertainty regarding a controversial pay equity practice.

Oil Rigs And Naps

Many people would think that you shouldn't be compensated for sleeping on the job. But what if you aren't allowed to leave work? SCOTUS addressed that very issue in *Parker Drilling Management Services Ltd. v. Newton*. Brian Newton worked on an offshore drilling platform owned by Parker Drilling located off the California coast. Like other workers, Newton would work 14 days on the platform, followed by 14 days off. While working, his shift was 12 hours, and he was on "controlled standby" for the other 12 hours per day. During standby, Newton could rest, relax, and sleep, but could not leave the platform. While the Federal Labor Standards Act requires employers to compensate employees in such situations for the 12 hours they work, California law requires employers to pay for the controlled standby time, as well.

By a unanimous 9-0 decision, SCOTUS declined to extend California's wage-and-hour laws to Newton and other employees working on offshore drilling platforms subject to the Outer Continental Shelf Lands Act. Focusing on the plain language of OSCLA, the Supreme Court held that "where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS."

Agency Deference Decision Could Have Significant Consequences

Though not arising in an employment context, SCOTUS's unanimous decision in *Kisor v. Wilkie* may have far-reaching impacts on employers. The Court revisited the long-held deference to agencies' interpretations of their own ambiguous regulations so long as the interpretations are neither clearly erroneous nor inconsistent with the regulatory framework. While SCOTUS affirmed that interpretation of regulations rests with the agency that promulgated them, it also clarified the court's role in assessing ambiguities and the reasonability of agencies' interpretations. By striking a balance between overturning long-held precedent of deference and allowing agencies to create, interpret, and enforce vague regulations, the Supreme Court imposed limitations.

Under the new standard, reviewing courts should only defer to an agency's interpretation if, after exhausting all the "traditional tools" of construction: (1) the regulation is truly ambiguous; and (2) the interpretation was issued with fair notice to regulated parties, is not inconsistent with the agency's prior views, rests on the agency's expertise, represents the agency's authoritative or official position, and the agency's reading of the rule reflects its "fair and considered judgment." This decision to increase judicial scrutiny will either lead to additional challenges to vague and ambiguous regulations in federal court or will push agencies to create clearer regulations and guidance.

Things Will Get Spicy

Perhaps after addressing these drier issues, SCOTUS is ready for some excitement. The Court has already accepted a number of juicy employment-related cases for review in the next term. Over the next year, we will be tracking the following cases and providing you with same-day alerts when the decisions are delivered, so make sure you're signed up for Fisher Phillips' legal alerts:

- *Zarda v. Altitude Express, Inc.* and *Bostock v. Clayton County, Georgia*: Whether discrimination based on an employee's sexual orientation constitutes prohibited "because of sex" discrimination in violation of Title VII.
- *Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.*: Whether discrimination based on an employee's status as transgender and sex stereotyping constitutes prohibited Title VII discrimination.
- *Trump v. NAACP*: Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals (DACA) policy is judicially reviewable and lawful.
- *Babb v. Wilkie*: What is the correct standard when assessing ADEA age discrimination cases for federal sector workers?

- *Comcast Corp. v. National Association of African American-Owned Media*: Whether a Section 1981 race discrimination claim fails absent "but for" causation.
- *Intel Corp. Investment Policy Committee v. Sulyma*: Whether the three-year statute of limitations period in ERISA, which begins on "the earliest on which the plaintiff had actual knowledge of the breach or violation," bars claims brought more than three years after the information was disclosed to the plaintiff, but the plaintiff chose not to read and could not recall having read such information.

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