# An Employer's Review of the SCOTUS 2020-21 Term: Stay Alert for Long-Term Impacts

Insights
8.04.21

Of the 67 decisions the U.S. Supreme Court issued during the 2020-2021 term, just a few decisions made broad, immediate impacts on employers and educators. Court-watchers wondered how the new, solidly conservative majority would coalesce and on what issues the nine justices would bridge the ideological divide. On the workplace law and education law front, we mostly saw decisions that could cause significant changes further in the future.

**Workplace Law**

The Court issued five decisions that employers should review for potential impact in the future.

***Employers Need to "Lower the Gates" to Hold Employees Liable for Exceeding Authorized Digital Access***

The Computer Fraud and Abuse Act (CFAA) protects workplace computers and information stored on them from different types of access. One such protection imposes liability on anyone who "intentionally accesses a computer without authorization and exceeds authorized access," thereby obtaining computer information. In *Van Buren v. United States*, the Court explained for the first time that to determine if someone "exceeds authorized access," courts must use a "gates-up-or-down inquiry." Essentially, if an employer raises the gate and gives an employee access to a computer and the information on it, the employee does not exceed authorized access for accessing that information — even if the employee does so for an improper purpose.

- **Immediate Impact**: Employers should review their practices and restrict access — or lower the gates — to information that employees do not need. Employer policies against improper use of information might not be enough on their own to impose liability under the CFAA.
- **Long-Term Impact**: The Court did not explain what employers need to do to sufficiently lower the gates. In a footnote, the Court said lowering the gates might turn "only on technological (or 'code-based') limitations on access," or it could also involve "limits contained in contracts or policies." So don't get rid of those strong policies against improper use of information quite yet. Those policies may end up being important evidence to show you lowered the gates.

***Temporary, Government-Mandated Access to Private Property May Require Compensation***

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The "takings" clause of the Fifth Amendment prevents the government from taking private property for public use without just compensation. Generally, "takings" happen when the government permanently occupies personal property or takes action that causes the loss of an economically beneficial use of land. But, in *Cedar Point Nursery v. Hassid*, the Court held that takings don't need to be long-term to require compensation.

Two agricultural employers argued that a California law, which requires them to give union representatives temporary access to their property, is a taking. The Court agreed. It explained that California's "access regulation" is a taking because it "grants labor organizations a right to invade the grower's property." It did not matter that union access to the private property was temporary; instead, "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes."

- **Immediate Impact**: The decision immediately affects California agricultural employers, who may now refuse to permit union organizers on their property if they don't receive compensation from the state.
- **Long-Term Impact**: Now that the Court has clarified that takings can be temporary, other local, state, or federal regulations may require just compensation for access to employer property. Look out for lawsuits challenging other regulations that require access to private property without compensation.

***The ACA Lives On***

*California v. Texas* was the Court's latest decision upholding the Affordable Care Act (ACA). But unlike in *NFIB v. Sebelius*, the 2012 case in which the Court upheld the ACA's individual mandate, the Court did not address the merits of the parties' arguments in this case. Instead, the Court determined that the individual plaintiffs and states bringing the claim did not have standing. The individual plaintiffs failed to show that they were harmed by the ACA's responsibility payment for not having insurance, given that Congress reduced the responsibility payment to $0 in 2017. And the states failed to show they were harmed by the ACA's reporting requirements or by the ACA causing more individuals to enroll in state insurance programs.

- **Immediate Impact**: Nothing changes. The ACA remains the law, and employers must continue to comply with the IRS's reporting requirements.
- **Long-Term Impact**: The ACA has long been politically divisive. It's unclear if those who take issue with the law will continue to find new ways to attack it in the courts.

***Statutory Penalties Do Not Automatically Confer Standing on Class Members***

The Fair Credit Reporting Act (FCRA) provides for a cause of action and statutory penalties when its procedural and notice provisions are violated. In *TransUnion LLC v. Ramirez*, the Court determined that the FCRA's congressionally created cause of action on its own does not create standing. The

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core legal dispute arose when Ramirez could not buy a car after TransUnion alerted the dealership that Ramirez's name matched names on the Office of Foreign Assets Control's (OFAC) list. U.S. businesses cannot conduct business with individuals on the OFAC list. Ramirez, however, wasn't actually on the OFAC list; TransUnion made a mistake.

Ramirez brought a class action against TransUnion for not following reasonable procedures to assure the accuracy of its OFAC alerts. He also claimed that TransUnion failed to follow FCRA notice requirements. Ramirez and other class members eventually won a total verdict of $60 million at the trial court, and TransUnion appealed. The Court determined that only 1,853 of the original 8,185 class members had standing. It reiterated that, in class actions involving damages, class members must demonstrate concrete injuries traceable to the illegal action to have standing; a statute creating a cause of action is not enough. And, although TransUnion had incorrect OFAC alerts in its database on all 8,185 class members, TransUnion only published the incorrect alerts of 1,853 class members. As a result, 6,332 members couldn't prove a concrete injury. The Court also noted no class member other than Ramirez suffered a concrete harm from the FCRA notice violations.

- **Immediate Impact**: The Court's decision cut the class size — and the verdict — significantly. Additionally, the decision will immediately affect other FCRA class actions.
- **Long-Term Impact**: The Court's decision may have a broader impact on class actions in federal courts that are based on statutory causes of action.

***The Arbitration Agreement's Language Determines Who Decides Arbitrability***

An arbitration agreement's language determines whether a judge or an arbitrator determines a claim's arbitrability, or, in other words, whether that claim must be submitted to arbitration. If language in the arbitration agreement is silent, a judge decides arbitrability. But if the arbitration agreement demonstrates a clear and unmistakable intent to have the arbitrator decide a claim, the arbitrator makes the decision.

In *Henry Schein Inc. v. Archer and White Sales Inc.*, the plaintiff claimed a need for injunctive relief. The arbitration agreement excluded "actions seeking injunctive relief" from arbitration, while at the same time incorporating the American Arbitration Association's (AAA) rules that grant questions of arbitrability to the arbitrator. Both parties disagreed over whether the arbitrator could decide arbitrability given the carve-out for injunctive relief. The 5th Circuit Court of Appeals determined that the arbitration agreement's natural reading required following AAA rules for all disputes except for claims seeking injunctive relief, as those claims were carved out of the arbitration agreement.

The Court initially agreed to review the 5th Circuit's opinion and issue a decision. But, in January 2020, the Court dismissed the case after deciding that it had improvidently granted review.

- **Immediate Impact**: The Court's refusal to hear the case means that the 5th Circuit's reasoning is binding on employers in Texas, Louisiana, and Mississippi. Employers in those states should

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ensure their arbitration agreements have clear and unmistakable language that the arbitrator determines arbitrability of any desired issues. Alternatively, if employers do not want certain issues arbitrated, their agreements must have clear language carving out those issues.

- **Long-Term Impact**: Although not binding outside the 5th Circuit, federal appellate courts often look to other circuits when developing law. Employers throughout the country would do well to review their arbitration agreements to see how the Fifth Circuit's reasoning would impact their agreements.

**Educational Institutions**

Educators will want to pay attention to two decisions issued by the Court this past term.

***Cussing Cheerleader Improperly Punished for Off-Campus Speech***

In *Mahanoy Area School District v. B.L.*, the Court decided whether a school improperly regulated the speech of a cheerleader-student who posted to Snapchat a photo with her middle finger upraised and the text "f-ck school f-ck softball f-ck cheer f-ck everything" superimposed over the image.

- **Immediate Impact**: The Court ruled that the public school improperly regulated the student's speech because the speech occurred off campus, did not target any specific member of the school community, and did not cause a substantial disruption of a school activity.
- **Long-Term Impact**: Although the Court rejected the school's speech regulation on these facts, it did agree that public schools may regulate off-campus speech that, for example, involves bullying or threats. Public schools should carefully reassess their policies and procedures on regulating off-campus student speech to ensure that they align with the Court's reasoning.

***Student-Athletes Can Receive Education-Related Benefits***

In *NCAA v. Alston*, the Court determined whether the NCAA's restrictions on education-related benefits to student athletes violated anti-trust laws.

- **Immediate Impact**: The NCAA must stop restricting student-athletes from receiving education-related benefits. At the same time, the Court's decision was narrow and does not necessarily prevent the NCAA from restricting student-athlete compensation for other purposes.
- **Long-Term Impact**: We may see further court challenges to the NCAA's compensation restrictions. But for now, state legislatures are where the action is. California's "Fair Pay to Play Act" goes into effect in 2023 and allows athletes to profit from their identities while maintaining athletic eligibility. Florida, Alabama, Mississippi, and Georgia also enacted similar laws that go into effect in July 2021.

**Next Term**

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We didn't see many decisions on highly contentious social issues this term. We expect that to change next year. We're watching these cases that could impact employers, and expect more to be added to the Court's docket in the coming months:

- *Cummings v. Premier Rehab Keller*: Does federal disability law allow plaintiffs to recover damages for emotional distress?
- *Hughes v. Northwestern University*: Are allegations that a retirement plan charged excessive fees when cheaper options existed enough to bring a lawsuit alleging that the plan's administrators violated their duty to make prudent decisions under the Employee Retirement Income Security Act?
- *Badgerow v. Walters*: Do federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question?

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