4 Supreme Court Cases Employers Should Be Tracking as New Term Kicks Off

Insights
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The Supreme Court just began a new term, and we're watching several cases that will likely have a big impact on the workplace. Specifically, the Court will weigh in on whether someone can "test" violations of federal disability law, whether a lateral job transfer can be discriminatory, the extent of federal agency power, and the standard for proving retaliation in whistleblower cases. More employment and labor cases will surely be added to the docket, but for now, you should keep an eye on these four issues.

1. **Can an ADA Accommodation "Tester" Sue a Business She Never Planned to Visit?**
   The Supreme Court agreed to weigh in on whether a private citizen can serve as a legal "tester" that goes from business to business looking for – and suing for – alleged violations of the Americans with Disabilities Act (ADA), even if they have no intent of patronizing the business. A hotel in Maine is challenging a federal appeals court ruling in favor of a so-called "accessibility tester" who has filed hundreds of such lawsuits against hotels even though she never planned to stay at their properties.

   Why is the case significant for hospitality, retail, and just about any other business with a physical location – and possibly just a website? The ADA doesn't require claimants to notify you of alleged violations that would give you a chance to fix the problem before a lawsuit is filed. That means many businesses are caught off guard when served with a lawsuit. Worse, they may spend thousands of dollars in attorneys' fees to resolve a case – even when the cost of actual compliance is very low. What do you need to know about the potential impact of a SCOTUS ruling in *Acheson Hotels v. Laufer*? Read more about the case here.

2. **An Employee Claims She was Forced to Accept a Lateral Transfer Based on Gender Bias. Was the Employer's Action Unlawful?**
   Title VII of the Civil Rights Act prohibits employers from discriminating against employees based on race, color, national origin, religion, and sex. But what if an employee was allegedly forced to accept a lateral transfer – with the same pay and benefits – for a discriminatory reason? Is it still unlawful, even if the employee fails to show the transfer caused them a significant disadvantage?

   In *Muldrow v. St. Louis*, a female police sergeant brought a sex discrimination suit claiming she was transferred to a lateral position in a different district because new leadership wanted to hire a man for her current role. The district court and the 8th U.S. Circuit Court of Appeals sided with

the police department, finding that Title VII bars only adverse employment actions that result in a materially significant disadvantage for the employee. Several other appellate courts have found that a forced lateral transfer is an adverse action even if the employee fails to show that the move caused any additional injury.

SCOTUS decided to weigh in on this issue, and the Court's decision in the case could provide clarity for employers on what is considered an adverse employment action under Title VII. Click here to read more about the issues in this case.

3. **Will SCOTUS Limit Federal Agencies' Regulatory Power?**
As you know, laws aren't always crystal clear and don't typically cover every situation that could arise. So, when Congress writes a statute, the federal agency that administers and enforces it generally has the power to interpret ambiguities and fill in the gaps – as long as the interpretation is reasonable. For example, the Department of Labor interprets the Fair Labor Standards Act, and the NLRB interprets the National Labor Relations Act. This longstanding rule is known as "Chevron deference," which refers to the 1984 SCOTUS decision in *Chevron v. Natural Resources Defense Council*. That pivotal case holds that a court may not supply its own interpretation of a statute when the designated agency has provided a reasonable interpretation. The justification is that a judge may not have sufficient knowledge about the statute and the regulatory body is in a better position to fill in the gaps.

Opponents of the *Chevron* deference doctrine say it gives government agencies too much power to bypass the checks and balances of the legislative and judiciary branches. They have called for SCOTUS to overturn its prior ruling or at least limit *Chevron* deference. The Court will consider these issues in *Loper Bright Enterprises v. Raimondo*.

What's at stake? If the Supreme Court strikes down *Chevron* deference, it will have profound implications on administrative agencies and employers dealing with these agencies. Numerous regulations could face legal challenge and be held invalid, because the agencies would lose the interpretation power even if the statutes appear ambiguous. While this may lead to uncertainty in many regulatory areas, in some it may lead to a positive outcome for stakeholders.

Take immigration law as an example. Even though the main portions of the immigration statute have remained unchanged for many decades, immigration agencies routinely create and amend regulations. While some of these regulations closely align with the statutes, many contain interpretations that add more burden on employers. For example, even though the immigration statute requires employers to obtain labor certifications only for petitions involving skilled or unskilled workers, the agency regulations also require labor certifications for professionals, workers who hold advanced degrees, and even workers who demonstrate exceptional ability in professions or business. The demise of *Chevron* deference may make it much easier to challenge these immigration regulations and potentially lead to reduced burden and cost for employers. We will continue to follow this matter and provide updates during the SCOTUS term.

4. **What is the Standard for Proving Whistleblower Retaliation?**
   SCOTUS also accepted a case this term that may clarify the standard for whistleblowers to prove retaliation under the Sarbanes-Oxley Act. Employees of publicly traded companies are protected under the act when they report financial wrongdoing — and covered businesses may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" when they assert their rights under the act.

   But how can an employee prove retaliation? In *Murray v. UBS Securities, LLC*, the Justices have been asked whether a whistleblower must prove that the employer acted with retaliatory intent, as the 2nd U.S. Circuit Court of Appeals ruled in this case. While this is a tough standard to prove, other federal appeals courts have placed a lower burden on employees who bring such claims and consider whether the employee's whistleblowing activity was merely a contributing factor to the adverse employment action.

   The employee in this case claims he was fired for refusing to create misleading reports about commercial mortgage-backed securities and complaining about being pressured to skew his research. According to the employee, if he shows the protected act was a contributing factor to his termination, then the employer can prevail only by producing clear and convincing evidence that it would have taken the same action regardless of whether he engaged in protected activity under the Sarbanes-Oxley Act. The employer claims the worker was laid off during a larger cost-cutting reduction in force.

   The outcome in this case will potentially resolve the difference among federal appeals courts and set a consistent standard for whistleblower retaliation claims under the Sarbanes-Oxley Act — and the ruling could also impact whistleblower protections under other laws that are similar structured. The Supreme Court will hear oral arguments in this case on October 10. Stay tuned for more!

Conclusion

We will be tracking these cases – along with any additional workplace law issues taken up by the Supreme Court this term – and providing you with alerts when the decisions are delivered. Make sure you're subscribed to Fisher Phillips' Insight Systems so you don't miss out.

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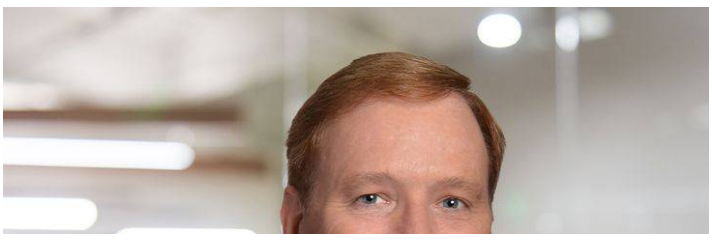

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