Justice Scalia's Death Throws SCOTUS Term Into Turmoil: A Review of The 2015-2016 Supreme Court Term

Insights
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Justice Antonin Scalia's death created a 4-4 split among liberal and conservative-leaning Justices, rendering tidy scorecards and trends regarding this past Supreme Court session's employment law jurisprudence imprudent. The employment law "blockbuster" decisions, which many had hoped for, never debuted. Instead, the Court punted several cases back to circuit courts and issued deadlocked ties or rulings limited in scope.

The country is on the eve of what appears to be a hotly-contested presidential race, and the workplace law proclivities of the next Supreme Court Justice is anyone's guess. Moreover, with Justice Ruth Bader Ginsburg turning 83 this year and Justice Stephen Breyer turning 78, a Republican president could solidify conservative control over the Court for decades to come.

Similarly, with Justice Scalia's passing and Justice Anthony Kennedy turning 80 this year, a Democratic president might produce a decisively liberal Court. In short, we are several months away from being able to accurately predict where the Court is headed. Still, an accounting must be made of this past year, and the overall takeaway is that employees fared slightly better than management. Rather than grouping the cases into two orderly "wins and losses" columns, the 4-4 split leads us to separate the cases into six separate categories.

Group One: The Deadlock Loss In a deadlocked 4-4 decision, the Court failed to reach a majority consensus in determining whether state employees who choose not to join a union must still pay a share of union dues to cover contract negotiations and other benefits (***Friedrichs v. California Teachers Association***). For approximately 10 million public sector employees in states mandating agency shop fees, this means they must continue to pay a fair share fee in order to remain employed, and valuable revenue streams remain intact for public sector unions.

Employers had hoped that *Friedrichs* would become a stepping stone to further reduce the impact of unions on the American workplace. But the tie vote left any precedential "sea change" for another day, and the labor movement breathed a collective sigh of relief.

While it is possible that the Court will accept a case with similar issues for review in the future once a full complement of nine Justices has been restored to the bench, until that day, the status quo remains. Public sector unions will continue to fill their coffers with these mandatory fees and will

continue to robustly lobby for a pro-union agenda in Congress and state legislatures across the country.

Group Two: The Straight Losses Employers were dealt straight-out losses in at least three decisions this past term. In a 6-3 decision, the Court in ***Gomez v. Campbell-Ewald Co***. limited employers' ability to proactively and inexpensively end class action litigation before it picks up steam.

In most contexts, if the plaintiff accepts an "offer of relief" or "offer of compromise," the case ends. If the plaintiff refuses the offer, the plaintiff runs the risk of paying defendant's costs or the plaintiff's attorney loses out on a large chunk of fees. Thus, these offers serve as a cost-shifting benefit to defendants. They prevent plaintiffs from maintaining litigation past the point of reason and stop them from bleeding defendants dry into the unforeseen future.

But the Supreme Court held that a defendant making a complete offer of relief to a named plaintiff in a class action does not serve to kill the case, and more importantly, the plaintiff can still move forward with class action litigation even if the offer is refused. The Court declined to answer the hypothetical of whether a plaintiff's claim would become moot if a defendant deposited the entire amount of a plaintiff's claim in an account payable to the plaintiff, saving that question for a future case.

Although this decision did not arise in the labor and employment context, it will have some impact on employment class action litigation. Employers may lose some procedural tactics when trying to neutralize individual plaintiffs who bring putative class actions before the litigation gets too costly.

In a 7-1 decision, the Court ruled that the filing period for a constructive discharge claim begins to run when an employee resigns as a result of discriminatory behavior, rather than the time of an employer's last act of discrimination that led to the resignation (***Green v. Brennan***). This is a bad decision for employers and will likely lead to an uptick in legal claims filed by disgruntled former workers. It opens the door for former employees to file constructive discharge claims long after the alleged discriminatory conduct occurred by simply delaying their resignation indefinitely.

The Court agreed with the employee that the trigger date for the limitations period for a claim of constructive discharge is the date on which the employee resigns. The Court reasoned that because a claim of constructive discharge requires both the employer's predicate discriminatory conduct and the employee's decision to resign in response, the statute of limitations period should not begin to run until both events have occurred. The Court acknowledged, however, that the limitations period should begin to run when the employee gives notice of resignation rather than on the date the resignation becomes effective.

Green reinforces the need for employers to periodically check in with employees who have filed complaints of discrimination, harassment, and retaliation to confirm that the working environment has improved and there have been no further occurrences of objectionable conduct.

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In ***Heffernan v. City of Paterson***, the Court held in a 6-2 decision that the First Amendment of the U.S. Constitution protects both actual and perceived political speech and expression by public employees. The Court made it clear that public employers will not be shielded from liability if they take an adverse employment action based upon an improper motive, even if it turns out that motive was based upon a factual error. In this case, the perception was as good as reality. This decision does not impact private sector businesses, but should serve as a reminder to all employers to use caution before proceeding with employee discipline.

Group Three: The Solitary Outright Victory There was little to cheer about in the last term, but employers could celebrate at least one victory. In a 6-3 case, the Court ruled in favor of the enforceability of arbitration clauses in the ***DirecTV, Inc. v. Imburgia*** decision, reinforcing once again the Court's preference for the enforcement of arbitration provisions. Although the case did not specifically involve employment law, it should give a boost to businesses that utilize arbitration agreements with their workforces.

The decision reiterated that state courts must give due accord to the federal policy favoring arbitration. The case struck down a California court interpretation that failed to put an arbitration clause "on equal footing" with other contracts, holding that the state court's hostility to arbitration was incompatible with the requirements of the Federal Arbitration Act. It was a clear victory for employers in a commercial setting, and serves as a reminder that it may be advantageous for employers to enter into carefully drafted arbitration agreements with their workers.

Group Four: The Good Punt Perhaps as a not-too-subtle message to Congress that it should approve a ninth Justice to the Supreme Court bench, the Court issued quite a few opinions this term that effectively sidestepped a final decision. At least one of these "punted" decisions could be considered good news for employers.

In a 6-2 decision, the Court in ***Encino Motorcars, LLC v. Navarro*** issued a limited ruling by choosing not to resolve the central question of whether service advisors – those workers at car dealerships who talk with customers about work on their vehicles – are exempt under the overtime provisions of the Fair Labor Standards Act (FLSA). Instead, the Court took the U.S. Department of Labor (USDOL) to task for not explaining its 2011 reversal of an earlier position that service providers were not eligible for overtime.

The Court stated that the "unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the USDOL's change in position and the significant reliance interests involved."

This means that, on remand, the 9th Circuit must determine whether service advisors are exempt from overtime under the FLSA, and at some point in the future the appellate court will issue a new ruling following the guidance provided by the Court. Dealerships outside of the 9th Circuit's reach, however, have no controlling authority preventing them from continuing to conduct business as

usual. For dealerships within the 9th Circuit, and until the 9th Circuit issues a new opinion, uncertainty remains as to whether the exemption applies.

Group Five: The Bad Punt In ***Spokeo, Inc. v. Robins***, the Court issued a "no decision" on an issue important to employers facing class action litigation. The Court decided that the 9th Circuit Court of Appeals needed to review again a question of whether plaintiffs have standing to pursue class action claims on behalf of themselves and others similarly situated if they cannot prove that they suffered actual harm.

By failing to decide the question one way or the other, the Court effectively delayed a determination of whether employers will have another tool to help curtail costly class action claims, or whether they will face a substantial increase in the number of such claims.

Group Six: The Other Punts Three other high-profile cases with potentially wide-ranging effects were essentially punted by the Court. First, in ***CRST Van Expedited, Inc. v. EEOC***, the Court declined to issue a definitive ruling on whether an employer is entitled to recover nearly $5 million in attorneys' fees and costs from the Equal Employment Opportunity Commission (EEOC) after the employer prevailed in a sexual harassment lawsuit brought by the agency.

The Court unanimously (8-0) remanded the case back to the 8th Circuit Court of Appeals to determine, among other things, whether the EEOC's conduct in the litigation was "frivolous, unreasonable, or groundless" so as to support the fee award. The Court, however, ruled that employers could be considered prevailing parties and entitled to fees even if they did not win on the merits, which could prove to be a useful ruling.

Second, in ***Zubik v. Burwell***, the Court declined to rule on whether religiously affiliated nonprofits can be required to affirmatively "opt out" of providing contraceptive coverage to their employees, which would have triggered separate contraceptive coverage directly from their issuers. Instead of publishing a decision, the Court took the unusual approach of suggesting that the parties work out a compromise.

To resolve the issues around such a compromise, the lower court decisions were vacated and the consolidated cases were remanded for further rulings by their respective courts of appeal. *Zubik* has significance for all employers because it suggests the eight-Justice Court may be looking for ways to delay decisions until a ninth Justice is appointed and a full complement of Justices has been restored to the bench.

Finally, in another rare 4-4 decision, the Court in ***United States v. Texas*** left in place a nationwide injunction blocking President Obama's Executive Action to spare more than 4 million unauthorized immigrants from deportation and allow them work. The Court's decision did not shed any light on the merits of the case. As such, the Executive Action remains subject to an injunction blocking its implementation.

The case will now return to a Texas judge to decide how to proceed with the case on the merits of the argument. No matter which side prevails, the case will almost assuredly return to the appeals court, and could one day surface again at the Supreme Court. While the case proceeds in a lower court, the undocumented workers, who would have benefited from the Executive Action, will not be able to seek protection from the threat of deportation and will remain ineligible for work authorization in the United States.

Employers' obligations with respect to obtaining proper documentation will continue, however, so you should use this case as a reminder to ensure compliance with all applicable federal immigration laws.

Preview Of Next Term Stay tuned for a preview of the 2016-2017 SCOTUS term before the Court's October commencement. As always, Fisher Phillips will be there to issue same-day analysis and summaries of all of these new cases, providing background and context for each decision, explaining the Court's reasoning in layman's terms, and discussing the impact on employers.

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