What Should Employers Expect During The New Supreme Court Term?

Insights
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The first Monday in October is the traditional first day of a new U.S. Supreme Court term. As always, the 2015-16 term will have several cases that are of particular interest to the nation's employers. Here is a review of some of the cases we are tracking:

Attack On Public Sector Unions

One of the more important cases to be decided this term is *Friedrichs v. California Teachers Association*. This case could be a crucial stepping stone for those who want to further reduce the impact of unions on the American workplace. This case, or one like it, has been long awaited by those who hope to strike a critical blow against public sector unions.

The petitioners in *Friedrichs* want to eliminate "agency shop" fees that public unions take from non-members. If a worker chooses not to join a union, a 1977 SCOTUS opinion still allows states to force those workers to contribute a membership fee out of their paychecks (*Abood v. Detroit Bd. of Educ.*). If the SCOTUS overturns that case and allows employees to opt out of paying anything to labor unions, it could spell big trouble for public unions in the form of lower resources and reduced political clout.

Private employers can only hope that such a development would eventually have a carryover effect on private sector unions, as the *Friedrichs* decision will have no direct impact on non-governmental businesses. Some observers believe that a pro-employer decision could lead to a further galvanizing of the "right to work" movement that has been slowly moving through state legislatures across the country.

A Higher Bar For Class Action Lawsuits?

Another case we are closely tracking is *Tyson Foods v. Bouaphakeo*. This decision could have major implications in the world of class action lawsuits, which have become a (very expensive) thorn in the side for many employers across the country.

Under federal rules, a court can certify a lawsuit as a class action if it finds that there is sufficient similarity among all possible employees implicated by the claim; i.e., that they have suffered the same injury. In this case, a large multimillion class action alleging wage and hour violations was allowed to proceed, despite the fact that each of the employees had a slightly different claim that

was averaged out to reach a consensus figure. Some employees, in fact, were permitted to join the class despite the fact they had never been actually harmed by the employer's overtime policy.

Employers are hopeful that the SCOTUS has accepted this case to tighten the reins on class action certification, setting a more stringent bar for these kinds of claims. By requiring tighter rules on similarity, the number of class action lawsuits should be reduced by a sizeable degree.

Class Actions, Part Deux

The Supreme Court will further define the contours of class action litigation when it decides *Campbell-Edward v. Gomez*. The issue in this case: whether class action lawsuits become moot after a plaintiff receives a full offer of relief.

The case itself involves a non-employment scenario; an individual launched a class action case against the U.S. Navy after receiving unsolicited promotional text messages. But the procedural maneuver at issue could aid employers looking for innovative ways to fend off costly class action claims. If the SCOTUS agrees with the defendant's position, employers could potentially disarm class actions by offering to make the named plaintiff whole through an offer of judgment. Class actions may start to look a whole lot less attractive to the plaintiff's bar if such a move could stop costly litigation in its tracks.

Fair Credit Reporting

Yet another class action case will be decided this term. In *Spokeo, Inc. v. Robins*, a claimant filed a class action lawsuit alleging violations of the Fair Credit Reporting Act (FCRA), claiming that he had been victimized by false background information and that harm was done to his credit, insurance, and employment prospects. The issue in this case is whether he can proceed with his claim without demonstrating proof of economic injury. The SCOTUS will decide whether or not an individual must suffer actual harm to bring a FCRA suit.

Employers should take an interest in this case because of the increasing number of FCRA class action lawsuits filed against businesses alleging unlawful background screening practices. If the SCOTUS determines that employees or applicants can sue under FCRA despite having no demonstrable injury, a veritable tidal wave of class action litigation could result.

When Does The Clock Start Ticking?

Another interesting case on the 2015-16 docket is *Green v. Brennan*. This case will resolve a circuit split, where a few federal appeals courts have ruled one way, and a few other federal appeals courts have ruled the opposite way. The issue in this case is when the all-important clock starts ticking that provides the deadline for filing discrimination lawsuits.

In some cases, employees will claim that they are "constructively discharged" from employment. In other words, they are not suing because they were actually fired, but instead they claim that the employer forced them to quit by making their work life so miserable that any reasonable worker in

their shoes would have also quit. In these kinds of cases, there is an open question as to when the statute of limitations clock starts ticking.

Five federal courts of appeal have held that the filing period begins when the employee actually resigns (which generally helps employees). Three others have held that the filing period could begin way earlier – when the employer last commits whatever discriminatory act that gives rise to the resignation (which generally helps employers). The SCOTUS will answer the question once and for all and (hopefully) provide firm guidance.

Affirmative Action, Again

If the case of *Fisher v. University of Texas*, looks familiar to you, don't worry – you're not having déjà vu. The Supreme Court will once again consider the extent to which public universities can consider race and ethnicity in admissions decisions, and once again the same litigants are back before the Court.

In 2013, the Supreme Court found that the 5th Circuit Court of Appeals had erred in not appropriately applying a "strict scrutiny review" to the university's race-conscious admissions policies. Last year, the 5th Circuit once again upheld the university's admissions plan, a decision the SCOTUS has again agreed to review.

While colleges and universities are closely following the case, the decision may also have an impact outside the higher education arena. For instance, the outcome of the case could directly impact private and public employers with affirmative action programs designed to promote workplace diversity. Depending on the breadth of the final decision, it may also may have implications on the permissible scope of affirmative action employment programs designed to remedy historical effects of discrimination as well as executive orders dealing with affirmative action, such as Executive Order 11246.

SCOTUS Alerts

As always, Fisher Phillips will be there to issue same-day analysis and summaries of all of these cases, providing background and context for each decision, explaining the Court's reasoning in layman's terms, and discussing the impact on employers. There will almost certainly be additional labor and employment cases added to the Court's docket in the coming months, and you can look to Fisher Phillips to get you up to speed on those, as well.

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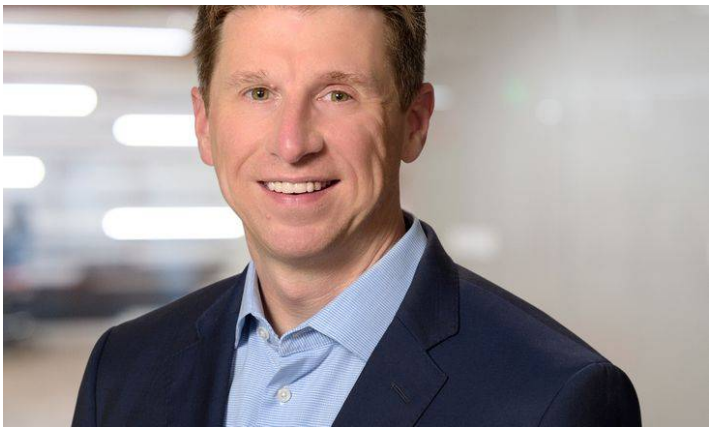

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