Upcoming SCOTUS Term Promises To Be A Blockbuster

Insights
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If you are the kind of person who gets excited by hot-button legal topics and monumental court decisions, this is the Supreme Court term for you. The SCOTUS kicked off their 2017-2018 term several days ago by hearing arguments in a critical workplace law case, and the hits will keep coming for the remainder of the term. After a rather boring session in 2016-2017, the Court has teed up a variety of juicy labor and employment cases that, once decided, promise to reshape the way you interact with your employees in the future.

Last Term Was A Dud
There's no sugarcoating it; the last SCOTUS term fizzled out before it even started. This can be explained by the untimely death of Justice Antonin Scalia in February 2016 and the refusal of the U.S. Senate to approve President Obama's nomination of Judge Merrick Garland to fill the open seat that Justice Scalia left behind. Operating for over a year with eight justices, the Court was reticent to take on any new cases of significant import.

Of the noteworthy cases that had already been on their docket, the Court disposed of many of them with either a 4-4 deadlock (such as the March 2016 agency shop decision or the June 2016 immigration decision) or by punting the case back to the lower court for further review (such as the March 2017 transgender rights decision, the June 2016 dealership wage and hour decision, or the May 2016 class action standing decision).

Full Docket Now Teed Up
But now that Justice Neil Gorsuch is on the bench and the Court has a full complement of nine justices, the heavy lifting can begin in earnest once again. The SCOTUS has wasted no time and has accepted several significant labor and employment cases on their current docket. Here are the main cases we're keeping an eye on to be decided this term.

Mandatory Class Action Waivers: The very first argument of the new term sought to answer a critical workplace law question: can employers require their workers to seek redress of workplace problems through individual proceedings instead of class or collective actions? Mandatory arbitration agreements in and of themselves do not protect employers from such legal proceedings, so rather than simply requiring employees to bring workplace claims through arbitration instead of court, employers have begun to regularly incorporate into their agreements class and collective action waivers. Pursuant to these waivers, employees agree not to pursue claims against their employer on a class or collective basis. The result of a mandatory arbitration agreement with a class

and collective action waiver is that a worker's only avenue for relief is limited to single-plaintiff arbitration hearings.

The National Labor Relations Board (NLRB) has concluded that these waivers violate the National Labor Relations Act (NLRA) because, in the agency's view, they interfere with workers' rights to engage in concerted activity for their mutual benefit and protection (in this case, class or collective action litigation). Several courts have agreed with the NLRB's interpretation, bucking the consistent national trend and leading to a split among the federal appellate circuits. The Court agreed to wade into the conflict and heard oral arguments in the *Epic Systems v. Lewis* case on October 3. You can expect a decision in this matter shortly before or after the turn of the new year.

Agency Shop Fee Arrangements: At first blush, this might seem like an overly technical legal issue, or one that doesn't apply to you if you are not a public sector employer. But hear us out; this case could be the most significant decision of the term for employers.

At issue are "agency shop" fees: those mandatory fees collected by unions from public sector employees. Under state laws permitting these arrangements, those employees who choose not to join a union are compelled to pay a service fee to finance union collective bargaining, contract administration, or grievance adjustment expenditures. While such workers are protected under the First Amendment from being compelled to contribute to union political activities they oppose, the fees that are collected still provide a large source of revenue for public sector unions, and they have been held to be legal since 1977.

These fees are now under attack from workers who believe they should not be forced to pay them; they have asked the Court to take a look at the issue anew in the case of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. If the Court can muster a majority of votes to disturb the valuable revenue stream enjoyed by public sector unions in agency shop states – and most legal observers believe that the only reason the Court accepted the case for review was to strike down these arrangements – many public sector unions will be financially devastated. They will be forced to take significant steps to survive, including possible reductions-in-force and operational restructuring plans.

But the decision could have more widespread implications down the road. Public sector unions may find it difficult to fund a variety of worker advocacy positions they currently support, including the development and backing of statutory and regulatory initiatives across the country. The trickledown effect of this decision could transform the role that unions play in the national dialogue regarding workplace laws and ultimately reshape the way that employers and employees interact with one another. No oral argument date has yet been set, but we can expect a decision before the close of the term in June 2018.

Same-Sex Wedding Cakes And Religious Freedom: The Court has agreed to determine whether a state's public accommodations law requires the owner of a bakery to "create expression" – in this case, make a cake for a same-sex wedding – causing what the baker believes would a violation of his

case, make a cake for a same-sex wedding – causing what the baker believes would a violation of his free speech and free exercise rights under the First Amendment. Jack Phillips, the co-owner of Masterpiece Cakeshop in Lakewood, Colorado, refused to sell a wedding cake to a same-sex couple in July 2012 because he said that supporting their wedding violated his religious beliefs.

The couple filed a lawsuit against the bakery and argued that state civil rights laws required it to provide their services to all customers regardless of their sexual orientation. The case has now wound its way all the way up to the Supreme Court for final review, and could produce a legal decision that will help clarify the rather-fuzzy concept of whether "religious freedom" can justify a business from serving certain clientele. There is not yet an oral argument scheduled, but business owners can expect a decision by June 2018.

Auto Dealership Service Advisors: The Court is set to decide whether service advisors at car dealerships are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). If reading that sentence brought about a sense of déjà vu, you are not imagining things. This is the second time in as many years that the Court will hear argument in this case.

The regulation behind the case has a long and tortured history, but suffice it to say, there has been a troublesome amount of flip-flopping on the issue since 1970. For the majority of that time, the U.S. Department of Labor (USDOL) has held that auto dealerships could classify their service advisors as exempt under the law. But in 2011, the agency changed its mind again and concluded that only those dealership employees who actually sold automobiles, trucks, or farm implements were exempt, excluding service advisors.

This led to a legal battle that has been fought up and down the appellate court system, including a 2016 stop at the SCOTUS. In June of that year, the Court called a "do over" and told the 9th Circuit Court of Appeals to take a fresh look at the issue with new guidance. It asked the lower court to ensure that the USDOL had sufficiently explained and justified its 2011 change of heart. In January 2017, the 9th Circuit once again ruled in favor of the service advisors and concluded they were not exempt from overtime requirements, and the employer once again asked the Court to step in. Just last week the SCOTUS agreed to rehear the case, and a decision in the matter – which will hopefully resolve the issue in employers' favor once and for all – is expected by June 2018.

Trump Travel Ban 2.0: By now, most are familiar with the controversial executive orders signed by President Trump that sought to restrict certain categories of travelers from entering or returning to the United States. In June 2017, right before the Court began its summer recess, it called for the legal challenges to the most-recent travel ban to be consolidated into one proceeding and scheduled an oral argument for October (*Trump v. International Refugee Assistance Project*).

However, that argument is now off the SCOTUS calendar. Everything changed when President Trump signed Travel Ban 3.0 on September 24, which took the place of the expired second travel ban. In fact, the Court has asked the parties to submit new briefs explaining whether they believe Travel Ban 3.0 has made the case moot. We should know in the coming weeks whether the case is tossed out altogether, or whether a more narrowly focused argument will take place. Whatever happens, there

altogether, or whether a more narrowly focused argument will take place. Whatever happens, there is a good chance that some of the new legal challenges that have been raised with regard to the September 2017 travel ban might soon wind their way up to the SCOTUS for review this current term.

Sexual Orientation Discrimination: Although this issue has not yet been accepted for SCOTUS review, many believe that it is inevitable that the Court will soon step in and decide whether sexual orientation is a category covered by Title VII of the Civil Rights Act. In April 2017, the 7th Circuit Court of Appeals became the first federal court of appeals in the nation to rule that sexual orientation claims are actionable under Title VII (*Hively v. Ivy Tech Community College*). In a full panel *en banc* decision, the court opened the door for LGBT plaintiffs to use Title VII to seek relief for allegations of employment discrimination and retaliation. The ruling broadens the class of potential plaintiffs who can bring workplace claims against them, and will require employers to ensure fair and equal treatment to all applicants and workers regardless of their sexual orientation.

More than half the states in the country do not have local laws protecting LGBT employees from workplace discrimination, which means this case – if accepted by the Supreme Court – could open the door to a broader interpretation of Title VII and a restructuring of most employers' policies and practices. Again, while this case has not yet been accepted for review, we can expect the Court to determine whether it will hear the case in the coming months.

Conclusion

It is typical for the Court to accept additional cases for review as the term unfolds, so we have probably not seen the last of the blockbuster workplace law cases on the Court's 2017-2018 docket. Moreover, there are several other cases the Court has already agreed to hear that will impact the business of litigating workplace cases (whether federal appellate rules permit a lower court to extend appeals court deadlines in an employment discrimination setting, for example, and to what extent a tolling provision suspends the statute of limitations clock on a state whistleblower claim) that will be of interest to employers.

After a sleepy 2016-2017, we can expect fireworks for 2017-2018. As always, Fisher Phillips will issue same-day summaries of each case, explaining the decision in plain English, putting the case in context, and exploring the possible impact on employers. If you want to ensure you receive our Supreme Court Alerts, subscribe to our service here or contact your regular Fisher Phillips attorney.

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