Insights, News & Events

NEW SCOTUS TERM STARTS WITH A WHIMPER...WILL IT END WITH A BANG?

Insights
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The Supreme Court term that wrapped up in June was one of the most exciting sessions for workplace law in recent memory, with several blockbuster decisions impacting a wide range of labor and employment law issues. From wage-and-hour exemptions to same-sex wedding cakes, class action waivers to agency shop fees, retaliation standards to travel bans—the past term had it all. So employers might be eagerly anticipating the current term, hoping for a repeat performance.

If you're in this camp, we have some bad news for you. The current Supreme Court (SCOTUS) term that just kicked off this week includes but four cases that will have an impact on labor and employment matters, and none are particularly exciting. While there's always a chance that high-profile cases will be added to its docket as the term unfolds—especially if a ninth Justice is seated—we'll be in "wait-and-see mode" for the next few months to see if things heat up. For now, let's take a brief look at the four cases the Court will be deciding this term.

AGE DISCRIMINATION IN THE PUBLIC SECTOR

Unless you're a small, public sector municipality, you can skip this part of the preview. The *Mt. Lemmon Fire District v. Guido* case only affects those state government entities with fewer than 20 workers. The case will answer the question of whether the federal Age Discrimination in Employment Act (ADEA) governs those public bodies with under 20 employees.

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The statutory language of the ADEA is clear in that it only applies to private employers with 20 or more workers, but how that limit applies to public sector employers is unclear. The statute first defines employers as those organizations "who have 20 or more employees," but later says it "also" means "any state or political subdivision of the state." So does that mean any public entity, no matter how small, or just those with 20 or more workers? That's the open question.

In the case, two firefighter captains for the Mt. Lemmon Fire District in Arizona were terminated by their employer. They claim that the reason for their termination was their age (46 and 54) and brought an ADEA claim against their former employer. The lower federal court dismissed their claim because the fire district had fewer than 20 employees, but the 9th Circuit Court of Appeals reversed the decision and revived the case. That set up a classic split in the circuits, as the four previous federal appellate courts to have looked at the issue ruled differently. The case was argued on the first day of the 2018-2019 SCOTUS term, October 1. Expect a ruling by the early part of 2019.

THREE ARBITRATION CASES

The Court will also examine three cases during the early part of this term involving the ever-popular issue of arbitration:

- In *New Prime Inc. v. Oliveira*, the Justices will determine whether the Federal Arbitration Act (FAA) exempts interstate transportation workers who are classified as independent contractors, and whether the issue should be decided by a court or an arbitrator. In 2015, an independent contractor truck driver filed a class action against the transportation company that hired him alleging wage and hour violations; the company wanted the case assigned to arbitration instead. Both the lower court and the 1st Circuit Court of Appeals ruled that the FAA exempted the worker's claim from arbitration, and that it was their call—not a private arbitrator's—to determine this crucial initial question. The Court accepted review and heard arguments on the case on October 3. We should get a final ruling by early 2019.

- Another employment-related arbitration issue arises in *Lamps Plus Inc. v. Varela*. The case began in 2016 when a data breach exposed the personal data of around 1,300

Lamps Plus employees to a phishing attack. One employee filed suit against the company, alleging that his employer did not do enough to protect his and his fellow employees' information. The employer pointed to the arbitration agreement signed by the worker and said the court system was not the appropriate forum for resolution of the dispute. The lower court agreed and sent the case to arbitration—but said that the worker could proceed with his claims on a class-wide basis because of the way that California state law interprets the general language contained in the arbitration agreement. The 9th Circuit Court of Appeals agreed. The Court will hear arguments on the case on October 29 to determine the contours of these types of arbitration disputes.

- Finally, a non-employment case before the Court this term will end up having an impact on employment arbitration agreements. In *Henry Schein Inc. v. Archer and White Sales Inc.*, the setting and resolution of a commercial dispute between two businesses hinges on an interpretation of the FAA. An agreement between the two parties mandated that disputes between them would be sent to arbitration, but a lower federal court said arbitration was not appropriate because one party sought injunctive relief and the agreement specifically carved out such claims from arbitration. In such instances, the court found and the 5th Circuit Court of Appeals agreed that motions to arbitrate that are "wholly groundless" should not be decided by an arbitrator but instead should be adjudicated by a court. The Court will resolve the dispute after it hears arguments on October 29; expect a ruling by February 2019.

WILL THERE BE FIREWORKS LATER IN THE TERM?

Every session, the Supreme Court adds many cases to its docket as the term unfolds. We expect this year to be no different, so a few more labor and employment cases should be teed up for resolution before the current term ends in June 2019. But will they be blockbuster-type cases, or more technical and narrowly focused in nature?

The answer to that question might be determined depending on whether and how soon a ninth Justice can be seated. The SCOTUS is usually loathe to accept critical cases to its docket if the bench is primed for a 4-4 split. During the period of time between Justice Scalia's death in February

2016 and Justice Gorsuch's elevation to the bench in April 2017, the Court rarely took up significant matters and often issued deadlocked decisions. The likelihood of significant decisions will increase if another Justice is confirmed before the end of this term. And if that happens, the likely issues that the court could take up include:

- Whether Title VII permits workers to bring claims of sexual orientation discrimination against their employers;
- Whether gender identity discrimination claims are viable under federal law; and
- Whether employers can rely upon salary history as a legitimate justification for wage disparities between workers of different genders.

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