FR Report *July 2015*

A Review of the Supreme Court's 2014 - 2015 Term

During the United States Supreme Court's 2014-2015 term, the Court departed from the pro-business reputation it had developed in labor and employment cases. This term, employees prevailed more often than not, including in several key cases. However, the Court also issued a handful of decisions that were favorable to employers.

In spite of the different outcomes this term, the Justices followed last year's trend in showing a remarkable degree of unity in many of the employment-related cases. Of the 11 employment-related decisions during the 2014-2015 term, six were unanimous or virtually unanimous (i.e., with a vote of 8 to 1), and two were by a vote of 6 to 3. Moreover, the three employment-related decisions that were decided by a 5 to 4 vote were not strictly employment cases, but rather, civil rights or other cases with employment implications. Some of these cases, such as the same-sex marriage decision (*Obergefell*), were perhaps unsurprising in their divisiveness.

The lack of a discernible pattern in the Roberts Court's approach to labor and employment cases suggests that the Court is trending toward a preference to issue narrow rulings that focus on the specific factual situations presented, rather than broad rulings that reach beyond the facts of a particular case. While this approach may leave practitioners wanting more definitive guidance, it potentially has the benefit of proceeding with care when altering interpretations of the nation's employment-related laws.

The 11 employment-related cases that were issued by the Court during this term addressed a wide variety of issues:

- Two discrimination cases:
  - Pregnancy accommodation (*Young*)
  - Religious accommodation (*Abercrombie & Fitch*)
- Two cases on agency powers and duties:
  - Agencies' powers to interpret regulations (*Mortgage Bankers Association*)
  - EEOC's duty to conciliate (*Mach Mining*)
- Three employee benefits cases:
  - Affordable Care Act (*Burwell*)
  - ERISA statute of limitations (*Tibble*)
  - Retiree health benefits under collective bargaining agreements (*M&G Polymers*)

- One FLSA case (*Integrity Staffing*)
- Two civil rights cases:
  - Same-sex marriage (*Obergefell*)
  - Fair Housing Act (*Inclusive Communities*)
- One immigration case (*Din*)

Following is a summary of each decision and the likely impact on employers. In the final section of this Review, we offer a glimpse of some of the labor and employment cases that the Court has agreed to hear next term.

Executive Summary

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Young v. United Parcel Service 135 S. Ct. 1338 No. 12-1226 **Decided**: March 25, 2015	The commonly used *McDonnell Douglas* burden shifting mechanism should be used to determine whether an employer has failed to accommodate an employee's pregnancy-related work restrictions, and the employee may show that the employer's stated reason is a pretext for discrimination by showing that an employer's policies impose a significant burden on pregnant workers and the justification for not accommodating pregnant workers is not sufficiently strong.	Vote: 6-3 **Opinion:** Breyer (joined by Roberts, Ginsburg, Alito, Sotomayor, Kagan) **Concurrence:** Alito **Dissent:** Scalia (joined by Kennedy and Thomas) **Dissent:** Kennedy

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. 135 S. Ct. 2028 No. 14-86 **Decided**: June 1, 2015	An applicant rejected for a retail store position by Abercrombie & Fitch because she wore a headscarf could maintain a Title VII claim against the retailer, even though she never specifically asked to be allowed to wear her headscarf as a religious accommodation.	Vote: 8-1 **Opinion:** Scalia (joined by Roberts, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan) Dissent: Thomas
Perez v. Mortgage Bankers Association 135 S. Ct. 1199 No. 13-1041 **Decided**: March 9, 2015 (consolidated with *Nickols v. Mortgage Bankers Association*, No. 13-1052)	The D.C. Circuit's *Paralyzed Veterans* doctrine, which requires agencies to use the notice and comment process before it can significantly revise an interpretive rule, is contrary to the text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the Act's maximum procedural requirements.	Vote: 9-0 **Opinion:** Sotomayor (writing for a unanimous court) **Concurrence:** Scalia **Concurrence:** Thomas **Concurrence:** Alito
Mach Mining, LLC v. EEOC 135 S. Ct. 1645 No. 13-1019 **Decided**: April 29, 2015	Courts may review whether the EEOC has fulfilled its statutory duty to conciliate discrimination allegations. But, because the EEOC has extensive discretion to determine what kind and amount of communication with an employer is appropriate, the scope of that review is narrow.	Vote: 9-0 **Opinion:** Kagan (writing for a unanimous court)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
King v. Burwell 135 S. Ct. 475 No. 14-114 **Decided:** June 25, 2015	The Patient Protection and Affordable Care Act allows subsidies to be provided to individuals who obtain coverage through a marketplace health exchange, regardless of whether that exchange was established by a state or by the federal government.	Vote: 6-3 **Opinion:** Roberts (joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) **Dissent:** Scalia (joined by Thomas and Alito)
Tibble v. Edison Int'l 135 S. Ct. 1823 No. 13-550 **Decided:** May 18, 2015	ERISA's fiduciary duty is derived from the common law of trusts, which provides that a trustee has a continuing duty, separate from the duty to exercise prudence in initially selecting investments, to monitor, and remove imprudent trust investments. So long as a claim alleging breach of the continuing duty of prudence occurred within six years of suit, the claim is timely.	Vote: 9-0 **Opinion:** Breyer (writing for a unanimous court)
M&G Polymers USA, LLC v. Tackett 135 S. Ct. 935 No. 13-1010 **Decided**: January 26, 2015	To determine whether retiree health care benefits survive the expiration of a collective bargaining agreement, courts should apply ordinary contract principles.	Vote: 9-0 **Opinion:** Thomas (writing for a unanimous court) **Concurrence:** Ginsburg (joined by Breyer, Sotomayor, and Kagan)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Integrity Staffing Solutions v. Busk 135 S. Ct. 513 No. 13-433 **Decided**: December 9, 2014	The time spent by warehouse workers waiting to undergo and undergoing security screenings is not compensable under the Fair Labor Standards Act, as amended by the Portal to Portal Act, because the screenings are not a principal activity and are not integral to the employee's duties.	Vote: 9-0 **Opinion:** Thomas (writing for a unanimous court) **Concurrence:** Sotomayor (joined by Kagan)
Obergefell v. Hodges 135 S. Ct. 1039 No. 14-571 **Decided**: June 26, 2015 (consolidated with *Tanco v. Haslam*, No. 14–562; *DeBoer v. Snyder*, No. 14–571; and *Bourke v. Beshear*, No. 14–574)	The Fourteenth Amendment of the U.S. Constitution requires every state to issue marriage licenses to same-sex couples and recognize same-sex marriages validly performed elsewhere.	Vote: 5-4 **Opinion:** Kennedy (joined by Ginsburg, Breyer, Sotomayor, and Kagan) **Dissent:** Roberts (joined by Scalia and Thomas) **Dissent:** Scalia (joined by Thomas) **Dissent:** Thomas (joined by Scalia) **Dissent:** Alito (joined by Scalia and Thomas)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. 135 S. Ct. ___ No. 13-1371 **Decided**: June 25, 2015	Disparate-impact claims are cognizable under the Fair Housing Act.	Vote: 5-4 **Opinion:** Kennedy (joined by Ginsburg, Breyer, Sotomayor, and Kagan) **Dissent:** Thomas **Dissent:** Alito (joined by Roberts, Scalia, and Thomas)
Kerry v. Din 135 S. Ct. 44 No. 13-1402 **Decided:** June 15, 2015	Consular decisions to deny visas and to exercise authority over the immigration laws are judicially unreviewable.	Vote: 5-4 **Plurality Opinion:** Scalia (joined by Roberts and Thomas) **Concurrence:** Kennedy (joined by Alito) **Dissent:** Breyer (joined by Ginsburg, Sotomayor, and Kagan)

Individual Case Analysis

1. COURT EXPANDS WORKPLACE ANTI-DISCRIMINATION PROTECTIONS

a. Court Gives Pregnant Employees a Path To Securing Accommodations

In a mixed opinion for employers, the Court in *Young v. UPS* expanded the potential for pregnant employees to secure workplace accommodations by endorsing a balancing test to determine under what circumstances a pregnant employee can prevail on a failure-to-accommodate claim.

The plaintiff in the case, Peggy Young, was unable to perform her job as a delivery driver for UPS during her pregnancy because her doctor imposed a lifting restriction. Young requested a temporary light duty assignment, but UPS denied her request. Pursuant to the collective

bargaining agreement with Young's union, UPS provided temporary modified work assignments only for drivers who: 1) were injured on the job; 2) suffered from a disability as defined by the Americans with Disabilities Act (ADA); or 3) lost their Department of Transportation (DOT) certifications. As a result, Young went on an extended, unpaid leave of absence.

At issue in the case was the interpretation of the language of the Pregnancy Discrimination Act (PDA), which provides that, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . . " In this case, UPS treated Young like employees who suffered off-the-job injuries and were not entitled to accommodations.

Young argued that the statutory language should be interpreted literally – in other words, that an employer must provide the same accommodations to pregnant employees as it does to non-pregnant employees who are similar in their ability or inability to work. On the other hand, UPS urged that as long as an employer provided accommodations to pregnant women in the same way it provided accommodations to others in a facially neutral category (e.g., no accommodations for off-the-job injuries), the employer could not be liable for pregnancy discrimination.

The Court rejected both interpretations. It found that Young's views – supported by the Obama administration – granted pregnant workers a "most-favored-nation" status, under which an employer would have to provide similar accommodations to all pregnant workers, regardless of the nature of their jobs, the employer's requirements, or any other criteria, anytime the employer made an accommodation for any employee. The Court also disliked UPS' argument, which it feared would permit employers to treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work.

In reaching its decision, the Court determined that the commonly used balancing test (known as the *McDonnell Douglas* burden shift) should be used to determine whether a pregnant employee has suffered employment discrimination as a result of her pregnancy.

First, she must clear an initial hurdle (known as a prima facie case) by showing that: 1) she belongs to the protected class (i.e., she is or was pregnant); 2) she sought an accommodation; 3) the employer did not accommodate her; and 4) the employer accommodated others similar in their ability or inability to work. Next, if the employer justifies its refusal to accommodate by providing a legitimate, non-discriminatory reason for its refusal – which normally cannot simply be that it is more expensive or less convenient to add pregnant women to the category of employees whom the employer accommodates – then the plaintiff may proceed to trial only by

demonstrating that the employer's reason is a pretext for discrimination. She may do this by showing that an employer's policies impose a significant burden on pregnant workers and that the justification for not accommodating pregnant employees is not sufficiently strong, giving rise to an inference of intentional discrimination.

The Court determined that Young created an issue of fact (thus potentially requiring a trial on the merits of her case) as to whether UPS provided more favorable treatment to at least some employees whose situation could not reasonably be distinguished from hers. However, it sent the case back to the Fourth Circuit Court of Appeals to determine whether UPS' reasons for having treated Young less favorably than other non-pregnant employees were pretextual. Thus, although Young's case may very well be dismissed yet again, the Court gave Young – and other pregnant employees – a path to victory.

The Court's decision made clear that an accommodation policy that is technically "pregnancy blind" will generally not, in itself, be enough to protect an employer from a pregnancy-related sex discrimination claim. Additionally, as the Court noted, its holding may be of limited significance in light of the ADA Amendments Act of 2008 (ADAAA), which were enacted after this case began and therefore did not govern the case. The EEOC has interpreted the expanded definition of disability under the ADAAA to require employers to accommodate employees whose temporary lifting restrictions originate off-the-job, and courts have applied this requirement to pregnant employees.

In a concurring opinion, Justice Alito emphasized that employers must have a neutral business reason for treating pregnant drivers differently from other drivers who were unable to drive for reasons unrelated to pregnancy, and concluded that UPS had not articulated such a reason. He disagreed with the Court of Appeals' rationale that UPS could permissibly treat pregnant drivers differently from drivers who had lost their DOT certification, a group whom UPS accommodated by assigning them to less physically demanding positions. First, as to the Court of Appeals' finding that that drivers who lacked DOT certification had a legal reason for being unable to drive, Alito maintained that this loss of legal status did not explain why UPS provided these drivers with an accommodation where none was provided for pregnant women. Second, Alito disagreed with the Court of Appeals' blanket assertion that the drivers who had lost their DOT certification could continue to perform physically demanding tasks, finding it "doubtful that this is true in all instances." Therefore, Alito agreed that remand was necessary.

Justice Scalia, joined by Justices Kennedy and Thomas, dissented. After rejecting the majority's interpretation of the PDA, Scalia blasted the majority's guidance on how a plaintiff may

establish pretext as a "grotesque effects-and-justifications inquiry into motive" that "requires judges to concentrate on effects and justifications to the exclusion of other considerations." He lamented that this approach would allow claims that belonged under Title VII's disparate impact provisions to be brought under its disparate treatment provisions instead. In a separate dissent, Kennedy echoed Scalia's concern about conflating the disparate treatment and disparate treatment analyses, and noted that numerous other state and federal laws provide protections for pregnant women in the workplace.

The decision arguably expands the scope of accommodations that will need to be made available to pregnant employees. For example, plaintiffs could argue that, in certain instances, the reasoning of *Young* requires employers to extend their workers' compensation light duty policies to pregnant employees. Therefore, to minimize liability for either a PDA or an ADAAA claim, employers should evaluate their accommodations and light duty policies and the effects of those policies on pregnant employees. Employers also must take seriously and review thoughtfully all employee requests for pregnancy-related accommodations to minimize liability for pregnancy discrimination claims.

b. Applicant Need Not Specifically Request Religious Accommodation To Maintain Title VII Claim

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court ruled that an applicant rejected for a retail store position by Abercrombie because she wore a headscarf could maintain a Title VII claim against the retailer, even though she never specifically asked to be allowed to wear her headscarf as a religious accommodation.

Abercrombie requires store employees to comply with a "Look Policy" designed to promote and showcase the company's brand, described as a "classic East Coast collegiate style of clothing." Sales-floor employees, to whom Abercrombie refers as "Models," are required to dress in clothing consistent with the clothes being sold in the company's stores. The policy prohibits certain kinds of clothing, including "caps."

In mid-2008, Samantha Elauf, then 17 years old, applied for a position in an Abercrombie store. Elauf had worn a hijab, the veil or head covering worn by Muslim women in public, since she was 13 years old. Although the EEOC's expert testified that some Muslim women wear a hijab for cultural reasons or to demonstrate a personal rejection of certain Western-style dress, Elauf maintained that she wore the headscarf for religious reasons.

Elauf was interviewed for the position by the store's assistant manager, Heather Cooke. During the interview, Cooke described the Look Policy, but did not mention Elauf's hijab or tell Elauf that she would not be able to wear a hijab at work. Using Abercrombie's standard system for rating applicants, Cooke gave Elauf a rating that qualified her to be hired.

However, after the interview, Cooke sought guidance from her store manager and ultimately from the district manager, Randall Johnson, regarding whether it would be a problem for Elauf to wear a headscarf. Cooke testified that she told Johnson that she believed Elauf wore her headscarf because of her religion. (Johnson denied being told that Elauf was a Muslim or that she wore her headscarf for religious reasons.) According to Cooke, Johnson directed her to change Elauf's "appearance" score from a two to a one, reducing her overall score to a five, below the threshold to be recommended for hire. Based on that direction, Cooke did not extend Elauf a job offer. Elauf was later told by a friend who worked at the store that she was not hired because of her headscarf.

The EEOC sued Abercrombie on Elauf's behalf, alleging that the company violated Title VII by failing to hire Elauf based upon her practice of wearing a headscarf. The EEOC won summary judgment and awarded Elauf $20,000. The Tenth Circuit Court of Appeals reversed, holding that an employer cannot ordinarily be held liable under Title VII for failing to accommodate a religious practice unless the plaintiff provides the employer with actual notice of the need for a religious accommodation.

In an opinion joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan, Justice Scalia rejected the "actual notice" standard adopted by the Court of Appeals. Title VII, the majority held, provides two, and only two, causes of action. First, it prohibits "disparate treatment" based upon religion. Second, it prohibits policies that, while facially neutral, have a "disparate impact" upon individuals because of their religion. Contrary to the framework often articulated by practitioners and lower courts, there is no separate cause of action for "failure to accommodate" a religious practice.

Employers are, however, still obligated to accommodate religious practices. That is because Title VII defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate" a "religious observance or practice without undue hardship on the conduct of the employer's business." Therefore, an applicant can establish a disparate treatment claim based upon religion if she can show that an employer failed to hire her because of her religious practice. Under Title

VII, this burden is met if the evidence establishes that the religious practice was a "motivating factor" in the employment decision.

What Title VII does not require, according to the majority, is that the employer have actual knowledge of the employee's need for an accommodation. Rather, a plaintiff need only demonstrate that the employer's action was motivated, in whole or in part, by a desire to avoid having to accommodate the employee's religious practice:

> Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

There are several questions left unanswered by the Court's decision. First, the majority opinion starts with the assumption that Abercrombie management in fact believed, or at least suspected, that Elauf wore a headscarf for religious reasons. However, what would have happened if Cooke, the assistant manager, had made no reference to her belief regarding Elauf's religion when she contacted her district manager for advice on how to apply the company's Look Policy? In his concurring opinion, Justice Alito addressed this issue directly, writing that he did not believe Abercrombie would have been liable in the absence of evidence that Abercrombie was aware of Elauf's religion. The majority, however, concluded that because the issue was not presented by either side, it "seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do."

In the case of a garment closely associated with religion, such as a hijab or yarmulke, it may be difficult for an employer to plausibly argue that it had no idea that an employee's dress might constitute a religious practice that the employer would be required to accommodate under Title VII. However, even in Elauf's cause, the EEOC's own expert noted that many women wear a hijab for cultural or social reasons rather than out of religious conviction. Could Abercrombie have avoided liability if Cooke had testified that she did not draw any particular conclusions about Elauf's religion from her dress? The answer is far from clear.

The Court also did not address whether or in what circumstances granting an exception to an employer's appearance policy may constitute an "undue hardship" that would excuse the employer from accommodating the employee's religious practice. That issue also was not addressed by the Court of Appeals. The District Court, however, rejected Abercrombie's undue hardship argument, observing that the company provided no "studies or . . . specific examples" to demonstrate that granting Elauf an exception "would negatively impact the brand, sales[,] and compliance" with the Look Policy. To the contrary, the District Court observed that Abercrombie had made numerous exceptions to the Look Policy, including "eight or nine head scarf exceptions."

The sole dissenter, Justice Thomas, took issue with the majority's conclusion that Title VII creates a cause of action for intentional discrimination when an employer takes action based upon application of a facially neutral employment policy. According to Thomas, an employer that uniformly applies a neutral policy, such as one restricting head coverings at work, does not engage in intentional discrimination when it applies that policy to an employee or applicant whose religious beliefs conflict with the policy. Thomas wrote that he would limit intentional discrimination claims for refusal to provide religious accommodations to situations where an employer provides similar accommodations for secular or nondenominational reasons.

The obvious lesson here for employers is that they cannot assume that they have no obligation to provide religious accommodations just because an employee or applicant has not specifically raised the issue. Likewise, employers cannot refuse to hire an applicant just because they think the applicant's beliefs might conflict with a company policy.

But there is also a more nuanced lesson here, one that has less to do with the Court's specific holding and much more to do with the story underlying this case. According to the Court of Appeals' opinion, Abercrombie had made exceptions to its Look Policy for hijab-wearing employees in the past. That begs the question: why did it not do the same for Elauf?

While the court opinions reveal only a partial story, one cannot help but wonder if the result might have been different if Abercrombie had a more clearly defined procedure for dealing with religious accommodation requests. Suppose, instead of simply turning down Elauf, Abercrombie had clearly informed her that her hijab did not comply with the Look Policy, and also advised her of the process for submitting a request for a religious accommodation. If Elauf accepted the job without requesting any accommodation and was later disciplined for violating the Look Policy, Abercrombie might have been able to argue that any suspicions its managers had about Elauf's religious practices were negated by her own failure to ask for a religious exception to the policy.

Conversely, if Elauf did request a religious accommodation, a centralized process for evaluating such requests might have flagged the "eight or nine" exceptions previously granted for headscarf-wearing employees and resulted in the same exception being granted to Elauf. Or, if granting such an exception really would have caused Abercrombie undue hardship that decision might have been made at a corporate level and perhaps backed up with marketing data, expert analysis, or other evidence that would have been more persuasive to the trial court.

In the wake of this decision, employers should review their practices and procedures relating to employee religious accommodations. These practices should include ensuring that accommodation decisions are being made or at least reviewed by people who understand the law, the needs of the organization, the reasons for existing policies, and the circumstances under which prior exceptions to those policies have been made. In addition, it is important to make sure that front-line managers and supervisors are trained on the organization's non-discrimination and accommodation policies, and know where to go for guidance on religious accommodation issues.

2. COURT FURTHER DEFINES FEDERAL AGENCIES' POWERS AND DUTIES

a. Agencies Need Not Conduct Notice-and-Comment Rulemaking for Interpretations of Regulations

In a significant case for all industries regulated by the federal government, a relatively unified Supreme Court decided in *Perez v. Mortgage Bankers Association* that a federal agency does not need to engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act (APA) before it can significantly alter an interpretive rule of an agency regulation, even if parties have relied on that rule to their detriment. Put simply, the Supreme Court agreed with the DOL that federal agencies can indeed "flip flop" on their interpretations with each new administration without first going through the more laborious process of promulgating new regulations. Although not entirely unexpected, the decision is nonetheless a disappointment for employers (and employees) who continue to get whipsawed by ever-changing administrative interpretations at the DOL, NLRB, and other agencies.

Perez and its companion case, *Nickols v. Mortgage Bankers Association*, were brought, respectively, by the Secretary of Labor and an intervening mortgage loan officer. In 2006, the Bush administration's DOL issued an opinion letter in which it announced an interpretation of the revamped 2004 FLSA rules as applied to mortgage loan officers. Under those rules, the DOL opined that mortgage loan officers would be exempt from overtime under the administrative exemption. Then, in 2010, the DOL did an about-face and issued a new Administrative

Interpretation in which it withdrew its 2006 opinion letter and announced a contrasting interpretation, namely, that the loan officers were not exempt from overtime after all.

The Mortgage Bankers Association sued to overturn the DOL's 2010 interpretation, but the district court dismissed the challenge. The Court of Appeals for the D.C. Circuit reversed, holding that an agency may not change any interpretation of a rule without engaging in the notice-and-comment rulemaking process. The Fifth Circuit had also adopted the same doctrine, but the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits had rejected it.

In an opinion written by Justice Sotomayor, and joined in the judgment by a unanimous Court, the D.C. Circuit's decision was overturned. The Court wrote that:

> When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the [APA]. . . . The [D.C. Circuit's] doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA.

Relying on a 1978 case, *Vermont Yankee*, the Court reiterated that the APA "clearly" says that unless a notice or hearing is required by statute, the law's notice-and-comment requirement does not apply to interpretive rules. "This exemption of interpretive rules from the notice-and-comment process is categorical," and was "fatal" to the D.C. Circuit's rationale. The Court wrote that imposing judge-made procedures when a court disagrees with the wisdom of a policy would violate "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."

"In the end, Congress decided to adopt standards that permit agencies to promulgate freely such rules – whether or not they are consistent with earlier interpretations," the Justices ruled. Extending that point to the *Mortgage Bankers Association* case, the Court held that "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."

The larger underlying problem raised by the case is that administrations frequently change, and interpretations of regulations may change with them. Drawing the distinction between "interpretation" and "regulation" is not as simple in practice as it seems on paper. As the Association argued, an agency's interpretations are entitled to (some) deference under two

seminal cases, including one decided before the APA was even enacted. Accordingly, the distinction between "interpretation" and "regulation" is more academic.

Whether before the EEOC (which has issued guidance on pregnancy discrimination, background checks, and more), the NLRB (whose Division of Advice and General Counsel routinely issue opinions), the DOL, or other agencies, whenever an agency opines about a subject in something other than a regulation, it necessarily blurs the line between mere interpretation and rulemaking. *Mortgage Bankers Association* does nothing to resolve this problem. Courts will continue to distinguish between interpretations requiring deference and interpretations that rise to the level of rulemaking.

However, the news is not all bad for employers. While Justices Alito, Scalia, and Thomas all joined in the judgment, they wrote separate occurrences strongly suggesting that they were open to reevaluating whether to give any deference to agency interpretations of regulations. A footnote in Justice Sotomayor's opinion recognizes in dicta, in an apparent nod to the concurrences, that "[e]ven in cases where an agency's interpretation receives . . . deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, . . . deference is not an inexorable command in all cases."

Justice Scalia specifically criticized the deference given to agencies, writing in his concurrence that the Court has

> developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning [5 U.S.C.] §706's directive that the "reviewing court… interpret…statutory provisions," we have held that agencies may authoritatively resolve ambiguities in statutes. . . . And never mentioning §706's directive that the "reviewing court . . . determine the meaning or applicability of the terms of an agency action," we have – relying on a case decided before the APA, *Bowles v. Seminole Rock & Sand Co.*, . . . – held that agencies may authoritatively resolve ambiguities in regulations.

Justice Scalia "would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations… [by] applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide – with no deference to the agency – whether that interpretation is correct."

Justice Thomas also concurred in the judgment, but provided his own lengthy explanation of why "the entire line of [deference] precedent beginning with *Seminole Rock* raises serious

constitutional questions and should be reconsidered in an appropriate case." Justice Alito, too, affirmed that he would entertain "a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."

The bottom line for employers is that *Mortgage Bankers Association* confirms that federal agencies are still free to reinterpret their statutes and regulations at any time, even if successive interpretations are incompatible. Furthermore, agencies need not go through the detailed and time-consuming procedures (or judicial review) required by the APA. Largely, the status quo employers have come to expect will continue: agencies will be free to interpret and reinterpret regulations as they see fit, even if that means overturning longstanding interpretations that employers have relied on, as in this case. By failing to provide any additional clarity on these issues, the Court's decision further complicates courts' ability to draw the already-fuzzy line between substantive regulations and "lesser" interpretations, policies, or guidance.

b. Court Unanimously Holds that EEOC Conciliation Efforts are Subject to Judicial Review

In *EEOC v. Mach Mining*, the Supreme Court held that courts have the authority to review whether the Equal Employment Opportunity Commission (EEOC) has fulfilled its statutory duty to attempt to conciliate charges of discrimination prior to filing suit, reversing a prior decision by the Seventh Circuit Court of Appeals.

When the EEOC determines that there is "reasonable cause" to believe that the allegations in a discrimination charge are true, Title VII of the Civil Rights Act requires that, prior to filing a lawsuit, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). At issue in this case was whether the EEOC's conciliation efforts were subject to judicial review, and if so the proper extent of that review.

Before this decision, most federal courts had held that the EEOC's conciliation process was subject to review by a court, but the type and level of scrutiny varied by circuit. In *Mach Mining*, however, the Seventh Circuit broke ranks with other federal appellate courts, holding that the EEOC's conciliation efforts were not subject to judicial review.

Echoing the Seventh Circuit's view, the EEOC argued at the Supreme Court that since Title VII provides "no standards by which to judge" the EEOC's performance of its statutory duty, and gives the agency broad discretion to decide the extent of its conciliation efforts, courts had no "judicially manageable" criteria with which to review the EEOC's efforts.

Mach Mining, on the other hand, argued that courts should be able to consider whether the EEOC negotiated in good faith over a discrimination claim, including letting the employer know the minimum required to resolve the claim, laying out the factual basis for its positions, and engaging in a negotiation with the employer as to what would constitute an acceptable settlement of a charge. Mach Mining specifically argued that the review should be analogous to determinations made under the National Labor Relations Act as to whether employers and unions engaged in "good faith" collective bargaining.

The Court rejected both parties' views and adopted a middle ground. The Court noted that the EEOC's position would require courts to "simply accept the EEOC's say-so that it complied with the law." In contrast, Mach Mining's position would impinge on the agency's "leeway" and "flexibility" in fulfilling the conciliation requirement.

Writing for a unanimous Court, Justice Kagan reiterated that, "The statute demands . . . that the EEOC communicate in some way (through 'conference, conciliation, and persuasion') about an 'alleged unlawful employment practice' in an 'endeavor' to achieve an employer's voluntary compliance." According to the Court, this means, at a minimum, the EEOC must inform the employer about the specific allegation and which employees (or class of employees) have suffered as a result, and engage in some form of discussion so as to allow the employer an opportunity to remedy the allegedly discriminatory practice. Judicial review of these requirements, while "barebones," is appropriate and manageable under Title VII, the Court concluded.

While the decision is certainly a victory for employers, it remains to be seen if this will result in a true departure from the status quo as to how the EEOC participates in the conciliation process. The EEOC often refuses during conciliation to provide even the most basic information needed for an employer to assess the strength of the EEOC's claims and the risks of further litigation, making the conciliation process essentially worthless. Given the limited and somewhat cryptic standard of review, a particular concern is whether this decision will provide the needed "stick" for the EEOC to change its behavior and actually provide information that is helpful to assess whether an employer would be better served by a voluntary resolution than by protracted and expensive EEOC litigation. If lower courts read the statutory language requiring "conference, conciliation, and persuasion" to require the EEOC to provide actual meaningful information during conciliation, employers will benefit by having actual information about the charge at issue and the ability to negotiate a voluntary resolution before facing the cost and burden of defending an EEOC-initiated lawsuit.

3. COURT ISSUES TRIO OF EMPLOYEE BENEFITS DECISIONS

a. Court Upholds Federal Exchange Subsidies Under Obamacare

In *King v. Burwell*, the Supreme Court held that subsidies for coverage under all marketplace health exchanges pursuant to the Patient Protection and Affordable Care Act (ACA) remain available.

Amongst other mandates, the ACA requires each state to create an "exchange" that, in essence, is a marketplace for individuals to purchase health insurance. If a state does not establish an exchange, the ACA further provides that the federal government will establish an exchange. The ACA also provides for subsidies (in the form of tax credits) to any taxpayer who has enrolled in an insurance plan through an exchange established by a state. The IRS interpreted the operative provision in the ACA to allow for tax credits for coverage provided through any exchange, whether established by a state or the federal government. Focusing on the language in the ACA that provided for the tax credits, the petitioners, four individuals in Virginia (which has a federal exchange), challenged the position taken by the IRS. In their challenge, the petitioners claimed that Virginia's exchange does not meet the "state exchange" requirement and, as such, individuals in Virginia should not receive any tax credits. For these four individuals (and many other taxpayers), not receiving a tax credit would result in coverage being more expensive than 8% of their income, which would exempt them from the ACA's "individual mandate" requirement under which individuals must either maintain health insurance coverage or pay a penalty on their individual income tax return.

The district court dismissed the petitioners' suit, finding that the ACA was unambiguous in allowing tax credits under federal exchanges. The Fourth Circuit appellate court affirmed that decision in finding that the language of the statute was actually ambiguous, but that Chevron deference should be given to the IRS's interpretation. In a different but simultaneous case, the District of Columbia Circuit appellate court vacated the IRS's interpretation, finding that the ACA was unambiguous in its restriction of tax credits to coverage under state exchanges.

In a 6-3 decision authored by Chief Justice Roberts, the Court held that tax credits are available in states that have a federal exchange. In so holding, the Court interpreted the language of the ACA itself, rather than giving Chevron deference to the IRS. The Court said that giving Chevron deference to an agency's interpretation is predicated on the assumption that Congress intended for the agency to fill in gaps in the statute. With respect to tax credits, however, the Court stated that the issue was one of such importance that had Congress intended for the IRS to provide an interpretation, it would have expressly stated so.

In analyzing the ACA's provisions itself, the Court first determined that the language regarding tax credits is ambiguous in its application to federal exchanges. Consequently, the Court turned to other provisions of the ACA for context. The Court looked to sections of the ACA that made it clear that both federal and state exchanges "must meet the same requirements, perform the same functions, and serve the same purposes." It also found that other provisions of the ACA would "make little sense" if the federal exchanges were treated differently from state exchanges for the purposes of tax credits.

The Court also looked at the ACA's overall scheme. Because 34 states have federal exchanges, a holding that coverage under federal exchanges does not allow eligibility for tax credits would have resulted in millions of taxpayers losing their subsidies. Furthermore, it would have essentially gutted the individual mandate because so many taxpayers would be exempt from the requirement of obtaining coverage since the cost would exceed 8% of their income. Since the effectiveness of the ACA relies on a balance between several mandates, including the individual mandate, in the Court's view, this one case—based on literally four words in the act—could have had a domino effect that would have "destabilize[d] the individual insurance market" resulting in drastic increases in premiums and decreases in enrollment. The Court noted that "[i]t is implausible that Congress meant the [a]ct to operate in this manner."

The dissent, by Justice Scalia, can be summed up with the following quote: "Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake." More specifically, Scalia took issue with the majority's decision to interpret the words "established by the [s]tate" to mean "established by the state or federal government." The dissent also accused the majority of self-aggrandizement, and stated that because the Court had saved the ACA so many times, it should be nicknamed SCOTUScare instead of Obamacare.

This is the second major Court decision upholding the ACA—President Obama's signature accomplishment—and is thus very significant. It is also important for employers and plan sponsors, as it effectively upholds the ACA's employer mandate or "employer shared responsibility" provision. The employer mandate requires larger employers to provide minimum levels of affordable health coverage to their full-time employees or risk paying significant penalties. Those penalties apply to an employer only if at least one full-time employee qualifies for a premium tax credit and uses it to purchase coverage in an exchange. If no tax credits were available for employees who obtained coverage through a federal exchange, then a large number of employers would not be subject to any penalties and could avoid complying with the employer mandate. The employer mandate and the ACA, in general, will therefore remain the law for the foreseeable future. Employers and plan sponsors should continue their efforts to

understand the application of the ACA (and the employer mandate in particular) and either ensure compliance or be prepared for the financial impact of non-compliance.

b. ERISA Statute of Limitations No Bar to Allegations Made Within 6 Years of Ongoing Breach

In *Tibble v. Edison International*, the Supreme Court unanimously held that a suit alleging breach of fiduciary duty based on certain investment options offered under a retirement plan was not barred by ERISA's six-year statute of limitations where the investments at issue had been added to the plan more than six years prior to the suit.

ERISA contains a six-year statute of limitations with respect to suits alleging breaches of fiduciary duty. Specifically, ERISA states that a breach of fiduciary duty complaint is timely if it is filed no more than six years after "the date of the last action which constituted a part of the breach or violation" or "in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation." The question in the case at hand was when ERISA's statute of limitations starts running.

The facts of the case were as follows: Participants and beneficiaries of the Edison 401(k) Savings Plan brought suit against the plan's fiduciaries in 2007, alleging that the fiduciaries had breached their duties when they added three mutual funds to the plan's investment lineup in 1999. In claiming that the fiduciaries had breached their duties, the complaint alleged that the mutual funds were higher priced retail-class investments and materially identical lower priced institutional-class funds were available.

The district court held that the petitioners' complaint as to the 1999 funds was barred by ERISA's statute of limitations because the funds had been added as investment options in 1999 and no change in circumstances had occurred that would have required the fiduciaries to review whether the funds were still appropriate investment options. The Ninth Circuit affirmed.

The Supreme Court found that ERISA's fiduciary duty is based on the common law of trusts, which requires a trustee to monitor and remove imprudent investments on a continuing basis. As a result of this continuing duty, in order to be timely, a complaint need only be filed within six years of the breach of continuing duty—not within six years of the initial date that the funds were added to the plan. The Court did not rule on whether the fiduciaries in the case had actually breached their ERISA duties.

The takeaway from this case for plan fiduciaries is a reminder that investment options should be reviewed regularly and on a continuing basis. Even if an investment option was prudent at the time it was added, a fiduciary must not assume that the option remains prudent, and that a failure to take appropriate action will not be protected by ERISA's statute of limitations. Plan sponsors and fiduciaries who do not regularly monitor investment options in their plans or who do not properly document their monitoring activities with the assistance of experts should strongly consider a more active approach to plan governance in response to the *Tibble* decision.

c. Ordinary Contract Principles Apply to Determine Whether Union Retiree Health Benefits are Vested

The Supreme Court ruled in *M&G Polymers USA, LLC v. Tackett* that ordinary principles of contract law should govern the interpretation of provisions for vesting of retiree healthcare benefits under collective bargaining agreements. In so holding, the Court rejected the "*Yard-Man* presumption," pursuant to which the U.S. Court of Appeals for the Sixth Circuit has long presumed that retiree healthcare benefits provided under a collective bargaining agreement vest for life absent specific language to the contrary in the collective bargaining agreement.

Retiree health benefits that are vested for life cannot be unilaterally modified or terminated by the employer. As a result, the *Yard-Man* presumption created a hefty burden for employers in the Sixth Circuit who wanted to modify or terminate retiree health benefits. Further complicating the issue, courts in other circuits have varied in their takes on vesting of retiree health benefits with a wide range of views regarding the presumptions and burdens that apply.

The facts surrounding the *M&G Polymers* case are not unlike other retiree medical benefit cases that came before it. M&G purchased a unionized plant in 2000 and entered into a collective bargaining agreement with the union. Following the expiration of the collective bargaining agreement, M&G announced that it would require retirees to contribute to the cost of their retiree health benefits. Retirees filed suit, alleging that the agreement's language created a vested right to lifetime retiree health coverage provided by M&G. The district court dismissed the complaint for failure to state a claim, but the Sixth Circuit reversed based on its long-standing *Yard-Man* presumption. On remand, the district court ruled in favor of the M&G retirees and issued a permanent injunction ordering the reinstatement of contribution-free health care benefits for retirees. The Sixth Circuit affirmed, and the Court granted certiorari on the sole question of whether the *Yard-Man* presumption was appropriate.

The Court held that the Sixth Circuit's *Yard-Man* presumption "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective bargaining agreements." Furthermore, the Court stated that the *Yard-Man* presumption "distorts the attempt to ascertain the intention of the parties." The Court also faulted the Sixth Circuit for making broad generalizations about the intent of parties to a collective bargaining agreement without taking into account the customs of a particular industry. Based on these findings, the Court remanded the case at hand to the appellate court to review the agreement under ordinary contract principles.

In the concurrence, Justice Ginsburg added that a contract's implied terms could result in a finding that the parties intended retiree healthcare benefits to vest – such a finding need not rely solely on express contractual terms.

The *Yard-Man* presumption has caused some employers to avoid unilaterally modifying or terminating retiree healthcare benefits out of fear that a court would apply the presumption and enjoin the employer from making changes even where the parties did not intend for the benefits to vest for life. In light of this ruling, employers who, because of *Yard-Man*, have avoided changing or terminating retiree healthcare benefits provided under a collective bargaining agreement should consider reviewing the contracts and engaging in a thorough analysis of whether such benefits are vested.

4. UNDER FLSA, TIME SPENT IN SECURITY SCREENINGS IS NOT COMPENSABLE

In *Integrity Staffing Solutions, Inc. v. Busk*, the Supreme Court was asked to decide whether warehouse workers were entitled to compensation under the Fair Labor Standards Act (FLSA) for time they were required to spend in lengthy security screenings (lasting up to 25 minutes) at the end of their shifts at Amazon.com warehouses. The Court unanimously held that the workers could not claim compensation for going through security screenings, which were aimed at protecting against theft, because these activities were not integral and indispensable to their principal duties.

Under the FLSA, as amended by the Portal-to-Portal Act, employers generally need not compensate employees for "preliminary" (pre-shift) and "postliminary" (post-shift) activities, unless the activities are "integral and indispensable" to an employee's principal activities. To be "integral and indispensable," an activity must be (1) "necessary to the principal work performed" and (2) "done for the benefit of the employer." The FLSA distinguishes between activities that

are essentially part of the ingress and egress process and those that constitute the actual "work of consequence performed for an employer."

In a short opinion written by Justice Thomas, the Court found that the security screenings were clearly part of the ingress and egress process, and that the screenings were not the principal activities the employees were employed to perform. As the Justices had hinted during oral argument, the decision explained that Integrity Staffing did not hire employees to go through security screenings but to retrieve products from the Amazon warehouse shelves and package them for shipment. These security screenings were not integral and indispensable to the "performance of productive work," as the FLSA regulations require. The Court observed that, unlike requiring pre-shift donning and doffing of protective gear, Integrity Staffing could have completely eliminated the security screenings altogether without impairing the safety or effectiveness of the employees' principal activities.

In reversing the Ninth Circuit Court of Appeals, the Court also expressly rejected the appellate court's test, which had focused on whether an employer required an employee to engage in a particular activity. The Court explained that by failing to tie activities to the employee's performance of productive work, the Ninth Circuit had broadened the definition of "principal activities" to include "the very activities that the Portal-to-Portal Act was designed to address" and exclude from compensation. The Court also dispatched the employees' argument that Integrity Staffing violated the FLSA because it could have acted to reduce the time spent in the security screenings to a *de minimis* amount. The Court found this decision had no bearing on the FLSA analysis and was an issue "properly presented to the employer at the bargaining table, not to a court in an FLSA claim."

Justice Sotomayor, joined by Justice Kagan, wrote a separate concurrence to explain her understanding of the standards applied by the Court. First, she understood the Court's conclusion that the time spent in security screenings was not compensable because it was not "integral and indispensable" to the employees' "principal work." That is, the employees' principal activities could be performed safely and effectively absent the security screenings. Second, Justice Sotomayor opined that since the screenings were not "work of consequence" that the employees performed for their employer, but were rather part of the ingress and egress process, they were not compensable.

Most immediately, the Court's decision provides a clear, final answer for employers on security screenings, which have become more common. The decision also wipes out the spate of class and collective action lawsuits filed by employees seeking back pay for time spent undergoing

pre- or post- shift security checks that were filed in the wake of the Ninth Circuit's decision, eliminating some tremendous potential liability for those employers. More broadly, even though this case focused only on security checks, the decision could further limit the scope of what constitutes "integral and indispensable" activities. Over time, a more limited view of an employee's principal activities should prove valuable to employers looking for certainty about the compensability of a host of pre- and post-shift activities (save for donning and doffing, which remain somewhat of an enigma).

5. COURT ENDORSES ROBUST CIVIL-RIGHTS PROTECTIONS

a. States Must Permit and Recognize Same-Sex Marriage

In *Obergefell v. Hodges*, the Court held in a 5-4 decision that the Fourteenth Amendment requires every state to issue marriage licenses to same-sex couples. The Court further held that states must recognize same-sex marriages validly performed elsewhere. The ruling effectively legalized same-sex marriage nationwide.

Prior to the *Obergefell* decision, a majority of states, including Illinois, already permitted same-sex marriage, but it was still outlawed in many other states. The suit was brought by fourteen same-sex couples and two other men whose same-sex partners were deceased. The plaintiffs were challenging the same-sex marriage bans in Michigan, Ohio, Kentucky, and Tennessee. The Sixth Circuit Court of Appeals had previously ruled against many of the *Obergefell* plaintiffs in a separate case, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The appeal in *DeBoer* was consolidated with appeals of other decisions from other federal circuits, including *Obergefell*.

In an opinion authored by Justice Kennedy, the majority held that the Due Process Clause of the Fourteenth Amendment and the Court's previous jurisprudence regarding certain fundamental rights, including the right to marry and to engage in intimacy, "compels the conclusion" that same-sex couples be afforded the right to marry. The majority further held that the rights of same-sex couples to marry are also derived from the Equal Protection Clause of the Fourteenth Amendment. By being denied the right to marry, the majority reasoned, same-sex couples are being denied many of the benefits of marriage that are available to opposite-sex couples.

All four of the dissenting justices wrote opinions. Chief Justice Roberts argued in his dissent, which was joined by Justices Scalia and Thomas, that the extension of marriage rights to same-sex couples was not supported by the Court's prior jurisprudence on marriage because those cases dealt only with opposite-sex marriage. He further argued that the fundamental right to marry found in the Fourteenth Amendment does not include a right to make a state change its

definition of marriage. In Justice Scalia's fiery dissent, he decried, as did all of the dissenters, the majority's ruling as robbing the people of the right to decide for themselves whether to approve same-sex marriage in their states. Justices Thomas and Alito also dissented.

Obergefell has obvious, immediate impacts for employers and plan administrators. For instance, many employer-sponsored health and welfare plans already covered same-sex spouses prior to *Obergefell*, but the ruling will nevertheless have a significant impact on employers with operations or employees in states that did not previously permit same-sex marriage.

First, employers should now strongly reconsider health and welfare plan eligibility provisions that limit participation to opposite-sex spouses, as these types of eligibility rules may be a viable target for litigation under Title VII of the Civil Rights Act of 1964. Employers and plan sponsors should also confirm that the definition of "spouse" in their plan documents is consistent with the administration of the plan. If the plan defines "spouse" by reference to state law, for example, that definition may need to be updated.

Second, and perhaps most importantly, employers with employees in states that did not previously permit same-sex marriage will need to consider the state payroll tax implications of the *Obergefell* decision. Employers with employees in states that did not permit same-sex marriage prior to *Obergefell* were previously required to withhold applicable state income and payroll taxes on the value of a same-sex spouse's health and welfare plan coverage. In light of the *Obergefell* decision, employers should stop withholding all state income and payroll taxes on the value of a same-sex spouse's health and welfare plan coverage, assuming the employee and the spouse have entered into a validly-performed marriage.

Third, *Obergefell* could also impact the desirability of offering health and welfare plan coverage to domestic partners. In an effort to provide coverage to their employees' same-sex partners, particularly in states where same-sex marriage was previously not permitted, many employers offer health and welfare plan coverage to unmarried same-sex (and opposite-sex) domestic partners. Because same-sex marriage licenses will now be issued nationwide, many employers may wish to reconsider whether domestic partner coverage is still necessary and appropriate.

Fourth, *Obergefell* means that employers must permit eligible employees to take leave under the Family and Medical Leave Act (FMLA) to care for their same-sex spouse with a serious health condition, for qualifying exigency leave if the spouse is being deployed, or for other qualifying reasons. For additional detailed guidance on the impact of the legalization of same-sex marriage on employers' FMLA obligations, please click here and here.

b. Court Reaffirms Viability of Disparate Impact Theory in Discrimination Cases

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Court interpreted the Fair Housing Act (FHA) to permit "disparate impact" claims, in which a plaintiff or group of plaintiffs alleges that a policy or practice, though racially neutral on its face, has the effect of creating disparities between racial groups. While the decision interprets the FHA, the Court relied heavily on analogous provisions in federal employment statutes – namely, Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA) – in reaching its conclusion. In doing so, the Court made clear that disparate impact claims are here to stay for the foreseeable future.

In *Inclusive Communities*, a Texas-based non-profit organization sued the Texas Department of Housing and Community Affairs, alleging that the Department's policy perpetuated racial segregation in housing by granting too many tax credits in predominantly black inner-city areas and too few in white suburban communities. Though the selection criteria were technically race-neutral, Inclusive Communities presented data that the Department's policies entrenched such segregation by discouraging the construction of affordable housing in suburban areas. For example, over 92% of tax credit units in Dallas were located in U.S. Census tracts with minority populations of more than 50%.

The Supreme Court held that the FHA permits plaintiffs to bring a claim based on disparate impact discrimination. The Court relied on its earlier interpretations of Title VII and the ADEA, stating that they provided "essential background and instruction" in the instant case. Under the Court's interpretations of employment antidiscrimination laws, "practices fair in form, but discriminatory in operation" are proscribed. Therefore, these statutes encompass disparate-impact claims when "their text refers to the consequences of actions and not just the mindset of the actors," and when such an interpretation is consistent with the statutory purpose. Since the language of the FHA was, like Title VII and the ADEA, "results-oriented," the Court concluded that the disparate impact theory was viable under the FHA.

The Court further relied on the fact that when Congress amended the FHA in 1988, nine circuit courts of appeal had held that the FHA authorized disparate impact claims. Despite being aware of this precedent, Congress declined to amend the FHA to reject the disparate impact theory. Its failure to do so, the Court found, suggested that it intended to allow such claims.

Another important aspect of this decision is the Court's recognition of constitutional limitations on disparate impact claims challenging government actions. The Court opined, for example, that

"serious constitutional questions" might arise if a plaintiff could prove an FHA violation merely by presenting statistical evidence, noting that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." And if a defendant can prove that the policy at issue was necessary to achieve a valid interest, then a plaintiff's claim must fail. The Court compared this defense to the "business necessity" standard under Title VII, under which an employer is not liable if the challenged practice was "job-related" and consistent with business necessity.

In the principal dissent, Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, admonished the Court for its expansive interpretation of the FHA. The dissent also found that the applicable language from the FHA strongly mirrored §4(a)(1) of the ADEA, which the Court had previously held did not encompass a disparate impact theory. Alito warned that the Court's reference to Title VII's "business necessity" defense would cause confusion among lower courts, and for government actors and private developers that may ultimately "let race drive their decision-making in hopes of avoiding litigation altogether."

Employers should be aware of *Inclusive Communities* because its affirmation of a disparate impact theory under the FHA is also a reaffirmation of the theory under employment discrimination laws. Although some believed that the Court's 2009 opinion in *Ricci v. DeStefano* signaled the possibility that the Court was questioning the constitutionality of disparate impact claims, particularly against public sector employers – and Justice Thomas advocated in his separate dissent in this case for the elimination of disparate impact claims altogether – the *Inclusive Communities* decision makes clear that there are not currently enough Justices on the Court to support such a reversal in existing law. The decision is also noteworthy for school districts and other government entities in Illinois because Illinois courts generally follow federal law in interpreting the Illinois Civil Rights Act, which prohibits all forms of disparate impact discrimination by government actors in Illinois.

6. DIVIDED COURT UPHOLDS CONSULAR NON-REVIEWABILITY OF IMMIGRATION VISAS

For the first time in more than 40 years, the Supreme Court revisited the seemingly well-settled doctrinal issue of consular non-reviewability in *Kerry v. Din*. In a decision with significant implications for visa applicants, the Court once again held that Consular decisions to deny visas and to exercise authority over the immigration laws were judicially unreviewable.

Under the Immigration and Nationality Act (INA), 66 Stat. 163, no alien may enter or permanently reside in the United States without first obtaining a visa. This case involved a visa

petition filed by a naturalized U.S. Citizen, Fauzia Din, on behalf of her spouse, an Afghani citizen named Kanishka Berashk. Din's visa petition seeking to classify Kanishka as an "immediate relative" was approved by the Department of Homeland Security (DHS). Under the INA, if the petition is approved, the foreign national may then submit a visa application to the U.S. consulate and appear for an interview with a consular officer. It is then the responsibility of the consular officer to ensure that the applicant is not "inadmissible" under any provision of the INA, such as the so-called terrorism bar, under which admission is denied to those with suspected past or present involvement in acts of terrorism. If the officer finds the applicant inadmissible, the application is denied. Further, the Government is not required to provide an explanation for the denial to an alien found inadmissible under the terrorism bar.

When Berashk appeared for a visa at a U.S. Consulate, his application was denied under the terrorism bar. No further information was provided. Seeking to understand why the application was denied, Din requested an explanation but was never provided one. While Berashk, a resident and citizen of Afghanistan, had formerly been a civil servant of the Taliban regime, the terrorism bar is one of the most complex provisions of the INA and the specific provision of the terrorism bar that resulted in the denial of his application was unclear.

Although Berashk was a non-citizen, and thus had no right of entry or cause of action, Din was a naturalized citizen who brought the petition through the "immediate relatives" provision of the INA. This gave her the opportunity to challenge this decision in the federal courts, and she filed a complaint in federal court claiming that both the denial of Berashk's application and the Government's refusal to provide an explanation for the denial were unconstitutional. Din sought a writ of mandamus directing the United States to properly review Berashk's visa application and provide an explanation for the denial. The district court found in favor of the Government and granted its motion to dismiss.

However, the Ninth Circuit Court of Appeals reversed, holding that Din was entitled to a review of the State Department's decision on her husband's application due to her protected interest in her right to marriage. The court further found that the Government deprived Din of a liberty interest without due process in violation of the Fifth Amendment when it denied Berashk's visa application without effectively explaining its decision.

Reversing the Ninth Circuit, Justice Scalia, writing for the plurality, noted that there were two central questions that governed the disposition of the case. First, and of primary importance, the Court had to determine whether the denial of Berashk's visa actually deprived Din of any protected interest. Only if the Court found that a protected liberty interest had been violated

would it then continue and weigh the Government's interests against Din's private interests to assess the risk of an erroneous deprivation of a liberty interest. In response to the first question, Scalia reflected on the history of the Due Process Clause's origins in England's Magna Carta and its original limited protection of life, liberty, or property (as adopted in the Fifth Amendment). These protections were limited, however, as they largely only applied to the protections of one's own person, the ability to transport one's self, and the free use of one's acquisitions. Since a right to immigration through marriage implicates none of the rights historically established in the concept of due process, Scalia reasoned that the right was not protected by due process. Scalia also pointed out the "checks and qualifications," such as the terrorism bar, that Congress had written into immigration law as proof that those decisions were left exclusively to the legislature and thus outside the purview of the judiciary.

Justice Kennedy wrote a concurring opinion in which Justice Alito joined. Kennedy's opinion assumed that Ms. Din had a protected liberty interest in the outcome of her husband's visa application, but that the government had met the requirements of procedural due process in this case. Kennedy reasoned that Congress' plenary authority over immigration and delegation of that authority to the Executive rendered the latter's decision on a visa application sufficient when it provided a "facially legitimate and bone fide" reason for its action, i.e., the terrorism bar.

In a dissenting opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, contended that Din had an implied non-fundamental right to due process since this matter impacted her ability to live with her husband in the United States. He thus concluded that the balancing test mandated by procedural due protection should apply, and that the government's justification failed to sufficiently inform Din about the reasons for the denial of this visa application. At the very least, Breyer wrote, Din was entitled to a more reasoned explanation of the denial so that she would have been able to determine whether to take additional action.

The Supreme Court upheld a long-standing tradition of judicial deference to the decisions of U.S. consulates regarding the granting or denial of immigration visas. The case outlined here touches specifically on the consular ability to deny visas to non-resident spouses who violate provisions of the INA. However, the holding of *Kerry v. Din* highlights the non-reviewability of consular decisions by judicial bodies and has significant relevance to employers sponsoring employees for temporary visas and permanent residency.

The continuing application of the doctrine of consular non-reviewability means that employers and individual employees whose visa applications are denied or subject to lengthy "administrative processing" delays at consular posts will continue to have very limited recourse

to challenge such actions. Unlike decisions made by the DHS, which can be challenged administratively and through the federal courts, denials of visa applications by Consular posts remain beyond the scope of judicial review. Employers with key foreign national employees who are traveling abroad and will require a visa to return to the United States should ensure that all risks and potential grounds of inadmissibility are thoroughly examined before the employee departs from the United States.

Looking Ahead: The 2015 - 2016 Term

The Court will open its 2015-2016 term on October 5, 2015. So far, the Court has already agreed to hear several significant labor and employment cases that will impact employers, including the following:

- ***Tyson Foods, Inc. v. Bouaphakeo et al.***, No. 14-1146: This case is a class and collective action under the FLSA and state law filed by hourly workers at a Tyson pork processing plant. At trial, the workers relied on statistical evidence that estimated the "average" time a worker would spend donning, doffing, and walking. A jury awarded the plaintiffs damages for unpaid overtime for time spent donning and doffing personal protective equipment and walking to and from their assigned work stations. The Court will decide: (1) whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the FLSA, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; and (2) whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages. This seems to be a case that should fall in favor of the employer. As Tyson argued, without commonality, the plaintiffs' claims amounted to an impermissible "trial by formula," and that the statistical modeling ignored each individual plaintiff's damages in violation of the Court's recent decisions in *Wal-Mart v. Dukes* and *Comcast v. Behrend*.

- ***Friedrichs v. California Teachers Association***, No. 14-915: In this case, the Court will consider whether public sector agency shop arrangements, also known as "fair share" contractual provisions, violate the First Amendment. The Court will also consider whether "opt-out" provisions for fair share fees violate the First Amendment by forcing non-union member employees to object to payments related to union political activity. This case presents the Court with an opportunity to overturn its 1977 decision in *Abood v. Detroit*

Board of Education, in which it held that state laws may require public sector employees to pay fees for the non-political work that public sector unions perform on their behalf, including collective bargaining. Under *Abood*, unions and courts have defended such provisions as a means of preventing non-members from "free-riding" on the unions' efforts to improve employment benefits without sharing the costs incurred. If the Court overturns *Abood*, it could strike a major financial blow to public sector unions across the country.

- ***Spokeo, Inc. v. Robins,*** No. 13-1339: In this case, the plaintiff alleged that Spokeo had published inaccurate information about him on its website in violation of the Fair Credit Reporting Act (FCRA). The district court dismissed the plaintiff's complaint after it concluded that the plaintiff had failed to plead that he suffered an injury in fact and that any injury was traceable to Spokeo's alleged conduct. The Ninth Circuit Court of Appeals reversed, holding that when, as with FCRA, the statutory cause of action does not require proof of actual damages, harm to a plaintiff may be inferred even absent actual damages. This case could have significant implications for employers' liability under FCRA specifically and more generally when facing potential class actions under a range of statutes. If the Court of Appeals' opinion is affirmed, employers could potentially be required to defend a suit even where a plaintiff or a class of plaintiffs suffers no concrete harm.

- ***Montanile v. Bd. of Trs. of Nat'l Elevator Industry Health Benefit Plan***: This case involves a group health plan's attempt to recover the monetary proceeds that a plan participant received as part of an out-of-court settlement for injuries stemming from a car accident, pursuant to the plan's subrogation provisions. The plan sought to recover the settlement amounts attributable to the participant's health costs even though the participant had already spent the settlement proceeds. Although similar subrogation-related issues have been litigated and resolved by the Supreme Court over the past several years, the specific issue the Court will decide in *Montanile* is whether ERISA Section 502(a)(3)'s equitable remedies provision allows a plan to recover overpaid amounts that are no longer in the possession of the plan participant or beneficiary.