New Supreme Court Term Promises a Range of Labor and Employment Cases

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The U.S. Supreme Court opened its 2011-2012 term this Monday. Although the Court may not issue as many landmark labor and employment decisions as it did last term—such as *Dukes v. Wal-Mart*—it is likely to hear a full complement of cases with significant implications for employers. The Court has already selected several labor and employment cases that it will hear this term, including the following:

- ***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC:*** The Court will consider whether the ministerial exception—a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions—"applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship." Although the courts of appeals agree that this doctrine applies to pastors, priests and rabbis, they are divided over the boundaries of the ministerial exception when applied to other employees.

- ***Knox v. SEIU Local 1000:*** The Court will consider whether (1) in addition to an annual fee notice to members, a union is required to send a second notice and provide an opportunity to object as required by *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), when adopting a mid-term fee increase for political expenditures; and (2) state employees may be required to pay union agency fees for purposes of financing political expenditures for ballot measures.

- ***Coleman v. Md. Court of Appeals:*** The issue in this case is whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the so-called self-care leave provision of the Family and Medical Leave Act, which allows eligible employees to take leave for a serious health condition that makes them unable to perform the functions of their job.

The Court may also opt to hear important cases on the following issues, which generally come to the fore as a result of a split among the courts of appeals:

Challenges to the Patient Protection and Affordable Care Act (Act): Constitutional challenges to President Obama's health care reform law have been percolating in the appellate courts for months, and three courts of appeals have reached diverging conclusions on perhaps the most controversial aspect of the Act: the requirement that Americans purchase health insurance beginning in 2014 or pay a penalty. In June, the Sixth Circuit upheld the law's constitutionality, including the so-called individual mandate. In August, the Eleventh Circuit reached the opposite conclusion, holding that Congress exceeded its power under the Commerce Clause in enacting the individual mandate. Finally, in September the Fourth Circuit joined the Sixth Circuit in rejecting challenges to the Act, but did not reach the merits of the cases because it decided them on procedural grounds.

The question is not whether the Supreme Court will take up a case on the Act's constitutionality, but when it will do so. Notably, the Obama Administration last week declined to ask the Eleventh Circuit to reconsider its decision, suggesting it may appeal that court's ruling sooner rather than later.

Whether Pharmaceutical Sales Representatives Meet the "Outside Sales" Exemption to the Fair Labor Standards Act (FLSA): The Ninth Circuit held in February that pharmaceutical sales representatives (PSRs) fell within the scope of the "outside sales" exemption to the FLSA even though they cannot directly sell prescription medications to patients. The Ninth Circuit reached the

opposite conclusion from the Second Circuit, which held last year that PSRs were not exempt from overtime. A similar case is pending in the Seventh Circuit.

One particularly interesting aspect of the circuit split here is the different weight the two appellate courts afforded the Secretary of Labor's interpretation of the FLSA's regulations. The Ninth Circuit rejected the Secretary's proposed distinction between "selling" products and "promoting" them, which would render the PSAs ineligible for the outside sales exemption. The Second Circuit, on the other hand, found that the Secretary of Labor's interpretation was entitled to controlling deference. The diverging views of the deference owed to the enforcing agency's interpretation of its own regulations may make this case attractive to the Supreme Court.

***Requisite Language for a Deferential Standard of Review for ERISA Denial-of-Benefits Cases*:** The Third Circuit joined the Second, Seventh, and Ninth circuits—and split from the First, Eighth, and Tenth circuits—in holding that plan language requiring the insured to submit "proof of loss satisfactory to us" was not sufficient to confer the deferential "arbitrary and capricious" standard of review on the plan administrator. Absent language that confers the arbitrary and capricious standard, a denial of benefits is accorded no deference or presumption of correctness when reviewed in court. Quoting the Seventh Circuit, the Third Circuit found that the "satisfactory to us" language did not sufficiently put the insured on notice that the plan administrator has the discretion to "interpret the rules, to implement the rules, and even to change them entirely." This case is ripe for Supreme Court review both because of the circuit split and because it would provide the Court an opportunity to further clarify its previous holdings on the appropriate standard of review in ERISA denial-of-benefits cases.

***Definition of an Employee at the Policymaking Level under the Age Discrimination in Employment Act (ADEA)*:** In a case with potential significance for public employers, the Court may grant a petition for certiorari in a case regarding who qualifies as an "appointee on the policymaking level" and is thus exempt from the ADEA's coverage. The Seventh Circuit held that three relatively low-level Cook County Assistant State's Attorneys fell under the exception, following its long-standing precedent based on the concept that individuals holding policymaking positions could be dismissed based on political affiliation. The Seventh Circuit's broad definition of an employee at the policymaking level is at odds with that of other circuits, including the Second Circuit, increasing the likelihood that the Supreme Court will agree to hear the case.

More Information

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