FR Report *July 2016*

A Review of the Supreme Court's 2015-2016 Term

Last week, the Supreme Court ended its 2015-2016 session under a cloud of uncertainty. On February 22, 2016, Justice Antonin Scalia, the stalwart of the Court's conservative wing for 30 years, passed away. Justice Scalia's absence impacted many decisions the Court has issued since February.

President Obama's nominee to succeed Justice Scalia, Judge Merrick Garland of the D.C. Circuit Court of Appeals, has yet to receive a confirmation hearing from the U.S. Senate. Therefore, with only 8 members, the Court split 4-4 on several major decisions, including two labor and employment decisions. In those cases, there is no majority decision and the lower court's ruling stands, as if the Supreme Court had not taken the case at all. For example, the Supreme Court deadlocked in *Friedrichs v. California Teachers Association*, preserving public sector unions' right to charge non-members a "fair share fee." Most recently, the Supreme Court tied in *United States v. Texas*, throwing the centerpiece of President Obama's immigration program into legal limbo by preserving an injunction preventing it from taking effect.

According to the publisher of SCOTUSblog.com, Tom Goldstein, the "most likely outcome by far is that the Court will order the affected cases reargued next Term." But rehearing is hardly guaranteed—in fact, on June 28, the Supreme Court rejected a petition for rehearing filed by the plaintiffs in *Friedrichs*. For now, and until the Court provides further direction, the decisions issued by the Circuit Courts of Appeals in each "tied" case will stand until further review before a full Supreme Court. During the Court's recess, all eyes will be on the presidential campaign, as the outcome will impact the Court for generations to come.

The 12 employment-related cases that were issued by the Court this Term touched on a number of topics:

- Two Fair Labor Standards Act ("FLSA") cases:
    - Payment for "donning and doffing" time (*Tyson Foods v. Bouaphakeo*)
    - Exemption of Service Advisors at auto dealerships (*Encino Motor Cars v. Navarro*)

- Two cases regarding Equal Employment Opportunity Commission procedural matters:
  - Statute of limitations for constructive discharge claims (*Green v. Brennan*)
  - Awards of attorneys' fees under Title VII (*CRST Van Expedited v. EEOC*)
- Two cases involving public sector employee rights:
  - "Fair share" union fees (*Friedrichs v. California Teachers Association*)
  - Retaliation for constitutionally-protected activities (*Heffernan v. City of Paterson*)
- Four cases involving employee benefits and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"):
  - ERISA's tracing requirements (*Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*)
  - ERISA preemption of state laws (*Gobeille v. Liberty Mutual Insurance Company*)
  - Pleading requirements for stock drop litigation (*Amgen v. Harris*)
  - Affordable Care Act (*Zubik v. Burwell*)
- One higher education, affirmative action case (*Fisher v. University of Texas at Austin*)
- One immigration case (*U.S. v. Texas*)

Following is a summary of each decision and the likely impact on employers. In the final section of this Review, we offer a brief glimpse into the next Term.

Executive Summary

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Tyson Foods, Inc. v. Bouaphakeo 136 S. Ct.1036 No. 14-1146 **Decided:** March 22, 2016	The district court properly certified a class of employees who alleged that Tyson Foods failed to pay them for “donning and doffing” time in violation of the FLSA, even though the employees relied on “representative evidence” to determine the number of additional hours that each employee worked because Tyson Foods failed to keep records of such time.	**Vote:** 6-2 **Opinion**: Kennedy (joined by Roberts, Ginsburg, Breyer, and Sotomayor) **Concurrence:** Roberts (joined by Alito as to Part II) **Dissent:** Thomas (joined by Alito)
Encino Motor Cars v. Navarro 136 S. Ct. ___ No. 15-415 **Decided:** June 20, 2016	The Department of Labor’s regulatory interpretation of the FLSA “salesman” exemption from overtime pay is not entitled to *Chevron* deference because that interpretation lacked the reasoned explanation necessary following the Department’s change in position.	**Vote:** 6-2 **Opinion:** Kennedy (joined by Roberts, Ginsburg, Breyer, Sotomayor, and Kagan) **Concurrence:** Ginsburg (joined by Sotomayor) **Dissent:** Thomas (joined by Alito)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Green v. Brennan 136 S. Ct. 1769 No. 14-613 **Decided:** May 23, 2016	The statute of limitations for contacting the EEOC in relation to a constructive discharge claim alleging discrimination under Title VII begins running after (and only after) an employee gives notice of his or her resignation rather than on the effective date of resignation.	**Vote:** 7-1 **Opinion:** Sotomayor (joined by Roberts, Ginsburg, Breyer, Sotomayor, Alito, and Kagan) **Concurrence:** Alito **Dissent:** Thomas
CRST Van Expedited v. EEOC 136 S. Ct. 1642 No. 14-1375 **Decided:** May 19, 2016	An employer does not necessarily have to prevail "on the merits" of a Title VII discrimination lawsuit to be entitled to attorneys' fees as the prevailing party.	**Vote:** 8-0 **Opinion:** Kennedy (joined by Roberts, Ginsburg, Breyer, Alito, Sotomayor, and Kagan) **Concurrence:** Thomas
Friedrichs v. California Teachers Association 136 S. Ct. 1083 No. 14-915 **Decided:** March 29, 2016	Public-sector unions may charge non-members "fair share" fees to cover the union's costs to negotiate and administer a contract under the First Amendment. (Affirming the Ninth Circuit's opinion)	**Vote:** 4-4 **Opinion:** Per Curiam

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Heffernan v. City of Paterson 136 S. Ct. 1412 No. 14-1280 **Decided:** April 26, 2016	An employee demoted by a public sector employer for engaging in protected political activity may contest that action under the First Amendment and 42 U.S.C. §1983. This applies even if the demotion was based on a factual mistake by the employer regarding the employee's actual behavior.	**Vote:** 6-2 **Opinion:** Breyer (joined by Roberts, Ginsburg, Breyer, Sotomayor, and Kagan) **Dissent:** Thomas (joined by Alito)
Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan 136 S. Ct. 651 No. 14-723 **Decided:** January 20, 2016	ERISA plans with claims for equitable relief against a plan participant resulting from a settlement must comply with tracing rules. Such rules require that the plan participant be in possession of the settlement funds or traceable assets purchased with the settlement funds at the time of the plan's equitable lien claim in order for the plan to recover under ERISA.	**Vote:** 8-1 **Opinion:** Thomas (joined by Roberts, Scalia, Kennedy, Breyer, Sotomayor, Kagan, and Alito) **Dissent:** Ginsburg

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Gobeille v. Liberty Mutual Insurance Company 136 S. Ct. 936 No. 14-181 **Decided:** March 1, 2016	ERISA preempts a Vermont law that required certain organizations to report information regarding health care claims and services to a state agency for compilation in an expansive health care database.	**Vote:** 6-2 **Opinion:** Kennedy (joined by Roberts, Thomas, Breyer, Alito, and Kagan) **Concurrence:** Thomas **Concurrence:** Breyer **Dissent:** Ginsburg (joined by Sotomayor)
Amgen Inc. v. Harris 136 S. Ct. 758 No. 15-278 **Decided:** January 25, 2016	In stock drop cases, a complaint must plausibly allege that a prudent fiduciary in the same position as the defending fiduciary "could not have concluded" that taking an alternative action with respect to the stock fund at issue "would do more harm than good." Plausible allegations that the alternative action would not cause harm to plan participants are not sufficient.	**Vote:** 9-0 **Opinion:** Per Curiam

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Zubik v. Burwell 136 S. Ct. 1557 No. 14-1418 **Decided:** May 16, 2016 (consolidated with *Priests for Life v. Dep't of Health and Human Services*, No. 14-1453; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505; *East Texas Baptist University v. Burwell*, No. 15-35; *Little Sisters of the Poor v. Burwell*, No. 15-105; *Southern Nazarene University v. Burwell*, No. 15-119; *Geneva College v. Burwell*, No. 15-191)	The Department of Health and Human Services and petitioners should be given the opportunity to develop a feasible alternative to the current religious accommodations available under the Affordable Care Act's contraception mandate, whereby contraceptive coverage could be provided through the petitioners' insurance companies without the petitioners actually opting into an accommodation.	**Vote:** 8-0 **Opinion:** Per Curiam **Concurrence:** Sotomayor (joined by Ginsburg)
Fisher v. University of Texas at Austin 136 S. Ct. ___ No. 14-981 **Decided:** June 23, 2016	Admissions officials may continue to consider race as one admission factor among many in order to ensure a diverse student body. Universities are entitled to considerable deference in designing their admissions programs, but courts must apply strict scrutiny when reviewing admissions programs that consider race.	**Vote**: 4-3* **Opinion:** Kennedy (joined by Ginsburg, Breyer, and Sotomayor) **Dissent:** Alito (joined by Roberts and Thomas) *Justice Kagan recused herself in this case.

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
U.S. v. Texas 136 S. Ct. ___ No. 15-674 **Decided:** June 23, 2016	Affirming preliminary injunction against implementation of the Deferred Action for Parental Accountability and expanded Deferred Action for Childhood Arrivals immigration programs announced by President Obama via executive order. (Affirming the Fifth Circuit's opinion)	Vote: 4-4 **Opinion:** Per Curiam

Individual Case Analysis

1. COURT CONSIDERS FLSA STANDARDS OF PROOF AND EVIDENCE PROVING DAMAGES

a. Court Allows Plaintiffs, in Limited Circumstances, to Use Statistical Averages to Prove FLSA Damages

In a modest victory for class action lawsuits after years of pro-employer rulings, the Court in *Tyson Foods, Inc. v. Bouaphakeo* affirmed a $5.8 million dollar judgment against Tyson Foods, Inc. in a class action lawsuit filed by workers claiming uncompensated overtime. Contrary to what many predicted given the trend in the Court's class action rulings, the Court upheld the workers' reliance on statistical analysis that used average time estimates to determine overall damages.

A class of over 3,000 Tyson workers at its pork processing plant in Iowa filed suit for FLSA violations, specifically failure to properly pay overtime. The employees alleged that they had not been properly paid for time they spent putting on and taking off protective gear that the company required them to wear. A federal jury in Iowa found that the Tyson employees proved that the time spent donning and doffing equipment was an indispensable part of their work.

When calculating damages, the employees presented "sampling evidence," computed and presented by a factory time-and-motion expert. The workers' expert averaged the time it took to complete the donning and doffing activities and then used those estimates to prove class liability and damages. Ultimately, the jury awarded the workers $2.9 million in damages. Because the FLSA entitles workers to liquidated damages, the final judgment was $5.8 million. That judgment was upheld on appeal by a divided Eighth Circuit in August 2014.

Tyson petitioned the Supreme Court for review, arguing that the Eighth Circuit's rulings conflicted with other circuits and recent Supreme Court precedent disallowing the use of formulas to establish class liability and damages. Tyson further argued that the varying amounts of time it took these employees to don and doff equipment made the reliance on the expert's estimates improper and would lead to the payment of damages to those who did not actually work more than 40 hours in a week. According to Tyson, a "trial by formula" did not require each worker to show that he had worked overtime, and some workers would share in the verdict even if they had no actual injury.

The Supreme Court upheld the Eighth Circuit's ruling, but writing for the majority, Justice Kennedy cautioned that the Court was not adopting a broad rule governing the use of representative and statistical evidence to establish class-wide liability. Instead, this was a case where reliance on statistical analysis was found to be permissible in order to fill an evidentiary gap created by Tyson's failure to maintain adequate records. In other words, the Court relied on Tyson's own failures to permit the use of statistics. The Court further reasoned that the fact this was a class claim did not make their reliance on the sample estimates improper for establishing class-wide liability, particularly since each employee would likely have used the analysis to prove their individual hours worked if they had brought separate claims. However, the Court cautioned that the use of statistical methods to establish class-wide liability will depend on the facts and circumstances of each.

The Court deferred on Tyson's argument that relying on statistical analysis would result in uninjured class members recovering damages, stating the issue was premature since the damages had yet to be allocated to class members and Tyson would have the opportunity to challenge the proposed method of allocation when on remand to the trial court.

However, Chief Justice Roberts, in his concurrence, expressed concern as to whether there is a method that would award damages *only* to those who suffered actual injury. Justice Roberts stated that if there is no way to ensure that only injured class members receive an award, the award itself cannot stand. Further, in a dissenting opinion, Justice Thomas argued that the

precedent is clear: district courts must undertake a rigorous analysis to ensure representative evidence is sufficiently probative of the individual issue to make it susceptible to class-wide proof. The district court in this case, in his view, did not satisfy that obligation.

Unfortunately, the Court declined to use this opportunity to restrict the use of statistical evidence in employment claims. While this is a departure from the Court's opinions in recent years making the requirements for class actions more stringent, it remains to be seen how broadly this will be interpreted by the lower courts under various individual case scenarios. Justice Kennedy's opinion made clear that the use of such evidence should be evaluated on a "case by case" basis. Certainly, the use of statistical evidence will continue to be an issue going forward in class litigation.

b. FLSA "Service Advisor" Exemption Sent Back to Lower Court for Closer Analysis, Leaving Car Dealerships Waiting

The Court issued a long-awaited decision in *Encino Motorcars, LLC v. Navarro* that many hoped would resolve a vexing issue for car dealers: whether Service Advisors at auto dealerships are exempt from the overtime provisions of the FLSA. Unfortunately, the Court did not resolve the issues conclusively. Instead, the Court held that the Department of Labor's (the "Department's") regulatory interpretation of this provision lacked any reasoned explanation for the change in its position. As a result, the provision must be construed without placing controlling weight on the Department's interpretation.

The FLSA expressly exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" from the Act's overtime pay requirement. Because Service Advisors primarily engage in selling vehicle service work to customers, many auto dealers have long-classified these employees as exempt. Prior court decisions from the Fourth and Fifth Circuits supported the auto dealers' interpretation under the "salesman" exemption. Nevertheless, in 2011, the Department changed its long-standing enforcement position and stated that it would no longer consider Service Advisors exempt from overtime under the "salesman" exemption, concluding that the exemption was limited "to salesmen who sell vehicles and partsmen and mechanics who service vehicles."

The Ninth Circuit ignored the prior decisions from the Fourth and Fifth Circuits, and instead chose to defer to the Department's new regulations, applying "*Chevron* deference" and stating that because the statute's language is unclear, the Department was entitled to deference in

interpreting and applying its own statute. Therefore, Service Advisors are not actually salesmen, and thus not exempt from the overtime pay requirements. In October 2015, Encino petitioned the Supreme Court to review the decision, resolve the Circuit split, and restore uniformity in the legal precedent regarding classification of Service Advisors.

When the Supreme Court agreed to hear Encino's petition earlier this year, many thought that the Court would provide final resolution as to whether Service Advisors are exempt. Unfortunately, the Court's opinion fails to do so. Instead, the Court vacated and remanded the case back to the Ninth Circuit to reconsider the issue without giving controlling weight to the Department's regulations.

Writing for the 6-2 majority, Justice Kennedy instructed that the FLSA "must be construed without placing controlling weight" on the Department's 2011 regulations because the agency issued those regulations without "reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved." This was unsurprising: the Department's efforts to defend the regulation went poorly at oral argument, as multiple Justices lambasted the Department for failing to offer any explanation for the regulatory change. Justices Breyer and Kagan were particularly critical on that front. The Court held it was not proper for the Ninth Circuit to defer to the Department's 2011 regulations. On remand, the Ninth Circuit has been instructed to interpret the FLSA overtime exemption for "salesmen," included Service Advisors, without placing controlling weight on the Department's regulations.

In his dissenting opinion, Justice Thomas conceded the majority's conclusion that the Court should not apply *Chevron* deference to the Department's position. However, Justice Thomas disagreed with the decision to remand to the Ninth Circuit. Instead, Justice Thomas reasoned that the Court had the responsibility to interpret the statute, and according to him, the statutory text is clear: overtime is not required for Service Advisors.

For now, the Supreme Court has refrained from deciding the ultimate issue. It is unclear how the Ninth Circuit will rule if it cannot defer to the Department's interpretations. However, with a vacated Ninth Circuit opinion, there is no longer a circuit split and the case law from the Fourth and Fifth Circuits favoring exempt status remains intact. The current legal landscape favors exempt status, but that could change if the Ninth Circuit holds that Service Advisors are not exempt, or if the Department issues new regulations with more careful reasoning. Therefore, auto dealerships should proceed with caution and partner with employment counsel in determining how to classify Service Advisors.

2. COURT REVIEWS EEOC TIMELINES AND ATTORNEYS' FEES

a. "Constructive Discharge" for Title VII Claims Tolling Begins Only When Employee Actually Resigns

In *Green v. Brennan*, the Supreme Court ruled that the statute of limitations for purposes of filing a claim alleging constructive discharge begins to run on the date that the employee resigns, as opposed to the last discriminatory act that prompts the resignation. This decision resolves a circuit split, and provides clarity to employees and employers on when an employee must file a timely "constructive discharge" discrimination charge.

A "constructive discharge" occurs when an employee establishes that discriminatory conduct makes the employee's working conditions so intolerable that a reasonable person in the employee's position would feel compelled to resign. This is an exception to the general rule that an employee who has resigned cannot claim discriminatory discharge under Title VII of the Civil Rights Act ("Title VII").

In *Green*, an African-American postmaster with the U.S. Postal Service ("USPS") was denied a promotion. Green alleged that the decision was based on his race and filed a formal internal complaint. Thereafter, Green alleged his supervisors retaliated against him and accused him of intentionally delaying mail delivery—a federal crime. Even after the USPS Inspector General reported that no further investigation was necessary, the supervisors continued to threaten Green with criminal charges. The supervisors eventually gave Green an ultimatum: either retire from USPS or accept a transfer to a new office and a much lower salary. Green signed a settlement agreement on December 16, 2009 agreeing to retire, and officially resigned on February 9, 2010.

On March 22, 2010, Green contacted the USPS Equal Employment Opportunity ("EEO") counselor. Green alleged that he was forced into the settlement, and his resignation was a constructive discharge. Under Title VII, a federal government employee must contact an EEO counselor within 45 days of the "matter alleged to be discriminatory." USPS successfully argued before the district court and Tenth Circuit Court of Appeals that the last "matter alleged to be discriminatory" was the entry of the settlement agreement on December 16, 96 days before Green contacted the EEO counselor. Therefore, Green's complaint was untimely. Before the Supreme Court, Green argued that the statute of limitations only began to run on February 9, when he officially resigned his employment.

The Supreme Court agreed with Green. By a 7-1 vote, the Court vacated the Tenth Circuit's ruling that the clock for a claim of constructive discharge starts running at the time of the employer's last alleged act of discrimination. Instead, Justice Sotomayor and the Court agreed with five other Circuit Courts that had previously held that when an employee alleges constructive discharge, the statute of limitations period starts *only* when an employee officially resigns and gives "definite notice" of his decision to leave.

The Court reaffirmed that the standard rule for determining the statute of limitations period is that the period starts when the plaintiff has a "complete and present cause of action." Because an employee must prove he or she actually resigned in order to establish constructive discharge, the Court reasoned that the limitations period for a constructive discharge claim cannot begin to run before an essential element of that claim—resignation—has even happened. Justice Sotomayor explained that the Court's ruling makes sense as a practical matter. A contrary rule might cause employees unnecessary procedural confusion: if the limitations period started to run before resignation, the employee might have to file a charge of discrimination, and then add a constructive discharge after he or she resigns. Notably, the Court's ruling overrules the Seventh Circuit (which has jurisdiction over federal courts in Illinois, Wisconsin, and Indiana), which, like the Tenth Circuit, had previously applied the "last discriminatory act" rule.

In his concurrence, Justice Alito argued the Court lost sight of a bedrock principle of Title VII cases in its pursuit of a bright-line limitations rule for constructive discharge claims: the principle that an act done with discriminatory intent must have occurred within the limitations period. In his dissent, Thomas argued that the majority's opinion ignored the text of Title VII entirely. Justice Thomas, therefore, would eliminate the "constructive discharge" exception altogether because only an employer's actions may constitute a "matter alleged to be discriminatory."

While *Green* concerned the application of the 45-day limitations period applicable to federal employees, the Court specifically noted in a footnote that the reasoning of the decision would apply to claims filed against private sector and state and local government employees, which generally have a 180 or 300-day limitations period. *Green* will undoubtedly make it more difficult to defend cases in which an employee alleges constructive discharge because this ruling effectively allows an employee to "resurrect" claims based on alleged discriminatory acts that occurred long before the employee's resignation.

b. Employers May Be Entitled to Attorneys' Fees under Title VII, Even if Parties Never Reach "The Merits"

In a helpful decision for employers, the Court in *CRST Van Expedited, Inc. v. EEOC* clarified that a defendant-employer does not necessarily need to prevail "on the merits" of a discrimination lawsuit to be entitled to attorneys' fees under Title VII. Title VII authorizes the award of attorneys' fees to a party who "prevails" in a discrimination or retaliation claim. This fee shifting provision applies to both employee plaintiffs and employer defendants. While courts routinely award fees to prevailing plaintiffs, courts have interpreted this provision to allow prevailing defendants to recover fees *only* in the rare case where the plaintiff's claim was frivolous or unreasonable.

In *CRST Van Expedited*, a truck driver for CRST, Monika Starke, filed an EEOC charge alleging sexual harassment. The EEOC filed suit on behalf of Starke and other similarly-situated employees. During discovery, the EEOC claimed that over 250 women had been subjected to unlawful harassment. However, the claims of all but 67 of the women were dismissed from the lawsuit during discovery for various reasons.

The district court then dismissed the claims of the remaining 67 women and, because the EEOC had failed to investigate their claims before filing suit, found the EEOC's actions had been unreasonable. The district court awarded CSRT more than $4 million in attorneys' fees, as the prevailing party. The Eighth Circuit affirmed the dismissal of the EEOC's claims on behalf of the 67 women, but reversed the award of attorneys' fees because it reinstated the claims of Starke and one other employee.

After Starke's claim settled and the claim of the other employee's was dismissed, the district court again awarded CRST attorneys' fees. On appeal, the Eighth Circuit reversed, finding that Title VII *only* allows the recovery of fees if a defendant prevails on the merits of the underlying lawsuit. The Eighth Circuit held that the district court's dismissal based on the EEOC's failure to satisfy its pre-suit investigation requirements was not a victory "on the merits," but rather, was on procedural grounds. Therefore, the district court had not definitively ruled that no unlawful discrimination or harassment occurred.

The Court was asked whether a defendant needed to win a favorable ruling on the merits of the claim in order to be considered a prevailing party. In a unanimous opinion, the Court said no, reversing the decision of the Eighth Circuit Court of Appeals. Writing for the Court, Justice

Kennedy reasoned that neither the text of Title VII nor the legislative goal in allowing defendants to recover fees in limited circumstances supported the conclusion that a defendant must "win on the merits" to recover fees.

The text of the statute allows an award of fees to a "prevailing party," regardless of the reason the party prevailed. Additionally, the Court noted that Congressional policy was to deter frivolous Title VII lawsuits which a defendant has won, regardless of the reason for the victory. Imposing an "on the merits" requirement, the Court found, would "undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available," such as those defendants who win on procedural grounds. The Court also noted that it was "common sense" that a defendant could win even if it did not win on the merits, because one way or another, the "plaintiff's challenge is rebuffed."

The Court refused to rule on the ultimate issue of whether CRST was in fact entitled to fees, and the appropriate amount of those fees. Instead, the court remanded the case to the Eighth Circuit to determine whether the EEOC's position was unreasonable. The Court's decision to defer on this ultimate issue appeared to be in line with its recent pattern of "minimalist" rulings in light of the vacancy created by Justice Scalia's death. However, it is worth noting that the decision was unanimous in favor of CRST.

This decision is certainly a victory for employers in that the Court has made clear that a defendant may be entitled to recover attorneys' fees even absent a victory on the merits if the EEOC does not adequately investigate or conciliate before filing suit. Prior to this decision, it was unclear whether the Court's 2015 ruling in *EEOC v. Mach Mining* would provide the needed "stick" for the EEOC to truly change its behavior during the conciliation process and actually provide information that is helpful for employers to assess whether engage in the process or risk expensive, protracted litigation. Although this remains an open question, the *CRST* decision will hopefully give the EEOC greater incentive to make its pre-suit investigation and conciliation efforts thorough and meaningful.

3. PUBLIC SECTOR EMPLOYEE RIGHTS: CLARIFIED AND SAVED, FOR NOW

a. Public Sector Unions Narrowly Avoid the Downfall of "Fair Share" Fees

In a critical win for public sector labor unions, an equally divided Supreme Court issued a one-sentence decision affirming the Ninth Circuit's decision in *Friedrichs v. California Teachers Association*, thereby upholding the constitutionality of state laws that allow unions to charge

public employees who opt out of union membership "fair share" fees. As we discussed earlier, although the decision was a 4-4 tie, the Court has already rejected the plaintiffs' petition for rehearing. Therefore, at least for now, fair share fees remain constitutional.

Under so-called "fair share" provisions, non-union member employees must pay their fair share—or rather, fees to the union that are proportionate to the union's costs associated with collective bargaining, contract administration, and other activities germane to the union's duties as collective bargaining representative. Fair share arrangements are designed to address the "free rider" problem by preventing non-union member employees from enjoying the benefits of collective bargaining without paying for those benefits. But because public employment implicates First Amendment interests, unions are prohibited from utilizing the fees paid by non-members for ideological or "political" purposes. California, as well as Illinois and nineteen other states, currently have laws that allow unions to collect fair share fees from public employees who opt out of union membership.

In several opinions in the past five years, the Supreme Court has issued decisions highly skeptical of fair share fees. Many predicted that in *Friedrichs* the Court's conservative majority would overturn *Abood v. Detroit Board of Education*, its 1977 decision holding that state laws may require public sector employees to pay fees to unions for the union's non-political work.

Based on the Court's oral arguments in *Friedrichs* and the Justices' questioning, a five-to-four decision finding fair share fees to be unconstitutional seemed highly likely. However, with the unexpected death of Justice Scalia, the Court was left with a 4-4 split and no tie-breaking vote. Thus, this highly contentious case was unceremoniously resolved in a single sentence leaving the decision of the Ninth Circuit upholding the California "fair share" fee law intact. The Court's ruling in *Friedrichs* leaves the Ninth Circuit decision in place, and *Abood* remains binding authority throughout the country.

There are currently several cases similar to *Friedrichs* that remain pending, including one in Illinois. Many expect the federal district court and subsequently the United States Court of Appeals for the Seventh Circuit to uphold the Illinois "fair share" law based on *Abood's* binding precedent. However, the question remains whether the Supreme Court will agree to hear another "fair share" fee case similar to *Friedrichs* in the near future, and that answer may depend on who is confirmed to fill Justice Scalia's vacancy on the Court.

b. Public Employers May Not Retaliate Against Employees for Engaging in Constitutionally-Protected Speech, Even When Their Action is Based on a Factual Error

In *Heffernan v. City of Paterson*, the Supreme Court held that a public employee could sue his employer for retaliation where the employer demoted him for engaging in constitutionally-protected political activity, even though the employer was factually mistaken about the employee's actual involvement in the activity.

Detective Jeffrey Heffernan, a veteran police officer in Paterson, New Jersey, was supervised by an individual appointed by the incumbent mayor as well as the chief of police, who likewise was appointed by the mayor. During the mayoral campaign, Heffernan's bedridden mother asked him to pick up and deliver to her a campaign yard sign supporting the mayor's opponent. Heffernan was also close personal friends with the mayoral challenger. Heffernan's fellow police officers viewed him holding the sign and speaking to staff at a distribution point for the opposing candidate. Word quickly spread among the force that Heffernan was campaigning against the mayor.

Heffernan was demoted the very next day for his perceived "overt involvement" in the opponent's campaign. In fact, Heffernan was not involved in the campaign at all, and thus the City's action was based on a factual mistake. The question before the Court was whether Heffernan, who was punished for constitutionally-protected political activity but did not actually engage in that activity, could maintain a claim alleging a violation of the First Amendment under 42 U.S.C. § 1983, the federal statute authorizing federal lawsuits against government actors for constitutional violations.

Reversing the Third Circuit Court of Appeals, the Court held that Heffernan could maintain his claim. The Court first reiterated well-established precedent that a public employer may not discharge or demote an employee for supporting a particular political candidate (with very limited exceptions not applicable here). The Court then focused on the motive for and effect of the City's actions, which it found were the same whether or not Heffernan had actually engaged in any political activity. As to effect, the City's demotion of Heffernan served to deter other employees from engaging in constitutionally-protected activity. "The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake," concluded Justice Stephen Breyer, writing for the 6-2 majority.

Thus, the Court held that when a public employer takes an adverse action against a public employee for the purpose of preventing the employee from engaging in protected political activity, the employee is entitled to challenge the action, even if the employer is mistaken about the employee's behavior.

In his dissent, Justice Thomas argued that the majority was mistaken because federal law does not provide a cause of action to plaintiffs whose constitutional rights have not been violated. For Justice Thomas, the mistake of fact was critical: Heffernan appeared to be engaged in protected speech, but was, in fact, merely carrying a sign for his mother. Justice Thomas summarized that Heffernan's claim was really "that the City tried to interfere with his constitutional rights and failed," which cannot form the basis of a Section 1983 claim.

During the upcoming election season, this case serves as an effective reminder to public employers to be mindful of the limitations on taking action against public employees for their political or other free-speech activity—whether real, or simply perceived.

4. COURT RULES ON BROAD RANGE OF EMPLOYEE BENEFITS CASES

a. Strict Tracing Requirements Limit ERISA Plans From Recovering Against Participants

In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, the Court held that an ERISA plan with a claim for equitable relief against a plan participant resulting from a settlement received by the participant from a third party must comply with strict tracing rules. These tracing rules require that the plan participant be in possession of the settlement funds or traceable assets purchased with the settlement funds at the time of an ERISA equitable lien claim in order for the plan to recover.

Robert Montanile was a participant in the National Elevator Industry Health Benefit Plan (the Plan"). The Plan's terms included a provision allowing the Plan to demand reimbursement from a participant who recovered money from a third party for medical expenses that the Plan had already paid for. Montanile was in a car accident which severely injured him and the Plan paid more than $120,000 for his medical care as a result of the accident. Subsequently, Montanile filed a negligence claim against the driver of the other vehicle involved in his car accident and a claim against his own car insurance for uninsured motorist benefits. Those claims settled for

$500,000. After attorney's fees, $240,000 remained of the settlement amount. Montanile's attorneys held that sum in a client trust account.

The Plan's trustees sought reimbursement from Montanile on behalf of the Plan, but Montanile's attorneys argued that the Plan was not entitled to recover. The parties attempted negotiations, but ultimately could not agree. This resulted in Montanile's attorney informing the trustees that he would distribute the settlement funds to Montanile unless the trustees objected within 14 days. The trustees did not respond until six month later when they filed suit against Montanile under Section 502(a)(3) of ERISA. In the meantime, Montanile's attorney had given Montanile the remainder of the settlement. In their suit, the trustees asked for an equitable lien on the settlement funds and any property in Montanile's possession, as well as an order enjoining him from dissipating the settlement funds. The district court granted summary judgment to the trustees and found that even if Montanile had spent all or some of his settlement funds, the Plan was still entitled to reimbursement from Montanile's general assets. The Court of Appeals for the Eleventh Circuit affirmed.

Section 502(a)(3) of ERISA allows plan fiduciaries, such as the Plan's trustees, to bring suit to obtain equitable relief to enforce the terms of the plan. The Court has, in other cases, defined "equitable relief" to be the categories of relief that were typically available in equity when the courts of law and equity were separate. If a remedy is "legal" it is not permissible under Section 502(a)(3). Determining whether a remedy is "legal" or "equitable" depends on the basis for the claim and the nature of the remedies. The basis for the Plan's claim in this case was equitable, which had been established by prior cases. However, the Court had not previously resolved whether the trustees' requested remedy of enforcement of an equitable lien against the defendant's general assets was equitable.

Based on prior case law, the Court found that had the Plan's trustees immediately sued to enforce a lien against the settlement funds then in Montanile's possession, the remedy would have been equitable and therefore permissible under Section 502(a)(3) of ERISA. Turning to traditional equity law, the Court noted that a plaintiff could ordinarily enforce an equitable lien only against specifically identifiable funds in the defendant's possession or against traceable items that the defendant purchased with the funds. The defendant's use of funds to purchase nontraceable items destroys an equitable lien. An example of a traceable item is a car. Food and travel expenditures are examples of nontraceable items. A plaintiff's claim for recovery out of a defendant's general assets is a legal remedy, not an equitable remedy. Thus, an ERISA plan cannot seek to enforce an equitable lien under Section 502(a)(3) of ERISA against a participant's general assets where the participant spent the entire settlement fund on nontraceable items.

Here, the lower courts had not determined whether Montanile kept his settlement funds separate from his general assets or if he spent the entire fund on nontraceable assets. As a result, the Court remanded the case for a determination on that point.

Justice Ginsburg wrote a brief dissenting opinion pointing out that the Court's holding has the "bizarre" result of allowing a participant to avoid reimbursing a plan by spending the settlement funds as quickly as possible on nontraceable items.

The primary takeaway from this case is that plan fiduciaries should promptly seek to enforce any claims that a plan may have for reimbursement. The key to enforcing a reimbursement provision may now depend on how quickly the plan's fiduciaries move.

b. Court Finds State Health Claim Reporting Law Preempted by ERISA

In *Gobeille v. Liberty Mutual Insurance Company*, the Court held that ERISA preempts a Vermont state law requiring certain entities to report health care information to a state agency for inclusion in a health care database.

ERISA contains a broad preemption clause which states that ERISA supersedes all state laws relating to employee benefit plans with the exception of state laws regulating health insurance. In practice, this generally means that states can regulate fully-insured health plans, but not self-insured health plans.

Liberty Mutual Insurance Company ("Liberty") sponsors a self-insured health plan for the benefit of its employees in all 50 states. Liberty engaged Blue Cross Blue Shield of Massachusetts, Inc. ("Blue Cross") to act as third-party administrator for its plan. The Vermont health care reporting law would have required Blue Cross to disclose certain eligibility and claims information regarding Liberty's Vermont employees. Worried that disclosure would violate its fiduciary duties, Liberty directed Blue Cross not to comply with the Vermont law and filed a suit seeking a declaration that the Vermont law is preempted by ERISA, as well as an injunction preventing Vermont from attempting to acquire information about Liberty's plan. The district court granted summary judgment in favor of Vermont, but the Second Circuit Court of Appeals reversed and concluded that the law was preempted by ERISA.

In a 6-2 ruling, the Court upheld the decision of the Second Circuit and found that Vermont's law is preempted by ERISA and therefore does not apply to self-insured health plans. The Court paid special attention to the fact that it would be burdensome for self-insured plans to be required

to comply with different reporting laws across the 50 states, especially in light of ERISA's already extensive reporting and disclosure requirements.

Justices Thomas and Breyer each wrote concurring opinions. Justice Thomas indicated in his concurring opinion that, although the opinion properly applied precedent, he questioned whether the ERISA's preemption clause is a valid exercise of congressional power. Justice Breyer noted in his concurrence the great burden of subjecting self-insured health plans to 50 or more possibly conflicting reporting requirements. Justice Breyer also noted that states could work with federal agencies, such as the Department of Labor, to gather the information they need.

Justice Ginsburg, joined by Justice Sotomayor, dissented. Justice Ginsburg noted that the Vermont law serves a different purpose from ERISA. ERISA governs the design and administration of employee benefit plans and the reporting requirements of ERISA are designed to ensure that plans actually provide promised benefits. By contrast, state data collection statutes are intended to improve health care by providing consumers, as well as government officials and researchers, with data. Furthermore, Justice Ginsburg stated, the fact that the Vermont law was not particularly burdensome weighed against ERISA preemption.

This decision will likely limit similar laws in states other than Vermont. However, the decision is unlikely to directly impact most plan sponsors, as Vermont's law and those similar to it primarily require health insurers to report information and do not directly regulate plan sponsors.

c. Court Clarifies the Scope of ERISA Fiduciary Obligations in Stock Drop Decision

In *Amgen v. Harris*, the Court weighed-in on so-called "stock drop" suits. To understand the holding in *Amgen*, it is necessary to explain the recent history of stock drop litigation. In recent years, plaintiffs' lawyers have brought numerous ERISA breach of fiduciary duty lawsuits against employers that offer employer stock funds in their 401(k) plans. These lawsuits are typically brought on behalf of plan participants who have lost money because the value of the company's stock has dropped. For many years, plaintiffs faced uphill battles in these stock-drop suits as most federal appellate courts adopted a "presumption of prudence" that favored plan fiduciaries' decisions with respect to the continued inclusion of company stock in 401(k) plans.

In 2014, however, in *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court weighed in on this issue and eliminated the presumption of prudence that favored plan fiduciaries. In that case, the Court held that fiduciaries responsible for administering employer stock funds are generally

subject to the same fiduciary standards as all other ERISA fiduciaries. The Court also directed lower courts to consider whether a complaint plausibly alleges that a prudent fiduciary in the same position "could not have concluded" that taking an alternative action with respect to the stock fund at issue "would do more harm than good." With *Dudenhoeffer*, the Supreme Court seemingly tilted the law in favor of plaintiffs in these stock drop suits.

In *Amgen v. Harris*, the Court issued a *per curiam* (unanimous) decision clarifying the standards it set out in *Dudenhoeffer*. The Court held that the Ninth Circuit in *Amgen* did not properly apply the new *Dudenhoeffer* standard because it failed to evaluate whether the plaintiffs' complaint plausibly alleged that a prudent fiduciary in the defendants' position could not have concluded that removing the Amgen stock fund from the list of investment options in the plan would cause more harm than good. Instead, the Ninth Circuit had evaluated whether it was plausible based on the pleadings that removing the Amgen stock fund would not cause harm to plan participants. The Court reviewed the complaint and found insufficient allegations to state a claim for breach of fiduciary duty under the *Dudenhoeffer* standard and remanded the case to allow the district court to determine whether the plaintiffs could amend their complaint.

For employer stock fund fiduciaries defending stock drop claims, this decision suggests that plaintiffs may continue to struggle to allege a plausible alternative action that plan fiduciaries should have taken, when, as the Court explained, a company's decision to halt trading in the stock fund could compound participant losses by sending a signal to the markets that the company itself views its own stock as a bad investment.

d. Court Declines to Rule on Merits of ACA Religious Accommodations Case

The Court declined to rule on the merits in a series of consolidated cases brought by religious non-profit entities challenging "religious accommodations" to the contraception mandate under the Patient Protection and Affordable Care Act ("ACA"). In *Zubik v. Burwell*, the Court issued a *per curiam* (unanimous) opinion remanding the case back to lower courts, while also vacating the prior judgments issued by those courts.

The ACA's contraception mandate generally requires employers with 50 or more full-time employees to offer contraceptive coverage and related services at no cost. Certain religious entities, such as churches, are completely exempt from this mandate. The Department of Health and Human Services ("HHS") has also provided accommodation schemes to certain other eligible entities that do not qualify for a complete exemption, but object to providing contraception services on religious grounds (such as colleges, universities, hospitals, and

religious charities). The accommodations permit such eligible entities to comply with the contraception mandate by arranging with an insurer or third-party administrator to provide contraceptive coverage at no cost to either the entity, or to its employees and beneficiaries. An entity that objects to the mandate must affirmatively opt into one of the available accommodations. The plaintiffs in *Zubik* contended that even opting into one of the offered accommodations violates their religious beliefs.

In its opinion, the Court noted that following oral argument, it asked the parties to brief whether contraceptive coverage could be provided through the petitioners' insurance companies without the petitioners actually opting into any of the accommodations. The parties agreed that it was possible for insured plans to provide contraceptive coverage without requiring the employers to actually provide notice that they are opting into an accommodation. As a result of these responses from the parties, the Court decided to vacate the judgments below and remand to the lower courts. However, Justice Sotomayor, joined by Justice Ginsburg, wrote a concurring opinion warning lower courts not to interpret the *per curiam* opinion as a signal of where the Court stands on the merits of the case.

The Court's decision to remand the case to lower courts, rather than resolve it on the merits, leaves some uncertainty regarding the available accommodations for religious entities that do not qualify for a complete exemption, and creates the possibility of conflicting opinions issued by lower courts in the future.

5. COURT UPHOLDS AFFIRMATIVE ACTION PROGRAM

In one of its final opinions of the term, *Fisher v. University of Texas* ("*Fisher II*"), the Supreme Court upheld the University of Texas at Austin's (the "University") consideration of race and ethnicity in its admissions process. The ruling has been characterized by some as a victory for affirmative action programs in college admissions, but others see the ruling as a temporary reprieve for one university. Justice Kennedy authored the opinion for the 4-3 majority of the Court, with Justice Kagan recusing herself. Once again, the death of Justice Scalia—who consistently and vigorously opposed affirmative action—proved crucial, as a tie would likely have led to reconsideration of the case when the Court's newest member is confirmed.

The University's admissions policies under review had two components. First, Texas law guarantees college admission to all students who graduate from a Texas high school in the top 10 percent of their class. According to the "Top Ten Percent Law," those students may choose to

attend any public university in Texas. Then, the University fills the remainder of its incoming freshman class by considering a student's SAT score and academic grades in high school, and the student's "Personal Achievement Index" (PAI). The PAI is based on a "holistic review" of the applicant's entrance essays, work experience, community service, and other "special characteristics" that might give the admissions committee insight into a student's background, including the applicant's race. In this way, race is "but a 'factor of a factor of a factor' in the holistic-review calculus."

Fisher II is the Court's second examination of the University's admissions policies. Abigail Fisher was denied admission to the 2008 freshman class. Fisher filed suit, alleging that the University's consideration of race disadvantaged her and other white applicants in violation of the Equal Protection Clause. After the district court and Fifth Circuit Court of Appeals ruled in favor of the University, the Supreme Court vacated the judgment in *Fisher v. University of Tex. at Austin* (*Fisher I*). The Court remanded the case, so the University's program could be evaluated under strict scrutiny. Strict scrutiny requires a government actor making a decision based on race to identify a compelling government interest and prove that the race-based test or criteria is "narrowly tailored" to achieve that interest. On remand, the Fifth Circuit again affirmed the entry of summary judgment for the University, and found that the University's plan survived strict scrutiny.

The Court agreed, and held that the University's carefully calibrated system survived strict scrutiny. Writing for the majority, Justice Kennedy reasoned that the University had articulated several compelling interests for including race as one factor in its admissions decisions: ending stereotypes, promoting "cross-racial understanding," preparing students for "an increasingly diverse workforce and society," and cultivating leaders with "legitimacy in the eyes of the citizenry." But Justice Kennedy also reiterated that, those interests notwithstanding, a university must prove that a "nonracial approach" would not promote these interests "about as well and at tolerable administrative expense" as an application process that does consider race.

Justice Kennedy, as the current "swing vote" on the Court, reiterated his skepticism regarding the long-term viability of affirmative action. He cautioned that universities and colleges, including Texas, have "a continuing obligation" to periodically reassess their admission programs' constitutionality in light of each school's experience and the data each school gathers. Each school must also narrowly tailor its approach to ensure that race plays no greater role than is necessary to meet its compelling interests. In other words, the Court's opinion should not be construed as a blanket, never-ending authorization to consider race in admissions.

In a blistering dissent which he read from the bench, Justice Alito accused Justice Kennedy and the Court of issuing a decision wholly inconsistent with *Fisher I*. First, Justice Alito argued that the University "has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve." Instead, Justice Alito claimed the University was requesting the kind of deference the Court rejected in *Fisher I*, and articulating justifications that are "shifting, unpersuasive, and, at times, less than candid." In conclusion, Justice Alito called the decision "affirmative action gone berserk."

For now, the use of race as an admissions criterion has been preserved. However, universities and colleges must ensure that the use of race is a "factor of a factor of a factor," and must be prepared to defend their specific practices and policies under strict scrutiny. Although *Fisher* does not expressly apply to employers, its potential ramifications for employer affirmative-action and diversity programs are significant. In particular, federal contractors' affirmative action programs are, for now, constitutional under the Equal Protection Clause. But under Title VII, private employers must continue to insulate their decisions from racial considerations, even when pursuing diversity and an inclusive workplace.

6. DIVIDED COURT ISSUES NON-PRECEDENTIAL ORDER REGARDING EXECUTIVE ACTIONS ON IMMIGRATION

In a non-precedential decision that left many legal observers and immigration advocates unsatisfied, the Supreme Court split 4-4 and issued a *per curiam*, non-precedential order affirming the decision by the Fifth Circuit Court of Appeals in *U.S. v. Texas*. This case arises out of the appellate court's decision to uphold a preliminary injunction against the enforcement of the Deferred Action for Parental Accountability ("DAPA") and expanded Deferred Action for Childhood Arrivals ("DACA") programs that President Obama announced in November 2014. These programs would have provided temporary relief from deportation and work authorization to undocumented immigrants meeting certain guidelines, including those who are parents of U.S. citizens or lawful permanent residents and those who entered the United States as youths.

The Supreme Court's decision does not impact the original, unexpanded version of the DACA program that President Obama announced in 2012, which remains in effect. The 2012 program is limited to certain undocumented individuals who entered the United States as children, were under the age of 31 as of June 15, 2012, have continuously resided in the U.S. since June 15, 2007, can demonstrate that they do not have a criminal record, and are in school, have completed high school or a GED certificate, or are honorably discharged veterans of the Coast Guard or

Armed Forces. The expanded DACA program differed from the original DACA program in two important ways:

1) It would have eliminated the upper age cap (31) and covered qualifying individuals who entered the U.S. and maintained continuous residence since Jan. 1, 2010; and

2) It would have increased deferred action and work authorization from 2 to 3 years.

A group of 26 states, led by Texas as the lead plaintiff, challenged the DAPA and extended DACA programs in the federal district court for the Southern District of Texas before they could be implemented, contending that they exceeded the scope of the President's authority under the U.S. Constitution and violated the Administrative Procedures Act. A threshold issue in the case was whether the states had standing to challenge these programs. The states contended that they would suffer an economic injury because of the subsidies that Texas provides to individuals seeking driver's licenses. In February 2015, an injunction was issued, and the U.S. Court of Appeals for the Fifth Circuit upheld this injunction in November 2015. The Supreme Court agreed to hear this case in January 2016.

The Supreme Court affirmed the lower court's decision. The decision, a one-page order without an opinion, underscores the fact that it has no precedential value. There remains a possibility of lawsuits in other jurisdictions outside of the Fifth Circuit seeking to compel enactment of the programs. Such lawsuits could, foreseeably, result in different findings about the legality of the programs in different circuit courts. Additionally, and while far from certain, the lack of precedent could result in the same issue being presented to the Supreme Court again if a future President decides to reenact the programs. As a practical matter, however, this decision will likely prevent the enactment of these programs during the remainder of President Obama's term, and will ensure that the issue of immigration remains squarely in the middle of the current Presidential election campaign.

Looking Ahead: The 2016-2017 Term

The Supreme Court opens its next Term on October 3, 2016. To date, the Court has been slow to grant petitions for *certiorari*, possibly a byproduct of Justice Scalia's death. As a result, the Court has only agreed to review one major labor case which we expect may impact employers, and declined *certiorari* in another critical case involving a Department of Labor regulation:

- ***SW General v. NLRB,* No 15-1251**: The Supreme Court will once again consider the President's authority to make bureaucratic appointments. This time, the Court will review whether the Federal Vacancy Reform Act (the "Act") gives the President's "acting" appointee the power to serve in that position until confirmed by the Senate.

  President Obama appointed Lafe Solomon to serve as "acting" General Counsel to the National Labor Relations Board ("NLRB") in June 2010, and then officially nominated him to be General Counsel on January 5, 2011. But the Senate rejected Solomon's nomination, and ultimately, Richard Griffin was confirmed as General Counsel and began serving on November 4, 2013. The issue before the Court is whether Solomon became ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel. The D.C. Circuit Court of Appeals held that the Solomon served in violation of the Act from January 5, 2011 to November 4, 2013, thereby voiding the NLRB's issuance of an unfair labor practice complaint against SW General. However, the district court specifically noted that it did not expect to "retroactively undermine a host of NLRB decisions" as was the case in *Noel Canning v. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

- ***Home Care Ass'n of America v. Weil* (Petition Denied)**: In a surprising denial of *certiorari*, the Supreme Court declined to hear *Home Care Association of America v. Weil.* In 2013, the Department of Labor issued new regulations that extended minimum wage and overtime protections to almost 2 million domestic workers providing either companionship services or live-in care for the elderly, ill, or disabled—including those technically employed by a third party agency, not the recipient of the services. As in *Encino*, this regulatory change was a substantial departure from the Department's previous interpretations. However, the D.C. Circuit Court of Appeals held that the Department's interpretation "is grounded in a reasonable interpretation of the statute and is neither arbitrary nor capricious." Accordingly, the employee-friendly interpretation will stand, and home care workers will be entitled to overtime.

Cases such as *U.S. v. Texas* which produced a 4-4 deadlock this Term may also be reheard when a ninth Justice is confirmed, presumably under the next presidential administration.

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