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PREVENTIVE STRATEGIES

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Employment, Labor, Benefits and Immigration Law for Employers

In this Issue

Supreme Court Round-Up

The U.S. Supreme Court term that ended June 2016 included a number of decisions important to workplace law. In this issue, we continue our coverage of the 2015-2016 term. (Fuller discussion and analysis of all decisions reported here may be found at www.jacksonlewis.com. For the first part of our two-part coverage, see Preventive Strategies, Second Quarter 2016.)

With just eight justices on the Court after the death of Justice Antonin Scalia, several decisions resulted in a 4-4 tie vote, which left intact the lower court decisions from which the appeals to the Supreme Court arose. Chief among those were United States v. Texas, which challenged the Obama Administration's executive action on undocumented immigrants, and Zubik v. Burwell, the latest challenge to the Affordable Care Act by entities with religious objections to providing health insurance coverage for contraceptive health care.

Supreme Court Tie Blocks Expansion of DACA and Creation of DAPA

Disappointing many, the U.S. Supreme Court has tied 4-4 in a case appealing a nationwide injunction on the Obama Administration's executive action expanding the Deferred Action for Childhood Arrivals (DACA) and creating the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs. *United States v. Texas*, No. 15-674 (June 23, 2016). The split leaves the district court injunction in place pending further action in the suit.

The Obama Administration used executive action to create DACA in 2012,

giving certain undocumented immigrants who arrived as minors the ability to defer deportation and receive employment authorization. In 2014, the Administration introduced DAPA, which would have allowed parents of U.S. citizens or lawful permanent residents (green card holders) to apply for deferred deportation and employment authorization.

INSIGHT

The decision will have a far-reaching and adverse impact on millions of undocumented immigrants. The Supreme Court deadlock means the appeals court ruling stands and continues to block the programs. As a result, up to five million undocumented immigrants may not be allowed legal work authorization in the United States or be protected from deportation. The Supreme Court's decision strongly indicates, at least for the immediate future, that further executive action on immigration on a widespread basis may be difficult and that immigration reform will have to be addressed by Congress, if at all, a view shared by many opponents of the President's actions.

The case is United States v. Texas*, No. 15-674 (June 23, 2016).*

Court Decides Not to Decide on Latest Challenge to ACA Contraceptive Coverage

The Supreme Court in a unanimous opinion remanded *Zubik v. Burwell* — and the six cases consolidated with *Zubik* — back to the Courts of Appeals to rule on the Affordable Care Act's contraceptive opt-out notice provisions. The Court directed the lower courts to consider new information presented in the parties' post-oral argument briefs ordered by the Court on March 29. The petitioners in each of these cases are religiously-affiliated nonprofit organizations which are challenging the requirement that notice be given to the government of religious objections to providing no-cost contraceptive coverage under employee health insurance plans, as required by the ACA and its regulations.

In the ruling, the Court stated that the parties had agreed in their briefs to a regulatory compromise solution originally suggested by the Court in its March 29 order. The high court's workaround would permit an objecting religious nonprofit employer to contract with its insurance provider for a health insurance plan that excludes contraceptives. The insurer, in turn, would provide the contraceptive coverage directly to the nonprofit organization's employees, with no further action or notice required from the organization.

The case is Zubik v. Burwell*, No. 14-1418 (May 16, 2016).*

Continuing the national discussion on how welcoming institutions of higher education are to racial minorities, the Supreme Court again reviewed the admissions policy at a major university in light of the proper boundaries for considering race as a factor in the admissions process. In a 4-3 decision, the Court has helped set a framework within which colleges and universities can work to provide their students with an educationally diverse student body — a component that has been found by the courts to be an educational benefit.

High Court Finds Race-Conscious Admissions Process Constitutional

In the 4-3 decision, the Supreme Court upheld the University of Texas's race-conscious admissions program. The decision addressed only UT's specific admissions policy in effect when the petitioner was denied admission in 2008, but for the third time in four decades, the Court confirms that race-conscious affirmative action admissions programs are not categorically unconstitutional. Rather, as set out in a pair of 2003 decisions (*Gratz v. Bollinger,* 539 U.S. 306, and *Grutter v. Bollinger,* 539 U.S. 306), narrowly tailored race-conscious admissions policies, as in this case, may survive a "strict scrutiny" review under the U.S. Constitution. *Fisher v. University of Texas at Austin*, No. 14-981 (June 23, 2016).

Justice Anthony Kennedy, writing for the majority, explicitly distinguished between an institution's decision to pursue educational benefits of student body diversity, which is due considerable judicial deference, and the question of whether an institution's particular program is narrowly tailored to achieve that goal, which is due no judicial deference. Applying this standard, Justice Kennedy — siding with the institution for the first time in such cases — found the program to be constitutional based on the University's ability to show that it had narrowly tailored the program to suit its compelling interest of providing its students with the educational benefits of a diverse student body. With this holding, the University of Texas's race-conscious admissions policy, in effect since 2004, survived on its second trip to the Supreme Court.

The case is Fisher v. University of Texas at Austin*, No. 14-981 (June 23, 2016).*

Several of the Supreme Court's workplace law decisions involved the application of federal statutes and their implementing regulations, including one on the degree of deference owed to a federal agency in promulgating those regulations. One case over who can sue for violations of the Fair Credit Reporting Act arose in the context of consumer rights but has application in the employment arena.

Supreme Court Unanimously Backs 'Implied Certification' Liability under False Claims Act

Federal contractors may be subject to liability under the federal False Claims Act for violating regulatory requirements not expressly stated in their contracts. The Supreme Court unanimously adopted the "implied certification" theory of liability under the FCA, under which companies implicitly certify compliance with applicable regulations when they seek payment from the federal government. However, the

Court also set a relatively high standard for establishing liability under the Act in clarifying when purported misstatements are "material" to government payment (a necessary element of an FCA claim).

The "implied certification" theory of liability under the FCA substantially increases the potential exposure for federal contractors under the FCA. However,

the Court tempered its decision by criticizing the government's overly broad view of the FCA definition of "materiality." The statute defines materiality as something "having a natural tendency to influence, or be capable of influencing" government payment decisions. That definition is a far cry, the Court said, from the standard adopted by the government and the First Circuit court: "that any statutory, regulatory or contractual violation is material so long as the defendant knows that the government would be entitled to refuse payment were it aware of the violation." While fully adopting the "implied certification" theory, the decision underscores the importance of maintaining compliance with all federal rules and regulations governing any business. Companies can use a comprehensive and well-implemented compliance program to demonstrate that, even if unlawful conduct occurred, it was carried out without company knowledge or acquiescence.

The case is Universal Health Services v. Escobar*, No. 15-7 (June 16, 2016).*

Supreme Court Rejects Deference to DOL Regulation on FLSA Exemption Due to Failure to Provide Reasoned Explanation for Change

As in life, petitioners to the U.S. Supreme Court do not always get what they asked for. In a case that promised to answer the question of whether automobile dealership "service advisors" are exempt from overtime pay under the Fair Labor Standards Act, the outcome did not provide the answer. In agreeing to resolve a split among the federal appeals courts over whether service advisors are entitled to overtime pay, the Court decided to skirt the issue. Likely due to an inability to find a majority opinion – again, the dilemma of a tie vote posed by an eight-member Court – automobile dealers face continuing uncertainty as to the exempt status of service advisers.

Instead of answering the fundamental question of the exempt status of the service advisers, the Supreme Court identified a separate error by the U.S. Court of Appeals for the Ninth Circuit (San Francisco) on which all of the Justices could agree: the Ninth Circuit held service advisors were entitled to overtime by deferring to a 2011 Department of Labor regulation. That regulation reversed the position of the DOL and was issued without any reasoned explanation for the change. Under those circumstances, the Court held, the regulation was arbitrary and capricious and entitled to no deference. On that basis, the Court remanded the case to the Ninth Circuit to determine, in the first instance (without deference to the DOL regulation), whether the exemption applied.

The case is Encino Motorcars, LLC v. Navarro*, No. 15-415 (June 20, 2016).*

'Actual Injury' Needed to Establish Standing to Sue for Violations of Fair Credit Reporting Act

In another case involving the application of a federal statute, but outside the employment context, the Supreme Court ruled 6-2 that plaintiffs must show they suffered from an actual injury, not just a "bare procedural violation," in order to sue in federal court for violations of the Fair Credit Reporting Act. The Court vacated the decision of the U.S. Court of Appeals for the Ninth Circuit and remanded the case for consideration of whether the plaintiff had adequately alleged injury-in-fact under the proper legal standard articulated by the Supreme Court.

The alleged violator in this case was an internet "people search engine," which had posted inaccurate data about the plaintiff. Based only on the inaccurate post-

ing, without allegations of any further injury to him, the plaintiff charged in a class action that the website had violated his rights under the FCRA. Holding the plaintiff did not have standing to sue for violation of the FCRA, the Court said that a showing of actual injury must be both "concrete *and* particularized." A concrete injury must be "de facto" — *i.e.,* "it must actually exist," it must be "real" and not "abstract."

INSIGHT

Although this case involved the FCRA obligations of consumer reporting agencies, its holding and rationale are applicable directly to the issues raised in FCRA class actions in the employment context. These class actions often involve plaintiffs (job applicants and employees) who have not suffered actual injury by the alleged FCRA violation. In what businesses and FCRA practitioners likely will consider the key section of the opinion, the Court stated, "A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm."

The case is Spokeo, Inc. v. Robins, *No. 13-1339 (May 16, 2016).*

Constructive Discharge Limitations Period Begins with Notice of Resignation

The U.S. Supreme Court has ruled that the statute of limitations for an employee's Title VII constructive discharge claim begins on the date of the employee's notice of resignation. Federal anti-discrimination statutes specifically prohibit discharging an employee based on a protected status, *e.g.,* race, gender, disability, and age. The courts have ruled the prohibition extends to claims of "constructive discharge," where the employee resigns, but shows the working conditions were so discriminatory and intolerable that a reasonable person would have felt compelled to resign.

Determining when the period for filing a constructive discharge claim begins was at the heart of this case involving a federal employee of the Postal Service. Three federal appeals courts, including the U.S. Court of Appeals for the Tenth Circuit affirming the dismissal of the employee's claim, held the limitations period begins to run for a constructive-discharge claim after the employer's last discriminatory act. However, other courts of appeals had held the limitations period for a constructive discharge claim does not begin to run until the employee actually resigns.

In a 7-1 decision, the Supreme Court found that the limitations period commences only after the occurrence of both: 1) discrimination by the employer to the point a reasonable person would resign; and 2) actual resignation. Therefore, only after an employee gives notice of resignation does the limitations period ordinarily begin to run.

INSIGHT

Although the Court's calculations in this case were for constructive-discharge claims in the context of the 45-day regulatory deadline that federal employees face in reporting discrimination to an agency EEO counselor, the 45-day requirement for federal employees has an "analog" for private sector Title VII employees: the 180/300 day deadline to file a charge of discrimination with the Equal Employment Opportunity Commission after an "alleged unlawful employment practice occurred."

The case is Green v. Brennan, *No. 14-613 (May 23, 2016).*

Wage and Hour Practice Lead Jeffrey Brecher on ...

Complying with New Exempt Employee Salary Test, Threat of Collective Actions, and Tangle of Wage and Hour Laws

After two years in the making, the U.S. Department of Labor has updated its rule under the Fair Labor Standards Act for exempting employees from the requirement they be paid overtime pay for work in excess of 40 hours weekly. The "salary basis" test under the "white collar" exemptions has increased from $455 to $913 weekly, raising the threshold salary to $47,476 annually over which employees are not entitled to overtime pay.

Jeffrey Brecher, Wage and Hour Practice Lead, discusses the impact of this new rule and compliance options for employers. Jeff is a Principal in the Long Island, New York, office of Jackson Lewis, and has litigated hundreds of cases, defending management at arbitration, before state and federal administrative agencies, and at trial. He regularly advises clients on compliance with various state and federal laws affecting the workplace, and he has significant experience representing employers in national collective and class actions under the Fair Labor Standards Act and state law for wage-related claims. Jeff has been interviewed by a variety of national media outlets on the new salary basis rule, see Jeffrey W. Brecher in the News.

What are some of the most common issues your clients have dealt with in the past several years?

Class and "collective" actions under the Fair Labor Standards Act and state law continue to be a source of significant risk for clients. These actions typically allege improper classification of employees as "exempt" from overtime pay under the FLSA or failure to pay non-exempt employees for work "off-the-clock." Litigation is testing what activity constitutes "work" and therefore must be included in determining total hours worked for purposes of calculating accurate payment, including overtime. Another common problem, especially for multi-state employers, is compliance with state-enacted "wage-theft" laws requiring employers to provide notice regarding employee wages and requiring employers to provide certain information on paystubs.

What issues have been the most troublesome for employers?

Currently, the biggest issue facing employers is how to address the Department of Labor's Final Rule amending the white-collar exemptions, which is scheduled to go into effect on December 1, 2016. The Final Rule more than doubles the salary level required for the white-collar exemptions (*i.e.*, executive, administrative, and professional) from $23,660 to $47,476. Many employers simply cannot absorb this cost and must determine how to adjust to the Final Rule, including reclassifying employees as non-exempt. There are practical as well as legal issues that result from reclassification, including potential employee-morale issues and the challenges of managing a newly non-exempt workforce that previously had been treated as exempt.

How have attorneys in your practice area handled the big issues and how would you evaluate the outcomes from the clients' perspective?

Lawyers in the Wage & Hour Practice Group routinely handle significant issues that affect company-wide operations. Our work include advice on structuring employee compensation, classification of employees under the FLSA as exempt or non-exempt, or defense of significant class litigation challenging a particular

pay practice, classification structure, and regulatory compliance. Attorneys representing employees need only locate one flaw in a client's wage and hour policies and practice to bring a claim on behalf of numerous employees; our practice group is responsible for making sure a client's entire wage and hour ship is seaworthy, a challenging prospect particularly with multi-state employers.

What are the major differences between the DOL's 2004 rule on overtime exemptions currently in effect and the Final Rule? How will those changes affect employers and what should they be doing to prepare?

Employers were very anxious about the 2015 proposed rule because it sought comments on whether changes should be made to the duties test for the white-collar exemptions. Ultimately, the DOL did not modify the duties test for the exemptions, only the salary level requirement.

The salary level requirement for the exemptions is increasing for both the standard white-collar exemptions (to $47,476) and the white-collar exemptions as they apply to highly compensated employees (increasing to $134,004). One of the most significant changes is that for the first time in the history of the FLSA, the salary levels will increase automatically every three years. After the initial increase, the next change is scheduled for January 1, 2020. Previously, changes occurred infrequently; the last increase to the salary level was in 2004, more than 10 years ago, and before that, it was in 1975.

Many employers are in the process of preparing for the changes — identifying which employees no longer meet the salary level requirement and determining their options for addressing the Final Rule. Those options include increasing salary levels, reclassifying affected workers as non-exempt, or avoiding overtime work through restructuring positions or hiring additional workers.

Are there any other legal developments — in the works or being discussed — that you see affecting employers either positively or negatively?

One of the most significant developments concerns the enforceability of workplace arbitration agreements with class action waivers. The U.S. Supreme Court has upheld arbitration agreements consistently, including those with class waivers. Nonetheless, in a recent decision in an FLSA case, the U.S. Court of Appeals for the Seventh Circuit, in Chicago, has held an arbitration agreement with a class action waiver was unenforceable. While several other federal appeals courts have rejected this holding, the issue will likely be addressed soon by the Supreme Court, and the decision could affect employers significantly.

What steps can an employer take to ensure compliance with wage/hour laws?

The network of laws governing the payment of wages is changing constantly. States and municipalities frequently pass legislation increasing the minimum wage, adding wage payment notification requirements, and increasing penalties for failing to pay minimum wages, overtime, or commissions properly. Case law also is changing rapidly, with attorneys who represent employees pushing the boundaries of applicable laws and the concept of what is compensable work. Employers should incorporate wage/hour compliance as part of their yearly compliance efforts, including a review of employee classifications and state and local law requirements. One easy way to keep abreast of important changes is to sign up for our practice area blog, Wage and Hour Law Update, at www.wageandhourlawupdate.com.

Jackson Lewis News

Jackson Lewis Named a 'Most Recommended Law Firm'

We are pleased to announce that the Firm has again been included in The BTI Consulting Group's "Most Recommended Law Firms." Jackson Lewis is one of only 25 firms that have been included for more than five years in a row in the report, which lists the law firms corporate counsel are most willing to bet their reputation on and recommend to their peers. "Jackson Lewis has received a multitude of accolades over the last several years, but knowing we are a firm that our clients would recommend to their peers is the ultimate compliment," said Firm Chairman **Vincent A. Cino**. For more information on this year's rankings, visit http://www.bticonsulting.com/themadclientist/2016/6/8/the-most-recommended-law-firms-2016.

Jackson Lewis and Its Attorneys Ranked in 2016 Chambers USA Guide

We are pleased to announce the Firm has been recognized in the 2016 edition of Chambers USA: America's Leading Lawyers for Business, a prestigious annual guide which ranks leading law firms in the United States. In addition to the Firm's national and statewide rankings, Jackson Lewis attorneys earned individual recognition as **Leaders in Their Field** and **Recognized Practitioners**. For a list of those individually recognized, click here.

Jackson Lewis Earns Top-Tier Ranking in 2016 *Legal 500*

We are pleased to announce that the Firm has been recommended as a Top-Tier Firm in the **Labor and Employment – Labor-Management Relations** category in the 2016 edition of *The Legal 500 United States*. The Firm was also recommended in the **Immigration, Labor and Employment Disputes – Defense** and **Workplace and Employment Counseling** sections of the Labor and Employment category. In addition, attorneys throughout the Firm were recommended in various practice groups (for a listing of all recommended attorneys in the respective practice groups, click here). *The Legal 500 United States* is an independent guide providing comprehensive coverage on legal services and is widely referenced for its definitive judgment of law firm capabilities.

Five Jackson Lewis Attorneys Recognized As 2016 'Most Powerful Employment Attorneys'

Congratulations to Firm Chairman Vincent A. Cino and Principals Neil Dishman, Maurice G. Jenkins, René E. Thorne, and Richard F. Vitarelli, who have been named to *Human Resource Executive* magazine's "Most Powerful Employment Attorneys" list for 2016. Produced in partnership with Lawdragon, the list recognizes employment lawyers who stand out for their ability to guide employers through constantly evolving workplace laws. Selections are based on editorial research completed by *Human Resource Executive* and Lawdragon, as well as input from clients, peers, colleagues, and judges. Attorneys are assessed on experience, career accomplishments, professional leadership, client recommendations, and impact within his or her firm and on the legal profession.

New York's Leading Government Relations, Health Care and Compliance Practices Change Law Firms

New York's largest government relations practice, along with major health care and compliance practices, are changing law firms. After a successful 21-year affiliation, the practice areas will be leaving Wilson Elser and joining Jackson Lewis P.C. in an amicable transition, as of September 1.

The move means a significant expansion of Jackson Lewis' Albany presence, which opened in September 2008.

Thank You, Roger Kaplan

Since the mid-1980s, Long Island Principal Roger Kaplan has played a leading role in this pioneering publication, now known as "*Preventive Strategies*." With a busy labor and employment law practice, and a concentration on workplace safety law and regulations, Roger consistently has brought to the Jackson Lewis flagship publication his knowledge, expertise, scholarship, and a keen talent for writing and editing developments in workplace law in a style understandable to lawyers and business people alike.

After nearly 47 years of practice with Jackson Lewis, Roger is retiring. His voice and his humor will be missed, and we thank him for establishing and maintaining a level of integrity and insight that has set the bar for all of the Firm's publications and website content.

Best wishes, Roger, and congratulations on a long and distinguished career with Jackson Lewis!

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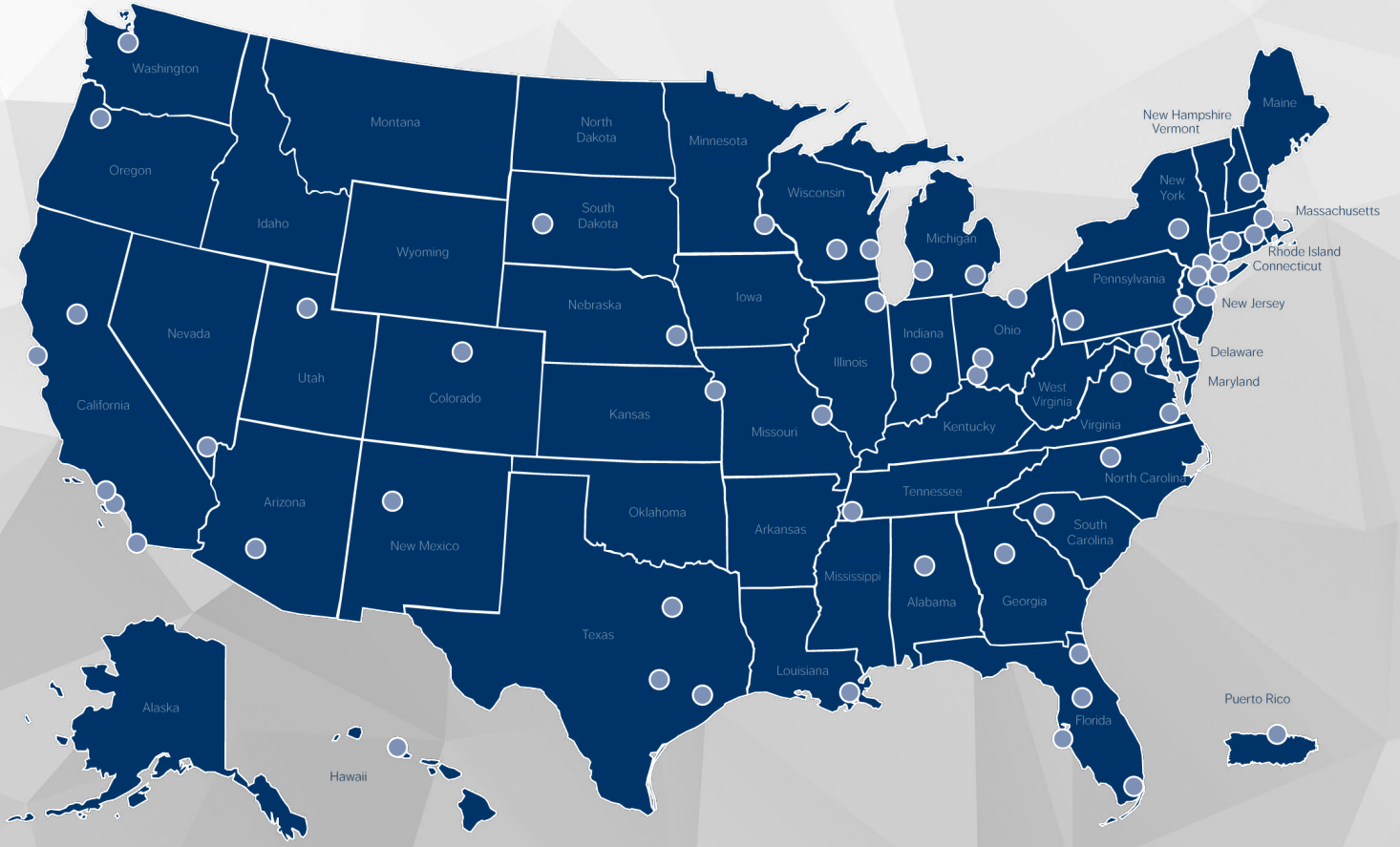

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With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

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