U.S. Supreme Court Round Up – 2016-2017

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The U.S. Supreme Court term that ended June 2017 included a number of decisions important to workplace law, as well as the confirmation of Justice Neil Gorsuch. Although functioning with only eight justices for most of the 2016-2017 term, the Court managed to achieve a strong consensus in each of its employment-related rulings.

However, the Trump Administration's complete reversal of several Obama Administration policies disrupted some highly anticipated decisions, which may be resolved by the Court in the next term. While the addition of Justice Gorsuch to the Court had little impact on this term, it likely will make a significant difference in the Court's future employment-related decisions. Therefore, with regard to employment law, this term might best be described as the calm before an uncertain future.

The Court produced nearly unanimous decisions, and maintained predictability and stability, in important areas such as class-action lawsuits, immigration, and ERISA. In these cases, the justices agreed that the letter of the law and the clear Congressional intent when passing the law weighed in favor of maintaining the status quo.

Class-Actions: Plaintiffs cannot use voluntary-dismissal tactic to appeal adverse ruling on class certification

The U.S. Supreme Court has ruled that plaintiffs may not voluntarily dismiss their class action lawsuit "with prejudice" in order to immediately appeal the denial of class certification, while simultaneously reserving the right to re-file their claim if the appellate court ruled in favor of certification. *Microsoft Corp. v. Baker,* No. 15-457 (June 12, 2017).

The U.S. Court of Appeals for the Ninth Circuit had sided with the plaintiffs and held that, "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class certification denial. The Supreme Court unanimously rejected the Ninth Circuit's reasoning, and reversed and remanded the case.

Writing for a court majority, Justice Ruth Bader Ginsburg stressed that the final judgment rule (now codified in 28 U.S.C. § 1291) preserves the proper balance between trial and appellate courts, minimizes harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. The majority found that plaintiffs' voluntary-dismissal tactic did not give rise to a "final decision" under § 1291 because the tactic:

1. "invites protracted litigation and piecemeal appeals" that undermine the final judgment rule and the process Congress established for refining that rule and for determining when non-final orders may be immediately appealed;
2. severely subverts Rule 23(f)'s careful calibration regarding class certification and class action litigation;
3. permits only plaintiffs (and never defendants) to force an immediate appeal of an adverse certification ruling; and
4. encourages plaintiffs with weak claims to dismiss their cases and immediately appeal, in the hopes of obtaining additional settlement leverage.

Because the appellate court lacked jurisdiction under § 1291, the case was reversed and remanded.

The concurrence, led by Justice Clarence Thomas, agreed with the majority that the Court of Appeals lacked jurisdiction over the plaintiffs' appeal, but would have grounded that conclusion in Article III of the Constitution and the fact that the plaintiffs' voluntary dismissal with prejudice ended any case and controversy between the parties.

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While this decision is not surprising, a different outcome would have had severe consequences for companies defending against class actions.

Immigration: Gender-based distinctions in immigration law violate equal protection

The Supreme Court also ruled unanimously that a federal citizenship statute setting different residency requirements for U.S. citizen fathers and mothers seeking to transmit birthright citizenship to their non-marital children born outside the U.S. violates the Equal Protection Clause of the Constitution. *Sessions v. Morales-Santana,* No. 15-1191 (June 12, 2017).

In this case, the plaintiff sought to avoid deportation by arguing that he would be considered a U.S. citizen if the Immigration and Nationality Act ("INA") treated men and women equally. At the time of the plaintiff's birth, the INA provided that a child born outside the U.S. to one U.S. citizen parent is a U.S. citizen, provided that the U.S. citizen parent lived in the U.S. for at least 10 years, and five of those years were after the age of 14. However, 8 U.S.C. § 1409(c) made an exception for unwed U.S. citizen mothers, requiring that they only live in the U.S. for one year after the age of 14.

The Court agreed that § 1409(c) made unconstitutional distinctions based on gender. It said that "[p]rescribing one rule for mothers, another for fathers" is unconstitutional unless there is an "exceedingly persuasive justification." The Court found no such justification, opining that the disparate rules had been based on stereotypical assumptions about women's roles as caregivers. The Court then struck § 1409(c) as unconstitutional, rejecting the plaintiff's invitation to force the general rule to conform with the exception, as inconsistent with Congress' intent when passing the INA. As a result, the plaintiff won the legal argument, but failed to benefit from it.

Thousands of individuals born outside of the U.S. prior to 1986 to unwed U.S.-citizen fathers might have been granted U.S. citizenship if the U.S. Supreme Court had decided differently.

ERISA: Pension Plans of Religiously Affiliated Organizations are Exempt from ERISA

Reversing several appellate court decisions, the Supreme Court again unanimously ruled that "church plan" exemption under the Employee Retirement Income Security Act applies to pension plans *maintained* by church-affiliated organizations such as healthcare facilities, even if the plans were not *established* by a church. *Advocate Health Care Network v. Stapleton,* No. 16-74 (June 5, 2017).

The plaintiffs in these cases argued that, under ERISA, a plan only qualified as a "church plan" if it was created by a church. The defendant healthcare employers, countered that, under a 1980 amendment, their plans are "church plans" and exempt from ERISA's strict reporting, disclosure, and funding obligations They also argued that the plans had received confirmation from the IRS over the years that their plans qualified for the exemption, even though the plans were created by hospitals and not churches, because of the entities' religious affiliation.

Siding with defendants, the Court found the 1980 amendment expanded the "church plan" exemption to include pensions maintained by "principal-purpose" organizations.

Whether an organization is a "principal-purpose" organization may be the subject of future litigation. For now, however, religiously affiliated organizations are not subject to the strict requirements under ERISA.

Arbitration Agreements: A contract like any other

In *Kindred Nursing Centers Limited Partnership, et al. v. Clark, et al.,* 137 S. Ct. 1421 (2017), the U.S. Supreme Court held that the Kentucky Supreme Court violated the Federal Arbitration Act when it refused to enforce arbitration agreements that agents with powers of attorney had executed on behalf of their elderly relative.

It held the Kentucky Supreme Court's insistence that a power of attorney clearly state, and "specifically" include, the power to execute binding arbitration agreements in order for the arbitration agreement to be enforceable, violated the FAA's equal-treatment provisions by discriminating against arbitration agreements and holding them to a higher standard than other kinds of contracts and agreements. The decision was 7-1.

The Court weighed in on some politically charged cases, but opted to withhold judgment on others. In particular, the Court did not hesitate to interpret long-standing statutes on the balance of power and responsibilities between the executive and legislative branches (even where the issues raised had never previously triggered a lawsuit), but deferred ruling on more recent, and controversial, issues that are still coming into focus under the Trump Administration.

President's power to make temporary appointments is limited

In a 6-2 decision, the Supreme Court found that, under Federal Vacancies Reform Act of 1998, former National Labor Relations Board Acting General Counsel Lafe Solomon was not permitted to continue to serve in that position after President Barack Obama nominated him to the General Counsel

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Practices

position. Thus, a 2013 unfair labor practice complaint filed by an NLRB Regional Director, exercising authority on Solomon's behalf, against the employer was invalid. *National Labor Relations Board v. SW General, Inc., dba Southwest Ambulance,* No. 15-1251 (Mar. 21, 2017).

After an extensive review of the language of the FVRA and its legislative history, the Supreme Court found that the FVRA prevents the president from using temporary appointments to bypass the Senate's advice and consent role. Therefore, if the administration wanted the NLRB General Counsel's office to continue to operate as normal, President Obama should have appointed a new Acting NLRB General Counsel while Solomon's nomination for a permanent position was pending. The Court rejected the Obama Administration's argument that Solomon was covered by a "first assistant" exception to the general rule, rejected the argument that its ruling would hamstring future presidents, and rejected the argument that its ruling would call dozens of past appointments and agency decisions into question. The fact that similar scenarios had occurred approximately 112 times in the past did not faze the Court, as no legal challenges were raised in those cases.

In this case, Solomon was appointed Acting NLRB General Counsel on June 21, 2010, and nominated to serve permanently as General Counsel on January 5, 2011, and May 23, 2013. Solomon was never confirmed, but continued to serve as Acting NLRB General Counsel until November 4, 2013. Because the unfair labor practices complaint and ruling against SW General Inc. occurred between January 5, 2011, and November 4, 2013, the U.S. Court of Appeals for the District of Columbia Circuit properly invalidated and vacated the NLRB ruling.

Although the Supreme Court affirmed the appellate court's decision, the Court also stated that its holding was narrow and "we do not expect it to retroactively undermine a host of NLRB decisions."

Transgender student rights case sent back to lower court

A much-anticipated Supreme Court decision on transgender rights under Title IX never came to pass, after the Trump Administration revoked an Obama Administration "Dear Colleague Letter" that had interpreted Title IX's "sex"-based protections as covering transgender students. *Gloucester County School Board v. G.G.,* No. 16-273 (Mar. 6, 2017).

Although the U.S. Court of Appeals for the Fourth Circuit ruled that a transgender student had shown a likelihood of success on the merits, and said the school district probably was violating Title IX by reserving boys' restrooms for "biological males," because that court relied on the now-revoked Dear Colleague Letter, the U.S. Supreme Court vacated and remanded the determination for reconsideration.

This case, or one like it, may make its way back to the Supreme Court in the next year or two.

Partial reinstatement of Trump Administration's revised travel ban

After several federal district and appellate courts enjoined the implementation of the Trump Administration's January 27, 2017, temporary travel ban (Executive Order 13769), and March 6, 2017, revised temporary travel ban (Executive Order 13780), on June 26, 2017, the Supreme Court granted a partial reinstatement of the revised ban and agreed to hear an appeal regarding the remainder of Executive Order 13780 in the coming term.

In a 6-3, unsigned decision, the Court held the Administration could refuse entry to travelers from six countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen), unless those travelers can demonstrate a "credible claim of a bona fide relationship with a person or entity in the United States." Examples given by the Court of a "bona fide relationship" include students admitted to a U.S. university, lecturers invited to address a U.S. audience, individuals who have accepted an offer of employment from a U.S. entity, and individuals who wish to visit or live with a close family member. Individuals with "bona fide relationships" remain eligible for visas. The majority said the interest in preserving national security is "an urgent objective of the highest order and to prevent the government from pursuing that objective against foreign nationals unconnected to the U.S. would appreciably injure that interest."

The three dissenting justices, which included the Court's newest member, argued that the Trump Administration likely will succeed on the merits, and the Court should have reinstated the temporary travel ban in its entirety.

The lower courts' injunctions against the remaining components of Executive Order 13780 were not disturbed. Those issues will be considered during the 2017-2018 term. The resolution of this matter may have a tremendous impact on employers who employ individuals who travel to any of the countries effected by Executive Order 13780, as well as employers that work with or employ individuals who live in any of the countries effected by the Executive Order. The matters are *Trump v. International Refugee Assistance Project et al.,* No. 16-1436, and *Trump v. Hawaii,* No. 16-1540.

In a case involving the Equal Employment Opportunity Commission, the Court, taking a deferential approach to the work of the district court judge, held that the district court judge is best qualified to make decisions relating to subpoenas.

Class Actions and Complex Litigation
Employee Benefits
General Employment Litigation
Immigration
Labor Relations

Services

Alternative Dispute Resolution

Industries

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Hospitality
Insurance
Life Sciences
Manufacturing
Media
Professional Services
Real Estate
Retail
Technology
Transportation

District court's ruling on EEOC subpoenas reviewed for "abuse of discretion"

In *McLane Co., Inc. v. Equal Employment Opportunity Commission,* 137 S. Ct. 1159 (2017), the U.S. Supreme Court held that, on appeal, a federal district court's decision to quash or enforce an EEOC subpoena must be reviewed for "abuse of discretion." The Court found that the U.S. Court of Appeals for the Ninth Circuit erred when it reviewed *de novo,* and then reversed, a district court's decision to quash such a subpoena. The decision was 7-1.

Justice Neil Gorsuch

During his 10 years on the U.S. Court of Appeals for the Tenth Circuit, Justice Gorsuch developed a reputation as a conservative judge, who frequently authored employer-friendly decisions.

Please contact Jackson Lewis with any questions about Supreme Court decisions and what they may mean to your particular situation.

Related:

- Supreme Court: Plaintiffs May Not Voluntarily Dismiss Case to Appeal Class Certification Decision
- Supreme Court: Gender-Based Distinctions in Immigration Law Violate Equal Protection
- Supreme Court Rules Pension Plans of Religiously Affiliated Organizations Exempt from ERISA
- Supreme Court Rules President's Power to Make Temporary Appointments is Limited
- Supreme Court Allows Partial Effect to Trump Travel Ban, Will Review Case in October
- Supreme Court Sends Transgender Student Case Back to Lower Court; Other Case Worth Watching
- President Trump Nominates Neil Gorsuch to U.S. Supreme Court