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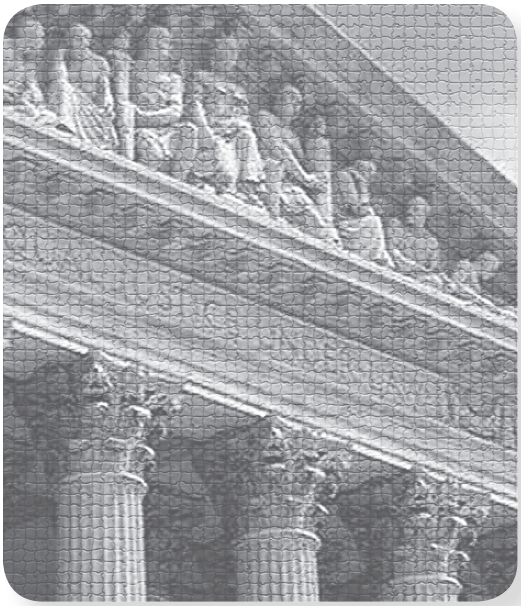

Supreme Court Round-Up

Term Ends with Decisions Affecting Major Areas of Workplace Law and Practice

Over the summer, much has been written about whether the **October 2014 term of the U.S. Supreme Court** portends a trend toward more liberal-leaning outcomes in future cases of interest to employers. "Workers fared better than companies" and "the Roberts court isn't giving employers a free pass" were the sentiments reflected by many SCOTUS watchers.

While commentators on the Supreme Court have been busy analyzing the opinions to find support for whichever way they see the Court leaning, employers are focused on more practical needs: how do the outcomes on issues ranging from religious and pregnancy discrimination to compensation for time spent on security screening and the extent of fiduciary responsibilities under ERISA affect day-to-day compliance programs and personnel practices.

Continuing *Preventive Strategies'* yearly reporting on the impact of Supreme Court decisions significant for workplace law, here is a round up of the October 2014 term. The decisions reflect the diversity of workplace law issues within the scope of Jackson Lewis' **Practices & Experience** representing employers.

Legalization of Same-Sex Marriage Nationwide Simplifies Compliance with Spousal Rights

In one of the most highly anticipated rulings of the October 2014 term, a divided Supreme Court ruled that states must issue a license for a marriage between two people of the same sex and that state prohibitions against same-sex marriages violate the Fourteenth Amendment rights of same-sex couples. In a 5-4 decision, the Court found that statewide prohibitions on same-sex marriage violate the Equal Protection and Due Process clauses of the U.S. Constitution's Fourteenth Amendment. ***Obergefell v. Hodges***, No. 14-556 (June 26, 2015).

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As a result of this decision, questions regarding the FMLA Final Rule including same-sex spouses have been all but eliminated, and employers should review and make necessary changes to their policies and practices to ensure compliance.

This decision has wide-ranging implications for employers and the application of certain workplace laws. For example, the Family and Medical Leave Act of 1993 requires covered private employers to grant qualifying employees time off to care for their sick spouses. The *Obergefell* decision will lend clarity and consistency to FMLA administration. Earlier in 2015, the Department of Labor issued a Final Rule revising the regulatory definition of spouse under the FMLA. (For details, see our article, **New FMLA Regulations Expand Definition of Spouse and Include Same-Sex Spouses**.) As a result of the Supreme Court's decision, it appears any questions regarding the Final Rule have been all but eliminated, and employers should review and make necessary changes to their policies and practices to ensure FMLA compliance.

In 2013, the Internal Revenue Service and **DOL issued guidance** providing that same-sex spouses would be recognized for purposes of federal protections under the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA) if they were legally recognized in the state where the marriage was celebrated, regardless of the law in their state of residence. These protections include:

- *same-sex spousal entitlement under some pension plans;*
- *status as default beneficiary under 401(k) plans;*
- *ability to roll over a survivor benefit to another employer's eligible retirement plan;*
- *entitlement to cafeteria plan and flexible spending account participation;*
- *entitlement to COBRA continuation elections; and*
- *ability to purchase health plan coverage for same-sex spouses on a pre-tax basis and exclude the cost of the coverage from gross income for federal income tax purposes.*

Following the *Obergefell* decision, all 50 states must recognize same-sex marriages, eliminating any distinction between where a marriage is celebrated and where the spouses reside. Employers offering health insurance plans that include spousal coverage will have to offer same-sex spousal coverage as well. Furthermore, while the decision itself does not create a requirement that employers offer health plan coverage – health plan coverage remains a benefit that employers may provide, or not, in their sole discretion – employers with self-insured plans that offer only opposite-sex spousal coverage will risk sex discrimination claims under Title VII of the Civil Rights Act of 1964.

Another important change involves the "spousal privilege" protecting confidential communications between spouses during their marriage from testimonial disclosure. In federal proceedings (e.g., depositions and trials), this privilege now will include the confidential communications of legally married same-sex couples. Employers should consult counsel about the implications of this change with respect to any ongoing litigation.

Given the significant changes to FMLA entitlement, employee benefits, and other important workplace issues associated with the *Obergefell* decision, employers should consult employment counsel to ensure compliance in a manner consistent with the organization's goals and applicable laws.

For more information about this landmark decision and its impact on the law of the workplace, go to "**U.S. Supreme Court Lifts Bans on Same-Sex Marriages, Requires Recognition of Valid Same-Sex Marriages**" at **www.jacksonlewis.com**.

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Validation of ACA Subsidies under State Exchanges Signals Importance of Readiness for Upcoming Reporting Requirements

The most recent validation of the Patient Protection and Affordable Care Act by the Supreme Court is the 6-3 decision in ***King v. Burwell***, No. 14-114 (June 25, 2015). It clears the way, at least for now, for the law's health insurance coverage requirements and reporting provisions. Under the ACA, covered employers must meet the threshold requirements for minimum health insurance coverage for eligible employees

or be subject to significant "shared responsibility" penalties. Employers and group health plans must be ready to comply with the law's schedule of information reporting requirements beginning in early 2016.

Employers with at least 50 full-time and full-time equivalent employees need to ensure they are tracking hours of service and are otherwise prepared to meet the large employer reporting requirements for the 2015 calendar year. Employers, regardless of size, that sponsor self-funded group health plans need to ensure they are prepared to meet the health plan reporting requirements for 2015 (also due in early 2016). All employers that sponsor group health plans also should be considering whether and to what extent the so-called Cadillac tax could apply beginning in 2018.

For more on this decision, see **"What the Supreme Court's Decision on Affordable Care Act Subsidies Means for Employers"** at **www.jacksonlewis.com**.

For details about the ACA's employer reporting requirements, see **Health Care Reform: Employers Should Prepare Now for 2015 to Avoid Penalties** and **What's Next for the Affordable Care Act...Information Reporting**.

The Jackson Lewis **Employee Benefits Practice Group** includes our Health Care Reform team, which focuses on compliance with federal health care reform. The Health Care Reform team follows health care reform legislative developments and legal decisions and monitors regulatory guidance. The team also presents seminars and webinars for employers on the impacts of federal health care reform and practical considerations and strategies for compliance. *See*, **www.jacksonlewis.com/practice/employee-benefits**.

Applicant Can Prevail on Discrimination Claim by Showing Failure to Hire Was Motivated by Need for Accommodation

Refining the legal standards to show religious discrimination under Title VII of the Civil Rights Act, the Supreme Court has held that a rejected applicant for employment must show only that his or her need for religious accommodation was a motivating factor in the employer's decision. The applicant need not show that the employer had knowledge of the applicant's need. An employer who acts in order to avoid accommodating an individual protected by Title VII may violate the law even if it "has no more than an unsubstantiated suspicion that an accommodation would be needed," the Court said. ***EEOC v. Abercrombie & Fitch Stores, Inc.***, No. 14-86 (June 1, 2015).

The applicant was a Muslim woman who, in keeping with her religious practice, wore a head scarf to her interview. The employer had a policy banning employees from wearing any kind of headgear while on the job. She claimed that in denying her employment, the employer was motivated by her need for an accommodation to permit her to wear a head scarf, constituting disparate treatment in violation of Title VII.

The Supreme Court held Title VII does not require showing that the prospective employer had "knowledge" of the applicant's need for religious accommodation before the employer could be held liable for religious discrimination in hiring. According to the Court, Title VII bars prospective employers from acting on certain motives, regardless of the employer's knowledge. Therefore, the prospective employer cannot make an applicant's religious practice, confirmed or otherwise, a factor in its employment decisions.

Writing for the majority of the Court, Justice Antonin Scalia said that with respect to religion, an argument that a neutral policy cannot constitute "intentional discrimination" is unavailing. "Title VII," the Court said, "does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual … because of such individual's' 'religious observance and practice.'" Neutral policies may have to yield to the need for religious accommodation, it said, remanding the case for further consideration consistent with its opinion.

A prospective employer cannot make an applicant's religious practice, confirmed or otherwise, a factor in its employment decisions; neutral policies may have to yield to the need for accommodation.

Plan administrators should keep an eye on the remanded proceedings at the Ninth Circuit to see how that court applies the Supreme Court's ruling on the employer's continuing duty to monitor plan investments.

For more on this decision, see "**Supreme Court Refines Religious Discrimination Requirements under Title VII to Focus on Employer Motive**" at **www.jacksonlewis.com**.

Unlike the Americans with Disabilities Act, where applicants or employees must advise the employer of their need for accommodation to invoke the Act's protection, applicants or employees under Title VII do not necessarily need to notify employers of their religious-based need for an accommodation. In the case of a rejected applicant claiming discriminatory treatment under Title VII, the employer's hiring process, along with its relevant policies, may come under scrutiny for signs of an "unsubstantiated suspicion" that the employer would have to offer an accommodation it did not wish to make.

ERISA Fiduciaries Have Ongoing Duty to Monitor Trust Investments

In a unanimous opinion, the Supreme Court ruled that 401(k) benefit plan fiduciaries have a continuing duty to monitor investments offered to employees under the plan. The Court rested its decision on traditional trust law, which requires a "regular review" of trust investments, and the Uniform Prudent Investor Act, which it viewed as embracing a continuing duty to monitor plan investments. ***Tibble v. Edison International***, No. 13-550 (May 18, 2015).

In the litigation, current and former 401(k) plan beneficiaries claimed the employer had violated ERISA's fiduciary duty of prudence by offering more expensive "retail class" shares of mutual funds, instead of relatively cheaper "institutional class" shares of the same funds. The three funds challenged in the Supreme Court appeal were added in 1999, but suit was not filed until 2007.

The Employee Retirement Income Security Act has a six-year limitations period for filing claims. In deciding to hear the case, the Court framed the issue broadly, but did not signal whether it would address the continuing-violation theory advocated by the plaintiffs or certain policy concerns emphasized by the U.S. Court of Appeals for the Ninth Circuit in its opinion in the matter. Finding a continuing duty to monitor the investments, the Court sent the case back to the Ninth Circuit to decide whether plan fiduciaries breached a duty to monitor those investments within the six years prior to suit.

For more on this decision, see **"ERISA Fiduciaries Have Ongoing Duty to Monitor Trust Investments"** at **www.jacksonlewis.com**.

Employee benefits practitioners and plan administrators had eagerly anticipated the Court's decision on whether the ERISA's limitations period barred claims over imprudent investment decisions initially made more than six years prior to suit. The decision side-steps a comprehensive discussion of numerous subsidiary questions, including whether ERISA recognizes a "continuing violation" theory.

Plan administrators should keep an eye on the remanded proceedings to see how the Ninth Circuit applies ERISA's monitoring duty to defendants' retention of the 1999 funds in the plan. Although periodic re-evaluation of all plan investments is already a "best practice," the decision on remand may offer guidance on particular circumstances that call for fiduciary scrutiny of specific investments.

Jackson Lewis attorneys in our **Employee Benefits** practice are available to answer inquiries regarding this case and discuss particular plans.

Courts Are Assured Role in Reviewing EEOC's Conciliation Obligations

In another unanimous decision, the Supreme Court held that federal courts may review the sufficiency of the Equal Employment Opportunity Commission's notice of and opportunity for conciliation afforded an employer under Title VII of the Civil Rights Act. While affirming that courts have a role to play, the Supreme Court ruled that Title VII gives the EEOC discretion on "how to conduct conciliation efforts and when to end them." ***Mach Mining, LLC v. Equal Employment Opportunity Commission***, No. 13-1019 (Apr. 29, 2015).

Title VII requires the EEOC to endeavor to conciliate a dispute with an employer after it finds reasonable cause to believe discrimination occurred and before the Commission files a lawsuit. In *Mach Mining*, the employer argued that the EEOC had failed to conciliate in good faith prior to filing the lawsuit; however, the federal appeals court hearing the matter found no basis in Title VII for the court to review the conciliation process.

The Supreme Court rejected the EEOC's argument that Title VII provided no standards

by which a court might evaluate the sufficiency of its conciliation efforts. Emphasizing the importance of conciliation within the scheme of Title VII, the Court said that absent judicial review, "[t]he Commission's compliance with the law would rest in the Commission's hands alone." Nonetheless, the Supreme Court cautioned the reviewing court not to do a "deep dive" into the conciliation process.

According to the Court, an employer is entitled to information that will allow the employer the opportunity to remedy the allegedly discriminatory practice. This includes information on what the employer had done and the persons harmed. If the sufficiency of the conciliation is questioned, a sworn affidavit from the EEOC outlining the performance of its conciliation obligations will typically suffice, the Court wrote. Nonetheless, a court may continue the inquiry beyond an affidavit if the employer provides evidence that the EEOC did not give the employer adequate information or the EEOC did not attempt to engage in a conciliation discussion, the Court said.

For more on this decision, see **"Supreme Court Vindicates Courts' Role in Reviewing EEOC Conciliation Obligations"** at **www.jacksonlewis.com**.

To the extent EEOC conciliation efforts continue to be litigated, most likely this will occur at the beginning of an EEOC lawsuit. Typically, the employer would assert the EEOC did not provide proper notice of the alleged discriminatory conduct or the persons harmed, and therefore the employer was denied an opportunity to conciliate. Addressing this situation, the Court said that if the employer demonstrates insufficient conciliation, "the appropriate remedy is to order the EEOC to undertake the mandated effort to obtain voluntary compliance."

Addressing Agency Interpretative Reversals, Supreme Court Finds DOL Acted Lawfully

Kicking what may prove to be a hornet's nest, the Supreme Court unanimously agreed that the U.S. Department of Labor did not have to provide the public with notice and an opportunity to comment before reversing its position on the exempt status of loan officers under the Fair Labor Standards Act. The Court ruled that an agency is not required by the Administrative Procedures Act to use notice-and-comment procedures when issuing interpretive rules, even where a new interpretation differs substantially from or contradicts prior interpretations. ***Perez v. Mortgage Bankers Association***, No. 13-1041 (Mar. 9, 2015).

This decision affirms the power of an administrative agency to issue interpretive rules or guidance – even if inconsistent with a prior interpretive rule or opinion – without first providing notice and an opportunity for comment. Nonetheless, the Court noted that while an agency can change position without providing a notice-and-comment period, a court justifiably may be unwilling to defer to the agency's latest interpretation simply because it is the most recent. Such agency reversals have drawn the attention of at least four justices, who have signaled an interest in overruling the underlying doctrine of judicial deference to agency interpretive rules. Three lengthy concurring opinions in *Perez* highlight the issue of deference to agency interpretations as a possible violation of separation of powers that occurs when agencies are permitted both to make and interpret the law.

For more on this decision, see **"Supreme Court Upholds DOL Flip-flop, While Concurrences Signal Doubt about Judicial Deference to Agencies"** at **www.jacksonlewis.com**.

Compensable Time Does Not Include Security Screenings of Warehouse Workers

In another unanimous opinion, the Supreme Court ruled that time spent by warehouse workers undergoing security screenings was non-compensable under the Fair Labor Standards Act. The time spent on the screenings did not constitute a "principal activity" nor was it "integral and indispensable" to the workers' other principal activities. ***Integrity Staffing Solutions, Inc. v. Busk***, No. 13-433 (Dec. 9, 2014).

The Court explained that an activity is "integral and indispensable" only if it is an "intrinsic element of those [other principal] activities and one with which the employee cannot dispense if he is to perform his principal activities." Undergoing a security

While an agency may change position without providing a notice-and-comment period, a court may be justified in refusing to defer to the latest interpretation just because it is the most recent, the Court said.

The Court broadly interpreted the scope of protection for whistleblowers and narrowly limited the exceptions to those specifically prohibited by law, not agency regulations.

screening was not an intrinsic element of the workers' principal activities of pulling products from warehouse shelves and packing them for shipment, and the security screenings were not "indispensable" to their work because the employer could have eliminated the security screenings without impairing the employees' ability to complete their work, the Court said.

In reaching its decision, the Supreme Court rejected the test used by the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, which looked only at whether the duty was required and performed for the benefit of the employer. The Court also rejected the argument that security screenings should be treated differently than safety screenings, saying neither was compensable under the Portal-to-Portal Act.

For more on this decision, see **"Security Screening Time Not Compensable under FLSA"** at **www.jacksonlewis.com**. The Jackson Lewis **Wage and Hour Practice Group** – with extensive knowledge of state and federal wage and hour laws – counsels clients about wage and hour issues, performs wage and hour compliance reviews, and defends related litigation and government agency investigations. Go to **www.jacksonlewis.com/practice/wage-and-hour**.

Giving Broad Protection to Whistleblowers over Leak of Sensitive Security Information, Supreme Court Follows Judicial Trend

In a case involving a leak to the media of confidential security plans by a federal air marshal, the Supreme Court ruled against the Department of Homeland Security and in favor of the employee who was terminated after the leak was discovered. Strictly construing the Whistleblower Protection Act in favor of the employee, the Court found the air marshal's whistleblower claim could proceed despite his actions being in apparent violation of a DHS regulation. ***Department of Homeland Security v. MacLean***, No. 13- 894 (Jan. 21, 2015).

The federal air marshal had disclosed to an MSNBC reporter plans by the Transportation Security Administration to remove air marshals from some overnight flights soon after the DHS had issued a confidential advisory about a potential hijacking plot on domestic flights. MSNBC published the story, causing members of Congress to criticize the TSA, which immediately withdrew the plan. TSA later discovered the source of the unauthorized disclosure and terminated the air marshal. He then filed a claim for retaliatory discharge under the Whistleblower Protection Act, contending the disclosure was protected activity.

The WPA prohibits a federal agency from taking action against an employee or applicant who discloses information reasonably believed to evidence a violation of a law, rule, or regulation. However, the WPA protection applies only "if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."

DHS argued that the employee's disclosure was prohibited by the Homeland Security Act under regulations concerning unauthorized disclosure of "sensitive security information," including information about deployment of federal air marshals, and was not protected by the WPA. Rejecting the government's argument, however, the Supreme Court ruled the WPA whistleblower protection covered the air marshal. Narrowly interpreting the exception for disclosures that are "specifically prohibited by law," the Court ruled that the subject disclosures were prohibited by agency regulation and not by law – that is, a statute enacted by Congress. Giving a broad interpretation to the WPA, the Court found the employee could proceed with his whistleblower claim.

For more on this decision, see **"U.S. Supreme Court Supports Whistleblower Claim of Employee Fired for Leaking Sensitive Information"** at **www.jacksonlewis.com**.

This decision is consistent with a trend in the lower courts broadening the scope and application of whistleblower laws in favor of employees. To avoid liability for unlawful retaliation, an employer considering the termination of an employee who claims he "blew the whistle" must prepare to counter that claim with a clear, well-documented, and lawful reason for ending the employment relationship.

Divided Court Eases Employers' Burden of Removal of Class Actions to Federal Court

Defendants in a class action will have a lighter burden in seeking to remove the case from state to federal court under the Class Action Fairness Act, according to the Supreme Court's 5-4 opinion. Under CAFA, employers seeking removal need only allege that the amount in controversy exceeds the five-million-dollar statutory threshold and need not attach evidence proving the amount in controversy. ***Dart Cherokee Basin Operating Co., LLC v. Owens***, No. 13-719 (Dec. 15, 2014).

The plaintiff in the case sought an unspecified "fair and reasonable" amount of damages for unpaid oil and gas lease royalties on behalf of a putative class. The defendants removed the case to the federal trial court under CAFA. In their notice of removal, the defendants alleged that the purported underpayments to the class members totaled more than $8.2 million, but defendants did not submit any evidence to support that amount. Alleging the notice of removal was deficient, the plaintiff then successfully sought to return the case to the state court, and the U.S. Court of Appeals for the Tenth Circuit denied the defendants' request to review that action.

The Supreme Court noted the requirement for a notice of removal under the statute is "a short and plain statement of the grounds for removal." A notice of removal need only include "a plausible allegation" that the amount in controversy is met, the Court concluded, and evidence to establish the amount in controversy is required only when the amount in controversy is contested by the plaintiff or questioned by the court.

For more on this decision, see **"U.S. Supreme Court Clarifies Procedures for Removal to Federal Court under Class Action Fairness Act"** at **www.jacksonlewis.com**.

Plaintiffs in class action litigation often prefer to bring cases in state courts, where they are more likely to receive favorable treatment. The Class Action Fairness Act was enacted, in part, to force larger class actions into the federal courts, where stricter procedural rules apply. The Court's decision in this case settled a conflict among the federal appeals courts over a defendant's burden in removing a case under CAFA. Moreover, the decision makes clear that there is no presumption against removing cases to federal court jurisdiction under CAFA, an argument often made by the plaintiffs when contesting removal.

Long-standing Presumption of Vesting of Retiree Health Benefits under Some Union Contracts Is Defeated

In a unanimous decision, the U.S. Supreme Court has established a new standard requiring that collective bargaining agreements, including those that establish ERISA plans, be interpreted by using ordinary principles of contract law. The decision crushed an inference of vesting of retiree health benefits in the collective bargaining context that has been upheld by the U.S. Court of Appeals for the Sixth Circuit, in Cincinnati, for more than 30 years. That court's "*Yard-Man* Inference" – after the name of the employer in the case – found an intent to vest for life certain collectively bargained retiree health care benefits absent language to the contrary in the bargaining agreement. ***M&G Polymers USA, LLC v. Tackett***, No. 13-1010 (Jan. 26, 2015).

The *Yard-Man* case involved a 1974 collective bargaining agreement that stated that the employer "will provide" retiree health benefits for an unspecified duration. The company sought to eliminate these benefits after expiration of the agreement's term, and the retirees filed suit to compel the company to continue the retiree benefits. While acknowledging the agreement was ambiguous as to the duration of the benefits, the Sixth Circuit ruled the employer had breached its contractual obligations by canceling the retiree health insurance. The Sixth Circuit explained, "When the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *International Union, United Auto, Aerospace & Agricultural Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

The Court's decision settles the conflict among federal appeals courts over what a defendant must do in removing a class action case under CAFA and makes clear there is no presumption against removal.

The issue of vesting of retiree benefits under a union contract depends on ordinary contract principles; no rule requires clear and express language showing an intention that retiree benefits survive the expiration of a union contract.

Since that decision, the Sixth Circuit has adhered to the "Yard-Man Inference" while federal appeals courts in the First (Boston), Fourth (Richmond) and Eleventh (Atlanta) Circuits accepted it in varying degrees. Other circuits, however, flatly rejected it, holding that upon the expiration of a collective bargaining agreement that is silent on the vesting of retiree benefits, there should be a presumption against the vesting of retiree health benefits for life.

The agreement in the *M&G Polymers* case provided that certain retirees "will receive a full Company contribution toward the cost of [health care] benefits." When the company reduced the contribution, the retirees sued, with the Sixth Circuit ultimately upholding a ruling in their favor.

In rejecting the Sixth Circuit's position, the Supreme Court stated "collective bargaining agreements, including those establishing ERISA plans" must be interpreted "according to ordinary principles of contract law," with which the inferences in the *Yard-Man* line of cases did not accord. The Court found the Sixth Circuit decision violated ordinary principles of contract law "by placing a thumb on the scale in favor of vested retiree benefits in all collective bargaining agreements," which distorted the attempt to ascertain the intent of the parties.

For more on this decision, see **"Ordinary Contract Principles Apply to Whether Retiree Health Benefits Survive Expired Bargaining Agreement"** at **www.jacksonlewis.com**.

Although the decision in *M&G Polymers* provides employers within the jurisdiction of the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) with an enhanced ability to defend class actions seeking to invalidate an employer's reduction or elimination of collectively bargained retiree benefits, the issue of vested retiree benefits in a collective bargaining context still exists. Courts must apply ordinary contract principles to determine whether retiree health benefits survive the expiration of a collective bargaining agreement.

No rule requires that union contracts contain clear and express language showing the parties intended retiree benefits to vest; such intent also may arise from the implied terms of an expired agreement. Consequently, employers and counsel must be cautious and precise in negotiating and drafting provisions relating to retiree benefits. Preferably, express language that retiree benefits do not survive term expiration should be included, if that is intended. Employers must take care to avoid any language that could be susceptible to an interpretation (under ordinary principles of contract law) that the parties intended to provide for vested retiree benefits.

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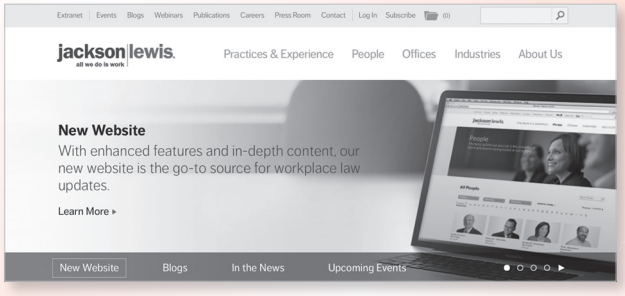

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