February 2016

Wolters Kluwer

Labor & Employment Law Special Briefing

2015 review—2016 forecast: High Court rulings and beyond

Highlights

- ✔ Four 2015 Supreme Court rulings addressed agency actions
- ✔ But-for causation, qualified employees under ADA, employee misclassification, immigration important in lower courts
- ✔ High Court to rule on class action certification, union agency fees, immigration reform in 2016

Inside

By Pamela Wolf, J.D.

The labor and employment litigation landscape saw some important developments in 2015 with Supreme Court rulings that impacted not only the way federal agencies do business, but how businesses must treat employees, particularly as to religious practices and conditions related to pregnancy. The lower federal courts also weighed in on important topics such as employee misclassification under the Fair Labor Standards Act, disability discrimination, but-for causation in retaliation claims, and employer-sponsored wellness programs.

And 2016 is likely to be an equally important year on the litigation front, with pending Supreme Court cases that will address issues such as class certification where many class members have suffered no injury, attorneys' fees against the EEOC, and public-sector agency shop fees.

To understand the significance of these important court decisions rendered in 2015 and on the docket for 2016, Wolters Kluwer *Employment Law Daily* reached out to a team of outside experts.

Supreme Court wrap-up

Generally considered conservative, the Supreme Court had what some have called an "employee friendly" year in 2015, favoring employees in decisions addressing the EEOC's obligation to conciliate before filing suit, accommodating conditions related to pregnancy, and employer obligations to provide religious accommodation. The Court also came down on the side of same-sex couples who wish to marry.

Case of the year?

Although it's not a labor and employment case, *Obergefell v. Hodges,* issued on June 26, is the "case of the year," according to Attorney Chris Bourgeacq, The Chris Bourgeacq Law Firm, PC, a member of the *Employment Law Daily* Editorial Advisory Board. Why? "The Supreme Court created a constitutional right to same-sex marriage," Bourgeacq said. The ruling's wake touches many aspects of the workplace, he added, for example, benefits and leave. "Perhaps more significantly, many view the Supreme Court's divided ruling in *Obergefell* as a head nod to expand LGBT rights where legislatures have refused to do so—or even contrary to policies where voters and legislators have eschewed recognizing or expanding such rights."

Jackson Lewis attorney Joy Napier-Joyce observed that although *Obergefell* "did not directly address employer-sponsored benefit plans and have the same direct impact that the Court's decision in *Windsor* did the previous year," it nonetheless has important ripple effects from a benefits standpoint. "By holding that the right to marry is a fundamental right guaranteed to same-sex couples, the decision has caused many employers who did not previously

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In 2015, the High Court issued seven rulings that had a substantial impact on labor and employment law, although in some cases the impact was indirect:

- *Obergefell v. Hodges*
- *Perez v. Mortgage Bankers Association*
- *Mach Mining v. EEOC*
- *EEOC v. Abercrombie & Fitch Stores, Inc.*
- *Young v. United Parcel Service, Inc.*
- *M&G Polymers USA, LLC v. Tackett*
- *King v. Burwell*

offer same-sex spouse coverage under health and welfare plans to re-examine such a design," she explained. "As the right to marry has become universal across the states, it has also caused many employers to examine whether there is still the need or desire to offer domestic partner benefits to same-sex or opposite-sex partners. State tax treatment of same-sex spousal coverage has decidedly become more streamlined and easier for employers to administer, while the tax treatment of domestic partner benefits remains the same."

Rulings on agency actions

In four of its rulings, the Supreme Court addressed agency actions at the Department of Labor and the EEOC, including the rulemaking process, pre-litigation obligations, agency enforcement litigation, and agency interpretation of statutory requirements.

Changes in regulatory policy. In its March 9 *Perez v. Mortgage Bankers Association* ruling, "the Court abandoned a 20-year precedent requiring agencies to engage in notice-and-comment rulemaking procedures before changing interpretations of their regulations," said Bourgeacq. "This requirement, known as the *Paralyzed Veterans* doctrine, had the effect of placing some check on substantial, unilateral changes in regulatory policy." In what Bourgeacq called "a surprisingly unanimous decision," the Court removed this check, which he suggested will spur "further aggressive regulation from federal agencies." Because there is little chance of any significant employment laws coming from Congress in 2016,"as Bourgeacq sees it, "agencies have a green light to accelerate their pro-employee agenda."

Interpretive flip-flop. "When an agency flip-flops back and forth about a position on an issue, the regulated community is whipsawed back and forth," observed Jackson Lewis attorney Collin O'Connor Udell. In this particular case, after the DOL revised its regulations, the Mortgage Bankers Association requested an opinion from the DOL as to whether mortgage loan officers were exempt employees under the FLSA. Udell explained that in 2006, the administrator issued an opinion letter saying that they were. "But in 2010, the Wage and Hour Division of the Department of Labor revised its interpretation of the regulations, withdrew the 2006 opinion letter, and concluded that mortgage loan officers were not exempt employees. All of this was done without any notice-and-comment rulemaking."

Notice-and-comment required? The Mortgage Bankers Association sued, arguing that the interpretation was invalid because notice-and-comment rulemaking had not taken place, Udell continued, but the federal government argued that because the interpretation was an "interpretative" rule, it was exempt from notice-and-comment rulemaking under the Administrative Procedure Act. "The Mortgage Bankers Association agreed that it was an interpretative rule but argued that even an interpretative rule may be subject to notice-and-comment rulemaking under the *Paralyzed Veterans* doctrine, which arose out of a D.C. Circuit opinion holding that if an agency has effectively amended its rule, it must be required to undergo notice-and-comment rulemaking," the Jackson Lewis attorney explained.

While the government argued that the *Paralyzed Veterans* doctrine deprives agencies of flexibility that they need, the Mortgage Bankers Association urged that because courts often give controlling deference to an agency's interpretation of its own regulations, the *Paralyzed Veterans* doctrine is particularly important so that substantial changes in the rules are not imposed without affording the regulated community a chance to participate.

Prior doctrine rejected. Rejecting the *Paralyzed Veterans* doctrine, the Court held that while a legislative rule requires notice and comment, that is not the case with interpretive rules, Udell noted. "The Court's reasoning relied both on the plain language of the APA as well as 'longstanding principles of our administrative law jurisprudence,' concluding that 'judge-made procedural rights' have no place. 'Imposing such an obligation,' it held, 'is the responsibility of Congress or the administrative agencies, not the courts.'"

Auer *deference.* Said Udell: "Although the Mortgage Bankers Association had undoubtedly hoped for a ruling addressing agency deference, the Court refused to take

the bait. However, Justices Scalia and Thomas concurred separately in order to criticize current deference jurisprudence. To date, Justices Thomas, Scalia, the Chief Justice, and Justice Alito (the latter two in different opinions) have appeared ready to revise *Auer* deference." Udell noted that on January 4, 2016, a cert petition was filed in *United Student Aid Funds, Inc. v. Bible*, presenting the question whether *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* should be overruled. "That is certainly a petition to watch," she added.

Loss of Justice Scalia. If the Court takes up the *Auer* deference issue, it's ruling in that and other cases, may be impacted by the unexpected death of Justice Scalia on February 13, 2016. The question whether the Senate will even take up consideration of President Obama's nominee to fill the Court vacancy looms large. Scalia's death will affect cases already voted on by the Court but not published, and cases yet to be decided by an eight-Justice Court, especially in the event of a tie.

In cases where Scalia has already voted but the written opinion has not been or publically released, his vote will not count; however the other Justices are able to change their votes if they wish. If there is a four-four tie in a case, the Justices have several options. They can vote to hear the case a second time when a new Justice joins the Court, or uphold the result reached in the lower court with a one-sentence decision. The second option results in a non-precedential opinion that would not bind all federal courts.

EEOC's pre-suit obligations. In a case that was very closely watched by employers but turned out to be what Chris Bourgeacq called "the dud of the term" for employers, the Court ruled on April 29, in *Mach Mining v. EEOC*, that the EEOC had an affirmative duty to engage in conciliation under Title VII before filing a lawsuit. "The Court essentially punted the issue of requiring a significant, detailed judicial review of the EEOC's conciliation efforts," Bourgeacq said. "For now, while employers still can assert failure to conciliate as an affirmative defense, courts since the *Mach Mining* decision for the most part have not been willing to engage in more than a rubber-stamp examination of the conciliation efforts." The Supreme Court's ruling "comes as a very disappointing decision at a time when courts otherwise have increasingly sanctioned the EEOC for overreach in its investigation and enforcement practices," he observed.

Some judicial review permitted. In its ruling, "the Court rejected the EEOC's attempt to insulate its conciliation process from any form of judicial review," observed Sherman & Howard attorney William Wright. The EEOC had sued the employer for failure to hire women as coal miners, he explained. Mach Mining contended that the agency had failed to engage in the conciliation required under Title VII. "From the evidence submitted, it appears the EEOC wrote the employer announcing its cause finding and promising further contact concerning conciliation, and then a year later, the EEOC wrote a second time announcing conciliation had failed," according to Wright.

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"The Court held that these bookend letters were not enough to show that the EEOC had engaged in the required conciliation," Wright said. Instead, the EEOC had to engage in communication with the respondent, including an exchange of information and views, about the alleged unlawful employment practice. The Sherman & Howard attorney pointed to this language in the opinion: "[T]he EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance."

In its ruling, the Court "noted the strong (yet rebuttable) presumption favoring judicial review of administrative action," Udell observed. "In determining what review was required, it declined to follow Mach Mining's suggestion that a court should take a 'deep dive' into the conciliation process; it was concerned about Title VII's command that the conciliation process be confidential."

"*Mach Mining* was not a one-sided victory for employers," Wright said. "The Court ruled that if the conciliation is challenged in court, the EEOC need only provide an affidavit stating that it met its obligations. The employer then may present evidence to the contrary, and the court will have to engage in fact-finding to resolve the dispute," he explained. If the employer prevails in this "threshold legal battle," the remedy is merely an order requiring the EEOC to conduct conciliation, Wright noted.

What does it mean? The Court's ruling in the case was not all that employers might have wished, Wright acknowledged. "It did not provide a new means to have EEOC-initiated legal actions dismissed," he said. "It only gave the EEOC a re-do if it failed in its obligation to conciliate." Looking on the bright side for employers, Wright explained, "the ruling that the EEOC must communicate with the respondent about the alleged unlawful employment practice does require the agency to change the conduct of its investigators, at least in some parts of the country. Additional information from the EEOC concerning what specific conduct is at issue and who is affected might make conciliations much more effective and reduce the EEOC's need for litigation." Another upshot: "Employers may enter conciliation with the hope that they will obtain enough information to make a business case to owners and directors concerning the scope and cost of litigation," according to Wright.

Although the Court's ruling is not quite what either party had hoped for, Udell observed, "it seems aimed at balancing EEOC discretion with accountability." She said that time will tell how that plays out in future cases. "In the meantime, employers should be sure to document any conciliation efforts, or the lack of such efforts, so if necessary they can show the EEOC failed to meet its obligations," Udell recommended.

Religious accommodation. In another EEOC enforcement action, *EEOC v. Abercrombie & Fitch Stores, Inc.*, issued on June 1, "the Court advanced the EEOC's goal of reducing barriers in recruitment and hiring," according to Wright. The employer had a "Look Policy" that prohibited "caps" as being too informal. A store assistant manager interviewed a young woman for a sales position. The applicant wore a scarf covering her head. The assistant manager asked her district manager whether a headscarf was a cap, and "informed [him] that she believed [the applicant] wore her headscarf because of her faith." The district manager said that all headwear, religious or otherwise, would violate the Look Policy and told the assistant manager not to hire the applicant.

What did the employer know? The issue before the Court then was whether the district manager "knew" the applicant wore the headscarf for religious reasons, Wright explained. "The Court's brief answer was that it does not matter, for Title VII disparate treatment liability, whether the district manager 'knew' of the religious nature of the headscarf; he was motivated by the religious nature of the headscarf and, as it turned out, the applicant did wear the headscarf for religious reasons." The Court wrote: "If the applicant actually requires an accommodation of [a] religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII."

Echoing Wright's observations about the ruling, Udell reiterated that a plaintiff like this one "need only show that her need for Abercrombie to accommodate her religious beliefs was a 'motivating factor' in its decision not to hire her. She did not need to show that the employer had 'actual knowledge' that she was wearing the scarf for religious reasons and needed the employer to accommodate her." In addition, the Court noted in its ruling that "other antidiscrimination statutes do explicitly require knowledge, but Title VII does not. Accordingly, it reasoned, adding a knowledge requirement to the statute 'is Congress's province,' not the Court's," Udell stressed.

According to Wright, though, "The Court's distinction, between an individual's knowledge of a fact and whatever cognitive content underlies the individual's motivation, left many readers puzzled. The vocabulary used in the decision is confusing. In this case, what the decision-maker knew or should have known was that, if wearing the headscarf was religious, he would have to make an exception to store policy. He also had notice that the applicant's wearing the headscarf probably was religious, but he did not investigate. He immediately ruled out any accommodation." The outcome of the case is not surprising, Wright said, but he added, "We can hope that other courts do not try to follow the Supreme Court's foray into philosophy of mind."

Tip for employers. Wright offered this tip based on the *Abercrombie & Fitch* case: "Employers should take note that the time to assess whether an applicant will need a religious accommodation is when the policy

is presented and the employee fails to comply or asks for an accommodation." Wright noted that for all the district manager "knew," the applicant would have been willing not to wear a headscarf (or a cap) if asked.

Udell likewise offered a tip for employers based on the Court's ruling: "This case drives home the importance of training for managers who make hiring decisions and, in particular, training emphasizing that hiring decisions should be based on objective factors and duties of the position, not stereotypes."

Accommodating conditions related to pregnancy. In *Young v. United Parcel Service, Inc.*, decided on March 25, "the EEOC had issued its own guidance in an attempt to dictate the outcome," as Wright put it. The Court was required "to interpret the phrase 'women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work,'" he explained. The phrase is from Title VII, as amended by the Pregnancy Discrimination Act. Wright noted that in the underlying case, the employee was pregnant and had a medical restriction that prevented her from lifting as much weight as the employer required. UPS accommodated other employees with lifting restrictions, but only as required by the ADA or its collective bargaining agreement. As a result, the employer did not accommodate this employee.

EEOC guidance. The employee brought a disparate treatment claim, based on the failure to provide her the same accommodation given to other employees with lifting restrictions. "While the case was pending, the EEOC stuck its thumb on the scale in favor of the employee by issuing new guidance on pregnancy discrimination," Wright noted. "The new guidance stated explicitly that employers could not distinguish among employees according to the source of their medical inability to perform their duties." But the Court "chose to attach little weight to the EEOC's new guidance because the guidance did not demonstrate the consistency and thoroughness of the EEOC's consideration of the issue," he pointed out.

Pregnant versus non-pregnant employees. Ultimately, the Supreme Court ruled that Title VII, as amended, does not require employers to treat pregnant employees at least as favorably as any other employee with similar restrictions," Wright observed. "Employers may still implement preferential light duty policies, so long as the employer has a legitimate, nondiscriminatory, non-pretextual reason for doing so."

The Sherman & Howard attorney said that the Court's ruling "caught employers' attention by pointing out that a pregnant employee might still prevail on a disparate treatment claim, based on the theory that the employer failed to accommodate her pregnancy, if the facts showed there was no legitimate reason not to accommodate pregnant employees." Wright pointed to this language in the opinion: "We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden …" He added, "The Court even suggested that plaintiffs could demonstrate the significant burden by showing the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers."

> *"We expect litigants to present additional claims related to employers' light duty work policies, and to support those claims with statistical analyses of the employees who are able to take light duty jobs and those who are not."*
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Employers beware. What does the ruling portend for employers? "We expect litigants to present additional claims related to employers' light duty work policies, and to support those claims with statistical analyses of the employees who are able to take light duty jobs and those who are not," Wright predicted. "The Supreme Court seems open to focusing its analysis of disparate treatment claims on such information." Wright suggested this best practice: "The time is right … for employers to review their leave, light duty, and accommodation policies.

Too many kinds of available leave and light duty might create an inference that the employer is targeting those employees left outside the scope of the policies."

Retiree healthcare benefits

Udell framed the question presented to the Court in *M&G Polymers USA, LLC v. Tackett*: Does silence in a collective bargaining agreement regarding the duration of retiree health care benefits mean the parties intended those benefits to vest and continue indefinitely? In 2006, M&G Polymers told retirees they would have to contribute to their health care costs, triggering a class action. The retirees and United Steelworkers sued under Section 301 of the Labor-Management Relations Act and ERISA, claiming that the union's bargaining agreements gave them free lifetime health benefits and that M&G Polymers couldn't change the terms.

Presumption applied below. Below, the district court and the Sixth Circuit held that language in the CBA providing employees with health care benefits "with full Company contribution," when combined with language in the CBA linking health care benefits to pension benefits, constituted an intent by the parties to vest lifetime contribution-free benefits, Udell explained. The Sixth Circuit's decision rested on the "*Yard-Man* presumption," she said, which presumes that any grant of health care benefits in a CBA vests those benefits so that they continue indefinitely after retirement without being subject to change, absent explicit plan or bargaining agreement language to the contrary. The Sixth Circuit affirmed the district court's grant of a permanent injunction ordering the retirees reinstated in the health plan and barring the company from requiring retiree contributions.

Yard-Man *tossed.* M&G Polymers argued that the Supreme Court should reject the *Yard-Man* presumption, Udell continued, and instead require at least some affirmative indication in the CBA that the parties intended to vest retiree health care benefits in perpetuity to reasonably support an inference that retiree benefits should continue indefinitely. Other circuits have held as much, although in several different ways. The retirees, Udell noted, argued that one need only apply traditional principles of contract interpretation to the CBA to determine the parties' actual intent but that the intent need not be expressed in explicit terms.

In its January 26 ruling, the Supreme Court rejected the *Yard-Man* presumption, Udell explained, pointing to this language written by Justice Thomas: "*Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law. And it distorts the attempt to ascertain the intention of the parties." The Court remanded the case for the lower court to interpret the parties' contract according to ordinary contract principles.

The Supreme Court noted that the Sixth Circuit had no evidence concerning the parties at issue on which to base its presumption, Wright added. The Court instructed the appeals court to reconsider the case in light of such traditional principles as the doctrine that a promise is not illusory if it benefits some of the intended beneficiaries, that contractual obligations generally cease upon termination of the bargaining agreement, and that courts should not construe ambiguous writings to create lifetime promises.

Why is the ruling important? The *M&G Polymers* ruling "is important to American companies because the cost of retirees' health care benefits is of great concern in the current economic climate," according to Udell. "In general, collective bargaining agreements, including those that establish ERISA plans, should be interpreted according to ordinary contract principles." She recommended that "employers should be precise when negotiating and drafting provisions regarding retiree benefits. If possible, language expressly providing that retiree benefits do not survive term expiration should be included."

Wright explained another important impact of the ruling: "*Yard-Man* was frequently cited for interpretative guidance of collective bargaining agreements, and the Supreme Court's definitive guidance on these issues will be helpful to both employers and unions."

Affordable Care Act

A final Supreme Court ruling that impacts the labor and employment arena is *King v. Burwell*, issued on June 25. The decision settled the question in 2015 that the Patient Protection and Affordable Care Act, at least for now, is here to stay, Napier-Joyce noted. "The decision required the justices to reconcile the fact that the plain language in the statute authorized subsidies only in state-run Marketplaces with what was thought to be the clear purpose and intent of the Act (providing subsidies to all, regardless of whether they lived in a state that ran its own Marketplace or one in which the federal government ran the Marketplace)," she explained.

Impact on employers. "Although not entirely unexpected," Napier-Joyce said, "the decision meant that employers had to continue the challenging task of identifying full-time employees and offering coverage to some who may not have been previously eligible in order to avoid costly penalties."

Year in the lower courts

The year 2015 also saw important rulings in the courts below on issues related to but-for causation in Title VII retaliation claims, qualified individuals under the Americans with Disabilities Act, misclassification of workers under the Fair Labor Standards Act, and immigration, among others.

But-for causation in Title VII retaliation

Wright cited as significant the further development in 2015 of but-for causation in Title VII retaliation claims. In 2013's *Univ. of Texas Southwestern Medical Center v. Nassar,* the Supreme Court clarified that while a discrimination claim requires a showing that an employer's discriminatory motive was a "motivating factor" for an adverse action, a plaintiff asserting a retaliation claim must meet a higher standard, showing his protected activity was a "but-for" cause of the adverse action.

In 2015, the circuit courts visited the cat's paw theory of liability, Wright noted, especially as applied to retaliation cases and in light of *Nassar*. In *Zamora v. City of Houston*, decided August 19, the Fifth Circuit specifically determined that cat's paw liability was available to a Title VII retaliation plaintiff. On September 25, in *Thomas v. Berry Plastics Corp*., the Tenth Circuit ruled that the plaintiff was unable to prove his protected conduct was the "but-for" cause of the materially adverse action because he had filed an internal appeal in which two independent managers had given him a chance to tell his side of the story and still had affirmed his discharge, without relying on the purported mastermind of the retaliation.

Why do these cases matter? "These cases were relatively routine expansions of *Nassar* and are interesting primarily for the ruling in *Thomas*," Wright explained. "Thomas illustrates the advantages to an employer of having some layer of review before a discharge decision becomes final. In some circuit courts, an opportunity for the employee to be heard, and causal separation between the decision and any person alleged to have a retaliatory animus, is all it takes to sever a but-for causal chain. Too few employers, outside the unionized setting, have formalized these mechanisms."

Qualified individuals under the ADA

Turning to the ADA, Wright observed, "The circuit courts had opportunities to consider employees' disabled status, and ruled that, despite relatively recent amendments to the ADA, an employee-plaintiff still must show that his or her impairment(s) both significantly affect(s) one or more of the major life activities and, yet, permit(s) the plaintiff to perform the essential functions of the job, with or without accommodation."

Participation in onsite interactive meetings. The Sherman & Howard attorney first pointed to the D.C. Circuit's August 18 decision in *Doak v. Johnson*, where the plaintiff had hypothyroidism and depression. She had a flexible work schedule, but even employees with flexible schedules were required to be in the office for meetings between 9:30 and 10:30 a.m. and 1:30 and 2:30 p.m. Wright noted that the employer accommodated the plaintiff's difficulty maintaining her attendance with lighting changes and further adjustments to her start time but rejected a further requested scheduling change because the employee's position required her to interact daily and frequently with staff. The employer suggested that, because the employee's ability to work was unpredictable, she was unable to work any fixed schedule.

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>
> – Francis Alvarez, Joseph Lazzarotti, and Kathryn Russo, Jackson Lewis

The court affirmed summary judgment against the employee, Wright said. Although the accommodations she requested were not unreasonable as a matter of law, the employee was unable to satisfy the essential functions of her position, even with the accommodations.

Regular predictable onsite attendance. Jackson Lewis principals Francis Alvarez, Joseph Lazzarotti, and

Kathryn Russo found significant the Sixth Circuit's April 10 *en banc* holding, in *EEOC v. Ford Motor Co.*, that regular and predictable onsite job attendance is an essential function of most jobs, especially interactive ones. Consequently, the employee's requested accommodation of telecommuting for up to four days a week was not reasonable, and the court affirmed the district court's grant of summary judgment to the employer.

"The decision was surprising in its reference to 'common sense' as additional support for the conclusion that the requested telecommuting accommodation was unreasonable," the Jackson Lewis attorneys said, highlighting this language: "Non-lawyers would readily understand that regular onsite attendance is required for interactive jobs. Perhaps they would view it as 'the basic, most fundamental' 'activity' of their job."

How does the ruling impact employers? "The decision will assist employers addressing requests for telecommuting as a reasonable accommodation, particularly 'as needed' requests which, by definition, are unpredictable," according to Alvarez, Lazzarotti, and Russo. "The decision emphasized that the employee's unsupported testimony that she could work from home was not enough to counter the employer's judgment regarding what constitutes essential job functions; here, regular onsite attendance."

The Jackson Lewis attorneys offered this tip: "When an employer receives a request to telecommute as a reasonable accommodation, the employer must engage in the interactive process and document the process and its outcome. The decision emphasized the importance of ongoing meetings with the employee to clarify accommodation requests and offer alternatives."

Administrative and supervisory duties. Wright also found notable the Seventh Circuit's June 4 ruling in *Stern v. St. Anthony's Health Center*. The plaintiff was chief psychologist at an acute-care facility, with essential duties of staff supervision, administrative tasks, and direct clinical treatment of patients. The employer believed he had cognitive issues typically seen with early Alzheimer's patients and discharged him. "Even though the employer had not engaged in an interactive process to determine whether there was an available reasonable accommodation, the plaintiff's ADA case was dismissed because the only suggested accommodation was the elimination of the plaintiff's administrative and supervisory duties," Wright explained. "Because those duties were essential, it would have been unreasonable to assign them to someone else."

Death threats. In the Ninth Circuit's July 28 ruling in *Mayo v. PCC Structurals, Inc.*, the plaintiff had major depressive disorder but had worked successfully for years, Wright observed. The plaintiff began telling coworkers that he felt like bringing a gun to work to "blow the head off" a supervisor and a manager. He recited part of the supervisor's schedule that would allow him to find the supervisor. During the employer's investigation, the plaintiff refused to state categorically that he would not carry out his threats. The plaintiff was voluntarily committed for six days and took FMLA leave for two months. When he was cleared to return to work, the employer terminated his employment. Mayo sued under the ADA and state law, arguing that his "disturbing statements and comments ... were the symptoms of and caused by his disability," and therefore his discharge was discriminatory, Wright explained.

Not qualified under ADA. The court affirmed summary judgment for the employer on the grounds that the plaintiff was not qualified for employment, according to Wright, who pointed to this language in the decision: "An essential function of almost every job is the ability to appropriately handle stress and interact with others. ... And while an employee can be qualified despite adverse reactions to stress, he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions (here, at least 5 times)."

Alvarez, Lazzarotti, and Russo also saw this case as significant. They cited the court's language holding that the ADA "does not require an employer to retain a potentially violent employee. Such a request would place an employer on a razor's edge—in jeopardy of violating the [ADA] if it fires such an employee, yet in jeopardy of being deemed negligent if it returned him and he hurts someone. The [ADA] protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one."

Disability versus resulting conduct. "The ruling made a clear distinction between the disability and conduct resulting from the disability in the context of a threat of workplace violence," the Jackson Lewis attorneys explained. "The court found that, even when the threatening comments can be traced back to a disability, such as major depressive disorder, the employee's inability to handle stress and interact with others rendered him unable to perform essential job functions and negated his ADA claim."

"In this regard, the decision clarified prior case law holding that conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination," Alvarez, Lazzarotti, and Russo continued. "The court emphasized that while individuals suffering from mental illness are not incapable of working, the ADA does not require employers to 'cross their fingers' and hope that threats of violence 'ring hollow.' The ADA does not require employers to 'play dice with the lives of the workforce.'"

A little advice for employers ... The Jackson Lewis attorneys offered a little advice for employers: "Take proactive steps to limit the risk of workplace violence, including conducting a workplace violence hazard assessment and security analysis; creating an anti-violence program and policy; and conducting mandatory and annual training on workplace violence issues." Employers in addition should "be alert to any incidents involving threatening remarks or gestures, demonstrated aggressive or hostile behavior, or talk of violence, and proactively investigate and respond to any employee complaints or concerns regarding workplace violence."

"In the immediate aftermath of the ADA Amendments Act, it appeared that courts would bypass threshold issues to focus on the legitimate, nondiscriminatory reasons for adverse employment actions," Wright observed. "These cases point to the continuing need for courts to engage in case-by-case analyses of a plaintiff's status as a qualified employee with a disability." He expects courts to continue this trend, taking the specific facts concerning each plaintiff into consideration.

"In making routine employment decisions, however, employers should not rely on courts to rubber stamp informal descriptions of essential duties or failures to discuss whether reasonable accommodations exist," Wright cautioned. "Employers should formalize their job descriptions in advance, and ideally, before hiring employees into specific positions. It is good practice to discuss apparent inabilities to fulfill essential duties with the employee and to follow up on any suggested accommodations before making a final employment decision."

Continuing FLSA developments

In 2015, courts at all levels continued to address misclassification issues under the FLSA, according to Wright. "These cases include both misclassification of employees as independent contractors and misclassification of non-exempt employees as exempt."

Independent Contractors. Wright suggested that the issues concerning misclassification of independent contractors stand out in the class action involving Uber drivers. He pointed to *O'Connor v. Uber Technologies, Inc.*, where the Northern District of California on September 1 granted in part a motion for class certification. "The factual matters at issue in this case include Uber's control over drivers' rates and pay and whether drivers are able to perform work for multiple competing entities at the same time," Wright said.

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>
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The Sherman & Howard attorney also pointed to the Fifth Circuit's July 2 decision in *Gate Guard Services, L.P. v. Perez*, where a key issue was whether the purported independent contractors performed work for multiple entities at the same time. The Labor Department alleged that the employer had misclassified gate guards as independent contractors. "The Wage and Hour Division investigator had performed almost no investigation before demanding over $6 million in back wages for the affected workers, but the DOL took a hard line in the resulting litigation, contesting all motions and obstructing discovery." In the end, the court awarded the employer attorney fees.

Take a lesson from the Uber case. "The Uber case is likely to have a significant effect on entities with similar 'gig-economy' business models," Wright predicted. "It is difficult to walk the line between creating a valuable and recognizable brand for service and controlling the terms and conditions of the workers' interactions with customers. Employers who find themselves in this grey area should take steps now to define their relationships

with workers—not just by agreement with the workers on the classification, but by analyzing the economic realities of the relationship."

Exempt employees. The cases in state and federal trial courts addressing misclassification of non-exempt employees as exempt, "are too numerous to mention," according to Wright. "In each case, the specific facts concerning such issues as employee duties, the proportion of exempt and non-exempt duties, the extent of supervisory authority, or the exercise of meaningful discretion dictate the result," he explained. "In the many claims filed seeking unpaid wages and overtime premiums, significant litigation revolves around meal and break times. These cases also are intensely fact specific."

Wright said that to determine whether employers may avoid paying employees for meal periods requires determining whether the employees are relieved of working during the break and whether any portion of the break predominantly benefits the employer rather than the employee. He cited the Fifth Circuit's September 15 decision in *Naylor v. Securiguard, Inc.*, as an example.

It's all about the facts. Wright offered this suggestion: "Again, employers should analyze the facts, rather than the strategy and the policies, to determine whether employees are properly classified." He expects these issues to become even more important when the Labor Department issues its final regulations on the salary threshold for certain exempt classifications, now expected this summer.

Status of interns. Jackson Lewis attorney *Paul DeCamp* underscored the importance of the Second Circuit's July 2 ruling in *Glatt v. Fox Searchlight Pictures*, "insofar as it rejected half a century of flawed guidance from DOL with respect to evaluating the employment status of interns under the FLSA." The decision articulates a nuanced non-exhaustive multi-factor test that takes into consideration the types of factors most relevant to modern internships at for-profit entities. "Most importantly, the court aligns the test with the more general economic realities jurisprudence the courts use to determine the employment relationship in a wide variety of contexts by clarifying that—unlike DOL's rigid six-factor test—no one factor is dispositive," DeCamp explained.

Beginning of the end? "The ruling is of great practical significance because it may be the beginning of the end for the spate of intern class and collective actions that have been appearing over the past several years," according to DeCamp. "It is still important to think carefully before bringing on unpaid interns, but in light of *Glatt,* it is likely that in the future such arrangements will rise or fall under a more flexible and realistic standard than the one DOL has asserted since the 1960s."

Employer-sponsored wellness programs

Jackson Lewis attorneys Alvarez, Lazzarotti, and Russo also found significant a pair of cases in which the EEOC challenged employer wellness programs under the ADA.

ADA safe harbor provision. In the first case, the Western District of Wisconsin rejected the EEOC's challenge, ruling on December 31 that the "safe harbor" provision for the terms of a bona fide benefits plan under the ADA shielded the employer from liability for unlawful medical examinations. In *EEOC v. Flambeau, Inc.*, the court granted summary judgment in favor of the employer, finding the employer's requirement that employees participate in a wellness program, including a health risk assessment and "biometric screening," was a term of its health benefits plan and thus covered by the safe harbor, the Jackson Lewis attorneys explained.

The information gathered through the wellness program was aggregated so that individual participants' results were unknown, and the employer had used the information to estimate the cost of providing insurance, set participants' premiums, evaluate the need for stop-loss insurance, adjust the co-pays for preventive exams, and adjust the co-pays for certain prescription drugs. Such decisions were a "fundamental part of developing and administering an insurance plan" and therefore fell "squarely" within the safe harbor.

Subterfuge argument rejected. Alvarez, Lazzarotti, and Russo noted that the court also rejected the EEOC's argument that the employer was using the safe harbor as a subterfuge to conduct unlawful medical examinations and inquiries. For a benefit plan to act as subterfuge, it must make a "disability-based distinction" that is used to discriminate against disabled individuals in a non-fringe benefit aspect of employment.

Here, the employer's wellness program did not involve such a distinction. All employees who wanted insurance had to complete the wellness program before enrolling in the plan, regardless of their disability status. Further, there was no evidence that the employer used the information gathered from the tests and assessments to make disability-related distinctions with respect to employees' benefits. Accordingly, the court granted the employer's motion for summary judgment.

Will the EEOC appeal? "Because this case was one of first impression in the Seventh Circuit and relied heavily on an Eleventh Circuit case, *Seff v. Broward County* (11th Cir. 2012), which the EEOC maintains was wrongly decided, it is likely that the EEOC will file an appeal with the Seventh Circuit," the Jackson Lewis attorneys predicted.

Penalties for nonparticipation. Alvarez, Lazzarotti, and Russo pointed to a similar case pending in the Eastern District of Wisconsin, *EEOC v. Orion Energy Systems, Inc.*, No. 1:14-cv-1019-WCG. There the parties have both moved for summary judgment regarding whether the employer violated the ADA's prohibition against involuntary medical inquiries and examinations by imposing impermissible penalties on employees who chose not to participate in its wellness initiative.

"Only time will tell whether these decisions will act as a catalyst for employers to become more aggressive in their design of wellness programs," suggested the Jackson Lewis attorneys.

On the immigration front

Jackson Lewis attorneys Michael Neifach, Amy Peck, Jessica Feinstein, Cynthia Liao, and David Jones singled out several immigration decisions in 2015 that were important.

Immigration reform on hold. In *Texas v. United States,* 26 states filed suit seeking to block implementation of President Obama's plan to expand eligibility under the administration's 2012 Deferred Action for Childhood Arrivals (DACA) program and create a similar program granting deferred action and work authorization to undocumented parents of U.S. citizens and lawful permanent residents (DAPA).

"With immigration reform legislation proposals at a standstill in Congress, the administration had been looking to provide millions of undocumented individuals with temporary relief from possible deportation and with work authorization by granting deferred action," the Jackson Lewis immigration attorneys explained. "That action was blocked by the Southern District of Texas, which issued a *preliminary injunction* in February 2015." The injunction was *affirmed* in November by the Fifth Circuit.

The administration sought the Supreme Court's review; the petition for cert was granted on January 19, 2016.

The case is important because the DACA and DAPA programs could provide millions of undocumented individuals with temporary relief from possible deportation and with work authorization by granting deferred action. The Fifth Circuit decision, however, has completely blocked the Obama Administration's central reform initiatives.

Continuing uncertainty. The case has also left both undocumented workers and employers in an uncertain situation where they do not have an immediate resolution. The Jackson Lewis attorneys suggested that employers and employees alike should closely watch the result of this case and consult with attorneys in order to take immediate actions.

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H-2B litigation. In its March 4 decision in *Perez v. Perez*, the Northern District of Florida vacated the Department of Labor's 2008 H-2B regulations on the ground that the DOL lacks authority under the Immigration and Nationality Act to issue regulations in the H-2B program. The decision affects how employers file the H-2B petition to bring foreign nationals to the United States to fill temporary nonagricultural jobs, Neifach, Peck, Feinstein, Liao, and Jones explained. It was an important ruling because, effective immediately, the DOL was no longer able to accept or process requests for prevailing wage determinations or applications for labor certification in the H-2B program.

The ruling was also surprising because, although it follows an earlier order by the same district court in *Bayou Lawn & Landscape Services v. Perez* (which vacated the DOL's 2012 H-2B regulations), *Bayou,* and now *Perez*, conflict with the Third Circuit's decision upholding the DOL's authority to promulgate H-2B regulations in *Louisiana Forestry Association v. Secretary, United States DOL*.

The case also presented challenges for other courts. The Eleventh Circuit subsequently vacated the prior order that invalidated the 2012 set of H-2B visa rules and remanded the case to let the lower court consider how the new rules have affected it, the Jackson Lewis attorneys explained.

STEM OPT litigation. In August, the District of Columbia, in *Washington Alliance of Technology Workers v. DHS*, found deficient the 2008 Department of Homeland Security rule allowing certain F-1 visa students with Science, Technology, Engineering or Math (STEM) degrees to extend their stay in the United States for an additional 17 months of training related to their degrees. The court concluded that the DHS rule was not properly subjected to public notice and comment but permitted it to remain temporarily in effect. The court further determined that the DHS' interpretation of the F-1 regulations, allowing for the 17-month STEM OPT extension, is "not unreasonable" and that a rule following the proper notice and comment process would be valid. The Washington Alliance of Technology Workers has appealed the court's finding that following the proper notice-and-comment process would validate this rule.

The decision is important because thousands of F-1 visa students in the U.S. with currently valid employment authorization will be impacted, according to the Jackson Lewis attorneys. Although the ruling puts the current STEM OPT program in jeopardy, it does not invalidate the employment authorization for current STEM extension holders, nor does it preclude an individual from applying for and being granted a STEM extension up until February 12, 2016.

Editorial note: The final regulation was submitted to the Office of Management and Budget for regulatory review on February 5, 2016.

H-1B amendment for worksite change. In April, the Administrative Appeals Office, in *Matter of Simeio Solutions*, issued a precedent decision requiring an amended H-1B petition to be filed prior to any worksite location change for an H-1B employee. This applies to any H-1B worker whose new worksite is not listed in the original H-1B Petition and Labor Condition Application (LCA). The decision is important because it overruled previous H-1B guidance used by U.S. Citizenship and Immigration Services.

"This is a drastic departure from prior guidance," Neifach, Peck, Feinstein, Liao, and Jones said. "Therefore, every time an H-1B worker is relocated, an amended H-1B petition must be filed prior to the relocation."

Employer tip. The Jackson Lewis attorneys had this tip for employers: "The H-1B employers who routinely place workers at third-party worksites should consider making a comprehensive compliance plan for prompt and cost-effective LCA/H-1B compliance."

Supreme Court forecast

The Supreme Court kicked off 2016 with a pair of opinions that are important to labor and employment practitioners: *Campbell-Ewald Co. v Gomez* and *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan.* And the Court's docket includes several pending cases, as well as petitions for certiorari that are closely watched by the L&E community.

Off to a strong start

Unaccepted offer of judgment. In *Campbell-Edwald*, the High Court addressed whether a putative class action lawsuit becomes moot when the defendant offers complete relief to the named plaintiff (regardless of whether the plaintiff accepts that offer), Jackson Lewis attorneys Joseph Lazzarotti, *Amy Worley,* and *Jason Gavejian* observed. In a 6-3 decision on January 20, 2016, the Court ruled that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case.

In reaching its holding, the Court found that Gomez's complaint was not mooted by Campbell's unaccepted offer to satisfy his individual claim. Rather, the Court stated that under basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected, had no continuing effectiveness. With no settlement offer operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset.

The case is important because organizations that are sued under the Telephone Consumer Protection Act (TCPA) often face class action suits, according to the Jackson Lewis attorneys. [The case also has broader implications for other class actions.] To defend such suits, companies would often attempt to have such claims dismissed by utilizing an offer of judgment to the named plaintiff and claiming the full offer of relief moots the claim, they explained.

Settlement leverage. "As the Court rejected the argument that offers of complete relief render putative class action lawsuits moot, the settlement leverage of plaintiffs asserting class action claims under the Fair Credit Reporting Act, the TCPA, and other similar statutes, is

likely dramatically enhanced," Lazzarotti, Worley, and Gavejian suggested. "Additionally, given the holding, it is imperative for organizations which utilize automated dialing systems to take steps to comply with the TCPA, its accompanying regulations, and related guidance."

ERISA tracing requirement. Jackson Lewis attorney Collin O'Connor Udell noted that *Montanile*, also issued on January 20, involved these issues: Does Section 502(a)(3) of ERISA, which requires that any lawsuits by plan fiduciaries seek only "equitable relief," allow a fiduciary to sue a participant who is no longer in possession of the disputed benefit payments? In order to bring the suit, must a fiduciary have identified a particular fund that is in the participant's possession and control at the time the fiduciary brings its claim? Six circuits have said "no" and two circuits have said "yes," according to Udell, who said the case would accordingly determine whether such a "tracing requirement" really is a threshold requirement to bringing suit.

The Court held that "when a participant dissipates the whole settlement on nontraceable items, the fiduciary cannot bring a suit to attach the participant's general assets under Section 502(a)(3) because the suit is not one for 'appropriate equitable relief.'" Udell said that the Court "turned to 'standard equity treatises,' which state that an equitable lien is only enforceable against specifically identified funds remaining in the defendant's possession or traceable items that defendant purchased with those funds." She explained that where a defendant spends the entire identifiable fund on nontraceable items, as Montanile did, that expenditure destroys an equitable lien. Any recovery must take place as a legal remedy, such as a suit for damages, not as an equitable remedy.

On the docket

Udell pointed to several other cases pending on the High Court docket, offering these comments, among others, on the issues involved in each instance:

- ***Tyson Foods, Inc. v. Bouaphakeo***: May differences among individual class members be ignored in a Rule 23(b)(3) class action or a FLSA collective action where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample? May such a class or collective action be certified or maintained where the class contains hundreds of members who were not injured and have no legal right to any damages? This "donning and doffing" case could narrow the circumstances in which a Rule 23 class and an FLSA collective action may be certified. As the latest major test of class-actions, this case has the potential to change the legal landscape, although depending on which way the majority leans, it may only apply to the FLSA context, in which case it will be unlikely to markedly affect the rules governing Rule 23 class actions. However, if plaintiffs' lawyers are successful, courts may see more statistical sampling not only in wage-and-hour suits but also in cases brought under Title VII or the Equal Pay Act.

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>
> – Chris Bourgeacq, The Chris Bourgeacq Law Firm

- ***Gobeille v. Liberty Mutual Insurance Company***: May Vermont apply its health care database law to the third-party administrator for a self-insured ERISA plan? Put another way, does ERISA preempt state statutes that provide for "all payer" health care databases? Such laws require all public and private entities that pay for health care services provided to residents of Vermont to transmit to the database certain claims data reflecting medical services and expenditures. Vermont's law requires ERISA plans providing some health care in Vermont to provide data, which imposes a burden on them in addition to their reporting and disclosure obligations to the U.S. Department of Labor. It is far from clear how the Court will decide this case, but given the importance of ERISA and health care to an aging population, it is a case to watch closely.
- ***CRST Van Expedited, Inc. v. EEOC***: Can the dismissal of a Title VII case, based on the EEOC's complete failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, form the basis of an attorneys' fee award to the defendant under 42 U.S.C. Section 2000e-5(k)? The setting sounds a bit familiar after *Mach Mining*, although the issue is a different one. The case presents a nice question about whether the EEOC's pre-suit duties constitute an element of its case or only an administrative prerequisite to suit.

- ***Friedrichs v. California Teachers Association***: Should *Abood v. Detroit Board of Education* be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment? Does it violate the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions instead of requiring that employees affirmatively consent to subsidizing such speech? Oral argument watchers felt the five Justices that made up the *Harris v. Quinn* majority [which questioned precedent in *Abood*] seemed to be coalescing once again, whereas the four Justices in the *Harris* dissent continued to lean the other way. The unexpected death of Justice Scalia on February 13, 2016, is widely expected to influence this case in particular.
- ***Zubik v. Burwell***: This case has been consolidated with many other appeals, and together, hot on the heels of *Hobby Lobby*, they ask the Court whether the Affordable Care Act's birth control mandate (which requires employers to provide their female employees with health insurance that includes no-cost access to certain forms of birth control) and the government's attempt to arrange a way to exempt non-profit charities, schools, colleges, and hospitals from the mandate violate the Religious Freedom Restoration Act.

Spokeo, Inc. v. Robins: Lazzarotti, Worley, and Gavejian pointed in addition to this case, brought under the Fair Credit Reporting Act, to determine whether individual consumers have standing to sue a consumer reporting agency for statutory violations of the FCRA when no "actual damages" were suffered by the consumer. The decision may impact federal laws in addition to FCRA, according to the Jackson Lewis attorneys. For example, *Spokeo* may provide at least persuasive authority in data breach litigation where questions of actual damages and standing have plagued plaintiff's attorneys for years.

"The FCRA, like other privacy laws, imposes monetary damages against consumer reporting agencies for statutory violations," Lazzarotti, Worley, and Gavejian explained. "When Congress enacted the FCRA, it also created a private cause of action for 'consumers' against 'consumer reporting agencies' for statutory violations, but it did not require a consumer to allege that the violation caused any harm as a result of the violation. Thus, a key issue in the case is whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm."

Challenges to NLRB actions

Jackson Lewis attorney Howard Bloom underscored these important NLRB-related issues facing federal courts in 2016:

- A challenge to the validity of the NLRB's *representation case procedures rule* at the United States Court of Appeals for the Fifth Circuit.
- Board decisions finding agreements requiring employees to waive their right to bring collective or class actions against their employers unlawful. As the board continues to issue decisions finding employers' class-action waivers unlawful, courts will continue to reverse the NLRB, Bloom predicts. 2016 may be the year when issue finally reaches the U.S. Supreme Court.
- The NLRB's *Browning-Ferris* decision, which revised the joint-employer test, is positioned procedurally to be appealed this year to a circuit court of appeals.

Article III standing issue. The Jackson Lewis attorneys said that the Supreme Court will likely approach the issue within the context of analyzing Congressional authority to confer Article III standing. "The resolution of this separation of powers argument could have significant consequences for companies and employers covered by the FCRA and other privacy laws," they said. "For example, there are other federal laws that have enforcement mechanisms similar to FCRA, such as the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act."

Green v. Brennan: Sherman and Howard attorney William Wright underscored this case on the Court's docket, where the Justices will consider whether the time to file a charge based on constructive discharge begins to run when the employee resigns or at the time the employer engages in the last act that allegedly would compel a reasonable employee to resign. "This dispute will be significant for employers because, if the claim does not arise until the resignation, the employer has time to correct any apparent discrimination or retaliation before the ultimate employment action," Wright said. In light of cat's paw cases and the possibility that an internal review could disrupt the causal chain leading to the resignation, the later time would be an advantage to employers, he added.

***United States v. Texas*:** Neifach, Peck, Feinstein, Liao, and Jones signaled as important the Supreme Court's decision in January 2016 to hear this case, which they also identified as an important 2015 development. It will be a significant ruling about the scope of the government's power. "The result of the case will have a broad impact on millions of undocumented individuals with temporary relief from possible deportation and with work authorization by granting deferred action," according to the Jackson Lewis attorneys.

Sleeper case? Chris Bourgeacq saw *Friedrichs v. California Teachers Association* as "the sleeper case with the potential for the biggest outcome in 2016." At stake in that case is whether employees in public unions can be required to pay compulsory union dues or agency fees. "If the unions lose this one, they'll lose big," Bourgeacq predicted. "Without compulsory dues, union membership will plummet." Click *here* to find out more about these and other Supreme Court cases and petitions for certiorari that *Employment Law Daily* is tracking.

What's ahead in the lower courts?

Sherman & Howard attorney William Wright suggested that the trends in 2015 will continue through 2016. Labor and employment experts pointed specifically to litigation related to National Labor Relations Board actions, states' legalization of marijuana, remedies for breach of fiduciary duty under ERISA, immigration reform, and another EEOC procedural question.

Arbitration agreements

Other L&E experts agreed that arbitration agreements will continue to be an important issue in the lower federal courts. Wright said he expects that courts will continue to "wrestle with the drafting issues related to arbitration agreements, including the incorporation of waivers to participate in any class action." These arbitration issues have been heard by various courts and by the NLRB, with varying results, he noted. The Supreme Court continues to rule that arbitration agreements may be enforced according to their terms, he said, citing the Court's December 2015 opinion in *DIRECTV, Inc. v. Imburgia* (ruling that California's interpretation of an arbitration agreement to incorporate earlier invalidated law was an interpretation specific to arbitration agreements and was preempted by the Federal Arbitration Act).

At the NLRB. Wright also observed that "the NLRB continues to maintain that class action waivers violate employees' NLRA right to engage in concerted activity," pointing to the Board's ruling in *Chesapeake Energy Corp*. "We look forward to an authoritative resolution of the impasse between the NLRB and the courts on this issue," Wright said.

Chris Bourgeacq was on the same wave length, citing "the NLRB's intransigence on class action waivers in mandatory arbitration agreements," as he put it. "The NLRB continues to refuse to follow *D.R. Horton*, a Fifth Circuit decision reversing the Board's decision that refused to enforce a class action waiver in an employer's arbitration agreement. Instead the Board continues to strike down such waivers, despite the Fifth Circuit's decision and the Supreme Court's clear support for class action waivers in arbitration agreements."

The marijuana question

Alvarez, Lazzarotti and Russo pointed to the marijuana question: Does federal law preempt state laws legalizing marijuana? In December 2014, the states of Nebraska and Oklahoma filed a motion with the Supreme Court (*No. 22O144 ORG*) to let them bring suit against the state of Colorado, challenging that state's legalization of marijuana, the Jackson Lewis attorneys noted. Colorado's neighbors contend that the "legal" marijuana in Colorado overflows into its neighboring states, creating law enforcement problems for those states.

Nebraska and Oklahoma argue, among other things, that Colorado's law is preempted by federal law which provides that marijuana is illegal. Nebraska and Oklahoma invoked what the Jackson Lewis attorneys called "a rarely used constitutional provision" giving the High Court original jurisdiction over suits between states. The two neighboring states are seeking a declaration that the Colorado legalization program is unconstitutional.

Solicitor General chimes in. The U.S. Solicitor General filed a brief in the case opposing Nebraska's and Oklahoma's challenge to Colorado's legalization of marijuana. The Solicitor General argued that the Supreme Court should not exercise original jurisdiction where a state has not directed or authorized injury to its neighboring states. According to the Solicitor General, there is no direct injury to Nebraska and Oklahoma inflicted by Colorado; rather, Nebraska and Oklahoma argue that third parties will commit criminal offenses in their states by bringing marijuana purchased in Colorado into their states.

What are the implications? "If the Supreme Court agrees to hear the case (which it is not required to do), the implications could be far-reaching, particularly for those states that have already legalized medical and

recreational marijuana," the attorneys said. "Currently, 24 states and the District of Columbia have medical marijuana laws, and four states and the District of Columbia have legalized recreational marijuana." And there is a bill pending in Congress seeking to downgrade marijuana from a Schedule I illegal drug to a Schedule II drug with a currently accepted medical use, despite its potential for abuse, the Jackson Lewis attorneys pointed out.

ERISA remedies

Another significant litigation issue for employers in 2016 is the determination of what remedies are available under ERISA for a breach of fiduciary duty, according to Jackson Lewis attorney Ashley Abel. "This issue is important because employers, as plan sponsors, plan administrators, and plan fiduciaries, are increasingly the subject of lawsuits (following *CIGNA Corp. v. Amara*) seeking to expand remedies under ERISA for any error in plan administration, including actions which would have been previously viewed as ministerial in nature (and not a fiduciary action) such as benefit statements to employees that are inconsistent with the terms of the plan document and other alleged misrepresentations or omissions."

Inconsistent rulings. Able anticipates inconsistent decisions from federal district courts and more appeals through the circuit courts until there is consistency or a grant of certiorari and a ruling by the Supreme Court on the question of what remedies are available for a breach of fiduciary duties.

Expanded remedies available? The implications for expanded remedies under ERISA, Abel explained, could include make-whole relief to plaintiffs/employees, which was not previously available under ERISA, thereby catching the interest of plaintiffs' attorneys who may have previously shied away from filing an ERISA action. "The filing of such lawsuits with the law unclear means plaintiffs will be allowed to pursue novel or unsettled theories through discovery and summary judgment, and perhaps to trial," he suggested. "This will result in significantly increased attorneys' fees to defend ERISA fiduciary claims and more uncertainty about the results."

Another EEOC procedural case

Wright identified another EEOC procedural case he thought likely to be the subject of a petition for certiorari in 2016: the Seventh Circuit's December 2015 ruling in *EEOC v. CVS Pharmacy, Inc*. There, the EEOC brought suit against an employer claiming that its employee separation agreement contained a waiver of claims that was overly broad and chilled employees' attempts to vindicate their rights by filing charges of discrimination. The EEOC also claimed that the use of these agreements amounted to a pattern or practice of resistance to the employees' enjoyment of Title VII rights, and therefore, the EEOC could initiate suit against the employer *without* obtaining, investigating, or conciliating a charge of discrimination.

The Seventh Circuit disagreed, Wright noted, ruling that the EEOC had to meet the familiar pre-suit requirements. "Because this case too fits the EEOC's agenda item of preserving access to the legal system, we would not be surprised to see the EEOC pursue its arguments to the Supreme Court," he explained. "We also would not be surprised to see the EEOC challenge other employers' separation agreements.

Tip for employers. Wright suggested that employers "might well review their standard forms to be sure that the forms make clear to employees that they may take complaints to the EEOC, despite having accepted consideration for a waiver of their claims."

About the Author

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation and trends for *Employment Law Daily.* As a practicing attorney for 12 years, Wolf 's experience includes litigation of employment and civil rights matters.