Supreme Court Preview: 2018-2019 Term.

The U.S. Supreme Court will begin its 2018-2019 Term with a docket full of cases significant to employers and businesses. Cases to watch involve questions on employment discrimination and class arbitration, among other things.

Age Discrimination in Employment Act

On the first day of the term, October 1, 2018, the Court will hear oral argument on whether the Age Discrimination in Employment Act (ADEA) applies to all state political subdivisions, regardless of size. *Mount Lemmon Fire District v. Guido,* No. 17-587.

The ADEA prohibits employment discrimination against persons 40 years of age or older. An "employer" covered by ADEA is defined as "a person engaged in an industry affecting commerce who has twenty or more employees…." The 20-employee threshold applies to private employers. The Court will settle a conflict among the federal appeals courts on whether the 20-employee threshold also applies to political subdivisions of a state or whether the ADEA applies to state political subdivisions of any size.

The U.S. Court of Appeals for the Ninth Circuit, in conflict with the U.S. Courts of Appeals for the Sixth, Seventh, Eighth, and Tenth Circuits, has held the ADEA applies to state political subdivisions of any size.

Arbitration

The Court will decide whether the Federal Arbitration Act (FAA) forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. *Lamps Plus, Inc. v. Varela,* No. 17-988. Oral argument has been scheduled for October 29, 2018.

The arbitration clause at issue in this case is silent on whether workers who signed it can pursue their claims through class arbitration. A divided Ninth Circuit panel had inferred mutual assent to class arbitration from such standard language as the parties' agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings." The Supreme Court's decision will affect the rights of employees and employers who have entered into arbitration agreements that are silent on class arbitration.

The Supreme Court will have the opportunity to clarify its decision in *Stolt-Nielsen v. AnimalFeeds International Corp.,* 559 U.S. 662 (2010), in which it ruled that parties cannot be forced into class arbitration "unless there is contractual basis for concluding [they] agreed to do so." The Court explained that courts may not "presume"

consent from "mere silence on the issue of class arbitration" or "from the fact of the parties' agreement to arbitrate."

The case arose from identity theft resulting from a phishing attack. A third party impersonating an employee had convinced another employee to send copies of W-2 forms containing employees' personal identifiable information.

In another FAA case, the Supreme Court will decide (1) whether a court or an arbitrator must determine the applicability of Section 1 of the FAA, which applies only to "contracts of employment," and (2) whether that provision includes independent contractor agreements. *New Prime Inc. v. Oliveira,* No. 17-340. Oral argument has been scheduled for October 3, 2018.

In still another FAA case, which did not arise in the employment context, the Court will decide whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." *Henry Schein, Inc. v. Archer and White Sales, Inc.,* No. 17-1272. Oral argument has been scheduled for October 29, 2018.

Others

To settle a split among the circuits, the Court will decide whether the Ninth Circuit erred when it held that equitable exceptions apply to mandatory claim-processing rules (such as Federal Rule of Civil Procedure 23(f), which sets a 14-day deadline to file a petition for permission to appeal an order granting or denying class-action certification) and can excuse a party's failure to file timely within the deadline established by Federal Rule of Civil Procedure 23(f). *Nutraceutical Corp. v. Lambert,* No. 17-1094. The Ninth Circuit ruling is in conflict with the rulings of the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits. As of this writing, oral argument has not been scheduled for this case.

The Court also will decide whether under the Railroad Retirement Tax Act, a railroad company's payment to an employee for time lost from work is compensation subject to employment taxes. *BNSF Railway Company v. Loos,* No. 17-1042. Oral argument has been scheduled for November 6, 2018.

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