U.S. SUPREME COURT'S OCTOBER 2015 TERM PROMISES SLEW OF SIGNIFICANT LABOR AND EMPLOYMENT CASES

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Each year, the U.S. Supreme Court begins its term on the first Monday in October. Although known as the "October Term," the term in fact continues, alternating between two-week "sittings" and "recesses," until late June or early July – when the court's annual cycle repeats.

Most terms, the court decides at least four or five significant labor or employment cases. This year promises to be no different. The court has already agreed to hear numerous cases of significance for employers, one of which — *Friedrichs v. California Teachers Association* — could fundamentally alter the public employment arena. Below is a sampling of what lies ahead on the court's calendar.

- *Friedrichs v. California Teachers Association*: Here, the court is expected to rule whether public employees may be compelled to pay union dues as a condition of their employment. Many observers anticipate that the court's conservative majority will overturn its 1977 opinion in *Abood v. Detroit Board of Education*. If this proves true, the decision will have a profound impact, as unions rarely thrive unless they are able to compel non-members to contribute toward their upkeep. Some believe that the very future of public sector unionism may be at stake.
- *Tyson Foods, Inc. v. Bouaphakeo*: In wage and hour cases, plaintiffs typically seek relief on behalf of a "class" or as part of a "collective" action. Plaintiffs do this in order to create a single high-stakes action from hundreds or even thousands of individual claims that otherwise would not be worth pursuing on their own. In *Comcast Corp. v. Behrend*, the Supreme Court recently limited the ability of plaintiffs to pursue relief in this fashion where the determination of individual damages was not susceptible to resolution on a class-wide basis. In *Bouaphakeo*, the court will have an opportunity to refine its analysis with respect to two related issues: 1) the extent to which statistical techniques that presume that all class members are identical to the average observed in a sample may be used to prove liability and damages; and 2) whether a class or a collective action may be maintained when the class contains members who were not injured and therefore are not entitled to damages.
- *Green v. Brennan*: This matter concerns when the statute of limitations runs on a constructive discharge claim where a plaintiff alleges that he was forced to resign

due to harassment or other forms of discrimination. Does the statute run from the employee's resignation or from the last alleged bad act of the employer? However technical, issues involving statute of limitations often determine a case's outcome, particularly with federal discrimination claims where plaintiffs generally must file a charge with the EEOC or corresponding state agency within a 300-day (or in some states 180-day) window or otherwise forfeit any relief.

- *Campbell-Ewald Company v. Gomez*: This case also turns on a technical but potentially outcome-determinative issue in many litigations. Although not an employment case, it has particular relevance to wage and hour class and collective actions. One strategy for defending these cases is for the employer to make an "offer of judgment" to the named, representative plaintiffs that provides them with complete relief for their individual claims. A number of influential courts have held that such an offer, even if unaccepted, moots these plaintiffs' claims and thus requires dismissal of the entire matter, as these plaintiffs no longer have any personal interest in representing other class members. Should the Supreme Court also adopt this view, it would be a very significant win for employers.
- *MHN Government Services Inc. v. Zabrowski*: The Federal Arbitration Act (FAA) strongly favors arbitration. Under California law, however, a contract clause requiring arbitration must be disregarded if any of its terms are invalid. This case will decide whether the FAA preempts this provision of California law and requires enforcement of an agreement to arbitrate even where several of the agreement's provisions are found to be unconscionable and unenforceable. The case is significant for employers who generally prefer arbitration over the courts as a means for resolving employment disputes. Not only is California the nation's largest jurisdiction, but the case's outcome could impact the FAA's application in other states with similar rules of contract interpretation.
- *Heffernan v. City of Paterson*: In this case, the court will consider whether the First Amendment prohibits a public employer from firing an employee based on the employer's perception of the employee's political affiliation. In doing so, the court is expected to resolve a circuit split concerning whether the First Amendment's protections extend only to actual speech or whether they also prohibit a public employer from penalizing an employee for perceived speech. In this somewhat usual case, the plaintiff, a police officer, was fired after he was observed picking up a political lawn sign for his bedridden mother that supported a candidate seeking to unseat the current mayor. The Third Circuit, however, dismissed the officer's claims because he could not show that he in fact engaged in speech.