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5 Supreme Court Employment Cases To Watch

By **Ben James**

Law360, New York (October 7, 2015, 9:25 PM ET) -- Legal battles that give the U.S. Supreme Court an opportunity to shed light on the requirements for pursuing employment class actions and deal a blow to public sector unions topped the list of high court labor and employment cases attorneys said they'd be keeping an eye on in the coming term.

The current crop of pure labor and employment disputes before the Supreme Court doesn't feature as many potential blockbusters as past terms have, according toBakerHostetler LLP partner Dennis Duffy. But that doesn't mean there's nothing worth monitoring.

“There are still a few meaty issues, and it's fair to say that the court is building on various themes that they've been addressing in prior terms,” Duffy said.

As the Supreme Court term kicks off, here are five labor and employment cases lawyers said they'd be following:

Tyson Foods Inc. v. Bouaphakeo

In June, the nation's highest court granted a petition for review from Tyson Foods Inc., which is taking aim at a $5.8 million loss in a hybrid class and collective action brought on behalf of workers at a pork-processing facility in Storm Lake, Iowa. Oral arguments are slated for Nov. 10.

In August 2014, a divided Eighth Circuit panel upheld a trial judge's decision affirming a jury verdict for Tyson workers, saying the lower court properly certified their claims under the Fair Labor Standards Act and Iowa law.

According to the company, the appeals court's decision broke with several sister circuits and conflicted with the landmark Dukes ruling, as well as the more recent Comcast decision. Those two rulings should have put a stop to class certification that's based on establishing liability and damages classwide through "trial by formula," Tyson said, panning the lower court's "lax approach."

Wigdor LLP's Lawrence Pearson, who represents workers, said the Tyson case presented a “fork in the road” for the Supreme Court, giving the justices a chance to say that differences between class members essentially prohibit class action treatment or that averaging and aggregation are permissible.

The latter course would be consistent with the reality of wage-and-hour suits, in which workers'

circumstances often differ to some degree, and employers' failure to keep required records can complicate an assessment of liability and damages, he said.

“You're not going to have situations where every plaintiff has suffered the same injury or number of instances of that injury and be able to determine classwide damages with scientific precision,” Pearson said.

Management-side lawyers are hoping Tyson yields another employer-friendly ruling that offers Wal-Mart v. Dukes-style guidance — and limitations — on what it takes to have a proper, certifiable class in a wage case.

“It's a really important follow-up to Wal-Mart but in a case that was actually tried,” Mayer Brown partner Miriam Nemetz said, noting that most class actions don't make it to a jury. “The Supreme Court has the opportunity to clarify that you can't sacrifice accuracy to achieve manageability and then award damages to people who were not injured.”

The case is Tyson Foods Inc. v. Bouaphakeo, case number 14-1146, in the U.S. Supreme Court.

Friedrichs v. California Teachers Association

This case, which the Supreme Court agreed to hear in June, was brought by a group of California teachers looking to topple the 1977 Abood v. Detroit Board of Education ruling, which allowed public employers to require nonunion workers in union-represented bargaining units to to pay union fees, as long as those workers aren't required to fund political or ideological activities.

Observers say a decision siding with the teachers could hurt unions in the public sector by cutting into their financial support. Faced with the option of paying either full union dues, nonmember fees or nothing, many workers are likely to take the third option and essentially give themselves a raise, Reed Smith LLP partner Joel Barras said.

“It has the real potential to do some damage to public sector unions across the country,” Barras said.

While lawyers agree that a win for the Friedrichs plaintiffs would be a blow to organized labor in the public sector, such a decision would not sound the death knell for public sector unions.

“I think public sector unions are alive and well,” Barras said. “I think it's fair to say that their political speech will be severely limited. I also think unions will need to increase their focus on maintaining the support of public sector workers.”

Michael Rubin of Altshuler Berzon LLP, who represents employees, said that the reason the Friedrichs case is being closely watched is that it is a political attack cloaked as a First Amendment challenge. The point of the lawsuit, he said, was to undermine public employee unions’ ability to perform their core functions and to have broader public influence.

“The problem is not just that overturning Abood would have significant economic impacts but that those impacts would limit unions' ability to engage in their core collective bargaining and member-servicing functions,” Rubin said.

Oral arguments have not yet been scheduled.

The case is Friedrichs v. California Teachers Association, case number 14-915, in the U.S. Supreme Court.

MHN Government Services Inc. et al. vs. Zaborowski et al.

On Oct. 1, the high court granted defense contractor Managed Health Network Inc.'s petition for review of a Ninth Circuit ruling that affirmed a lower court's decision to reject the company's motion to compel arbitration in a would-be overtime class action.

The trial court ruled that the contract was "so permeated with unconscionability" that lopping off the provisions it deemed unconscionable wasn't an option and thus invalidated the whole agreement.

A Ninth Circuit panel affirmed the trial court in December, leaving intact the decision not to sever the unconscionable parts of MHN's the arbitration provision. The panel's memorandum came with a partial dissent from Circuit Judge Ronald Gould, who said he would have required cutting away the offending portions and left the arbitration agreement in place.

MHN's June 10 petition criticized California courts for displaying "flagrant hostility to arbitration" and said the Golden State used one severability rule for contracts in general — favoring enforcement and severing invalid terms when possible — while using another rule that frowns on enforcement for arbitration agreements.

The contract at issue contained a severability clause, stating that if any provision of the agreement is found invalid or unenforceable, the remaining provisions would remain in full force or effect, the petition said.

The case gives the justices a chance to tackle the question of whether California's arbitration-only severance rule is trumped by the Federal Arbitration Act.

"The concern is that the court might extend the reach of Federal Arbitration Act preemption beyond its already broad reach, interfering with California contract law and, as a practical matter, giving employers an incentive to add unconscionable provisions to arbitration agreements, knowing courts would sever the most offensive provisions, leaving the arbitration agreement just barely legal," Rubin said.

The case is MHN Government Services Inc. et al. vs. Zaborowski et al., case number 14-1458, in the U.S. Supreme Court.

Green v. Brennan

The Supreme Court agreed to wade into this dispute on April 27, when it granted ex-postmaster Marvin Green's petition for review of a Tenth Circuit ruling that said the filing period for a constructive discharge claim starts running at the timer of the employer's last allegedly discriminatory act, not from the time the worker resignation. Oral arguments have not been scheduled yet.

"It's just another brick in the court's jurisprudence about timeliness and how you measure it," Duffy said of the Green case.

Green sought a promotion in 2008 and was passed over, leaving him suspecting that he had been discriminated against because he is black. He complained and relations with his supervisors went south,

his Nov. 24 petition said.

Eventually he was summoned to a meeting where he was confronted with allegations of mismanagement, including a claim that he had intentionally delayed the mail, which is a criminal violation, the petition said, adding that he was reassigned to off-duty status with no pay.

In December 2009 the parties reached a deal that allowed Green to use accrued leave to receive his then-current salary through March of that year, but demoted him to a position hundreds of miles away in Wyoming that paid considerably less.

Green filed suit in Colorado federal court against the postmaster general, and the court decided that his constructive discharge claim was time-barred because signing the Dec. 16, 2009 agreement triggered the applicable 45-day filing period, though he still had a choice at that point as to whether to relocate to Wyoming or retire, according to his petition.

Though Green was a federal employee, his case gives the high court a chance to make a clarification that has implications for private sector employees as well, said Mayer Brown partner Marcia Goodman, noting that while private employees have a longer window of opportunity—180 or 300 days, under Title VII—they still have to calculate whether their time to file a charge runs from the time the employee resigns claiming constructive discharge or from the earlier date when the final allegedly unlawful act by the employer occurred.

“That timeliness issue would apply in the private sector as well, and the cases discussed are a mix of private sector and public sector cases,” Goodman said of the Green dispute. “A private sector employee has more leeway, but the principle would apply in either setting.”

The case is Green v. Brennan, case number 14-613, in the U.S. Supreme Court.

Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan

The Supreme Court granted Robert Montanile's petition for review in this Employee Retirement Income Security Act case on March 30 and has scheduled oral arguments for Nov. 9.

Montanile was hurt when a drunk driver ran a stop sign and struck his car in 2008, and the National Elevator Industry Health Benefit Plan picked up the tab for $121,044.02 in medical expenses, his Dec. 16 petition said. Montanile then sued that driver and ended up settling for $500,000, of which $263,788.48 went to his lawyers, according to the petition.

The trustees eventually sued Montanile, but by then, he had far less than the $122,044.02 they wanted still in his possession, according to his petition. The suit invoked a section of ERISA that authorizes fiduciaries to seek “appropriate equitable relief,” and the case turns on whether what the trustees were after falls into that category.

There's a 6-2 circuit split on the key question of whether an ERISA fiduciary looking to recover an alleged overpayment is seeking equitable relief — within the meaning of ERISA Section 502(a)(3) — if that fiduciary hasn't identified a particular fund that's in the defendant's possession and control when the claim is asserted, according to Montanile's petition.

The Montanile case presents a fairly common situation, and the high court's eventual decision could

have ramifications not only for situations like Montanile's but also for plan fiduciaries' efforts to recover alleged overpayments in general, according to Mayer Brown LLP partner Nancy Ross.

“People should not be myopic in recognizing the ramifications of this decision, which are really quite enormous,” Ross said.

The case is Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan, case number 14-723, in the U.S. Supreme Court.

--Editing by Christine Chun.
