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For further information please contact:

William Pokorny
(312-786-6141)
Puja Singh
(312-786-6579)

or

any other Franczek Sullivan attorney (312-986-0300)

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A REVIEW OF THE U.S. SUPREME COURT'S 2006-2007 TERM

Since the conclusion of the U.S. Supreme Court's 2006-2007 term on June 30, 2007, many have observed the emergence of a new, more conservative coalition on the Court and the sharp divisions that have resulted, as evidenced by several 5-4 decisions in important cases. These trends were less dominant but still visible in the Court's 2006-2007 docket of labor and employment cases. While the Court's labor and employment docket was unusually light (four cases), the Court's most significant labor and employment decision was one of the 5-4 decisions reflecting the impact of this new, more conservative majority. Interestingly, however, the remaining three decisions were all unanimous.

Specifically, the four labor and employment decisions issued by the Court during its 2006-2007 term address diverse topics: the time limit for filing a charge of pay discrimination under Title VII; whether domestic companionship workers employed by an agency rather than a family or individual are exempt from federal minimum wage and overtime requirements; termination of pension plans; and state laws restricting labor unions' use of agency-shop fees for political purposes. The following review summarizes these decisions and their likely impact upon employers. Please contact us for additional information or advice regarding the impact of these decisions on your workplace.

Time Limit for Filing Title VII Pay Discrimination Charges

To maintain a lawsuit under Title VII of the Civil Rights Act of 1964, an employee must generally file a charge with the Equal Employment Opportunity Commission (EEOC) within a certain period after an act of discrimination (180 days in some states, 300 in others). In *Ledbetter v. Goodyear Tire & Rubber Co.*, a sharply divided Court held 5-4 that the plaintiff could not maintain a pay discrimination claim under Title VII based upon allegedly discriminatory pay decisions made outside this “charging period,” even though those decisions continued to affect her pay during the charging period.

Plaintiff Lily Ledbetter, a 21-year employee at Goodyear, alleged that her supervisors gave her poor performance reviews and smaller pay increases than her male colleagues throughout her career because of her sex. However, she failed to present evidence of any intentional sex discrimination during the 180 days before she filed her EEOC charge. Ledbetter argued that her claim should be regarded as timely because each paycheck she received reflecting earlier discriminatory pay decisions constituted a new Title VII violation and therefore started a new charging period. The Court rejected this reasoning, citing its earlier decisions in *United Air Lines, Inc. v. Evans* (1977), *Delaware State College v. Ricks* (1980), and *Lorance v. AT&T Technologies, Inc.* (1989). In those cases, the Court held that a violation of Title VII occurs when a discriminatory decision is made and communicated to the would-be plaintiff, rather than when the plaintiff experiences the effects of a previously-communicated decision. Consequently, the Court held that the discriminatory pay decisions that were the subject of Ledbetter's complaint occurred when they were communicated to her, not when Ledbetter later received paychecks affected by those decisions.

Four justices dissented. In an opinion by Justice Ginsburg, the dissenters observe that pay disparities often develop slowly and in small increments, and that employees may not even be aware of pay disparities until long after they learn of pay decisions. Consequently, the dissenters argued that Ledbetter should have been allowed to maintain her Title VII suit because her pay during the applicable charging period was affected by earlier discrimination, even though the discriminatory pay decisions were made more than 180 days before she filed her EEOC charge.

The longevity of the Court's ruling in this case remains to be seen, as a bill entitled the “Ledbetter Fair Pay Act of 2007” has been introduced in the House of Representatives. If enacted, this bill would amend Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act to provide that a violation of those statutes occurs each time an employee receives a paycheck affected by application of a discriminatory pay decision, effectively writing the dissenters' view into law.

Domestic Companionship Worker Employed by a Third-Party Agency Is Not Covered by Federal Minimum Wage and Overtime Requirements

In *Long Island Care at Home, Ltd. v. Coke*, the Supreme Court ruled 9-0 that federal minimum wage and overtime requirements do not apply to domestic service workers who provide “companionship services” to individuals unable to care for themselves, even where such workers are employed by third-party agencies.

In 1974, Congress enacted an amendment to the Fair Labor Standards Act (“FLSA”), extending the statute's minimum wage and overtime requirements to many “domestic service” employees not previously covered. However, the amendment exempted certain categories of workers, including individuals “employed in domestic service employment to provide companionship services for individuals ... unable to care for themselves.” The Department of Labor (DOL) later issued two sets of regulations relating to this exemption. The first defines the term “domestic service employment” as “services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed” The second, set out in a later subsection of the rules entitled “Interpretations,” states that exempt companionship workers include those “employed by an employer or agency other than the family of the household using their services.”

Evelyn Coke, a domestic worker who provides companionship services to elderly and sick patients, sued her employer, Long Island Care at Home, for violating the Fair Labor Standards Act (FLSA) by failing to pay her minimum wage and overtime. She argued that the DOL's rule providing that the domestic companionship worker exemption applies to workers employed by a third-party was invalid and not entitled to deference from the courts. The Supreme Court disagreed with Coke's assessment and upheld the DOL's rule. The Court held the DOL acted properly as well as within its authority and therefore its interpretation of the domestic companionship exemption was entitled to deference.

Termination of a Pension Plan Through Merger with a Multi-Employer Plan

In another unanimous decision, the Supreme Court held in *Beck v. Pace International Union* that a merger with a multi-employer benefit plan is not a permissible method of terminating a single-employer defined-benefit pension plan.

In May 2000, Crown Paper filed for bankruptcy and began to liquidate its assets. At the time, Crown sought to terminate its multiple pension plans by buying annuities to cover its obligations, which is one of the plan termination methods permitted by the Employee Retirement Income Security Act (“ERISA”). However, PACE International Union, which represented employees covered by seventeen of the pensions plans, proposed instead that Crown merge its plans with the PACE Industrial Union Management Pension Fund, a multi-employer or “Taft-Hartley” plan. Although Crown took PACE's proposal under advisement, it discovered that it had overfunded its obligations to several of the pension funds by \$5 million - money which would revert to Crown if it terminated the funds by buying annuities, but which would go to the PACE pension fund if the plans were merged. Crown rejected the PACE proposal.

PACE subsequently sued Crown for breach of its fiduciary duties under ERISA, claiming that Crown failed to give diligent consideration to PACE's proposal. The Bankruptcy Court, the District Court for the Northern District of California, and the Ninth Circuit all found that the implementation of a termination decision was a fiduciary decision and that Crown had breached this fiduciary duty by failing to sufficiently consider the merger proposal.

On appeal, the Supreme Court reversed, deferring to the opinion of the Pension Benefit Guarantee Corporation, holding that the proposed merger of Crown's pension plans with the PACE multi-employer plan was not a form of plan termination permitted by ERISA. Consequently, it held that Crown did not breach its fiduciary duty by failing to consider PACE's merger proposal.

Unions and the First Amendment

An undivided Supreme Court held in *Davenport v. Washington Education Association* (joined with *Washington v. Washington Education Association*) that states can require unions representing public-sector employees to obtain affirmative authorization from a nonmember before spending fees paid by the nonmember for political purposes.

Many states allow public-sector unions to negotiate “agency-shop” agreements, which entitle unions to levy a fee on nonmember employees who are represented by the union in collective bargaining. These fees can raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment. Consequently, the Supreme Court held in *Abood v. Detroit Board of Education* (1977) that public-sector unions are constitutionally prohibited from using the fees of objecting nonmembers for “ideological purposes that are not germane to the union's collective-bargaining duties.” In *Teachers v. Hudson* (1986), the Court set forth various procedural requirements that unions must follow to ensure that objecting nonmembers' fees are used only for constitutional purposes.

Under Washington state law, a public-sector union must obtain affirmative authorization from a nonmember before spending the person's agency-shop fees to influence an election or operate a political committee. The Washington Education Association was sued in 2001 (in two separate cases) for allegedly violating this law. On appeal, the Supreme Court of Washington ruled for the union, finding that the state law violated the First Amendment because it required more of unions than the procedures mandated by the U.S. Supreme Court's decision in *Hudson*.

The U.S. Supreme Court reversed the Washington court's ruling. First, the Court held that *Hudson* merely set out the *minimum* procedures to prevent use of objecting nonmembers' contributions for political purposes, but did not prohibit states from imposing greater restrictions. The Court also rejected the union's argument that the Washington law impermissibly distinguished between expenditures for election-related purposes and expenditures for other “ideological” purposes prohibited by *Abood*, finding the law permissible in the unique context of public-sector agency-shop arrangements. However, the Court expressly limited its opinion to the application of Washington's law to public-sector unions, noting that different constitutional considerations would arise in the private sector.

Looking Ahead: The 2007-2008 Term

The Court will open its 2007-2008 term on October 1st. The Court has already accepted several cases dealing with important labor and employment issues in its upcoming term, including the following:

- Requirements for Filing Age Discrimination Charge. In *Holowecki v. Federal Express*, the Court will determine whether submitting an “intake questionnaire” to the EEOC is sufficient to meet the requirement that a plaintiff file a charge of discrimination with the EEOC before filing suit under the Age Discrimination in Employment Act.

- Evidence in Employment Discrimination Cases. In *Sprint United Management Company v Mendelsohn*, the Court will consider whether a trial court must allow a plaintiff in an employment discrimination case to present “me too” evidence - that is, testimony by other employees not party to the case, who claim that they too experienced discrimination at the hands of persons not involved in the decision being challenged by the plaintiff.
- Employment Retirement Income Security Act (ERISA). *LaRue v. DeWolff, Boberg & Associates, Inc.* presents the question of whether a participant in a 401(k) retirement savings plan can sue under ERISA to recover losses caused by his employer's alleged failure to carry out his investment instructions.

As usual, the Court will add additional cases to its docket as the term progresses.