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A Review of the Supreme Court's 2017-2018 Term

The United States Supreme Court concluded its 2017-2018 term with a bang, issuing decisions in several highly publicized cases impacting labor and employment, including *Epic Systems Corp. v. Lewis* and *Janus v. AFSCME*. This term marked the first full term for Justice Gorsuch after last year's dramatic appointment battles. Not surprisingly, with the addition of Justice Gorsuch to the Court, many of the labor and employment decisions this term were employer friendly.

Notably, many of the decisions of the Court from this term were sharply split along ideological lines. Of the seven labor and employment decisions issued during the 2017-2018 term, four were split 5 to 4 and only two were unanimous/per curiam decisions. This split marks a break with the trend we saw developing over the past several years of increased Court consensus in labor and employment cases. For example, in the 2013-2014 term, six of ten labor and employment decisions were unanimous, and in the 2015-2016 term, six of eleven decisions were unanimous with two cases decided by a vote of 6 to 3.

In addition to displaying a sharp ideological divide, the Court's labor and employment decisions from the 2017-2018 term—with one notable exception—displayed a tendency by the Justices to issue narrow rulings that focus on the specific facts presented, rather than broad rulings with more widespread effects. That is not to say, however, that this term was lacking in excitement or impact. The Court saved one of the most significant labor and employment cases of the past decade (*Janus*) for the very last day of the term, and extended its continuing trend of reliance on protecting First Amendment rights to labor and employment cases in unexpected ways.

The seven most notable labor and employment related cases that were issued by the Court during this term addressed a wide variety of issues, including the enforceability of contract language addressing significant employment topics (*Epic Systems*, *CNH Industrial N.V.*), statutory interpretation of important employment laws (*Digital Realty*, *Encino Motorcars*), the scope of presidential powers impacting immigration and employment opportunities for foreign nationals (*Trump v. Hawaii*), and the impact of the First Amendment in business relationships (*Masterpiece Cakeshop*, *Janus*). We will address each in turn, grouped by issue, as follows:

- The enforceability of employment contract clauses requiring individual arbitration of employment disputes (*Epic Systems*)
- The proper interpretation of union contract language relating to claims of lifetime vesting of retiree health benefits (*CNH Industrial N.V.*)
- The scope of whistleblower protections under Dodd-Frank Act (*Digital Realty Trust*)
- Whether service advisors at automobile dealerships are exempt from overtime pay obligations under the Fair Labor Standards Act (*Encino Motorcars*)

- The scope of Presidential powers under the Immigration and Nationality Act (*Trump v. Hawaii*)
- The right of a business to refuse to provide services for certain customers or events based on religious beliefs (*Masterpiece Cakeshop*)
- The legality of fair share fees paid to unions by public sector employees (*Janus v. AFSCME*)

Of additional importance, Justice Kennedy announced his retirement effective July 31, 2018, giving President Trump the opportunity to appoint a second nominee to the Court. On July 9, the President announced that his nominee to fill this vacancy will be current District of Columbia Court of Appeals Judge Brett Kavanaugh, thus initiating an appointment process that is widely anticipated to be acrimonious. If Judge Kavanaugh is ultimately confirmed, it is expected that his addition will move the Court to the right, as Justice Kennedy's record in labor and employment cases was often more centrist.

Following is a summary of each decision and the likely impact on employers. In the final section of this summary, we also offer a glimpse of the labor and employment cases that the Court has agreed to hear next term. Please contact us for additional information or advice regarding the potential effect of these decisions on your workplace. Additionally, we are very pleased to announce that we will be hosting two upcoming webinars that delve into these topics in more detail. The first, on July 19, 2018, will examine the implications of the *Janus* ruling on public sector "fair share" union fees. The second, on July 26, 2018, will review the other major employment rulings from the 2017-2018 term and what employers can anticipate from the 2018-2019 term. You can register for one or both webinar(s) here and here.

Executive Summary

The following table briefly summarizes the holdings of each of the Court's labor and employment decisions this term.

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
CNH Industrial N.V. v. Reese No. 17-515 Decided: February 20, 2018	In rejecting a claim that certain contract language evidenced an intent to vest retiree health benefits for life, the Court held that contracts, including collective-bargaining agreements, should be interpreted using ordinary principles of contract law, and reiterated that lower courts should look to the plain meaning of the language of a contract when interpreting the document.	**Vote:** per curiam **Opinion:** per curiam (Roberts Court)
Digital Realty Trust, Inc. v. Somers No. 16-1276 Decided: February 21, 2018	The Court held that the text of the Dodd-Frank Act was clear, and that the whistleblower protections in the Act apply only to employees who report securities law violations to the SEC.	**Vote:** Unanimous **Opinion:** Ginsburg **Concurrences:** Thomas (joined by Alito and Gorsuch); Sotomayor (joined by Breyer)
Encino Motorcars, LLC v. Navarro No. 16-1362 Decided: April 2, 2018	The Court found that service advisors at automobile dealerships are salesmen primarily engaged in servicing automobiles, and are therefore exempt from the FLSA's overtime-pay requirements.	**Vote:** 5-4 **Opinion:** Thomas **Dissent:** Ginsburg (joined by Breyer, Sotomayor, and Kagan)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Epic Systems Corp. v. Lewis No. 16-285 Decided: May 21, 2018	The Court upheld an employer's right to require that employment disputes be brought on an individual basis rather than as a class.	**Vote:** 5-4 **Opinion:** Gorsuch **Concurrence:** Thomas **Dissent:** Ginsburg (joined by Breyer, Sotomayor, and Kagan)
Janus v. AFSCME, Council 31 No. 16-1466 Decided: June 27, 2018	The Court held that government employees who are represented by a union to which they do not belong cannot be required to pay a fee to cover the costs of collective bargaining. The Court overruled prior precedent and held that such contributions, known as "fair share" fees, are unconstitutional under the First Amendment.	**Vote:** 5-4 **Opinion:** Alito **Dissents:** Kagan (joined by Ginsburg, Breyer, and Sotomayor); Sotomayor
Masterpiece Cakeshop, Ltd.v. Colorado Civil Rights Commission No. 16-111 Decided: June 4, 2018	The Court held that a baker who refused to bake a wedding cake for the wedding ceremony of a same-sex couple did not receive a fair hearing by a state Civil Rights Commission because the Commission showed animus towards his religious beliefs. Therefore, the baker was entitled to a new hearing consistent with the religious neutrality required by the Constitution.	**Vote:** 7-2 **Opinion:** Kennedy **Concurrences:** Kagan (joined by Breyer); Gorsuch (joined by Alito **Concurring in part and concurring in judgment:** Thomas (joined by Gorsuch) **Dissent:** Ginsburg (joined by Sotomayor)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Trump v. Hawaii No. 17-965 Decided: June 26, 2018	The Court upheld President Trump's travel restrictions on individuals from certain predominantly Muslim nations based on a broad delegation of authority in the Immigration and Nationality Act ("INA"). Further, the Court held that the travel restriction did not violate the Establishment Clause of the Constitution.	**Vote:** 5-4 **Opinion:** Roberts **Dissents:** Breyer (joined by Kagan); Sotomayor (joined by Ginsburg)

Individual Case Analysis

Enforceability of Contract Language (Epic Systems, CNH Industrial N.V.)

1. Court Holds that Contractual Mandatory Arbitration Clauses with Class Action Waivers are Valid

In one of the most important cases of the term, the Supreme Court consolidated three separate cases—*Epic Systems Corp. v. Lewis*, *Ernst & Young, LLP v. Morris*, and *NLRB v. Murphy Oil, USA*—into one opinion addressing the validity of arbitration clauses in individual employment contracts. The question presented by the consolidated cases was whether employers could require employment disputes to be settled through individual arbitration or whether clauses that waive access to class or collective action necessarily violate other statutes (like the National Labor Relations Act ("NLRA")), which provide protections for employees engaging in collective or concerted activity. In a 5-4 decision authored by Justice Gorsuch, the Court affirmed that mandatory arbitration provisions that waive access to class actions are valid and enforceable.

Historically, arbitration clauses in contracts have been upheld by the Supreme Court as valid under its interpretation of the governing law, the Federal Arbitration Act ("FAA"). Enacted in 1925, the FAA's purpose is to encourage dispute resolution through private arbitration. The Court has long interpreted the FAA to require the courts to respect and enforce private arbitration agreements and the provisions therein. For instance, in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), the Supreme Court further expanded the scope of the FAA by holding that class action waivers contained in arbitration clauses are valid. Nonetheless, the question of whether class action waivers interfered with statutory rights granted by other labor

laws, such as the Fair Labor Standards Act ("FLSA") and NLRA, remained open and came to a head in *Epic Systems*.

In *Epic Systems*, employees who were contractually obligated to settle disputes with their employer through individual arbitration challenged the validity of their employment contracts as conflicting with rights guaranteed by NLRA. Specifically, these employees alleged that forced individual arbitration clauses which prohibit employees from bringing a class action suit or group arbitration, conflict with the NLRA's Section 7 rights to engage in "concerted activity."

The majority rejected the argument advanced by the employees and based its decision on two considerations: (1) the Court's requirement, when two acts of Congress are allegedly in conflict, to give effect to both and bring them into harmony; and, (2) the absence of language in the NLRA regarding arbitration. Writing for the majority, Justice Gorsuch declared: "[As] a matter of law the answer is clear. In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." In holding that there was no conflict between the FAA's recognition of class action waivers and the right of employees granted by the NLRA to engage in concerted activity, the majority adopted a narrow reading of the rights protected by the NLRA. The Court held that the NLRA protects employees' rights to engage in collective bargaining in the workplace, "not the treatment of class or collective actions in court or arbitration proceedings."

Interestingly, while affirming the enforceability of individual arbitration clauses, the Court conveyed a skepticism of the benefit of such provisions. Justice Gorsuch noted, "You might wonder if the balance Congress struck in 1925 between arbitration and litigation [with the signing of the FAA] should be revisited in light of more contemporary developments. You might even ask if the [FAA] was good policy when enacted." Ultimately, though, the Court noted that, based on the FAA's clear language, it is "difficult to see how to avoid the statute's application."

In a concurring opinion, Justice Thomas went further, opining that under the language of the FAA, the only way an individual can attack an arbitration clause within a contract is to show illegality in the formation of the contract itself. By that reasoning, Justice Thomas noted that even if the contract had conflicted with provisions of the NLRA, there was no illegality in the formation of the contract and, thus, it must be enforced. In dissent, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued that collective arbitration was clearly collective action and, as such, the majority's opinion conflicted with the mandates of the NLRA.

This decision is one of the most important labor and employment developments of this term because the Court upheld an employer's right to require that employment disputes be arbitrated on a one-by-one basis, and that a waiver of access to class or collective actions is enforceable. This may result in fewer employees bringing claims against employers if the amount in dispute is relatively small. Further, this holding signifies that employers may require resolution of a broad range of work-related claims through individual arbitration. As noted below, however,

this decision does not resolve all issues relating to the permissible scope of arbitration clauses, as the Court has already agreed to hear three arbitration-related cases next term.

2. Court Reiterates that Claims that Retiree Health Care Benefits are Vested for Life Will be Resolved Through Ordinary Principles of Contract Law

In *CNH Industrial N.V. v. Reese*, a per curiam opinion, the Supreme Court reaffirmed that collective bargaining agreements "must be interpreted according to ordinary principles of contract law," and, for the second time since 2015, rejected the "*Yard-man* inferences" utilized by the Court of Appeals for the Sixth Circuit. The Sixth Circuit's *Yard-Man* inferences allowed the presumption, "in a variety of circumstances, that collective-bargaining agreements vested retiree benefits for life." The Court found that these inferences "erroneously" circumvented the application of general clauses specifying the limited duration of the union contract, distorted the text of the agreement, and conflicted with ordinary principles of contract law.

This case involved a dispute between retirees and their former employer over whether the retirees, relying on an expired collective bargaining agreement, had a vested right to lifetime health benefits or whether the general durational clause in the agreement terminated the retirees' right to health benefits as of the specified end date of the contract. The agreement provided health care benefits to employees "who retire under the … Pension Plan"; but further provided that "[a]ll other coverages, such as life insurance, ceased upon retirement." The union contract expired in 2004 and was not renewed. While the contract was silent on whether health care benefits vested for life, the retirees argued that the language specifying the expiration of life benefits as of retirement clearly implied that health benefits did not so expire, and were thus vested for life. Applying the *Yard-man* inferences, the Sixth Circuit held the agreement was ambiguous, which allowed the court to consider extrinsic evidence that favored lifetime vesting.

Notably, this case was not the first time that the Supreme Court considered the *Yard-man* inferences. Three years ago, in *M&G Polymers USA, LLC v Tackett*, 574 U.S. —, 1345 S.Ct. 926 (2015) ("*Tackett*"), the Court found these inferences were "inconsistent with ordinary principles of contract law" because they presumed retiree health benefits operated as a form of delayed compensation (like a pension), even without supporting language in the agreements. The Court found the inferences incompatible with the Employee Retirement Income Security Act ("ERISA"), which clearly distinguishes between plans for deferred income versus health benefits on the vested-for-life issue. Even after the Court's ruling in *Tackett*, however, the Sixth Circuit continued to rely on the *Yard-man* inferences to find collective-bargaining agreements ambiguous as a matter of law, allowing the court to consider extrinsic evidence.

Quoting the lower court's dissent, the Supreme Court reversed, and scolded the Sixth Circuit for its apparent recalcitrance, finding this case was "*Yard–Man* re-born, re-built, and re-purposed for new adventures." The Court reiterated that under ordinary principles of contract law, extrinsic evidence is not to be considered unless a contract is ambiguous, and that a contract is not

ambiguous unless it is subject to more than one reasonable interpretation. The Court found that the *Yard-man* inferences did not lead to a reasonable interpretation of the contract. Rather, the Court noted that, "[s]horn of *Yard-man* inferences, this case is straightforward."

Within days of releasing its decision in *CNH Industrial N.V.*, the Court granted certiorari to another Sixth Circuit retiree health benefits case, *Kelsey-Hayes Co. v. International Union*, No. 17-908 (Feb. 26, 2018), which it immediately vacated and remanded back to the Sixth Circuit for additional consideration—this time without utilizing the *Yard-man* inferences. With these decisions, it is now clear that the *Yard-man* inferences historically applied by the Sixth Circuit are no longer valid.

Statutory Interpretation Cases (Digital Realty Trust, Encino Motorcars)

3. Court Limits Whistleblower Protection under Dodd-Frank to Violations Reported Directly to the Securities and Exchange Commission

In *Digital Realty Trust, Inc. v. Somers*, a decision authored by Justice Ginsburg, the Court unanimously held that the Dodd-Frank Act only protects whistleblowers who report suspected securities law violations directly to the Securities and Exchange Commission ("SEC"). This question had been hotly contested in the years following the passage of Dodd-Frank in 2010. In the wake of the 2008 financial meltdown, Dodd-Frank provided protections to employees who reported SEC violations under the 2002 Sarbanes-Oxley Act ("SOX") and offered financial rewards to whistleblowers.

However, since Dodd-Frank's passage, there has been extensive litigation and debate regarding whether the whistleblower provisions protect and reward individuals who report violations to the SEC or whether they also cover individuals who only report violations internally (but not to the SEC). In 2011, the SEC issued a regulation stating that it would interpret Dodd-Frank's protections as covering all types of disclosures, not just SEC reports. In contrast, though, some lower appellate courts held that Dodd-Frank, by its terms, only protected and rewarded whistleblowers who reported violations to the SEC.

This case involved an employee who was terminated in 2014 after reporting possible securities law violations to his superiors at Digital Realty Trust. The employee did not report the alleged violations to the SEC. Nonetheless, relying on the 2011 SEC regulations, he claimed whistleblower protections based on his internal report.

While the Court's decision clarified that internal reports do not qualify for protection under Dodd-Frank, publicly traded employers who are subject to SEC regulation should be wary of how this decision may impact their businesses. In a recent report to Congress, the SEC stated that 83% of whistleblowers who received SEC awards under Dodd-Frank since 2012 first reported the alleged violation internally. Thus, while this appears to be a huge win for publicly traded

employers because these internal complaints are no longer subject to Dodd-Frank protection, the ruling may create problematic incentives. If employees go directly to the SEC with future complaints, employers will lose the opportunity internal reporting offered: to be aware of possible violations prior to SEC involvement and to be able to take proactive measures before a federal investigation begins.

To minimize this risk and potential disincentive to report internally, SEC-regulated entities should take a careful look at their existing reporting policies to ensure that they are well publicized and provide adequate incentives and protections for individuals who report violations internally. Principally, ensuring employees are aware of reporting policies that protect them from retaliation when making an internal report may curtail any increase in direct SEC reports.

4. Court Rules that Overtime Exemptions Under the FLSA May Be Interpreted More Broadly Under "Fair Reading" Analysis

In a 5-4 ruling authored by Justice Thomas, the Court held in *Encino Motorcars, LLC v. Navarro* that a finite category of employees — service advisors at an automobile dealership — are exempt from the FLSA's overtime pay requirements. More broadly, in so holding, the Court signaled a shift in seven decades of wage and hour jurisprudence. Since *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945), the Court has narrowly construed exemptions to overtime pay requirements under the FLSA, requiring exemptions to be "plainly and unmistakably" within the FLSA's terms. In *Encino Motorcars*, the Court shifted away from "narrowly construing" FLSA exemptions and agreed to extend exemptions based on a "fair reading" of the law.

Procedurally, this case was no stranger to the Court, as it was heard for the first time two years ago in 2016. The case began in 2012, when current and former service advisors at a car dealership in California sued their employer, alleging they were misclassified as exempt from overtime pay and were entitled to overtime pay. The service advisors' job descriptions required them to: greet customers who come to the dealership for car service and repair, listen to the customer's concerns, suggest repair and maintenance services, sell accessories and replacement parts, record service orders, follow up with customers throughout the service process, and explain the repairs when the customers returned to pick up their vehicles. The dealership argued that service advisors were exempt from overtime pay requirements under Section 13(b)(10)(A) of the FLSA, which exempted a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers."

The parties stipulated a few facts, including that the dealership was the type of business controlled by Section 13(b)(10)(A) and that the service advisors were not salesmen primarily engaged in selling automobiles. In 2016, the Ninth Circuit relied upon 2011 Department of Labor guidance in determining that the service advisors were not covered by the exemption. In reviewing

this initial ruling in 2016, the Supreme Court found the 2011 guidance was invalid and remanded the matter to the Ninth Circuit for reconsideration.

After reconsidering, the Ninth Circuit reached the same decision—the service advisors should not be covered by the exemption. The Ninth Circuit relied on two primary factors: (1) service advisors were not specifically listed in the FLSA as exempt, and (2) exemptions to the FLSA should be construed narrowly. In addressing the first factor, the Ninth Circuit invoked the "distributive" canon of statutory construction whereby it related certain words back to only particular other words, rather than plain language. Using that canon, it matched "salesman" with "selling" and "partsman" and "mechanic" with "servicing."

The Supreme Court rejected that interpretation, and framed the question as whether service advisors were "salesmen" primarily engaged in "servicing" automobiles. Relying on ordinary meanings and dictionary definitions, the majority determined that service advisors were, in fact, salesmen servicing automobiles. More broadly, the Court flatly rejected the "narrow construction" doctrine as a useful formula for interpreting the FLSA. Instead, Justice Thomas opined that the Court had "no license to give the exemption anything but a fair reading" because "the FLSA gives no textual indication that its exemptions should be construed narrowly."

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. In drafting the exemptions, Justice Ginsburg argued, Congress explicitly exempted only "salesmen, partsmen, and mechanics," but not service advisors, who do not sell or repair automobiles under any plain-language reading of the FLSA. The dissent pointed out the divergence of the majority's decision from past Supreme Court decisions, encouraging the Court to "resist, as the Ninth Circuit did, diminishment of the [FLSA]'s overtime strictures."

Although it is too soon to tell what impact this change will have on the specific exemptions under the FLSA, this decision may signal a broader application of the exemptions specified under the FLSA in the future.

Scope of Presidential Powers Case (Trump v. Hawaii)

5. Court Upholds Travel Ban Confirming Broad Presidential Powers in Matters of Immigration and National Security

In a 5-4 decision, the Court held President Trump's amended travel restrictions on individuals from certain predominantly Muslim nations to be lawful. The plaintiffs (the State of Hawaii, the Muslim Association of Hawaii, and three individuals) challenged the travel restrictions, often referred to as the "travel ban," arguing that they violated the Immigration and Nationality Act ("INA") and the Establishment Clause of the United States Constitution. The District Court in Hawaii granted a preliminary nationwide injunction barring enforcement of the travel ban, and the U.S. Court of Appeals for the Ninth Circuit affirmed the injunction. The

Supreme Court's decision remanded this matter, allowing the travel restrictions to go into effect pending consideration of the lawsuit by lower courts on the merits of the travel ban.

The Court relied on provisions of the INA which permit the President to suspend the entry of aliens to the United States when admission of such aliens "would be detrimental to the interests of the United States." The Court held that the actions of President Trump fell squarely within his authority and did not violate the INA. Writing for the majority, Chief Justice Roberts stated that "[t]he entry suspension is an act that is well within executive authority and could have been taken by any other President."

Further, the Court held that the President's travel restriction did not violate the Establishment Clause of the Constitution, which prohibits the government from passing any law that favors one religion over another. The plaintiffs argued that this travel restriction singled out Muslim countries and disfavored them compared to non-Muslim countries. The Court, however, applied a low standard of review, known as "rational basis review," and found that the travel restriction could reasonably relate to a legitimate state interest of national security. Further, the Court noted that the restrictions were not clearly passed for a discriminatory purpose. Although the Court stated it would not comment on the soundness of the policy, it held this policy was likely constitutional.

Justice Breyer authored a dissenting opinion joined by Justice Kagan. Justice Breyer noted that the waivers and exemptions within the restrictions *could* support the argument that the restrictions were not based on religion and, thus, could be constitutional. However, he commented that visas have been given under the waivers only very sparingly in practice. As such, Justice Breyer opined that enough evidence of religious animus existed to set the travel restrictions aside.

Justice Sotomayor, joined by Justice Ginsburg, authored a passionate dissenting opinion. Her dissent likened the majority's opinion to the Court's infamous *Korematsu* decision, which upheld the federal government's internment of Japanese Americans during World War II. Justice Sotomayor also criticized the majority opinion as clearly based in anti-Muslim animus and unrelated to any specific national security threat.

Importantly, the majority's decision does not mark the end of this case. The case will be sent back to the lower courts to determine whether judicial proceedings may continue against the travel ban, given the deference that must be accorded to the President in conducting foreign affairs.

Nonetheless, employers and employees are reminded that Customs and Border Protection officers hold significant power when admitting individuals at the border. This power includes the ability to detain individuals, search their belongings and possessions, and to deny the right to counsel. Individuals who may be impacted by the travel ban are highly encouraged to consult with legal counsel and defer unnecessary international travel.

First Amendment Cases (Masterpiece Cakeshop, Janus)

6. Court Rules in Favor of Baker Who Refused to Create Cake for a Same-Sex Marriage, but Does Not Open the Door for Discrimination Based on Religious Belief

In another limited opinion, the Court ruled in favor of a Colorado baker who refused to create a wedding cake for a same-sex couple. Notably, the Court's decision in the case, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm*., largely punted on the broader constitutional question of whether, and under what circumstances, a business may refuse to provide services to individuals based on a sincerely-held religious belief (protected by the First Amendment) that potentially conflicts with anti-discrimination law. Rather, the Court suggested this question should be decided on a case-by-case basis.

As a devout Christian, the baker believed that creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration contrary to his religious beliefs. He told the same-sex couple that he would not make them a wedding cake, but that he would sell them other baked goods like birthday cakes, shower cakes, and cookies. Notably, these events took place in 2012, before same-sex marriage was legal in either Colorado or nationally.

The couple filed a charge against the baker with the Colorado Civil Rights Commission ("Commission"), alleging violations of the state's prohibition on discrimination in places of public accommodation, which expressly prohibited discrimination based on sexual orientation. At each stage of investigation or review by the state, Colorado officials rejected the baker's argument that requiring him to make the cake violated his constitutional rights to freedom of speech and the free exercise of his religion.

In reversing the Colorado Court of Appeals, Justice Kennedy, who wrote the 7-2 majority opinion, focused the Court's ruling on evidence that the baker did not receive a fair and impartial hearing before the Commission. For example, the Court noted that statements by one Commission member during a public hearing that the baker's religious-belief defense was "despicable" and akin to defenses used to justify slavery and the Holocaust. The Court called these comments "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation."

In addition, several facts about the Commission's review of the case tipped the balance in the baker's favor at the Court. He did not refuse to do any business with the same-sex couple. Rather, he refused only to create their wedding cake because, he argued, using his artistic skills on the cake would make an "expressive statement" endorsing the same-sex wedding. Further, while the couple's charge was pending in the Commission, the Colorado Civil Rights Division found that three other bakers who refused to bake cakes with messages opposed to same-sex marriage

had not violated Colorado law. These facts, the Court concluded, suggested that this case was given "disparate consideration." Accordingly, the Court held that he was entitled to a new hearing.

Although Colorado lost the case, Justice Kennedy emphasized that the decision should not provide a basis for discriminating against those who are gay. "Our society has come to the recognition that gay persons and couples cannot be treated as inferior in dignity and worth," Kennedy wrote. Therefore, he continued, our laws and Constitution "can, and in some instances, must, protect them in the exercise of their civil rights." The Court recognized that while members of the clergy cannot be compelled to perform marriages for gay couples if they object on moral and religious grounds, this exception needs to be "confined" to avoid having a long list of persons who refuse to provide goods or services for gay weddings.

At the same time, Justice Kennedy emphasized the need to balance the free exercise of religion with otherwise valid exercises of state power. Such a "delicate question" must be resolved without reliance on a hostility to the underlying religious beliefs, which the Commission did not do in this case. Unfortunately, the opinion provided little guidance on where that line should be drawn and future decisions may be fact-specific.

The holding of *Masterpiece Cakes* has potential implications for all anti-discrimination laws. However, the fact that the Court largely declined to address whether the Constitution allows employers to discriminate against customers based on their sincerely-held religious beliefs means that employers must continue to observe anti-discrimination laws. There is a split in the courts of appeal as to whether federal anti-discrimination laws prohibit discrimination based on sexual orientation. However, more than half the states, including Illinois, prohibit discrimination based on sexual orientation in at least some situations. Until this issue is further fleshed out by the courts, employers are advised to tread carefully when balancing these competing interests.

7. Court Rules "Fair Share Fees" Unconstitutional

As widely anticipated, the Court held in *Janus v. AFSCME* that fair share agreements in public-sector unions are unconstitutional. Writing for a divided court (5-4), Justice Alito stated that the public-sector unions' practice of exacting fair share fees from nonconsenting employees violated the First Amendment. The decision was immediately effective and required all public bodies to cease deductions from their fair share members.

Janus addressed whether government employees who are represented by a union to which they do not belong can be required to pay a fee to cover the costs of collective bargaining, or so-called fair share fees. The plaintiff in *Janus* argued that having to pay a fair share fee violated his First Amendment rights. Breaking from precedent established in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court agreed. In *Abood*, the Supreme Court held that public employees could bargain for fair share fees—which could be used for purposes from which everyone benefited, like bargaining and enforcement of the contract. The fair share fees

could not be used for advocacy, lobbying, or political organizing, which could violate non-members' free speech rights.

The *Janus* overruled *Abood*, finding that its holding was inconsistent with standard First Amendment principles. The Court reasoned that forcing free and independent individuals to endorse ideas they find objectionable raised serious constitutional concerns. Further, the Court held these concerns could not be validated by *Abood's* justifications for agency fees—labor peace and avoiding the risk of free riders. The Court elaborated, "Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition)."

Justice Kagan filed a dissenting opinion, which was joined by Justices Ginsburg, Breyer and Sotomayor. The dissent focused its concerns on the impact of this decision on public employers. For public employers who felt that fair share provisions furthered their interests in managing an efficient workforce, the majority decision could "alter in both predictable and wholly unexpected ways" their relationships with employees. The dissent also accused the majority of showing "little regard for the usual principles of *stare decisis*," and focused on the role that fair-share fees played in ensuring unions fairly represent all employees in a bargaining unit—not just dues paying members. Countering the majority's reliance on First Amendment protections for non-members, Justice Kagan noted that: "the balance *Abood* struck between public employers' interests and public employees' expression [was] right at home in First Amendment doctrine."

Justice Sotomayor filed a separate dissenting opinion stating that she believed the majority, in its reliance on past precedent, was "wield[ing] the First Amendment in . . . an aggressive way." She emphasized concerns that the Court was using the First Amendment to chip away at economic or regulatory policies which, in her opinion, almost always affect or touch upon speech. She ends her dissent by stating that the First Amendment "was meant not to undermine but to protect democratic governance—including over the role of public-sector unions."

The Court's decision may not immediately impact a public-sector union's responsibility to represent non-members, depending on state laws. In Illinois, the Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act require unions to represent everyone in the bargaining unit, even those that are no longer paying fair share fees (commonly called the "duty of fair representation"). Thus, the unions will remain the exclusive representative of all bargaining unit members. While some unions may challenge their duty of fair representation in court following *Janus*, public-sector employers must reimburse any fair share fees deducted from employee paychecks after June 27, 2018. Employers should match their records of fair share fee paying employees with the records of the union to ensure there is consistency and accuracy. This decision does not change an employer's obligation to continue to deduct dues from regular union members, if provided for in a collective bargaining agreement.

Looking Ahead: The 2018-2019 Term

One Justice enters, another one leaves. With the addition of Justice Gorsuch to the bench last year, the 2017-2018 resulted in more decisions divided along ideological lines. Now, at the end of the term, Justice Kennedy has announced his retirement, effective July 31, 2018. Although appointed by President Reagan, in the recent past Justice Kennedy leaned more toward the center on the ideological spectrum and served as an important swing vote for the Court (most notably, perhaps, in the *Obergefell v. Hodges* same-sex marriage decision of 2015).

While we cannot know how the possible appointment of Judge Kavanaugh will impact the Court, it is likely that we will see a continuation or an increased frequency of ideological splits among the Justices, with the more conservative Justices in the majority. What role the midterm elections will play in the timing of the appointment is unclear. Given the substantial delays seen during the last year of President Obama's second term relating to his nomination of Judge Merrick Garland, it is possible that the Court may open its 2018-2019 term on September 24, 2018 as a body of eight justices.

So far, the Court has agreed to hear several labor and employment cases next term that could significantly impact employers, including the following:

- ***Mount Lemmon Fire District v. Guido*, No. 17-587.** The Court will decide whether the same 20-employee minimum that applies to private employers under the Age Discrimination in Employment Act ("ADEA") also applies to political subdivisions of a state or whether the ADEA applies, instead, to all state political subdivisions of any size. Here, the Ninth Circuit Court of Appeals held that the Mount Lemmon Fire District, a political subdivision of the State of Arizona, was subject to the ADEA even though the Fire District employed fewer than 20 employees, as required under the ADEA. This decision was directly at odds with decisions of the Sixth, Seventh, Eighth, and Tenth Circuits, which have held the 20-employee requirement of the ADEA does apply to political subdivisions of a state.

- ***Henry Schein Inc. v. Archer and White Sales Inc*., No. 17-1272.** The Court will consider whether the FAA permits a court, in situations where the court concludes the claim of arbitrability is "wholly groundless," not to enforce an agreement delegating questions of arbitrability to an arbitrator.

- ***Lamps Plus, Inc. v. Varela*, No. 17-988.** The Court will decide whether the FAA forecloses a state-law interpretation that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

- ***New Prime Inc. v. Oliveira*, No. 17-340.** The Court will consider two questions under Section 1 of the FAA, which provides that the FAA does not govern contracts of employment for, among others, employees engaged in foreign or interstate commerce. The Court will consider whether Section 1 is applicable to independent contractor agreements (as on its face, it states that it applies to "contracts of employment") and whether the exemption in Section 1 requires the resolution to occur in arbitration, pursuant to a valid delegation clause.