

## A Review of the Supreme Court's 2016-2017 Term

This year's Supreme Court term may be more memorable for the intrigue and political drama taking place outside the Court than the import of the decisions the Court issued. On April 10, 2017, Judge Neil Gorsuch of the Tenth Circuit Court of Appeals was sworn in as the 113<sup>th</sup> Associate Justice of the United States Supreme Court. Gorsuch's elevation followed a year of partisan battles in the U.S. Senate over whether to consider then-President Obama's nominee for the high court following Justice Antonin Scalia's sudden death in February 2016.

The ultimate decision to leave Justice Scalia's seat vacant until after the 2016 presidential election means that the Court will continue to have a solid conservative majority for the foreseeable future. Although Justice Gorsuch did not rule on any of the key employment cases this term, as a reliable conservative, his record on the Tenth Circuit strongly indicates he will vote similarly to how Justice Scalia would have voted on many issues.

While high drama played out in the halls of Congress and the voting booths, the Supreme Court's docket slowed considerably. After Justice Scalia's death, as we described in our [Review last year](#), the Court issued several critical but unremarkable "tie" votes. With the uncertainty surrounding Justice Scalia's replacement, the Supreme Court simply agreed to take fewer major labor and employment cases during the 2016-2017 Term. However, a few decisions will have an impact on employers:

- *McLane Co. v. Equal Employment Opportunity Commission* ruled on the proper level of deference a district court should receive when it chooses to enforce or quash an administrative subpoena.
- *Microsoft Corp. v. Baker* eliminated a novel litigation tactic that had previously given plaintiffs in class action cases the right to immediately appeal denial of class certification to a circuit court.
- *Advocate Health Care Network v. Stapleton* held that retirement plans sponsored by church-affiliated organizations (such as hospitals), but not directly by a church, are exempt from the requirements of the Employee Retirement Income Security Act of 1974 (ERISA).

Below are detailed analyses of these cases. At the end of the summary, we preview potential cases that could come before the Court during the 2017-2018 Term.

Executive Summary<sup>1</sup>

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
<p><a href="#"><i>McLane Co. v. Equal Employment Opportunity Commission</i></a> No. 15-1248 137 S.Ct. 1159 Decided: April 3, 2017</p>	<p>A district court’s decision to grant or quash the EEOC’s request for a subpoena in an employment discrimination investigation is reviewed for abuse of discretion, not the much less deferential <i>de novo</i> standard of review.</p>	<p><b>Vote:</b> 7-1  <b>Opinion:</b> Sotomayor (joined by Roberts, Kennedy, Thomas, Breyer, Alito, and Kagan).  <b>Concurrence in part and dissenting in part:</b> Ginsburg</p>
<p><a href="#"><i>Microsoft Corp. v. Baker</i></a> No. 15-457 137 S. Ct. ____ Decided: June 12, 2017</p>	<p>An appellate court lacks jurisdiction to review a district court’s decision to deny class certification when plaintiffs voluntarily dismiss their case with prejudice. A voluntary dismissal with prejudice does not create a final judgment necessary to create jurisdiction for review.</p>	<p><b>Vote:</b> 8-0  <b>Opinion:</b> Ginsburg (joined by Kennedy, Breyer, Sotomayor, and Kagan)  <b>Concurrence:</b> Thomas (joined by Roberts and Alito)</p>
<p><a href="#"><i>Advocate Health Care Network v. Stapleton</i></a> (Consolidated with <a href="#"><i>Saint Peter’s Healthcare System v. Kaplan</i></a>, and <a href="#"><i>Dignity Health v. Rollins</i></a>) No. 16-74 137 S. Ct. ____ Decided: June 5, 2017</p>	<p>The statutory language of the Employee Retirement Income Security Act’s exemption for retirement plans established and maintained by churches extends to church-affiliated organizations, such as religiously affiliated hospitals, regardless of whether a church directly established the plan.</p>	<p><b>Vote:</b> 8-0  <b>Opinion:</b> Kagan (joined by Roberts, Kennedy, Thomas, Ginsburg, Breyer, and Alito).  <b>Concurrence:</b> Sotomayor</p>

<sup>1</sup> Justice Gorsuch took no part in these decisions.

## Individual Case Analysis

### 1. Greater Deference for District Courts in EEOC Subpoena Enforcement Actions

In *McLane Co. v. Equal Employment Opportunity Commission*, the Supreme Court reinforced the broad subpoena powers of the Equal Employment Opportunity Commission (“EEOC”). The Court held that a federal district court’s decision whether to enforce or quash an EEOC subpoena should be reviewed under the deferential “abuse of discretion standard.” Although the case focused on a procedural question—the appropriate level of deference afforded to lower courts—the decision will have serious implications for employers who face an EEOC subpoena enforcement action.

As the agency tasked with enforcing Title VII of the Civil Rights Act and investigating discriminatory employment practices, the EEOC has broad authority to issue subpoenas for documents, personnel files, and other information from an employer. When an employer refuses to comply, the EEOC may file an action in district court to enforce the subpoena. A district court’s role is to determine whether the underlying charge of discrimination is valid, and whether the material requested is relevant to that charge. If so, the court can order an employer to provide the information unless the subpoena is “too indefinite,” is issued for an “illegitimate purpose,” or is “unduly burdensome” for the employer.

In *McLane*, Damiana Ochoa was fired after failing to complete three physical evaluations when she returned from maternity leave. McLane’s policy required employees in certain physically demanding jobs to take physical evaluations upon returning from medical leave. After she was fired, Ochoa filed a gender discrimination charge. As part of its investigation, the EEOC requested that McLane provide a list of all employees who were required to take the physical evaluation tests. McLane complied, but refused to provide the EEOC with certain identifying information, including names, Social Security numbers, addresses, and telephone numbers for employees who were required to undergo the physical evaluations.

The EEOC widened the scope of its investigation to include age discrimination, and issued subpoenas requesting identifying information related to McLane’s use of the physical evaluation tests nationwide. When McLane refused to provide the information, the EEOC filed actions in district court to enforce the subpoenas. After a hearing, the district court declined to enforce the request for nationwide identifying information, finding such information to be irrelevant for purposes of the EEOC’s investigation.

On appeal, the Ninth Circuit reversed. The court observed that federal appellate courts uniformly rely on the deferential “abuse of discretion standard” when reviewing administrative subpoena enforcement actions. Nevertheless, the Ninth Circuit applied the less deferential *de*

*novo* standard of review, and held that the district court erred in determining that the information was irrelevant.

In a 7-1 decision, the Supreme Court reversed and remanded to the Ninth Circuit for review under an abuse of discretion standard. Writing for the majority, Justice Sotomayor noted that in the absence of an “explicit statutory command” dictating the standard of review, the Court looks to the history of appellate practice, and as a matter of “sound administration of justice,” considers which court is better positioned to decide the issue at hand.

The Court noted the longstanding use of the abuse of discretion standard by appellate courts reviewing a district court’s decision to enforce or quash an administrative subpoena. Specifically, the Court noted that the National Labor Relations Act conferred authority to issue subpoenas on the National Labor Relations Board (“NLRB”), and *every* circuit court uses the abuse of discretion standard when reviewing NLRB subpoena enforcement actions. This history, and the fact that Congress was certainly aware of this practice when conferring the same administrative subpoena authority on the EEOC, carried “significant persuasive weight.”

Additionally, the Court noted that “basic principles of institutional capacity” weighed in favor of a deferential standard of review. Proper enforcement of an EEOC subpoena is a case-specific inquiry, and district courts are better positioned to determine issues such as relevancy of information and whether compliance with a subpoena would be unduly burdensome in light of the circumstances. Because these questions are “fact-intensive, close calls,” the Court found, district courts should be granted greater deference in resolving them.

Justice Ginsburg wrote a short partial concurrence and partial dissent. Justice Ginsburg noted that while she agreed with the Court’s holding, she would have affirmed the Ninth Circuit’s ruling because she believed the district court had made a legal error in its reasoning.

This decision eliminates all doubt as to what standard of review applies when appealing subpoena enforcement actions by the EEOC. Because all decisions by district courts will be reviewed for abuse of discretion, employers should not expect that a decision by a district court would be overturned on appeal. The Supreme Court reminded those reading its opinion that the EEOC may subpoena any evidence relevant to the investigation which includes “virtually any material that might cast light on the allegations against the employer.” Unless an employer can convince a district court that the EEOC’s subpoena is unduly burdensome or seeks irrelevant information, an employer will almost certainly have to comply and provide the information requested.

## 2. Court Clamps Down on Procedural Maneuver in Class Action Lawsuits

In *Microsoft Corp. v. Baker*, the Supreme Court unanimously held that for purposes of appellate review, a district court's denial of class certification is not a final order when the plaintiffs voluntarily dismiss their claims. The Court's rejection of a procedural maneuver utilized by class action plaintiffs helps level the playing field for employers facing FLSA and other class or collective actions.

Historically the Supreme Court had held that orders granting or denying class action certification were "inherently interlocutory," and therefore not automatically and immediately reviewable under 28 U.S.C. § 1291, which permits appeals from "final decisions" only. This meant that the case would have to be fully litigated on behalf of the named plaintiffs only before the plaintiffs could appeal the denial of class certification. Class action plaintiffs' advocates noted that the denial of class certification, in most cases, was a "death knell" for the case because the named plaintiff's individual claims were not worth pursuing. Often, the value of each individual claim is so small that it is not economically prudent to pursue a lawsuit to a final judgment and then seek appellate review of the class determination. This rule typically left a class action plaintiff whose class certification motion had been denied no realistic avenue for pursuing his claims.

However, Federal Rule of Civil Procedure 23(f) was added to authorize "permissive interlocutory appeals" of orders denying or granting class certification. In other words, a party may appeal a class certification ruling immediately if the court of appeals grants permission and agrees to hear the case. Absent such permission, plaintiffs can pursue their individual claims on the merits to final judgment, at which point the denial of class certification becomes ripe for review—just as they could before Rule 23(f) took effect. According to the Supreme Court's review of the Rule's history, the drafters carefully calibrated this rule to deny plaintiffs and defendants alike the right to appeal routine class certification decisions unworthy of immediate appeal.

Since the adoption of Rule 23(f), plaintiffs created a loop-hole. Instead of asking for permission to appeal a class certification decision, plaintiffs voluntarily dismiss their claims. After the dismissal, they claim they have a final order that they can appeal as a matter of right—without permission from the appellate court. If the appellate court reverses the class denial, the plaintiffs simply revive their claims and pursue the class action. Several federal circuit courts have rejected this tactic, but the Ninth Circuit often allowed it.

In *Baker*, a group of class action plaintiffs filed a lawsuit, alleging that Microsoft's gaming console, the Xbox, scratched and therefore ruined video game discs inserted into the Xbox. The district court struck the plaintiffs' class action allegations, effectively denying certification for the supposed class. The Ninth Circuit denied the plaintiffs' Rule 23(f) request that it review the district court's decision. To evade the consequences of the Rule 23(f) decision,

the plaintiffs then voluntarily dismissed their claims to appeal the district court's ruling as a matter of right. The Ninth Circuit found it had jurisdiction to hear the appeal, and remanded the case to the district court to reexamine its ruling regarding its ruling on the class allegations.

The Supreme Court unanimously and unequivocally rejected this tactic. Writing for the majority, Justice Ginsburg found that the plaintiffs' tactic invited "protracted litigation and piecemeal appeals" that would cause vexing delays at the trial court level. Additionally, Justice Ginsburg observed what most circuits have already held: voluntary dismissal was an impermissible maneuver designed to subvert Rule 23(f).

Congress authorized the Supreme Court—through special rule-making procedures—to determine when a decision is final for purposes of appeal, and to provide for appellate review of interlocutory orders not covered by statute when the Court deemed appropriate. In this case, the rule-making process already addressed this issue by crafting what the Court called a "measured, practical solution" for certification appeals: the permissive process of Rule 23(f). In sum, the Court concluded that "[p]laintiffs in putative class actions cannot transform a tentative interlocutory order...into a final judgment...simply by dismissing their claims with prejudice—subject, no less, to the right to 'revive' those claims if the denial of class certification is reversed on appeal."

In a separate concurring opinion, Justice Alito, joined by Justice Thomas and Justice Roberts agreed with the holding, but said they would have grounded the decision in Article III of the Constitution. Justice Alito reasoned that once a plaintiff dismisses his claims, there is no longer a live "case or controversy" before the Court, and the plaintiff loses standing to appeal the class certification ruling. The Court's ruling therefore puts a definitive end to procedural chicanery of this nature for class action suits.

### **3. Court Confirms that ERISA's "Church Plan Exemption" Applies to Church-Affiliated Organizations**

In *Advocate Health Care Network v. Stapleton*, the Court unanimously held that retirement plans sponsored by church-affiliated organizations, such as hospitals, are exempt from the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA's "church plan exemption" provides that a retirement plan that is "established and maintained" by a church is exempt from ERISA's funding, participation, vesting, and disclosure requirements, among other provisions. In a decision authored by Justice Kagan, the Court ruled that ERISA's statutory language does not require that a plan be established directly by a church in order for the church plan exemption to apply.

The vast majority of church-affiliated retirement plan sponsors administer their plans under the church plan exemption, with the effective endorsement of the federal agencies tasked with administering ERISA's retirement plan provisions (the Internal Revenue Service,

Department of Labor, and the Pension Benefit Guaranty Corporation). The Court's ruling validates the longstanding view of these federal agencies regarding the scope of the church plan exemption, i.e. that plans established by church-affiliated organizations (in addition to plans established directly by churches) are exempt from complying with ERISA's provisions.

The *Stapleton* case involved lawsuits brought by current and former employees of three separate religiously-affiliated hospital systems around the country—Advocate Health Care Network (based in Illinois), Saint Peter's Healthcare System (based in New Jersey), and Dignity Health (which operates facilities nationwide)—that were consolidated on appeal to the Court. The employees asserted that the retirement plans sponsored by the hospital systems did not fall under ERISA's church plan exemption (thereby also challenging the position of the administering federal agencies regarding such plans). In each case, the federal appeals court (the Third, Seventh, and Ninth Courts of Appeal) had ruled in favor of the employees prior to the Court's unanimous reversal of their rulings.

Justice Sotomayor filed a concurring opinion stating that although she joined the Court's decision, she was "troubled" by the implications of its ruling because the available legislative history regarding ERISA's church plan exemption does not clearly mandate this result. She wrote that despite their religious affiliations, the hospital systems involved in this case "look and operate much like secular businesses," and the Court's decision might potentially deny thousands of employees ERISA's protections.

These lawsuits are symptomatic of a flurry of litigation against church-affiliated hospital system retirement plan sponsors. The litigation focuses on the severe funding shortfalls of many of these plans, which were not funded according to ERISA's minimum funding rules. The funding shortfall issue remains largely unresolved from the perspective of the plans' participants. Accordingly, the Court's ruling may open the door to more novel claims on issues that the ruling did not address, such as whether church-affiliated organizations' internal benefit committees are covered under the church plan exemption and whether there are any other avenues of relief (under state law, for example) to address these plans' funding issues.

## Looking Ahead: The 2017-2018 Term

Justice Gorsuch assumed his seat on the bench this spring. Many court observers noted that while Justice Scalia's seat was vacant, the Supreme Court granted certiorari sparingly to avoid the procedural uncertainty that would arise with 4-4 tie votes. The past year's relatively slow docket may lead to increased activity in the coming term. Here are several cases for which the Supreme Court has either already granted certiorari, or which present interesting labor and employment issues the Supreme Court might look to review:

- ***National Labor Relations Board v. Murphy Oil USA, Inc.*** – The Supreme Court agreed to hear three separate cases, which have now been consolidated, to determine whether arbitration agreements with individual employees that prohibit them from pursuing work-related class action lawsuits constitute an unfair labor practice under the National Labor Relations Act. In 2012, the NLRB held that [such agreements were unlawful](#) under the National Labor Relations Act (“NLRA”). The NLRB reasoned that because Section 7 of the NLRA protects employees’ rights to improve their working conditions through proceedings in court, their right to pursue these goals through a class or collective action lies at the “core” of the legal protections of federal labor law. The Obama Administration and several courts of appeals agreed with the NLRB. However, in a significant about-face, the Trump Administration switched sides, and the official position of the U.S. government is now that such agreements do not violate the Act. The Court will resolve a circuit split on this issue.

- ***Hively v. Ivy Tech Community College*** – Employers should stay tuned for the Court to review whether or not Title VII prohibits discrimination based on sexual orientation. In *Hively*, a part time professor filed suit alleging that her employer terminated her because she was openly gay. The Seventh Circuit Court of Appeals [became the first appellate court](#) in the country to hold that discrimination based on sexual orientation is “sex” discrimination that is prohibited by Title VII. The employer did not petition the Court for certiorari, and so the Court will not reexamine the Seventh Circuit’s ruling. However, employers should be aware that other plaintiffs may rely on this decision in sister circuits and district courts. Moreover, the Seventh Circuit’s ruling in *Hively* created a “circuit split” that will likely be resolved by the Supreme Court. In fact, the Second Circuit Court of Appeals—agreeing with all other circuit courts to consider the issue—recently reached the opposite conclusion when it dismissed a sexual orientation Title VII claim. Until this split reaches the Supreme Court, employers will need to be mindful of state law obligations regarding sexual orientation discrimination, and take a “wait and see” approach regarding Title VII.

- ***Janus v. AFSCME*** – Last year, an equally divided Supreme Court issued a one-sentence decision affirming the Ninth Circuit’s decision in *Friedrichs v. California Teachers Association*, upholding the constitutionality of state laws that allow unions to charge [“fair share” fees](#) to public employees who choose to opt out of union membership. The class of plaintiff-teachers in *Friedrichs* challenged the constitutionality of the California law allowing fair share fees as a violation of their free speech rights. Given several Supreme Court decisions on this issue over

the past several years, many predicted that the Court's conservative majority would overturn *Abood v. Detroit Board of Education*, its landmark 1977 decision holding that states may require public sector employees to pay fees to unions for the unions' non-political work. However, with Justice Scalia's death, the Supreme Court issued a non-precedential decision upholding the Ninth Circuit's decision in *Friedrichs*.

With Justice Gorsuch joining the bench, many Court observers believe a new group of right-to-work advocates may seek certiorari for reexamination. A group of plaintiffs in *Janus v. AFSCME* challenged Illinois' fair share laws and [recently announced](#) they are planning to submit a petition for certiorari so that the Court—with all nine Justices—can decide the issue. The Court has not yet decided whether to take the case.

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