Executive Briefing: December 2013

U.S. Supreme Court Employment and Labor Cases to Watch

The United States Supreme Court has a full docket of employment law cases this term. Decisions in these cases are expected before July 2014.

Recess Appointments to the National Labor Relations Board

In a highly-anticipated case, the Supreme Court will decide whether President Obama's January 2012 appointments to the National Labor Relations Board (NLRB) were constitutional recess appointments. After the appointments, the NLRB's rulings were challenged in a number of cases based on the argument that the board lacked a sufficient number of members for a quorum and, therefore, decisions issued following the appointments were void. *Noel Canning v. NLRB* raises questions of when a President may make a recess appointment and bypass Senate confirmation of an appointee. Because of the potential for a significant ruling on the separation of powers between the President and Congress, the case is being closely watched. (On July 30, 2013, after the Supreme Court agreed to accept this case, the Senate confirmed a full 5-member compliment of the NLRB. As a result, NLRB decisions issued by at least 3 of the Senate confirmed NLRB members are not subject to challenge based on lack of a proper quorum.)

Donning and Doffing Under the FLSA

What constitutes "clothes"? The Supreme Court heard argument on November 4, 2013, concerning the meaning of "changing clothes" under Section 203(o) of the Fair Labor Standards Act (FLSA).

In *Sandifer v. U.S. Steel Corp.*, the plaintiffs claim they were unlawfully denied compensation for the time it took them to put on and take off ("donning and doffing") the protective gear they are required to wear to do their jobs. Under Section 203(o), time spent changing clothes or washing up is excluded from compensable time (*i.e.,* workers are not paid for that time) if such time is treated as non-work time by the terms of a collective bargaining agreement. So the question in *Sandifer* is whether the protective gear the plaintiffs put on and took off each work day constituted "clothes" under Section 203(o).

Prior to the oral argument on November 4, 2013, commentators speculated that the Court would criticize the U.S. Department of Labor (DOL) for its re-interpretation of the FLSA during different presidential administrations. Although courts typically give deference to the interpretations of statutes provided by the federal agency that has responsibility for enforcing the particular statute, federal courts of appeal have recently been critical of the DOL for changing its interpretations when presidential administrations change. With respect to Section 203(o), the DOL has interpreted this statutory provision in varying ways over the last 15 years.

At oral argument, the Court did not focus on the DOL's changing interpretations of the statute. Instead, the Court intensely questioned attorneys about the various definitions of "clothing" the attorneys proposed. The Justices' questions seemed to reflect their desire to craft a broadly applicable standard for use in many industries, and not just for the steelworkers in the case before the Supreme Court.

Are Severance Payments Subject to FICA?

In *U.S. v. Quality Stores, Inc.,* the Supreme Court will decide whether severance payments to individuals whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act (FICA). Quality Stores went out of business in 2001, laying off its employees. The bankrupt company paid severance to those employees. Based on existing court interpretations, Quality Stores treated the payments as wages and withheld income and FICA taxes. The company then filed a refund request with the IRS, arguing that the severance payments were not wages but were instead supplemental unemployment benefits which are not subject to FICA tax withholding.

Not surprisingly, the IRS denied the company's request for a refund. Quality Stores brought an action to recover the refunds in the bankruptcy court presiding over the company's bankruptcy. The bankruptcy court agreed with Quality Stores, a decision that was later upheld by the district court and the U.S. Court of Appeals for the Sixth Circuit. Because the Sixth Circuit's decision conflicts with an earlier decision of the U.S. Court of Appeals for the Federal Circuit, the Supreme Court has agreed to resolve the conflict. Should the Supreme Court agree with the Sixth Circuit, employers that have made severance payments may be able to seek significant refunds.

Religious Objections to the ACA

On November 26, 2013, the Supreme Court agreed to hear appeals of two cases which deal with the question

of whether a for-profit corporate employer can object to the mandate under the Affordable Care Act (ACA) that employers' health care coverage pay for employees' birth control because of the religious beliefs of the companies' owners. Two lower courts reached opposite results in the two cases, and various companies and the Obama administration have urged the Supreme Court to resolve the issue.

Under the ACA, churches and other houses of worship are exempt from the birth control mandate. In the cases before the Supreme Court, the owners of the corporate employers are opposed to certain forms of birth control based on the owners' religious beliefs. They argue that the birth control mandate violates another federal law known as the Religious Freedom Restoration Act (RFPA). Under several civil rights laws that protect employees against employment discrimination, nonprofit religious organizations have limited exemptions, but those exemptions have not been extended to for-profit corporations.

In *Conestoga Wood Specialties v. Sebelius*, the U.S. Court of Appeals for the Third Circuit held that a for-profit, secular corporation cannot practice religion and, therefore, it had no rights under the RFPA. In contrast, the U.S. Court of Appeals for the Tenth Circuit held in *Sebelius v. Hobby Lobby Stores Inc.* that a corporate entity could assert its religious faith. Relying on the Supreme Court's analysis in *Citizens United v. Federal Election Comm'n*, the Tenth Circuit reasoned that a corporation could express its religious faith much like it could engage in protected political speech. Under the Tenth Circuit's reasoning, a corporation would qualify as a "person" under the RFPA.

The outcome of this case before the Supreme Court may have ramifications both with respect to coverage under the Affordable Care Act and enforcement of laws which prohibit discrimination in employment.

Whistleblower Cases

In the first Sarbanes-Oxley Act (SOX) whistleblower case to reach the Supreme Court, *Lawson v. FMR LLC*, the Court will decide whether the SOX's whistleblower protection provision protects only employees of public companies. The plaintiffs are two former employees of a private company that is a contractor for a public company. They allege that they discovered wrongdoing by the public company, reported it and were subsequently fired or forced to resign. Their lawsuit, claiming they were whistleblowers protected against retaliation by SOX, was dismissed by the Court of Appeals for the First Circuit because they were not employed by a public company.

Key to the case is the language of the statutory provision providing whistleblower protection. The statute includes the words "contractor" and "subcontractor" in the list of entities prohibited from retaliating against whistleblowers. The former employees argued that Congress meant to extend SOX whistleblower protection to employees of every business entity that has a contractual relationship with a publicly-traded corporation. The corporate defendants argued that the statutory language identifies those who are prohibited from engaging in retaliation but it does not expand whistleblower protection beyond those employed by public companies.

At oral argument on November 13, 2013, several Justices suggested that Congress could not have intended SOX to cover every person employed by every "officer, employee, contractor, subcontractor or agent" of a publicly-traded corporation. However, some Justices also noted that the corporations' reading of the statute would render some of the statutory language seemingly meaningless. The Justices asked questions about some middle ground between the positions taken by the parties in the case.

The outcome of this case should clarify the scope of employees protected under SOX.

Mandatory Union Fees

The Supreme Court will decide in *Harris v. Quinn* whether the State of Illinois can classify in-home care providers who are paid by Medicaid waivers as public employees, thereby requiring the workers to pay fees to a union even if they are not members of the union representing public employees. The employees who brought this lawsuit allege that classifying them as public employees who can be required financially to support a union violates their First Amendment rights. Unions representing public sector employees are concerned that the Supreme Court will use this case to reconsider an early decision pursuant to which unions can require nonmembers to pay fees for certain union activities.

Pregnancy Discrimination

The Supreme Court is still undecided whether to accept the case of *Young v. United Parcel Service Inc.*, but it has asked the U.S. Solicitor General to file a brief laying out the government's view.

Young was a driver for UPS. Under a collective bargaining agreement between UPS and the union to

which the plaintiff belongs, UPS had an accommodations policy that delineated the circumstances under which UPS would provide a light duty assignment. For example, drivers who could not perform their normal duties due to an on-the-job injury would be assigned light duty. The policy did not provide that pregnant employees would be given light duty assignments if they could not perform their normal duties because of pregnancy. Young claimed that UPS' policy violated the federal Pregnancy Discrimination Act because it provided work accommodations to non-pregnant employees who had work limitations but did not offer similar accommodations to pregnant employees with similar work limitations. UPS argued that its policy was pregnancy-neutral and that providing Young with light duty because of her pregnancy would have been giving her preferential treatment in violation of the collective bargaining agreement.

This case is important to watch because the Equal Employment Opportunity Commission, which has responsibility for enforcing the PDA, has made clear its top priorities include addressing workplace accommodation for pregnancy-related limitations.

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U.S. Supreme Court Employee Benefits Case to Watch

A decision from the U.S. Supreme Court is also expected before July 2014 in *Heimeshoff v. Hartford Life & Accident Insurance Co.* The Employee Retirement Income Security Act (ERISA) does not specify the statute of limitations for initiating a claim in court. However, ERISA does require that lawsuits relating to the denial of benefits under an ERISA plan cannot be made until the claimant has exhausted the ERISA plan's claims procedures. The question before the Court in *Heimeshoff* is whether an ERISA plan's contractual statute of limitations for challenging an adverse benefits determination can begin to run before the plan participant has exhausted the ERISA plan's claims procedures, as long as such provision is reasonable, or whether such a statute of limitations can only begin to run after the claimant has a right under the plan's claims procedures to initiate a lawsuit. The issue is important for employers because ERISA benefit plan documents (and their related insurance policies) are increasingly including statute of limitations provisions which place outside time limits on when ERISA plan participants and beneficiaries can judicially challenge an alleged denial of benefits by the ERISA plan administrator.

The facts in *Heimeshoff* are as follows: In August, 2005, Julie Heimeshoff submitted a claim to Hartford Life & Accident for long-term disability benefits under the ERISA-covered long-term disability plan sponsored by her employer, Wal-Mart. The applicable insurance policy required Ms. Heimeshoff to take legal action relating to the matter no later than three years after the time written proof of loss was required to be furnished according to the terms of the policy. The District Court concluded that, by the time Ms. Heimeshoff filed her lawsuit, the statute of limitation had run despite the fact that the statute of limitations period had begun to run before Heimeshoff had exhausted her administrative remedies and, hence, had a right to bring a legal action.

Currently there is a split among the Federal Circuit Courts of Appeals on this issue. The Second Circuit in *Heimeshoff* followed the Sixth, Seventh, Eighth and Tenth Circuits in holding that ERISA permits a statute of limitations period to begin running before the claimant's right to bring a judicial claim accrues, unless the application of such a limitations period would be unreasonable in the particular situation. The Fourth Circuit, however, has taken the position that a contractual statute of limitations period that begins running before the claimant has the ability, under the operative plan's claims procedures, to bring a judicial claim, cannot be enforced. Resolution of the issue will provide employers, plan participants and administrators with clarity regarding the operative deadlines for filing suit for ERISA benefits.

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Minimum Wage Increases and Other Changes Effective January 1, 2014

In many states and cities, the applicable minimum wage rate is subject to change each calendar year. Consequently, although the federal minimum wage will

remain unchanged at $7.25 per hour, employers should confirm the applicable minimum wage in each state and city in which they have operations. Following are changes set to take effect in the states in which Stinson Morrison Hecker currently has offices.

Arizona: The minimum wage will increase from $7.80 to $7.90 per hour effective January 1, 2014. The new Arizona minimum wage poster can be found here.

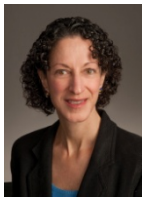
Colorado: The Colorado Division of Labor has proposed that its minimum wage be increased on January 1, 2014, from $7.78 to $8.00 per hour (and from $4.76 to $7.98 per hour for tipped workers). A final order from the Division implementing this change is anticipated prior to January 1, 2014. A new poster is also expected by January 1, 2014.

Missouri: The Missouri Department of Labor has announced that the state minimum wage rate will increase from $7.35 per hour to $7.50 per hour effective January 1, 2014. A copy of the new Missouri minimum wage poster is available here.

Other changes not previously reported in the Executive Briefing of which employers should be aware include:

Affirmative Action: Federal contractors must begin using 2010 census data "to develop all affirmative action plans that commence on or after January 1, 2014," according to a May 15, 2013 notice by the Office of Federal Contract Compliance Programs (OFCCP). The U.S. Census Bureau released the 2010 EEO Tabulation to the public on November 29, 2012, and it "replaces the Census 2000 Special EEO File that OFCCP and covered federal contractors began using in January 2005."

New Model COBRA Election Notice: Due to the fact that COBRA qualified beneficiaries may want to consider and compare health coverage options available through the Health Insurance Marketplace (Exchange) established under the Affordable Care Act, employers should begin using the U.S. Department of Labor's updated model COBRA election notice.



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Whistleblowers Can Now File Complaints With OSHA Online

On December 5, 2013, the U.S. Occupational Safety and Health Administration (OSHA) announced that whistleblowers covered by one of 22 statutes that OSHA administers can now file complaints with OSHA online. The new online form prompts workers to provide basic information so that they can be contacted for follow up. Complaints are then automatically routed to the appropriate regional whistleblower investigators. A complaint form can also be downloaded and submitted to OSHA in hard-copy form by fax, mail or hand-delivery. The paper complaint form and online complaint form are identical.

Online SHOP Enrollment Delayed One Year

In October we reported that the "Small Business Health Options Program" or "SHOP" Exchanges under the Affordable Care Act opened as scheduled on October 1, 2013, but that an online enrollment process was not expected to be available for another month or so. On November 27, 2013, the Obama administration announced that this online enrollment process would be delayed by one year. As a result, employers with fewer than 50 full-time employees (or full-time equivalents) who want to provide their employees with group health coverage through the SHOP Exchanges must do enrollment through paper forms, in person, or over the telephone.