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Civil LITIGATION

Recent Supreme Court decisions affecting the labor and employment practice area

The Supreme Court recently handed down some significant decisions in the labor and employment field. These decisions represent a trend of pro-employer decisions from the Court.

Union Agency Fees: ***Janus v. AFSCME, Council 31***, 138 S. Ct. 2448 (2018)

In ***Janus***, the Supreme Court held that public-sector unions cannot force non-union employees to pay "agency fees," sometimes referred to as "fair share fees." This decision affects 22 states that allow this practice, including New York. Unions collect these fees to help pay for the services they provide to members, such as negotiating the collective bargaining agreement, representing members in grievance and arbitration proceedings, and lobbying activities. Previous case law found such fees to be permissible under the theory that even non-members reaped the benefit of the union's bargaining with the employer, even if employees disagreed with the uses of the funds or opposed the union.

In ***Janus***, the plaintiff argued that charging the agency fees essentially forces an individual to contribute to a lobbyist or political advocacy group that the individual may not support. The Supreme Court agreed and found that forcing non-members to pay agency fees constituted a violation of the First Amendment. Critics of the decision argue that the agency fees amounted to normal union dues minus the portion charged to members that was used for political activities, thereby alleviating First Amendment concerns.

Janus is expected to have an effect in private sector unions as well, with at least one major union slashing its budget by 30% in anticipation of the ***Janus*** decision. New litigation has also resulted, with a class action suit filed in California by teachers seeking to recoup the payment of agency fees.

By ALINA NADIR
Daily Record Columnist

Class Action Waivers: ***Epic Systems Corp. v. Lewis***, 138 S. Ct. 1612 (2018)

Federal courts have disagreed on whether employers could require employees to sign arbitration agreements containing class action waivers as a condition of employment. Some employers favor such clauses as they limit the employer's exposure to potential class action claims. Last year, New York's First Department decided that such clauses violated the NLRA (National Labor Relations Act), while the Second Circuit found them permissible.

The Supreme Court has now settled the disagreement, finding in ***Epic Systems*** that class action waivers in mandatory arbitration agreements are permissible. Such waiver clauses limit employees' ability to pursue wage-and-hour and other workplace related claims in court, forcing them to arbitrate such claims individually. Justice Gorsuch held that the NLRA did not apply to such claims, as it is focused on collective-bargaining rights, rather than non-union rights. Therefore, the Federal Arbitration Act's savings clause did not apply. That savings clause renders unenforceable arbitration contracts based "upon such grounds as exist at law or in equity for the revocation of any contract."

Opponents argue that waiver clauses make valid claims too small to be worth pursuing, potentially letting employers off the hook for violations of employment laws. More employers are likely to look into implementing such agreements to potentially decrease the risk that they will face extremely expensive and time-consuming class action litigation.

Standard of Review for FLSA Overtime Exemptions: ***Encino Motorcars LLC v. Navarro et al.***, 138 S. Ct. 1134 (2018)

The Supreme Court's decision in ***Encino Motorcars*** in April is not receiving as much attention as the previously discussed cases, but is important to those who work in the labor and employment practice area. All labor and employment practitioners know that the exemptions to the Fair Labor Standards Act's (FLSA) overtime requirements should be narrowly construed. Failing to do so and misclassifying an employee can result in an employer owing that employee years of back wages and liquidated damages. Those employees who enforce their misclassifications in court can also collect attorney's fees from the employer.

The decision was limited to the finding that auto service advisers are exempt from overtime provisions under the FLSA, but it also included a new standard to use when deciding a misclassification case — "a fair reading." For decades, the Supreme Court has construed such exemptions narrowly, which gave employees the upper hand in cases where the appli-

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cability of a particular exemption was questionable.

While this decision is unlikely to result in any immediate changes, it will arguably make it a little easier for employers to demonstrate that a particular employee should be exempt from overtime provisions. It will be interesting to see how this new standard is applied to misclassification cases in the future.

With Justice Kennedy's recent retirement, President Trump has now had the opportunity to nominate another Supreme Court justice. On July 9, he nominated Judge Brett Kavanaugh for the seat. If confirmed, Judge Kavanaugh is generally expected to favor employer's interests, and the Supreme Court's shift toward employer-friendly decisions is likely to continue.

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