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UPDATE ON STATUS AS OF APRIL 17, 2008[1]

U. S. Supreme Court to Address Important Labor and Employment Issues in 2008

The U. S. Supreme Court currently has several cases on its docket involving important labor and employment issues that could have significant implications for employers. It is anticipated that the U. S. Supreme Court will be ruling in these cases in 2008. This summary provides a run-down of the key cases to be decided over the coming months.

A. Important Decisions of U. S. Supreme Court Already Rendered in 2008

As of April 17, 2008, the U. S. Supreme Court has issued three significant decisions with respect to labor and employment issues (as well as an important ERISA case[2]):

1. Sprint/United Management Co. v. Mendelsohn, 2008 U.S. LEXIS 2195 (Docket No. 06-1221) (Appeal from 10th Circuit) (Oral argument held on December 3, 2007; Decision issued on February 26, 2008). The U. S. Supreme Court held that so-called "me, too" evidence is neither *per se* admissible nor *per se* inadmissible in employment discrimination cases. "Me, too" evidence is testimony by co-workers alleging similar discrimination by the employer, although by *different* supervisors or decision-makers who played *no role* in the adverse employment decision at issue in the litigation. The Court's holding in this case could subject employers to increased discovery and evidentiary burdens as trial courts must determine whether "me, too" evidence is admissible on a discretionary case-by-case basis.

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[1] This memorandum updates the status of U. S. Supreme Court cases based on new developments since our memorandum on this topic dated March 11, 2008.

[2] **LaRue v. DeWolff, Boberg & Associates, Inc., 2008 U.S. LEXIS 2014 (Docket No. 06-586) (Appeal from 4th Circuit) (Oral argument held on November 26, 2007; Decision issued on February 20, 2008).** The U. S. Supreme Court held that section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), "authorizes recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." In short, ERISA permits an individual plan participant in a defined contribution plan to bring an action to recover losses to his account that were caused by a fiduciary breach.

2. Federal Express Corp. v. Holowecki, 2008 U.S. LEXIS 2196 (Docket No. 06-1332) (Appeal from 2d Circuit) (Oral argument held on November 6, 2007; Decision issued on February 27, 2008). The U. S. Supreme Court held that an EEOC intake questionnaire or other EEOC filing may constitute a charge under the Age Discrimination in Employment Act ("ADEA"), if it is "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee" – even if the submission does not trigger the EEOC to actually take action. The Court further found that plaintiff's "intake questionnaire" and 6-page affidavit filed with the EEOC met the criteria for a charge because it contained a request for the EEOC to act.

3. Hall Street Associates, L.L.C. v. Mattel, Inc., 2008 U.S. LEXIS 2911 (Docket No. 06-989) (Appeal from 9th Circuit) (Oral argument held on November 7, 2007; Decision issued on March 25, 2008). The U. S. Supreme Court held that parties to an arbitration agreement may not contractually provide for more expansive judicial review of an arbitration award, beyond the narrow scope permitted under the Federal Arbitration Act ("FAA"). The Court's holding is significant for employers because they no longer have the option under the FAA to include additional grounds to challenge adverse arbitration awards in arbitration agreements. As a consequence, arbitration may now be viewed as less attractive to some employers as awards are final and difficult to vacate under the FAA's limited grounds for review. However, for those employers who find the finality of the arbitration process attractive, the Court's decision is a favorable development.

B. Important Cases Where U. S. Supreme Court Has Held Oral Argument and Rulings Could Be Issued Soon

1. CBOCS West Inc. v. Humphries, (Docket No. 06-1431) (Appeal from 7th Circuit) (Oral argument held on February 20, 2008). The U. S. Supreme Court will decide whether a race retaliation claim is actionable under section 1981, 42 U.S.C. §1981, which protects the rights of all persons to make and enforce contracts without regard to race. In this case, the Seventh Circuit joined the Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits in holding that section 1981 provides a cause of action for an employee who was terminated in retaliation for complaining of race discrimination. If the U. S. Supreme Court agrees with these circuits, plaintiffs asserting race retaliation claims will not have to follow administrative and procedural requirements under Title VII, and will have an alternative to Title VII's more stringent statute of limitations and caps on damages.

2. Kentucky Retirement Systems v. EEOC, (Docket No. 06-1037) (Appeal from 6th Circuit) (Oral argument held on January 9, 2008). The U. S. Supreme Court will decide whether any use of age as a trigger for issuing or calculating benefits in a retirement or employee benefits plan is arbitrary age discrimination and renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act ("ADEA"). Here, the Sixth Circuit joined several other courts, including the Second, Seventh, Eighth and Ninth Circuits, in holding that an employment benefit that is triggered by the employee's age (rather than an objective factor like years of service or salary level) is facially discriminatory. This case could have serious implications for many retirement plans that use age as a trigger for benefits, and require a re-evaluation of such plans.

3. Chamber of Commerce v. Brown, (Docket No. 06-939) (Appeal from 9th Circuit) (Oral argument held on March 19, 2008). The U. S. Supreme Court will decide whether a California state statute regulating noncoercive employer speech in the context of union organizing is preempted by federal labor law. In this case, the Ninth Circuit held that California's law is not preempted by the National Labor Relations Act ("NLRA") or the First Amendment. The Ninth Circuit's decision is in accord with the Second Circuit's view of a similar New York statute, to the extent that both cases dealt with the question of whether a state may regulate labor relations by restricting the use of state grant monies provided to employers. The U. S. Supreme Court's ruling could have far-reaching effects, since several states, including Illinois, currently have legislation pending that mirrors the California and New York statutes.

C. Important Cases Where U. S. Supreme Court Has Scheduled Oral Argument and Rulings Anticipated in 2008

1. Meacham v. Knolls Atomic Power Lab, (Docket No. 06-1505) (Appeal from 2d Circuit) (Oral argument scheduled for April 23, 2008). The U. S. Supreme Court will decide whether an employee alleging disparate impact discrimination under the Age Discrimination in Employment Act ("ADEA") bears the burden of persuasion on the "reasonable factors other than age" defense. Here, the Second Circuit joined the Ninth and Tenth Circuits in holding that the plaintiff carries the ultimate burden of persuasion to demonstrate that the employer's proffered justification for an adverse employment action is *unreasonable*. If the U. S. Supreme Court follows the emerging trend and affirms the Second Circuit's holding, it will narrow the scope of potential claims under the ADEA, and plaintiffs will have a more onerous burden of persuasion at trial.

2. 14 Penn Plaza, LLC v. Pyett, (Docket No. 07-581) (Appeal from 2d Circuit) (Oral argument anticipated in Fall 2008). The U. S. Supreme Court will decide whether an arbitration clause contained in a collective bargaining agreement ("CBA"), freely negotiated by a union and an employer, that clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, is enforceable. In this case, the Second Circuit joined the Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits in holding that such arbitration provisions are *unenforceable*. Only the Fourth Circuit has found to the contrary. If the U. S. Supreme Court were to find such arbitration clauses to be enforceable, where the waiver of a judicial forum is clear and unmistakable, employers with unionized workforces will greatly benefit from the opportunity to address employment discrimination claims through arbitration.

3. Crawford v. Metropolitan Government of Nashville & Davidson County, (Docket No. 06-1595) (Appeal from 6th Circuit) (Oral argument anticipated in Fall 2008). The U. S. Supreme Court will decide what constitutes protected activity in retaliation cases under Title VII, and specifically whether an employee who participates in an employer's internal investigation of sexual harassment is protected. In this case, the Sixth Circuit took a narrow view of what triggers protected activity and held that in the absence of a pending EEOC charge, the plaintiff had not engaged in protected activity where she participated in an employer's investigation of another employee's allegations of sexual harassment or raised her own complaint that she had been harassed during the investigation of another employee's allegations. The court held that the plaintiff had not "opposed" an unlawful employment practice because she had not initiated any complaint prior to her participation in the investigation or taken any further action following the investigation.

D. Important Case Where U. S. Supreme Court is Expected to Grant Writ of Certiorari

1. Progress Energy, Inc. v. Taylor, (Docket No. 07-539) (Appeal from 4th Circuit) (Writ of certiorari not yet granted). This is an additional significant case to watch. The U. S. Supreme Court has not yet agreed to hear the case, but early indications are that it will likely hear the case in the current session. At issue is whether the Family Medical Leave Act ("FMLA") and a related Department of Labor ("DOL") regulation prohibit the waiver of FMLA claims without the prior approval of the DOL or a court. The Fourth Circuit held that the regulation prohibits the waiver and release of *any* FMLA rights without prior approval by the DOL or a court. The holding is at odds with a Fifth Circuit decision interpreting the regulation, which held that approval was only needed for the waiver of *future* FMLA rights. This is a potentially significant development for employers who frequently include waiver of FMLA claims in their severance or settlement agreements. Such waivers may now be invalid in the Fourth Circuit and subject to review in other circuits depending on how the U. S. Supreme Court weighs in on the issue.

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