Special Report

Looking Ahead: Upcoming U.S. Supreme Court Cases Employers Need to Know

By Donald E. English, Jr. & Greg Riolo

July 12, 2022

Meet the Authors

Donald E. English, Jr.

(Donny)
Office Managing Principal
410-415-2007
Donald.English@jacksonlewis.com

Greg Riolo

Office Managing Principal
(518) 512-8791
Greg.Riolo@jacksonlewis.com

Related Services

Trials and Appeals

The U.S. Supreme Court decisions that were issued in June 2022 had a significant impact on employers, and employers are now looking at implementing policies and practices in response to the decisions. The Court's decisions in *Dobbs v. Jackson Women's Health Organization* and *Kennedy v. Bremerton Sch. Dist.* broadly affected employment in areas such as privacy, benefits, religious accommodation, and gender discrimination.

Looking forward, employers should be poised to act quickly to comply with the law as the 6-3 conservative majority on the Court is likely to continue to change the status quo.

The following previews four cases with potential implications for employers in the upcoming October 2022 Supreme Court session.

***Mallory v. Norfolk Southern Railway Co*, No. 21-1168**

Oral argument scheduled: October 11, 2022

Issue: Whether the due process clause of the 14th Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

Background: Petitioner Robert Mallory is a Virginia resident formerly employed by Norfolk Southern Railway, a Virginia-based company. Mallory claimed that work-based exposure to carcinogens caused him to develop colon cancer. Mallory brought suit in Pennsylvania Superior Court against Norfolk, but he did not allege that any of the exposure occurred in Pennsylvania. Norfolk filed objections, arguing that the court lacked personal jurisdiction. Pennsylvania law states that a foreign corporation that registers to do business in the commonwealth, as Norfolk did, enables Pennsylvania tribunals to exercise personal jurisdiction over the corporation. The Pennsylvania Supreme Court, however, held that this "consent-by-registration scheme" did not comport with due process and upheld the lower court's dismissal of Mallory's suit for lack of jurisdiction.

Impact on employers: If the Supreme Court agrees with Mallory that a corporation that registers to do business in a state voluntarily consents to personal jurisdiction in that state, employees could bring suit against an employer in any state where the employer is merely registered to do business, regardless of whether the employer has any continuous and systematic connections to the state.

***Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199; and *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (consolidated)**

Oral argument scheduled: TBD

Issue: (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; (2) whether

Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives; and (3) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

Background: Students for Fair Admissions, Inc. (SFFA), is a conservative activist organization involved in affirmative action litigation. The two cases pending before the Court challenge admissions practices at Harvard University and University of North Carolina-Chapel Hill (UNC). In the Harvard case, SFFA argues that the University's admissions policy discriminates against Asian Americans and violates Title VI of the federal Civil Rights Act, which prohibits racial discrimination by entities receiving federal funding. In the UNC case, SFFA asserts that the university's admissions process violates Title VI and the Equal Protection Clause of the Constitution. In challenging these policies, SFFA asks the Court to overrule *Grutter v. Bollinger*, which held that a "race-sensitive" admissions program that considered race as only one factor and gave individual consideration to each applicant was sufficiently narrowly tailored to survive strict scrutiny.

Impact on employers: If the Supreme Court overturns *Grutter* and invalidates Harvard and UNC's admissions programs, higher education employers will need to examine admission programs to determine whether they require revision and train admissions personnel accordingly. Such a decision could have a far-reaching impact and may encourage private sector employers to re-evaluate their diversity, equity, and inclusion measures.

***303 Creative LLC v. Elenis*, No. 21-476**

Oral argument scheduled: TBD

Issue: Whether applying a public-accommodation law to prohibit a business from announcing its intent to deny service to LGBTQ+ customers violates the free speech clause of the First Amendment.

Background: Lorie Smith filed the underlying lawsuit on behalf of her graphic design firm, 303 Creative LLC. Smith seeks to expand her business and begin designing websites for weddings. However, Smith opposes same-sex marriage on religious grounds. Her suit challenges a Colorado law prohibiting businesses open to the public from discriminating against LGBTQ+ customers or announcing an intent to do so. The U.S. Court of Appeals for the 10th Circuit held that the Colorado law was sufficiently narrowly tailored to the state's interest in ensuring LGBTQ+ customers have access to 303's unique services and, therefore, did not violate Smith's First Amendment rights.

Impact on employers: A decision in favor of 303 would invalidate the Colorado law prohibiting discrimination against LGBTQ+ customers, as well as any other state laws that provide similar protections, granting broad discretion for a company to deny services to customers based on the religious beliefs of the company's owners or executives. Employers that provide services to the public will need to carefully consider the economic, social, and reputational impact of allowing employees to refuse services to LGBTQ+ individuals if such conduct is no longer prohibited by law.

***Helix Energy Solutions Group, Inc. v. Hewitt*, No. 21-984**

Oral argument: October 12, 2022

Issue: Whether a supervisor making over $200,000 each year is entitled to overtime pay because the standalone regulatory exemption set forth in 29 C.F.R. § 541.601 remains subject to the detailed requirements of 29 C.F.R. § 541.604 when determining whether highly compensated supervisors are exempt from the Fair Labor Standards Act's overtime-pay requirements.

Background: Michael Hewitt held a supervisory position on an offshore oil and gas rig and was paid biweekly at a daily rate. Helix Energy Solutions Group, Inc. terminated Hewitt's employment, and Hewitt then filed a putative class action suit seeking retroactive overtime pay. Hewitt argued that his pay was computed on a daily basis, and he therefore was a non-exempt employee and entitled to overtime pay. Helix argued that Hewitt was exempt as a "bona fide executive, administrative, or professional" and a "highly compensated" employee. The U.S. Court of Appeals for the Fifth Circuit overturned the lower court's decision, holding that Hewitt was non-exempt because he was a salaried employee.

Impact on employers: If the Court agrees with the Fifth Circuit's analysis that daily rate pay is not equivalent to a salary, regardless of how highly compensated the employee is, employers will face increased liability for failure to pay overtime. Employers with highly compensated employees paid on a daily basis should consider whether to revise its pay practices.

***

While it is impossible to predict precisely how the Supreme Court will rule on these four cases, employers should re-examine their policies and practices to make sure they are compliant with the current law and remain flexible in the event that the Court's ruling significantly departs from the status quo.

If you have any questions about the recent Supreme Court decisions, the upcoming Supreme Court term, or any other employment law trends in the appellate courts, please contact a member of the Trial and Appeals Practice Group.