Podcast

U.S. Supreme Court's Impact on Employers: Present and Future

By Greg Riolo & Donald E. English, Jr.

August 31, 2022

Meet the Authors

Greg Riolo

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

Donald E. English, Jr.

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

Details

August 31, 2022

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 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.

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Transcript

Alitia Faccone (00:00):

Welcome to Jackson Lewis's podcast, We get work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business- oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

Alitia Faccone (00:29):

Several United States Supreme Court decisions issued this past June had a significant impact on employers, including issues affecting privacy, benefits, religious accommodation, and gender discrimination. Employers are now faced with ensuring policies and practices are compliant in light of those decisions. On this episode of We get work, we discuss why employers should reexamine their policies after the 2021-2022 Supreme Court term. And looking forward to the next term, employers should remain flexible and be poised to act quickly to comply with any new court opinions that alter the status quo in the workplace.

Alitia Faccone (01:08):

Our hosts today are Donny English and Greg Riolo, co-leaders of the Trial and Appeals Practice Group and principals respectively in the Baltimore and Albany offices of Jackson Lewis. Donny, a member of the firm's board of directors, has more than 20 years of experience litigating employment matters and trying cases. He served as an officer in the Air Force prior to his legal career and is the co-leader of the Jackson Lewis's Veterans Attorney Resource Group. Greg, the office managing principal of the Albany office, has been with the firm for more than 25 years and has first chaired jury and bench trials as well as arbitrations involving claims of discrimination, sexual harassment, breach of contract, whistleblower, civil rights, and wage and hour matters.

Alitia Faccone (01:54):

Donny and Greg, the question on everyone's mind today is what do I need to know about the recent and future U.S. Supreme Court decisions and how will those decisions impact my business?

Greg Riolo (02:07):

Thank you. Hi, this is Greg Riolo, and I'm here with Donny English. I think it's important to discuss the Supreme Court, both what has happened in the last term, but also some things that we expect to see in the next term and it's impact on employers and workplace law. And with the change in the Supreme Court, with the general 6-3 majority, we've seen already a shift in a lot of cases, and we're going to discuss some of those. But also, we're going to see how those trends are going to continue into the new term and beyond and how those mostly affected employers.

Greg Riolo (02:39):

First, one of the most publicized cases that everyone's heard about is the Dobbs versus Jackson Women's Health Organization. And as everyone may know, Dobbs overturned 50 years of precedent in the court's decision really overturning Roe v. Wade and Planned Parenthood Pennsylvania versus Casey.

Greg Riolo (02:55):

In anticipation of that decision, many states either already enacted or had in place trigger laws that really severely restricted individual abortion rights and potentially third parties who assist individuals who seek abortion. We've been instructing and helping clients develop our policies and practices regarding leave policies to assist women who are seeking reproductive services to get those services even if it is out of state. There's also been travel and reimbursement policies which have been put in place in employee benefit policies to make sure that, again, women have access to those reproductive services if they are out of state.

Greg Riolo (03:38):

We've also seen in terms of some reaction to Dobbs of a religious discrimination tint and how employers can square their policies with challenges based on an employee's sincerely held religious beliefs. So the impact, although it's received a lot of publicity,

has really dealt with how do employers react to make sure their policies, whether it be leave policies or reimbursement policies, really coincide and try to allow women to access the reproductive services that may no longer be available in the states.

Greg Riolo (04:13):

We're certainly going to see more challenges to not only the laws that have been put into place, whether it's the trigger laws or others, but also the potential challenges to policies that employers put in place in order to allow women to obtain those reproductive services. So companies are going to have to be a lot of ready to adapt as things approach and be able to modify their policies to fit the need, but also keeping in mind and avoiding the liabilities that may arise.

Greg Riolo (04:43):

So that's one that's been a lot in the papers and publicized. But there's some others, Donny, that really are going to implicate kind of the broader workplace law. Can you talk about one of those, please?

Donny English (04:55):

You're absolutely right, Greg. And as you said, Dobbs got all the headlines, but a decision that may have even broader implications for employers is the court's decision in West Virginia v. Environmental Protection Agency because all employers in every state are affected by agency regulations. And so this decision effectively limits the power of government agencies through the application of what's known as the major questions doctrine. And in a nutshell, what that doctrine says is that administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions about matters of considerable significance.

Donny English (05:39):

And so the court concluded that the EPA lacked clear congressional authorization to effectuate a shift in U.S. energy generation from coal to wind and solar sources. And so this decision has the potential to significantly impact employers who are subject to regulatory authority from a number of different governmental agencies. And that would include OSHA, Department of Labor, the EEOC, and the NLRB. So virtually, all employers.

Donny English (06:07):

We already saw this in January when the Supreme Court struck down OSHA's COVID-19 vaccine mandate for large employers, where the court noted that the 50-year-old section of the law that invested OSHA with the authority did not grant that authority for such remarkable measures. We could also see similar challenges to regulatory authority in an employment context, such as challenging the Department of Labor's authority to define what an independent contractor is or the NLRB's authority to require card checks over secret ballot elections. Already, a restaurant industry group is challenging a Department of Labor rule regarding tipped workers. And this West Virginia v. EPA case is already cited in challenges to President Biden's executive order increasing the minimum wage for federal contractors.

Donny English (07:01):

So this is likely only the beginning of an increase in challenges to agency regulations. And so the real takeaway for employers here is that employers can now be a little more aggressive in litigation with agencies because they now have a stronger legal foundation to challenge that agency's regulations and the decisions of that agency.

Greg Riolo (07:25):

Yeah. And Donny, I think it's important to understand in terms of the implications that could be with many agencies that all employers may have contact with. One of them being the EEOC. And the EEOC has taken a very broad approach in terms of its ability, whether it's through a conciliation or the cases, to really take a broad approach on how it implements the different laws that it oversees. So I think there may be more challenges that employers can really look at with respect to the EEOC cases.

Donny English (07:54):

I think that's exactly right, Greg.

Donny English (07:56):

Another case to discuss is Southwest Airlines v. Saxon. And so I don't think it was much of a surprise that a conservative majority Supreme Court was in favor of restricting agency powers in the West Virginia case. In this case, there was a challenge to whether ramp workers for airlines are considered to be transportation workers for the purposes of the Federal Arbitration Act. And so if ramp workers are classified as transportation workers, they would be exempt from the FAA and not subject to mandatory arbitration of employment disputes.

Donny English (08:31):

The court concluded that ramp workers are in fact transportation workers and therefore not required to arbitrate claims under the FAA. And so on the surface, as I said, this decision was surprising because conservative courts typically tend to favor arbitration and would be more likely to actually expand the reach of the FAA.

Donny English (08:55):

The underlying issue in this case was whether the employees were actually engaged in interstate commerce, and the court concluded that the worker's actual job duties were determinative. And so here, Saxon frequently loaded and unloaded cargo on the aircraft, which rendered her intimately involved with the commerce of that cargo. And so the court specifically, though, excluded supervisors and transportation workers who are not directly involved in transporting goods in its decision.

Donny English (09:26):

I think the key takeaway from this case is that employers in the transportation industry or any other industry engaged in interstate commerce should consider whether its employees are exempt from the FAA under this decision and determine whether state arbitration provisions would be applicable instead.

Donny English (09:45):

And so Greg, Southwest is an example where this court veered a little bit from what we would expect, but I think the Kennedy v. Bremerton School District case was pretty much on brand. So why don't you talk to us about that?

Greg Riolo (09:58):

Yeah. Thanks, Donny. And that case involved an assistant football coach's prayer on the 50 yard line after football games. There was disciplinary action taken against the individual. And ultimately, the court ruled that his engagement in that religious activity at the 50 yard line was protected free speech. The court specifically rejected the district's argument that allowing public prayers would open it to liability in a violation under the Establishment Clause. And the court characterized the district's prohibition on religious conduct while on duty as neither neutral nor generally applicable.

Greg Riolo (10:33):

This really is in line with what you would expect from the current majority. So given the ideological makeup of the court, it'll be interesting, especially for higher education employers, to see how this court approaches free speech challenges to these laws. And some of the broader implications we already see is the enactment of the Stop WOKE Act in Florida. It's called the Individual Freedom Act.

Greg Riolo (10:58):

Recently, a federal district court blocked that. But that act prohibited employers from requiring any activity endorsing certain concepts related to race, sex, or gender. So that will certainly be challenged and brought up to the Supreme Court, and it'll be interesting to see how the Supreme Court acts with respect to statutes like that.

Greg Riolo (11:15):

Additionally, there are currently more than 50 proposed state and local laws that would place limitations on speech similar to those in the Florida act in public schools around the country. So not only are we going to see an expansion of potentially religious freedoms under the Free Speech Clause, but also kind of a restriction in the areas when districts or higher education clients want to expand in terms of diversity, equity, inclusion efforts.

Greg Riolo (11:42):

So the takeaways, it seems, like Donny said, this is more in line with the Supreme Court's conservative bent. And it seems more poised to allow claims of religious freedom in the public arena, whether it be in education, whether it be in the area of first responders, and certainly as we're going to discuss in places of public accommodation.

Greg Riolo (12:02):

So now we've talked a little bit about some of the Supreme Court cases that have been decided in the past term. We also want to look ahead based on some of the

things we've discussed on Supreme Court cases in the upcoming term. So Donny, if you can, take us through the Students for Fair Admissions cases.

Donny English (12:19):

Sure. And yeah, those are actually two cases, Students for Fair Admissions v. Harvard, and then a separate case also against the University of North Carolina. And those cases have been consolidated. And so that consolidated case is probably going to be the one to get all the headlines from this term, this upcoming term.

Donny English (12:39):

And so the court's going to consider three primary issues in that consolidated case. First, the court's going to consider whether the court should overrule Grutter v. Bollinger. And in Grutter, the Supreme Court 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 constitutional strict scrutiny. If the court ends up overruling Grutter, then institutions of higher education may not be able to use race as a factor in admissions at all. So we'll all be keeping our eyes on the court's decision on that issue.

Donny English (13:26):

The other issue that the court's going to consider is whether Harvard and UNC violated Title VI of the Civil Rights Act by penalizing Asian American applicants by engaging in racial balancing and overemphasizing race, and also rejecting workable race-neutral alternatives.

Donny English (13:47):

Lastly, the court will determine whether a university can reject race-neutral alternatives because it would change the composition of the student body without first proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of the overall student body diversity.

Donny English (14:07):

And so, interestingly, both cases were brought by the Students for Fair Admissions, which is a conservative activist organization that routinely challenges affirmative action policies across the nation. And so the outcome of these cases will most directly impact higher education employers. And depending on how the case goes, those employers in higher ed will need to be prepared to reexamine their admissions programs and train admissions personnel if the court invalidates the Harvard and UNC policies.

Donny English (14:43):

But this case really has the potential to impact employers outside of higher ed with respect to diversity, equity, and inclusion measures, especially when viewed alongside the outcome of any litigation pertaining to proposed legislation similar to the Florida Stop WOKE Act that Greg spoke about.

Donny English (15:07):

If the Supreme Court rules in favor of Students for Fair Admissions, then I would expect more litigation from the plaintiffs who are challenging DEI policies and practices. And this could really change what employers are doing with respect to recruiting, promoting employees, and also attempts to retain employees. So we're all going to be keeping our eyes on this case.

Donny English (15:29):

So Greg, I'll pass it to you to talk about the 303 Creative case.

Greg Riolo (15:33):

Yes, the case that's going to come up on the Supreme Court's term this year is 303 Creative LLC versus Elenis. The court's going to consider whether applying a public accommodation law to prohibit a business from announcing its intent to deny services to LGBTQ customers violates the Free Speech Clause of the First Amendment. This is kind of in line of what we were talking about earlier and really the expansion in allowing individuals in this case to deny customers the services of their business because of their religious beliefs, specifically.

Greg Riolo (16:06):

The Colorado law that's in play here prohibits businesses open to the public from discriminating against LGBTQ+ customers or announcing its intent to do so. In that case, the owner of a graphic design firm challenged the law because she disagrees with the same-sex marriage on religious grounds and doesn't want to create and design websites for same-sex clients.

Greg Riolo (16:30):

Everyone will remember the infamous baker cases, but this is something where given the conservative bent on the Supreme Court, it'll be interesting to see if the court upholds the challenge to Colorado's public accommodation laws. And if so, that would allow broad discretion for individual companies to deny services to customers based on the religious beliefs of the owners or executives.

Greg Riolo (16:55):

Even if the denial of services is found constitutional, companies will still need to consider the economic, social, and reputational impact to deny service to certain people. So that's going to have broad implications in the public accommodation case.

Greg Riolo (17:09):

I think, Donny, we were talking earlier about the regulations, but certainly there's already one case coming up in the Supreme Court term dealing with certain regulations.

Donny English (17:18):

That's right, Greg. And that case would be the Helix Energy Solutions Group v. Hewitt case. We were talking about the court limiting the power of agencies in the West Virginia case, while the Helix case is a wage and hour case in which the court

will consider regulations relating to the Fair Labor Standards Act and how those regulations apply when determining whether a highly compensated supervisor is exempt from overtime pay requirements.

Donny English (17:43):

So in this case, Hewitt was a supervisor who made over $200,000 annually. And he was terminated. And after he was terminated, he claimed that he was due overtime because his pay was computed on a daily basis. So in his view, he was not exempt. Well, Helix Energy Solutions argued that he was exempt as a bonafide executive and as a highly compensated employee. I mean, he made $200,000.

Donny English (18:12):

And so the court's analysis is going to determine, it's going to kind of turn on how he was paid, maybe not necessarily how much he was paid, but how he was actually paid. And so if the court concludes that an employee paid at a daily rate is not salaried by definition, then employers may see an increased liability under the FLSA's overtime laws because it will open the door to more employees to be under the non-exempt umbrella.

Donny English (18:40):

And so that case is certainly interesting, Greg. I think there's one more case on our list to cover. May not be quite as interesting, but why don't you talk about that one?

Greg Riolo (18:51):

Yes, and this is a case, Mallory versus Norfolk Southern Railway. And this really has border implications than even just employers. In that case, the court's going to consider whether the Due Process Clause of the Fourteenth Amendment prohibits a state, in this case Pennsylvania, from requiring a corporation to consent to personal jurisdiction if it does any business in the state.

Greg Riolo (19:12):

Specifically, in that case, the Pennsylvania law states that a foreign corporation that registers to do business in the Commonwealth enables Pennsylvania tribunals to exercise personal jurisdiction over the corporation. This has broad implications, especially when you consider the remote type of work that a lot of companies are engaging in. And therefore, having one employee in an entire state, could that potentially open up the company to employment laws in other cases with respect to personal jurisdiction in that state?

Greg Riolo (19:42):

So although not as juicy as some of the other things we're discussing, it could have broad implications, especially as we live and work in this virtual environment.

Greg Riolo (19:51):

So Donny, why don't you take us out in terms of just some summary and your thoughts on the past as well as the future in the Supreme Court world?

Donny English (20:00):

Well, you and I are certainly going to be keeping our eyes on these cases and other cases that are in the pipeline for the Supreme Court, along with our colleagues in the Jackson Lewis Trial and Appeals Practice Group.

Donny English (20:16):

Now, there's really no way to predict how the Supreme Court's going to rule on these cases. We may think we have a pretty good idea given this 6-3 majority, and we don't really see the court changing substantially in the near future. But you really can never predict where the court's going to go. And some of the cases that we talked about kind of illustrate that. But what employers can do is they can start reexamining their policies and their practices now to get ahead of any future changes in the law.

Donny English (20:47):

And so I think that we're just about out of time. And we really wanted to thank everyone for your time today. And we really look forward to the next episode where we can cover, hopefully, the next term of the Supreme Court. So thanks a lot, everybody.

Greg Riolo (21:02):

Thank you.

Alitia Faccone (21:03):

Thank you for joining us on We get work. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective.

Alitia Faccone (21:12):

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Alitia Faccone (21:30):

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