

Employment Cases To Watch In 2012

By **Abigail Rubenstein**

Law360, New York (January 01, 2012, 12:00 AM ET) -- The coming year will likely see fewer game-changing employment law decisions than years past, but employment attorneys say there will still be plenty of big rulings on issues ranging from the constitutionality of health care reform to the language of California's wage-and-hour law and the exemption status of drug representatives.

"We seem to be in between the turbulent times that have passed and the turbulent times to come," said Richard Meneghello of Fisher & Phillips LLP.

Here are the cases employment attorneys will be watching closely in 2012.

Health Care Reform At The Supreme Court

Although it doesn't directly touch on traditional labor or employment law, the ruling this year that attorneys say will have the biggest impact on employers is the Supreme Court's decision on the constitutionality of the Patient Protection and Affordable Care Act.

The decision will affect employers where it counts the most — namely, their bottom line.

"The case will impact employers more significantly than many other cases that are pending because it relates to an ever-growing part of the cost of doing business, which is the cost of health care and insurance for their employees," said Dennis Duffy of Baker Botts LLP. "It affects employers in the sense that it will affect their health care cost."

The high court will consider whether the law's mandate that individuals buy health insurance or pay a penalty is unconstitutional, a politically charged question that has divided appellate courts across the nation.

The justices seem to have acknowledged the case's blockbuster status by allotting 5 ½ hours for oral argument in March.

So far, the Eleventh Circuit has been the lone federal appeals court to strike down the mandate.

The Sixth Circuit upheld the mandate's constitutionality in June, while the Fourth Circuit in September dismissed two other challenges to the overhaul, ruling the plaintiffs did not have standing to sue. The D.C. Circuit in November tossed a suit that argued the mandate violated the right to religious freedom.

The high court granted three petitions for certiorari on cases over the law, one filed by the U.S. Department of Justice, one filed by 26 states challenging the law, and a third filed by small business trade group the National Federation of Independent Business.

"It's hard to plan for the future when constitutionality of the law is in question," said Vincent Cino of Jackson Lewis LLP. "The uncertainty is the most pressing issue for employers right now."

The states are represented before the Supreme Court by Paul D. Clement and Erin E. Murphy of Bancroft PLLC. The NFIB is represented by Michael Carvin, Gregory G. Katsas, C. Kevin Marshall and Hashim M. Mooppan of Jones Day.

The court has also picked Farr & Taranto partner H. Bartow Farr III to argue that the individual mandate is severable from the rest of the law and Covington & Burling LLP partner Robert Long to argue that the Anti-Injunction Act bars any suit from challenging the individual mandate because no penalty has been imposed yet.

The cases are National Federation of Independent Business et al. v. Sebelius et al., case number 11-393; U.S. Department of Health and Human Services et al. v. Florida et al., case number 11-398; and Florida et al. v. Department of Health and Human Services et al., case number 11-400, in the U.S. Supreme Court.

Michael Shane Christopher et al. v. Smithkline Beecham Corp.

The Supreme Court will consider in this case the hotly contested question of whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives, who are legally prohibited from closing sales.

Pharmaceutical sales representatives have been considered overtime-exempt salesmen for over 70 years, but in recent years a slew of FLSA lawsuits have sprung up to challenge the drug industry's policy, so the case will be closely watched by the drug industry.

In this case, the high court has agreed to review a Ninth Circuit ruling affirming an Arizona court's finding that the exemption applies to a putative class of GlaxoSmithKline PLC drug sales representatives.

The Ninth Circuit's decision put the court at odds with both the Second Circuit, which held that the exemption did not apply to representatives of Novartis Pharmaceuticals Corp. and Schering Corp., and the U.S. Department of Labor, whose amicus brief in favor of the plaintiffs' position was given no deference.

Attorneys predict that a win for GSK would likely shut down the wave of wage-and-hour suits filed by drug sales representatives, while the industry may keep fighting to classify its workers as exempt under another exemption if the high court sides with the sales representatives.

"If the sales representatives lose, it's pretty much over for them, but the pharmaceutical industry would still have the administrative exemption to fall back on," said Ford & Harrison LLP's David Prather.

The court's ruling on the sales representatives' status will have the greatest impact on drugmakers, but it could have more far-reaching consequences for employers. It will be the first time the court has ruled on the scope any of the so-called white collar exemptions to the federal wage law and it will address how much deference courts should give to amicus briefs lodged by regulators.

“Any time you have a thought-out decision on the white collar exemptions, it is going to have an impact beyond the industry,” said Ann Marie Painter of Morgan Lewis & Bockius LLP.

The sales representatives are represented by Michael R. Pruitt and Otto S. Shill III of JacksonWhite PC.

GSK is represented by Neal D. Mollen of Paul Hastings LLP and Paul D. Clement of Bancroft PLLC.

The case is Michael Shane Christopher et al. v. Smithkline Beecham Corp., case number 11-204, in the U.S. Supreme Court.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC

The Supreme Court in this case will tackle the boundaries of the so-called ministerial exception, which blocks workers who perform religious duties from filing employment suits against the religious organizations they work for.

Although the case has limited application for employers besides religious or religiously affiliated institutions, the case is huge for the employers it does affect. It has the potential to explode decades of existing legal doctrine that covers the role courts can play in the hiring and firing decisions of religious institutions.

“Religious organizations have strict rules, and they're faith-based, so the courts have given them wide latitude to deal with these types of issues because of the separation of church and state,” Cino said. “But the line gets more blurred if the ministerial exception does not apply, so it is very important to religious institutions how this case is finally adjudicated.”

The case now before the Supreme Court began as an employment discrimination suit brought by the U.S. Equal Employment Opportunity Commission against Hosanna-Tabor on behalf of one of its teachers, Cheryl Perich, who lost her job after being diagnosed with narcolepsy.

The trial court dismissed the suit, finding that since Perich taught a mix of religious and secular subjects, and was "called" to her position by voting members of the church congregation, she was covered by the ministerial exception and could not sue.

But the Sixth Circuit reversed that ruling, finding that Perich could not be deemed a minister under the doctrine because she spent the majority of her time teaching a secular curriculum, not a religious one.

Hosanna-Tabor appealed to the Supreme Court, and the court heard oral arguments Oct. 5.

“[The Supreme Court's ruling] may extend the scope of the exception for individuals who are ostensibly performing parochial or nonreligious duties,” Duffy told Law360. “It could be very significant for employers like religious universities, schools and hospitals.”

Hosanna-Tabor is represented by Douglas Laycock, law professor at the University of Virginia School of Law.

Perich is represented by Walter Dellinger, a partner at O'Melveny & Myers LLP.

The Case is Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, case no. 10-553, in the U.S. Supreme Court.

Brinker International Inc. et al. v. Superior Court

In early 2012, the California Supreme Court is slated to rule in a long-running dispute on whether employers in the Golden State must merely make meal breaks available or ensure that employees take them.

The case has been of interest to employment attorneys and to California employers since the state's highest court agreed to take it in 2008. The court is expected to rule on the case in mid-April, following briefings from the parties on whether its ruling should be retroactive or prospective only.

A ruling in favor of the stricter meal break standard in Brinker, especially when combined with a recent ruling in an overtime case against California Oracle Corp. that the state's labor laws apply even to out-of-state residents who temporarily work in California, could lead to major headaches for multistate employers trying to comply with the law, according to Ogletree Deakins Nash Smoak & Stewart PC partner Ron Chapman Jr.

And even employers without operations in California should pay attention to the case because employment law trends often start in the state, attorneys say.

"The whole wage-and-hour juggernaut started in California and then came east. Everyone keeps an eye on California," said Paul Salvatore of Proskauer Rose LLP. "If the court gives a pro-employee ruling in Brinker, it's possible it will set off non-California Brinker-like challenges across the country, even though California wage-and-hour law is unique."

But observers of the oral arguments saw the court appearing to lean in a pro-employer direction, as the justices asked questions that appeared sympathetic to Brinker's position.

"If those questions were any way indicative, it seems like the employer may have a decent shot at getting a reasonable ruling," Meneghello told Law360.

"This is significant for any employer thinking about expanding or moving operations to California, since these kinds of cases have created a subindustry in terms of specialization among wage-and-hour practitioners in California," he said.

The plaintiffs are represented by Michael Rubin of Altshuler Berzon LLP, Kimberly Kralowec of the Kralowec Law Group, Timothy Cohelan and Michael Singer of Cohelan Khoury & Singer, Tracee Lorens of Lorens & Associates, and William Turley of the Turley Law Firm APLC.

The defendants are represented by Rex Heinke of Akin Gump Strauss Hauer & Feld LLP, Michael Burns, Susan Sandidge and Laura M. Franze of Hunton & Williams LLP, and Karen Kubin of Morrison & Foerster LLP.

The case is Brinker International Inc. et al. v. Superior Court, case number S166350, in the California Supreme Court.

D.R. Horton Inc. v. Michael Cuda

The National Labor Relations Board may find itself at odds with the Supreme Court when it rules on whether an employee arbitration agreement that includes a class action waiver constitutes an unfair labor practice under the National Labor Relations Act.

The Supreme Court came out in favor of such waivers in April in its 5-4 decision in *AT&T Mobility LLC v. Concepcion*, ruling that the Federal Arbitration Act preempts state laws that invalidate class action arbitration waivers.

“There is the potential for a very stark contrast between the very pro-arbitration decisions coming out of the Supreme Court and what could be a very different decision from the NLRB,” said Chapman, whose firm represents D.R. Horton. “The tension that is going to create long-term is going to be an issue we're all going to be grappling with over the next few years.”

The case before the NLRB stems from D.R. Horton employee Michael Cuda's efforts to launch a class action accusing the homebuilder of misclassifying its superintendents as exempt from the FLSA's overtime pay requirements.

When Cuda tried to initiate classwide arbitration, the company refused, citing a portion of its agreement with employees that barred arbitration of collective claims. Cuda then turned to the NLRB, claiming the agreement ran afoul of the NLRA.

An administrative law judge ruled that maintaining and enforcing the agreement was not an unfair labor practice, but the NLRB's acting general counsel took exception to the decision.

The issue is now fully briefed before the NLRB, but it is unclear whether the case will move forward in 2012 because of the board's lack of a quorum.

Nonetheless, the case is one to watch, especially because the board's decision is unlikely to be the final word on the question, as an appeal will probably follow no matter how the board rules.

“Any way the board's decision comes out, it will probably end up at the Supreme Court someday because of the conflict between the statutory language in the NLRA and the Supreme Court's pro-arbitral jurisprudence of the last 20 years,” Salvatore said.

D.R. Horton is represented by Bernard P. Jeweler and Mark M. Stublely of Ogletree Deakins Nash Smoak & Stewart PC.

Cuda is represented by Carlos Leach of Morgan & Morgan.

D.R. Horton Inc. v. Michael Cuda, case number 12-CA-25764, in the National Labor Relations Review Board.

--Additional reporting by Jacqueline Bell and Ben James. Editing by Kat Laskowski.

Correction: A previously published version of this story misidentified the date the California Supreme Court is expected to rule in the Brinker case.