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# Employment Law Cases To Watch In The 2nd Half Of 2018

By **Vin Gurrieri**

*Law360 (July 6, 2018, 8:27 PM EDT)* -- From the U.S. Supreme Court clarifying what language must be present in arbitration agreements for them to permit class arbitrations to the D.C. Circuit potentially resolving a long-simmering appeal by Browning-Ferris Industries of the National Labor Relations Board's controversial joint employer doctrine, courts will have no shortage of significant employment issues to tackle over the next six months.

Here, Law360 looks at four employment cases that bear watching in the second half of 2018.

**Lamps Plus Inc. v. Frank Varela**

Shortly before the Supreme Court issued its landmark May 21 ruling in Epic Systems that said businesses aren't flouting the National Labor Relations Act if they require workers to sign class action waivers as part of mandatory arbitration agreements, the justices agreed to take up a data breach lawsuit that hinges on what arbitration agreements have to say for workers to be able to bring class claims in arbitration.

In late April, the justices granted a petition for certiorari from lighting retailer Lamps Plus, which is challenging the Ninth Circuit's ruling that worker Frank Varela could pursue class arbitration even though the language in the arbitration agreement he signed didn't explicitly allow for class proceedings.

The cert petition specifically asked the justices to consider whether the Federal Arbitration Act prohibits any interpretation of arbitration pacts under state law that allow for class arbitration based only on general language that is commonly used in such agreements.

In taking Lamps Plus' appeal, the high court opened the door to potentially clarifying its 2010 Stolt-Nielsen decision, which said that parties can't be forced into class arbitration "unless there is a contractual basis for concluding [they] agreed to do so."

The high court's interpretation of the Stolt-Nielsen decision is key to the Lamps Plus case as well as to scores of would-be class actions brought by workers who signed ambiguous arbitration pacts.

Matthew Steinberg, deputy chair of Akerman LLP's labor and employment practice, said the Lamps Plus case "may show a continuing pattern" by the high court to enforce arbitration agreements according to

their language and not infer things that aren't stated in the agreements.

"It would seem to follow a trend towards interpreting arbitration provisions as they're written, and in light of the decision in Epic Systems, it would seem to suggest that the court would be unlikely to infer that the plaintiffs in that case have a right to proceed to class action arbitration," Steinberg said. "I think going forward employers will start or continue to be specific and explicit in terms of what these arbitration provisions say — what they cover and what they don't cover."

**Altitude Express Inc. v. Zarda**

Another simmering issue that has percolated through several circuit courts in recent years and is now on the Supreme Court's doorstep involves whether the U.S. Equal Employment Opportunity Commission is right to interpret Title VII of the Civil Rights Act's existing ban against sex discrimination to include protection for bias based on sexual orientation.

The Seventh Circuit last year became the first appellate court in the country to adopt the EEOC's position, and the Second Circuit followed the same path when it ruled in favor of deceased former skydiving instructor Donald Zarda, reviving his suit accusing Altitude Express Inc. of illegally firing him.

Altitude Express filed a petition for certiorari in May asking the high court to consider whether Title VII's scope encompasses sexual orientation bias. A similar cert petition was also recently filed by former Clayton County, Georgia, worker Gerald Bostock, who is appealing a ruling by the Eleventh Circuit rejecting his allegations that he was fired because of his sexual orientation, finding he didn't have a viable cause of action under Title VII for such a claim.

Steinberg, who noted that the case, if accepted, will be heard by a Supreme Court that won't include retiring Justice Anthony Kennedy, believes that lawyers arguing in favor of the position that Title VII covers sexual orientation or gender identity will have to convince one of the members of the court's traditionally conservative bloc to adopt the EEOC's position.

"I think it's a really interesting question that is intertwined with Justice Kennedy's retirement form the court," Steinberg said. "I think a lot will depend on who gets that appointment, [but] I'm not convinced that they'll actually take cert on that question."

Steinberg also pointed out that the Supreme Court recently issued a narrow decision in the closely watched Masterpiece Cakeshop case, which asked the court to decide whether a Christian baker had a First Amendment right to refuse a custom cake order for a same-sex wedding. The decision, authored by Justice Kennedy, largely sidestepped questions around the First Amendment and religious objections to same-sex marriage.

The Masterpiece Cakeshop ruling "might suggest that they're not ready as of yet to make a sweeping ruling on the Title VII question, particularly given that it hasn't been decided by all that many circuits," Steinberg said.

**Browning-Ferris Industries of California Inc. v. NLRB**

On the NLRB front, the D.C. Circuit is yet again considering the future of a long-running and closely watched appeal by Browning-Ferris Industries of California over the board's Obama-era expansion of its standard for analyzing joint employment.

By a 3-2 vote, the board's 2015 decision in Browning-Ferris expanded its joint employer test from one that rested on a business having "direct and immediate" control over workers' terms and conditions of employment to a standard that included "indirect control" or the ability by businesses to exert such control.

Although the D.C. Circuit held oral arguments in BFI's appeal in early 2017, its issuance of a long-awaited decision was put on hold after the NLRB in December vacated the BFI standard in another case involving Hy-Brand Industrial Contractors Ltd.

But the board later withdrew Hy-Brand and reinstated the Browning-Ferris test in February amid an ethics controversy, which led the board to ask the D.C. Circuit to resume its consideration of Browning-Ferris' appeal. The company, meanwhile, has recently argued that the D.C. Circuit should return the case to the NLRB since the agency recently announced that it will pursue rulemaking to clear up the joint employer question.

Philip Miscimarra of Morgan Lewis & Bockius LLP, a former NLRB chair who was a dissenting vote in the initial BFI ruling and was in the majority in Hy-Brand, noted that current NLRB chairman John Ring has highlighted the joint employer issue as one of the most important currently involving the NLRB and has indicated that any rulemaking "will be applicable prospectively."

"So, the validity of the board's joint employer standard that was established in Browning-Ferris remains to be addressed by the court of appeals, and I think the two different tracks are in fact independent of one another," Miscimarra said. "Depending on what the court of appeals does with the [BFI] case, that's certainly something … that could be taken into account by the NLRB."

Miscimarra added that the board in the rulemaking process "could potentially address the joint employer issue in a variety of different ways that may differ from simply restoring the state of the law to the way it existed before Browning-Ferris Industries was decided."

Meanwhile, Morgan Lewis partner Harry Johnson, himself a former board member who joined Miscimarra in dissenting from the board's 2015 BFI decision, shone a spotlight on the uniqueness of the procedural path the joint employer question has taken.

"I think it's fascinating because procedurally you have these parallel tracks," Johnson said. "It'll be interesting to see what comes out first and whether it has any effect on the other track or not."

"It will be very telling to see whether the D.C. Circuit, when it does come out with the opinion, finds whether the board majority did completely depart from its powers under the [NLRA] or whether it was just simply inadvisable," Johnson added. "I agree with Phil and think it's going to be more of the former, but you don't know."

**National Women's Law Center et al. v. OMB et al.**

Although it is still in its early stages when compared with cases like BFI and those before the high court, another case that bears watching in the coming months is a suit by the National Women's Law Center and the Labor Council for Latin American Advancement seeking to resuscitate a rule proposed by the U.S. Equal Employment Opportunity Commission that would expand the pay data employers are required to disclose in their annual employer information, or EEO-1, reports.

Although the rule was on the verge of being finalized last year, the White House's Office of Management and Budget delayed the expanded pay data collection pending a review, which was slated to include whether the regulation comports with the Paperwork Reduction Act.

The NWLC and the Labor Council filed suit against OMB and the EEOC alleging in part that they suffered "informational" injury from OMB's decision, saying the government's decision to rescind its promise of more data that would have aided their work advocating on employees' behalf caused them harm. The federal government, however, has sought to dismiss the suit by arguing that the groups lack standing to sue. The federal government has also contended in court filings that OMB's decision to put the rule on hold can't be challenged because it wasn't a final agency action, noting that the EEOC could still go through with the expanded data collection.

The NWLC, along with the Lawyers' Committee for Civil Rights Under Law, also filed a separate suit against OMB in March seeking to force the agency to respond to five Freedom of Information Act requests and disclose the records underlying its reasons for stopping the rule form being finalized.

Tammy Daub of Paul Hastings LLP, formerly a senior attorney in the U.S. Department of Labor's solicitor's office, told Law360 that while the plaintiffs in the case face "an uphill battle" to overcome the government's arguments on standing, it remains to be seen what happens with the suit and with the commission's next action on the rule once two new commissioners who are currently awaiting Senate confirmation are in place.

"I still think it is somewhat up in the air what [the agency] is going to do. They're going to have to revisit this and … regardless of the lawsuit, the outcome is still unknown," she said, while noting that the broader idea behind the rule was for the EEOC and Office of Federal Contract Compliance Programs to use the data it gleaned to "drive their enforcement effort and, from their perspective, target the right employers."

"In the meantime, there's still a lot of activity on the state and local level on the equal pay front," Daub said. "I think … there's going to be a lot of slack that's taken up [on the state and local levels] if this [rule] ends up dying completely."

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