

A Review of the Supreme Court's 2013-2014 Term

The United States Supreme Court concluded its 2013-2014 term by issuing decisions in several highly publicized employment and employee benefits cases during the Court's final scheduled sessions, including *Noel Canning*, *Harris*, and *Hobby Lobby*. Overall, the Roberts Court continued to validate its pro-business reputation in labor, employment and employee benefits cases, with employers and plan sponsors prevailing more often than not, including in several key cases. But the Court also issued a handful of decisions that were favorable to employees.

While the predominantly pro-business results were not a surprise, the vote counts of the Justices in the cases were certainly unexpected. In a substantial departure from previous terms, the Court's conservative and liberal wings were frequently in agreement. Of the 10 decisions during the 2013-2014 term, six were unanimous, and only two were by a vote of 5 to 4. This represents a complete reversal from the Court's 2012-2013 term, in which six of the 11 employment-related decisions were 5-4, and only two were unanimous. And the Court's unanimity was not limited to employment-related decisions. According to [SCOTUSblog](#), the Court issued unanimous opinions in 66% of all cases during this year's term, the highest percentage in any term since World War II. The Court's decisions during the 2013-2014 term also display an increased willingness by the Justices to issue narrow rulings that focus on the specific factual situations that are presented, rather than broad rulings that reach well beyond the facts of a particular case. While some commentators have applauded the Court's exercise of "judicial restraint," others expect the narrow rulings to spur future litigation.

The 10 employment- and employee benefit-related cases that were issued by the Court during this term addressed a wide variety of issues:

- One Presidential powers case under the NLRA (*Noel Canning*)
- One whistleblower case (*Lawson*)
- One FLSA case (*Sandifer*)
- Two public employee cases:
 - Mandatory union dues (*Harris*)
 - First Amendment protected speech (*Lane*)
- One Affordable Care Act case: Contraceptive coverage mandate (*Hobby Lobby*)
- Two ERISA cases (*Heimeshoff* and *Fifth Third Bancorp*)
- One case regarding taxation of severance payments (*Quality Stores*)
- One civil rights case (*Schuette*)

Following is a summary of each decision and the likely impact on employers. In the final section of this summary, we also offer a glimpse of the labor and employment cases that the Court has agreed to hear next term. Please contact us for additional information or advice regarding the effect these decisions may have on your particular workplace.

Executive Summary

The following table briefly summarizes the holding of each of the Court's labor and employment decisions this term:

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
<p><u><i>N.L.R.B. v. Noel Canning</i></u> 134 S. Ct. 2550 Case No: 12-1281 Decided: June 26, 2014</p>	<p>The President lacks authority under the Constitution's Recess Appointments Clauses to appoint members to an administrative agency during a three-day intra-session recess of Congress because a recess of three days is of insufficient length to trigger the President's recess appointment power.</p>	<p>Vote: 9-0 Opinion: Breyer (writing for a unanimous court) Concurrence: Scalia (joined by Roberts, Thomas, and Alito)</p>
<p><u><i>Lawson v. FMR LLC</i></u> 134 S. Ct. 1158 Case No: 12-3 Decided: March 4, 2014</p>	<p>Whistleblower protections in the Sarbanes-Oxley Act protect from retaliation employees of privately held contractors and subcontractors of publicly traded companies, not just those employed directly by a public company.</p>	<p>Vote: 6-3 Opinion: Ginsburg (joined by Roberts, Kagan, and Breyer) Concurrence: Scalia (joined by Thomas) Dissent: Sotomayor (joined by Kennedy and Alito)</p>

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
<p><u><i>Sandifer v. U.S. Steel Corp.</i></u> 134 S. Ct. 870 Case No: 12-417 Decided: January 27, 2014</p>	<p>The Fair Labor Standards Act does not require unionized employers to compensate union employees for time spent putting on and taking off certain protective clothing if the collective bargaining agreement specifically excludes this time from compensable work time.</p>	<p>Vote: 9-0 Opinion: Scalia (writing for a unanimous court)</p>
<p><u><i>Harris v. Quinn</i></u> 134 S. Ct. 896 Case No: 11-681 Decided: Jun 30, 2014</p>	<p>Personal care assistants paid by the State of Illinois but primarily supervised by the home care recipients they serve are not full-fledged public employees and cannot be compelled to pay union dues or a “fair share” fee.</p>	<p>Vote: 5-4 Opinion: Alito (joined by Roberts, Scalia, Kennedy, and Thomas) Dissent: Kagan (joined by Ginsburg, Breyer, and Sotomayor)</p>
<p><u><i>Lane v. Franks</i></u> 134 S. Ct. 2369 Case No: 13-483 Decided: June 19, 2014</p>	<p>A public employee’s truthful subpoenaed testimony that is not ordinarily within the scope of the employee’s duties is protected speech under the First Amendment.</p>	<p>Vote: 9-0 Opinion: Sotomayor (writing for a unanimous court) Concurrence: Thomas (joined by Scalia and Alito)</p>
<p><u><i>Burwell v. Hobby Lobby Stores</i></u> 2014 WL 2921709 Case No: 13-354 Decided: June 30, 2014</p>	<p>Closely held, for-profit corporations whose owners object to the Affordable Care Act’s contraceptive mandate on religious grounds are not required to provide such contraception coverage to employees in their group health plans.</p>	<p>Vote: 5-4 Opinion: Alito (joined by Roberts, Thomas, Scalia, and Kennedy) Concurrence: Kennedy Dissent: Ginsburg (joined by Sotomayor, and in part by Breyer and Kagan) Dissent: Breyer and Kagan</p>

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
<p><u><i>Fifth Third Bancorp v. Dudenhoeffer</i></u> 134 S. Ct. 822 Case No: 12-751 Decided: June 25, 2014</p>	<p>Fiduciaries of employee stock ownership plans (including 401(k) plans that include employer stock as an investment option) are not entitled to a special presumption of prudence standard, and instead are subject to the same prudence standard under ERISA as other types of fiduciaries.</p>	<p>Vote: 9-0 Opinion: Breyer (writing for a unanimous court)</p>
<p><u><i>Heimeshoff v. Hartford Life & Accident Insurance Company</i></u> 134 S. Ct. 604 Case No: 12-729 Decided: Dec. 16, 2013</p>	<p>Contractual limitations provisions in ERISA plans are enforceable, so long as they are of reasonable length and are not prohibited by statute.</p>	<p>Vote: 9-0 Opinion: Thomas (writing for a unanimous Court)</p>
<p><u><i>U.S. v. Quality Stores</i></u> 134 S. Ct. 1395 Case No: 12-1408 Decided: March 25, 2014</p>	<p>Employee severance payments that are not directly linked to state unemployment benefits are “wages” for purposes of FICA and are thus subject to tax withholding.</p>	<p>Vote: 8-0 Opinion: Kennedy (writing for a unanimous Court) Kagan recused.</p>
<p><u><i>Schuette v. Coalition to Defend Affirmative Action</i></u> 134 S. Ct. 49 Case No: 12-682 Decided: April 22, 2014</p>	<p>A voter-approved amendment to Michigan’s Constitution that prohibits state universities in Michigan from considering race as part of its admissions process does not violate the Equal Protection Clause.</p>	<p>Vote: 6-2 Opinion: Kennedy (joined by Roberts and Alito) Concurrence: Scalia (joined by Thomas) and Breyer Dissent: Sotomayor (joined by Ginsburg) Kagan recused.</p>

Individual Case Analysis

1. COURT UNANIMOUSLY FINDS NLRB RECESS APPOINTMENTS UNCONSTITUTIONAL

In March 2013, in *Noel Canning v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit ruled that President Barack Obama's January 2012 recess appointments of Members Richard Griffin, Terrence Flynn (who resigned prior to D.C. Circuit decision), and Sharon Block to the National Labor Relations Board (NLRB) were unconstitutional because they did not occur during an inter-session recess of the Senate. Without those three members, the D.C. Circuit held that the NLRB did not have a quorum and could not act lawfully, calling into question the continuing validity of literally hundreds of NLRB decisions issued between January 3, 2012 (when Member Becker's term ended) and August 2013, when the current NLRB members were confirmed by the Senate.

A unanimous Supreme Court affirmed the D.C. Circuit's decision that the President lacked authority under the Constitution's Recess Appointments Clause in appointing Members Griffin, Flynn and Block to the NLRB on January 4, 2012 during a three-day intra-session recess of the Senate. The Court concluded that because the Senate was in session during its *pro forma* sessions on the date that President Obama appointed Griffin, Flynn and Block to the NLRB, the President made the recess appointments during a three-day recess. The Court held that while the Recess Appointments Clause empowers the President to fill any existing vacancy during a recess of sufficient length—whether intra-session or inter-session—a three-day recess was insufficient in length to trigger the President's recess appointment power. Therefore, the Court found that the President lacked the authority under the Constitution to make those appointments.

The D.C. Circuit's Decision

Noel Canning, a Pepsi-Cola distributor, petitioned the D.C. Circuit to review the NLRB's decision that the company had refused to execute a collective bargaining agreement reached with the Teamsters union. In addition to challenging the merits of the decision, Noel Canning argued that the NLRB did not have the quorum necessary to act because Members Griffin, Flynn, and Block, three of the then-sitting five NLRB members, were never validly appointed since they filled vacancies that did not happen during a "Recess of the Senate," as Article II, Section 2 of the Constitution requires. Citing the Supreme Court's 2010 decision in *New Process Steel*, which invalidated decisions issued by the so-called "two-member" Board, and numerous historical documents, the D.C. Circuit ruled that the recess appointments were invalid, leaving the NLRB without a quorum, and therefore vacated the *Noel Canning* decision.

In reaching its decision, the D.C. Circuit ruled that "the Recess of the Senate" mentioned in the Constitution is limited to inter-session recesses only. The court rejected the NLRB's arguments that President Obama acted properly because the Senate was in recess on January 4, 2012. The court ruled that the Senate had technically stayed in session when it conducted *pro forma* sessions every three days from late December 2011 through early January 2012, and thus, the NLRB appointments were made between

the January 3 and January 6 *pro forma* sessions. The D.C. Circuit further held that the appointments were also invalid because the purported vacancies did not “happen” during a Senate recess. The court noted that the Constitution’s Recess Appointments Clause only permits Presidents to fill “Vacancies that may happen during the Recess of the Senate” and reasoned that this required the vacancies to actually occur during the recess. The court reasoned that because the vacancies filled by Griffin, Flynn, and Block had arisen prior to the recess the President did not have the right or authority to fill those vacancies during the recess. Since the Board lacked a quorum of three members when it issued its *Noel Canning* decision, the D.C. Circuit vacated the Board’s decision.

The Supreme Court’s Decision

On appeal, the Court considered three questions:

- Whether the phrase “the Recess of the Senate” refers only to inter-session recesses, such as a break between formal sessions of Congress, or also to intra-session recesses, such as a summer recess in the midst of a formal session of Congress;
- whether the phrase “vacancies that may happen” refers only to vacancies that first come into existence during a recess or whether it also includes pre-existing vacancies that continue to exist during a recess; and
- the length of a “recess” under the Recess Appointments Clause.

With respect to this last question, to determine the length of the recess, the Court also had to consider whether it would recognize *pro forma* sessions of Congress as being in session.

In reaching its decision, the Court first rejected the D.C. Circuit’s analysis that there is a distinction in the validity of recess appointments depending upon whether the Senate is an inter-session recess versus an intra-session recess. Reviewing the history of Presidential recess appointments occurring since 1867, the Court noted the frequent recess appointments made by Presidents during intra-session breaks and the fact that the Senate had never taken any action to deny the validity of intra-session recess appointments. Moreover, the Court noted that, in 1905, the Senate Judiciary Committee had defined “recess” as the “period of time when the Senate...because of its absence,” cannot “participate as a body in making appointments.” Thus, the Court concluded that because Presidents have made intra-session appointments for a century and a half and the Senate has never taken formal action to oppose them, the term “recess” in the Recess Appointment Clause must be broadly interpreted to include intra-session recesses.

The Court also rejected the D.C. Circuit’s interpretation of the phrase “vacancies that may happen during the recess of the Senate” to include only those vacancies that arise during a recess. Rather, the Court endorsed a broader interpretation of the phrase to include both vacancies that first come into existence during a recess as well as vacancies that initially occur before a recess but continue to exist during the recess, as it was consistent with Presidents’ historical practice (which had not been countered by the Senate), and also because it ensures that offices needing to be filled can be filled during a recess.

While finding that the President was permitted to use the Recess Appointment Clause to make intra-session appointments to pre-existing vacancies, the Court nevertheless concluded that the recess in this case—a three-day recess—was too short to trigger the recess appointment powers. Specifically, the Court concluded that a Senate recess that is so short that it does not require the consent of the House under the Adjournments Clause is not long enough to trigger the President’s recess appointment power. The Court further explained that it had not found a historical example of a recess appointment made during an intra-session recess that was shorter than 10 days. The Court also concluded that absent very unusual circumstances, a recess of more than three days but less than 10 days would be too short to fall within the Recess Appointments Clause.

In reaching its conclusion that the NLRB appointments occurred during a three-day recess, the Court concluded that the Senate had stayed in session when it conducted *pro forma* sessions every three days from late December 2011 through early January 2012 because the Senate had retained the power to conduct business, and had, in fact, conducted business by passing a bill by unanimous consent during one of these *pro forma* sessions. Because the Senate was in session during its *pro forma* session and each *pro forma* session terminated the immediately preceding recess, the Court concluded that the President had made the recess appointments during a three-day recess. Because a three-day recess was insufficient to trigger the President’s recess appointments power, the Court found that the President lacked the authority under the Constitution to make those appointments.

Although the decision by the Court was unanimous on the judgment, Justice Scalia filed an opinion concurring in the judgment, joined by Chief Justice Roberts as well as Justices Thomas and Alito. Justice Scalia’s concurrence, which nearly matched the majority’s opinion in length, criticized the majority for engaging in “judicial adventurism” by relying on historical practice (which Justice Scalia found was unclear) instead of the text of the Constitution (which he found clear). Although he agreed with the majority decision, he would have permitted recess appointments only between formal sessions, rather than adopting a presumptive standard to resolve whether a particular intra-session break was long enough to trigger the President’s recess appointment power.

In Justice Scalia’s view, recess appointments are an anachronism designed to fill a need that no longer exists and that only serves to “circumvent the Senate’s role in the appointment process.” Under the approach outlined by the majority, he reasoned, when faced with uncertain confirmation of a nominee, the President could simply appoint that person unilaterally during an intra-session recess, allow the appointment to expire at the end of the next Congressional session, renew the appointment the following day, and repeat the process *ad infinitum*. Notwithstanding the past practice of recess appointments, Justice Scalia found no ground to depart from his interpretation of the recess clause, and therefore declined to join the reasoning offered by the majority.

Impact of the Decision

As was the case with the Supreme Court's decision in *New Process Steel*, the Supreme Court's decision could result in hundreds of NLRB decisions decided between January 2012 and January 2013 being invalidated and remanded to the current NLRB for decision. Legitimate questions exist, however, as to whether remanding these decisions to the current NLRB will produce a different outcome in those cases. Although the cases remanded in the aftermath of *New Process Steel* did not produce any significant pro-employer results, the aftermath here might be quite different. The two-member Board that led to the *New Process Steel* decision generally issued only noncontroversial cases that did not involve making new law. Not surprisingly, after remand, those decisions were overwhelmingly upheld. In contrast, the recess appointed members at issue in *Noel Canning* decided some extremely controversial and groundbreaking cases, including cases involving employers' social media policies, off-duty employee access rules, dues check-off after contract expiration, and employee discipline while bargaining a first contract with a union.

As the Court recognized in its decision, there are also numerous decisions pending which challenge the appointment of Board Member Craig Becker, who was appointed by the President during an intra-session recess that was not punctuated by *pro forma* Senate sessions. Thus, the Court's decision in *Noel Canning* could also result in decisions issued after August 31, 2011 (when then-Chairman Liebman's term expired) or that involved Member Becker casting the deciding vote in a 2-1 decision being invalidated under *Noel Canning's* rationale. Among the notable decisions in this group is the NLRB's *D.R. Horton* decision about mandatory arbitration and class action waiver clauses.

Only time will tell how many of the NLRB's decisions since August 2011 will be invalidated based on the Court's *Noel Canning* ruling and what the impact will be on the employers who challenged these decisions. With the current pro-labor majority in the NLRB, some employers may see their decisions simply remanded and reissued with the same results. However, much could depend upon when these cases are remanded to the Board and the makeup of the Board at such time. Employers must keep in mind that Member Schiffer's term expires in December, meaning that between now and December is the Board's best opportunity to reaffirm any invalidated decisions and take action with respect to its other significant agenda items. Whether the NLRB will maintain its pro-labor majority after December, however, could depend on the makeup of the Senate after the November elections and whether President Obama will be successful in replacing Member Schiffer with another pro-labor Member.

On July 11, 2014, President Obama re-nominated recess appointee Sharon Block to the NLRB, likely to replace Member Schiffer. If Block is confirmed by the Senate, her appointment should affirm the Board's ideological agreement with the holdings in the key invalidated decisions and allow the NLRB to move more quickly to review and affirm the invalidated decisions even after Member Schiffer's term expires.

2. COURT DRAMATICALLY EXPANDS COVERAGE OF SARBANES-OXLEY WHISTLEBLOWER PROTECTIONS

In *Lawson v. FMR LLC*, the Court held that the whistleblower protections found in the Sarbanes-Oxley Act (SOX) protect from retaliation employees of privately held contractors and subcontractors of publicly traded companies—and not just those employed directly by a public company.

In 2002, Congress passed SOX to safeguard investors in publicly traded companies and restore trust in the financial markets following the collapse of Enron and other high-profile accounting scandals. Among its many provisions, SOX empowered government regulators like the Securities and Exchange Commission to investigate and punish fraud in public companies. Congress found that “Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a ‘corporate code of silence.’” To investigate fraud, the SEC and other law enforcement agencies obviously first need to know about it. So, Congress added whistleblower protections to SOX that prohibited “any officer, employee, contractor, subcontractor, or agent” of a publicly traded company from discharging, demoting, suspending, threatening, harassing, “or in any other manner discriminat[ing] against an employee in the terms and conditions of employment because” that employee provided information or otherwise assisted in an investigation of a fraud.

The issue in *Lawson* involved Fidelity’s mutual funds, which are publicly traded companies, but have no direct employees themselves as is common in the mutual fund industry. Instead, the mutual funds are often managed by private companies that contract with the funds. Two employees of the private companies that managed Fidelity’s mutual funds filed SOX whistleblower complaints with the Labor Department and the case eventually made its way to the U.S. Court of Appeals for the Second Circuit. There, the court of appeals relied on the heading of SOX’s whistleblower protection section (“Whistleblower Protection for Employees of Publicly Traded Companies”) and other aids in its statutory interpretation to rule that SOX’s whistleblower protection provisions do not protect employees of privately held companies that are contractors or subcontractors of a publicly traded company. The Supreme Court rejected this interpretation.

Relying on the plain language of the statute, the Court held that SOX’s whistleblower protections do apply to employees of private entities that contract or subcontract with publicly traded companies. The decision in *Lawson* could have a potentially sweeping effect as any company that has a contract or subcontract with a publicly traded company, the employees of that contracting company now have SOX whistleblower protections. This could be lawyers, accountants, consultants, and other financial professionals—really anybody that works for an entity that has a contract or subcontract with a public company. The Court recognized the broad reach of its decision, but countered that it “would thwart Congress’ dominant aim if contractors were taken off the hook for retaliating against their whistleblowing employees, just to avoid the unlikely prospect that babysitters, nannies, gardeners, and the like will” bring a flood of whistleblower complaints. Employers that have contracts or subcontracts with

publicly traded companies should add SOX's whistleblower protections to the list of protections afforded to employees and seek counsel should they receive a fraud claim involving a public company.

Justice Scalia filed a concurring opinion, joined by Justice Thomas, in which he reiterated his belief that the Court should not rely on legislative history or any other indicators of Congressional intent aside from text in deciding a case. The concurring Justices joined the majority opinion in principal part and in judgment in *Lawson* because the Court's "conclusion logically flows from [SOX]'s text and broader context."

Justice Sotomayor authored a lengthy dissent in which Justices Kennedy and Alito joined. Justice Sotomayor would have followed the First Circuit's interpretation to determine that SOX does not protect employees of private contractors from retaliation when they report fraud, and charged the majority opinion as overreaching in including protection from retaliation for any household employees of people who work for a public company and any employee of a private business that contracts work for a public company. The dissent argued that the majority opinion gave inadequate weight to the statute's headings, misconceived the nature of the modern workforce in analyzing the statutory context, and ignored the absurd results and increased litigation that would flow from the decision.

3. COURT HOLDS THAT UNION EMPLOYERS DO NOT HAVE TO PAY EMPLOYEES FOR TIME SPENT PUTTING ON OR TAKING OFF CERTAIN PROTECTIVE GEAR IF CBA EXCLUDES IT

In *Sandifer v. U.S. Steel Corp.*, the U.S. Supreme Court held that the Fair Labor Standards Act does not require unionized employers to compensate employees for time spent putting on and taking off certain protective clothing if they have a collective bargaining agreement that excludes this time as compensable work time.

The U.S. Department of Labor's regulations have long-required employers to pay employees for time spent changing into protective gear and equipment, as well as the time spent taking it off, if that gear is required to perform the job. But under Section 203(o) of the FLSA, employers do not have to pay employees for time spent "changing clothes or washing at the beginning or end of each workday" if a "bona fide collective-bargaining agreement" excludes that time as compensable work time. The question before the Supreme Court was whether a specific list of items could be considered "clothes" within the meaning of Section 203(o): flame-retardant jackets, pants, hoods, hardhats, "snoods," "wristlets," work gloves, leggings, steel-toe boots, safety glasses, earplugs, and a respirator. (A snood is a hood that covers the head, neck, and upper shoulder area, and wristlets are essentially detached shirt sleeves.)

The Court found that with the exception of safety glasses, earplugs, and respirators, these items fell within Section 203(o)'s clothes exception and the time spent putting them on and taking them off was not compensable work time if the labor contract so excluded it. The Court reasoned that while these items had protective qualities, these items "are commonly regarded as articles of dress." For example, according to

the Court, a “hardhat is simply a type of hat.” On the other hand, safety glasses, earplugs, and respirators are not commonly regarded as articles of dress.

Additionally, the Court also held that employers do not have to compensate employees for time spent putting on and taking off protective items—even if they are not clothes within the meaning of Section 203(o)—if the vast majority of their time before and after their primary work duties involves changing into and out of clothes that do meet Section 203(o)’s definition of “clothes.” In other words, “if the vast majority of the time is spent in donning and doffing ‘clothes’ as defined [in *Sandifer*], the entire period qualifies [as non-compensable time], and the time spent putting on and off other items need not be subtracted.”

Although the Court’s decision in *Sandifer* definitely falls in the win column for employers, it seems to leave open a number of questions. For example, why is a hardhat merely a “type of hat” and classified as clothing, rather than as a piece of protective equipment, when hardhats are almost always worn only for protection for certain jobs? How are hardhats (clothing) any different than safety glasses (protective equipment)? Given the Court’s rather strained reasoning over what constitutes “clothes,” the Court gave little guidance to determine what else fits within Section 203(o)’s exception besides the items it specifically considered in *Sandifer*. Even the Court acknowledged “that it may be impossible to eliminate all vagueness when interpreting a word as wide-ranging as ‘clothes.’” And what happens if the time putting on and taking off compensable protective items and non-compensable clothes is roughly even? Is this paid or unpaid time under *Sandifer*?

Despite these lingering questions, employers must remember that this ruling only applies to employers with unionized workforces with the necessary language in a collective bargaining agreement. Nonunion employers must always pay employees for time spent changing into and out of protective gear and equipment that is required to perform their jobs.

Unionized employers should proceed with caution after *Sandifer* and evaluate what items employees put on before they work and take off after, and consider whether the time spent do so should be paid work time or not.

4. COURT HOLDS THAT “LIMITED PUBLIC EMPLOYEES” CANNOT BE REQUIRED TO PAY UNION DUES OR “FAIR SHARE” FEES

In *Harris v. Quinn*, Illinois home health aides challenged the requirement in a collective bargaining agreement that they pay their “fair share” of the cost of union representation. Although the State of Illinois and Service Employees International Union (SEIU) (the parties that negotiated the collective bargaining agreement in question) had prevailed before the District Court and the Seventh Circuit Court of Appeals, when this case made its way to the Supreme Court it became a vehicle for the potential overruling of long-standing Court precedent regarding “fair share” deductions first established in the Court’s 1977 decision in *Abood v. Detroit Board of Education*. In *Abood*, the Court endorsed the

proposition that a governmental entity may, consistent with the First Amendment, require public employees who exercise their option not to become members of a union to pay their “fair share” of the cost incurred by the union in representing them for purposes of collective bargaining.

The Court, in a 5 to 4 decision authored by Justice Alito, severely criticized the *Abood* holding for what it characterized as its “questionable foundations,” but ultimately sidestepped the question of whether it should be overruled. Instead, the Court held that *Abood* does not apply where the employees involved are not “full-fledged public employees.” With respect to this new category of public employees, the Court applied “generally applicable First Amendment standards” to determine that the fair share clause in the SEIU collective bargaining agreement unlawfully infringed on the First Amendment interests of the non-member employees.

The plaintiffs in *Harris v. Quinn*, whom the Court deemed “partial public employees,” were personal care assistants who deliver in-home care to disabled individuals as part of Illinois’ Medicaid-funded Rehabilitation Program. In 2003, the Illinois General Assembly passed legislation that narrowly amended the Illinois Public Labor Relations Act (the IPLRA) and deemed these personal care assistants public employees of the State of Illinois for the limited and sole purpose of collective bargaining. Shortly after the amendment, these personal care assistants selected SEIU as their exclusive representative and a collective bargaining agreement, including a fair share fee provision, governed most of their terms and conditions of employment.

Impact of the Decision

Although many observers predicted that this decision would result in the reversal of *Abood*, the majority refused to take that ultimate step, holding that *Abood* does not apply in the context of what it referred to as “partial public employees.” Where the Court goes from here, insofar as “fair share” cases are concerned, is less than clear. On the one hand, the majority opinion’s criticism of *Abood* is scathing, and leaves little doubt that five current justices believe *Abood* was incorrectly decided. On the other hand, given the battering *Abood* took in this decision, it is not obvious just what prevented the majority from taking the logical next step and overruling it. If this case did not present the appropriate context in which to do so, it is questionable exactly what circumstances would justify a reversal.

As pointed out by Justice Kagan in the dissent, Illinois is one of several states that addressed the needs of the population requiring home health care through legislation authorizing the sharing of authority over the employees providing the services. In those case(s) where a governmental entity is a party to a collective bargaining agreement with a union, while another party shares control over the terms and conditions of employment of the employees, it is reasonable to assume that the opinion will prohibit the public entity from agreeing to inclusion of a “fair share” provision in the collective bargaining agreement.

Public sector unions are subject to a process requiring notification to non-members of the categories of expenditures it deems chargeable to non-members, subject to the proposition that unions may charge for

expenditures for collective bargaining and contract administration but not for political or ideological purposes. Although *Abood* narrowly survives, this opinion suggests that the scope of what constitutes an expenditure for “political” purposes may be significantly broader than previously understood. The *Harris* Court emphasized that, in the public sector, in contrast to the private sector, “core issues such as wages, pensions, and benefits are important *political* issues . . .” (emphasis added). Combined with its criticism of the Court’s chargeable/non-chargeable analysis, the *Harris* Court’s likening of collective bargaining to “political advocacy and lobbying” suggests that in the future it may prevent unions from charging non-members for bargaining for improvements in bread and butter economic issues such as wages and benefits because of their inherently “political” character. If so, the proportion of full dues that a union will be able to charge non-members will be significantly lower than current amounts, presumably making non-membership a more attractive option to employees.

In view of the majority’s sweeping criticism of *Abood*, public employers may be tempted to refuse to bargain about fair share clauses in collective bargaining agreements. This strategy is ill-advised and poses significant hazards in Illinois. *Abood* remains good law as far as “full-fledged” public employees are concerned. Both Illinois public sector collective bargaining statutes (the IPLRA and its educational counterpart, the IELRA) still treat “fair share” provisions as a mandatory subject of bargaining and a public employer refuses to bargain over this subject at its peril. However, public employers should review the “fair share” provisions in their labor agreements to determine whether they should be updated to take account of the potential for increased liability (such as by insisting on strong and expansive indemnification provisions).

5. COURT UNANIMOUSLY HOLDS THAT PUBLIC EMPLOYEE’S TRUTHFUL SUBPOENAED TESTIMONY WAS PROTECTED SPEECH UNDER THE FIRST AMENDMENT

It has long been recognized that public employees are not excluded from First Amendment protection, and for more than 40 years the courts have wrestled with balancing the free speech rights of a public employee against the interest of the public employer in controlling the operation of the workplace to ensure efficient delivery of public services. Under Supreme Court precedents, the test for determining whether the speech is protected by the First Amendment requires an initial showing that the employee spoke as a “citizen” on a matter of “public concern.” These terms of art are significant, because if the public employee’s speech is pursuant to the employee’s “official duties,” then the speech is not entitled to First Amendment protection. In its unanimous decision in *Lane v. Franks*, the Court applied this firmly established legal standard, and ruled that a public community college employee’s truthful subpoenaed testimony in a public corruption trial was protected speech under the First Amendment. Although the employee’s testimony addressed information he learned during the course of his employment, testifying in court proceedings was not within the scope of his ordinary job duties, and therefore his testimony was protected even though it concerned those duties.

The Court's narrow decision does not establish a new standard for analyzing whether a public employee's speech is entitled to First Amendment protection; nor does it create a bright line rule that *any* public employee who testifies pursuant to a subpoena is automatically entitled to First Amendment protection. Indeed, the Court made clear that it was expressing no opinion as to whether the result might be different for public employees whose ordinary job duties involve testifying in court. In a concurring opinion, Justice Thomas noted that this could include public employees such as police officers, crime scene technicians, and lab analysts. The Court's decision illustrates that determining whether an employee's speech is constitutionally protected is a fact-intensive inquiry, and it is hazardous to leap to the conclusion that simply because a public employee's speech concerned their official duties the speech is not protected. Public employers must, therefore, be mindful of this issue before taking adverse action against an employee for his or her speech.

Summary of the Case

Edward Lane was employed by Central Alabama Community College as the director of a youth program. In conducting an audit of the program's expenses, Lane discovered that an Alabama state legislator, Suzanne Schmitz, who had done no work for the program, was on the program's payroll. When Lane notified the College's President and attorney of his discovery, they warned Lane that firing Schmitz could have negative repercussions for both him and the College. Nonetheless, Lane terminated Schmitz's employment. Schmitz was later indicted as part of a larger public corruption scandal on criminal charges including theft of federal funds. Lane was subpoenaed as a witness, and he testified at Schmitz's criminal trial. Not long after testifying, the College's then-President, Steve Franks, terminated Lane's employment, purportedly to address the College's budget shortfalls.

Lane sued Franks alleging that Franks had violated his First Amendment free speech rights by terminating him in retaliation for testifying at the criminal trial. The federal trial court ruled in favor of Franks, and the Eleventh Circuit Federal Court of Appeals affirmed. The Eleventh Circuit held that Lane's testimony was not entitled to First Amendment protection because he acted pursuant to his official duties as a College employee when he investigated Schmitz's employment and later terminated her.

The Supreme Court began its decision by reaffirming the oft-quoted proposition that individuals do not surrender their First Amendment rights by accepting public employment. Determining whether a public employee's speech is protected under the First Amendment requires courts to balance the competing interests of the employee and the governmental employer. The Court also acknowledged the applicable two-step test as articulated in its most recent public employee speech case, *Garcetti v. Ceballos*. Under the first step, a court must determine whether the employee spoke as a citizen on a matter of public concern; if not, the employee's speech is not protected. If the employee's speech satisfies this initial step, a court must then determine whether the governmental employer was nonetheless justified in treating the employee differently from any other member of the general public.

Applying the two-step *Garcetti* test, the Supreme Court held that Lane’s truthful sworn testimony was protected speech under the First Amendment. The Court first concluded that Lane’s testimony “clearly” satisfied the first step, noting that sworn testimony in a court proceeding is a “quintessential example of citizen speech” because anyone who testifies in court has an obligation, to both the court and society at large, to tell the truth. The Court noted that this obligation was separate and distinct from any obligations a testifying public employee might have to his (or her) employer. The fact that Lane’s testimony addressed information he learned during the course of his employment was irrelevant. Rather, the appropriate question is whether the speech itself is ordinarily within the scope of the employee’s duties, not whether it merely concerns those duties. As the director of the College’s youth program, Lane’s ordinary duties did not involve testifying in court. Furthermore, Lane’s testimony unquestionably involved a matter of public concern – corruption and misuse of state funds. Proceeding to the second step of the *Garcetti* test, the Court found that the College had no interest or justification that would warrant treating Lane differently. Lane had not, for example, provided false testimony, disclosed confidential or sensitive information, or admitted to engaging in wrongdoing.

The Court did, however, affirm the Eleventh Circuit’s determination that Franks was entitled to qualified immunity, a legal doctrine which insulates public officials from individual liability when they make reasonable but mistaken judgments. The Court found that when Franks fired Lane, he reasonably could have believed that doing so would not violate the First Amendment as the only courts who had addressed similar issues as of that point in time had issued conflicting decisions.

Analysis of the Decision

The Supreme Court’s decision in *Lane v. Franks* reversed what some commentators had described as an errant opinion from the Eleventh Circuit that directly conflicted with decisions from other federal appellate courts, including the Seventh Circuit. Significantly, the Court left intact the governing standards under *Garcetti* and prior decisions for determining whether a public employee’s speech is protected under the First Amendment. The precedential value of this narrow decision remains to be seen. The Court could have held, but did not, that a citizen’s obligation to testify truthfully is always entitled to First Amendment protection as “citizen speech,” even where the testimony is part of the public employee’s official duties. That the Court went out of its way to emphasize that it was expressing no opinion on that question is a caution to public employers that this issue remains unsettled.

6. COURT HOLDS THAT CLOSELY HELD, FOR-PROFIT CORPORATIONS ARE NOT REQUIRED TO PAY FOR CONTRACEPTIVE METHODS UNDER ACA MANDATE

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court ruled by a 5-4 margin that closely held, for-profit corporations whose owners object to the Affordable Care Act’s (ACA) contraceptive mandate on religious grounds are not required to provide such contraception coverage in their group health plan. The Court held that the mandate, as applied to such corporations, violates the Religious Freedom Restoration Act of 1993 (RFRA).

Background

The ACA's contraception mandate requires employers with 50 or more employees to offer coverage for contraceptives and related services at no charge to their employees. Certain religious institutions, such as churches, are completely exempt from the mandate. The Department of Health and Human Services (HHS) has also provided an accommodation for certain other eligible non-profit entities that do not qualify for a complete exemption, but object to providing contraceptive coverage on religious grounds (such as colleges and universities, hospital systems, and charities with religious affiliations). Such eligible non-profit entities may comply with the mandate by arranging an insurer or third-party administrator to provide stand-alone contraceptive coverage separate from the entity's group health plan at no cost to either the entity, or to its employees and beneficiaries.

Hobby Lobby, Inc. and Conestoga Wood Specialties Corp. are both closely held for-profit corporations, and therefore ineligible for either the complete exemption or the accommodation to the mandate. Hobby Lobby and Conestoga each challenged the validity of the mandate under both the RFRA and the Free Exercise Clause of the First Amendment with respect to four of the 20 included contraceptive methods; Hobby Lobby brought its challenge in the Tenth Circuit and Conestoga in the Third Circuit. The Tenth Circuit Court of Appeals ruled in favor of Hobby Lobby, holding that the company qualified as a "person" capable of asserting religious rights under the RFRA. By contrast, the Third Circuit Court of Appeals ruled against Conestoga, ruling that corporations cannot exercise religion apart from its owners. The Supreme Court granted certiorari and combined the two cases.

Analysis and Impact of the Decision

The RFRA prohibits the federal government from enacting laws that "substantially burden a *person's* exercise of religion" unless the government can show that the burden is (1) in furtherance of a compelling governmental interest, and (2) is the *least restrictive means* of furthering that interest.

The Court held that the plaintiffs (Hobby Lobby and Conestoga), as closely held, for-profit corporations, are "persons" entitled to protection under the RFRA. The Court next applied the RFRA test to the plaintiffs, reasoning that the ACA contraception mandate substantially burdens the plaintiffs' exercise of religion due to the considerable penalties they would face if they chose not to comply with the mandate. The Court concluded that although the government's stated interest for enacting the mandate, i.e. providing cost-free access to contraceptives, is a compelling one, it is invalid under the RFRA as applied to the plaintiffs. The mandate, the Court held, is not the least restrictive means of furthering the government's interest. The Court pointed to HHS's accommodation scheme for religious non-profits (discussed above) as evidence that a less restrictive means of furthering the same governmental interest is feasible; the Court reasoned that HHS could extend this accommodation to for-profit entities (as discussed below, however, the Court was also careful to point out that it was not opining on whether the accommodation scheme for religious non-profit entities is itself valid under RFRA). Because the Court

found the ACA mandate as applied to the plaintiffs invalid under RFRA, it did not rule on whether the mandate was also invalid under the Free Exercise Clause of the First Amendment.

It remains to be seen how the ACA contraception mandate will now be applied, if at all, to closely held for-profit corporations that object to it on religious grounds. There is a possibility that HHS will issue future guidance providing that for-profit entities objecting to the mandate on religious grounds are able to claim the same accommodation currently offered to non-profits who do not qualify for an outright exemption from the mandate. Although the Court pointed to HHS's accommodation scheme for non-profits as evidence that a less restrictive means of offering cost-free contraception coverage is feasible, its opinion specifically stated that it should not be construed as opining on the validity of the accommodation scheme itself under RFRA or the First Amendment.

Non-profit organizations, including colleges and universities with religious affiliations, have challenged the accommodation scheme under RFRA and the First Amendment in several courts as insufficient to protect their religious rights against the ACA contraception mandate. Many such plaintiffs have successfully obtained temporary injunctions barring enforcement of the accommodation while a decision is pending on the merits (including one at the Supreme Court level), and some plaintiffs have been unsuccessful. It appears that the Supreme Court may soon hear a case challenging the accommodation scheme. As a result, whether HHS extends the accommodation scheme to for-profits in light of the *Hobby Lobby* decision may depend on how courts rule on the merits with respect to the validity of the accommodation itself. In sum, we caution against reading the *Hobby Lobby* case as either affirming or negating the validity of the accommodation now available for religious non-profit employers such as colleges and universities, hospital systems, and charities. Until there is a decision on the merits regarding the accommodation, religious non-profits that are eligible for the accommodation should continue complying with its terms.

7. COURT UNANIMOUSLY AGREES TO ELIMINATE THE PRESUMPTION OF PRUDENCE IN EMPLOYER STOCK DROP CLAIMS

When the value of a company's stock falls and the company maintains an employer stock fund, participants in those funds often bring suit against the plan's fiduciaries to recover losses. In some appellate circuits, fiduciaries to these funds have been entitled to a presumption that their decision to maintain investments in the fund is prudent under ERISA. Indeed, absent a showing by plaintiffs that the company is about to collapse, employers could typically prevail in litigation. In *Fifth Third Bancorp v. Dudenhoeffer*, the Court unanimously held that this employer-friendly presumption of prudence no longer applies.

As background, Section 404(a) of ERISA requires that fiduciaries act prudently by diversifying plan investments in order to prevent the risk of large losses. This is in tension with the rules governing an employer's ability to establish employee stock ownership plans (known as "ESOPs" or "employer stock funds") which by definition are not diversified. While Congress has granted a statutory exemption from

the diversification requirement for ESOPs, employers maintaining these arrangements continue to face lawsuits alleging breach of fiduciary duty when company stock prices collapse. In response, numerous appellate courts have adopted a presumption that a fiduciary's failure to act in the face of falling stock prices is prudent absent a showing that the company itself is at risk of collapse.

In *Dudenhoeffer*, the plaintiffs were participants in Fifth Third Bank's employer stock fund. Between July 2007 and September 2009, Fifth Third's stock price fell 74% because Fifth Third's business was heavily invested in subprime loans. In their complaint, the plaintiffs alleged that the fiduciaries of the stock fund breached their ERISA fiduciary duties to participants by permitting continued investment in the stock fund despite public press reports of the dangers of subprime lending and insider information that the fiduciaries possessed regarding the health of the company. In light of this knowledge, the plaintiffs argued that ERISA's prudence rule required that the plan's fiduciaries close the Fifth Third stock fund or take a number of other actions to mitigate the risk of continued participant losses.

The district court reviewed the complaint, applied the presumption of prudence, and dismissed the claim on a motion to dismiss. On review, the Sixth Circuit Court of Appeals ruled that the district court erred in applying the presumption at the pleading stage; it held that the district court should have applied the presumption at the evidentiary stage. The Sixth Circuit's decision created a circuit split on when a court should apply the presumption. Rather than resolving that circuit split, however, the Supreme Court decided to jettison the presumption of prudence entirely.

In eliminating the presumption, the Court reasoned that the plain language of ERISA's prudence requirement does not give ESOP fiduciaries special status with respect to their employer stock funds. Save for the statutory exception to the prudence requirement for employer stock funds, ESOP fiduciaries are still required to adhere to the general prudence requirements set forth in Section 404 of ERISA. Instead of applying a presumption of prudence, in *Dudenhoeffer*, the Supreme Court instructed trial courts to review motions to dismiss stock drop claims according to the standards that it established in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly*. More specifically, *Dudenhoeffer* now requires judges to look closely at the circumstances that gave rise to the plaintiff's claim of imprudent conduct when deciding a motion to dismiss.

On the other hand, the Court also offered two very helpful and very clear items of guidance for employers that offer publicly traded stock in a 401(k) or similar plan. First, the Court ruled that a fiduciary does not need to take action to protect participants when the employer's stock is traded on a public exchange and there is public information available asserting that the stock is over- or undervalued. Fiduciaries, the Court reasoned, are not equipped to outsmart the pricing mechanism of a public stock exchange. Second, the Court ruled that a fiduciary does not violate ERISA's prudence standard by failing to act on insider information that would affect the stock price. Indeed, the Court refused to take a position that would require fiduciaries to act on insider information in possible violation of securities law.

Under *Dudenhoeffer*, fiduciaries are no longer shielded by the presumption of prudence that numerous appellate courts had adopted. However, plaintiffs still face significant challenges in prevailing on a motion to dismiss as district courts carefully scrutinize whether the fiduciary has acted imprudently. It is too early to tell what effect *Dudenhoeffer* will have on the formation of ESOPs, the offering of employer stock funds, or on stock drop litigation generally. From the plan sponsor and plan fiduciary's perspective, *Dudenhoeffer* appears on its face to simply continue the erosion of the few employer-friendly principles left under ERISA. But, beneath the surface, the decision offers some unusually clear and helpful guidance to plan sponsors that offer publicly traded employer stock in their 401(k) or similar plans.

8. ERISA PLANS MAY INCLUDE A REASONABLE LIMITATIONS PERIOD FOR FILING SUIT EVEN IF IT BEGINS TO RUN BEFORE A FINAL ADMINISTRATIVE DECISION

In *Heimeshoff v. Hartford Life & Accident Insurance Co.*, the Court unanimously held that an ERISA plan may impose a reasonable limitations period (i.e. an internal statute of limitations) on filing lawsuits for plan benefits, even if the internal limitations period is shorter than the otherwise legally applicable limitations period and even if the internal limitations period begins to run before the plan issues a final denial of benefits.

Summary of the Case

Julie Heimeshoff worked as a senior public relations manager for Wal-Mart and was a participant in Wal-Mart's Group Long Term Disability Plan (the "Plan"). After being diagnosed with lupus and fibromyalgia, she filed a claim for long-term disability benefits with Hartford Life & Accident Insurance Co. ("Hartford"), the Plan administrator, in August 2005. After two initial denials, Hartford allowed Heimeshoff until September 30, 2007 to appeal the decision. Heimeshoff filed her appeal within that timeframe, and Hartford issued its final denial on November 26, 2007. The Plan provided that a participant could not file a lawsuit challenging the denial more than three years after the time written proof of loss (internal review) was required.

On November 18, 2010, Heimeshoff filed suit in federal district court. The district court granted Hartford's motion to dismiss, and the Second Circuit affirmed on appeal, concluding that the unambiguous limitations language in the Plan barred Heimeshoff's suit.

The Supreme Court's Decision

The Supreme Court agreed. Writing for the Court, Justice Thomas explained that under ERISA, a plan and a participant may contractually agree on a limitations period for filing such a lawsuit, even if the accrual date of that limitations period begins to run before a final denial, as long as the limitations period is "reasonable."

The Court acknowledged the general rule that a statute of limitations begins to run when a plaintiff may file suit. Under ERISA, this occurs when a plan administrator issues a final decision denying benefits. The Court also noted its long-standing rule that, absent a controlling statute to the contrary, a contractual time limitation for bringing a claim on that contract may be shorter than that provided in the applicable statute of limitations, provided that the length of time is reasonable. Applying that rule, the Court held that the three-year limitations period in the Plan was enforceable because it was reasonable and ERISA was not “a controlling statute to the contrary.”

As to the reasonableness of the provision, the Court noted that under the Plan, “mainstream” claims were typically resolved within one year. Even in Heimeshoff’s case, where the review process took longer than usual, Heimeshoff had approximately one year to file a lawsuit after the final denial. The Court determined this to be a reasonable time limitation, particularly since there was no evidence of any other obstacles in bringing a timely suit.

As to whether ERISA is a controlling statute to the contrary, the Court found that it was not, for several reasons. First, ERISA does not contain a statute of limitations for denial-of-benefits claims. Therefore, courts have traditionally applied the most analogous state statute of limitations to determine whether a suit is timely. Heimeshoff acknowledged this, but argued that enforcing the Plan’s limitations period would undermine ERISA’s two-tiered remedial scheme of internal review followed by judicial review. She claimed that the contractual limitations period in the Plan would give participants like herself an incentive to shortchange the internal review process in order to have more time in which to seek judicial review. The Court rejected this argument, noting that such an approach would not serve the participants’ ends because the record for judicial review is generally limited to the record developed during the internal review process. In addition, in many cases the judicial standard of review is deferential, thus giving participants “much to lose and little to gain” by trading full internal review for more time to seek judicial review.

Second, the Court rejected Heimeshoff’s argument that enforcing the limitations period in the Plan would lead plan administrators to delay the internal review of claims in order to prevent judicial review. The Court noted that the regulations governing time periods for the review of claims require prompt action, and provide for immediate access to judicial review where a plan fails to meet those deadlines. In addition, the Court noted that the Plan’s limitations period was common and prevalent, citing statutes from the “vast majority” of states that require insurance policies to include a three-year limitations period that runs from the date proof of loss is due. The Court also noted that in the rare case where participants are prevented from seeking judicial review within the contractual limitations period, courts can apply traditional doctrines to allow the suit to go forward, such as waiver, estoppel, and equitable tolling.

Analysis and Impact of the Decision

Heimeshoff resolves a circuit split on the enforceability of contractual limitations periods in ERISA plan documents. *Heimeshoff* is also important for plan sponsors and plan drafters because it validates the long-standing and increasingly common practice of including in plan documents reasonable limitations periods for benefit claims. In light of the holding in *Heimeshoff*, plan sponsors should consider adding a limitations period to their plan documents if their plans do not already contain one. Plan sponsors can now be confident that courts will uphold such a provision provided that it is not unreasonably short.

Notably, the Court declined to provide guidance on how short a contractual limitations period can be and still be considered reasonable. This issue will play out in the lower courts in the coming years as they interpret *Heimeshoff*.

9. COURT CLARIFIES EMPLOYER FICA WITHHOLDING OBLIGATIONS FOR SEVERANCE PAYMENTS

In *U.S. v. Quality Stores*, the Court ruled that payments from a severance plan that is not directly linked to state unemployment benefits are “wages” for purposes of FICA and are thus subject to withholding.

In the case, the employer filed for bankruptcy and made severance payments to its employees from two of its severance plans. These supplemental unemployment compensation benefit plans (or “SUB” plans) provided severance benefits that were generally tied to job grade and management level. The employer initially paid FICA taxes on the severance amounts but later reconsidered and requested a refund from the IRS. It argued, among other things, that the general tax withholding and FICA tax rules in the Internal Revenue Code had been drafted by Congress with the intent to broadly exempt these types of SUB plan payments from FICA taxes and withholding.

Historically, the IRS had issued rulings exempting certain SUB plan severance payments from FICA taxes. It granted these exemptions on the ground that characterizing such SUB payments as “wages” subject to withholding was problematic because it jeopardized an employee’s ability to simultaneously receive state unemployment compensation and compensation from an employer at the same time. In this case, the employer’s SUB plans had no link to state unemployment payments. Accordingly, the Supreme Court ruled that the SUB payments were wages subject to tax and FICA withholding.

Employers should be aware that the Supreme Court did not issue a blanket rule requiring that employers withhold FICA from all severance payments. Indeed, the opinion leaves open the possibility that payments from a SUB plan that are linked to unemployment benefits may be exempt from FICA withholding. In most cases, however, individual severance payments and payments from employer severance plans are taxable wages and employers should continue to pay and withhold FICA.

10. COURT'S DECISION IN MICHIGAN AFFIRMATIVE ACTION CASE LEAVES REQUIREMENTS FOR THE CONSIDERATION OF RACE UNTOUCHED

In *Schuette v. Coalition to Defend Affirmative Action*, the Court held that a voter-approved ban on the use of race-based preferences for public university admissions does not violate the U.S. Constitution. The decision focused narrowly on whether the U.S. Constitution prohibited the voters of Michigan from making a university admissions decision typically made at the university board level—the decision to consider race in admissions. The Court found no constitutional prohibition. The Court's decision did not disturb the Court's prior rulings that institutions of higher education and K-12 schools may maintain admissions and student assignment policies that consider race under certain conditions.

In finding the United States Constitution does not prohibit Michigan voters from banning race-based preferences, Justice Kennedy explained in announcing the judgment that classifying an “individual on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend.” For this reason, he rejected the application of the United States Constitution advocated for by those challenging the Michigan voter ban, which would, as a starting place, categorize government action based on how the action aligns with racial interests. Justice Kennedy repeatedly criticized the classification of racial interests, which he described as imposing “categories dependent upon demeaning stereotypes.”

Furthermore, central to Justice Kennedy's opinion was the finding that voters are properly part of the national dialogue regarding race-conscious admissions policies. Justice Kennedy explained that “[t]he process of public discourse and political debate should not be foreclosed even if there is risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage.”

In a concurring opinion, Justice Scalia characterized the dispute as presenting a “jurisprudential twilight zone” and summarized the issue as one in which the State of Michigan, by prohibiting different treatment based on race, cannot both comply with and at the same time violate the Equal Protection Clause. He explained that he would “hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution.”

In a dissenting opinion, Justice Sotomayor explained the ongoing significance of race in higher education: “Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’”

The National School Boards Association filed an amicus brief in this case that was prepared by Franczek Radelet attorneys. The “friend of the court” brief addressed the impacts of state provisions prohibiting the use of race in public education on public school districts.

Looking Ahead: The 2014-2015 Term

The Court will open its 2014-2015 term on October 6, 2014. So far, the Court has already agreed to hear several significant labor and employment cases that will impact employers, including the following:

- ***Mach Mining v. EEOC***: The Court will consider whether and to what extent a court may enforce the Equal Employment Opportunity Commission's statutory duty to conciliate discrimination claims before filing suit. For more information, please see our Franczek Radelet alerts on the [Seventh Circuit's decision](#) and the [Supreme Court's decision to hear the case](#).
- ***Young v. United Parcel Service***: The Court will consider whether, and in what circumstances, the federal Pregnancy Discrimination Act requires an employer that provides work accommodations to non-pregnant employees with work limitations to also provide work accommodations to pregnant employees with similar work limitations. For more information, please see our Franczek Radelet [alert](#).
- ***Integrity Staffing Solutions v. Busk***: The Court will consider whether time spent by employees in security screenings is compensable under the Fair Labor Standards Act.
- ***M&G Polymers USA, LLC v. Tackett***: The Court will consider how courts should construe provisions in collective bargaining agreements regarding the duration of retiree healthcare benefits. Some courts currently require a clear statement that such benefits are intended to survive the termination of the collective bargaining agreement, while other courts require only some language that can reasonably support an interpretation that the benefits should continue beyond the termination of the agreement.
- ***Nickols v. Mortgage Bankers Association; Perez v. Mortgage Bankers Association***: The Court will consider the processes that federal agencies must adhere to in revising their administrative rules and regulations where the agency is subject to the Administrative Procedure Act. The D.C. Circuit struck down the U.S. Department of Labor's 2010 reclassification of mortgage loan officers as eligible for overtime pay because the agency did not use notice-and-comment rulemaking procedures.