Labor Letter

November 2011

Fisher & Phillips LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

The Calm Before The Storm?

An employment law preview of the 2011-2012 Supreme Court Term

By Rich Meneghello (Portland)

After the turbulent roller-coaster ride to which the Supreme Court treated employers the last few sessions, businesses across the country are casting a wary eye on Washington D.C. as the Justices gear up for their latest session, which kicked off last month.

Breathe a sigh of relief, employers – at least for now; the Supreme Court has avoided accepting review of any blockbuster cases so far this term, and companies may be spared any sweeping changes this time around. To date, only five labor and employment cases sit on the Supreme Court's 2011-2012 docket, and the average private employer will not be impacted by these decisions one way or the other.

But this reprieve may only be temporary, as the High Court could rock the boat once again by reviewing any number of high profile cases that have thus far eluded its docket.

Short Term Forecast: Light, Mild And Easygoing

The Supreme Court has thus far only accepted review of five cases that Fisher & Phillips will be tracking this term. As noted above, each case will have only a limited impact on the state of labor and employment law, with narrow applicability and scope on employers. In fact, the only employers that even need to take notice are:

Religious Organizations

Federal employment law has long recognized the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions. Most religious employers are aware of the scope of this principle when it comes to pastors, priests, rabbis, and other high-profile members of the community – but how is the ministerial exception applied to other employees, such as school teachers? That's exactly what the Supreme Court will decide.

The case recently argued before the Court, and most likely to be decided by early 2012, involves a former teacher at a religious elementary school who not only taught a secular curriculum, but also daily religion classes while regularly leading students in prayer and worship. The EEOC sued the organization after the teacher was terminated, and the U.S. Court of Appeals for the 6th Circuit decided that the lawsuit could proceed since the ministerial exception did not apply to this situation. The Supreme Court will have the final say, and will provide much-needed contours to this doctrine (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*).

Public Employers

The other four cases relate to issues impacting government employees.

In *Coleman v. Maryland Court of Appeals*, the Supreme Court will decide whether state employers can face lawsuits for alleged violations of FMLA's "self-care" provisions, which grant employees the right to take

unpaid leave for their own medical conditions. A 2003 decision held that states are not immune from FMLA lawsuits involving caring for family members, but the *Coleman* case will provide much needed clarification on an even more common issue.

In *Filarsky v. Delia*, the Court will decide whether a private lawyer retained by a government body to conduct a workplace investigation is entitled to the same type of qualified immunity that government employees enjoy.

In *Knox v. SEIU*, the Supreme Court will decide whether a union is required, in addition to an annual fee notice to public employees, to send a second notice if adopting a mid-term fee increase. In the *Knox* case, the temporary fee increase was designed to create a fund to be used for a "broad range of political expenses," to which employees were prevented from objecting as they could with annual fee increases.

And in *Elgin v. Department of Treasury*, the Court will decide whether federal employees who were terminated once it was discovered they had failed to register with the Selective Service have a right to challenge these decisions on constitutional grounds, and if so, by what avenue.

The Perfect Storm On The Horizon?

Storm watchers are bracing for the big one, however – if there is a chance for a dramatic event on this year's Court docket, it will probably center around healthcare reform. You can be sure that if "Obamacare" reaches the steps of the Supreme Court, it will be the labor/employment highlight of the year.

As most of our readers know, various groups have filed lawsuits attacking the constitutionality of the recently-passed healthcare legislation. Of all those cases, the one most worthy of tracking is the 11th Circuit case of *State of Florida et. al. v. U.S. Dept. of Health and Human Services*, which has been fast-tracked for review at the Supreme Court. Although the Court has not officially accepted review of this matter, most legal observers expect that the Justices will soon place the case on its current docket, to be decided by Summer 2012 – right in time for the upcoming Presidential election.

Continued on page 2

A Down Economy – An Increase In Hiring Dangers

By Grace Y. Horoupian and Matthew C. Sgnilek (Irvine)

With the unemployment rate in the United States continuing to flirt with record highs, employers are faced with a swell of job applicants and a larger pool of qualified candidates for open positions. The glut of applicants in comparison with the dearth of jobs has left many hardworking and qualified individuals unemployed for an extended period of time.

Desperate to find work and stand out from the crowd, the jobless are turning to such sites as Craigslist to advertise themselves as potential employees to anyone who needs work performed. Craigslist posts reveal that the jobless are offering to do almost anything for hire from repairing roofs to organizing storage rooms.

Often, the posts are heartwarming and detail struggles to find work in a down economy. Yet, in their zeal to find employment, the jobless sometimes reveal more about themselves than employers can typically legally obtain from the interview process. The information can pose significant dangers to employers.

Craigslist posts can reveal information about protected categories such as age, marital status, religion and even disabilities. Of course, no law prohibits employers from searching Craigslist or social networking sites to find job applicants. But if you decide to bring a candidate in for an interview based upon a Craigslist advertisement that identifies an applicant's disability, medical condition or other protected characteristic, and you later elect not to hire the individual, you could quickly be slapped with a failure-to-hire discrimination lawsuit. The risk of such lawsuits only increases in these economic conditions.

Quick And Slick Versus Tried And True

Hiring managers can often be tempted to use the Craigslist post as if it were a job application, but doing so poses additional risks. Employers will be deprived of information typically used to weed out risky job candidates such as questions about criminal convictions. Job applications require applicants to sign a statement confirming that they have been truthful in their application and that any misleading or errant information can lead to termination. Craigslist posts provide no such protections for employers and increases the risk of a negligent hiring claim if the applicant turns out to have a history of theft or violence.

As tempting as it may be to interview and hire someone who has posted an inspiring Craigslist post detailing their need for work, doing so presents too many risks and is not the best way for employers to find employees. Instead, employers would be wise to continue to adhere to traditional principles that minimize hiring dangers.

Job Descriptions

Ensure that you have a detailed job description for the open position that details the essential job functions.

Employment Applications

Require every potential applicant to complete an employment application so that it can be examined for red flags such as "victim like" responses to questions why they left prior jobs. Also, ensure a signature attesting to the truthfulness of the application is obtained.

Scripts

Prepare a consistent script of key job-related questions that are asked of each applicant; make sure the script asks questions that are tied to the job description and are not discriminatory. As an example, it is lawful to ask if an applicant is fluent in Mandarin, if Mandarin is an essential job duty, but not to ask the applicant if he or she is Chinese. By preparing the script, employers can virtually eliminate the risk, posed by Craigslist posts, of obtaining information that could lead to discrimination lawsuits.

Although Craigslist posts seeking work may be viewed as useful to the jobless, employers should avoid using these "I Need Work" posts to find qualified applications given the significant risks they pose. Continue to adhere to traditional hiring processes to ensure the risks of failure to hire and negligent hiring lawsuits are minimized.

For more information contact either of the authors: ghoroupian@laborlawyers.com or msgnilek@laborlawyers.com or call 949.851.2424

The Calm Before The Storm?

Continued from page 1

As it stands now, employers will need to begin compliance with the Patient Protection and Affordable Care Act in 2014, and the controversial "individual mandate" will also go into effect that same year. The Supreme Court has only been asked to decide the constitutionality of the individual mandate portion of the law, but the Court's review could impact the entire Act. It seems like the three most likely outcomes of a possible decision would be the Court: 1) upholding the entire law; 2) striking down the individual mandate portion but permitting the employer portion to go forward; or 3) deciding that the individual mandate is such an integral part of the Act that the entire law must be stricken. For these reasons, if this case is accepted by the Supreme Court, employers across the country will want to keep a close watch on this decision.

Long Term Forecast: Unpredictable At Best

Besides the healthcare matter, the Court is currently deciding whether to accept a number of other cases that would impact the world of labor and employment law. If the past is any indication, the number of cases decided this term will probably increase by at least four or five, as each of the last several years has seen around 10 labor or employment cases decided on the annual docket.

Some of the other cases we'll watch include a wage and hour case which would provide clarity to FLSA's outside sales exemption, an age discrimination case which would further define the contours of the ADEA, and several other public employee cases involving constitutional claims for relief and discrimination claims. We are also tracking a non-employment case which would offer clarity on the Class Action Fairness Act, which allows defendants to remove certain class actions to a usually friendlier federal court.

Fisher & Phillips will be tracking all of these matters on the Supreme Court's docket, and will issue same-day Supreme Court Alerts when they are decided. If you are not signed up to receive our legal updates, feel free to contact your regular Fisher & Phillips attorney, or send an email to fp@laborlawyers.com and ask to be added to the list.

For more information contact the author at rmeneghello@laborlawyers.com or 503.242.4262.

Employee Or Independent Contractor: One Way Of Thinking It Through

By John McLachlan (San Francisco)

Deciding whether an individual is an employee or independent contractor is becoming an ever more important question. Employers should carefully scrutinize each and every independent contractor relationship which exists within the business before the Labor Department, the IRS, or a state agency does it for you.

While the issue is taking on a new importance in light of federal and state attention, the criteria for the determination of bona fide independent contractor status have not gotten any clearer. Nor will this article provide a way for you to determine with legal certainty which is which. While we have no magic formula which answers every question, we do want to provide a "rule of thumb" or a "quick-scan" way of thinking about the subject which can help to raise questions about independent contractor relationships where they should be raised.

Show Me The Money

One fact that is certain is that the price and penalties for misclassification of employees will get ever higher. As one example of the increasing danger to employers who utilize independent contractors, earlier this year the DOL and the IRS entered into a Memorandum of Agreement by which the two agencies as well as a number of participating states (Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah, Washington, Hawaii, Illinois, Montana and New York) have agreed to share information about independent contractor relationships.

Much of the reason for the renewed interest in the distinction between employees and independent contractors has to do with state and federal revenues. Employers pay payroll and other taxes on wages they pay to employees – but not on payments to independent contractors.

This apparent benefit quickly becomes illusory in light of the penalties and back taxes which are levied when independent contractors are found to actually be employees. Another argument against a too-quick designation of independent contractor status is the presumption that everyone working for an employer is an employee. This presumption can be overcome by facts that establish a lack of employee status, but in case of doubt, the default position is inevitably in favor of employee status.

If it were easy to distinguish between employees and independent contractors, there would be no reason for this article. But as you may have guessed, it is actually quite complicated. The tests to determine whether an individual is a bona fide independent contractor are multi-tiered and subject to different interpretations. And if this weren't bad enough, the rules for determining an individual's status can differ, depending on which agency is asking the questions.

Rather than review each agency's tests for determining a legitimate independent contractor relationship, we can draw analogies to an indisputably independent contractor relationship – putting a new roof on a home. While this analogy only goes so far and is an oversimplification, it nonetheless illustrates a number of the tests used to distinguish between legitimate independent contractors and employees.

Dealing With A Roofer

A typical homeowner in need of a roof will find one or more contractors in the business. After locating one or more, the homeowner reviews qualifications, discusses price, and gets bids. After settling on details such as when the job will be completed, a contractor is ultimately selected to install the roof.

From there, it's the contractor who hires the proper number of individuals to install the roof, and who directs their work. The homeowner will not tell the contractor how the job is to be done (so long as it is done safely, and the premises are not harmed). The contract between them will include agreement about the job's completion date and the required quality of the final installation. Typically also there would be agreement on a schedule of payments which would be tied to the progress of the job.

When the roof is finished to contract specifications, the contractor receives the final agreed upon payment and the homeowner and contractor go their separate ways, likely never to do business with each other again.

Applying The Economic Realities Test

The roof installation model is a simplistic illustration but it reflects a number of factors used by government agencies and courts to scrutinize the legitimacy of a claimed independent contractor relationship. While this model doesn't include all of the relevant factors relied upon, it does provide a preliminary view into the examination which must be undertaken. It should be considered an initial screen, which, if not passed, at a minimum will be sufficient to alert employers that their use of independent contractors should be further analyzed before any federal or state authorities begin to consider the situation.

We will use the DOL set of criteria called the "economic realities test." Again we add that these are not the only criteria used by state and federal agencies, but they provide a reasonably comprehensive overview for the initial self-examination we are proposing for employers who use independent contractors in their businesses.

Control Of The Work

In our example the homeowner imposed very little direction on the actual roof installation. The homeowner set the requirements as to what final results were expected, but the method of obtaining that final result was left to the contractor. In a business context, the more control the business exerts over the manner in which the required work is accomplished, the more likely the relationship is that of employer and employee.

Continued on page 4

Employee Or Independent Contractor: One Way Of Thinking It Through

Continued from page 3

Investment By The Contractor

Our hypothetical roofing contractor provided all the tools and equipment he needed to install the roof on the home. On the other hand, the more a business provides the tools and equipment needed to perform the work, the more the relationship looks like that of employer and employee.

Opportunity For Profit

The roofing contractor was in charge of the ultimate amount charged for the work. He could have charged more or less for the job, depending on a number of factors exclusive to himself, such as how much profit he wanted to make on that particular job, the efficiency of his roofing crew, whether or not he was busy, etc. The less opportunity for profit, or the more an individual appears to be paid on an hourly basis, the less likely is a finding of independent contractor relationship. Payment on an hourly basis does not by itself negate a finding of independent contractor, but it is not helpful to that end.

Use Of Initiative And Judgment

The more efficient the roofing contractor, the greater is his opportunity for profit. If he has a highly trained roofing crew, he can increase his competitive relationship to other contractors. If he has invested in more efficient roofing equipment, he may be able to finish jobs faster and thus have a competitive edge over other contractors he is competing against. If he has developed a more efficient system for the installation of a certain roofing product, he will lower his costs and improve resulting profit margins.

In contrast, an employee works for an agreed- upon wage and does not have the opportunity for profit or loss. Of course, there is the possibility for career advancement for an employee, but this would take place over a period of time and an employee does not have the same opportunity for profit – or loss – as does the independent contractor.

Permanency Of The Relationship

Our roofing contractor finished the job and moved on to the next job with another homeowner. When the roof was installed, the relationship was over. Shorter or clearly defined discrete projects with a beginning and ending point are more closely associated with the independent contractor relationship and longer engagements look more like employment relationships.

Integration With An Organization's Business

In our example putting a roof on the house had no connection to the homeowner's primary employment or means of making a living. By the same token, the more central the work performed by the independent contractor is to the proper functioning of the business, the more the relationship looks like that of employer – employee. And certainly if the same work is done by employees and by independent contractors, that would be an extremely strong argument that the independent contractor is actually an employee.

Obviously each factor listed above does not always have one clear answer and a state or federal agency or court will consider all of the above factors as well as others in reaching a final determination whether there is an employment relationship rather than one of independent contractor.

Don't Try This At Home

While not fail-safe, this cursory summary can help you to identify where problems may exist. If you find questionable situations after this cursory examination, it is much preferable to contact your employment counsel to get certainty rather than let the government answer the question for you. You can get some additional information by visiting our website at www.laborlawyers.com or our blog at www.wage-hour.net.

For more information contact the author at jmclachlan@laborlawyers.com or 415.490.9000.

Office Locations

Atlanta
phone 404.231.1400

Charlotte
phone 704.334.4565

Chicago
phone 312.346.8061

Cleveland
phone 440.838.8800

Columbia
phone 803.255.0000

Dallas
phone 214.220.9100

Denver
phone 303.218.3650

Fort Lauderdale
phone 954.525.4800

Houston
phone 713.292.0150

Irvine
phone 949.851.2424

Kansas City
phone 816.842.8770

Las Vegas
phone 702.252.3131

Los Angeles
phone 213.330.4500

Louisville
phone 502.561.3990

New England
phone 207.774.6001

New Jersey
phone 908.516.1050

New Orleans
phone 504.522.3303

Orlando
phone 407.541.0888

Philadelphia
phone 610.230.2150

Phoenix
phone 602.281.3400

Portland
phone 503.242.4262

San Diego
phone 858.597.9600

San Francisco
phone 415.490.9000

Tampa
phone 813.769.7500

Washington, DC
phone 202.429.3707

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Labor Letter* or any of our other publications, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.