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# LEGAL ALERT

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## Supreme Court Rejects Six Employment Cases, Still Has Full Docket on Tap

Earlier this week, the U.S. Supreme Court declined to review six labor and employment law cases which had been presented. The Court showed no favoritism, denying petitions for certiorari on cases coming out of U.S. Courts of Appeal for the Second, Third, Fifth, Eighth, Ninth, and Federal Circuits and covering substantive and procedural issues, including age claims, disability claims, retaliation, and due process, among others.

Despite its rejection of these six cases, the Supreme Court has a full docket of employment law cases for the current term. Here's a preview of some of the cases to be decided in the coming year:

### Cases Involving Privacy, Arbitration, Immigration, And Class Actions

The Court will hear at least four cases from the typically employee-friendly Ninth Circuit. In *NASA v. Nelson*, the Court will weigh the privacy rights of “low-risk” employees of federal contractors versus the employer’s right to obtain certain information about its employees, such as past drug use and names of references who may be asked for any “adverse information” about the employee’s financial integrity, mental or emotional stability, and general behavior or conduct, among other things. The Ninth Circuit held in favor of the employees, finding that these inquiries were not narrowly tailored to any legitimate government interest and stating that employees were faced with “a stark choice – either violation of their constitutional rights or loss of their jobs.”

The Court will also decide *AT&T Mobility LLC v. Concepcion*, which challenged the validity of an arbitration agreement banning class action claims and will require the Court to determine whether states are preempted by the Federal Arbitration Act from conditioning enforcement of an arbitration agreement on the availability of certain procedures, even though those procedures are not necessary to vindicate the party’s claims.

Two of the most anticipated cases of the term will also arise out of the Ninth Circuit, as the Court will hear *Chamber of Commerce of the U.S. v. Whiting*, and *Wal-Mart Stores v. Dukes*. The *Whiting* case held that the Legal Arizona Workers Act, a law that allows potential sanctions against employers who knowingly or intentionally hire illegal aliens, is not preempted by federal law and does not violate employers’ due process rights. In *Wal-Mart Stores*, a divided appellate court affirmed the



certification of a class of “all women” who had been employed at any Wal-Mart store since December 1998. This nationwide class would contain approximately a million and a half plaintiffs – the largest class in an employment case to date – who are collectively seeking billions of dollars from Wal-Mart for alleged gender discrimination.

### Other Cases: Benefits, Retaliation, And A “Cat’s Paw”

In *Cigna Corp. v. Amara* (Second Circuit), the Court will determine whether a showing of “likely harm” is sufficient to entitle participants in an ERISA plan to recover benefits based on an alleged inconsistency between the terms of the actual plan and the explanation of benefits in the Summary Plan Description or other disclosure.

And in *Kasten v. Saint-Gobain Performance Plastics Corp.* (Seventh Circuit), the Court will decide whether an oral complaint constitutes protected activity under the Fair Labor Standards Act’s anti-retaliation provision, which protects an employee who has “filed” a complaint.

Also before the Court is *Thompson v. North American Stainless, LP*, in which the Sixth Circuit held that Title VII does not allow a cause of action by an employee who did not personally engage in any protected activity – in this case, a man who claimed his employer terminated him in retaliation for his fiancée’s EEOC charge.

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And last, but far from least, is *Staub v. Proctor Hospital* (Seventh Circuit), which asks the Court to determine under what circumstances an employer may be found liable based on the unlawful intent – not of the decision-maker – but of an official who influenced the decision, often called the “cat’s paw” theory.

Interestingly, it appears that only two of the above cases, *AT&T* and *Wal-Mart*, will be heard by the full Court; Justice Sotomayor will take no part in the *Cigna* case and Justice Kagan will take no part in the rest.

With oral argument already completed in over half the cases, employment practitioners eagerly await the Court’s upcoming decisions to determine the impact for employers and employees alike.

In 2011, Fisher & Phillips will once again issue “Supreme Court Alerts” immediately after the Court hands down an opinion, offering our analysis of the opinion and providing guidance on what the decision means to the everyday operations of employers across the country. For more information about these cases, or any others, contact your regular Fisher & Phillips attorney.

*This Legal Alert provides a general overview of several pending Supreme Court cases. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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