



## The Calm Before The Storm?

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### ***An Employment Law Preview of the 2011-2012 Supreme Court Term***

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 6<sup>th</sup> 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.

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](mailto:fp@laborlawyers.com) and ask to be added to the list.

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