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Labor Law, Facebook Threats And Administrative Overreach On Supreme Court Docket

By Daniel Fisher

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The U.S. Supreme Court hears the first arguments of its 2014-15 session on Monday, starting a term that will feature cases about the rights of pregnant workers, whether a commercial fisherman can be prosecuted for violating Sarbanes-Oxley, and several challenges to how the Obama administration interprets regulatory law.

Not on the docket of the nation's highest court are closely followed cases seeking to determine, once and for all, whether same-sex marriage will be legal nationwide. And the court didn't take as many patent disputes as in some recent years. But there are plenty of cases that business will be watching closely, including a challenge to how professional associations can restrict competition and whether an employer must accommodate religious requirements even if a prospective employee doesn't mention them.

Here's a list of the business-oriented cases I consider most interesting in the upcoming session, with some commentary from Andrew Pincus, a partner with Mayer Brown in Washington who has argued 23 cases before the Supreme Court and frequently represents business clients there.

EMPLOYMENT LAW:

Young v UPS – This case is perhaps most interesting because of the strange bedfellows it has brought together. The question is whether the Preganancy Discrimination Act, passed in 1978, prohibits UPS from enforcing work rules that require employees to be able to lift a 70-pound package. The parcel service provided "light duty" to some disabled employees but argued it didn't have to do so for pregnant workers any more than workers who were injured off the job playing softball or skiing. Unions naturally support the plaintiff, but a group of 23 pro-life organizations also filed a brief supporting the plaintiff, saying the PDA requires employers to give pregnant workers the same accommodations as anyone else with a similar disability.

Integrity Staffing vs. Busk: Plaintiffs are workers at an Amazon.com AMZN +1.56% warehouse who say they were forced to wait in line up to 25 minutes per shift to be searched for possible

contraband. The Ninth Circuit Court of Appeals held these screenings stemmed from the nature of the work and were for the benefit of the employer, and must be compensated. The AFL-CIO supports that interpretation, as do trial lawyers who stand to make hundreds of millions on back-pay claims if Busk wins. But the Obama administration surprisingly disagrees, citing a long line of precedent and a federal law, the Portal-to-Portal Act of 1947, which specifically excludes from wages the time spent walking to a job and from one's job station.The Supreme Court took this seemingly arcane case for the same reason Congress passed the Portal-to-Portal Act, Pincus said, in order to clarify the rules for business. "They understand the litigation system generates lots of lawsuits where there is uncertainty, which is not only hard on businesses but on courts," he said. "When someone's waiting on line to punch out, I think everybody agrees that time doesn't count."

EEOC vs. Abercrombie & Fitch: Abercrombie & Fitch declined to offer a sales position to a woman who showed up for her interview wearing a black headscarf. She didn't identify herself as Muslim and the interviewer, following company policy, didn't ask her religion. But the EEOC sued, saying the fashion chain failed to accommodate her religious beliefs by enforcing a "no hats" policy for employees who modeled A&F styles in the stores. An appeals court rejected the EEOC's claim and the government appealed, saying it isn't necessary for an employer to have actual knowledge of a conflict between work rules and an employee's religious beliefs.

Mach Mining vs. EEOC: Title VII prohibits discrimination but also says the Equal Employment Opportunity Commission "shall endeavor to eliminate" unlawful discrimination through "conference, conciliation, and persuasion" before filing suit. EEOC received single charge of sex discrimination against coal miner in 2008 and sued the company a few days after determining conciliation had failed. The same day, it issued a news release with a government attorney saying "Mach Mining needs to realize that this is 2011, not 1911." Mach sued the government, saying it hadn't conciliated in good faith, but the Seventh Circuit rejected that argument, saying courts can't even ask if the EEOC has fulfilled the requirement. The EEOC says it has sole discretion to decide whether to settle or bring suit. The Society for Human Resource Management,supports Mach, saying the EEOC's current Strategic Plan orders field offices to bring more cases, which incentivizes staff to "bypass conciliation in favor of high-profile, systemic litigation."

Nickols vs. Mortgage Bankers Assoc.: This case illustrates the fight between advocates of a strong administrative state and those who think legislators should be required to write laws, instead of delegating the power to bureaucrats. It stems from the Obama administration's decision to reinterpret the Fair Labor Standards Act, reversing a Bush administration decision and moving mortgage-loan officers into the category of workers who are entitled to overtime pay. According to this post in the Yale Journal on Regulation blog, Nickols plus the accompanying Perez vs. Mortgage Bankers Association "present a High Noon of sorts in admin law circles." As the Yale blog notes, the court of appeals for the D.C. Circuit, under its "Paralyzed Veterans" doctrine named after a 1997 decision, allows agencies to interpret their rules without notice and comment, but subsequent revisions require it. The government,

naturally, disagrees, saying the Administrative Procedure Act requires agencies to go through the formal notice and comment period when proposing new rules with the effect of law, but not when issuing "interpretive rules." The Supreme Court, in its 1977 Vermont Yankee decision, held that courts shouldn't second-guess how agencies go about implementing their rules.

FREE SPEECH:

Elonis vs. U.S.: Anthony Elonis was convicted on five counts of making threatening statements against his ex-wife and others via rap lyrics he posted under a pseudonym on Facebook. The American Civil Liberties Union, joined by the libertarian Cato Institute and Yale Law School's Abrams Institute for Free Expression support Elonis, saying that while his comments were "undeniably crude and offensive," the court erred by not requiring the government to prove he had the subjective intent to harm. In a key precedent, the Supreme Court held that a protester who said if he were forced to carry a rifle he'd shoot the president was engaging in political hyperbole, not a true threat. "Intent to threaten is an essential element of any true threat," the ACLU says in its brief.

Williams-Yulee vs. The Florida Bar: Both sides urged the Supreme Court to take cert. on this challenge to a Florida Bar rule that prohibits judicial candidates from personally soliciting campaign contributions. The Florida Supreme Court held the rule doesn't violate the First Amendment guarantee of free speech, but the 11th Circuit Court of Appeals in Atlanta, which covers Florida, ruled the opposite in a case challenging a similar rule in Georgia. With similar rules in at least 20 states that allow judges to be elected, the Florida Bar said, "it is a virtual certainty that the existing and anticipated future conflicts will not be resolved without the intervention of this Court."

DISCRIMINATION LAW:

Texas Dept. of Housing and Community Affairs vs. The Inclusive Communities Project: The Obama administration and its allies including George Soros have twice succeeded in preventing this question from appearing before the Supreme Court, but this time the case appears to be going to argument. The question is whether the government can use statistical analysis to prove discrimination in housing and mortgage lending, instead of proving actual intent. The Texas Dept. of Housing is accused of issuing tax credits for Section 8 subsidized housing more frequently in minority neighborhoods. Texas and lenders who are closely watching this case say the "discrimination" reflects lower earnings and wealth in minority households, and eliminating it would require them to take illegal measures like allocating housing according to race or lowering loan-underwriting standards for minority applicants.

TAXATION:

Alabama vs. CSX: A 1976 law prohibits states from imposing discriminatory taxes on railroads. Alabama has 4% sales and use tax that includes fuel, but exempts vessels engaged in interstate

commerce and diesel subject to motor-fuel taxes. CSX won a 2011 Supreme Court decision allowing it to challenge the tax (drawing an extremely rare Thomas/Ginsburg dissent). The 2011 decision said discrimination is the failure to treat people equally when no reasonable distinction can be found between the favored and unfavored, not just taxes that discriminate against out-of-state entities. The court declined to answer whether Alabama's policy discriminated against CSX, but the railroad won on a second appeal. Now the court must decide whether the total tax load against competitors is what matters, or the application of specific taxes. The U.S. government filed a brief in support of neither side, saying the case should be remanded to answer that question.

Comptroller vs. Wynne: Maryland collects income taxes at the state and county level. It offers its residents a credit for income taxes they pay for money earned in other states, but not against county taxes. The plaintiffs are a couple who earned $2.7 million from an S corporation that earned much of its income in other states, but were denied an offset against their county taxes. Maryland courts held the scheme violated the Commerce Clause by discouraging businesses from operating out-of-state, but the Obama administration disagrees, saying in a brief that states can choose to offset taxes paid elsewhere but don't have to. The American Legislative Exchange Council, representing business interests, says states should not be allowed to make "unwarranted tax grabs from interstate commerce" by double-taxing income earned elsewhere.

Direct Marketing Assoc. vs. Brohl: Appeal of a Tenth Circuit decision upholding a Colorado law requiring out-of-state Internet merchants to report sales to state residents. The court dismissed the case under the federal Tax Injunction Act, which prohibits federal courts from hearing lawsuits asking to block the collection of taxes before they are paid. The U.S. Chamber, in a brief, said the TIA only prohibits federal courts from preventing a state from collecting a tax before it has been paid. But it doesn't prevent out-of-state taxpayers from suing in federal court to challenge a regulatory scheme that forces them to hand over customer information to state tax authorities.

SECURITIES LAW:

Omnicare vs. Laborers District Council: Whether federal securities laws cover statements of opinion in financial documents. "Does it just have to have turned out wrong?" Pincus asked. "Or do you have to prove the speaker have a different opinion and was lying?" Class-action lawyers like the former, of course, since that means they can go through every word of a securities offering document and play "gotcha" over any statement, no matter how vague, that turned out to be incorrect. The Securities Industry and Financial Markets Association, of course, say the Sixth Circuit's decision making statements of opinion potential liability bombs would make a "dramatic change in the scope of section 11," which has worked well for 81 years. (Omnicare, in this case, told investors it operated in compliance with the law, a statement that turned out not to be strictly true when it was found guilty of engaging in an illegal kickback scheme.)

ANTITRUST:

North Carolina Bd. of Dental Examiners vs. FTC: The FTC sued North Carolina's dental board for issuing "cease and desist" orders to non-dentists who engaged in the profitable business of teeth whitening. Six of the eight board members are elected by their fellow dentists, and the Obama administration argues they are illegally protecting themselves from competition. The N.C. board says the Supreme Court long ago granted such powers to agricultural boards that set crop prices and other groups organized under state power. The government says the so-called "state-action doctrine" exempting such boards from antitrust laws only applies if they operate under active supervision by disinterested state officials. The Supreme Court in the 1975 decision Goldfarb v. Virginia State Bar rejected minimum legal fees on real-estate transactions, saying the bar's status as a state agency for limited purposes didn't allow it to break antitrust laws to protect its members' interests. In most states, regulatory boards are appointed by the legislature or the governor, Pincus said. "There may be seats reserved for people in the industry, but they're not directly elected by the people they'll be regulating," he said.

LENDING LAW:

Jesinoski v. Countrywide: The plaintiffs refinanced their home in 2007, and then exactly three years after the transaction closed, they sent notice of rescission to Countrywide, saying the lender didn't provide the number of copies of disclosure required under the Truth in Lending Act. That law allows borrowers to rescind a loan up to three days after it closes, or three years if certain other terms are violated. The American Bankers Association, naturally, wants to discourage this kind of strategic move to avoid foreclosure and says borrowers must actually file suit within the three-year limit. They say otherwise buyers and title insurers would have to "prove a negative" in order to safely buy property, making sure no lender had received a notice of rescission. The Obama administration disagrees, saying Congress has dealt with this clouded-title issue by tightening the deadline to three years and borrrowers shouldn't be forced to sue as well as give notice.

PROSECUTORIAL OVERREACH:

Yates vs. U.S.: Yates is a commercial fisherman who was busted for violating Sarbanes-Oxley, the financial crimes law, because he allegedly disposed of some underlength fish a game warden suspected he had in his catch. Yes, the law's "anti-shredding" provision, passed in the wake of the Enron scandal, prohibits the desrtruction of ""any document, record or tangible object" that might be useful in an investigation. But a fish? It's not hard to predict how the Supremes will come down on this one. With prosecutors advancing ever-more aggressive claims and collecting huge settlements from banks and companies that aren't willing to risk destruction in a criminal case, Pincus said, courts have stepped in to keep them in check. The Solicitor General opposed certiorari in this case. "It's a one-off case about fish, why should anyone care?" Pincus said. "But

this is another in a series of cases the court has taken" — like last year's poisoned mailbox case — "where there is concern of prosecutorial overreach."