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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Term Ends With Few Employment Fireworks

By **Vin Gurrieri**

Law360, New York (June 30, 2017, 7:01 PM EDT) -- Although the U.S. Supreme Court's recently completed term didn't yield the kind of blockbuster labor and employment rulings seen in previous sessions, it did feature several notable procedural decisions that could also be a harbinger of where the justices will land on class waivers and other hot-button issues they will soon take up, lawyers say.

Among the highlights of the high court's term in the labor and employment context was a decision that appellate courts must use a deferential standard when reviewing lower courts' decisions over whether to enforce subpoenas issued by the U.S. Equal Employment Opportunity Commission and a decision overturning a Kentucky Supreme Court ruling that had been unfavorable to arbitration agreements.

But while attorneys generally told Law360 that the recently concluded term's lineup of employment cases was heavily tilted toward procedural rulings with only limited applicability, the upcoming October 2017 session could include many more sparks, with issues such as class waiver provisions in arbitration agreements and religious liberty primed to take center stage.

"I don't think there were any real watershed decisions," said Akerman LLP partner Matthew Steinberg. "There were some interesting procedural decisions and decisions that may foreshadow other changes. There are bigger cases coming down the pike that will have greater day-to-day impact on employers."

Of the six decisions from the October 2016 term that were on employment lawyers' radar, each included at least six justices in the majority, underscoring the lack of divisive employment issues the justices faced.

Here, Law360 looks at what the Supreme Court's term yielded for businesses, employees and federal agencies.

McLane Co. v. EEOC

In April, the justices **ruled 7-1** that the Ninth Circuit used an incorrect standard to evaluate whether grocery distributor McLane Co. Inc. had to turn over workers' personally identifiable information in response to a subpoena from the EEOC as part of a gender bias investigation.

Writing for the majority, Justice Sonia Sotomayor said that district courts' decisions over whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion, not de novo,

which was the standard used in McLane's case by the Ninth Circuit.

Both the EEOC and McLane had taken the position before the high court that the Ninth Circuit was wrong to use the de novo standard instead of the more deferential standard of review. But the EEOC, unlike McLane, argued that the Ninth Circuit would have reached the same conclusion under either framework.

Allyson Ho, the co-chair of Morgan Lewis & Bockius LLP's appellate practice and counsel for McLane in the case, told Law360 that the litigation involved "an issue of great importance" both to employees and businesses.

"The agency has frequently claimed that trial courts should give the agency's own determination of what's relevant to its investigation great deference," Ho said. "Although the Supreme Court's ruling for McLane focused on a procedural question … Justice Sotomayor's opinion for the court made clear that a trial court need not simply defer to the EEOC's own determination of relevance — and that may be the most significant aspect of the case going forward."

Carrie Hoffman of Gardere Wynne Sewell LLP said instead that the case was largely limited to a procedural issue that "doesn't change the day-to-day analysis [by] human resources" departments regarding employment situations.

"It was more procedural than it was substantive," Hoffman said.

National Labor Relations Board v. S.W. General Inc.

The Supreme Court **in March** held that Lafe Solomon, a onetime acting National Labor Relations Board general counsel, improperly served as acting counsel while he awaited U.S. Senate confirmation to a permanent appointment. The 6-2 decision upheld the D.C. Circuit's conclusion that most of Solomon's three-year tenure violated the Federal Vacancies Reform Act.

The justices held that a portion of the FVRA prevents any individual who has been nominated to fill a so-called PAS position — in which an individual is nominated by the president and confirmed by the Senate — from performing the duties of that office in an acting capacity. The prohibition is also not limited to first assistants performing acting service, as the NLRB had argued, the justices said.

SW General Inc., which operates as Southwest Ambulance, had challenged the validity of an unfair labor practice complaint Solomon filed accusing the company of flouting the National Labor Relations Act.

But although the majority of Solomon's tenure was invalidated, the D.C. Circuit had gone out of its way to emphasize the narrowness of its ruling, finding that not every action taken by Solomon or any regional director on his behalf was void.

The circuit court said that employers would have had to have raised the FVRA issue surrounding Solomon's appointment during their own proceedings before the NLRB, as SW General did, to have standing for any decision to be voidable.

In any event, union lawyer David Rosenfeld of Weinberg Roger & Rosenfeld said there hasn't been any significant impact resulting from the ruling "because current general counsel [Richard Griffin] reaffirmed all complaints and actions as needed."

Kindred Nursing Centers Limited Partnership v. Clark

By **a 7-1 vote in May**, the high court ruled the Kentucky Supreme Court's refusal to compel arbitration in a wrongful death suit filed against a nursing home flouted the Federal Arbitration Act.

The Kentucky high court had said a state-law contract rule required individuals with powers of attorney to explicitly authorize such arbitration agreements.

But Justice Elena Kagan's opinion said the rule failed to put arbitration agreements "on an equal plane with other contracts."

The Kentucky high court's decision also contradicted the Supreme Court's 2011 ruling in AT&T Mobility LLC v. Concepcion, which said that the Federal Arbitration Act can preempt state laws prohibiting class action arbitration waivers, the justices said.

"This is just another example of this Supreme Court saying, 'We're going to support arbitration agreements,'" said Jon Yarbrough, a partner at Constangy Brooks Smith & Prophete LLP. "The [court's] support of the FAA is beyond clear at this point. The bigger question for next term is [whether] the [justices] give guidance for the use of class waivers."

The Supreme Court **granted cert in January** to a trio of cases that raise the issue, but pushed back considering those cases until next term. In two of them, the Seventh and Ninth circuits adopted the NLRB's long-standing position — first proffered in a case involving homebuilder D.R. Horton — that mandatory arbitration agreements containing class action waivers are not legal, while the Fifth Circuit ruled in the third case that they are valid.

"Mandatory arbitration provisions is the bigger issue that's coming up," said Brian Markovitz, a principal at Joseph Greenwald & Laake PC. "We're probably looking at a 5-4 decision striking the NLRB's rule."

Advocate Health Care Network v. Stapleton; Dignity Health v. Rollins; Saint Peter's Healthcare System v. Kaplan

In three consolidated cases that arose out of the Third, Seventh and Ninth circuits, the Supreme Court **unanimously ruled** that the Employee Retirement Income Security Act's religious exemption could extend to benefit plans maintained by organizations that are church affiliates, regardless of whether an actual church established the plan.

The ruling was a win for a trio of hospitals — Advocate Health Care Network in Illinois, Saint Peter's Healthcare System in New Jersey and Dignity Health in California — that had argued that a 1980 amendment to ERISA clarified that a church-affiliated organization, not a church itself, could maintain such a plan and still be exempt from ERISA's benefit plan requirements.

Eric Keller of Paul Hastings LLP noted that the three agencies who oversee ERISA — the U.S. Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corp. — have each already interpreted the statute in line with the high court holdings for decades.

"The ruling was very specific and limited to church plans … [and] shows the [Supreme] Court's focus on statutory text," Keller said.

Perry v. Merit Systems Protection Board

Near the end of its term, the high court **ruled that discrimination cases** before the Merit

Systems Protection Board — which hears cases by federal employees challenging serious adverse actions taken against them — should be appealed to a district court and not to the Federal Circuit. The ruling came in a case involving a U.S. Census Bureau worker who filed a lawsuit claiming he was forced into early retirement.

The high court's 7-2 ruling rejected the government's proposal to split review of jurisdictional dismissals of so-called mixed cases — when a government employee not only invokes the MSPB's jurisdiction by challenging an adverse action but also alleges discrimination — between the Federal Circuit and district court, saying it would overly complicate review.

Aside from jurisdictional requirements, this case is the one in which Justice Neil Gorsuch lodged his first dissent as a member of the nation's highest court.

Joined by Justice Clarence Thomas, Justice Gorsuch accused his colleagues of "tinkering" with a "perfectly good law" in his dissent, and said that legislation is the "constitutionally prescribed way" to fix statutes that need repair.

BNSF Railway Co. v. Tyrrell et al.

In May, the justices reversed a ruling by the Montana Supreme Court that individuals injured while working outside the state have the right to sue in the state even though they have no connection to it under both the Federal Employers Liability Act, a 1908 law that protects railroad workers injured on the job, and Montana state law.

The high court instead sided with BNSF Railway Co.'s argument that such suits must be brought in the state where the employer is incorporated or headquartered.

By **an 8-1 vote**, the panel said that a state court must follow the Supreme Court's 2014 decision in Daimler AG v. Bauman — which held that the due process clause forbids a state court from exercising general personal jurisdiction over a defendant that is not at home in the forum state — in a suit against an American defendant under FELA.

"It's very hard based on this decision to forum shop and go into a state where an injury didn't occur where you might get a better result," Steinberg said.

--Additional reporting by Braden Campbell, Y. Peter Kang and Jeannie O'Sullivan. Editing by Pamela Wilkinson and Jill Coffey.

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