3 Supreme Court Cases Employers Should Watch This Term

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The U.S. Supreme Court's last term stretched into the summer months due to delays caused by the COVID-19 crisis, but the new term will start as scheduled on Oct. 5. Here's what employers and HR professionals need to know about the upcoming term.

"If 2020 taught us anything, it's that it is pretty foolish to try to predict the future," observed Rich Meneghello, an attorney with Fisher Phillips in Portland, Ore. "That also applies to the Supreme Court and how we believe the justices will decide on certain cases."

Looking forward to the 2020-21 term, he said, court observers will continue to have a difficult time forecasting how the court will resolve disputes.

Justice Ruth Bader Ginsburg died on Sept. 18, leaving a vacancy on the court. "Our nation has lost a jurist of historic stature," said Chief Justice John Roberts Jr. in a statement. He added that Ginsburg was "a tireless and resolute champion of justice."

"Justice Ruth Bader Ginsburg was a champion for workplace equity. Her work towards eliminating discrimination and promoting gender equality cannot be understated, and her legacy will continue to shape workplaces of the future," said Emily M. Dickens, Society for Human Resource Management (SHRM) corporate secretary, chief of staff and head of government affairs.

More turnover on the high court is possible, as some justices might consider retiring. Justice Stephen Breyer is in his 80s; in addition, Justice Clarence Thomas has served on the high court for more than 25 years. The average tenure (https://www.supremecourt.gov/about/faq_justices.aspx) is 16 years.

The president has the authority to appoint justices to the Supreme Court with the confirmation of the U.S. Senate.

Few Employment-Related Cases

Craig O'Loughlin, an attorney with Snell & Wilmer in Orange County, Calif., and Phoenix, noted the lack of employment-related cases so far in the 2020-21 term's lineup. "There tends to be a blockbuster employment case each term," he said, such as last term's *Bostock* ruling (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/supreme-court-title-vii-scope-of-protection.aspx). In *Bostock*, the high court found that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

"There are really only a few cases that indirectly touch on employment in the new term," O'Loughlin said.

Confidential Information

"The most interesting, by far, is a case that will determine the limits employers can set when it comes to authorized access to work computers," Meneghello said.

Van Buren v. United States (https://www.scotusblog.com/case-files/cases/van-buren-v-united-states/) isn't directly employment-related. "It's a criminal case involving a police officer, an FBI sting operation, a prostitution ring, exotic dancers and unrequited love—your typical fact pattern," Meneghello joked. But the case will resolve a conflict about interpreting the Computer Fraud and Abuse Act (CFAA), which is often used by employers to sue employees or former employees who access electronic files on work computers.

The petitioner in the case didn't "break into the safe," so to speak, O'Loughlin explained, because he "had the keys." The petitioner was authorized to access information for specific reasons, but he used the information for an improper purpose. The high court has been asked to decide if he violated the CFAA.

Camille Olson, an attorney with Seyfarth Shaw, said this marks the first time the Supreme Court will review the CFAA. Currently, there is a disagreement in the courts about whether a person, including an employee, who is authorized to access certain information for a specific purpose violates this federal law by accessing the information for another purpose beyond the original authorization.

"If the Supreme Court rules that civil litigants, including employers, may use the CFAA to defend against unauthorized employee activities, it provides additional federal remedies to employers for damages that arise from any unauthorized usage that can be brought in a civil action in federal court," Olson explained. For example, under the CFAA, criminal penalties as well as damages and equitable relief are available. Olson further noted that "regardless of how the Supreme Court decides *Van Buren*, that ruling will not impact an employer's right to limit the use of its information to specific purposes and to discipline employees who utilize their access for a purpose outside the authorization."

Oral argument has been scheduled for Nov. 30.

ACA Individual Mandate

The Affordable Care Act (ACA) requires that most Americans either maintain a minimum level of health care coverage or pay a specified amount to the Internal Revenue Service. In 2012, the Supreme Court upheld this mandate (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/supreme-court-will-not-expedite-aca-challenge.aspx) as a legitimate exercise of Congress' taxing power. In 2017, and effective in 2019, Congress amended the ACA to set the penalty to zero, making the individual mandate provision unenforceable.

In two consolidated cases, *California v. Texas* (https://www.scotusblog.com/case-files/cases/california-v-texas/) *and Texas v. United States* (http://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf), the Supreme Court has been asked to decide whether reducing the penalty to zero rendered the minimum-coverage provision unconstitutional—and, if so, whether the rest of the ACA can remain enforceable without it.

The Small Business Majority Foundation said in a friend-of-the-court brief that the ACA provides "substantial benefits for small businesses, their employees, and the self-employed, by providing a means of acquiring affordable health insurance."

Texas and other states that challenged the ACA argued that "Congress may not use its power to regulate interstate commerce to order Americans to buy health insurance" and that the only reason the individual mandate survived a legal challenge was because it was "fairly possible" to read the ACA's mandate as a tax trigger. "Because the mandate raises no revenue, it can no longer be read as a tax," they wrote in a brief to the Supreme Court.

"In the meantime, compliance with the ACA's employer mandate and employer-reporting requirements are still in effect and employers should continue to comply with these requirements until the Supreme Court makes its ruling," explained Chatrane Birbal, vice president of public policy at SHRM.

Oral argument is scheduled for Nov. 10 in this case.

Arbitration Agreements

Questions about arbitration agreements frequently find their way to the Supreme Court. Some of these agreements include a clause stating that an arbitrator must decide the threshold question of whether an issue should be heard by an arbitrator or a court. In 2019, the Supreme Court held that arbitrators, not courts, should decide whether an arbitration agreement applies to a dispute—even when the language of the agreement suggests that a particular claim isn't covered by the contract—if the agreement gives arbitrators the power to make that threshold decision.

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The high court will revisit the case, *Henry Schein Inc. v. Archer and White Sales Inc.* (https://www.scotusblog.com/case-files/cases/henry-schein-inc-v-archer-and-white-sales-inc-2/), to answer what Meneghello called "a more nuanced question" that was raised in the appeals court on remand. Does an agreement that carves out certain claims—but generally delegates questions of arbitrability to an arbitrator—require that the arbitrator decide whether the carved-out claim is arbitrable?

That's a pretty technical question. But O'Loughlin said the answer will hopefully give employers clearer guidance on how to properly draft employment arbitration agreements and how clear the agreement has to be about whether the arbitrator can decide whether issues should be brought in arbitration or court.

Oral argument has been scheduled for Dec. 8.