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LABOR RELATIONS

Expert Analysis

Supreme Court Review: NLRB, ERISA Fair Share Laws, Affordable Care Act

Today's column is the second of two articles discussing decisions issued by the U.S. Supreme Court during the 2013-14 term that are significant for employers. More specifically, we address the court's rulings on the validity of the 2012 recess appointments to the National Labor Relations Board (NLRB), the constitutionality of state "fair share" laws, the enforceability of contractual limitations periods in benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), whether a special presumption of prudence applies to fiduciaries of Employee Stock Ownership Plans (ESOPs) and religious exemptions to the contraceptive mandate imposed under the Patient Protection and Affordable Care Act.

Recess Appointments

In a long-awaited decision, the court in *NLRB v. Noel Canning*, 134 SCt 2550 (2014), unanimously invalidated President Barack Obama's three recess appointments to the NLRB—members Sharon Block, Terence Flynn and Richard Griffin—made on Jan. 4, 2012. In doing so, the court made several rulings with respect to the Recess Appointments Clause of the U.S. Constitution, Art. II, §2, cl. 3,

By **John P. Furfaro**

And **Risa M. Salins**

which provides a subsidiary method for the president to appoint officers of the United States.

In this case, the NLRB found Noel Canning, a beverage distributor, had unlawfully refused to execute a collective bargaining agreement with a union and ordered it to do so. Noel Canning asked the U.S. Court of Appeals for the D.C. Circuit to set the order aside, claiming that three of the NLRB members had been invalidly appointed and that the NLRB consequently lacked a quorum for the order. The three recess appointments at issue had been made by the president during an intra-session recess while the Senate was operating in pro forma sessions, meeting every third business day. Such intra-session recess appointments occur during a break in the midst of a formal session of the Senate, as opposed to inter-session recess appointments, which occur between sessions of the Senate. The D.C. Circuit agreed with Noel Canning, holding the NLRB's ruling was invalid because the Recess Appointments Clause only permitted the president to make appointments during inter-session recesses and only to fill vacancies that came into existence during such recesses.

The Supreme Court affirmed but, unlike the D.C. Circuit, held that "vacancies" includes vacancies that come into existence while the Senate is in session and that "recess" includes intra-session recesses "of substantial length" in addition to inter-session recesses. However, the court also held that recesses of less than 10 days are presumptively too short to fall within the meaning of the clause. According to the court, the purpose of the recess appointment power is to enable the Executive Branch to function properly even when the Senate is unavailable. In the absence of any historical examples of recess appointments made during intra-session recesses shorter than 10 days, the court determined that the power is not necessary in such situations. Nonetheless, the court left open the possibility that some unusual circumstance—such as a national catastrophe—may justify the usage of the recess appointment power during a shorter period.

Justice Antonin Scalia concurred in the judgment but would have gone further than the majority. According to Scalia, the Founders only intended the Recess Appointments Clause to permit appointments during inter-session recesses and to fill vacancies that originated during the tenure of the recess.

While the composition of the current

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* KARA CHEEVER, *a summer associate at the firm, assisted in the preparation of this article.*

NLRB, which consists of five Senate-confirmed members as of Aug. 4, 2013, will not be altered, Noel Canning has potentially far-reaching implications. Under the Supreme Court's 2010 ruling in *New Process Steel*, 560 US 674 (2010), the NLRB must have a three-member quorum to operate. In finding the recess appointments of members Block, Flynn and Griffin invalid, this decision calls into question over 700 NLRB opinions issued during their tenure.

Agency Fees

In *Harris v. Quinn*, 134 SCt 2618 (2014), the court, in a 5-4 decision, determined that the First Amendment prohibits a public-employee union from collecting "agency fees" from home health care workers who do not want to join or support the union. In an opinion written by Justice Samuel Alito, the court first distinguished this case from *Abood v. Detroit Board of Education*, 431 US 209 (1977), which held that state employees who choose not to join public-sector unions may nevertheless be required to pay agency fees to support union work. The court determined that, unlike the workers in *Abood*, the workers in this case were only "partial public" employees. Although the state of Illinois paid the workers from its federally subsidized Medicaid fund, the individuals receiving the home care had complete authority to hire, supervise, evaluate, and discharge the workers.

After finding *Abood* was not controlling in this case, the court held the agency-fee provision in the Illinois Public Labor Relations Act violated the First Amendment. This provision required home health care workers, who were not members of the union but part of the bargaining unit, to pay their "fair share" of union dues. According to the court, the agency-fee provision did not achieve a compelling state interest that could not be achieved through less restrictive means. As such, the provision was found to violate the First Amendment, which prohibits states from compelling individuals to subsidize third-party speech.

Harris v. Quinn is expected to have widespread implications for the home health care industry, as many other states besides Illinois have established similar agency-fee arrangements with home care workers based on Medicaid reimbursements.

ERISA Claims

Two unrelated cases this term, *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 SCt 604 (2013), and *Fifth Third Bancorp v. Dudenhoeffer*, 134 SCt 2459 (2014), involved the interpretation of ERISA. Both decisions were unanimous.

> In invalidating President Obama's three recess appointments to the NLRB, the court made several rulings with respect to the Recess Appointments Clause.

In the first case, *Heimeshoff v. Hartford Life & Accident Insurance Co.*, the court decided that reasonable contractual limitations periods in employee benefit plans governed by ERISA are enforceable, absent a controlling statute to the contrary. Furthermore, the court noted that a limitations period may be reasonable and enforceable even if a cause of action only accrues after the limitations period has run.

The petitioner, a senior public relations manager, suffered from chronic pain and fatigue that interfered with her ability to work. She stopped working and filed a claim for long-term disability benefits with Hartford Life & Accident Insurance Co., the administrator of her employer's Group Long Term Disability Plan. After more than two years, Hartford issued a final denial of her claim, concluding she was able to perform the activities required by her occupation.

The long-term disability plan required any suit to recover benefits pursuant to ERISA to be filed within three years after "proof of loss" was due. The petitioner filed suit in district court within three years after the final denial of her claim, but more than three years after proof of loss was due.

The court determined that the three-year contractual limitations provision was enforceable and affirmed the lower court's dismissal of the petitioner's claim as untimely. In doing so, the court found there was no controlling statute to the contrary and the contractual limitations period was not unreasonable. It explained that administrative review of "mainstream" claims are usually resolved within a year, leaving two years for the participant to file suit, and even where the review process requires more time than usual, such as here, the participant still was left with approximately a year to file suit. Moreover, the court noted that the enforceability of such limitations provisions is especially suitable in the context of an ERISA plan because ERISA specifically authorizes a participant to bring suit to recover benefits, clarify rights, or enforce rights "under the terms of the plan." 29 USC §1132(a)(1)(B).

ESOP Fiduciaries

In the second ERISA case, *Fifth Third Bancorp v. Dudenhoeffer*, the court rejected a "presumption of prudence" for ESOP fiduciaries with respect to the fiduciaries' decisions to buy or hold employer stock. Instead, the court held the same duty of prudence that applies to all ERISA fiduciaries applies to ESOP fiduciaries, except ESOP fiduciaries need not diversify the assets of the ESOPs.

Most circuit courts had previously embraced a defense-friendly standard for ESOP fiduciaries, consisting of a presumption that ESOP fiduciaries acted prudently in their decisions to invest in employer stock (i.e., a presumption of prudence). Plaintiffs could only overcome this presumption if there was evidence that the company was on the brink of collapse or undergoing serious mismanagement.

The plaintiffs in *Dudenhoeffer*, former employees of Fifth Third, had invested in Fifth Third stock through their ESOP. The stock price plummeted 74 percent between July 2007 and September 2009, at which time the plaintiffs filed a putative class action. The plaintiffs claimed the fiduciaries overseeing the ESOP violated ERISA's duty of prudence by continuing to invest in employer stock despite knowing that investment was unwise in light of publicly and nonpublicly available information.

The federal district court dismissed the complaint, finding the complaint's allegations failed to overcome the presumption that the fiduciaries were reasonable in their continued investment in company stock. The U.S. Court of Appeals for the Sixth Circuit reversed, holding such presumption of prudence was evidentiary only and immaterial at the pleading stage.

In an opinion written by Justice Stephen Breyer, the court determined there is no special presumption of prudence for ESOP fiduciaries regarding company stock; rather, the same standard of prudence applies to ESOP fiduciaries as to all ERISA fiduciaries. Nonetheless, the court recognized the need to "weed out" meritless claims against ESOP fiduciaries. In order to weed out meritless claims based on publicly available information, the court laid down several considerations that courts should apply in evaluating whether allegations against ESOP fiduciaries meet the pleading standards previously set forth in *Ashcroft v. Iqbal*, 556 US 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).

The court held that "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." Here, the court found the Sixth Circuit improperly denied dismissal of the claims based on publicly available information, as there was no evidence of special circumstances indicating that reliance on the company's market price was imprudent.

The court also set forth three considerations to inform courts' analyses with respect to claims alleging that ESOP fiduciaries were imprudent by neglecting to act on the basis of nonpublic information. First, ERISA's duty of prudence cannot require an ESOP fiduciary to take an action—such as divesting the ESOP's holdings of the employer's stock on the basis of inside information—that would violate securities laws.

> In 'Harris,' the court held the agency-fee provision in the Illinois Public Labor Relations Act violated the First Amendment. This provision required home health care workers, who were not members of the union but part of the bargaining unit, to pay their "fair share" of union dues.

Second, courts must consider the complexities of insider trading and corporate disclosure requirements when complaints allege fiduciaries should have known to refrain from purchasing additional company stock or to disclose particular information to the public on the basis of inside company knowledge. In other words, courts should contemplate whether imposing an ERISA-based obligation, either to refrain from making a trade on the basis of insider information or to disclose information to the public, could conflict with federal securities laws.

Third, courts must consider whether a prudent fiduciary in the respective fiduciary's position would have concluded that stopping purchases of company stock or disclosing information to the public "would do more harm than good to the fund." For instance, a prudent fiduciary may conclude that stopping purchases of company stock or disclosing information to the public would cause a decrease in the value of the stock held by the fund. Thus, the judgment of the Sixth Circuit was vacated and the case was remanded for the lower court to apply the abovementioned considerations.

Religious Objections

While not an employment law case, the highly publicized decision in *Burwell v. Hobby Lobby Stores*, No. 13-354 (June 30, 2014), may impact the health insurance coverage that certain employers offer to their employees. In this controversial case, the court considered the legality of the Department of Health and Human Services' regulations promulgated pursuant to the Patient Protection and Affordable Care Act of 2010. More specifically, the regulations at issue mandated that nonexempt employers, such as closely held for-profit corporations, provide contraceptive coverage for their women employees. The court, divided 5-4, held that, as applied to closely held corporations, such contraceptive mandate violated the Religious Freedom Restoration Act of 1993, which prohibits laws that substantially burden a person's free exercise of religion.

In dissent, Justice Ruth Bader Ginsburg, joined by Justices Sonia Sotomayer, Stephen Breyer, and Elena Kagan, questioned the appropriateness of permitting for-profit entities to claim religious exemptions from statutorily required duties. Ginsburg fears the court has "ventured into a minefield" in which it will be difficult to evaluate the sincerity of companies' differing religious claims.