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Expert Analysis

Supreme Court Review: Fiduciary Duty, Conciliation, FLSA, Agency Action

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This is the first of two columns discussing U.S. Supreme Court decisions from the 2014-2015 term in the area of labor and employment law of significance for employers. This month we review rulings pertaining to an employer's fiduciary duty to monitor plan investments, judicial review of the Equal Employment Opportunity Commission's efforts at conciliation prior to litigation, compensation for time spent waiting to undergo security screenings, and whether an administrative agency's changes to its interpretive rules are subject to notice-and-comment rulemaking under the Administrative Procedure Act.

Fiduciary Duty

In *Tibble v. Edison International*, 135 SCt 1823 (2015), the Supreme Court unanimously held on May 18, 2015, that the six-year statute of limitations for fiduciary duty claims under the Employee Retirement Income Security Act (ERISA) does not bar a claim brought more than six years after a plan investment was selected, if the claim alleges the fiduciary failed to prudently monitor the investment within the limitations period. Although the court explicitly declined to define the parameters of the duty to monitor plan investments, this ruling will make it easier for plan participants to challenge plan fiduciaries' retention of investment options within 401(k) plans.

> The court in 'Mach Mining' held that a court may review the EEOC's efforts to conciliate discrimination charges before filing a lawsuit, but the scope of judicial review is narrow.

ERISA imposes on plan fiduciaries a duty of prudence that requires a fiduciary to "discharge his duties with respect to a plan… with the care, skill, prudence, and diligence" that a prudent person would use under similar circumstances. 29 USC §1104(a)(1)(B). *Tibble* involved beneficiaries of the Edison International 401(k) Savings Plan who brought suit against Edison International and other plan officials in 2007, seeking to recover damages from losses to the plan. The beneficiaries claimed defendants acted imprudently when investing in retail-class mutual funds when materially identical lower priced institutional-class funds were available.

The U.S. Court of Appeals for the Ninth Circuit found plaintiffs' concerns raised in 2007 over investments made in 1999 untimely under the statutory bar contained in Section 1113 of ERISA. Section 1113 states in relevant part that a breach of fiduciary duty complaint is timely if filed no more than six years after the date of the last action by the fiduciary which constituted a part of the breach or violation. 29 USC §1113. The Ninth Circuit rejected plaintiffs' argument that their claims remained timely because defendants committed a continuing breach of fiduciary duty for so long as the challenged investments remained as options within the plan. The Ninth Circuit reasoned plaintiffs had not successfully shown "a change in circumstances that might trigger an obligation to review and to change investments within the 6-year statutory period."

The Supreme Court vacated the decision and remanded the case back to the Ninth Circuit for further consideration in light of trust law principles from which ERISA's duty of prudence is derived. Under such principles, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones… separate and apart from the trustee's duty to exercise prudence in selecting

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investments from the outset." Thus, a claim alleging defendants failed to prudently monitor investments still could be deemed timely as long as the alleged failure to monitor occurred within the limitations period. The court remanded the case to the Ninth Circuit to address the scope of such duty to monitor.

EEOC Conciliation

In a highly anticipated decision, a unanimous Supreme Court in *Mach Mining v. EEOC*, 135 SCt 1645 (2015), held on April 29, 2015, that a court may review the EEOC's efforts to conciliate discrimination charges before filing a lawsuit, but the scope of judicial review is narrow. The court also ruled the appropriate remedy when the EEOC fails to conciliate is not dismissal of the lawsuit but an order requiring the EEOC to conciliate before moving forward, ending a longstanding split among federal courts on this issue.

Section 2000e-5(b)of Title VII of the 1964 Civil Rights Act requires the EEOC, before commencing a lawsuit against an employer, to "endeavor to eliminate alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 USC §2000e-5(b). If the EEOC "has been unable to secure from the respondent a conciliation agreement acceptable to the [EEOC]," the EEOC may sue the employer in federal court. 42 USC §2000e-5(f)(1).

In *Mach Mining*, a complainant filed an EEOC charge alleging Mach Mining refused to hire her as a coal miner because of her sex. The EEOC sent two letters, one inviting both parties to engage in informal methods of dispute resolution and the other (a year later) stating that attempts at conciliation had been unsuccessful. The EEOC then sued Mach Mining in federal court alleging sex discrimination. The district court agreed with Mach Mining's assertion that the EEOC had failed to conciliate in good faith and denied the EEOC's motion for summary judgment on that issue. The U.S. Court of Appeals for the Seventh Circuit reversed the district court, holding the statutory directive to attempt conciliation is not subject to judicial review.

The Supreme Court granted certiorari to decide whether and how courts should review the EEOC's informal methods of dispute resolution. Applying the "strong presumption" favoring judicial review of administrative action, the court concluded Congress intended courts to have the authority to review the EEOC's conciliation efforts. With regard to the scope of judicial review, the court rejected Mach Mining's request for a "deep dive" into the conciliation process. Instead, it determined a "limited review respects the expansive discretion that Title VII gives to the EEOC over the conciliation process, while still ensuring that the [EEOC] follows the law."

In a long-awaited decision, the court in 'Perez v. Mortgage Bankers Association' unanimously held that federal agencies do not need to use the notice-and-comment procedures specified by the Administrative Procedure Act in order to significantly revise an interpretive rule.

Although the court did not issue a bright-line test for determining what efforts would satisfy the EEOC's obligations, the court stated the EEOC must inform the employer about the specific allegation and which employees (or class of employees) have suffered as a result. And the EEOC must attempt to engage the employer in a discussion "so as to give the employer the opportunity to remedy the allegedly discriminatory practice." The court further held a sworn affidavit from the EEOC stating that it has performed such obligations but its efforts have failed will usually suffice to show it has met the conciliation requirement.

Compensable Time

In *Integrity Staffing Solutions v. Busk*, 135 SCt 513 (2014), the Supreme Court unanimously held that time spent waiting to undergo and undergoing anti-theft security screenings before leaving the workplace is not an integral and indispensable part of the employee's principal activities, and therefore is not compensable under the Fair Labor Standards Act, 29 USC 201, et seq. (FLSA).

Integrity Staffing Solutions required its hourly warehouse workers to undergo security screenings before leaving the warehouse each day. Former employees sued the company alleging the roughly 25 minutes each day associated with waiting for the screenings and the actual screenings was compensable under the FLSA. They also alleged this time could have been minimized to a "de minimis amount" if the employer added security screeners or staggered the termination of shifts.

The district court dismissed the complaint, reasoning the screenings, which occurred after regular work shifts, were not an "integral and indispensable" part of the employees' principal activities. The Ninth Circuit reversed, in relevant part, holding post-shift activities like security screenings are compensable because they are required by the employer to prevent theft and thus necessary to the principal work performed and done for the benefit of the employer.

In a unanimous opinion written by Justice Clarence Thomas, the Supreme Court reversed. Applying dictionary definitions of "integral" and "indispensable,"

the court determined that an activity is "integral and indispensable to the principal activities…if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." The court gave special attention to the Portal-to-Portal Act, which amended the FLSA to address the question of compensable time. The Portal-to-Portal Act exempts employers from offering compensation for (1) travel to work unrelated to the employees' performance of the principal activity they are employed to perform and (2) activities that are "preliminary or postliminary to said principal activity or activities." 29 USC §254(a)(1).

The court found the security screenings in *Integrity Staffing* to be noncompensable postliminary activities because they were not a principal activity of the work performed or an intrinsic part of the employees' duties. It reasoned that Integrity Staffing did not employ its workers to undergo security screenings, but rather to retrieve products from warehouse shelves and package those products for shipment. The court also rejected the argument that the time was compensable because the employer could have reduced the waiting time to a de minimis amount, noting this was a topic that could be addressed through collective bargaining.

Justice Sonia Sotomayor's concurrence, joined by Justice Elena Kagan, distinguished the security screenings at issue here from a principal workplace activity by finding the security checks were not work of consequence that the employees performed for their employer.

Interpretive Rules

In a long-awaited decision, the Supreme Court in *Perez v. Mortgage Bankers Association*, 135 SCt 1199 (2015), unanimously held that federal agencies do not need to use the notice-and-comment procedures specified by the Administrative Procedure Act, 5 USC §551 et seq (APA), in order to significantly revise an interpretive rule. In so holding, the court struck down a doctrine established by the U.S. Court of Appeals for the D.C. Circuit in *Paralyzed Veterans of Am. v. DC Arena*, 117 F3d 579 (D.C. Cir. 1997), which required a federal agency to use notice-and-comment rulemaking procedures when it wished to substantially alter an interpretive rule.

As background, in 1991 and 2001 the Department of Labor Wage and Hour Division issued opinion letters stating that mortgage-loan officers did not qualify for the administrative exemption to overtime pay requirements under the FLSA. In 2004, the Labor Department revised its FLSA regulations to provide for several examples of exempt administrative employees, including "[e]mployees in the financial services industry." 29 CFR §541.203. In 2006, in response to a request from the Mortgage Bankers Association to interpret the revised regulations, the Labor Department issued a new opinion letter finding mortgage-loan officers fall under the FLSA's administrative exemption. However, in 2010, upon further review of the 2004 regulations, and without notice or comment, the Labor Department again changed position and issued an Administrator's Interpretation finding mortgage-loan officers not to be exempt. The Mortgage Bankers Association filed suit against the Labor Department contending that the Administrator's Interpretation was procedurally invalid under the Paralyzed Veterans decision.

In granting summary judgment to the Labor Department, the district court held the Paralyzed Veterans doctrine did not apply to the Labor Department's interpretive rule because the Mortgage Bankers Association did not rely on the Labor Department's 2006 opinion letter and the administrator's 2010 interpretation was fully supported by the text of the 2004 regulations. The D.C. Circuit reversed the district court, finding the 2010 interpretation had to be vacated because of the conflicting 2006 interpretation of the same 2004 regulations.

The Supreme Court, in a unanimous opinion, reversed the D.C. Circuit. The court stated the APA expressly exempts interpretive rules from notice-and-comment requirements, 5 USC §553(b)(A), and held that exemption applied equally when agencies amend or repeal existing interpretive rules. The court struck down the Paralyzed Veterans doctrine, finding it improperly impose[d] on agencies an obligation beyond the maximum procedural requirements specified in the APA. Justice Sotomayor wrote:

> Time and again, we have reiterated that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." (citations omitted)

In response to other justices' concerns relating to potential agency abuse, Sotomayor noted that radical departures from previous agency policy decisions are subject to the APA's arbitrary and capricious standards. 5 USC §706(2)(A).

Our next column will discuss the remainder of the cases decided by the Supreme Court this term in the area of labor and employment law.