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I.

INTRODUCTION

2016 will certainly be regarded as one of the most interesting political years in our country's history. While we routinely select a new President at least every eight years, the events of the 2016 presidential campaign and election are emblazoned on all of our minds as a watershed period in America's history:

- A woman was nominated as a major party's presidential candidate for the first time in history;
- A businessman, and not a politician, was nominated as a presidential candidate for the first time in history;
- A 75 year old avowed socialist captured the votes of the younger generation
- The pollsters, whether Gallup, Rasmussen, Quinnipiac or others, got it wrong in their predictions of winners and losers;
- The "Inside the Beltway" types in both major political parties got it wrong.

The unpredicted result of Donald Trump winning the election and becoming the 45th President of the United States continues to confound everyone in terms of what to expect generally on many fronts – and the labor and employment arena is no exception.

Key governmental agencies affecting labor and employment issues remain without anyone in key positions. Labor/employment initiatives have taken a back seat to key campaign initiatives, such as immigration, healthcare and tax reform.

Employers wait expectantly for employer-friendly legislation and executive orders, while existing laws, regulations and executive orders from the Obama administration, for the near term, remain firmly in place.

The judiciary is no exception. While Justice Gorsuch, a replacement for Justice Scalia, has been confirmed, over 20 judicial seats on the courts of appeal and 101 judicial seats at the district court level remain unfilled.

All of the above provides uncertainty for employers, for unions and employees; and for labor and employment lawyers.

In past years, this presentation has focused on the lack of action and gridlock in Washington D.C. In many ways, despite Republican control of the House, Senate and the White House, that is where we still find ourselves.

II.
2016-2017: AGENCIES, LAWS, REGULATIONS AND EXEUTIVE ORDERS

Despite high hopes, conservatives are still waiting for even one new piece of significant/pro-business employment legislation. Healthcare has thus far consumed all of the air in the room. A Labor and Employment "Wish List" for the Trump Administration is not readily apparent from either the campaign website or the current www.whitehouse.gov site. Many have nevertheless speculated on a likely priority list based on President Trump's public statements, both as a candidate and as President. This "likely" list of labor and employment initiatives includes:

- A possible federal minimum wage of $10.00 an hour;
- Promotion of National parental leave program to provide six weeks of paid family leave for new and adoptive parents;
- Closing the gender pay gap;
- A boost of the prevailing wage for H-1B workers;
- Adopting a National E-verify system;
- Eliminating "Blacklisting," Fair Pay and Safe Workplaces Executive Orders, as part of bidding process for federal contractors;
- Modification or Elimination of the NLRB Joint Employer Standard;
- Overturning the NLRB "Quickie" Union Election Rules;
- Eliminating or Modifying the DOL "White Collar" Overtime Rules;
- Stopping NLRB activism on Arbitration Agreements and Class Waivers;
- Eliminating or modifying the DOL Persuader Rule;
- Repealing and Replacing the Affordable Care Act;
- Merger of EEOC and OFCCP.

A. AGENCY LEADERSHIP:

While appointments for Agency positions are lagging, progress has been made by appointment (and confirmation of) the following:

Department of Labor:

- Secretary of Labor, Alex Acosta – confirmed 04/27/17;

National Labor Relations Board:

- Chairman of NLRB Member Philip A. Miscimarra named Chair;

Equal Employment Opportunity Commission:

- Republican EEOC Commissioner Victoria Lipnic named as acting Chair;

Other Key Positions Remaining Open Include:

- Administrator of the Wage and Hour Division;
- Head of OSHA;
- Head of OFCCP;
- Head of EBSA (Employee Benefits Security Administration); and
- Two Open Republican Board Seats (although names of two appointees have been announced: Bill Emmanuel, Littler and Marvin Kaplan, OSHA);
- One Republican seat on the Commission is vacant;
- One Democrat seat opens up in July 2017 and a Republican will be appointed for that seat; and
- EEOC General Counsel position is open.

B. AGENCY DEVELOPMENTS

1. Equal Employment Opportunity Commission:

At present, the EEOC balance is in favor of Democrat-appointed Commissioners, with three current Democrat appointees and one Republican (Chair Lipnic). This balance is expected to change this year as new Republican Commissioners are appointed. For now, the EEOC's focus for FY 2017 will likely remain unchanged. The anticipated trends from the EEOC will include:

1. Continued focus on Systemic Investigation and Related Litigation;

2. Continued focus on attacking barriers to hiring;

3. Continued close review of alternative work arrangements;

4. Focus on sexual and other forms of workplace harassment, including systemic harassment;

5. Focus on diversity in the Tech Sector, including the underrepresentation of women, African Americans and Hispanics in that field;

6. Disability Discrimination;

7. Pay Equality;

8. Age Discrimination (the ADEA turns 50 this year); and

9. LGBT coverage under Title VII.

Fiscal year 2016 EEOC Charge Statistics

Fiscal Year 2016 saw a slight increase in EEOC Charge filings, with 91,503 charges filed, an increase of 1.85% over 89,836 Charges in fiscal year 2015, but still short of the elusive 100,000 Charges mark and of the 2011 historically high total of 99,947 charges filed.

Types of Charges filed in FY 2016 by ranking include:

Retaliation	45.9%
Race	33.3%
Sex	29.4%
Disability	30.7%
Age	22.8%
National Origin	10.8%
Religion	4.2%
Color	3.4%

EEOC litigation filings were down with only 86 lawsuits filed in 2016. This number represents a new low for lawsuits filed by the EEOC in recent years: 142 filed in 2015, 133 filed in 2014, and 131 filed in 2013).

Monetary recovery, in mediation in 2016 grew to $163.5 million over $157.4 million in 2015.

What About the Revised EEO-1 Form?

While pay equity remains a key focus for 2017, the updated EEO-1 form set to become part of annual reporting in March 2018, may not survive. Chair Lipnic does not believe the changed form will aid identification of discrimination in hiring and believes the new form is based on flawed methodology. Nothing will happen to the new form until the balance of the Commission shifts to 3-2 Republican/Democrat Commissioners, which should occur before March 2018.

2. Department of Labor:

With key positions unfilled, even with new DOL Secretary of Labor Acosta in place, policy changes are uncertain at present.

At a minimum, new rules are in limbo and may never become final. These include

1. OSHA:

   - Electronic Accident Reporting Rule;
   - Union Agents allowed to participate in OSHA inspections of non-union workplaces;
   - Crystalline Silica and Beryllium Rules;

2. EBSA (Employee Benefits Security Administration):

   - Fiduciary Rule broadening definition to advisers of retirement investors
     - Secretary Acosta has recently left in place a key date of June 9, questioning the ability to stop the rule at this point.
     - Trump has directed the DOL to ensure that the rule does not adversely affect the ability of retirees to gain access to financial advice. The current projection is that while "tweaks" may occur, the rule will go forward.

3. OFCCP (Office of Federal Contract Compliance Programs):

   - Federal Contractor Executive Order (EO 13673):
     - Blacklisting – currently enjoined and cannot be reinstated without Congressional action;
     - GBLT Anti-discrimination EO 13672 will remain in effect.
   - Others Initiatives or Executive Orders in Doubt:

- $10.20 minimum wage with annual increase;
- Paid sick leave of 56 hours a year;
- Project Labor Agreement encouraging contractors to recognize unions

4. Wage and Hour Division:

- White Collar Overtime Regulations setting the minimum exempt salary at $47,476 annually with automatic annual increases beginning January 1, 2020
  - Stayed on hold, perhaps indefinitely, briefing deadlines in the Fifth Circuit continue to be pushed back by the DOL;
  - Rumored as potentially being recast with $30,000 as salary minimum – a more modest increase;
- Targeted Initiatives;
- Independent Contractor focus;
- Joint Employment focus (including franchises); and
- Potential Revival Opinion Letters.
- Opportunities for Action at Wage and Hour Division:
  - Update of the computer employee exemption;
  - Expanding inside sales exemption to all commissioned employees;
  - Reinstating the overtime exemption for home care workers;
  - Allowing comp time in the private sector (already proposed in House);
  - Centering on affirmative defense to willfulness and liquidated damages under the FLSA; and
  - Excluding some types of bonuses from the regular rate calculation.

III.
2016-2017 UNITED STATES SUPREME COURT DECISIONS

A. INTRODUCTION

Until Justice Neil Gorsuch's confirmation on April 7, 2017, the Court operated for over a year without nine justices and a tie-breaking vote. The future of the "balance" of the Supreme Court is unknown, given the current ages of three of the Supreme Court Justices (Justice Ginsburg, 84, Justice Kennedy, 80 and Justice Breyer, 78), and the prospect that President Trump may have the opportunity to nominate one or two more Supreme Court Justices during his Presidency.

Labor and employment decisions of the Court in the last year have included:

B. DECISIONS OF THE COURT:

1. *Kindred Nursing Centers L.P. v. Clark*: Supreme Court Strikes Down Kentucky Rule Discriminating Against Arbitration and Upholding Arbitration Agreement under FAA.

On May 15, 2017, the U.S. Supreme Court reiterated the principle that the Federal Arbitration Act (FAA) requires states to treat arbitration agreements just as they treat other types of contracts. In *Kindred Nursing Centers L.P. v. Clark*, the Court reversed in part a decision of the Kentucky Supreme Court, which had instituted a new rule chipping away at the enforceability of arbitration agreements under certain circumstances.[1] Justice Kagan wrote the majority 7-1 opinion and, moreover, was joined by other liberal-leaning members of the Court.[2] While newly-confirmed Justice Gorsuch did not participate, the Kindred Nursing Centers decision reaffirms the Supreme Court's continued commitment to uphold arbitration agreements under the FAA to the greatest extent possible.

Background

The case stems from arbitration agreements entered into by relatives of two residents who lived in a nursing home, The Winchester Centre, operated by Kindred Nursing Centers. The two residents had executed powers of attorney granting their relatives authority to make contracts on their behalf and otherwise manage their affairs. Pursuant to that authority, the relatives executed arbitration agreements with Kindred Nursing Centers when completing paperwork for the residents to move into The Winchester Centre. Those arbitration agreements required the parties to submit all claims or controversies to binding arbitration.

The residents died the following year, and their estates (represented by their relatives) separately sued Kindred Nursing Centers for alleged substandard care. Kindred Nursing Centers sought dismissal of the lawsuits based on the arbitration agreements, but the Kentucky courts rejected

[1] No. 16-32 (May 15, 2017). The Supreme Court's opinion is available at https://www.supremecourt.gov/opinions/16pdf/16-32_o7jp.pdf (https://www.supremecourt.gov/opinions/16pdf/16-32_o7jp.pdf).

[2] Only Justice Thomas dissented, based on his longstanding view that the FAA does not apply to state court proceedings.

the motions. The Kentucky Supreme Court consolidated the cases and, agreeing with the lower courts, invalidated the arbitration agreements. The Kentucky Supreme Court first explained that the language of the resident's power of attorney was not broad enough to authorize his relative to enter into an arbitration agreement on his behalf. The court then announced a new rule applicable to both—and all—powers of attorney. Based on the Kentucky Constitution, the Kentucky Supreme Court held that a power of attorney could never grant authority to execute an arbitration agreement unless it specifically said so.

Supreme Court Decision

The U.S. Supreme Court swiftly dismantled the Kentucky Supreme Court's "clear-statement" ruling. The Court stressed that the FAA requires equal treatment of arbitration agreements and "thus preempts any state rule discriminating on its face against arbitration."[3] The Court went further, stating that the FAA "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have defining features of arbitration agreements."[4] Because the Kentucky Supreme Court's rule was tailored to disfavor arbitration agreements, it "flouted the FAA's command to place those agreements on an equal footing with all other contracts."[5] The Court therefore struck the Kentucky Supreme Court's rule and remanded the case to the Kentucky Supreme Court for further proceedings.[6]

While the Kindred Nursing Centers case arose in a narrow, consumer setting, the Supreme Court's opinion likely carries broader ramifications. Even without Justice Scalia, the Court shows no interest in retreating from its vigorous defense of arbitration agreements. If anything, the opinion indicates that the Court may be willing to intensify its scrutiny of state laws or legal interpretations that undermine the enforceability of such agreements. The Court rebuffed an argument, raised by the relatives, that the states should have the liberty to regulate contract formation, if not enforcement. The Court found that this reasoning "would make it trivially easy for [s]tates to undermine the [FAA]—indeed, to wholly defeat it."[7] Overall, the Court seemed put off by Kentucky's attempts to discriminate against arbitration.

The Court's tough talk should apply with equal force to arbitration-related rules in the employment law context as well. For example, the principles espoused in Kindred Nursing Centers may bode ill for the newly-enacted section 925 of the California Labor Code. That provision, which took effect January 1, 2017, prohibits an employer from requiring an employee "who primarily resides and works in California, as a condition of employment, to agree to a

[3] *Kindred Nursing Centers, L.P.*, No. 16-32 at 4.

[4] *Id.* at 5.

[5] *Id.* at 9.

[6] Specifically, the U.S. Supreme Court held that Kentucky courts must enforce the arbitration agreement executed by one of the relatives (Janis) on behalf of one of the residents (Olive), given their ruling that the underlying power of attorney was broad enough to authorize Janis to make such an agreement. The Court vacated the judgment as to the arbitration agreement executed by the other relative (Beverly) on behalf of the other resident (Joe) because the Kentucky Supreme Court had concluded that the underlying power of attorney did not grant Beverly the same authority. The court instructed the Kentucky Supreme Court to review its prior interpretation of that power of attorney, now that the "clear-statement" rule had been eliminated. *Id.* at 9-10.

[7] *Id.* at 8.

provision that would … [d]eprive the employee of the substantive protection of California law." The law primarily targets choice-of-law and choice-of-venue provisions. Nonetheless, the legislative history indicates that the new law was intended in part to limit the freedom to enter into arbitration agreements, placing it in the crosshairs of Kindred Nursing Centers.[8]

The decision and its focus on calling out "covert" attempts to undermine arbitration could also bode well for attacks on California state and federal court's invalidation of Private Attorney General Act (PAGA) waivers. Recently, Bloomingdale's filed a petition for certiorari in *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110. The Petition for Certiorari and Litter's Amicus Brief on behalf of the National Retail Federation argue that PAGA claims are nothing more than manufactured public policy exceptions to the Federal Arbitration Act. The Kindred decision reiterates the preeminence of the FAA and the prohibition against states interfering with enforcement of private arbitration agreements.

Although the Kindred decision is a strong endorsement of the FAA, it is unclear if the 7-1 majority opinion will carry over into decisions affecting enforcement of class action waivers. In the upcoming October term, the Supreme Court will address the enforceability of class action waivers in employment arbitration agreements. *Ernst & Young LLP v. Morris*, 2017 U.S. LEXIS 689 (Jan. 13, 2017) (granting certiorari and consolidating with Lewis and Murphy Oil).

The Kindred decision is similar to the Supreme Court's recent opinion in *Directv, Inc. v. Imburgia*. In that decision, in which Justice Breyer was joined by Justice Kagan and four conservative justices, the Court also stressed the preemptive power of the FAA. These decisions seem to indicate strong support for arbitration and the FAA by a majority of the Court. However, in previous decisions addressing class waivers in arbitration, the liberal-leaning justices have uniformly opposed class waivers. This strong support for arbitration may or may not translate into support of class action waivers.

2. ***McClane Co. Inc. v. Equal Employment Opportunity Commission*: ; Supreme Court Decides Abuse of Discretion Standard Applies to Court Ruling on EEOC Subpoena.**

On April 3, 2017, in a 7-1 decision, the Supreme Court refused to follow a Ninth Circuit ruling applying a de novo standard to appellate review of a district court's ruling refusing to enforce an EEOC subpoena. The Court instead held that the Ninth Circuit should have used a more deferential abuse of discretion standard in reviewing the trial court's decision.

The Ninth Circuit had ordered the employer to comply with the EEOC's request for "pedigree information" (i.e., name, Social Security number, last known address, and telephone number) based on a subpoena enforcement action after the EEOC expanded its investigation of an individual sex discrimination charge (based on pregnancy) stemming from the Charging Party's termination because she failed to pass a required strength test on her return to work.

[8] *See Scott McDonald & Jim Hart*, New California Law Prohibits Choice of Law and Venue in Employment Contracts (https://www.littler.com/publication-press/publication/new-california-law-prohibits-choice-lawand-venue-employment-contracts), Littler Insight (Oct. 3, 2016).

The employer maintained that all new employees and employees returning from medical leave had to take the test. The Charging Party's termination occurred after she took the test three times and failed to receive a passing score. During the investigation, the employer disclosed that it used the strength test at its facilities nationwide for all positions classified as physically demanding. The EEOC ultimately expanded its investigation nationwide for the division in which the Charging Party was employed and required the pedigree information for all those who had taken the test. For all those who were terminated after taking the test, the EEOC requested the reason for termination.

The subpoena enforcement action arose after the employer failed and/or refused to provide the requested information. The district court concluded that the EEOC did not need to know the pedigree and related information to determine whether the Company used the test to discriminate on the basis of sex and refused to enforce the subpoena. The Ninth Circuit reversed, using a de novo standard of review to overturn the trial court's decision that the grocery distributor, McLane Co, Inc. had to turn over such information as part of a gender discrimination investigation.

Rejecting a "scheme of double deference" to the EEOC, the decision highlights that federal courts do not have to defer to the EEOC as to the proper scope of agency discovery and provides support for parties to challenge EEOC subpoenas based on both relevance and as unduly burdensome.

3. ***National Labor Relations Board v. SW General, Inc.*: U.S. Supreme Court Strikes Down Appointment of Former NLRB General Counsel.**

On March 21, 2017, the U.S. Supreme Court affirmed the D.C. Circuit's holding that former President Barack Obama's appointment of Lafe Solomon, as acting general counsel to the NLRB, violated the Federal Vacancies Reform Act (FVRA). The decision does not invalidate all NLRB complaints and decisions issued during Solomon's tenure, and it is not comparable in scope to the Court's 2014 decision in Noel Canning. Rather, the Court's holding applies only to those matters arising before the Board between January 5, 2011 and November 4, 2013, where the employer timely raised a challenge to Solomon's appointment under the FVRA.

Background on the FVRA

Article II of the U.S. Constitution requires that the president obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States." The NLRB general counsel is one such position that requires presidential appointment and Senate confirmation (a "PAS office"). The Federal Vacancies Reform Act of 1998 provides the president with the authority to appoint acting officers to temporarily carry out the duties of a vacant PAS position. The current version of the FVRA permits three categories of government officials to perform acting service in a vacant office, including "first assistants" to the open office, an individual who already serves in a PAS office, and a person who has served in a senior position in that agency.

However, the FVRA also makes certain individuals ineligible for acting service. Subsection (b)(1) states: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the president nominates him for the vacant PAS office and, during

the 365-day period preceding the vacancy, the individual "did not serve in the position of first assistant" to that office or "served in [that] position … for less than 90 days."

Lafe Solomon's Tenure

In June 2010, NLRB General Counsel Ronald Meisburg vacated his position and President Obama appointed Lafe Solomon to become the NLRB's acting general counsel. On January 5, 2011, Obama nominated Solomon to become the NLRB's general counsel on a permanent basis. The Senate did not take action on Solomon's nomination and returned it to the president when the legislative session expired. The president re-submitted Solomon's name for consideration in May 2013, but later withdrew it and nominated Richard F. Griffin, Jr. Griffin was confirmed as general counsel of the NLRB in October 2013. From June 2010 through Griffin's confirmation, Solomon served as the NLRB's acting general counsel.

The matter before the Supreme Court in SW General arose in January 2013, when an NLRB regional director, exercising authority on Solomon's behalf, issued a complaint against respondent SW General, Inc. The employer sought review in the D.C. Circuit arguing that the complaint was invalid because, under subsection (b)(1) of the FVRA, Solomon could not perform the duties of general counsel to the NLRB after having been nominated to fill that position. On appeal, the D.C. Circuit agreed with the employer's FVRA objection and ruled that Solomon had become ineligible to continue serving as acting general counsel as of January 5, 2011, the date on which the president nominated him as general counsel.

The Supreme Court affirmed the D.C. Circuit's decision and held that subsection (b)(1) of the FVRA prevents a person who has been nominated to fill a vacant PAS office from performing the duties of that office in an acting capacity. In support of this conclusion, the Court held that the plain language of the FVRA provides that subsection (b)(1) applies to any "person," which has an expansive meaning and applies to all of the FVRA.

Implications of the Court's Decision

In its opinion, the D.C. Circuit noted that it addressed the FVRA objections because the company raised the issue in its exceptions to the administrative law judge's (ALJ) decision and that its decision did not automatically render all of Solomon's actions as general counsel void *ab initio*, or "from the beginning." The court expressed "doubt that an employer that failed to timely raise an FVRA objection will enjoy the same success" or that its decision would "retroactively undermine a host of NLRB decisions" unless those litigants raised the FVRA argument before the Board. The D.C. Circuit stated that its decision was "not the Son of Noel Canning," referencing the Supreme Court's decision in *Noel Canning v. NLRB*, 134 S.Ct. 2550 (2014), which resulted in the retroactive invalidation of hundreds of Board decisions. The Board did not seek *certiorari* on its arguments against voiding all of Solomon's actions, and the Supreme Court did not consider the issue in *SW General*.

Thus, the Supreme Court's decision in *SW General* is narrow and does not invalidate all of Solomon's actions as general counsel. Rather, only those cases in which FVRA defenses were timely raised before the Board between January 5, 2011 and November 4, 2013 are potentially "voidable." Furthermore, after he was confirmed, current NLRB General Counsel Griffin

utilized a provision of the FVRA to ratify actions that Solomon authorized, so those cases where a timely FVRA challenge was raised may have been subsequently ratified by Griffin.

Employers alleged to have committed unfair labor practices between January 5, 2011 and November 4, 2013, should consider raising an FVRA defense if possible, assuming the matter has not already been decided by an ALJ or the Board. However, the Supreme Court's decision does not invalidate all Board actions in unfair labor practice proceedings during Solomon's tenure, nor does the case permit employers to retroactively challenge Board actions under Solomon's tenure if an FVRA defense was not timely raised and preserved.

4. ***Universal Health Svcs. V. United States ex rel. Escobar*: Supreme Court Endorses FCA Implied False Certification Theory of Liability with Limitations.**

In a unanimous decision, the U.S. Supreme Court issued its highly anticipated False Claims Act ("FCA") opinion in U*niversal Health Services, Inc. v. United States ex rel. Escobar*. The June 16, 2016, Court decision resolved a split among the circuit courts of appeal and held that the implied false certification theory is a viable theory of liability under the FCA. The Supreme Court further ruled that under this theory, a contractor seeking payment from the government may be liable for violations of government regulations if it "makes specific representations about the goods or services provided but knowingly fails to disclose violations of material requirements regarding those goods and services."[9] Liability may attach even if the contractor did not expressly certify compliance with the regulation requirements and the regulations are not designated conditions of payment. The Court, however, limited liability under the theory by establishing a demanding standard for what constitutes materiality. As discussed below, the Court's decision is significant not only due to its adoption of the implied false certification theory, but also because it could have far-reaching implications for employers due to new litigation brought under this theory.

Relevant Background

The claimants in *Escobar* sued a hospital management company after its subsidiary, a mental health facility, provided medication to the claimants' daughter who suffered an adverse reaction and subsequently died from a seizure. The claimants alleged that the company (through the subsidiary) violated the FCA when it submitted claims to Medicaid for payment and made certain representations about the services its employees provided and their titles, yet failed to disclose alleged serious violations of Massachusetts state regulations governing the staff's qualifications and licensure requirements for those services. According to the complaint, even though the company did not expressly certify it provided such services, it was liable under the implied false certification theory because its omission rendered its claim misleading.

The district court dismissed the complaint, holding that a contractor could only be held liable if the violated regulations constituted a condition of payment under the regulatory scheme. However, on appeal, the First Circuit held that any statutory, regulatory or contractual violation

[9] *Universal Health Services, Inc. v. United States ex rel. Escobar*, No.15-7, 2016 WL 3317555, at *9 (June 16, 2016).

can be material whether expressly identified or through implication, and is therefore actionable as long as the defendant knows that the government would be entitled to refuse payment were it aware of the violation.

The Supreme Court's Decision

Although the Supreme Court rejected the district court's condition of payment interpretation, it did not adopt the First Circuit's expansive view of liability. Instead, the Court held that the implied false certification theory is viable in "at least certain circumstances." Specifically, a contractor may violate the FCA if it submits a claim for payment and knowingly fails to disclose its noncompliance with a statutory, regulatory, or contractual requirement that renders the contractor's specific representations about its goods or services misleading. In other words, the party violates the FCA if it knowingly submits a "half-truth[]," in that it omits critical qualifying information that the party knows is material to the government's payment decision. The Court reasoned that the FCA "encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions," and here, by using payment codes and identification numbers without also disclosing the violations of basic staff and licensing requirements, the claims constituted misrepresentations.

The Court rejected the company's argument that the FCA limited liability to only those claims of misrepresentation about express conditions of payment, but held also that the mere fact that a statutory, regulatory, or contractual requirement is a condition of payment does not mean that a submitting party's noncompliance violates the FCA. The Court reasoned that such arguments could result in the government designating everything a condition of payment. Instead, the Court ruled that whether noncompliance is actionable turns on whether the misrepresentation is material. The Court set forth a rigorous standard of analysis for making that determination. The determination does not rest on whether the government had the option of withholding payment, but whether a contractor should have known that the government was likely to withhold payment if it knew of the undisclosed regulatory violation. Furthermore, the government's payment of a particular claim despite actual knowledge that certain requirements were violated or its continuous payment in that instance is strong evidence that those requirements are not material.

The Court further held that the FCA is not an "all-purpose antifraud statute … or a vehicle for punishing garden-variety breaches of contract or regulatory violations" and that "materiality cannot be found where noncompliance is minor or substantial."

In light of its analysis, the Court vacated the First Circuit's decision and remanded the case to determine whether relators stated a claim under the FCA.

Takeaways

The implied false certification theory provides yet another means for whistleblowers to bring claims against their employers. In this case, employees of the company's subsidiary brought the violations to the relators' attention. Thus, compliance training continues to be critical as well as having numerous reporting mechanisms in place for employees to report any suspected violations of government regulations, whether or not expressly provided in a claim or submission

to the government. Accordingly, employees must be able to report wrongdoing without fear of retaliation.

The ruling, however, is not a complete loss for employers, as the Court established stringent limitations on what constitutes a "material" misrepresentation under the FCA, an area employers will be able to address at the summary judgment or trial stage.

5. ***Zubik v. Burwell*: Court Gives Victory to Religious Non-Profits Regarding ACA Coverage**

In its ruling of May 16, 2016, the Court settled a widespread dispute between the Obama administration and religious non-profits over insurance coverage under the Affordable Care Act (ACA)for birth control. The petitions of seven non-profit organizations asked the Court to overturn the lower court decisions that would force the groups to take action to opt-out of the requirement, rather than receiving the blanket exclusion granted to churches and other solely religious institutions under ACA. In a unanimous decision, the court handed petitioners a great victory vacating the lower court decisions and remanding for further consideration of the issues in light of the Court's ruling that, "the government may not impose taxes or penalties on petitioners for failure to provide the relevant notice."

6. ***MHN Government Services Inc., et al. v. Zaborowski, et al.*, No. 14-1458, in the U.S. Supreme Court: Case Settles Before Oral Argument.**

Defense contractor, Managed Health Network Inc., sought court review of a Ninth Circuit ruling affirming a lower court's decision to deny MHN's motion to compel arbitration in a putative class action. The trial court ruled that the contract was "so permeated with unconscionability" that there was no ability to remove unconscionable provisions and still have a meaningful document. As a result the court invalidated the agreement.

MHN's petition to the court highlighted the "flagrant hostility to arbitration" of the California courts, observing that California uses one severability rule for contracts in general and another that disfavors enforcement of arbitration agreements.

A key question for the Court was whether California's arbitration-only severance rule is trumped by the Federal Arbitration Act. The question was not answered, however, as the parties announced settlement before Oral Argument.

IV.
CASES PENDING ON (AND POTENTIAL CASES COMING TO) 2016-2017/SUPREME COURT DOCKET

A. PENDING CASES:

1. ***NLRB v. Murphy Oil USA, Inc., Epic Systems Corp. v. Lewis and Ernst &Young LLP v. Morris*: CLASS ACTION WAIVER ISSUE**

In January 2017, the Court granted *certiorari* in these three cases all involving the validity of the D.R. Horton Rule. The D.R. Horton Rule of the National Labor Relations Board states that

Section 7 of the National Labor Relations Act, which protects the ability of employees to engage in "concerted activities," supersedes the Supreme Court's interpretation of the FAA in *Concepccion* and its progeny, and requires that employees be allowed to bring class actions, either in court or arbitration, without regard to class action waivers. The *ATT Mobility v. Concepcion* decision of the Court held that the Federal Arbitration Act generally requires the enforcement of arbitration agreements that waive class or collective proceedings.

B. POTENTIAL CASES:

1. Seventh Circuit Holds Title VII Protections Extend to Sexual Orientation Discrimination:

On April 4, 2017, in *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit Court of Appeals held that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII of the Civil Rights Act of 1964. This is the first time a federal appellate court has so held.

Title VII makes it unlawful for employers to discriminate on the basis of a person's race, color, religion, sex, or national origin.[10] Therefore, an employer may not take an adverse employment action, such as a termination or refusal to hire, on the basis of a protected characteristic, such as sex. Historically, many lawsuits brought under Title VII alleging discrimination on the basis of sexual orientation have been dismissed on the grounds that Title VII does not identify sexual orientation as a protected category. In recent years, however, social and judicial understanding of sex discrimination has expanded to include sex-based assumptions about sexuality.

The Question Before the Court

The plaintiff in *Hively* was an adjunct professor and openly gay. She brought suit under Title VII against her employer alleging she was denied full-time employment because of her sexual orientation. The employer moved to dismiss Hively's claims, arguing that sexual orientation is not protected under Title VII. The lower court granted Ivy Tech's motion and dismissed the complaint, and Hively appealed.

The Seventh Circuit set out to answer whether Title VII's protections against sex discrimination protect Hively from discrimination on the basis of her sexual orientation. The question was one of statutory interpretation: "We must decide [] what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."

Seventh Circuit Decision

The court held, "[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination" and "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." The court relied on two legal theories to come to this conclusion. First, it

[10] 42 U.S.C. § 2000e-2(a).

held that Hively's claim was, at its core, a gender stereotyping claim and that Title VII prohibits gender stereotyping. Second, it held that Hively was alleging discrimination on the basis of her association with a woman and that Title VII prohibits discrimination on the basis of association with someone with a protected trait (sex).

The U.S. Supreme Court has yet to decide whether sexual orientation discrimination is a subset of sex discrimination. However, the Seventh Circuit relied heavily on Supreme Court precedent about gender stereotyping.[11] The Seventh Circuit held, "[v]iewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual." Just as the Supreme Court ruled that an employer cannot discriminate against a woman on the basis of being "too 'masculine'" or having "no makeup, no jewelry, no fashion sense,"[12] the Seventh Circuit found that the same logic applies to discriminating against a woman for not meeting her sexuality stereotype.

What Does This Decision Mean for Employers?

The circuit courts are now split on this topic and the law is quickly evolving. On March 10, 2017, the Eleventh Circuit dismissed a similar lawsuit and held that Title VII does not protect against discrimination on the basis of sexual orientation.[13] In that case, the Eleventh Circuit rejected the argument that sexual orientation discrimination is another form of gender stereotyping. A petition for rehearing *en banc*, however, has been filed in that case. This circuit split means the issue as to whether sexual orientation is a protected category under Title VII may eventually be considered by the Supreme Court for resolution.

In the meantime, employers in the Seventh Circuit should review their personnel policies to ensure they comply with the court's decision. Moreover, almost half of all states and many cities already prohibit discrimination based on sexual orientation and/or gender identity, so an employer's obligation not to discriminate on these bases might already be in place. In addition, the U.S. Equal Employment Opportunity Commission maintains the position that Title VII's prohibition of employment discrimination on the basis of "sex" includes a prohibition of discrimination based on gender identity or expression and sexual orientation, and it will continue to pursue such claims as part of its 2017-2021 Strategic Enforcement Plan.

2. Supreme Court Will Not Hear Trans Bathroom Access Case:

On March 6, 2017, the Supreme Court refused to hear the case of *Gloucester County School Board v. G.G.*, Case No. 16-273. Instead, the Court vacated a Virginia federal court order enjoining the School Board's rule requiring students to use the bathroom of their birth sex and

[11] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

[12] *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 2017 WL 1230393 (7th Cir. Apr. 4, 2017), *citing Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[13] *Evans v. Georgia Reg'l Hosp.*, 850 F3d 1248 (11th Cir. 2017).

remanded the case to the Fourth Circuit. The question raised was whether Title IX protects transgender rights.

The issue is predicted to arise in future cases and is likely to ultimately be determined by the Supreme Court.

Significance for Employment Law

The EEOC has already taken the position that Title VII bars discrimination against transgender workers and they have made it plain that Title IX is persuasive in the EEOC's interpretation of Title VII. Thus, any developments as to Title IX coverage of transgender/gender identity, will ultimately also impact such coverage analysis under Title VII.

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