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Labor And Employment Cases To Watch In 2016

By **Aaron Vehling**

Law360, New York (December 24, 2015, 8:38 PM ET) -- Employers and workers in 2016 will be keeping a close eye on cases that could strengthen private-sector unions while chipping away at public ones, change how classes are certified, and increase the number of workers covered by minimum wage and overtime protections.

Here are the cases employment lawyers will be watching:

Tyson Foods Inc. v. Bouaphakeo et al.

In June, the U.S. Supreme Court agreed to review whether courts can certify class and collective actions that cover uninjured members, in a battle that attorneys say could affect the size of classes bringing Fair Labor Standards Act, Title VII, Equal Pay Act and other employment-related claims.

Springdale, Arkansas-based Tyson is challenging a $5.8 million judgment, which the Eighth Circuit upheld in August 2014, to compensate workers for time spent putting on and removing protective gear and walking to their workstations.

The company has argued that the lower court certified the class in the suit based on establishing liability and damages classwide through "trial by formula." It also says the high court's 2011 Dukes decision that articulated a streamlined standard for class certification controls here.

The debate over statistical sampling in the absence of reliable records or time that is difficult to account for is important for the plaintiffs bar, which has argued that the simple difference in the hours worked or pay rates are not enough to dispose of class or collective action mechanisms.

Tom Gies, a management-side partner at Crowell & Moring LLP, says the question of class certification and the management of statistical sampling is important because of the practice's reach.

"Statistical sampling is not limited to wage-and-hour suits," he said. "I see plaintiffs lawyers start to extend that to other types of employment litigation, such as Title VII or Equal Pay Act cases."

Regardless of the type of case, sampling means a battle of experts, he said.

Plaintiffs-side labor and employment attorney David Lee says the burden is on the employer to keep the

records, and that the high court has ruled that in the absence of such records estimations are approved of.

“It’s fine for an employee to get on the witness stand to say, ‘I think I worked about 40 hours a week,’ and the jury can go with the employee’s best estimate,” Lee said. “It’s the tortfeasor’s problem.”

Oral arguments took place in November, with a 2016 ruling expected.

The case is Tyson Foods Inc. v. Bouaphakeo et al., case number 14-1146, in the Supreme Court of the United States.

McDonald’s Joint-Employer Fight With NLRB

A slurry of consolidated cases with big implications in the franchising world make up the NLRB general counsel’s sprawling action against McDonald’s, in which the general counsel asserts that McDonald’s corporate is a joint-employer with its franchisees and therefore is liable for their alleged labor law violations.

It began in December 2014, when the general counsel’s office kicked off a series of complaints that would eventually encompass more than a hundred unfair labor practices charges against more than 30 entities in five states.

The office said the complaints stemmed from allegations that franchisees were engaging in discriminatory discipline and coercive conduct such as threats, surveillance and interrogations when workers protested working conditions.

McDonald’s USA LLC has contested the complaints, saying that allegations underlying the complaints were largely driven by a two-year, union-backed campaign and that the company had taken “appropriate steps” to defend itself. It has also attacked the NLRB for improper actions that “dramatically strike at the heart of the franchise system.”

Management-side attorneys have seen the McDonald’s effort as part of the NLRB’s sea change when it comes to who is a joint employer, most recently articulated in August in its blockbuster Browning-Ferris decision that allowed for indirect control, rather than direct and immediate control, to establish a joint-employer status.

For the plaintiffs bar, the McDonald’s cases are, like the Browning-Ferris decision, about bringing the appropriate party to the bargaining table.

“The board’s position is a common-sense ruling that recognizes the realities of the modern workplace,” Andrew Melzer of Sanford Heisler Kimpel LLP said. “Basically, it says that the employer who has substantial control over the workplace and possesses control over terms and conditions of employment can’t simply hide behind the franchise model.”

The cases are making their way through the NLRB system, being tried before administrative law judges, unless they are settled. The outcome of those proceedings may be appealed to the five-member labor board, and then to a circuit court of appeals.

The cases are before the National Labor Relations Board.

Miller & Anderson Inc.

An NLRB case attorneys will be watching is a labor dispute involving electrical and mechanical contractor Miller & Anderson, in which the board could toss out the requirement that employers must consent in order for unions to organize bargaining units that include workers solely employed by a company and jointly employed workers, like those supplied by a staffing firm.

The case dates back to 2012, when a sheet metal workers union petitioned to represent construction workers employed by Miller & Anderson Inc. and Tradesmen International.

If the board does jettison the standard, it could allow only one of the companies to assent to a collective bargaining agreement that would encompass both workers of a supplier company like a staffing agency and employees solely employed by the user company, according to Jackson Lewis PC's Howard Bloom.

"It makes it more likely a union can win," the management-side attorney said.

Often, the jointly employed workers don't get the same terms and conditions of employment as the solely employed workers do. That, Bloom said, is where the window opens for workers to start considering union representation.

"It makes them perhaps more likely to want to bring in a union than the solely employed," he said.

The NLRB has invited parties to file amicus briefs, and scores have, because the issue is vitally important to contractors and the companies who use them, according to Bloom, who sees the decision coming down in 2016.

"They're probably going to come down on the side of no consent necessary to include jointly employed employees in same bargaining unit as solely employed employees," he said.

The case is Miller & Anderson Inc., case number 05-RC-079249, at the National Labor Relations Board.

Friedrichs v. California Teachers Association et al.

In June, the high court justices agreed to review whether, under the First Amendment, they should invalidate public-sector "agency shop" arrangements, in which nonunion employees in a unionized workplace pay a fee to cover collective-bargaining costs.

At the center of the case are nonunion California public school teachers asking the high court to throw out its 1977 Abood standard, which allows public employers to require union and nonunion members alike to pay union fees, provided the workers are not forced to pay a portion of the fees that covers political or ideological activities.

The Abood standard was the foundation for the Ninth Circuit's 2014 two-page summary affirmation against the teachers' challenge, but the teachers say the high court's subsequent decisions have chipped away at the integrity of Abood.

As part of their effort to nix Abood, the teachers are challenging the practice of the California Teachers Association and other unions of requiring nonunion employees to opt-out of subsidizing expenses, like

political activities, every year, in writing, during a roughly six-week period following the issuance of an annual notice about fee allocation.

They say that violated their constitutional rights because they are effectively forced to fund political speech by public-sector unions.

However, Lee sees it as part of the attacks on the last stronghold of unions, which according to the most recent Bureau of Labor Statistics data, represent about 7 percent of private workers and about 36 percent of public.

“It’s sort of a continuing assault on unions and the rights that employees might have with unions,” said Lee, an immediate past president of the National Employment Lawyers Association.

California Attorney General Kamala Harris, whom the justices have asked to weigh in on the case with a brief, and Solicitor General Donald Verrilli will participate in oral argument with the teachers and the union respondents, according to the docket.

Oral argument is scheduled for Jan. 11.

The case is Friedrichs v. California Teachers Association et al., case number 14-915, at the U.S. Supreme Court.

Associated Builders and Contractors of Texas Inc. et al. v. National Labor Relations Board

In the Fifth Circuit, business groups led by the Associated Builders and Contractors of Texas Inc. are challenging the NLRB’s rule streamlining the union election process, after a Texas federal judge tossed their suit.

The rule, which took effect in April, made a number of changes to NLRB procedures, including eliminating a 25-day delay that normally occurs between the time a regional director directs an election and the election itself, and putting off employer challenges to voter eligibility issues until after an election is held.

The business groups' lawsuit was dismissed in June after U.S. District Judge Robert L. Pitman ruled that they failed to show that the rule on its face violated either the NLRA or the Administrative Procedure Act. One month later, a federal judge in Washington, D.C., dismissed a similar lawsuit that had been filed by the U.S. Chamber of Commerce, which declined to appeal the ruling.

Management-side attorneys have called it the “ambush election rule” because it seems to give unions a way to quickly earn representation without management having the ability to effectively present their case, and NLRB data does suggest the median petition-to-election times are nearly two weeks shorter. However, union-side attorneys say that because employers effectively have a captive audience, the shorter election process isn’t going to have a negative impact on anti-union campaigns.

Time frames aside, of high importance to Bloom is a data collection requirement in the rule that calls for “reasonable diligence” to gather contact information for unions’ voter lists, but “nobody knows what that means,” he said.

“It’s a big deal for employers, because if an employer wins an NLRB election, the union can file an

objection to [the] win claiming the employer didn't use that reasonable diligence," Bloom said. "It's one example of the [as-applied] challenges that you could see ending up in the U.S. court of appeals."

But the business groups' Fifth Circuit challenge, which finished a round of briefing in November, is a facial challenge and according to Bloom likely won't survive the Fifth Circuit.

"I don't think the court challenge pending at this point is going to be successful," he said. "Obviously, I'd like it to be."

The case is Associated Builders and Contractors of Texas Inc. et al. v. National Labor Relations Board, case number 15-50497, in the U.S. Court of Appeals for the Fifth Circuit.

Home Care Association et al. v. David Weil et al.

The DOL's 2013 home care rule, currently awaiting the high court's decision whether to review its legality, narrows the companionship exemption of the FLSA and brings minimum wage and overtime protections to those who provide in-home care for the elderly and for people with illnesses and disabilities. The DOL has said that striking the exemption would bring nearly 2 million new workers under the statute's ambit.

The Home Care Association of America and others have argued that the rule goes too far — saying the department is essentially, and unlawfully, rewriting the FLSA to exclude more than 90 percent of employees eligible for the exemptions.

The D.C. Circuit didn't accept that argument, ruling in late August that the DOL's decision to extend the protections was based on a reasonable interpretation of the law, overturning a D.C. federal judge's nixing of the extension.

If the high court declines the HCA's petition for review, there's a chance some of the in-home workers will have to adapt to new circumstances, according to Brian Steinbach of Epstein Becker Green. The federal government doesn't cover the overtime cost of patients' in-home workers, he said, which leaves workers with fewer hours or multiple, limited-hour gigs.

"Those individuals are now finding ways to work for more than one provider," he said.

For the providers, even if they can avoid paying overtime, they might still be more exposed to wage-and-hour lawsuits, according to Mark Kisicki of Ogletree Deakins Nash Smoak & Stewart PC.

"Most of these companies are not large enough to manage those costs," he said.

HCA and the others filed their petition for a writ of certiorari in November, and the DOL has until late January to filed its opposition brief.

The case is Home Care Association of America et al. v. David Weil et al., case number 15-683, in the Supreme Court of the United States.

--Additional reporting by Ben James. Editing by Jeremy Barker and Emily Kokoll.