

***Third Thursday* – Crowell & Moring’s Labor & Employment Update**

July 17, 2014

The webinar will begin shortly. You will not hear any audio until we begin. Please stand by.

Today's Presenters



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Today's Discussion

Supreme Court's 2013-2014 Term – 6 decisions

- FLSA
- SOX anti-retaliation
- NLRB
- ERISA
- First Amendment/retaliation
- Public sector employee union dues

Today's Discussion

Early Grants for the Court's 2014-2015 Term

- 4 decisions
 - FLSA
 - Title VII
 - PDA

Lawson v. FMR, LLC

- Holding:
 - SOX anti-retaliation provisions extended to cover employees of contractors and subcontractors, and even employees of a public company’s “officers,” “employees” and “agents.”
- Scope of protections still unclear
- Best practices for contractors in the wake of *Lawson*

Sandifer v. U.S. Steel Corp.

- Holding:
 - Collective bargaining arrangement for ‘donning/doffing’ practices immune from FLSA suit under Section 203(o)
- 203(o) excludes time spent “changing clothes”
- Impact on the *de minimis* defense in other types of cases

NLRB v. Noel Canning

- Issue: Whether the President's January 2012 "recess" appointments to the NLRB, made during a 3-day, intra-session break in Congress, were constitutional.
- Holdings: (1) The NLRB recess appointments were unconstitutional because the Senate was not in "recess" at the time; (2) "recess appointments" can be used to fill any existing vacancy during any "recess" of a sufficient length.

Impact of *Noel Canning*

- Clarifies scope of “recess appointments”
- Invalidates hundreds of NLRB decisions including:
 - *D.R. Horton* – Mandatory arbitration policy
 - *Banner Health* – Confidentiality instruction regarding ongoing internal investigations
 - *Piedmont Gardens* – Disclosure of witness statements
 - *WKYC-TV* - Continuation of dues check-off post contract
- Creates uncertainty as to other Board Actions

Fifth Third Bancorp v. Dudenhoeffer

- Holding:
 - ESOP fiduciaries not entitled to any special deference in the discharge of their fiduciary obligations with respect to decisions about investment in company stock
 - Court unanimously rejected the *Moench* presumption
 - Application of *Twombly* and *Iqbal* re pleading fiduciary breach claims in ‘stock drop’ claims

Fifth Third Bancorp v. Dudenhoeffer

- Early Reactions
 - *Amgen Inc. v. Harris*, Case No. 13-888
 - *Whitley et al v. BP PLC*, Fifth Cir. No. 12-20670

Harris v. Quinn

- Issue: Whether the First Amendment prohibits the collection of an agency fee from Illinois in-home care providers who do not wish support a union.
- Holding: Illinois public sector in-home care providers cannot be compelled to pay union agency fees.

Impact of *Harris*

- Narrow – Holding only applies to the type of public employee at issue (*i.e.*, those whose terms and conditions of employment are not controlled by the State)
- Future Reverberations – potential for reversing Court’s 1977 decision in *Abood* to prohibit agency fees for all public sector employees

Lane v. Franks

- Issue:
 - Does First Amendment protect public employee's testimony under oath
- Holding(s)
 - Sworn testimony of employee entitled to First Amendment protection
 - Qualified immunity for defendant

Impact of Lane

- Qualified immunity defense not available to other public employers
- Universities will have to do more 'line drawing'
- No extension of *Garcetti* - this testimony was not part of the employee's normal job responsibilities

Young v. UPS

- Certiorari granted July 1, 2014
- Issue:
 - Whether the PDA requires employer to provide accommodations to pregnant workers if it provides accommodations to non-pregnant workers based on disabilities or other work limitations if they are “similar in their ability or inability to work.”

Integrity Staffing v. Busk

- Certiorari granted March 3, 2014
- Issue:
 - Whether time spent in security screenings is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.
 - Are such duties ‘integral and indispensable’ under the statute?
- Clarification on the ‘primary duty’ test?

Mach Mining, LLC v. EEOC

- Certiorari granted June 30, 2014
- Issue:
 - Whether and to what extent a court may enforce the Equal Employment Opportunity Commission's mandatory duty to conciliate discrimination claims before filing suit.

Perez v. Mortgage Bankers Ass'n

- Certiorari granted June 16, 2014
- Issue:
 - Whether a federal agency must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.
 - DOL interpretative guidance on FLSA exemption

2013-2014 Term Decisions

- *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870
- *NLRB v. Noel Canning*, 134 S.Ct. 2550
- *Lawson v. FMR, LLC*, 134 S.Ct. 1158
- *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459
- *Harris v. Quinn*, 134 S.Ct. 2618
- *Lane v. Franks*, 134 S.Ct. 2369

2014-2015 Term Cases

- *Mach Mining, LLC v. EEOC*, Case No. 13-1019
- *Integrity Staffing Solutions, Inc. v. Busk*, Case No. 13-433
- *Young v. United Parcel Service, Inc.*, Case No. 12-1226
- *Perez v. Mortgage Bankers Ass'n*, Case No. 13-1041

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