Advisory
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United States Supreme Court Active in Employment Law Area

The Supreme Court of the United States has issued several decisions this Term that are sure to impact employers, both directly and indirectly. The following is a summary of the relevant cases.

In November 2005, the Court issued decisions in two companion cases clarifying the type of activities that are compensable under the Fair Labor Standards Act ("FLSA"). In ***IBP, Inc. v. Alvarez*** and ***Tum v. Barber Foods, Inc.***, the Court interpreted the Portal-to-Portal Act to require that employees be paid for "walking time" between production areas and locker rooms where they change into specialized gear, but not for "pre-donning waiting time" while they hang around waiting to pick up gear. Although the Portal-to-Portal Act excludes from the FLSA any walking time between principal work areas and "preliminary and postliminary activities," tasks that are "integral and indispensable" to principal work—such as "donning and doffing" specialized gear in a locker room—are covered activities.

But what about time spent walking from the locker room to the work station, after one has put on specialized work gear, and from the work station to the locker room, before the gear has been removed? The Court held that because donning or doffing specialized gear is "integral" to a principal work activity, it is *itself* a principal activity and therefore compensable. So in a continuous work day, employees must be paid for any time between the beginning of the first principal activity and the last (i.e., between donning the gear and doffing it). That resolved ***Alvarez***, but ***Tum*** added a wrinkle in particular whether the time workers spend waiting in the locker room to get their specialized gear before they put it on, or to get their regular clothes back, is compensable. Because Tum's employees were not required to arrive at a particular time to start waiting on their gear, the waiting time was not "integral and indispensable" to the donning, so this "pre-donning" time was excluded. But because doffing (i.e., removing) the gear remained a principal activity, the FLSA still covered the pre-*doffing* locker room time.

In February 2006, the Court issued an important, but limited, decision in ***Ash v. Tyson Foods, Inc.***, a Title VII racial discrimination action. After a trial resulted in hefty verdicts for two plaintiffs, Ash and Hilton, the district court granted judgment as a matter of law in favor of Tyson Foods and, in the alternative, a new trial, concluding that there was insufficient evidence of pretext to sustain either verdict. The Eleventh Circuit affirmed the lower court's decision as to Ash. As to Hilton, it found there was enough evidence to go to the jury, but it still affirmed the alternative remedy of a new trial because the evidence did not support the damage awards. While the Supreme Court did not reverse the Eleventh Circuit, it found the Court of Appeals' decision flawed in two respects. First, the Eleventh Circuit appeared to conclude, as a matter of law, that referring to the plaintiffs as "boy" (without more)

continued next page

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CONTINUED

WIGGIN AND DANA

Counsellors at Law

could not be construed as anything other than benign. While the Court agreed that "boy" would not always connote racial animus, it might, depending on tone, context, historical usage and other factors. Second, the Eleventh Circuit used the wrong standard for determining whether Tyson Foods' asserted nondiscriminatory reasons for the challenged employment actions were pretextual. The plaintiffs sought to show pretext by arguing that two less qualified white individuals were promoted over them. The Eleventh Circuit found such comparative evidence is insufficient to demonstrate pretext except where "the disparity in qualifications is so apparent as to virtually jump off the page and slap you in the face." While the Court declined to offer its own test, it denounced the "jump off the page and slap you in the face" standard as unhelpful and inexact. On remand, the Eleventh Circuit will decide whether these two aspects of its decision were essential to its holding and, if so, it will try to come up with a better test for pretext.

In ***Arbaugh v. Y&H Corp.***, the Court found that Title VII's definition of "employer," which excludes entities with fewer than 15 employees, is not an unwaivable jurisdictional threshold. Instead, the 15-employee threshold is an element of a Title VII claim that *can* be waived if not timely asserted. The Court adopted a bright-line rule for threshold limitations on the scope of statutes: If Congress does not say the requirement is jurisdictional, it's not. In this case, Y&H waited until two weeks after an adverse judgment before asserting that the district court lacked jurisdiction over the plaintiff's Title VII claim because Y&H did not have 15 employees. Discovery then ensued as to the number of individuals providing services to Y&H and whether they counted as "employees" under the law. The Supreme Court found this approach both unfair and a waste of judicial resources given that Congress had not clearly indicated the 15-employee threshold was jurisdictional. Further, whether or not Y&H had 15 employees was a factual matter that properly belonged to the jury. Since the 15-employee requirement is not jurisdictional, Y&H waived its claim by not raising it earlier, and Arbaugh will keep her judgment.

In ***Buckeye Check Cashing, Inc. v. Cardegna,*** a case not directly dealing with an employment law issue but relevant to any employer who has adopted, or is thinking of adopting, an alternative dispute resolution program, the Court reaffirmed that the Federal Arbitration Act ("FAA") applies in state courts and requires state courts to apply substantive federal law in determining whether the court or an arbitrator is to decide challenges to the validity of a contract containing an arbitration clause. Under federal law, an arbitration clause is severable from the rest of a contract, so unless a party challenges the arbitration clause *itself*, an attack on the validity of the contract as a whole must go to the arbitrator in the first instance. In this case, Cardegna brought a class action in Florida state court, claiming the class members' agreements with Buckeye were illegal and void because they charged usurious interest rates. The agreements contained an arbitration clause, but the trial court declined to enforce it because Cardegna claimed the entire contract was void under Florida state law. The Florida Supreme Court agreed. The U.S. Supreme Court reversed and held that substantive federal law governed the issue of severability.

continued back page

Because most modern cgl forms specifically exclude from coverage employee-initiated suits, many companies have sought the shelter of Employment Practices Liability Insurance, or EPLI, which generally cover discrimination, harassment, and other employment related claims. EPLI coverage may be purchased as a stand-alone policy or as an endorsement to other forms of liability insurance.

Generally speaking, employers can utilize EPLI to cover defense costs, judgments, and settlements (up to the policy limits) for the corporate entity, former and current employees, directors, and officers. EPLI policies ordinarily cover legal actions alleging:

Discrimination, Sexual harassment, Wrongful termination, Breach of employment contract, Negligent evaluation, Failure to employ or promote, Wrongful discipline, Deprivation of career opportunity, Infliction of emotional distress, and Mismanagement of employee-benefits plans.

Employers should be careful not to assume that all employment-related claims come within the scope of an EPLI policy, as there are invariably exclusions for workers' compensation, bodily injury or property-damage cases, or any other forms of liability specifically covered under another insurance policy.

In the event of covered litigation, most EPLI policies contain a fairly standard promise to defend, similar to provisions found in general liability policies. A legal defense is often provided through panel counsel selected by the carrier. However, if preferred counsel is not on the panel, employers can, and should, request that the insurer add that firm to their list of approved counsel. Not all EPLI policies are written with "duty to defend" coverage. Particularly, when EPLI coverage is assumed as an endorsement on a traditional Directors and Officers policy, there is no standard obligation to defend, but rather a promise to indemnify a claim, sometimes coupled with an advancement of defense costs. Under those policies, the insured has the right to select its own counsel, with the carrier retaining a right to consent that cannot be unreasonably withheld.

Employers should also be careful to note that EPLI policies are frequently written to include defense costs within the EPLI policy's limits. Thus, every dollar an employer spends defending a claim reduces the amount available for settlement or to pay a judgment. This feature of coverage is designed to induce plaintiffs' counsel to broach settlement early, rather than force an employer to incur litigation costs that will ultimately erode the insurance dollars available for potential settlement.

Although EPLI policies often afford the employer control over settlements, they also may contain terms designed to limit the insurer's potential exposure if the employer refuses to settle a claim in the face of the insurer's recommendation. An increasingly common variation on this type of clause includes terms providing that the insurer is required to cover only a set percentage of future defense and/or indemnity costs exceeding the amount of a given settlement offer rejected by the insured. Both clauses are designed to give employers a financial stake in the risk of litigating vs. settling a particular claim. However, such provisions can also put pressure on employers to settle claims they believe to be defensible in order to avoid the risk of reducing their available policy limits in the event the case "breaks bad," thereby further underscoring the need for trusted counsel.

Of course, EPLI coverage is not a panacea, and may not be right for every company. Each employer must gauge the relative benefits of an EPLI policy as compared to the costs. Ultimately, the wide variety of available EPLI policies necessitates that interested employers undertake a careful process of comparison, analysis, and negotiation in selecting the proper type and amount of EPLI coverage for their business. It is important for employers seeking to get the most out of EPLI coverage to shop around to find a cost-effective policy that best fits the needs of their business. In addition, employers should be proactive in requesting that a law firm they have historically retained be able to defend the company in the event of litigation, if the preferred legal services provider is not among the insurer's panel counsel. ■

WIGGIN AND DANA

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Therefore, since Cardegna challenged the contract as a whole, the Florida courts should have enforced the arbitration clause and left it to the arbitrator to determine the validity of the contracts.

In another case impacting employers that did not arise out of an employment relationship, the Court in ***Domino's Pizza, Inc. v. McDonald*** found that John McDonald, the sole shareholder and president of JWM Investments, could not sue Domino's under 42 U.S.C. § 1981 (which protects the right of all persons to make and enforce contracts without respect to race). McDonald accusing Domino's of breaching a contract with JWM because of alleged racial animus toward McDonald. The Court held that it would upend the law of corporations and agency to allow a shareholder to sue for breach of a contract to which the company—not the shareholder—was a party. Section 1981 is not a means of redress for all racial injustice, but only provides a cause of action to those whose rights under a contract (or whose right to make contracts in the first place) are violated. Under general principles of corporate law, McDonald had no rights or responsibilities under the Domino's contracts, so he had no claim under Section 1981. ■

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