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Recent U.S. Supreme Court Decisions Alter the Shape of the Workplace

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A series of decisions recently issued by the Supreme Court of the United States, may alter your workplace and result in an evaluation of your polices and procedures as well as potentially create concerns regarding past litigation with unions. Employers need to be aware of what the decisions could represent for their facilities, which include adding a class action provision to arbitration policies, reviewing policies for disparate impact and electronic communication provisions, and determining whether the Supreme Court's invalidation of all of the decisions made by National Labor Relations Board since 2008 creates a conflict for you. The following provides a brief overview of these cases and how they could ultimately affect your workplace.

***Stolt-Nielson S.A. v. AnimalFeeds Internat'l Corp.*, U.S. No. 08-1198, (April 27, 2010).**

Stolt-Nielson is a shipping company with whom AnimalFeeds entered into a standard contract to ship a load of goods internationally. The contract was a standard contract known in the maritime industry as a "charter party," and it included an arbitration provision mandating the parties to resolve any disputes they may have through arbitration. However, AnimalFeeds filed a class action lawsuit against four transportation companies, including Stolt-Nielson. Pursuant to the charter party contract arbitration provision, the parties submitted the dispute to an arbitrator. The parties agreed that the arbitration provision was silent on the issue of whether or not class arbitration, similar to a class action lawsuit, was available and Stolt-Nielson argued that this silence should indicate that class arbitration is not permitted. AnimalFeeds disagreed, contending that the provision required arbitration.

The arbitrator held that, pursuant to his understanding of the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and the public policies favoring arbitration, class arbitration is indeed available in this situation. This issue eventually was appealed all of the way to the United States Supreme Court. The Court held that, under the Federal Arbitration Act, "a party may not be compelled … to submit to class arbitration unless there is a contractual basis for concluding the party agreed to do so." Essentially, the Court held that imposing class arbitration on parties that have not agreed to it is inconsistent with the Federal Arbitration Act, as an implicit agreement to authorize class-action arbitration is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate, generally.

What does this mean for you?
It has become more common for employers to include mandatory arbitration provisions in the employment contracts it requires employees sign. Therefore, as a practical matter, the Court's holding means that in order for class arbitration to be available, either the contract must include an express statement to that effect or a different governing law must be held applicable to the situation which interprets silence on the issue as agreement that class arbitration is proper. Updating your employment contracts with the help of Counsel is advised so that you can take advantage of class arbitration if it becomes necessary to invoke.

***Lewis v. City of Chicago*, U.S. No 08-974 (May 24, 2010).**

In 1995, the City of Chicago administered a written examination for firefighters to over 26,000 applicants. In

1996, the City announced that the individuals who scored an 89 or better on the test were deemed "well qualified." The City would begin randomly selecting individuals from the "well qualified" group to proceed to the next phase of the hiring process (a physical abilities test, background check, medical examination, and drug test). If the individuals passed all the tests, they were hired.

At the same time, the City also determined how it was handling the remaining applicants. Individuals who scored less than 65 on the examination were sent letters that they had failed the test and would no longer be considered for the positions. Applicants who scored between 65 and 88 were considered "qualified" for the position. The City notified these individuals that they had passed the test, but informed them that because of the number of "well qualified" individuals and the City's hiring needs, it did not expect that their applications would be processed any further. However, these individuals would be kept on an eligibility list. Starting in May 1996, the City selected its first class of applicants to advance to the next stage of the hiring process, drawing only from the "well-qualified" pool. Over the next six years, the City selected ten more classes using the "well-qualified" pool until it was exhausted. The last class was selected using the "qualified" applicants.

In March 1997, an African- American applicant from the "qualified" pool who was not hired filed an EEOC charge. Five other "qualified" applicants also filed charges. The applicants were given right to sue letters in July 1998 and filed suit two months later, alleging that the City's practice of selecting only "well qualified" applicants had a disparate impact on African-Americans. The City filed a summary judgment motion on grounds that the applicants did not file their EEOC charges within 300 days after their claims accrued.

The Supreme Court determined that the firefighters claims against the city were timely asserted alleging a disparate impact claim on a specific employment practice even though they were filed over 300 days after the alleged unlawful action. The Court began by focusing on the nature of disparate impact claims, noting that such claims do not require discriminatory intent. A plaintiff only needs to show that the employer used an employment practice that caused a disparate impact on a protected group, not that there was discriminatory intent. The Court found that the term employment practice encompassed the City's exclusion of passing applicants who scored below 89 when selecting those who would advance. Thus, every use or application of the City's decision to exclude individuals in the "qualified" pool resulted in a possible present disparate impact violation (but not a continuing disparate treatment claim).

What does this mean for you?

This decision possibly affects employers in numerous ways but it is now clear that employers can be subject to disparate impact lawsuits years after policies are implemented since they will continue to apply those policies from that point forward. The 300 day limitation for federal discrimination claims is practically irrelevant in these cases. Due to the potential legal risks, employers need to review and scrutinize policies that they have adopted, particularly if you administer employment tests to candidates, to determine if the policies had a disparate impact when they were created, even if years earlier, and if they continue to create such a disparate impact every time the policy is used.

***Ontario v. Quon*, U.S. No. 08-1332 (June 17, 2010).**

Sergeant Jeff Quon was a police officer for the City of Ontario. To determine whether a monthly character limit for text messages under the City's contract with its wireless service provider was sufficient to meet the City's business needs, the City decided to audit text messages sent and received on City-supplied pagers. Specifically with respect to Quon, the City wanted to determine whether Quon's exceeding of the monthly character limit resulted from work-related messages or possibly was due to personal use. The City obtained and reviewed transcripts of Quon's (and other employees') text messages. Finding a multitude of sexually-explicit and other personal texts, the City disciplined Quon for conducing personal business on company time.

Quon sued under 42 U.S.C. § 1983, alleging violation of his Fourth Amendment right of privacy. The case went to trial and a jury ruled for the City, finding the police chief ordered the audit for the "constitutionally

reasonable" purpose of determining the efficacy of the department's pager contract. On appeal by Quon, a Ninth Circuit panel reversed, saying the city was required to show "there were no less-intrusive means" than reading Quon's personal text messages. The case then went to the United States Supreme Court.

The Court noted that the City had a written departmental policy stating that employee e-mail on work computers was subject to search. A police department supervisor, moreover, had verbally warned employees that pager text messages would be treated the same as e-mail under the policy. The Court also found that Quon's status as a police officer inherently limited his privacy expectations but that reviewing the texts was considered a "search" similar to searching an employee's private office. Accordingly, the Court concluded that the City's search of text messages was reasonable because its review was "an efficient and expedient way to determine" whether Quon's excessive use was due to work-related or personal use. The Court essentially found that the City had acted in good faith and for business-related purposes, deciding that the search of Quon's messages was reasonable and not excessively intrusive.

<u>What does this mean for you?</u>
It is important to note that the Fourth Amendment only applies to public employers and therefore, a review of private employers' policies need not consider Fourth Amendment implications. However, it is clear that this decision has potential consequences for private employers as well. Most notably, it is now paramount for employers to create a written policy on all electronic communications in the workplace and convey this to their employees so to shape their expectation of privacy in these areas. The Court stated, "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." While the employer, the City of Chicago in this case, was successful, privacy concerns always are shaped by the "totality of the circumstances" and you should be cautious in relying too heavily on this decision to begin your own "search" without first putting your employees on notice and consulting legal counsel.

***New Process Steel LP v. NLRB*, U.S. No. 08-1457 (June 17, 2010).**

The National Labor Relations Board is an independent federal agency tasked with administering the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. By statute the NLRB is made up of 5 members, all appointed by the President and confirmed by the Senate. However, by December of 2007 the Board was faced with the possibility that it would be left with 2 members since no new members had been confirmed by the Senate. At this time, the remaining members delegated its authority to a three-member panel. They took this action knowing that two members' terms were about to expire, with the intention of allowing a "quorum" of two members of that three-member panel to continue operating and issuing decisions. This two member "quorum" issued close to 600 opinions during a 27 month period. Subsequently, numerous parties, including New Process Steel LP, challenged the authority of the Board to operate with only two members, contending that a "quorum" of at least three members was required by statute for the Board to operate with legitimate authority. In *New Process Steel LP v. NLRB*, the United States Supreme Court found that Section 3(b) of the National Labor Relations Act requires that when the Board delegates its authority to a three-member group, the group must maintain at least three members to continue exercising the delegated authority, thereby making the nearly 600 decisions issued by the two member panel presumably invalid.

<u>What does this mean for you?</u>
While many employers are not directly affected by the Court's decision, the implications of this case could be far reaching for those nearly 600 employers involved in the Board's decisions now found to have been improperly made by the two-member panel. However, it continues to remain unclear as to what will happen to the outcomes in those cases. There is speculation that only the 60+ cases where a party appealed the decision of the two-member panel in Court will be affected; or that the current, full Board will re-issue all of the opinions upholding the two-member panel's original decisions. Whatever the outcome, the Supreme Court's holding in New Process Steel is sure to impact many workplaces and upset labor relations across the country. If you believe you are potentially affected by this decision please let us know and we can investigation the options available to you.

Conclusion
Since Supreme Court decisions are largely fact specific, seeking Counsel in how you should react to these recent decisions is advisable. Please let Dinsmore & Shohl assist you in reviewing your company's policies and procedures to ensure you are remaining lawful within the ever-changing rules created by the courts for the workplace.