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FR Report

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A Review of the Supreme Court's 2010 – 2011 Term

As the United States Supreme Court's 2010-2011 term drew to a close, commentators observed several trends in its holdings. In particular, cases involving the First Amendment dominated the term, and the Court imposed substantial barriers to class actions. These latter decisions, in particular, hold major implications for employers.

The Roberts Court continues to be viewed as generally pro-business, with Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) calling the Court the "most business-friendly Supreme Court in the last 75 years." That characterization is not entirely accurate in the area of employment law, however, which requires a more nuanced examination of the Court's rulings. The nine major employment-related decisions issued by the Court this term include:

- Two class action cases (*Wal-Mart, AT&T Mobility*);
- Two retaliation cases (*Kasten, Thompson*);
- One case on the "cat's paw" theory of liability (*Staub*);
- One immigration case (*Whiting*);
- Two public employee cases (*Borough of Duryea, NASA*); and
- One ERISA case (*CIGNA Corp*.)

Interestingly, the Court's employment decisions this term were typically either unanimous or split 5-4 along conservative/liberal lines. (Justice Kagan was recused from four decisions because of her former position as U.S. Solicitor General.) Viewed in the aggregate, these decisions suggest hostility to large class actions, but receptivity to—and in some circumstances, expansion of—individual employee rights. Indeed, on substantive issues of employment law, the Court tended to side with the plaintiffs, either unanimously or by a substantial majority. Of the nine decisions, four are viewed as generally favorable to employers, three are viewed as generally favorable to employees, one (*Whiting*) is not favorable to either, and one (*CIGNA Corp*.) contains aspects that are favorable to employers and aspects that are favorable to employees. Therefore, the fact that conservative justices continue to play a dominant role has not translated into an across-the-board pro-employer trend.

Executive Summary

The following table briefly summarizes the holding of each of the Court's nine principal labor and employment decisions this term.

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
1(a). *Wal-Mart Stores, Inc. v. Dukes* Case No. 10-277 Decided: June 20, 2011	The class was improperly certified because the plaintiffs failed to meet the Rule 23(a)(2) requirement that their sex discrimination claims had common questions of law or fact. The class should also not have been certified under Rule 23(b)(2) because the monetary relief the plaintiffs sought was not "incidental" to the requested injunctive or declaratory relief.	Vote: 5-4 **Majority:** Scalia (joined by Roberts, Kennedy, Thomas, and Alito) **Concurring in Part and Dissenting in Part**: Ginsburg (joined by Breyer, Sotomayor, and Kagan)
1(b). *AT&T Mobility v. Concepcion* Case No. 09-893 April 27, 2011	The Federal Arbitration Act preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration because such a condition stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.	Vote: 5-4 **Majority:** Scalia (joined by Roberts, Kennedy, Thomas, and Alito) **Concurrence**: Thomas **Dissent:** Breyer (joined by Ginsburg, Sotomayor, and Kagan)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
2(a). *Kasten v. Saint-Gobain Performance Plastics Corp.* Case No. 09-834 Decided March 22, 2011	Oral complaints constitute protected conduct under the FLSA's anti-retaliation provision.	Vote: 6-2 **Majority:** Breyer (joined by Roberts, Kennedy, Ginsburg, Alito, and Sotomayor) **Dissent:** Scalia (joined by Thomas) Kagan recused.
2(b). *Thompson v. N. Am. Stainless LP, U.S.* Case No. 09-291 Decided: January 24, 2011	An employee who was fired because his fiancée filed an EEOC charge against their employer has a viable cause of action and standing to sue for retaliation under Title VII.	Vote: 8-0 **Opinion:** Scalia (writing for a unanimous Court) **Concurrence:** Ginsburg (joined by Breyer) Kagan recused.
3. *Staub v. Proctor Hospital* Case No. 09-400 Decided: March 1, 2011	If a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and if the act is a proximate cause of the ultimate employment action, then the employer is liable.	Vote: 8-0 **Opinion:** Scalia (writing for a unanimous Court) **Concurrence:** Alito (joined by Thomas) Kagan recused.

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
4. *Chamber of Commerce of the United States v. Whiting* Case No. 09-115 Decided: May 26, 2011	Arizona law allowing the state to revoke the business licenses of employers that knowingly or intentionally employ unauthorized aliens and requiring that all Arizona employers use E-Verify was not preempted by federal immigration law.	Vote: 5-3 **Majority:** Roberts (joined by Kennedy, Scalia, Thomas, and Alito) Concurrence in Part and in the Judgment: Thomas **Dissent:** Breyer (joined by Ginsburg) **Dissent:** Sotomayor Kagan recused.
5(a). *Borough of Duryea v. Guarnieri* No. 09-1476 Decided: June 20, 2011	Government employer's allegedly retaliatory action against an employee does not give rise to liability under the Petition Clause unless (i) the employee's petition relates to a matter of public concern and (ii) the employee's First Amendment interest outweighs the interest of the government employer in promoting the efficiency of public services.	Vote: 8-1 **Majority:** Kennedy (joined by Roberts, Ginsburg, Breyer, Thomas, Alito, Sotomayor, and Kagan) **Concurrence:** Thomas **Concurring in Part and Dissenting in Part:** Scalia
5(b). *NASA v. Nelson* Case No. 09-530 Decided: January 19, 2011	The federal government's background investigation questions do not violate contract employees' constitutional right to informational privacy.	Vote: 8-0 **Opinion:** Alito (writing for a unanimous Court) **Concurrence:** Scalia (joined by Thomas) **Concurrence:** Thomas Kagan recused.

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
6. *CIGNA Corp. v. Amara* Case No. 09-804 Decided: May 16, 2011	ERISA §502(a)(1)(B) did not give the district court authority to reform CIGNA's plan because §502(a)(1)(B) speaks to enforcing a plan's terms, not changing them. However, equitable relief is authorized by §502(a)(3), which provides for a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of ERISA or the plan's terms.	Vote: 8-0 **Opinion:** Breyer (writing for a unanimous Court) **Concurrence:** Scalia (joined by Thomas) Sotomayor recused.

Individual Case Analysis

Following is a more detailed summary of each of these decisions and their likely impact on employers. Please contact us for additional information or advice regarding the effect these decisions may have on your particular workplace.

1. Supreme Court Raises the Bar for Class Claims

a. The Court Effectively Nixes Class Actions that Attempt to Aggregate a Large Number of Discrete Employment Decisions Involving Different Decision-Makers

In the biggest victory for employers this term, the Court held in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (June 20, 2011), that a sex discrimination lawsuit brought on behalf of approximately 1.5 million current and former female Wal-Mart employees could not be maintained as a class action. This ruling will make it much more difficult for plaintiffs' attorneys to maintain class action lawsuits alleging that a large class of employees has been subjected to a "common policy" or practice of discrimination.

In April 2010, the Ninth Circuit Court of Appeals affirmed certification of what would have been the largest employment discrimination class action in history. The class included women employed in numerous positions at any of Wal-Mart's 3,400 retail stores across the United States at any time since 1998 who had been or may be subjected to the challenged practices. The plaintiffs argued that although Wal-Mart maintained a formal policy prohibiting gender discrimination and had no express corporate policy against the advancement of women, there was a tacit, unwritten common policy in that (1) the discretion exercised by local Wal-Mart managers over pay and promotions led to an unlawful disparate impact on women; and (2) Wal-Mart's strong and uniform "corporate culture" permitted bias against women to infect the decisions of local Wal-Mart managers.

The issue before the Court was whether the case met the requirements for a class action under Rule 23 of the Federal Rules of Civil Procedure. A 5-4 majority held that the plaintiffs had failed to meet the requirement of Rule 23(a)(2) to demonstrate that their sex discrimination claims had common questions of law or fact. The Court also unanimously held that the plaintiffs' claims for monetary relief were inappropriately certified under Rule 23(b)(2), which allows for class actions to obtain injunctive or declaratory relief common to the class, because the monetary relief sought, such as lost wages, was not "incidental" to the requested injunctive or declaratory relief.

The Court found that the plaintiffs failed to meet the Rule 23(a) requirement of demonstrating the existence of a common policy of discrimination. Noting that Rule 23 "does not set forth a mere pleading standard," the Court found that the plaintiffs' burden of proving commonality necessarily overlapped with their contention that Wal-Mart engaged in a pattern or practice of discrimination, thereby requiring the district court to examine the merits of the case in determining whether to certify a class.

The Court reasoned that to satisfy the commonality requirement, the plaintiffs' claims must depend on a common contention—for example, the discriminatory bias of a supervisor—and must be capable of class-wide resolution. The plaintiffs attempted to show commonality by providing testimony from a sociological expert, statistical evidence about pay and promotion disparities between male and female employees, and anecdotal reports of discrimination in the form of affidavits from employees. The Court found that this evidence did not constitute the "significant proof" required to show a general policy of discrimination. For instance, the Court rejected the sociological expert's analysis because he could not calculate with any specificity how regularly stereotypes played a meaningful role in employment decisions at Wal-Mart.

In fact, the only "policy" that the plaintiffs' evidence established was that local supervisors were allowed discretion over employment matters, a finding which undermined the plaintiffs' claims. The Court found it "quite unbelievable that all managers would exercise their discretion in a common way without some common direction." Since the plaintiffs failed to demonstrate a specific, prohibited employment practice or any evidence that tied all the class members' claims together, the Court concluded that there was no question common to the putative class members.

The Court also unanimously held that claims for monetary relief may not be certified under Rule 23(b)(2), which allows for injunctive or other declaratory relief common to a class as a whole. The Ninth Circuit previously held that the plaintiffs' claims for lost wages did not bar a class action under Rule 23(b)(2) because this relief was only "incidental" to the requested injunctive or declaratory relief. The Supreme Court disagreed, holding that the claims for monetary relief in the form of back-pay could be certified only under the more stringent requirements of Rule 23(b)(3), which requires that common issues of law and fact predominate over issues affecting individual class members and that a class action be superior to other methods of litigating the claims. Rule 23(b)(3), unlike Rule 23(b)(2), also requires that all class members be given notice of the proposed litigation and an option to opt out of the class.

The dissent argued that the Court had improperly imported the requirements of Rule 23(b)(3) into the Rule 23(a) analysis. Citing various aspects of the plaintiffs' evidence, such as wage differentials between female and male Wal-Mart employees, the dissent argued that the plaintiffs had adequately demonstrated the presence of common questions about Wal-Mart's pay and promotion practices to satisfy Rule 23(a)(2). The dissent also noted that although it agreed that the plaintiffs did not satisfy the requirements of Rule 23(b)(2), the case should have been remanded to determine whether it could meet the requirements of Rule 23(b)(3) (the plaintiffs had requested Rule 23(b)(3) certification as an alternative to Rule 23(b)(2) certification).

The Court's ruling is a clear victory for employers. While not sounding the death knell for all discrimination class actions, the decision severely limits private class action lawsuits which attempt to aggregate a large number of discrete employment decisions involving different decision makers in a single lawsuit. Contrary to opinions expressed by some commentators, the decision does not exempt large employers from discrimination laws or leave true victims of discrimination without a legal remedy. Employees remain free to bring individual claims of discrimination, and nothing in the decision precludes the maintenance of a class action where a group of plaintiffs can produce evidence of a common policy that was lacking in this case. It remains to be seen whether plaintiffs' attorneys respond to this decision with more specifically tailored class action suits aimed at the actions of a particular decision maker or groups of decision makers within a company, possibly requiring employers to defend similar actions in multiple forums.

b. The Federal Arbitration Act Preempts State Law Prohibiting Class Arbitration Waivers

In *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), the Court held that a state law prohibiting a class arbitration waiver in most consumer contracts was preempted by the Federal Arbitration Act (FAA). While this decision involved a consumer dispute, it has clear implications in the employment context as to the permissible scope of mandatory arbitration clauses which include a waiver of class-wide actions.

The Concepcions entered into a cell phone service agreement with AT&T, which provided for arbitration of all disputes but required that a customer bring all claims in an "individual capacity," and not as the representative of a class. As part of the service agreement, the Concepcions were given free cell phones but were charged sales tax based on the retail value of the phones. They sued in federal district court, alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it claimed in advertisements were free.

The district court, affirmed by the Ninth Circuit Court of Appeals, held that the service agreement was unconscionable under California precedent because it required consumers to waive their right to file class arbitration claims. California's rule provides that class arbitration waivers in consumer contracts of adhesion are unconscionable and exculpatory where (1) disputes under the contracts are likely to involve small amounts of damages, and (2) it is alleged that the party with superior bargaining power carried out a scheme to cheat large numbers of consumers out of individually small sums of money.

The Court reversed, finding that California's rule contravened the twin goals of the FAA: encouraging speedy dispute resolution and ensuring that private arbitration agreements are enforced according to their terms. The Court found that California's rule upended the goal of speedy dispute resolution because class arbitration requires procedural formality that leads to a much longer process, and eliminates the advantage of informality that individual arbitration has. It also noted that arbitrators are unlikely to be familiar with the procedural requirements for class certification. The Court further opined that class arbitration provides fewer procedural protections for defendants because, while defendants have multiple opportunities to appeal in a judicial class action, a court may only vacate an arbitration award when it is based on misconduct by the arbitrator or procured by corruption, fraud or undue means.

The Court also found that California's rule interfered with arbitration agreements because, although the rule "does not *require* class arbitration, it allows any party to a consumer contract to demand it *ex post*." Further, the practical effects of the rule were to reduce attorneys' incentives to arbitrate claims on behalf of individuals when they could do so on behalf of a class and reap higher fees, and to reduce companies' incentives to continue with individual arbitration when they face "inevitable" class arbitration. Justice Thomas concurred, but argued for a narrower interpretation of the FAA's savings clause so as to allow an arbitration agreement not to be enforced only when there is a successful challenge to the formation of the agreement, such as fraud or duress.

The dissent framed the issue as whether California's law placed arbitration agreements on equal footing with other contracts, not the "merits and demerits of class actions." It found that California's law was consistent with the language and purpose of the FAA because the basis on which the lower courts invalidated the service agreement—unconscionability—was a basis to revoke any contract. The dissent also took issue with the majority's contention that individual arbitrations are more efficient than class arbitrations, arguing that the relevant comparison for class arbitrations is to judicial class actions. Since class arbitrations are often resolved more quickly than judicial class actions, California's rule reinforces the efficiency objective of the FAA.

The broad language of the Court's opinion means that it will likely apply to arbitration agreements in the employment context. Employers may therefore be able to avoid the risk of employee class arbitrations on a range of claims by inserting appropriate language in employment contracts. However, *AT&T* does not mean that a class arbitration waiver is an automatic shield against such actions. The permissible scope of the Court's decision and its application to employment arbitration agreements will be interpreted over time by the lower courts.

2. The Court Continues to Broaden the Scope of Employment Retaliation Claims

Two employee-friendly retaliation decisions issued this term underscore the need for employers, now more than ever, to document the legitimate reasons for all adverse employment decisions.

a. Oral Complaints Constitute Protected Conduct under the FLSA's Anti-Retaliation Provision

In one of the few split decisions this term on substantive employee rights, the Court held in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011), that oral complaints are protected under the anti-retaliation provision of the Fair Labor Standards Act (FLSA). Although the Court discussed the validity of oral complaints at length, it did not address whether the FLSA covers such oral complaints made solely to a private employer instead of a government agency.

Kevin Kasten is a former employee of Saint-Gobain Performance Plastics Corporation (St. Gobain). During Kasten's employment, St. Gobain located its timeclocks between the area where its employees changed into and out of their work-related protective gear and the area where they carried out their assigned tasks. This location prevented employees from receiving credit for the time they spent donning and doffing their protective gear. In accordance with the company's internal grievance procedure, Kasten complained to his shift supervisor, lead operator and two HR officials about the location of the timeclocks, and believed that his complaints resulted in his termination. Following his termination, Kasten sued, alleging that St. Gobain retaliated against him in violation of the FLSA. The district court issued summary judgment for St. Gobain, holding that the FLSA did not protect oral complaints, and the Seventh Circuit Court of Appeals affirmed.

The Supreme Court reversed, holding that the FLSA anti-retaliation provision covered oral complaints. In reaching this decision, the Court had two primary considerations: (1) effective enforcement of the FLSA and (2) the position taken by the Department of Labor (DOL). Regarding the first consideration, the Court noted that the FLSA's basic objective of prohibiting detrimental labor conditions was enforced by reliance on the reporting of violations by employees. The Court reasoned that this enforcement system is only effective if employees can report violations without fear of retribution, and surmised that excluding oral complaints from the category of protected activity would inhibit the use of the FLSA's complaint procedure by "illiterate, less educated, or overworked workers." Moreover, the Court found that limiting the scope of the anti-retaliation provision to written complaints would limit the DOL's flexibility in enforcing the FLSA, as it would be unable to use hotlines, interviews and other oral methods to receive complaints. Regarding the second consideration, the Court found that the DOL's view on the matter was entitled to "a degree of weight," and the Secretary of Labor's consistently held position that oral complaints were covered was therefore weighted heavily.

Unfortunately, this decision did not resolve the circuit split on whether an oral complaint must be "filed" with the government in order to be protected under the FLSA. The dissent argued that the Seventh Circuit's opinion should be affirmed on this basis. Based on the meaning of the phrase "filed any complaint," and the context in which the phrase appears in the FLSA, the dissent argued that the

retaliation provision requires that an official grievance be filed with a court or agency in order to be covered.

In light of this decision, employers should proceed cautiously when confronted with a possible oral complaint relating to wage and hour issues. This decision, combined with the DOL's aggressive enforcement agenda, underscore the need for employers to ensure that they understand and are complying with their myriad obligations under the FLSA.

b. Court Allows Retaliation Claim by Employee Terminated after Fiancée Filed EEOC Charge

The Court unanimously ruled in *Thompson v. North American Stainless LP*, 131 S.Ct. 863 (2011), that an employee allegedly fired in retaliation for a sex discrimination charge filed by his fiancée could sue his employer under Title VII of the Civil Rights Act of 1964.

Eric Thompson and his fiancée, Miriam Regalado, both worked for North American Stainless (NAS). In February 2003, the Equal Employment Opportunity Commission (EEOC) notified NAS that Regalado had filed a charge of sex discrimination against the company. NAS fired Thompson three weeks later. Thompson then filed his own EEOC charge and later filed suit in federal district court, alleging that NAS fired him to retaliate against Regalado for filing her charge with the EEOC. The district court dismissed the case, holding that "Title VII does not permit third-party retaliation claims." The Sixth Circuit Court of Appeals affirmed the district court's ruling en banc.

Reversing the Sixth Circuit, the Court observed that Title VII's anti-retaliation provision is broader than the statute's substantive anti-discrimination provisions. Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin "with respect to . . . compensation, terms, conditions, or privileges of employment" and discriminatory practices that would "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." In contrast, the anti-retaliation provision prohibits an employer from "discriminating against any of his employees" for engaging in protected conduct, without further specifying what acts are prohibited.

Citing the Court's 2006 ruling in *Burlington Northern & S.F.R. Co. v. White*, 548 U.S. 53, the Court noted that this language prohibits employers from taking any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Applying this logic to *Thompson*, the Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired."

While the Court acknowledged that its ruling could expose employers to claims any time they fire an employee who has some connection to another employee who complained of discrimination, it provided almost no guidance as to what sorts of relationships could give rise to a third-party reprisal claim. While the Court stated that firing a close family member would "almost always" give rise to a claim, beyond that it was "reluctant to generalize . . . Title VII's anti-retaliation provision is simply not reducible to a comprehensive set of clear rules." Justice Ginsburg wrote a separate concurrence to emphasize that the

Court's decision comported with the longstanding views of the EEOC and with the interpretations of analogous statutes enforced by other federal agencies like the National Labor Relations Board.

Employers should be cognizant that retaliation charges may now be filed not only by an employee who complains of discrimination, but also by anyone who has some significant relationship with a complaining employee. Last year, more retaliation charges were filed with the EEOC than any other type of charge. With this decision, the Courts opened the door even wider to such claims. Consequently, now more than ever, employers are well advised to make sure that they can articulate (and later substantiate in court) legitimate, credible reasons for any adverse employment action.

3. Court Broadens "Cat's Paw" Theory of Liability

In *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), the Court unanimously held that an employer can, in certain circumstances, be held liable for employment discrimination based upon the bias of a supervisor who influenced, but did not make, the ultimate employment decision being challenged. In so doing, the Court flatly rejected a narrower version of this so-called "cat's paw" argument, under which the employer could be held liable only if the biased supervisor exerted a "singular influence" over the ultimate employment decision.

Vincent Staub worked for Proctor Hospital as an angiography technician until his termination in 2004. During his employment, Staub was a member of the United States Army Reserve, which required him to attend drill one weekend per month and to train full-time for two to three weeks per year. According to Staub, his supervisors were hostile to these military obligations, and they gave Staub a disciplinary directive that required him to report to them when he had no patients or when the angio cases were completed. Around April 2004, one supervisor reported to Proctor's vice president of human resources, Linda Buck, that Staub left his desk without informing a supervisor in violation of the disciplinary directive. Buck relied on the accusation and, after reviewing Staub's personnel file, decided to fire him.

After unsuccessfully appealing the decision through the grievance procedure, Staub sued Proctor under the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA), claiming that his discharge was motivated by hostility to his military obligations. Staub did not argue that Buck harbored any hostility regarding his military obligations, but that his supervisors' hostility influenced Buck's ultimate employment decision. A jury found in favor of Staub. The Seventh Circuit Court of Appeals reversed the jury verdict, holding that Staub's claim could not succeed unless the biased supervisor exercised such a "singular influence" over the decision-maker that the decision to terminate was the product of "blind reliance."

Reversing, the Court found that the Seventh Circuit's narrow view of the "cat's paw" theory "would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and*

intended to produce the adverse action." Thus, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." Justice Alito concurred, opining that an employer should not be held liable "where the officer with formal decision making responsibility, having been alerted to the possibility that adverse information may be tainted, undertakes a reasonable investigation and finds insufficient evidence to dispute the accuracy of that information."

This case is a clear victory for plaintiffs and plaintiffs' attorneys, particularly in jurisdictions such as the Seventh Circuit that had previously adopted more limited versions of the "cat's paw" theory. While the case addresses a claim under USERRA, the Court's decision makes it clear that the same analysis is likely to apply under nearly all federal laws prohibiting discrimination and retaliation in employment.

In light of the Court's opinion, it is clear that having HR or a higher-level manager review an employment decision will not necessarily absolve an employer of liability for the bias of a subordinate. Nevertheless, this case makes meaningful review of employment decisions by HR and management even more vital, as the best way to avoid a lawsuit is to ensure that supervisors' recommendations are well-supported and that questionable actions are reversed or postponed until they can be properly supported. Further, it is now all the more important to ensure that even first-line supervisors receive effective training regarding equal employment laws and how to properly document and support employment decisions.

4. Federal Immigration Law Does Not Preempt Controversial Arizona Law

In *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968 (2011), the Court upheld the Arizona Legal Workers Act (Act). The Act provides that the business licenses of employers who knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use E-Verify. The Court held that neither of these provisions is preempted by federal immigration law.

This case arose when the Chamber of Commerce of the United States and various business and civil rights organizations filed a federal pre-enforcement suit against those charged with administering the Act in the federal district court, arguing that the Act was preempted by federal immigration law. The district court held that the Act is not preempted by federal law, and the Ninth Circuit Court of Appeals affirmed.

The Supreme Court agreed that the Act was not preempted. Specifically, the Court found that the Act's licensing provisions fell well within the confines of the authority Congress chose to leave to the states in the Illegal Immigration Reform and Control Act (IRCA); while IRCA prohibits the states from imposing "civil or criminal sanctions" on employers of unauthorized aliens, it preserves state authority to impose sanctions "through licensing and similar laws." The Court also held that the Act's E-Verify provision is not preempted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). While the IIRIRA does limit the federal government's ability to mandate the use of E-Verify, it contains no

language limiting state action. Justice Thomas concurred in part and concurred in the judgment, but did not file a separate opinion.

Dissenting, Justice Breyer argued that Arizona's law was preempted because Congress did not intend to allow states such broad latitude in crafting "licensing" laws. He argued that Arizona's law contravened Congressional intent for two main reasons. First, its substantially stiffer penalties made it likely that employers would adopt safeguards against hiring unauthorized aliens without counterbalancing protections against unlawful discrimination. Second, the law's enforcement mechanisms increased the burdens on employers and raised the risks of erroneous prosecutions. Justice Breyer also argued that states could not make the use of E-Verify mandatory when it was expressly made voluntary in IIRIRA. Justice Sotomayor also dissented, arguing that IRCA should be read to allow states to impose licensing sanctions only after a final determination by federal authorities that a person violated IRCA by knowingly employing an unauthorized alien.

The Supreme Court's approval of state E-Verify mandates and more stringent laws prohibiting the employment of unauthorized aliens underscore the importance of employers taking all legally required steps to ensure that they are properly verifying the their employees' eligibility to work in the United States. Employers are encouraged to carefully track current legislative activity in any states in which they maintain operations, and to review their policies and procedures for compliance with applicable law.

5. The Court Continues to Recognize Public Employers' Need to Manage Their Affairs

a. The Test for Public Employees' Right to Free Speech Applies the to Right to Petition Under the First Amendment

In *Borough of Duryea v. Guarnieri*, No. 09-1476 (June 20, 2011), the Court limited retaliation claims by public employees under the Petition Clause of the First Amendment to cases in which the employee's petition relates to a matter of "public concern."

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The last clause has been interpreted to prohibit the government from taking adverse action against an individual merely because the individual sought access to the courts for the resolution of a legal dispute.

Charles Guarnieri was employed as Chief of Police of the borough of Duryea, a small town in Pennsylvania. After his employment was terminated, Guarnieri filed a union grievance challenging his termination, and an arbitrator ordered Guarnieri reinstated. Following his reinstatement, Guarnieri complained that the borough council retaliated against him for filing his grievance by issuing 11 directives instructing him on the performance of his duties. He filed a second grievance, and was partially successful.

Guarnieri then filed suit, alleging that his first grievance was a "petition" protected by the First Amendment, and that the directives issued upon his reinstatement were retaliation for his protected activity. Guarnieri won at trial, and the Third Circuit Court of Appeals affirmed the award of compensatory damages because it found that the Petition Clause protects public employees who petition the government through a formal mechanism such as a lawsuit or grievance, even if the petition concerns a matter of solely private concern.

The Court reversed, holding that because the right of free speech and the right to petition share substantial common ground, the so-called "public concern test" should also apply to Petition Clause claims. Applying that test to Petition Clause claims, a government employer is not liable for retaliation unless (i) the employee's petition relates to a matter of public concern and (ii) the employee's First Amendment interest outweighs the interest of the government employer in promoting the efficiency of public services. A petition that involves nothing more than a complaint about the employee's own duties does not relate to a matter of public concern and is not actionable under the Petition Clause. The Court remanded the case for a determination of how this framework would apply to Guarnieri's claims.

Dissenting in part, Justice Scalia argued that the public concern test should not be applied to Petition Clause cases simply because that clause appears in the same amendment as the Speech Clause. He argued that the Petition Clause should protect public employees against retaliation unless their petitions are addressed to the government as their employer, rather than as their sovereign. Justice Thomas wrote that he largely agreed with Justice Scalia, but concurred in the judgment because he agreed that the case should be remanded.

This case demonstrates that not every "petition" by a public employee will support a claim for retaliation under the Petition Clause of the First Amendment. However, this ruling does not leave employers free to retaliate against employees who file a grievance or lawsuit, as such retaliation will still often be prohibited by state or federal law. Consequently, employers should proceed with caution and consult legal counsel when taking adverse action against any employee who has filed a formal grievance, lawsuit or other complaint.

b. Background Check Questions Do Not Invade Government Contract Employees' Constitutional Rights

In *Nat'l Aeronautics and Space Admin. v. Nelson*, 131 S.Ct. 746 (2011), the Court unanimously held that certain questions in background checks of federal contract employees do not invade the contract employees' constitutional right to informational privacy.

The case was brought by 28 NASA contract employees at the Jet Propulsion Laboratory (JPL), who were required to undergo standard federal employee background checks as a result of a change in the law after the September 11 attacks. When the contract employees began working for JPL, the background checks were only required for federal employees unless required by individual contract.

The form the contract employees were required to complete asked whether they had used, supplied, manufactured, illegal drugs in the past year. The contract employees objected to the follow up question, which stated that if employees answered "yes" to the question about drugs, they had to provide further information about "any treatment or counseling received." The contract employees also objected to open-ended questions on a form sent to employees' designated references and former landlords about whether they had "any reason to question" the employee's honesty or trustworthiness. That form also asked whether the reference knew of any "adverse information" about the employee in several areas, such as "financial integrity," "abuse of alcohol and/or drugs," and "mental or emotional stability." If the reference answered "yes" to any of the questions, the form requested an explanation.

Reversing the Ninth Circuit Court of Appeals, the Court held that these questions did not violate the contract employees' constitutional privacy rights. The Court emphasized that the government has a legitimate interest in conducting background checks on contract employees at JPL, where "important work" is done pursuant to a "multibillion dollar investment from the American taxpayer." The challenged questions were a reasonable effort by the federal government to "ensur[e] the security of its facilities and in employing a competent, reliable workforce." In reaching its decision the Court assumed, without deciding, that the questions implicated informational privacy issues of constitutional significance.

The Court also recognized that the government has a "freer hand" when dealing with its employees than when it deals with the privacy rights of citizens at large. However, it found that the government's authority should not be more limited with respect to the plaintiffs-contract employees than federal employees because the contract employees performed the same type of work as federal employees. The Court's conclusion also was bolstered by the fact that the background check forms contained substantial protections against disclosure to the public, and therefore complied with federal privacy laws.

Justice Scalia concurred, but argued that he would have decided the case on the "simpler" ground that no constitutional right to "informational privacy" exists. Justice Thomas joined Justice Scalia's concurrence, and also wrote his own concurrence to emphasize that no provision in the Constitution mentions such a right.

Although this holding applies to federal contract employees, the Court noted that the challenged questions were comparable to questions commonly asked by private employers. In doing so, the Court recognized the explosion of pre-employment background checks generally, and appeared loath to require the government to meet a different standard than that imposed on private employers. Although this case was a victory for the government, it is a reminder that both private and public sector employers must strike an appropriate balance to ensure that questions asked in a background check are related to the job to be performed, without being either overly broad (which can risk discrimination claims) or overly narrow (which can risk negligent hiring claims). In addition, employers must ensure that their forms and background checks are in compliance with the growing number of state laws.

6. *Employers Are Not Liable for ERISA Benefits Based on False or Misleading Summary Plan Documents, but Plan Participants May Be Entitled to Other Equitable Relief*

In *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, the Court held that a plan administrator may not be required to pay benefits based on false or misleading information in a summary plan description (SPD), but a catchall enforcement provision in ERISA may entitle plan participants to various forms of equitable relief, including monetary relief in the appropriate circumstances.

In 1998 CIGNA changed its pension plan from a defined benefit in the form of an annuity to a cash balance plan calculated on the basis of a defined annual contribution from CIGNA. Although the company represented to employees that their benefits would be enhanced by the change, the new plan in fact made a significant number of employees worse off. As a result, the district court found that CIGNA intentionally misled employees, and ordered relief under ERISA § 502(a)(1)(b), which allows a plan participant or beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan." The district court found that CIGNA's conduct raised a presumption that the employee class as a whole suffered "likely harm" as a result of the misleading information, and that reformation of the terms of the plan was warranted. The Second Circuit Court of Appeals affirmed.

The Supreme Court reversed, holding unanimously that § 502(a)(1)(b) does not authorize a court to reform the terms of a plan, even if the ERISA-mandated SPDs and summaries of material modification (SMMs)—the documents which are intended to provide participants with a readily understandable description of the plan—are false or misleading. Since SPDs and SMMs do not constitute the terms of the plan for purposes of § 502(a)(1)(b), the Court held that they may not trump the plan documents themselves.

The Court then discussed whether relief might be appropriate under ERISA § 502(a)(3), a catchall provision which allows for "other appropriate equitable relief" to redress violations of ERISA or the terms of the plan. The district court declined to address this question because it found a basis for awarding relief under § 502(a)(1)(b). The Court found that § 502(a)(3) could include reformation of the plan to remedy the misleading information CIGNA provided. The Court also found that the other forms of "equitable relief" the district court ordered—estoppel and injunctive relief involving monetary compensation against a trustee (called "surcharge")—were appropriate under this section.

Finally, the Court held that participants or beneficiaries must show "actual harm" to be entitled to relief under § 502(a)(3). The Court opined that the extent of harm that must be shown varies with the form of equitable relief sought. For example, a showing of detrimental reliance is required to impose a remedy equivalent to estoppel. On the other hand, detrimental reliance is not always required to award a surcharge remedy for violations like those in this case; a showing of harm and causation may suffice. Justice Scalia concurred in the judgment, but argued that the Court should not have addressed the issues under § 502(a)(3) because the district court declined to consider those questions.

This case resolves a circuit split regarding the relief available where a SPD contains false or misleading information, as some courts had authorized relief based on the terms of a SPD. However, the Court's broad interpretation of "equitable relief" under § 502(a)(3) may open the door for participants and beneficiaries to seek relief under this section with greater frequency.

LOOKING AHEAD: THE 2011-2012 TERM

The Supreme Court will open its 2011-2012 term on October 3, 2011. The Court will likely hear several blockbuster cases with significant implications for employers, including cases on immigration, affirmative action and President Barack Obama's health care reform law. As of the date of this writing, the Supreme Court has not yet agreed to consider the health care reform law, but challenges to the constitutionality of the law are pending in the Fourth and Eleventh Circuit Courts of Appeal, and a panel of the Sixth Circuit recently upheld the law's constitutionality.

The Court has already selected several labor and employment cases that it will hear during the next term, including the following:

- ***Knox v. SEIU Local 1000***: The Court will consider whether (1) in addition to an annual fee notice to members, a union is required to send a second notice and provide an opportunity to object as required by *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), when adopting a mid-term fee increase for political expenditures; and (2) state employees may be required to pay union agency fees for purposes of financing political expenditures for ballot measures.
- ***Coleman v. Md. Court of Appeals:*** The issue in this case is whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the so-called self-care leave provision of the Family and Medical Leave Act, which allows eligible employees to take leave for a serious health condition that makes them unable to perform the functions of their job. Coleman, a former Maryland state employee, brought the challenge after being terminated following his request for medical leave.
- ***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC:*** The Court will consider whether the ministerial exception—a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions—applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship. Although the courts of appeal agree that this doctrine applies to pastors, priests and rabbis, they are divided over the boundaries of the ministerial exception when applied to other employees.