SUPREME COURT END OF TERM ROUNDUP: IMMIGRATION, ANTITRUST, TAXATION OF ONLINE SALES, ARBITRATION OF EMPLOYMENT CLAIMS, AND MOBILE DATA PRIVACY HEADLINE THE END OF A MOMENTOUS TERM

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The Supreme Court of the United States ended its 2017–2018 term on June 27 with several critical and highly contested decisions of great importance and practical significance. In many of these decisions, the Court ruled by a 5-4 majority, with Roberts, CJ, Kennedy, Thomas, Alito, and Gorsuch, JJ, the Court's conservative wing, in the majority; and Ginsburg, Breyer, Sotomayor, and Kagan, JJ, the Court's liberal wing, in the minority, highlighting the critical impact of Senate Majority Leader Mitch McConnell's refusal in 2016 to allow a vote on nominee Merrick Garland during President Obama's last year in office, allowing President Trump to fill the seat left vacant by the death of Justice Scalia with Neil Gorsuch. A selection of this term's decisions follows; after the description of each decision are some practical takeaways.

Immigration. In Trump v. Hawaii, et al (No. 17-965, June 26, 2018), the Court upheld the Trump Administration's third executive order "travel ban," prohibiting or limiting entry by persons from seven specific countries, five of which are Muslim-majority in population (the five are Iran, Libya, Somalia, Syria, and Yemen; the two non-Muslim majority countries are North Korea and Venezuela; an eighth country originally included, Chad, was later removed from the proscribed list). The order, which with its predecessors provoked enormous controversy from the administration's first week in office, upholds its right, on professed national security grounds, to deny or condition entry under Article II of the Constitution and the Immigration and Nationality Act.

Chief Justice Roberts, writing for the Court's conservative majority, held that the executive order was clearly within the President's Article II powers and authority to exclude or limit the entry of aliens under the Immigration and Nationality Act, and also held that one of the main lines of attack against the travel ban, President Trump's anti-Muslim rhetoric during the 2016 campaign, could not be used as "parole evidence," in effect, to attack the motives for which the order was issued, if the order was facially valid. Justice Sonia Sotomayor, writing in a dissent in which Justice Ginsburg joined, argued that the administration's evidence of a national security imperative for the travel ban should have been questioned and that President Trump's anti-Muslim rhetoric should have been used to invalidate the travel ban based on an impermissible intent. Justice Breyer issued a milder dissent in which Justice Kagan joined, in which they questioned the administration's trustworthiness to enforce the travel ban impartially. It is significant that the Court's liberal dissenters were

split in their grounds for dissent and could not issue a united dissent; Justices Sotomayor and Ginsburg had been the only justices to dissent last year from the Court's decision to vacate an injunction issued by a lower court and allow the order to go into effect pending the Court's decision, with Justices Breyer and Kagan joining the conservative majority.

Takeaways: The levels of restrictions in the travel ban for the seven affected countries varies significantly and should be reviewed in the case of an employee or family member seeking entry. For example, both immigrant and nonimmigrant entry from Syria and North Korea is suspended, while Iranians with valid student or exchange visas may be able to enter, subject to advanced screening. In a sidelight to the case, but one of enormous historical significance, the Court took the opportunity to formally overrule Korematsu v. U.S., 323 U.S. 214 (1944), the discredited decision that authorized Japanese-American internment camps in World War II. Korematsu is often mentioned along with the infamous Dred Scott decision (Dred Scott v. Sandford, 60 U.S. 393 (1857)) that allowed a slave brought to a free state to be returned into slavery as the Supreme Court's twin low points of jurisprudence. Chief Justice Roberts wrote about Justice Sotomayor's dissenting invocation of Korematsu that: "The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission." The statement might seem to contain a signal that the Court would uphold the administration's current "zero tolerance" policy on the southern border as long as the policy was facially race-neutral.

Antitrust. While much of the country's attention was focused on the chaos at the southern border and the broader context of immigration, the same five conservative justice majority of the Supreme Court issued a decision sharply limiting antitrust law as a tool of consumer protection and encouraging competition. In Ohio v. American Express Co., (No. 16-1454, June 25, 2018), the Court held that the American Express Company's practice of forbidding merchants that accept American Express cards in payment from encouraging customers to use other cards that impose lower fees on transactions, a practice known as "anti-steering," did not violate the Sherman Antitrust Act's prohibition on "unreasonable restraints of trade." The Court held that treating the consumer-credit card and credit card-merchant transactions necessary to each sale as two sides of the same market, and understanding credit card networks as supplying only one product – the transaction – that is consumed by both consumer and merchant as an analytic framework, precluded a finding of anticompetitive effects created by the anti-steering rules. Prices charged by the credit card companies on one side of the transaction necessarily affect and constrain the prices charged on the other side of the transaction. The Court also took note that despite American Express's practice, the credit card market appeared competitive, and that competitor cards' fees continued to grow even in merchant locations in which American Express was not accepted.

Takeaways: The Court sent a strong signal that it will increasingly assume that competition, rather than antitrust regulation, suffices to drive down consumer fees on transactions. There is little evidence of that, since American credit card fees are many times higher for any given transaction than the equivalent fees in Europe, where fees are capped by regulation, but that is the Court's direction.

Taxation of Online Sales. In South Dakota v. Wayfair, Inc. (No. 17-494, June 21, 2018), the Court took a step to limit the what state governments and brick-and-mortar retailers have come to perceive as an unfair advantage by online retailers such as Amazon. Since the development of the Internet and World Wide Web over twenty years ago, online sellers have not been required to collect sales tax from customers in states in which the seller does not have a physical "brick-and-mortar" presence." The tax-free status of online sales has fueled the growth of e-commerce and lowered costs for consumers, but also put traditional retailers at a disadvantage and cost states billions of dollars in tax revenues. On June 21, 2018, the Supreme Court closed the online sales tax loophole, holding that states may pass laws requiring online sellers selling into their jurisdictions to collect sales tax as though the transaction was a brick-and-mortar one. Several states have announced plans to do so. States were already taxing an estimated 75% of online sales owing to the sellers' physical presence in their jurisdictions (brick-and-mortar stores, warehouses, distribution centers, etc.), but the decision will result in perhaps $13 billion in additional tax revenue, and, of course, equalize the playing field with brick-and-mortar retailers.

Takeaways: In structuring large-scale ecommerce portals, businesses and their advisors should going forward conduct a yearly fifty-state review to determine in what states they will need to collect sales tax on transactions (and in which they are not already doing so), and build appropriate language into their terms of use and functionality into their web portals.

Arbitration of Employment Claims. On May 21, 2018, the U.S. Supreme Court, by the same 5-4 conservative majority as for the travel ban case, upheld the general enforceability of arbitration agreements and clauses under the Federal Arbitration Act, 9 U.S.C. §1 et seq. In the decision, Epic Systems Corp. v. Lewis, 16-285, 584 U.S. ____ (May 21, 2018), the Court ruled that the Act's "savings clause," permitting courts to set aside arbitration agreements in given cases, did not render them unenforceable as a general matter, given the Act's statement elsewhere that arbitration agreements are enforceable. The decision, written by Justice Gorsuch, has the effect of allowing employers to contract out of class action and other collective litigation processes, meaning, according to the dissent written by Justice Ginsburg, that individual employee plaintiffs may not only be contractually forced to arbitrate, rather than litigate, their claims, but that the expense of doing

so, when not combined with other similarly-situated plaintiffs, may effectively prevent them from pursuing such claims at all.

Takeaways: Employers can generally rely on the enforceability of arbitration agreements in employment contracts, so long as the contract as a whole is not unenforceable on grounds of unconscionability, fraud or misrepresentation, mistake, or other common bases of contract invalidity. Arbitration clauses should be considered by employers when preparing employment agreements.

Mobile Data Privacy. In Carpenter v. U.S. (16-402, June 22, 2018), the U.S. Supreme Court set a large marker in favor of mobile digital privacy and in limitation of the surveillance society. The Court ruled that the Government cannot use mobile phone location data to track a person's movements without obtaining a judicial search warrant first. The 5-4 ruling was surprising in that Chief Justice John Roberts joined the Court's liberal wing to form the five-justice majority. In practical terms, the ruling means that the Government will have to demonstrate probable cause to a federal judge pursuant to the Constitution's Fourth Amendment "unreasonable search and seizure" standard to obtain a search warrant and track a person's movements. In the case, the Government used data sent by the defendant's mobile phone to cell towers to triangulate his location without a warrant. The Government claimed that since records of what numbers a person has called are not constitutionally private, as they are automatically shared with telecommunications service providers, location data was not, either. The Court disagreed, holding that defendants had a "reasonable expectation of privacy" as to their location at any given time, and did not lose that expectation of privacy by making a call. The Court's decision clearly took account of surveillance society concerns.

The Carpenter decision follows other recent Supreme Court decisions in which the Court has declined to permit undue Government intrusion into digital records on Fourth Amendment grounds. In Riley v. California 573 U.S. ____ (2014), the Court unanimously refused to allow police to search cell phones when arresting a person on the grounds that many people stored personal information on their phones unrelated to any alleged crime for which the arrest was made. In U.S. v. Jones, 565 U.S. 400 (2012), the Court unanimously refused to sanction a right of police to place a GPS tracking device on a car without a warrant. The Jones case was specifically cited by the Carpenter majority.

Takeaways: Critics may well question the practical value of the decision: other Court decisions have made it about as easy for prosecutors to obtain search warrants from judges as it famously is for prosecutors to obtain indictments from grand juries, thereby lowering the "probable cause" burden. In the corporate/commercial sphere, telecommunications, Internet, and other IT service agreements should be structured with covenants for

the service provider or intermediary not to share intermediary or end-user location data with the government in the absence of a warrant or subpoena or with other third parties.

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