FRANCZEK RADELET
Attorneys and Counselors

FR Report

July 2012

A Review of the Supreme Court's 2011 – 2012 Term

As the United States Supreme Court's 2011-2012 term drew to a close at the end of June, the Court's decision upholding the Patient Protection and Affordable Health Care Act (PPACA or the Act) dominated media coverage. Unquestionably, this decision delivered a historic victory to President Barack Obama's administration and requires that employers now turn their full attention to complying with the law.

Partly as a result of the health care decision, commentators had differing views of the term. While the Roberts Court continues to be viewed as generally pro-business, some observers argued that this term marked a "radical" shift to the right by the Court, while others opined that the term was relatively favorable for progressives. In the employment arena, however, the results were more readily apparent. Indeed, with the notable exception of health care, every major Court ruling directly addressing employment issues was favorable to employers. The seven major employment-related decisions issued by the Court this term include:

- One health care case (*Sebelius*)
- One case on FLSA exemptions (*Christopher*)
- One case on religious institutions (*Hosanna-Tabor*)
- Three public employee cases (*Coleman*, *Knox*, and *Elgin*)
- One immigration case (*Arizona*)

As in the past, many of the Court's employment decisions split along ideological lines. Although Justice Kennedy—seen as the key swing vote—had an overall balanced voting record this term, he tended to side with the conservative bloc more consistently in employment decisions. It would be premature to conclude that the Court's decisions this term suggest a pro-employer trend, particularly in light of the relatively balanced outcome in the employment area during the last term. The decisions of this term do suggest, however, that the Roberts Court continues to be sympathetic to employer positions.

Executive Summary

The following table briefly summarizes the Court's holdings in the principal labor and employment decisions this term.

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
National Federation of Independent Business v. Sebelius (Affordable Care Act) Case No. 11-393 (combined with 11-398 and 11-400) **Decided:** June 28, 2012	The Affordable Care Act's individual mandate is valid under Congress' power to tax even though the mandate is not constitutional under the Commerce Clause or the Necessary and Proper Clause. Medicaid expansion that threatens a state's existing level of federal funding of Medicaid is unconstitutional. However, if a state elects to expand coverage, it may be required to meet certain conditions for the additional federal funds. The remainder of the Act remains intact.	Individual mandate valid under taxing power **Vote:** 5-4 **Opinion:** Roberts (joined in part and in judgment by Ginsburg, Breyer, Sotomayor, and Kagan) **Dissent:** Scalia, Kennedy, Thomas, and Alito Medicaid expansion not constitutional (controlling opinion) **Vote:** 7-2 **Controlling opinion:** Roberts (joined by Breyer and Kagan) **Concurrence:** Scalia, Kennedy, Thomas, and Alito
Christopher v. SmithKline Beecham Corp. Case No. 11-204 **Decided:** June 18, 2012	Pharmaceutical representatives are "outside salesmen" exempt from FLSA overtime requirements when the position is viewed in the context of the pharmaceutical industry. The Department of Labor's interpretation is not entitled to judicial deference when the interpretation is erroneous, is inconsistent with the DOL's own regulations, or does not reflect the agency's fair and considered judgment on the matter.	**Vote:** 5-4 **Opinion:** Alito (joined by Roberts, Scalia, Kennedy, and Thomas) **Dissenting in part:** Breyer (joined by Ginsburg, Sotomayor, and Kagan)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C. Case No. 10-553 **Decided:** January 11, 2012	The "ministerial exception" bars employees who fall within this exception from bringing employment discrimination suits against their religious employers.	**Vote:** 9-0 **Majority:** Roberts (writing for a unanimous Court) **Concurrences:** Thomas and Alito (joined by Kagan)
Knox v. SEIU Local 1000 Case No. 10-1121 **Decided:** June 21, 2012	In the agency shop context, a public sector union must provide bargaining unit employees who are not union members an annual notice regarding the proportion of fees to be spent on expenses unrelated to representation, such as political expenses, and receive affirmative consent from nonmembers prior to imposing a special assessment or other mid-year dues increase.	**Vote:** 7-2 **Opinion:** Alito (joined by Roberts, Scalia, Kennedy, and Thomas) **Concurring in judgment:** Sotomayor (joined by Ginsburg) **Dissent:** Breyer (joined by Kagan)
Coleman v. Court of Appeals of Maryland Case No. 10-1016 Decided: March 20, 2012	Sovereign immunity bars lawsuits by public employees under the "self-care" provisions of the FMLA against state employers.	**Vote:** 5-4 **Majority:** Kennedy (joined by Roberts, Thomas, and Alito) **Concurrences:** Thomas and Scalia (concurs in judgment only) **Dissent:** Ginsburg (joined by Breyer and in part by Sotomayor and Kagan)
Elgin v. Dept. of the Treasury Case No. 11-45 **Decided:** June 11, 2012	Federal employees must bring constitutional challenges to federal laws underpinning the challenged employment action under the administrative review scheme enumerated in the Civil Service Reform Act.	**Vote:** 6-3 **Majority:** Thomas (joined by Roberts, Scalia, Kennedy, Breyer, and Sotomayor) **Dissent:** Alito (joined by Ginsburg and Kagan)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Arizona v. U.S. Case No. 11-182 **Decided:** June 25, 2012	Provision of state immigration law making it a misdemeanor for unauthorized aliens to knowingly apply for, solicit, or perform work as an employee or independent contractor in Arizona is preempted by federal law. (Other, non-employment provisions of law also reviewed.)	**Vote:** 5-3 **Opinion:** Kennedy (joined by Roberts, Ginsburg, Breyer, and Sotomayor) **Concurring in part and dissenting in part:** Scalia, Thomas, and Alito (separate opinions) Kagan recused.

Individual Case Analysis

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

FEDERAL HEALTH CARE REFORM LEGISLATION IS UPHELD

In *National Federation of Independent Businesses v. Sebelius*, Nos. 11-393, 11-398, and 11-400 (June 28, 2012), the Supreme Court upheld the key provisions of PPACA. The Court heard three consecutive days of oral arguments in *Sebelius*, a case that challenged the constitutionality of the Act. While the Court ultimately found part of the Act unconstitutional insofar as it affects the power of the federal government to terminate state Medicaid funding, the Court did not find the remainder of the Act unconstitutional as a result of this flaw. In particular, the Court found that the "individual mandate" (which requires individuals to either secure health insurance or pay a tax) constitutional, and therefore the remainder of PPACA and all of its significant obligations for employer group health plans survive. As a result, federal health care reform remains a present and ongoing compliance obligation for employers nationwide. *Sebelius* is one of the most significant cases the Supreme Court has considered in years, and addresses the most significant employee benefits issue facing employers in 2012 (and beyond).

In *Sebelius*, the Court first considered a frequent threshold question—namely, whether it had jurisdiction to consider the matter at all. Under the Anti-Injunction Act (AIA), a tax cannot be challenged in court until it has actually been paid. Under the Act, the individual mandate penalty will not be assessed until 2015. The Court held the AIA did not apply to the suit, allowing the Court to hear the case on its merits. The Court interpreted the selective use of the word "penalty" throughout PPACA as indicative of Congress' intent for the AIA not to apply to PPACA.

The Court then considered whether Congress had authority to enact the individual mandate. The individual mandate requires all individuals to have or obtain a minimum level of health insurance coverage by 2014. This coverage can be through an employer plan, a federal program like Medicare, a state exchange created through the Act, or obtained privately from an insurance company. Individuals who cannot afford the coverage will receive generous subsidies. But anyone who does not obtain such coverage will pay a substantial penalty beginning in 2015. Chief Justice Roberts, in a majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, ultimately deferred to the government's argument and considered the mandate's validity within Congress' power to "lay and collect taxes." The Court noted that it must make every reasonable construction to save a statute from unconstitutionality. The Court found that PPACA's "shared responsibility payment" – although labeled a "penalty" – was substantively a tax and a valid exercise of Congress' taxing power. The Court further noted that while the payment was considered a penalty for purposes of the AIA, this label was not dispositive for evaluating whether it fell within Congress' taxing power.

Chief Justice Roberts' opinion also set forth a lengthy explanation on why the individual mandate would not be constitutional under the Commerce Clause. He viewed PPACA as an attempt by Congress to regulate persons who are not in commerce; noted that Congress has the right to "regulate," not "compel," commerce; and stated that the Commerce Clause is "not a general license to regulate an individual from cradle to grave." The Chief Justice's opinion on these points will likely have a significant impact on future Congressional action (even if it did not change the result in *Sebelius*).

Finally, the Court considered PPACA's expansion of Medicaid coverage. The Act expands Medicaid eligibility by requiring coverage for individuals with household incomes up to 133 percent of the federal poverty level. For states that meet the new conditions for Medicaid participation, the federal government will pay 100 percent of the cost of coverage of newly eligible individuals starting in 2014, and this will gradually decrease to 90 percent in 2020. The states opposed this expansion, arguing that Congress exceeded its powers and violated basic principles of federalism by essentially compelling states to accept the new conditions (i.e., by threatening to withhold all federal funding for Medicaid from the states that do not comply with the new conditions).

No one opinion on the expansion of Medicaid commanded a majority of the Court. However, Chief Justice Roberts' opinion (joined by Justices Breyer and Kagan) was controlling. He found that Congress could not penalize states that choose not to participate in the expanded Medicaid rules. That would amount to "a gun to the head," and "when pressure turns into compulsion," the statute exceeds Congress' authority. Therefore, the states must be given the option of expanding their Medicaid programs (and receiving additional funding) or retaining the *status quo*. It is important to note that expanding Medicaid coverage was a critical component of PPACA because it provided a means to get millions of individuals covered by health insurance (and thus allow them to avoid the individual mandate tax imposed by Congress). The Court's decision on Medicaid expansion could upset to some degree the already delicate economic balance of the Act as a whole. This defect may have to be remedied by further Congressional action.

While she agreed with the judgment of the Court, Justice Ginsburg authored a concurring opinion (joined by Justice Sotomayor and in part by Justices Breyer and Kagan) to disagree with Chief Justice Roberts' discussions of the Commerce Clause. Justice Ginsburg referred to the Founding Fathers and their understanding that "general interests of the Union" may change over time and in ways they had not anticipated. In her opinion, the Constitution is not a "blueprint" but a "great outline" with the capacity to provide for future problems as they arise. In that sense, Justice Ginsburg viewed PPACA as enforceable under the Commerce Clause through Congress' necessary and proper authority to address the far reaching and substantive economic cost-shifting effects of the uninsured in interstate commerce.

Justices Scalia, Kennedy, Thomas, and Alito filed a strongly worded joint dissent. The dissenters believed that the failure to engage in economic activity (i.e., not purchasing health insurance) is not subject to regulation under the Commerce Clause (and therefore joined Chief Justice Roberts on this point). The dissent further found that PPACA was not intended by Congress to create a "tax" and therefore should not be viewed through that lens. The dissent noted that the individual mandate payment is referred to in the Act as a penalty, and that it acts as a penalty as well because it is simply a punishment for failing to obtain insurance rather than a contribution to support the government.

Now that PPACA has been upheld, additional compliance requirements are fast approaching which pose even more significant obligations on employers and require careful planning to ensure compliance. These upcoming requirements include the "pay or play" tax and Cadillac health plan tax on employers, automatic enrollment obligations, maximum waiting periods, and additional administrative and reporting obligations. In short, the Supreme Court's decision ended an early "rain delay" in a nine-inning ballgame. Now that the rain has stopped, there is a ton of baseball left to be played. An overview of employers' obligations under PPACA is available here.

PHARMACEUTICAL SALES REPRESENTATIVES ARE EXEMPT FROM OVERTIME PAY REQUIREMENTS

Resolving a circuit split, the Supreme Court ruled 5-4 in *Christopher v. SmithKline Beecham Corp.*, No. 11-204 (June 18, 2012), that pharmaceutical sales representatives are "outside salesmen" and are therefore exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA).

As described by the Court, the pharmaceutical sales representatives at issue in this case (also known as "detailers") provide information to physicians about the company's products in hopes of persuading them to write prescriptions for the products in appropriate cases. They also call on physicians within assigned territories to discuss information regarding the company's drugs and seek nonbinding commitments from physicians to prescribe those drugs in appropriate cases. Detailers' compensation includes an incentive component based upon the sales volume or market share of their assigned drugs within their territories. Detailers normally work beyond normal business hours and with minimal supervision.

The Court first addressed whether courts must defer to the position of the U.S. Department of Labor (DOL) that detailers are not exempt. The DOL first announced its view that pharmaceutical sales representatives were not exempt outside salesmen in an *amicus* brief filed in the U.S. Court of Appeals for the Second Circuit in 2009. The DOL reiterated its position in *amicus* briefs filed in subsequent cases, including the one before the Supreme Court. Specifically, the DOL argued that pharmaceutical representatives were not "salesmen" because they did not make "sales," in the sense that they did not directly consummate transactions, but rather secured only nonbinding commitments from healthcare providers to purchase their employers' products.

Ordinarily, courts will defer to an administrative agency's interpretation of its own regulations. However, such deference is not required where the agency's interpretation is plainly erroneous or inconsistent with the law or regulation, or does not reflect the agency's fair and considered judgment on the matter in question. The latter might apply, for example, where the agency has changed its interpretation over time, or where it appears that the regulation is nothing more than a "convenient litigating position" or "*post hoc* rationalization."

In this case, the Court noted that the DOL's position would create massive liability for pharmaceutical companies based upon conduct occurring before the DOL made its views public in 2009. It also observed that the DOL's position was "preceded by a very lengthy period of conspicuous inaction" by the DOL to enforce its newly announced interpretation. The most plausible explanation for this inaction, the Court found, was that up until 2009 the DOL evidently did not think that pharmaceutical sales representatives were misclassified. Thus, the Court determined that the DOL's interpretation of its regulations was not entitled to judicial deference.

Turning to the merits of the case, the Court rejected the DOL's argument that pharmaceutical sales representatives are not exempt because they merely "promote" pharmaceuticals rather than actually "selling" them. The Court instead held that the FLSA requires a "functional, rather than a formal inquiry" on this issue, and that an employee's responsibilities must be viewed "in the context of the particular industry in which the employee works." In the pharmaceutical industry, "[o]btaining a nonbinding commitment from a physician to prescribe" a pharmaceutical company's drugs "is the most that [sales representatives] were able to do to ensure the eventual disposition of the products" being sold. The Court held that given the regulatory environment applicable to the pharmaceutical industry, this arrangement comfortably fell within the regulatory language defining "sales."

The Court also observed that sales representatives "bear all of the external indicia of salesmen." They were hired for their sales experience, trained to close sales, worked away from the office, and were compensated with sales incentives. The Court noted that "it would be anomalous to require [the employer] to compensate [detailers] for overtime, while at the same time exempting employees who function identically to [detailers] in every respect except that they sell physician-administered drugs, such as vaccines and other injectable pharmaceuticals that are ordered by the physician directly rather than purchased by the end user at a pharmacy with a prescription from the physician."

In a dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer agreed with the majority that the DOL's interpretation of the regulations was not entitled to deference, but reached a different view regarding the merits of the case. Following an exhaustive review of the FLSA, the DOL's regulations, DOL reports, and industry ethics codes governing the detailers' work, Justice Breyer concluded that "the drug detailers do not promote their 'own sales,' but rather 'sales made, or to be made, by someone else,'" and therefore could not qualify as "outside salesmen" under the FLSA.

While certainly a major relief for pharmaceutical companies, it is not immediately clear that this case will have a major impact upon most employers. While certainly more esoteric, the most interesting piece of this decision is not so much the Court's ruling on the scope of the sales representative exemption, but its determination that the DOL's interpretation of its own regulations was not entitled to judicial deference. Given the current political climate, pushing through new legislation or even new regulations to change the FLSA is likely to be extraordinarily difficult if not impossible. That has left the DOL and other federal agencies in the position of having to implement policy changes by modifying their interpretations of existing rules or changing their enforcement priorities. This case illustrates that legislation by administrative interpretation has its limits, and may encourage further challenges to some of the DOL's more aggressive interpretations of the FLSA and its regulations.

A 'MINISTERIAL EXCEPTION' PROTECTS CHURCH FROM TEACHER'S RETALIATION CLAIM

In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012), the Supreme Court unanimously confirmed that a "ministerial exception" bars employment discrimination actions against religious employers brought by employees who fall within this exception. Relying upon the "religion clauses" of the First Amendment, the Court held that the ministerial exception barred the retaliation claim of a teacher who was also a commissioned minister.

The employee involved in the case, Cheryl Perich, began working for the Hosanna-Tabor Evangelical Lutheran Church and School as an elementary school teacher in 1999. At that time, Perich functioned as a "lay" teacher, meaning that she was not required to be Lutheran or trained in church doctrine. She then completed the requirements to become a "called" teacher and received the formal title of "Minister of Religion, Commissioned." While lay teachers at Hosanna-Tabor were appointed to one-year renewable terms of employment, called teachers served for an open-ended term, and their call could be rescinded only by a supermajority vote of the congregation. Perich's job duties were generally the same before and after she became a called teacher, and she continued to teach a variety of secular subjects as well as religion classes.

In 2004, Perich was diagnosed with narcolepsy and began the school year on disability leave. Although Perich was cleared to return to work in February of 2005 and expressed her intent to do so, Hosanna-Tabor's principal had concerns about Perich returning to the classroom. A dispute between Perich and the school arose and escalated, culminating in Perich's threat to sue for discrimination, the congregation's vote to rescind Perich's call, and the school's termination of Perich's employment. Perich then filed a

charge with the EEOC, after which the EEOC sued Hosanna-Tabor, alleging that Hosanna-Tabor had retaliated against Perich for threatening to sue for disability discrimination.

The Supreme Court first found that the First Amendment affords a ministerial exception to liability for employment discrimination. The Court also ruled that failing to recognize such an exception would violate the Free Exercise and Establishment clauses of the First Amendment because it would "depriv[e] the church of control over the selection of who will personify its beliefs." In the words of Chief Justice Roberts, government involvement in determining who should be accepted or retained as a minister "intrudes on more than a mere employment decision"; it is also an unconstitutional interference with a church's internal governance.

Applying the exception to Perich's case, the Court relied upon the following factors in concluding that Perich did, indeed, fall within the ministerial exception: (i) Perich was required to complete a substantial amount of religious training, followed by a formal process of commissioning, to become a commissioned minister; (ii) Hosanna-Tabor held Perich out as a minister; (iii) Perich held herself out as a minister in several respects, including taking advantage of a housing allowance on her taxes available only to ministers; and (iv) Perich's job duties reflected her role in carrying out Hosanna-Tabor's mission, in that she taught religion and led students in prayer. In light of these facts, the Court rejected the EEOC's argument that Perich spent only about 45 minutes per day on religious duties and hence failed to qualify as a minister.

Justice Thomas concurred, adding his belief that courts should defer to a religious organization's "good-faith understanding" of who qualifies as a minister. Thus, Hosanna-Tabor's sincere belief that Perich was a minister should suffice to bring her lawsuit within the realm of the ministerial exception.

Justice Alito, joined by Justice Kagan, also concurred. He noted that the term "minister" should not be used in the sense of ordination, but rather as a term for persons who perform key religious activities. The ministerial exception, in turn, should "apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." Justice Alito agreed with Justice Thomas that a religious group should be able to determine for itself who is qualified to serve in these positions.

The *Hosanna-Tabor* decision is important both for what the Court stated and also for what it left open. This decision marked the first Supreme Court confirmation that a "ministerial exception" actually exists; previously, this exception had been widely applied by lower courts but never addressed by the Supreme Court. The decision was also significant because it recognized the potential application of this exception even if the employee is not a formally ordained priest or minister or engaged primarily in theological instruction or traditional religious functions. The Court declined to adopt a "rigid formula" for deciding when an employee qualifies as a minister and stressed the importance of allowing religious institutions to make this determination. At the same time, however, the Court was careful to emphasize the facts indicating that Perich functioned as a "minister" in the eyes of her employer and that Perich agreed to

function in that capacity. In light of the fact-specific nature of this ruling, religious entities need to exercise caution and examine the particular circumstances of each employee's arrangement before determining whether the exception applies.

In terms of issues left open by the decision, the Court expressly did not address whether the exception could be invoked in other types of suits brought by ministers, such as breach of contract or tortious conduct by their employers. Consequently, religious organizations should keep in mind that the ministerial exception presently remains limited to employment discrimination claims and has not yet been applied by the Supreme Court to contract, tort, or state anti-discrimination claims.

Nonetheless, *Hosanna-Tabor* is a significant ruling and a resounding victory for religious organizations. Certainly this decision is likely to inspire additional constitutional challenges to a host of laws that religious institutions view as intrusive upon their First Amendment rights. It remains to be seen how far-reaching *Hosanna-Tabor* may prove to be, but this much is now clear: the "ministerial exception" is sound constitutional law; and a wider array of employment relationships fall within this exception than might have been supposed.

PUBLIC SECTOR UNIONS' ABILITY TO COLLECT NONMEMBER FEES IS RESTRICTED

In a decision upholding the free speech rights of public employees who are represented by but do not belong to a union, the Supreme Court held in *Knox v. Service Employees Int'l Union Local 1000*, No. 10-1121 (June 21, 2012), that a public sector union must provide the requisite "Hudson notice," and also receive affirmative consent from nonmembers, prior to imposing a special assessment or other mid-year dues increase.

The case involved the Service Employees International Union (SEIU), which represents certain state employees in California. Under state law, public sector employees may vote to create an "agency shop" arrangement, whereby all bargaining unit employees are represented by a union. While employees in an agency shop are not required to join the union, they are required to pay a "fair share" or "agency fee" associated with collective bargaining costs (so-called "chargeable" expenses). These nonmembers are not required, however, to fund a union's non-chargeable expenses, such as those for political and ideological purposes.

Teachers v. Hudson, 475 U.S. 292 (1986), laid out the procedural requirements with which a union must comply when collecting annual agency fees. These requirements include providing notice of the percentage of fees that fund non-chargeable expenses and the opportunity to opt out of contributing to these expenses. In this case, SEIU sent its annual *Hudson* notice in June 2005, informing employees that approximately 56% of its total expenditures would be dedicated to chargeable expenses and 44% would fund non-chargeable expenses, and giving nonmembers 30 days to opt out of contributing to the non-chargeable expenses.

Later that summer, and after the opt-out window under the annual *Hudson* notice had closed, SEIU sent bargaining unit employees a second notice indicating that, for a limited time, their fees would be raised in order to fund a SEIU political initiative. Nonmembers were not given an opportunity to opt out in the second notice; however, nonmembers who had objected pursuant to the earlier notice were required to pay only 56% of the special assessment, rather than the full amount. The petitioners filed suit on behalf of 28,000 nonunion employees who were obligated to financially support SEIU's political initiative, arguing that they should have been given a new opportunity to opt out of the special assessment.

The Court's majority began by noting that allowing unions to collect fair share fees from nonmembers is a "significant impingement" on the nonmembers' First Amendment rights because it constitutes a form of compelled speech and association. Although this practice has been justified by the notion that nonmembers should not be allowed to free-ride on the union's efforts, the Court called such a scheme an "anomaly." Due to these First Amendment concerns, the procedures unions use to collect fees from nonmembers must be "carefully tailored to minimize the infringement" on nonmembers' free speech rights.

The Court also questioned the justification for allowing opt-out schemes for collecting agency dues from nonmembers, calling the opt-out framework a "remarkable boon for unions." Reviewing its prior cases, the Court found that the opt-out approach had arisen "more as a historical accident than through the careful application of First Amendment principles." It found that, while an opt-out requirement might be acceptable during the collection of regular dues on an annual basis, there was no way to justify the "additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires."

Against this backdrop, the Court concluded that SEIU's failure to send a new *Hudson* notice when it implemented the special assessment was "indefensible." In particular, the Court found no justification for requiring nonmembers who had objected to the annual *Hudson* notice to pay even a portion of the special assessment where the special assessment was to be used for political purposes. Rejecting SEIU's argument that objecting nonmembers could recoup the fees the following year by opting out, the Court found that even a full refund would not cure the First Amendment violation because SEIU would still be receiving an impermissible loan from these nonmembers. It therefore held that, "when a public-sector union imposes a special assessment or other dues increase [that was not contemplated in the annual *Hudson* notice], the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent," e.g., an opt-in feature.

Justice Sotomayor, joined by Justice Ginsburg, concurred in the judgment only. She argued that the majority's holding that a union is required to obtain affirmative consent from nonmembers before collecting funds via a special assessment or dues increase was outside the scope of the questions presented to the Court, and therefore violated the Court's own rules. She also warned that the wording of the majority's opinion "cast serious doubt on longstanding precedent," and "strongly hint[ed]" that the

opt-out framework may not endure for any collection of fees for non-chargeable expenses from nonmembers.

Justice Breyer, joined by Justice Kagan, agreed with Justice Sotomayor's reasoning regarding the Court's imposition of an opt-in requirement, but dissented from the judgment because he found that SEIU had imposed its special assessment according to the requirements of *Hudson*. Specifically, since SEIU had based its assessment on its expenses during the prior year—a practice the Court had sanctioned in *Hudson*—Justice Breyer found that the petitioners had suffered no harm.

Knox limits a public sector union's ability to raise funds from nonmembers for purely political or ideological causes by way of a mid-year special assessment and, therefore, may impact a union's ability to push its political agenda. *Knox* also suggests that the Supreme Court may be willing to consider whether an opt-out scheme is consistent with the First Amendment *at all* where a public sector union seeks to exact money from nonmembers to fund its solely political or ideological initiatives. Indeed, Justice Alito noted that the Court's prior decisions authorizing unions to collect fees from nonmembers and allowing them to use an opt-out system "approach, if they do not cross, the limit of what the First Amendment can tolerate." The opt-out scheme, while an "anomaly," is still viable in certain circumstances. But it may come under closer scrutiny in the future.

For private sector employers, the impact of *Knox* is less certain. Private sector employees who are represented by a union have the ability to opt out of paying for union political spending, but the framework for doing so is regulated by the National Labor Relations Board (NLRB). The NLRB has not required unions to provide an opt-in feature, but it is conceivable that *Knox* may be interpreted by subsequent court decisions to require the NLRB to review its precedent on this issue.

STATE EMPLOYEES CANNOT SUE UNDER "SELF-CARE" PROVISION OF THE FMLA

In a victory for state employers, the Supreme Court held in *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012), that the Family and Medical Leave Act (FMLA) does not allow lawsuits for damages against states by their employees when the suit is brought under the so-called "self-care" provision of the FMLA.

The FMLA provides eligible employees up to 12 weeks of unpaid leave in a 12-month period: (1) to care for a newborn child; (2) to care for a newly adopted child or a newly placed foster child; (3) to care for a spouse, child or parent with a serious health condition; or (4) for an employee's own serious health condition that makes the employee unable to perform the functions of his or her position. The Court previously held that states may be subject to damage suits for violations of the first three provisions (collectively referred to as the "family-care" provisions). At issue in *Coleman* was states' liability under the fourth clause, the so-called "self-care" provision.

Petitioner Daniel Coleman was a former employee of the Court of Appeals of the State of Maryland. Coleman requested sick leave as a result of his own alleged serious health condition. Instead of providing him leave, however, the Court of Appeals informed him that he would be terminated if he did not resign. Coleman sued. In response, Maryland argued that the lawsuit was barred by its sovereign immunity, the legal privilege under which states cannot be sued unless they consent to be sued or unless Congress validly abrogates their immunity from suit pursuant to the 14th Amendment to the U.S. Constitution.

The Supreme Court agreed with Maryland's argument. The Court found that, while Congress made it "unmistakably clear" that it intended to subject states to liability under the FMLA, Congress had not validly exercised its power under the 14th Amendment to abrogate states' immunity with regard to the self-care provision because that provision was not intended to remedy a pattern of gender-based discrimination in states' sick leave policies. Here, Maryland argued that the self-care provision of the FMLA was passed pursuant to the Commerce Clause of the Constitution, which cannot be used to bypass states' sovereign immunity.

In rejecting Coleman's arguments that Maryland was subject to suit, the Court found that: (1) unlike leave under the FMLA's family-care provisions, Congress' findings on the self-care provision made no reference to distinctions in state leave policies based on sex; (2) the self-care provision was not necessary to effectuate the family-care provisions; and (3) although the self-care provision helped single parents, who are disproportionately female, retain their jobs when ill, disparate impact alone was insufficient to show a constitutional violation. Since Congress did not identify a pattern of sex discrimination or a remedy "congruent and proportional" to the discrimination with its enactment of the self-care provision, the Court held that Congress had not validly abrogated states' immunity from suits brought under the self-care provision.

Justice Thomas concurred, reiterating his opinion that neither the family-care nor the self-care provisions were validly abrogated. Justice Scalia concurred in the judgment only, finding that Congress' authority to abrogate sovereign immunity should be limited to regulating conduct that violates the 14th Amendment itself, and would therefore not include the regulation of employee leave laws.

In dissent, Justice Ginsburg, joined by Justice Breyer and in part by Justices Sotomayor and Kagan, argued that in enacting the FMLA, Congress decided to adopt comprehensive leave legislation aimed at combating a pattern of sex discrimination. Tracing the genesis of the FMLA, she found that Congress decided against legislation aimed solely at protecting pregnant women because it could give employers an incentive to discriminate against women in hiring. Since the self-care provision covered serious health conditions arising from pregnancy, it fell within Congress' purpose of remedying a pattern of sex discrimination and constituted a valid abrogation of state sovereign immunity.

Coleman is significant for states and their subdivisions because these entities can no longer be sued under the self-care provision of the FMLA (provided they have not voluntarily ceded their sovereign immunity with respect to the FMLA). Lawsuits seeking damages for infringement of other forms of FMLA leave

(e.g., caring for a family member), however, still remain protected, and the Court has not ruled on whether states can be sued under the FMLA for "bonding" leave and similar forms of FMLA leave. Thus, public employers should be cautious when seeking to deny FMLA leave for reasons other than self-care. Similarly, it is vital for employers—public and private alike—to enforce sick leave and FMLA policies consistently to avoid claims of discrimination. Failing to do so could subject them to liability under other federal, state, or local employment laws.

FEDERAL EMPLOYEES MUST INITIATE CONSTITUTIONAL CHALLENGES IN ADMINISTRATIVE FORUM

In *Elgin v. Dept. of the Treasury*, No. 11-45 (June 11, 2012), the Supreme Court held that the administrative review procedure authorized by the Civil Service Reform Act (CSRA) is the exclusive avenue for adjudicating the adverse employment claims of covered federal employees, even when the claim involves a challenge to the constitutionality of a federal statute.

Michael Elgin was discharged from his federal job pursuant to 5 U.S.C. § 3328 (§ 3328) for knowingly and willfully failing to register for the Selective Service as required by law. Elgin protested his termination before the Merit Systems Protection Board (MSPB), the administrative agency established by the CSRA to hear adverse employment claims. Elgin argued that § 3328 was unconstitutional because it discriminated on the basis of sex (since only males are required to register for the Selective Service) and because it was an unconstitutional bill of attainder.

Elgin's case was initially heard by an administrative law judge, who dismissed the claim for lack of jurisdiction because administrative agencies, such as the MSPB, did not have the authority to determine a federal law's constitutionality. At that point, Elgin did not seek review by the MSPB or the U.S. Court of Appeals for the Federal Circuit, the channels prescribed in the CSRA for reviewing adverse personnel decisions. Instead, Elgin joined other petitioners and filed suit in federal district court challenging the constitutionality of § 3328. The government argued that a former federal employee must first bring claims to the MSPB rather than federal district court.

The Supreme Court, in a 6-3 opinion written by Justice Thomas, agreed with the government and held that challenges to adverse employment actions brought by covered federal employees must proceed through the CSRA review scheme, even if the employees argue that the federal statute underlying the adverse action is unconstitutional.

Reviewing the text, structure, and purpose of the CSRA, the Court found it "fairly discernible" that Congress intended to preclude federal district court jurisdiction over the petitioners' claims. In particular, the Court found that the CSRA created a comprehensive, "elaborate" system to review employment actions taken against federal employees, including prescribing in detail the protections and remedies available, enumerating the specific adverse actions and employee classifications to which the CSRA's procedural protections apply, and detailing the system of review before the MSPB and the Federal Circuit.

The Court rejected the petitioners' claim that there was an exception carved out of the CSRA for facial or as-applied constitutional challenges to federal statutes. The Court noted that Congress had exempted appeals to the Federal Circuit where a covered employee alleged that the basis for the adverse action was discrimination, allowing the employee to seek judicial review under federal anti-discrimination laws. The inclusion of this exemption demonstrated that Congress knew how to provide for alternate forums for judicial review. The fact that Congress included no similar exemption for challenges to a statute's constitutionality demonstrated that the omission was intentional.

Although the Court declined to rule on the issue of whether the MSPB has the power to declare a federal statute unconstitutional—a power the MSPB has repeatedly refused to exercise—it found that challenges to a federal statute's constitutionality could be resolved by the Federal Circuit after fact-finding by the MSPB. The Court observed that such a statutory scheme was "nothing extraordinary," and likened it to the role of magistrate judges, who make findings of fact but are "powerless" to issue final rulings on dispositive motions.

In dissent, Justice Alito, joined by Justices Ginsburg and Kagan, argued that requiring the petitioners to bring their constitutional claims before the MSPB in the first instance did not satisfy either of the factors generally used to determine whether Congress intended an agency to have exclusive original jurisdiction over a claim: whether a claim falls within the agency's area of expertise and whether the claim is factually or legally related to the type of dispute the agency is authorized to hear. Rather, the MSPB's purpose is to adjudicate fact-specific employment disputes within an existing statutory framework. The dissent found that the majority's approach sanctioned an inefficient, "needlessly vexing" procedural framework.

Although the scope of this case is limited to federal employees covered by the CSRA, the case reinforces that virtually all adverse employment claims brought by covered employees must follow the CSRA's administrative review scheme. The decision may result in a prolonged judicial review process when a covered federal employee seeks review based on a constitutional challenge, since the Federal Circuit may remand cases to the MSPB for additional fact-finding prior to deciding the pertinent constitutional issue.

PROVISION OF STATE IMMIGRATION LAW CRIMINALIZING UNAUTHORIZED ALIENS SEEKING WORK IS PREEMPTED BY FEDERAL LAW

In a decision that largely affirmed the primacy of the federal government in making immigration law and policy, the Supreme Court in *Arizona et al v. U.S.*, No. 11-182 (June 25, 2012), struck down a provision of state law that made it a misdemeanor for an unauthorized alien to seek or engage in work in the state. The provision was one of four challenged portions of a 2010 Arizona statute that aimed to establish a policy of "attrition through enforcement." Emphasizing that the "federal power to determine immigration policy is well settled," the Court invalidated three of the four challenged provisions of the Arizona statute as preempted by federal law.

The employment provision, § 5(C), made it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Penalties for violations included a $2,500 fine and imprisonment for up to six months. The Court noted that states were permitted to pass their own laws on the employment of unauthorized aliens before 1986, when the federal Immigration Reform and Control Act (ICRA) was enacted and created a "comprehensive federal program." The enactment of IRCA curtailed states' ability to regulate immigration.

Although IRCA imposes civil and criminal penalties on employers who knowingly hire, recruit, refer, or continue to employ unauthorized workers, unlike Arizona's law, IRCA imposes only civil penalties on unauthorized aliens who seek or engage in unauthorized work. The Court found that although IRCA's express preemption provision was silent on the issue, the legislative history made it clear that Congress deliberately chose not to impose criminal penalties on unauthorized aliens who seek or engage in employment. Since Arizona's law presented a "conflict in the method of enforcement," it was preempted by IRCA.

In separate opinions concurring in part and dissenting in part, Justices Scalia, Thomas, and Alito argued that § 5(C) was not preempted. They argued that the absence of language in IRCA's express preemption provision regarding penalties for those who seek employment demonstrated that Congress intended to preserve state and local authority to regulate such matters.

In addition, the Court held that two other provisions of Arizona's law were preempted: (1) a provision making it a misdemeanor to willfully fail to complete or carry an alien registration document in violation of federal law; and (2) a provision authorizing law enforcement officers to detain a person if the officer has probable cause to believe that the person is an alien subject to removal from the United States. But the Court unanimously upheld the most controversial provision of the Arizona statute, a requirement that law enforcement officers make a "reasonable attempt" to determine the immigration status of any person they stop or detain if they have a "reasonable suspicion" that the person is an unauthorized alien. The Court acknowledged that detaining a person solely to verify his immigration status would pose constitutional concerns, but it found that Arizona state courts should be given an opportunity to interpret the provision before determining whether it was preempted. The Court, however, expressly left open the possibility of other preemption or constitutional challenges to the provision based on how it is applied.

Although *Arizona* does not impact employers directly, it reaffirms that the burden of ensuring that unauthorized aliens are not employed rests squarely on the employer, not the employee. The efforts in some states to enact more stringent laws regarding 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.

Looking Ahead: The 2011-2012 Term

The Supreme Court will open its 2012-2013 term on October 1, 2012. The Court will likely hear several significant cases affecting or implicating employers, including cases on affirmative action and same-sex marriage. The Court has already selected several labor and employment cases that it will hear during the next term, including the following:

- ***Vance v. Ball State Univ.***: The issue in this case is whether an employee who oversees and directs other employees' daily tasks, but lacks authority to hire, fire, demote, promote, transfer, or discipline them, is a "supervisor" as defined in Title VII of the Civil Rights Act of 1964. The courts of appeal are split on how expansive the definition is. Since an employer is strictly liable for severe or pervasive harassment by a supervisor, but is only liable for actions of a coworker when it is negligent, the Court's decision on how it defines "supervisor" will have important implications for employers under Title VII, and perhaps under other employment statutes that similarly define a "supervisor."
- ***Genesis Health Care Corp. v. Symczyk***: The issue in this case is whether a FLSA collective action becomes moot when the lone plaintiff receives an offer of judgment that fully satisfies her FLSA claim and no motion for conditional certification of a collective action has been filed. The U.S. Court of Appeals for the Third Circuit held that the offer of judgment did not moot the plaintiff's claim, expressing a concern that a contrary ruling would enable employers to avoid FLSA collective action claims by simply "picking off" individual named plaintiffs.
- ***U.S. Airways, Inc. v. McCutcheon***: This case involves § 502(a)(3) of the Employee Retirement Income Security Act (ERISA), which provides for "appropriate" equitable relief for a health benefits plan administrator that is entitled to reimbursement for medical expenses pursuant to an ERISA-governed plan. At issue is whether equitable defenses and principles, such as unjust enrichment, may be applied to limit a benefit plan's recovery in spite of plan language entitling the benefit plan to reimbursement.