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Supreme Court

Six Items on High Court's Labor Docket Include Church-Plan ERISA Exemption Cases

The U.S. Supreme Court in January resumes its term with six pending cases that have implications for labor and employment law.

Three cases—involving the Employee Retirement Income Security Act's ''church plan'' exemption—will be argued together.

The justices are reviewing an issue with big financial stakes: whether the ERISA exemption extends to religiously affiliated hospitals with pension plans covering thousands of employees and potentially billions of dollars in underfunded liabilities.

The court also will decide if the Department of Education reasonably interpreted ''sex'' in Title IX of the Education Act of 1972 to include a student's transgender status.

A Virginia school district is urging the justices not to defer to the department's interpretation that the law compels schools to allow transgender students to use the bathroom consistent with their gender identity.

The decision could signal if bias based on gender identity also is considered sex discrimination under Title VII of the 1964 Civil Rights Act, which covers workplace discrimination.

The court will decide if an NLRB attorney could continue to serve as the board's acting general counsel once President Barack Obama nominated him for a full term as general counsel. It also will decide the proper standard of appellate review after a district court determines if an EEOC administrative subpoena is too broad or can be enforced.

Will a New Justice Be Seated? Perhaps the biggest Supreme Court story in 2017 will be who Donald J. Trump as president nominates to fill the vacancy left by Justice Antonin Scalia's death and how long it takes the Senate to confirm a nominee.

The court has operated with eight justices since last February. That has affected both which cases the court accepts for review and the scope of its decisions.

Trump during his campaign released a list of 21 potential Supreme Court nominees. But there's no word yet on who, if anyone, is a front-runner.

ERISA and Church Plans. Whatever the makeup of the court, the justices will take on a major issue under the nation's laws governing retirement plans and other employee benefits. ERISA exempts ''church plans'' from complying with the law's strict funding and insurance mandates on companies that sponsor pension plans, and a trio of cases asks the court to decide how broadly this exemption applies.

Hospital workers have filed lawsuits against religiously affiliated hospitals that rely on the exemption. The workers claim their pension plans are underfunded by hundreds of millions of dollars.

The Supreme Court will hear three cases asking whether large hospitals and other non-church employers can use the exemption to avoid fully funding their pension plans.

A three-year litigation push involved more than two dozen religiously affiliated hospitals. The lawsuits claim more than 300,000 hospital workers face a pension shortfall of about $4 billion because hospitals have wrongly designated their pension plans as exempt.

Three federal appeals courts sided with the hospital workers against government regulators, which have given hospitals the green light to run ERISA-exempt church plans.

Ruling against Advocate Health Care Network, Saint Peter's Healthcare System and Dignity Health, the appeals courts gave little weight to Internal Revenue Service-issued letters approving the ''church plan'' designations.

The cases turn on a statutory interpretation question: Must a pension plan be both ''established and maintained'' by a qualifying church-connected entity to claim the exemption or is it available to plans merely ''maintained'' by a qualifying entity?

High Stakes for Hospitals, Employees. The court's decision will affect about 30 pending lawsuits against hospitals with similar pension plans.

It also could affect other non-church entities claiming the exemption, including social services agencies, educational institutions and religiously affiliated nonprofits, Karen Ferguson of the Pension Rights Center in Washington told Bloomberg BNA.

The validity of ''hundreds'' of IRS letters authorizing religiously affiliated employers to run ERISA-exempt plans also may be at stake, said Mark E. Chopko, a partner with Stradley Ronon in Washington.

A decision favoring the hospital workers could be very expensive for the hospitals. The litigation push already has led to some hefty settlements. Providence Health & Services in Washington announced a $352 million deal in October, and Connecticut's Saint Francis Hospital agreed to a $107 million settlement. Trinity Health Corp., Ascension Health and Alabama's Baptist Health System Inc. also reached multimillion-dollar settlements.

But the justices also could rule the hospitals' reasonable reliance on the IRS letters shields them from hav-

ing to make up the alleged pension funding shortfalls, said Robert Rachal of Holifield Janich Rachal & Associates PLLC in New Orleans, who represents hospitals.

Title IX Case Could Have Impact. A decision in the transgender student case could turn narrowly on how much deference a reviewing court must give a federal agency's regulatory interpretations.

But the court also could signal more broadly whether it interprets sex discrimination to include bias based on gender identity.

Title VII, which prohibits sex bias in employment, usually is interpreted consistently with Title IX, which bans sex bias in education, said Sarah Warbelow, legal director of the Human Rights Campaign in Washington.

If the justices reach the merits of the Title IX issue, it could signal how they would interpret sex discrimination and transgender status in the employment context as well.

But that issue could get sidetracked if the Justice Department in the Trump administration decides not to back the Education Department's views. If that happens, the justices might just remand to the U.S. Court of Appeals for the Fourth Circuit for reconsideration.

NLRB Appointments, EEOC Subpoenas. The court heard argument Nov. 7 in *NLRB v. SW General Inc.*, No. 15-1251, which involves whether Lafe Solomon could continue to serve as acting NLRB general counsel after the president in January 2011 nominated him for a full term as general counsel.

The U.S. Court of Appeals for the District of Columbia Circuit ruled the Federal Vacancies Reform Act barred Solomon from serving in the acting capacity after Obama sent the Senate his nomination for the full-term post.

The court's decision could be significant regarding the president's appointment power, but its labor law impact is limited, said Paul Secunda, a Marquette University law professor who specializes in labor and employment law.

Solomon served as acting general counsel until November 2013, when Senate-confirmed Richard Griffin assumed the full-term post. The board has taken legal steps to ratify the actions Solomon took during his tenure.

The justices also are considering *McLane Co. v. EEOC*, No. 15-1248, which involves the standard for review when a federal circuit court hears the EEOC's appeal from a district court's denial of enforcement of an agency subpoena.

The U.S. Court of Appeals for the Ninth Circuit held ''de novo'' review was available, meaning it could decide the EEOC subpoena issue from scratch and not defer to the district court.

But eight other federal circuits have ruled a district court's decision regarding an agency subpoena shouldn't be disturbed absent ''abuse of discretion'' or ''clear error.''

The Justice Department isn't defending the Ninth Circuit's standard, which would apply to district court decisions to enforce EEOC subpoenas as well as to deny enforcement. The Supreme Court has appointed a private lawyer to argue for the Ninth Circuit's rule.

It seems likely the justices would endorse the majority view of deference to the district court, said Thomas Goldstein of Goldstein & Russell in Bethesda, Md., a Supreme Court practitioner who also is publisher of SCOTUSblog.

Class Action Waiver Issue on the Brink. Four pending review petitions ask whether class action waivers in arbitration agreements violate the National Labor Relations Act because they infringe employees' rights to engage in ''concerted activities'' over wages, working conditions and other employment-related matters.

Among them is the NLRB's petition in *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, in which the U.S. Court of Appeals for the Fifth Circuit reiterated its disagreement with the board's view that class action waivers violate the NLRA.

The Seventh and Ninth circuits have endorsed the NLRB's position, which originally was expressed in *D.R. Horton Inc*. Supreme Court review is sought on those decisions as well, with attorneys for the companies and workers all urging the justices to resolve the circuit split.

The class waiver arbitration issue is extremely important for workers who jointly want to protect their rights under the Fair Labor Standards Act, federal anti-discrimination laws, the NLRA and other employment laws, Secunda said.

Under normal circumstances, the court almost certainly would grant review.

But questions about whether a ninth justice would be available to decide the cases, whether an NLRB with a Republican majority ultimately would overturn *D.R. Horton* and whether a Trump administration Justice Department would support the NLRB position might cause the justices to hesitate.

The court could decide whether to grant review as early as Jan. 6.

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