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Supreme Court Roundup: 2016-2017

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As we move toward the end of the Supreme Court's 2016-2017 term, we have seen relatively few employment law cases getting the Court's attention. This blog will discuss one decision by the Court dealing with EEOC subpoenas, several other pending cases and an issue that is making its way to the Court. If you find yourself in front of the EEOC, dealing with arbitration agreements, are a church-affiliated entity or are dealing with LGBT issues, you should keep reading.

- EEOC Subpoenas. In *McLane v. Equal Employment Opportunity Commission*, No. 15-1248 (April 3, 2017), the Court confirmed that District Courts have wide latitude on whether to enforce, or refuse to enforce, EEOC subpoenas and that Courts of Appeals may only review such determinations for abuse of discretion instead of deciding the validity of a subpoena *de novo*. In *McLane*, the EEOC issued a nationwide subpoena seeking information it claimed was "relevant" to an individual charge arising in a single location. The District Court refused to enforce it. The Ninth Court of Appeals overturned that decision after reviewing the validity of the subpoena *de novo*. The Supreme Court remanded the case to the Court of Appeals, instructing it to review the District Court's action using the "abuse of discretion" standard.

TAKE AWAY: If you are involved in an EEOC investigation that leads to a subpoena, you should be aware of these standards as you develop a strategy for dealing with any EEOC move to enforce the subpoena.

- Arbitration Class Action Waivers. The justices will return to the familiar question of the extent to which employers can require arbitration of all employment-related claims and limit employees to pursuing only their individual claims. The Court has before it three cases: *National Labor Relations Board v. Murphy Oil USA*, No. 16-307, *Ernst & Young LLP v. Morris*, No. 16-300, and *Epic Systems v. Lewis,* No. 16-285. In *Murphy Oil*, the question is whether arbitration agreements that bar employees from pursuing work-related claims on a collective or class basis are prohibited as an unfair labor practice under the National Labor Relations Act (NLRA). In *Ernst & Young*, the question is whether requiring an employee to resolve employment-related claims through individual arbitration, waiving class and collective proceedings, is enforceable under the Federal Arbitration Act (FAA), despite the NLRA. And, in *Epic Systems,* the justices agreed to decide the extent to which the collective bargaining provisions of the NLRA prohibit enforcement of an agreement requiring an employee to arbitrate claims on an individual rather than collective basis. The justices granted all three petitions to review the interplay between the FAA and the NLRA and the Court has consolidated the cases for argument. The Court's announced briefing schedule will push any decision on this trio over until the Court's next term.

TAKE AWAY: If you use arbitration agreements, or plan to do so, you should watch for these decisions next year as they could sharply alter the pros and cons of arbitration agreements.

- Church-Affiliated Pension Plans under ERISA. Employee-participants of church-affiliated pension plans filed a multi-billion dollar suit in *Advocate Health Care Network v. Stapleton*, No. 16-74 and two related cases to bring church-affiliated plans under the protections of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, the question is whether ERISA's rules apply to pension plans operated by affiliates of churches, such as hospitals, if the church itself did not create the pension plan. Organizations affiliated with churches operate a large share of the hospitals in this country. For more than 30 years, the three federal agencies that administer ERISA have treated the pension plans of such hospitals, and other church-affiliated entities, as exempt from ERISA.

TAKE AWAY: This case could have far-reaching implications for hospital systems, other church-affiliated plans and their employees, although it seems likely from the Court's questions that the exemption for church-affiliated plans which were not established by a church may survive.

- LGBT Rights Under Title VII of the Civil Rights Act. Another issue to watch that is destined to go to

the Supreme Court is whether Title VII prohibits sexual orientation discrimination under the rubric of "sex" discrimination. For many years it was considered a settled issue that Title VII did not cover such claims. However, as the status of the laws affecting LGBT individuals has dramatically changed in recent years, the issue has come back to the courts. District Courts in Pennsylvania, Alabama, Oregon, California, Florida and the District of Columbia have ruled in favor of coverage. And now, within the last month or so, three Courts of Appeals have ruled on the issue. A three-judge panel for the U.S. Court of Appeals for the Second Circuit, in *Christiansen v. Omnicom*, held that it did not have the power to extend Title VII to sexual orientation discrimination. Similarly, a three-judge panel for the U.S. Court of Appeals for the Eleventh Circuit, in *Evans v. Georgia Regional Hospital*, also held that it was bound by existing precedent stating that Title VII does not protect LGBT employees. In contrast, at the beginning of April, the full Court of Appeals for the Seventh Circuit, in *Hively v. Ivy Tech Community College*, ruled that Title VII does extend to protect LGBT individuals in the workplace. *Hively* involved a lesbian adjunct professor who claimed that her college refused to promote her and ultimately eliminated her position because of her sexual orientation. As a result of the Seventh Circuit's decision, there is now a split among the federal Courts of Appeals as to whether Title VII prohibits workplace discrimination based on sexual orientation, setting the stage for the Supreme Court to address the issue at some point in the future.

TAKE AWAY: While we wait for the Court to decide the issue, employers need to be aware, not only of the federal law in their circuits, but also of the myriad of state and local laws that are protective of sexual orientation and gender identity and ensure that their policies and practices are compliant.
