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High Court Could Reshape Employment Practices

Law360, New York (January 15, 2008) -- The U.S. Supreme Court may soon decide two important issues facing public and private sector employers.

In the first case, Engquist v. Oregon Dep't of Agriculture, Case Number 07-474, the Court has granted certiorari on the question of whether public sector employees may use the "class-of-one theory" under the U.S. Constitution's Equal Protection Clause to challenge adverse employment actions.

In the second case, Progress Energy, Inc. v. Taylor, Case Number 07-539, the Supreme Court may agree to consider the validity of private settlements that waive employee rights under the Family and Medical Leave Act ("FMLA"). The Court's resolution of either issue could have far-reaching consequences for employers.

Application Of "Class-Of-One Theory" To Public Sector Employment Decisions

The Supreme Court has already agreed to review the Ninth Circuit's decision in Engquist v. Oregon Dep't of Agriculture. At issue in Engquist is whether the "class-of-one theory" under the Equal Protection Clause, which protects individuals from being treated differently from others who are similarly situated without a rational basis, can be applied to public employment decisions.

The Supreme Court's decision in this case could have long-lasting ramifications for public employers. Generally, public employers (like private sector employers) can terminate employees for reasons that may appear arbitrary as long as the decision does not violate a contract between the parties or any applicable laws, such as anti-discrimination laws.

This concept of "at-will" employment provides public employers with significant discretion in the employment context. However, as the Ninth Circuit noted, if the Supreme Court decides to apply the "class-of-one theory" to public employers, the concept of "at-will" employment may no longer exist with respect to public employment.

As a result, public employers would be subjected to constraints never before placed upon them, and could be forced to revise long-standing personnel practices. This could significantly hinder a public employer's ability to effectively manage its workforce.

As the Ninth Circuit also noted, applying the "class-of-one theory" to public employment decisions could significantly burden the federal court system by creating a "flood of new cases."

Indeed, every decision by a public employer, including terminations, promotions, disciplinary actions and decisions regarding benefits and pay, could be susceptible to challenge under the Equal Protection Clause.

The Validity Of FMLA Waivers Comes Under Scrutiny

On Jan. 14th, the Supreme Court asked the Solicitor General to weigh-in on whether the U.S. Court of Appeals for the Fourth Circuit was correct in holding that a U.S. Department of Labor ("DOL") regulation precludes the private settlement or release of FMLA claims between employers and employees. Progress Energy, Inc. v. Taylor, Case Number 07-539.

A divided Fourth Circuit ruled in July 2007 that, absent prior court or DOL approval, 29 C.F.R § 825.220(d)1 bars the prospective and retrospective waiver or release of employees' FMLA rights, including the right to bring a claim for a violation of the FMLA. See Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007).

The Fourth Circuit concluded that the regulation comports with the FMLA's express language making it illegal for employers to interfere with, restrain, or deny the exercise of "any right" provided under the statute, and reversed the district court's decision granting summary judgment to the employer on the basis of the employee's FMLA release.

In its petition for Supreme Court review, the employer, Progress Energy, stated that the Fourth Circuit's ruling improperly rejected the DOL's longstanding interpretation of § 825.220(d) permitting waivers of FMLA claims. Progress Energy also raised the DOL's concern that the Fourth Circuit's decision creates brand new burdens on it to review literally thousands of settlements and waiver agreements.

Ultimately, the Solicitor General's recommendation to the Court will turn on a number of factors, including: (1) the extent to which there exists a sufficient conflict between the circuits; (2) the national importance of the question at issue; and (3) whether this case is the best vehicle for presenting the issue squarely to the Court.

Given the DOL's stance permitting the waiver of FMLA claims, the Solicitor General could plausibly recommend that the Court grant certiorari, particularly since the Solicitor General serves as an advocate for

government agencies like the DOL. The Court usually follows the Solicitor General's recommendation.

While it is unclear whether the Supreme Court will agree to address this issue, or how it would ultimately rule if it did so, one thing is certain: the Fourth Circuit's decision should remind employers that they must take great care when drafting employee release agreements so that they do not contain unlawfully-broad waivers of rights.

Indeed, some courts have ruled that an employee's invalid waiver of certain rights, such as FMLA rights, may void a release agreement in its entirety.

Until this issue is ultimately resolved, employers should consider taking the following steps when seeking an employee's waiver of claims: (1) avoid catch-all waivers in separation and release agreements; (2) specify the particular statute for which a waiver of claims is sought (as required for example, in connection with claims under the Age Discrimination in Employment Act); (3) and incorporate adequate severability clauses in such agreements to avoid nullifying otherwise enforceable waiver provisions.

Indeed, depending on the outcome of this issue, employers may ultimately be forced to tailor the terms of their release agreements to waive only those claims that they believe an employee would most likely assert against them.

In recent years, the Supreme Court has taken a strong interest in employment law issues. The two cases discussed above are no exception. Public and private employers should continue to monitor these cases, as they have the potential to significantly reshape long-standing employment practices and the legal precepts upon which such practices are based.

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[1] 29 C.F.R. § 825.220(d) states that, "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA."