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Q&A: Baker Donelson's Donna Glover on 2017-18 Supreme Court employment rulings

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Management-side attorney Donna Glover of Baker Donelson recently participated in a Q&A with Thomson Reuters on employment-related rulings from the U.S. Supreme Court's recently completed term and their possible effect on employers.

Glover also previewed the employment cases pending before the court for its next term, starting in October, and what the departure of Justice Anthony Kennedy could mean in employment cases.

The questions and answers have been edited for clarity and brevity.

Thomson Reuters: In *Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (Apr. 2, 2018), the high court majority, perhaps unexpectedly, expanded the scope of overtime exemptions under the Fair Labor Standards Act. What is the significance and long-term implication of the ruling?

Donna Glover: *Encino Motorcars* was, no doubt, a significant win for employers. The court considered whether service advisers at car dealerships are exempt from the FLSA's overtime pay requirements pursuant to 29 U.S.C.A. § 213(b)(10)(A). In a tight 5-4 decision, the court held that service advisers are exempt from the requirements because they are "salesm[e]n ... primarily engaged in ... servicing automobiles."

"Replacing Justice Kennedy with a solidly conservative justice could mean more employer successes in future arbitration cases — including two on deck for the upcoming term," Glover said.

The exemption ruling may not be that remarkable, but the Supreme Court's rational may have far-reaching impact on courts' interpretation of FLSA exemptions.

The Supreme Court rejected the 9th Circuit's conclusion that FLSA exemptions should be construed narrowly and its holding that service advisers were not exempt. The court determined that the appeals court had used a "flawed premise that the FLSA pursues its remedial purpose at all costs."

To solidify its position, the court noted that the FLSA has more than two dozen exemptions and those exemptions are as much a part of the FLSA's purpose as the overtime pay requirement — meaning, that courts must read those exemptions fairly, not narrowly.

The court also rejected the 9th Circuit's reliance on a 1966-67 Department of Labor Occupational Outlook Handbook and the FLSA's legislative history, both of which the court found unpersuasive.

The outlook for employers in defending their good-faith FLSA classification decisions has significantly improved — the Supreme Court abandoned the position held for more than 70 years that the exemptions from overtime under the FLSA must be narrowly construed, and it opted for a "fair interpretation" of those exemptions.

The *Encino Motorcars* decision, therefore, may result in fewer conditional certifications of FLSA class/collective actions and fewer summary judgments in plaintiffs' favor.

TR: Is the decision in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (May 21, 2018), another close 5-4 ruling, this time addressing individual arbitration, likely to severely curtail employment-related class actions?

DG: *Epic Systems* was one of a group of consolidated cases that posed the question of whether an agreement that requires an employer and employee to resolve employment-related disputes through individual arbitration and waive class and collective action proceedings is enforceable under the Federal Arbitration Act, 9 U.S.C.A. § 1, notwithstanding the provisions of the National Labor Relations Act, 29 U.S.C.A. § 151, preventing employers from limiting employees' rights to engage in "concerted activities" in pursuit of their "mutual aid or protection."

In an "epic" decision for employers, the court held that class-action waivers in employee arbitration agreements are enforceable.

Following this decision, employers may assuredly include class/collective action waivers in arbitration agreements with their employees without fear that those agreements will later be found to be unenforceable. Making certain that employees individually arbitrate their claims will protect employers from costly class-action suits.

Notably, just prior to the release of the *Epic* decision, the Supreme Court granted a petition for a writ of certiorari in *Lamps Plus Inc. v. Varela*, No. 17-988, *cert. granted*, 138 S. Ct. 1697 (Apr. 30, 2018), a case involving the 9th Circuit's expansive interpretation of an employee arbitration agreement to allow for class arbitration.

The court will decide whether the FAA forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. This signals that interpretation of an arbitration agreement absent an explicit class-action waiver remains an open question and, in fact, could allow for class-wide arbitration.

Employers whose arbitration agreements do not currently contain an express waiver of class actions, including class arbitrations, should consider adding such a provision, even though it seems quite possible that the court will rule in favor of the employer in *Lamps Plus*.

TR: Will the ruling in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (June 4, 2018), a discrimination case, have an employment law impact?

DG: The *Masterpiece Cakeshop* decision, better known as the "baker case," is likely to have little or no impact on employment law. The court held that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the free exercise clause of the First Amendment.

This narrow decision focused on the commission's conduct when it investigated charges of discrimination that Charlie Craig and David Mullins filed after Jack Phillips, the cake shop owner, declined to make their wedding cake on the grounds that he does not create cakes for same-sex weddings because of his religious beliefs. The commission found in favor of Craig and Mullins, and the Colorado Court of Appeals subsequently affirmed the ruling.

The case wound its way to the Supreme Court, where the question at issue was whether the application of Colorado's public accommodations law — which would compel Phillips to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage — violate the free speech or free exercise clauses of the First Amendment?

The court decided the case on very narrow grounds — that during the commission's consideration of the charges, it had shown anti-religious bias that violated the free exercise clause. A commissioner said Phillips' use of his religion as an excuse not to create the cake was a despicable piece of rhetoric.

"This sentiment is inappropriate for a commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law — a law that protects against discrimination on the basis of religion as well as sexual orientation," Justice Anthony Kennedy wrote in the majority opinion.

But the deeper question many wanted answered was whether the First Amendment protects Phillips' right to deny services to same sex-couples.

This case simply did not tee up the issues that could have led to the answer to that question. Thus, it went unanswered in *Masterpiece Cakeshop*, and it is unlikely that the decision will have any far-reaching impact on employment law.

TR: The decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (June 27, 2018), is seen by many as a huge blow to the viability and future of public sector unions. Can unions recover from the ruling? Is there a further impact on employment law beyond union dues/fees?

DG: In *Janus* the Supreme Court ruled that public sector employees cannot be forced to pay an "agency" fee as a condition of employment because such a requirement violates First Amendment free speech rights of employees who disagree with the union's positions. The decision overturned a 41-year-old precedent. As background, the Supreme Court in 1977 held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that a union representing government employees could require nonmembers to pay an agency fee, which is a percentage of full union dues, generally because the nonmembers benefited from the union's efforts.

The plaintiff in the present case, Illinois state employee Mark Janus, is represented by, but not a member of, AFSCME Council 31. He did not want to join the union because he opposed various public policy positions that it took. Nonetheless, the union required that, as a nonmember, Janus pay an agency fee as a condition of his employment with the state.

Chief Justice John Roberts and Justices Samuel Alito, Neil Gorsuch, Kennedy and Clarence Thomas agreed with Janus' argument and overruled *Abood*.

"Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command," Justice Alito wrote for the majority, and "measures compelling speech are at least as threatening" as those that involve restrictions on what can be said.

Justice Alito also recognized that "the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members."

But, he said, "It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public sector unions in violation of the First Amendment" — quite a conservative statement.

No doubt, many public sector employees who are nonmembers have and will continue to take advantage of the *Janus* decision to stop paying agency fees to the union that represents them. Unions have begun "marketing" to enforce nonunion members to continue their financial support and are looking to focus on value-added services for their members. We may also see state legislatures, or Congress, entering the fray to enact laws to protect unions from being forced to offer full benefits to nonmembers.

Janus applies only to public sector employees. Therefore, unless an employee works in a state with a right-to-work law, private sector employees can still be required to pay union dues as a condition of employment unless a *Janus*-like private sector case works its way up to the Supreme Court.

TR: What does the court's next term hold for employment-related cases?

DG: In the high court's 2018-19 term beginning Oct. 1, we can look forward to another notable year of attention-grabbing employment-related cases, as well as a successor for Justice Kennedy.

The outcome of pending cases, as well as any new cases for which the court grants certiorari, may depend on how quickly the Senate confirms U.S. Circuit Judge Brett Kavanaugh, President Donald Trump's nominee to replace Justice Kennedy.

Prior to the end of the 2017-18 term, in addition to *Lamps Plus*, the court granted certiorari in *New Prime Inc. v. Oliveira*, No. 17-340, *cert. granted*, 138 S. Ct. 1164 (Feb. 26, 2018), a case in which the court will once again take up an issue related to the Federal Arbitration Act.

Section 1 of the FAA, 9 U.S.C.A. § 1, provides that the law does not apply "to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The questions at issue are whether a dispute over the applicability of the Section 1 exemption must be resolved by a court or an arbitrator, and whether Section 1 applies to independent contractor agreements.

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The court also granted certiorari in two other cases. In *BNSF Railway Co. v. Loos*, No. 17-1042, *cert. granted*, 138 S. Ct. 1988 (May 14, 2018), it will decide whether a lost-wages damages award to a former railroad employee is subject to withholding or taxation under the Railroad Retirement Tax Act. In *Mount Lemmon Fire District v. Guido*, No. 17-587, *cert. granted*, 138 S. Ct. 1165 (Feb. 26, 2018), the court will consider whether, under the Age Discrimination in Employment Act, the same 20-employee minimum that applies to private employers also applies to political subdivisions of a state, as the 6th, 7th, 8th and 10th circuits have held, or whether the ADEA applies instead to all state political subdivisions of any size, as the 9th Circuit has held.

In the absence of Justice Kennedy's swing vote and with the possibility of adding another conservative-leaning justice to the court, it is more likely than not that the court will decide in favor of political subdivisions that the ADEA's 20-employee minimum applies.

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ABOUT THE AUTHOR

Donna M. Glover is an associate in the Baltimore office of **Baker Donelson**. She represents a wide variety of clients, including construction, property management, and scientific and technology solution companies, and not-for-profit organizations. She advises clients on day-to-day management issues relating to employees, guides clients in a way that minimizes exposure, defends them against charges of discrimination and wage complaints filed with federal, state, and local agencies, and handles various employment-related litigation matters.