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# SUPREME COURT LABOR CASES

# 2013-14 TERM

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# Section Six

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## SUPREME COURT LABOR CASES: 2013-2014 TERM

The Court addressed nine cases in its 2013-2014 term dealing directly or indirectly with labor and employment issues. In particular there were two ERISA cases, two cases dealing with wage issues, a SOX whistleblower case, an NLRB case (which was really a constitutional powers issue), two public sector free speech cases, and a case interpreting the interplay between the Affordable Care Act and the Religious Freedom Restoration Act, which latter case may have future implications for the application of employment laws to for-profit corporations.

### ERISA CASES

***Heimeshoff v. Hartford*, 134 S.Ct. 604 (2013): 9-0 decision written by Thomas.**

Petitioner was covered under a long-term disability policy which required participants to file any lawsuit over the denial of benefits within three years after written proof of loss is required to be furnished. Under the plan, the insured must submit written proof of disability within 90 days after the start of the period for which disability payment is sought.

This plan was covered by ERISA, and ERISA requires that the insured exhaust the plan's administrative process before filing suit to challenge denial of benefits. ERISA does not, however, specify the statute of limitations (SOL) for challenging a denial of benefits. Where a federal law does not provide n SOL, the Supreme Court's general rule is to borrow from the most closely analogous state law SOL. (*See , e.g. North Star Steel v. Thomas,* 515 U.S. 29 (1995) WARN case). In *Heimeshoff*, the district court had determined that Connecticut law provides that insurance carriers may specify in their contract the limitations period for filing a claim so long as the SOL is not less than one year from the date when the loss insured against occurs.

Generally speaking, an SOL begins to run from the date that a cause of action accrues,

i.e. the date when a plaintiff can first file suit. Under ERISA the plaintiff cannot file suit until after exhausting plan remedies. However, in this case, the parties agreed by contract (i.e. the terms of the disability plan) that the SOL begins running from the date of proof of loss. The Court applied the well-established principle that "absent a controlling statute to the contrary, a contract may validly limit the time for filing a lawsuit providing that the period is reasonable." This principle is particularly appropriate for ERISA where the written terms of the plan itself are the focus. Thus, the Court held that it must give effect to the SOL as written in the plan unless the period is either unreasonably short, or a controlling statute prevents the application of the SOL.

The Court found that the latter condition did not apply to this case as the Connecticut statute expressly allows insurance carriers to specify the SOL so long as it is longer than one year. The first condition was also inapplicable since, in the ordinary course, internal administrative reviews last about one year, thus giving plaintiff at least two more years to file the lawsuit. In those rare cases where the length of the internal review process caused by the administrator's conduct prevents the insured from timely filing a lawsuit, courts may apply traditional doctrines of waiver, estoppel or tolling. It should be noted, however, that the Court rejected petitioner's argument that the limitations period should be tolled as a matter of course while the internal review process is ongoing.

***Fifth Third Bancorp v. Dudenheoffer*, 134 S.Ct. 2459 (2014): 9-0 decision written by Breyer.**

This case is an ESOP stock-drop case and considers the duty of prudence applied to plan fiduciaries in such a case. The Courts of Appeals which had confronted this question in cases involving a challenge to the ESOP fiduciary's decision to buy or hold employer stock had

unanimously determined that "a presumption of prudence" applied to the fiduciary's conduct (also known as the *Moench* presumption). The courts had split, however, over both the nature of the presumption – did plaintiff have to prove that the employer was in a dire situation or only that a prudent fiduciary would have made a different decision – and whether this presumption applied at the pleading stage or only at summary judgment.

The Supreme Court did not answer either of these questions, however, as it held that no such "presumption of prudence" applies – period. In reaching this conclusion, the Court looked to the statutory language of ERISA. In §1104(a)(1) the law defines the "prudent man' standard as including the duty to diversify investments to minimize risks as well imposing standards of loyalty, skill and diligence.

Congress made an exception for ESOPs, however, with regard to the requirement of diversification. By its very nature an ESOP is designed to invest primarily in company stock which means the investment options are not prudently diversified. In order to encourage the use of ESOPs, ERISA specifically provides in §1104(a)(2) that the diversification requirement and the prudence requirement as it related to diversification do not apply to ESOPs. The Court held that §1104(a)(2) did not constitute a total exception for ESOPs from the prudence standard, but merely a limited exception as it relates to the requirement for diversifying the portfolio. Thus the lower courts had erred in creating a more general presumption of prudence as regards all of an ESOP fiduciary's decisions.

Petitioner in this case argued that the presumption was necessary to weed out meritless lawsuits. The Court, however, did not find the presumption to be an appropriate mechanism for achieving that purpose. The Court instead held that since a plaintiff must meet the

*Twombly/Iqbal* pleading standards when alleging a breach of the fiduciary duty, this would serve to preclude meritless lawsuits. Thus, when stock is publicly traded, allegations that the ESOP fiduciary should have recognized from publicly available information that the stock was either over or under-valued will generally not be plausible for alleging breach of the duty. The Court declined to consider whether a plaintiff in such a case could point to special circumstances as a basis for plausibly alleging imprudence.

What the Court did hold was that when the case involves a claim of breach of duty based on inside information a plaintiff must plausibly allege an alternative action that the fiduciary could have taken consistent with securities law, and that a prudent fiduciary would not view such alternative action as more likely to harm the fund than help it.

As a practical matter, the take-away here appears to be two-fold. Regarding the issue of continuing investment in company stock in an ESOP, there should be a process for determining the prudence of that decision. As to the inside information issue, several ERISA practitioners have suggested that CEOs and CFOs should not sit on ESOP plan committees. *See* Jacklyn Wille, *Employer Sock Plan Fiduciaries Can Take Liability-Shielding Measures, Attorneys Say*, 209 DLR A-8 (Oct. 27, 2014).

**WAGE CASES**

***US v. Quality Stores*, 134 S.Ct. 1395 (2014): 8-0 decision written by Kennedy (Kagan took no part in the consideration of the case).**

This case involves a pretty straight-forward question – are severance payments FICA wages. The Court, in looking at the relevant Internal Revenue Code provisions, clearly found that the definition of wages for FICA purposes, as found in §§3121(a) and (b), includes any

remuneration received for services performed by an employee for an employer. The severance payments in this case were based on the job and seniority of the employees and were a benefit offered to attract and retain employees and thus were remuneration for services. Moreover, the Code section defining FICA wages includes a list of specific types of payments as exemptions from wages (such as disability payments) but does not exempt severance payments. Finally, in 1939 Congress did create an exception from wages for "dismissal payments" but that exception was repealed in 1950. So clearly, the Court held, the code definition of FICA wages includes severance pay.

Respondent had argued that a provision of the Code dealing with the definition of wages for purposes of income tax withholding acts to limit the meaning of wages for FICA. §3402, dealing with income tax withholding, provides for the "extension of withholding to certain payments other than wages" and lists as one of those payments "any supplemental unemployment compensation benefit" (SUB). Thus, respondent argued, SUBs are not defined as wages for tax withholding, and this indirectly includes severance pay; if severance pay is not wages for income tax purposes then it is not wages for FICA purposes either.

The Court notes that the problem Congress was addressing with SUB payments was related to the fact that some states would provide unemployment compensation (UC) payments only if workers were not earning wages from an employer. The point of SUB was to "supplement" UC benefits not supplant them. Thus, in order to avoid this problem the IRS issued a Revenue Ruling that SUB payments were not wages for either FICA or tax withholding. A non-intended consequence of that ruling, however, was that workers who received SUB payments were hit with a large tax bill at the end of the year, so Congress enacted §3402 to

extend withholding to SUB payments. Where the severance payment was not linked to receipt of state UC benefits the exemption was not necessary.

In this case the severance payments were remuneration for services and were not linked to the receipt of state UC benefits, so these payments are taxable wages for both FICA and tax withholding purposes.

The Court noted that IRS Revenue Rulings still provide that severance payments tied to receipt of state UC payments are exempt from both income tax withholding and FICA tax. The Court specifically stated that it was not addressing the question whether those rulings are consistent with the broad definition of wages under FICA. So this may leave some uncertainty for employers and unions trying to craft severance payments that will not affect worker eligibility for state UC.

***Sandifer v. US Steel Corp.*, 134 S.Ct. 870 (2014): 9-0 decision written by Scalia (Sotomayor joined in the decision except for footnote 7).**

This is a relatively straight-forward FLSA case. As a general rule, the time spent donning and doffing protective gear which is an integral and indispensable part of the principal activities for which the workers are employed is compensable under the Act. *Steiner v. Mitchell*, 350 U.S. 247 (1956). However §203(o) specifically allows that time spent "changing clothes" can be excluded from compensable time pursuant to a collective bargaining agreement. In this case, the parties had such an agreement and the question was "what constitutes changing clothes" for purposes of taking advantage of the exception. Consulting dictionaries from the time when §203(o) was enacted, the Court determined that clothes are any item that is worn or covers the person. Thus clothes includes both apparel that is decorative as well as protective. Items which

are not meant to be worn as covering for the body, such as tools or respirators, are not clothes. The terms "changing" is not limited to substitution (e.g. taking off a shirt and putting on an apron) but includes "layering" (applying a covering over existing apparel such as putting a flame-retardent jacket over a shirt).

The Court then applied these definitions to the "clothing" at issue and found that the majority of items used by the workers were clothes – jacket, pants, hardhat, gloves, leggings and boots; three items, however, were not clothing – safety glasses, earplugs and a respirator. Thus, since some of the workers' time was spent on non-excludable items, the Court had to address the issue of whether that additional time should be compensated.

Here it gets a bit tricky. The lower courts had been applying the *de minimis* doctrine when confronted with the issue of separating compensable and non-compensable duties. The Supreme Court noted that the *de minimis* doctrine was applied in *Anderson v. Mt. Clemens Pottery,* 328 U.S. 680 (1946)(a pre-Portal to Portal Act case) in the context of determining time spent for purposes of computing how many hours the employees worked during a workweek for overtime purposes. But, according to the Court, that doctrine is not appropriate when dealing with a portion of the statute that is actually aimed at "trifles" – i.e. the small amounts of time during which workers change clothes needed for the job.

The question for the courts in such cases is whether the period at issue can be fairly characterized *on the whole* as time spent changing clothes. If the vast majority of time involves putting on equipment or other non-clothes items, the entire period of time would not quality for the exemption under §203(o) even is some clothes were put on. Vice-versa, if the majority of the time involves putting on clothes, which was the case in this instance, then the entire period of

time qualifies for the exemption.

Two items are worthy of note. One concerns the Court's treatment of the *de minimis* doctrine. In footnote 8 the Court noted that the current DOL regulations (i.e., 29 C.F.R. §785.47 which requires payment for any part of hours worked, *however small*) apply a stricter *de minimis* standard than the Court had used in *Anderson*. I do not think the Court is suggesting that the "majority of time" standard that it is using in a §203(o) case would apply outside of that context, but it seems the Court is signaling that the DOL's interpretation of *de minimis* in those circumstances where it *is* appropriate to use that doctrine is subject to attack.

The second item of note concerns footnote 7 on which Sotomayor dissents. This footnote raised the issue of when it is appropriate to apply the general rule that exemptions to generally applicable statutes are to be narrowly construed against the party seeking the exemption. There is disagreement among the Courts of Appeal as to whether §203(o) is an exemption or a definition (§203 is labeled as "Definitions"). The Supreme Court in *Christopher v. SmithKline Beecham,* 132 S.Ct. 2156 (2012)(holding that pharmaceutical reps are exempt outside salespersons) held that the narrow-construction principle did not apply to the interpretation of general definitions. Footnote 7 in *Sandifer* notes that exemptions from the FLSA generally are found in §213 which is entitled "Exemptions". So the Court appears to be signaling that §203(o) should not be narrowly construed. That hint, along with the *de minimis* comment in footnote 8, provides some basis for a more employer- friendly application of the FLSA in certain cases.

**SOX WHISTLEBLOWER CASE**

***Lawson v. FMR*, 134 S.Ct. 1158 (2014): 6-3 decision written by Ginsburg; concurrence by**

**Scalia (joined by Thomas); dissent by Sotomayor (joined by Kennedy and Alito).**

This is another relatively straightforward case of statutory interpretation – in this instance, the whistleblower provisions of Sarbanes-Oxley. The petitioners in this case were employees of a privately held investment advising company which subcontracted with the publicly-held Fidelity Investment Funds to provide investment advice. While employed, the petitioners raised concerns about certain practices of their employer as it affected the employer's dealings with Fidelity Funds, which practices allegedly violated securities law. The employees were subsequently retaliated against.

The question was whether SOX applies not only to the employees of publicly-traded companies but also to the employees of privately-held companies which do business with publicly-traded companies. The majority reads the text of SOX as plainly applicable to both. Specifically, the statutory language (18 U.S.C. §1514A) states that "no [public] company or any contractor, subcontractor or agent of such company may . . . discriminate against *an* employee . . . because of whistleblowing activity]". The majority found no ambiguity in the statutory language and noted that its interpretation is consistent both with the context of the entire statute as well as its legislative history. Not surprisingly, Scalia's concurrence stresses that the majority's decision is amply supported by both the text and context of the statute, eschewing any reliance on legislative history.

In dissent, Sotomayor notes that the majority interpretation gives SOX "a stunning reach" that "subjects a multitude of individuals and private business to litigation over fraud reports that have no impact on public company shareholders." She views the statutory language as ambiguous and would resolve the ambiguity in favor of a narrower reading that would limit SOX

protections to the employees of the publicly-traded company.

Initially, the majority dismisses this floodgate argument by noting that no single case of a SOX claim unrelated to shareholder fraud has been asserted. If such a result does ensue from the Court's ruling, the majority noted that Congress can amend SOX to remove protections for certain categories of employees. The majority also noted that the overbreadth problem may be resolved in the interpretation of the meaning of "contractor." Contractor arguably implies more than a fleeting business relationship and normally requires performance over a significant period of time. Moreover, it could be argued that contractor employees are protected only to the extent that their whistleblowing related to the contractor fulling its role for the public company, and not if the employee is working for the contractor in a capacity unrelated to the public company work. Lastly the majority notes that it is not determining whether §1514A claims would be valid if they do not impact the shareholders of a publicly-traded firm, since the plaintiffs' claims in this case directly implicated the interests of the shareholders of the publicly-trade mutual funds.

It should be noted that, separate from SOX, the amended Dodd-Frank Act also protects employees of both public *and* private companies from retaliation for providing information to the SEC, participating in an SEC proceeding or making disclosures required by certain laws. This statute does not, however, protect employees who make internal complaints, which activity is protected under SOX.

## NLRB CASE

***NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014) 5-4-0 decision written by Breyer; concurrence by Scalia (joined by Roberts, Thomas and Alito) concurring in the judgment only.**

In essence this is a one-off case. I do not see any of the analysis, argument or rationale

which would be useful in any other labor scenario. This case focused on the appropriate meaning of the recess appointment power given to the President by the Constitution. In this instance that power was used by President Obama to appoint three members to the NLRB during an intra-session recess of Congress. The Court's analysis relied in large measure on historical precedent in deciding how to define the recess appointment powers. Indeed the majority opinion has a nine page appendix detailing the different times there have been intra-recess appointments and a two page appendix detailing pre-recess vacancies. Five justices agreed that: 1) the appointment power can be exercised during intra-session breaks so long as the break lasts at least 10 days (and pro forma sessions do not constitute breaks); and 2) the vacancy can occur pre-recess. While Scalia concurs with that limitation, he and three other justices would have interpreted the Constitution to limit the power more severely by applying it only to inter-session breaks and only to vacancies that actually occur during the recess. Since President's Obama's NLRB appointments were made during an intra-session recess lasting less than ten days they were not valid.

The real issue here is how does this decision affect the workings of the NLRB. Well, to some degree "we've been there done that" with *New Process Steel*, 560 U.S. 674 (2010)(delegation of Board authority to two member panel invalid). It has been reported that over 700 "invalid" decision were issued during the period when the Board did not have a lawful quorum. *See* G. Roger King and Bryan Leitch, *The Impact of the Supreme Court's Noel Canning Decision*, 123 DLR I-1 (June 26, 2014). To the extent that parties want to bring a case back to the NLRB, the General Counsel can bring cases back to the Board for reconsideration and/or confirmation.

There were 98 appellate cases pending at the time *Noel Canning* was issued; in 43 cases the NLRB had not yet filed the record with the Court. The Board, pursuant to its §10(d) authority to modify or set aside orders before the record is filed, issued unpublished decisions announcing action in each case. Of the remaining 55 cases in which the record was filed, the NLRB asked the courts to return the cases to the Board for further action. *See* Lawrence E. Dube, *NLRB General Counsel Provides Update on Responses to Noel Canning Decision*, 131 DLR AA-1 (July 9, 2014).

There is also the issue of actions taken by Regional Directors appointed by the "invalid" Board. The courts which have considered these cases so far have held that the prior Delegation Orders issued by the Board delegating prosecutorial authority to the General Counsel, are valid and thus, so far, challenges to complaints and §10(j) petitions filed by Regional Directors have been dismissed. Indeed in footnote 4 in *New Process Steel* the Court stated that its invalidation of the Board's delegation of authority to the two Member Board "does not cast doubt on the prior delegations of authority to nongroup members such as the general counsel." 560 U.S. at 684 fn. 4. *See Kreisberg v. Health Management LLC,* 732 F.3d 131 (2d Cir. 2013); *McKinney v. Kellogg Co.*, 2014 WL 3746448 (W.D. Tn 2014); *Overstreet v. SFTC*, 943 F.Supp. 2d 1296 (D.N.M. 2013); and *Paulsen v. All American School Bus*, 967 F.Supp.2d 630 (E.D.N.Y. 2013).

## FIRST AMENDMENT CASES

***Lane v. Frank*, 9-0 decision written by Sotomayor; concurrence by Scalia (joined by Thomas and Alito).**

In this case a state community college employee, Lane, was auditing expenses of a program (which received federal funding) when he noticed that a state legislator was listed on the

payroll but had not been reporting to work. He discharged the legislator. When the feds began an investigation into this no-show job Lane was subpoened to testify. Subsequently, Lane was laid off and he alleged that the lay-off was in retaliation for his testimony and thus claimed a violation of 42 U.S.C. §1983 based on the First Amendment.

The question for the Supreme Court was disentangling the *Garcetti* standard (*Garcetti v. Cabalos*, 547 U.S. 410 (2006): no cause of action where retaliation against public employee is based on speech that is part of the employee's official duties) from the *Pickering* line of cases (*Pickering v. Board of Education*, 391 U.S. 563 (1968)). The Court first noted that speech by citizens on matters of public concern can be the result of information learned through public employment. Indeed, government employees are in the best position to know about government problems and the public has a stake in receiving this type of reliable information. The *Pickering* framework requires a two step analysis – is the employee speaking as a citizen on a matter of public interest and if so, can the government present an adequate justification for retaliating against such speech?

In applying this analysis the Court first found that truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen even when the testimony relates to information learned through his employment. The Court cautions however that it is not addressing a case were the sworn testimony was given as part of the public employee's ordinary job duties (i.e. a coroner or police officer). This is the point which Scalia in his concurrence emphasizes.

The Court then found that the content of the testimony was speech on a matter of public concern because it involved misuse of tax-payer funds.

In applying the second step – does the government have an adequate justification -- the Court noted that in this case the employer's side of the scale was empty; the respondents did not assert any government interest, such as that the testimony was false or erroneous or that Lane had unnecessarily disclosed sensitive or confidential information.

Now one might think that Lane, therefore, wins his case. Wrong. The Court found that in this case the government officials had qualified immunity from an award of damages because the controlling precedent of the Eleventh Circuit provided respondent with a reasonable belief that its actions were justified under *Garcetti*. Lane can, however, pursue his claims for equitable relief, including reinstatement, on remand.

***Harris v. Quinn*, 134 S.Ct. 2618 (2014): 5-4 decision written by Alito; dissent by Kagan (joined by Ginsburg, Breyer and Sotomayor).**

The majority avoids overturning precedent in this case by giving a constrained reading to the nature of the employment relationship between personal home-care assistants (PAs) and the state of Illinois, finding that the PAs are not "full-fledged public employees" and thus the state's interests in requiring payment of agency fees to the union is not justified by *Abood's* rationale (*Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977)). The dissenters, on the other hand, see the employment relationship as one of joint employment (with both the state and the client as co-employers jointly controlling aspects of the working relationship) and therefore the *Abood* precedent governs the case requiring the workers to pay their fair share fees to the union.

This case is clearly building on the *Knox* case (*Knox v. Service Employees Int'l Union*, 132 S.Ct. 2277) from the Court's 2011-2012 term in which the majority began the process of questioning the continuing viability of *Abood.* To refresh your recollections, *Abood* held that the

state's interest in stable labor relations, industrial peace and preventing free-riders justified requiring public employees to pay agency fees to the union representing them for purposes of collective bargaining in the face of a First Amendment challenge. The majority in *Knox* however, noted that:

> "Our cases to date have tolerated this "impingement," (i.e. public sector agency shop agreements) and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake."

*Knox* at 2289.

> "Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly--one that we have found to be justified by the interest in furthering "labor peace." *Hudson*, 475 U.S., at 303, 106 S. Ct. 1066, 89 L. Ed. 2d 232. But it is an anomaly nevertheless."

*Knox* at 2290. The crux of the issue in *Knox*, however, was not the agency fee per se, but rather the union's failure to provide a written *Hudson* opt-out notice before imposing an additional levy for political expenditures.

The *Harris* majority again circumvents the issue of the continuing viability of *Abood* by refusing to extend it to workers who are not "full-fledged" public employees. But the majority does spend 12 pages questioning the validity of the analysis underlying *Abood*. The majority states that the First Amendment analysis used by the Court in the cases leading up to *Abood* (and upon which *Abood* relied) was thin. Moreover, the Harris majority asserts that the *Abood* Court

misunderstood the narrowness of the previous holdings and failed to sufficiently appreciate the differences between union speech in the public sector (where issues such as wages and pensions are political issues) from union speech in the private sector (where such issues do not implicate the public). This difference in the type of speech, and the overlap in the public sector between political issues and terms of employment, creates difficulties in the public sector context in trying to separate union dues money spent for political purposes (for which agency fees cannot be assessed) from money spent on purely collective bargaining issues.

Having taken a second bash at *Abood*, the *Harris* Court turns its attention to the "special" nature of the employment relationship for these PAs and finds that they are not exclusively public sector employees to which the *Abood* precedent would apply. Thus it did not, in this opinion, overrule *Abood*, but the National Right to Work Legal Defense Fund will certainly keep up the fight to get such a result from this Court and the majority in both *Knox* and *Harris* have provided a reason for hope.

The *Harris* Court found that these PAs are public employees solely for collective bargaining purposes: they are not covered by state laws providing pension or health care for state workers; the job duties are specified in service plans which must be approved by the client and the client's physician; and the clients have the authority to hire and discharge the assistants as well as evaluating their performance. Because of the limited nature of state control over the employment relationship, the union's ability to negotiate with the state over working conditions is very limited. The union cannot file a grievance over a client's termination or failure to hire an assistant, nor based on a reduction in working hours by the client. The union can only negotiate with, and file grievances over, conduct controlled by the state agency which is extremely limited.

The free rider problem is therefore insignificant, as the union is not expending much in terms of the few items over which it can bargain.

Since *Abood* does not apply, the Court looks to *Knox* which held that the state cannot compel funding of speech unless it passes exacting First Amendment scrutiny. The labor peace justification does not apply because the petitioners do not contest the authority of the union as exclusive representative nor do they seek to form a rival union. The free rider justification does not apply because there is no evidence that the union could not have effectively advocated for improvements in wages and benefits based on the union dues paid by those individual who voluntarily supported the union and became members.

Significantly underestimating human nature and its penchant for getting something for nothing, the Court states: "a majority of the personal assistants voted to unionize. When they did so, they must have realized that this would require the payment of union dues, and therefore it may be presumed that a high percentage of these personal assistants became union members and are willingly paying union dues. Why are these dues insufficient to enable a union to provide "feedback" to a State that is high receptive to suggestions for increased wages and other improvements?" *Harris* at 2641.

Lastly the majority applies *Pickering* to this case and finds that union speech germane to collective bargaining is a matter of public concern and thus the state may not require support for such speech without a compelling government justification which the Court, in its prior analysis, already found missing.

The *Harris* dissent finds *Abood* not only still viable precedent but applicable to this case. The state is the joint employer with the clients: the state has the authority to determine and pay

wages and benefits; it establishes the basic qualifications for the job; describes the services the PA may provide; and prescribes standard terms for the employment contract entered into between the PA and the client. Thus *Abood* applies and the principle of *stare decisis* prevents overturning this precedent despite petitioner's request to do so. Kagan argues that *Abood* is consistent with a long line of First Amendment cases, thus belying any argument that special justification exists to overturn it. Kagan also addresses the reality of free riding – in the federal workforce there are many fewer employees who pay dues than have voted for the union – "and why, after all, should that endemic free-riding be surprising? Does the majority think that public employees are immune from basic principles of economics?"

**THE AFFORDABLE CARE ACT AND THE RELIGIOUS FREEDOM RESTORATION ACT**

***Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014): 5-4 decision written by Alito; concurrence by Kennedy; dissent by Ginsburg (joined by Sotomayor and in part by Breyer and Kagan)**

This, again, is another statutory interpretation case – this time of the Religious Freedom Restoration Act (RFRA) which provides "Government shall not substantially burden a person's exercise of religion. . ." unless "it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a)(b)(1)(2). The question presented to the Court was whether RFRA prohibits the government, pursuant to the Affordable Care Act, from requiring a closely-held for-profit corporation to provide its employees methods of contraception which violate the religious beliefs of the company's owners.

The first question for the Court to answer was whether a corporation is a person entitled

to the benefits of RFRA. While the Act itself does not define "person" the Dictionary Act, which the Court then consulted, defines person to include corporations. This is not surprising as most labor statutes (e.g. such as NLRB §2(1), FLSA §203(a) and Title VII §701(a)) define person to include corporations, or indeed any legally cognizable entity.

So the crux of the coverage argument under RFRA boiled down to "exercise of religion". Can a corporation exercise a religion? All parties conceded that non-profit corporations enjoy protection under RFRA. Thus, the majority reasoned, it is not the corporate form that is determinative of whether a corporation can exercise religion; the bone of contention must be the "for profit" motive. In determining that the profit motive is not a hindrance to applying RFRA, the Court referred first to *Braunfeld v. Brown*, 366 U.S. 599 (1961)(plurality opinion) which allowed the assertion of a free exercise claim by Orthodox Jewish retail merchants who were challenging Sunday closing laws. It should be noted, however, that the merchants in *Braunfeld* were sole proprietors, not corporations, and thus in that case it was indeed a private individual who was exercising religion not a corporate form which acts to shield the private individual. The Court next relied on citations to corporate law treatises as support for the premise that the law does not require a for-profit to pursue profit at the expense of other interests, such as charitable and humanitarian objectives; corporate law permits corporations to pursue any lawful objective would could include acting in conformity with the owners' religious principles. The majority fails to explain how the fact that the law allows the corporate form to pursue these objectives in any way turn these objectives into the *exercise of religion* by the corporate entity itself. So yes the Greens (the family which retains exclusive control over the closely-held company at issue in the case), if they were sole proprietors, may have a valid exercise of religion claim if they were

made to pay out of their own pockets for contraceptives that their religion told them were abortifacients. But once they incorporated, they were no long acting as individuals. The whole point of incorporation is to get the benefit of shielding one's personal assets – it is no longer the individual who acts but a separate entity. The dissent might be on the right track in viewing the combination of corporate form with profit motive as the disqualifying factor for purposes of gaining the benefit of RFRA,

The majority does, however, limit its holding in this case to *closely-held* for-profit corporations owned and controlled by members of a single family whose sincerely held religious beliefs are not in question. The Court does notes that if there were disputes among the corporate owners about how to conduct business consistent with certain religious beliefs then corporate law governance structures would provide a method for resolving that dispute. This suggests that the view of the majority owners can become the "sincerely held belief" for the corporate entity as a whole.

Having determined that Hobby Lobby can make a claim under RFRA, the question then becomes whether the contraceptive mandate substantially burdens its religious exercise. The Court notes that the monetary penalties the company would be assessed for either failing to comply with the mandate or failing to provide insurance at all are substantial. Even if the penalty for not providing any insurance were less than the cost of employer-provided insurance, this would still substantially burden the corporation. The corporation would be at a comparative disadvantage in attracting workers, and raising wages would be more expensive and not tax deductible. The Court ends its discussion with a policy argument: "we doubt that the Congress that enacted RFRA would have believed it a tolerable result to put family-run businesses to the

choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans." *Hobby Lobby* at 2777.

Having found a substantial burden the Court then turns to the question of compelling government interest but finds it unnecessary to decide. "We will assume that the interest in guaranteeing cost-free access is compelling." *Hobby Lobby* at 2780. The Court then addresses the final question of "least restrictive means" and finds that government assumption of the cost is less restrictive and has not been shown to be an unviable option, particularly in light of the costs of the ACA as a whole. While noting that in some cases cost may be an important factor in deciding least restrictive means, RFRA may require some government expenditure to accommodate religious beliefs. The Court, however, decides that it need not rely on requiring a new government-funded program, since HHS itself has developed a least restrictive means by providing an accommodation for non-profit religious objectors, *i.e.* filing a certification of opposition to providing coverage to its health insurance issuer/administrator which entity will then assume the cost of coverage. While not deciding that this alternative satisfies all religious claims, the Court held that this alternative does not impinge on these particular plaintiffs' religious beliefs.

So, what does all this mean for labor and employment law. Despite the news commentary of doom and gloom for the enforcement of employment discrimination laws, I think the compelling government interest in preventing discrimination and the fact that the prohibition on discrimination in employment is arguably the least restrictive means for achieving that interest would be viewed even by the *Burwell* majority as sufficient to overcome any religious challenge under RFRA to statutes like Title VII.