

Highlights of 2020-2021: An Analysis of Crucial Case Decisions Reshaping Labor & Employment Law

AUTHOR: TIMM SCHOWALTER, TOSHA CHILDS

The United States Supreme Court issued four pertinent decisions during the 2020-2021 year related to labor and employment law. In one decision, the Court offered guidance regarding the clarity of arbitration agreements and the issue of an arbitrator's authority to decide whether employer-employee disputes are subject to mandatory arbitration. Following the 5th Circuit's ruling that the Affordable Care Act's individual mandate setting the penalty for not buying health insurance to zero was unconstitutional, the Supreme Court in the second decision determined the individual and state plaintiffs nevertheless lacked standing to challenge the mandate given they had no fairly traceable injury to the unlawful conduct.

In the third decision, the Court held that a California regulation allowing labor organizers a right to access workplaces was a *per se* physical taking and was not enforceable without just compensation to the employer.

Finally, the Court held in the fourth case that an employee who is authorized to access information on a computer for *certain* purposes is in violation of the Computer Fraud and Abuse Act if he obtains information located in areas of the computer that are off limits to him. Accordingly, employers should revise non-disclosure agreements to prevent cyber theft by employees. The following is a brief analysis of these crucial decisions and their legal impact on employers, laborers, and business owners across the country.

In *Henry Schein Inc. v. Archer and White Sales Inc.*, the arbitration agreement at issue expressly exempted certain claims from arbitration. Pursuant to that agreement, Plaintiff desired to arbitrate the Defendant's accusations that Plaintiff plotted with dental distributors to maintain margins by threatening to cease purchases from manufacturers that sold to low-margin distributors such as the Defendant. Thus, the issue was whether the agreement provided clear and unmistakable delegation of questions of arbitrability to an arbitrator.

Previously, in 2019, the Court held, pursuant to the Federal Arbitration Act, a court may not decide whether an arbitration agreement applies to a particular dispute if the parties “clearly and unmistakably” delegated the question to an arbitrator, even if the court believes the argument for arbitrability is “wholly groundless.” On remand, the Court of Appeals for the 5th Circuit again refused to compel arbitration, finding that the parties had delegated at least some questions of arbitrability to the arbitrator, and the US Supreme Court dismissed the writ of certiorari as improvidently granted.

Take Away: *Henry Schein Inc.* provides clear guidance concerning the importance and necessity to appropriately draft clear arbitration agreements. Employers should strive to unambiguously specify whether an arbitrator has sole authority to determine whether employer-employee disputes can be heard in a court of law or are subject to mandatory arbitration.

In *California v. Texas*, the issue decided by the U.S. Supreme Court was whether the plaintiffs had standing to challenge the constitutionality of the 2017 amendment to the individual mandate of the Affordable Care Act (ACA), which set the penalty for not buying health insurance to zero. Texas and several other states and individuals filed a federal lawsuit challenging the mandate, arguing that because the penalty was zero, it could no longer be characterized as a tax and is therefore unconstitutional.

In a 7-2 majority opinion, the Court found the individual plaintiffs' injuries – past and future payments necessary to carry the minimum essential coverage that § 5000A(a) requires – were not “fairly traceable” to the alleged unlawful conduct. The statute's unenforceable language, which was the only penalty for noncompliance, was insufficient to establish standing. With respect to the state plaintiffs, the alleged indirect injuries of increased costs to run state-operated medical insurance programs and direct injuries of increased administrative expenses were not fairly traceable to the conduct alleged. The state plaintiffs failed to show how an unenforceable mandate would cause state residents to enroll in valuable benefits programs they would otherwise forgo and their alleged administrative expenses were the result of other provisions of the Act, not § 5000A(a).

Take Away: Although the US Court of Appeals for the 5th Circuit upheld the district court's conclusion holding the mandate was unconstitutional and remanded the case for reconsideration of whether the remainder of the ACA could survive in its absence, the principles of standing remain: a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

In *Cedar Point Nursery v. Hassid*, the U.S. Supreme Court upheld the private property rights of business owners over a union's right to organize. In California, labor unions have a “right to take access” of an agricultural employer's property to solicit support for unionization. Cal. Code Regs., tit. 8, § 20900(e)(1)(C). This regulation mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Organizers from the United Farm Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company.

The Plaintiff growers filed suit in the US Court of Appeals for the 9th Circuit seeking to enjoin enforcement of the access regulation on the grounds that it constituted an unconstitutional per se physical taking without just compensation under the Fifth and Fourteenth Amendments. The Plaintiffs argued and the US Supreme Court ultimately agreed, the regulation was invalid because it appropriated the owners' right to exclude third parties from their land, "one of the most treasured rights" of property ownership.

Take Away: Although the California regulation did not restrict the Plaintiffs' use of their own property, the "right of access" to third-party union organizers, even for a limited time, conferred a right to physically invade the growers' property, which constituted a physical taking.

Finally, in *Van Buren v. United States*, a former police officer requested the US Supreme Court to review and reject an overbroad interpretation of the Computer Fraud and Abuse Act (CFFA). The Plaintiff, while serving as a Georgia police officer, was convicted of violating § 1030(a)(2) of the CFFA based on allegations that he received compensation in exchange for improperly accessing a government database maintained by the Georgia Bureau of Investigation and the FBI to determine whether a person was an undercover officer via a license plate records search.

The issue before the Court was whether an individual who is authorized to access information on a computer for *certain* purposes violates the CFFA if he accesses that information for an improper purpose. Under § 1030(a)(2), an individual "exceeds authorized access" when he "accesses a computer with authorization" and "uses such access to obtain . . . information in the computer that the accessor is not entitled so to obtain." The parties agreed the former officer was entitled to obtain the license-plate information, but they disagreed that he was "entitled so to obtain it."

In a 6-3 majority opinion, the Court adopted the former officer's interpretation that the disputed phrase refers to information one is not allowed to obtain by using a computer that he is authorized to access. The Court held this interpretation was more plausible and supported by the statute's structure. According to the Court, the government's interpretation that the phrase referred to information one was not allowed to obtain "in the particular manner or circumstances in which he obtained it" would attach criminal penalties to a breathtaking amount of commonplace computer activity and inject arbitrariness into the assessment of criminal liability.

Take Away: An individual "exceeds authorized access" under § 1030(a)(2) of the CFFA when he accesses a computer with authorization and obtains information located areas of the computer that are off limits to him, and not simply when he obtains information available to him with improper motives. It is, therefore, critical that employers consider revising non-disclosure agreements to deter and protect against cyber theft by employees.