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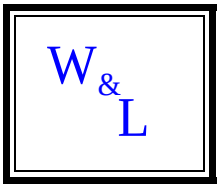
EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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SUPREME COURT REJECTS UNION ACCESS TO EMPLOYER'S PROPERTY IN CALIFORNIA

A strong ruling for employers' private property rights was issued by the U.S. Supreme Court in June in *Cedar Point Nursery v. Hassid*, No. 20-107 (June 23, 2021). The Court ruled that a California regulation that gives union organizers access to workers on employers' farms violates the property rights of the owners. Chief Justice Roberts wrote the 6-3 majority ruling. He said that giving the organizers access to the private property was the kind of uncompensated "taking" of private property by the government that the U.S. Constitution forbids.

A California state regulation had granted union organizers a right to physically enter and occupy the farmers' land for three hours per day, 120 days per year. Justice Roberts wrote: "The regulation appropriates for the enjoyment of third parties the owners' right to exclude." Justice Breyer, in dissent, worried that the Court's ruling would endanger any government intrusion on private property. The majority opinion said, however, that there was room for exceptions for law enforcement and health and safety inspections under the decision.

The state law was an outgrowth of the Cesar Chavez farmworker movement in the 1970s, when it was argued that the seasonal and isolated nature of agricultural labor made access to the fields essential so workers could exercise their right to organize a union. The ruling thus reinforces the Court's commitment to private property rights, which some Justices have viewed as under threat from over-reaching government regulations.

Editor's Note: There are two significant ramifications of this important ruling on property rights. First, it is likely that this case can be argued to oppose the many rulings of the National Labor Relations Board (NLRB) and other government agencies that require access to employers' properties for any number of reasons, such as the argument that employees should have the right to use the employer's email systems and the like for union organizing purposes. There remains to be seen what the NLRB and other government agencies will do with this important Supreme Court precedent, particularly since the Republican majority on the NLRB is likely to end in late August. A second interesting question is whether and how the Constitutional problem in the California regulation can be overcome. That is, the question is whether either the Labor Board or unions find a way to compensate employers for the time spent on employer property or using employer equipment.

LABOR BOARD TO RECONSIDER EMPLOYER RESTRICTIONS ON WEARING BUTTONS AND OTHER INSIGNIA IN THE WORKPLACE

Many employers do not like the idea of employees wearing pro-union shirts or buttons on the job. In the past, however, and particularly during the Obama Administration, the National Labor Relations Board (NLRB) gave employees a great deal of rights to wear union buttons and other buttons pertaining to concerted activities. More current issues concern the wearing of buttons for Black Lives Matter or other political buttons.

Now, in a case involving Tesla, the NLRB has invited the public to submit briefs on the issue of whether the company violated the labor laws by prohibiting employees from wearing union shirts. An administrative law judge had ruled that Tesla's apparel policy was not justified by "special circumstances" to maintain production or discipline. Tesla argued that the special-circumstances standard did not apply because the employees had not been prohibited from wearing union stickers and hats, but were simply required to wear special "team wear" Tesla shirts. A previous NLRB ruling during the Obama Administration had said employers cannot get around the special-circumstances test by mandating uniforms or other clothing in the workplace that prevents employees from wearing apparel with union insignia.

Thus, the three remaining Republican members of the NLRB asked for public comment on the appropriate standard for employers with a nondiscriminatory uniform policy that implicitly allows employees to wear union insignias. The deadline for filing such briefs was in March, and perhaps the existing Republican majority wants to issue a ruling before one of the Republican member's term expires in late August.

EEOC ADDRESSES CONTROVERSIAL LGBT RESTROOM POLICIES

A year ago the U.S. Supreme Court ruled in *Bostock v. Clayton County* that Title VII outlawed workplace bias based on sexual orientation and transgender status. However, that ruling expressly left open questions on whether employers could segregate bathrooms or dress codes by sex.

According to guidance issued by the EEOC in June, employers cannot bar workers from bathrooms or locker rooms that correspond to their gender identity. The guidance states: "In other words, if an employer has separate bathrooms, locker rooms or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities."

Editor's Note: This guidance is controversial for several reasons. First, it provides a definitive opinion on an issue left open by the U.S. Supreme Court. Nevertheless, there have been prior Equal Employment Opportunity Commission (EEOC) rulings consistent with the current guides. Another controversial aspect, however, is that the EEOC Commission, which currently has a 3-2 Republican majority, did not vote on the guidance. The guidance was issued solely on the authority of the current Administration's appointed Chair of the EEOC.

SUPREME COURT ALLOWS CATHOLIC GROUP TO EXCLUDE FOSTER-CARE RIGHTS

The public and the courts continue to debate whether there should be religious exemptions to LGBT anti-discrimination laws. In other words, there are anti-bias laws that must be enforced, and at the same time there

are religious rights that under the law generally require some accommodation. When these two issues collide, the outcome becomes difficult.

In the most recent U.S. Supreme Court ruling, issued in June, *Fulton v. Philadelphia*, in which the Catholic Social Services lost a city contract to screen foster parents after Philadelphia officials learned that the agency would not work with same-sex couples. Catholic Social Services argued that because the Roman Catholic Church does not recognize same-sex marriage, its religious exercise rights entitle it to disregard city policies forbidding discrimination based on sexual orientation.

In an earlier 1990 precedent, *Employment Division v. Smith*, the Supreme Court ruled that religious believers cannot use the First Amendment to exempt themselves from neutral laws that apply to the public at large. This ruling has been interpreted as reaching the conclusion that the government can enforce generally applicable laws without making an exception for religious groups. In the current case, however, the opinion written by Chief Justice Roberts, found a way to rule for the Catholic group's religious rights without issuing a more sweeping ruling favoring religious rights, by pointing to the city contract which contained a clause allowing exceptions to the non-discrimination policies. He therefore concluded that this exception meant the rules were constitutionally suspect because they were not "generally applicable" due to the exceptions allowed.

There was a concurring opinion by newly appointment Justice Barrett, joined by Justice Kavanaugh, and, importantly, by Justice Breyer. This concurrence suggested that the earlier 1990 precedents limiting religious rights under generally applicable laws should be reviewed, but that it would be unwise to do so before working out legal framework to replace it. Many believe that the Court will be presented in the near future with a case in which the Court will issue such an important ruling, possibly a case where a religious retailer refused to make floral arrangements for a same-sex wedding. Some believe there is a trend at least among the current Court to allow greater religious accommodation. The controversy may also affect current legislation known as the Equality Act dealing with comprehensive LGBT rights, which is to be considered by the U.S. Senate. In Texas, Christian groups are suing the EEOC over Title VII's LGBT anti-discrimination requirements. Christian groups are seeking to represent classes of employers that have religious and non-religious objections to homosexually or "transgender" behavior. Christian groups have long advocated a strict test that would require the government to show that a neutral law of general applicability that burdens religious at all, must be narrowly tailored to meet a compelling interest. Justices Alito and Thomas advocated in their concurring opinions for this "strict scrutiny" test to apply.

NO-MATCH SOCIAL SECURITY LETTERS DISCONTINUED

In the past, the Social Security Administration (SSA) during periods of time has issued so-called "no-match letters" to employers with "at least one name and combination submitted on Form W-2 that do not "match" Social Security records. This has created difficult issues for employers as to the extent they must investigate such discrepancies, terminate employees having such discrepancies, or face issues of "constructive knowledge" of unauthorized workers. SSA has now announced that it is discontinuing such letters and will try to find other ways to make reporting wages better. For more information click "Educational Correspondence to Employers"

on the page https://www.ssa.gov/employer/notices.html. The elimination of these no-match letters will relieve some employers of the burden of facing this dilemma.

SUPREME COURT AGAIN UPHOLDS AFFORDABLE CARE ACT

In *California v. Texas*, the Supreme Court has again upheld the provisions of the Affordable Care Act (ACA), often know as ObamaCare. A federal appeals court had ruled that ACA had originally been upheld by the Court as a tax, but subsequent legislation removed the tax penalty thus casting doubt on the validity of the individual mandate and perhaps the entire law. In a 7-2 ruling, the Court did not address the main contentions and instead ruled in favor of the ACA on a technicality. The Court found that the individual and state plaintiffs did not have standing to challenge the validity of the law, because they could not show they were injured by the mandate that now had no enforcement mechanism. This ruling is the third time the U.S. Supreme Court has upheld the law in one way or another.

Editor's Note: Some wonder whether the Court's ruling on the lack of standing by individuals and states will make it difficult to challenge the ACA in the future. There is a difference of opinion as to whether standing will be created if the federal government tries to enforce another provision of ObamaCare against someone, other than the individual mandate, and the person argues that the ACA's individual mandate is unconstitutional and that the entire law must therefore fall.

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