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Epic, Janus Highlight 2018's Biggest Employment Rulings

By **Vin Gurrieri**

Law360 (December 14, 2018, 10:06 PM EST) -- The U.S. Supreme Court's blockbuster twin bill of Epic Systems and Janus — which blessed employers' use of arbitration pacts with class action waivers and curtailed public-sector unions' ability to collect fees from nonmembers — highlighted a crop of 2018 rulings that are likely to leave a lasting impact on the employment law landscape.

Here, Law360 looks back at four of the year's key employment case decisions.

Epic Systems v. Lewis

In one of the most closely watched U.S. Supreme Court employment cases of the decade, the justices ruled 5-4 on May 21 that employers aren't violating the National Labor Relations Act if they make workers sign arbitration agreements that include class action waiver provisions.

Justice Neil Gorsuch wrote the majority opinion in a trio of cases involving Epic Systems Corp., Murphy Oil USA Inc. and Ernst & Young. The ruling gave the tens of millions of businesses that already used class action waivers in arbitration agreements, as well as those that hadn't already been doing so, a legal green light to use them as a tool for limiting their exposure to potential collective claims from workers.

Paul Hastings LLP partner Elena Baca, who heads the firm's Los Angeles office, said the ruling "certainly provided a certain level of comfort" for companies that such agreements will be enforced if they operate in states that have placed barriers on their enforceability. She noted, however, that there are still factors that cut against companies seeking to arbitrate claims against them, including the cost of the proceedings and limited avenues for appeals.

"There will always be a continued debate as to the benefits of arbitration overall from a company's perspective and an employee's perspective," Baca said. "But what Epic Systems did was it brought about a higher level of certainty, which when you're trying to engage in business is always a positive. It makes it easier from a business planning perspective."

Seyfarth Shaw LLP partner Noah Finkel, who was Epic Systems' co-counsel at the high court and who represented the company when the case was before the lower courts, said the decision allows employers to "protect themselves" from most employment class and collective actions "provided they draft their arbitration agreements carefully."

But he added that the ruling hasn't yet proven to be a death knell for class suits.

"Thus far, it is hard to say how many employers have availed themselves of that potential defense, but it certainly isn't all employers, and at this point, I think we can conclude that rumors of the demise of the employment class action are premature," Finkel said. "Many employers have not implemented an arbitration program because they fear an employee relations backlash from implementing an arbitration program or because they have an aversion to the arbitration process, especially for discrimination cases."

Janus v. AFSCME

The second leg of the high court's springtime double main event was a labor case in which the justices, by the same 5-4 split as in Epic Systems, struck a harsh blow against public-sector unions. The court in June stripped away the unions' ability to collect so-called agency fees from nonunion workers that cover the costs associated with collective bargaining if the workers haven't given their affirmative consent to paying those fees.

The justices, siding with Illinois state worker Mark Janus in his challenge of a four-decade-old precedent from a case called Abood v. Detroit Board of Education, concluded that requiring individuals who don't want to be union members to pay agency fees violates their First Amendment rights.

Seen by employment law observers as one that could cut into unions' membership and funds, the ruling included a forceful dissent from Justice Elena Kagan, who likened the majority to "black-robed rulers" who "want to pick the winning side" by "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."

But Hugh Murray of McCarter & English LLP says the ruling "hasn't yet resulted in a widespread fleeing of people from public-sector unions."

"I think the public-sector unions had a good deal of lead time knowing that this was probably coming, and they did some preparation. Some of [it] was upping their game in terms of what benefits you get in terms of being a member," Murray said. "It'll be interesting in a year, or two or three, to see what effect [the decision] has with new people coming into bargaining units and being told, 'You don't necessarily have to pay.' With what we saw last year ... [with] teachers striking in states where there wasn't a collective bargaining statute, I'm not sure that [Janus] is going to have the catastrophic impact that people were either fearing or hoping for, depending on what side of the political spectrum folks are on."

Dynamex Operations West Inc. v. The Superior Court of Los Angeles County

Although the California Supreme Court's April decision rejecting delivery company Dynamex's challenge to the certification of a class of delivery drivers in a wage-and-hour case applies only to employers in the Golden State, it has registered with employment attorneys nationwide as being a game-changer for businesses in the gig economy.

The state appellate court embraced a three-pronged standard — called the ABC test — that presumes workers are employees instead of independent contractors and stepped away from a more flexible classification test known as Borello that had been in use in the Golden State for almost three decades.

The test puts the onus on businesses to show that workers are free from its supervision, perform work that is outside the usual course or place of business, and work "in an independently established trade,

occupation, or business of the same nature" as the work they do for the entity that is hiring them to overcome the presumption that they're employees.

The decision has led California lawmakers to propose legislation to enshrine it into state law or to effectively overturn it, depending on their political bent.

"It was a huge decision and it was one of those bombs that dropped that people really didn't know what the significance is going to be, and I think people are trying to figure out what the decision means for their business model," said Reed Smith LLP partner Michele Haydel Gehrke. "There are certain types of companies that rely so heavily on independent contractors, and it really is part of their business model, that [the decision is] a real problem."

She added that there could be follow-on rulings like one issued in October "fine-tuning exactly what Dynamex means" and how the ABC factors will be applied by courts, and that the proposed legislation has led employers to either take "a wait-and-see approach" or to take a fresh look at potentially tightening up their practices related to independent contractors.

Plaintiffs' groups, however, have praised the decision, with Rebecca Smith, director of the work structures program of the National Employment Law Project, saying when Dynamex was decided that the new test "will aid employers, workers and the courts in applying the broad terms of California law" and that the ruling will mean that companies in a slew of industries "will no longer be able to dodge minimum wage laws by pretending that the workers who form their workforces are somehow not their employees."

Minarsky v. Susquehanna County

In July, the Third Circuit issued a precedential decision that a jury should decide whether Pennsylvania's Susquehanna County took reasonable steps to protect an employee from workplace sexual harassment, and whether a woman accusing her boss of making unwanted sexual advances took full advantage of those protections.

The panel upended a lower court's decision that Susquehanna County was entitled to summary judgment over claims made by Sheri Minarsky, a part-time secretary for the county's Department of Veterans Affairs, that she was sexually harassed for years by her boss, Thomas Yadlosky.

The panel said Susquehanna County shouldn't have won summary judgment based on its assertion of the so-called Faragher-Ellerth defense. To successfully use that defense, employers must show that they "exercised reasonable care" to avoid or address harassment, and that a plaintiff "failed to act with like reasonable care" by not using the processes employers put in place to safeguard against harassment.

"I think the big takeaway from the Third Circuit's decision is that it makes reasonableness of conduct — both an employer's conduct and an employee's conduct — the true touchstone in analyzing the Faragher-Ellerth affirmative defense, and that reasonableness has to be judged in light of the particular factual circumstances before the court, which will necessarily vary from case to case," said Elizabeth McManus, senior counsel at Epstein Becker Green. "This is going to lead to more unpredictable outcomes for employers and certainly an increased likelihood that the court will look to a jury to evaluate the facts and circumstances before making a determination on the applicability of the defense."

Also of note in the decision was a nearly two-page footnote in which the Third Circuit placed the case in the context of the #MeToo movement, which prompted BakerHostetler partner Amy J. Traub to call the case "a perfect example" of how courts are beginning to react to #MeToo. Traub pointed out that the panel cited #MeToo headlines and statistics as part of its basis for finding that Minarsky acted reasonably in not reporting the harassment.

"We think this is a case that needs to be taken to heart and that employers need to be aware of it," Traub said. "And they need to be aware of it ... not just from the legal standpoint of understanding that Faragher-Ellerth is now being brought into question and may not be as easy to get summary judgment in this #MeToo world, but also from a cultural standpoint of understanding that the court focused on — the culture of this organization and the fact that they had reprimanded this individual twice and it did not appear to sink in with him."

"So, it'll be important for employers to really make sure they are taking the appropriate remedial action in each instance because that can be challenged years later, and making sure they create a culture where reporting is welcomed, encouraged, required to set the stage for a more successful affirmative defense on this front," Traub added.

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