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IMMIGRATION-RELATED DEVELOPMENTS

Almost immediately after the inauguration of Donald Trump as president of the United States, Trump issued an Executive Order imposing a broad ban on entry into the United States from certain Muslim-majority countries. A federal appellate court upheld a nationwide temporary restraining order against the president's first executive order travel ban, based on evidence of the administration's discriminatory intent against Muslims. After the administration responded with a revised executive order with a 90-day ban on approving new visas from six Muslim-majority nations (Sudan, Syria, Iran, Yemen, Somalia and Libya), two federal trial courts relied on the same evidence of discrimination to issue preliminary orders against enforcement, which were upheld by two federal appellate courts. In *Hawaii v. Trump*,¹ the Ninth Circuit Court of Appeals found that the President exceeded his authority in issuing the Executive Order, given the lack of evidence showing the need for the Executive Order. The court also based its decision on evidence that the Executive Order discriminates on the basis of national origin. In *Int'l Refugee Assistance Project v. Trump*,² the Fourth Circuit Court of Appeals upheld the injunction based on evidence that adoption of the Executive Order was motivated by the President's desire to exclude Muslims from the U.S. in violation of the First Amendment Establishment Clause. The court concluded that the Government's national security arguments did not outweigh the competing harm of the likely constitutional violation. Further, the court found that the plaintiffs plausibly alleged that the stated national security purpose was provided in bad faith.

On June 26, 2017, the U.S. Supreme Court granted review of the federal court orders and consolidated the two cases. At the same time, the Court issued an opinion allowing the Government to enforce the Order pending the review in the Supreme Court, with an exception for travelers and refugees who have a "credible claim" of a genuine relationship with an individual or institution in the United States.³ The Court scheduled oral argument in both cases for October 10, 2017. However, on September 24, 2017, President Trump issued a new proclamation restricting travel to the United States by citizens from eight countries, Iran, Libya, Yemen, Somalia and Syria, North Korea, Venezuela and Chad. Trump's proclamation asserts that these countries "remain deficient" in their procedures to enable the U.S. government to "assess whether foreign nationals attempting to enter the United States pose a security or safety threat."⁴ The Supreme Court canceled the oral argument

1 2017 U.S. App. LEXIS 17340 (9th Cir. 2017), *cert. granted*, 2017 U.S. LEXIS 4432 (2017).

2 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017).

3 See, Amy Howe, *Justices agree to weigh in on travel ban, allow parts of it to go into effect*, SCOTUSblog (Jun. 26, 2017, 11:51 AM), <http://www.scotusblog.com/2017/06/justices-agree-weigh-travel-ban-allow-parts-go-effect/>

4 See, Amy Howe, *Trump issues new order on travel*, SCOTUSblog (Sep. 24, 2017, 11:09 PM), <http://www.scotusblog.com/2017/09/trump-issues-new-order-travel/>; Amy Howe, *Justices take travel ban cases off October argument calendar*, SCOTUSblog (Sep. 25, 2017, 3:05 PM), <http://www.scotusblog.com/2017/09/justices-take-travel-ban-cases-off-october-argument-calendar/>

in the Executive Order travel ban cases and directed the parties to file briefs addressing whether the challenges to the Executive Order are now moot, due to the new proclamation and the upcoming October 24 expiration of the Executive Order's temporary suspension of the admission of refugees. The Court will decide whether to dismiss the cases or to reschedule oral argument.

On September 5, 2017, the Trump administration announced that it will end the program, Deferred Action for Childhood Arrivals (DACA), which had been created by the Obama administration in 2012. DACA prevents deportation of young, undocumented immigrants who came to the country as children, protecting an estimated 800,000 individuals. Trump has announced a delay of the end of DACA for six months to provide Congress with time to consider putting DACA protections into legislation.⁵ Fifteen states have sued the administration, alleging that the rescission of DACA is unconstitutional.⁶

In response to the Trump administrations' aggressive immigration-related enforcement actions, a sanctuary movement has spread nationwide to multiple states, cities and other localities. The U.S. Attorney General has attempted to withhold federal funding from state and local governments that have declared themselves sanctuaries or that refuse to assist the federal government in enforcing immigration law. On September 15, 2017, a federal judge in Chicago on Friday issued a nationwide preliminary injunction blocking the Trump administration from withholding public safety grants to sanctuary cities that do not cooperate in federal immigration enforcement.⁷ On October 5, 2017, California enacted two new laws declaring California a sanctuary state and limiting cooperation by the state with federal immigration officials. The state law restrictions include requiring federal immigration officials to produce a judicial warrant to gain access to California workplaces.⁸

DEVELOPMENTS IN OTHER WORKPLACE RIGHTS ISSUES

On September 27, 2017, the U.S. Supreme Court granted a petition for a writ of certiorari to review the lower court decision in *Janus v. AFSCME, Council 31*,⁹ which rejected the plaintiff's challenge to the constitutionality of agency shop fee clauses in collective bargaining agreements in the public sector workplace. Under agency shop fee clauses, since all employees represented by a union benefit from collective bargaining, they are required to pay their "fair share" of union dues even if they are not union members. The plaintiffs in *Janus* argue that the Supreme Court should overrule its 40-year precedent in *Abood v. Detroit Board of Education*,¹⁰ which upheld the constitutionality of agency shop fees in public employment. *Abood* held that agency shop clauses do not violate nonunion

5 Michael D. Shear and Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, New York Times (Sept. 5, 2017) <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>

6 Associated Press, *Advocacy Groups File Lawsuit Over DACA in Maryland*, New York Times (Oct. 5, 2017) <https://www.nytimes.com/aponline/2017/10/05/us/ap-us-immigration-lawsuit.html>

7 Debra Cassens Weiss, *Federal Judge in Chicago Blocks Trump Administration's Hold on Grants to Sanctuary Cities*, ABA Journal (Sept. 15, 2017) http://www.abajournal.com/news/article/federal_judge_in_chicago_blocks_trump_administration_hold_on_grants_to_sanctuary_cities

8 Laura Mahoney, *California Freezes ICE Access to Workplaces*, 192 Daily Labor Report 8 (Oct. 5, 2017).

9 851 F.3d 746 (7th Cir. 2017), cert. granted, 2017 U.S. LEXIS 4459 (2017).

10 431 U.S. 209 (1977).

member employees' First Amendment rights of association since they are required to pay only the amount of union dues germane to collective bargaining or contract enforcement. In its 2015-2016 term, the Court heard the case of *Friedrichs v. California Teachers Association*, which raised the same constitutional challenge to agency shop fees in public employment. The death of Justice Antonin Scalia, in February 2016, had a decisive effect on the outcome of *Friedrichs*, as it was generally anticipated that Scalia would be part of a five-vote majority to overrule *Abood*. About a month after Scalia's death, the remaining eight justices decided *Friedrichs* by a 4-4 vote,¹¹ which left intact the Court's *Abood* precedent. With the Supreme Court now at full strength after the Senate's confirmation of Justice Neil Gorsuch in April 2017, there is significant concern that he will provide the fifth vote to overrule *Abood* in the *Janus* case.

On October 2, 2017, the Supreme Court heard oral argument in *NLRB v. Murphy Oil USA, Inc.*,¹² concerning mandatory individual arbitration agreements that require employees to waive the right to bring class or collective actions against the employer, in either court or arbitration. The NLRB held that such agreements violate employees' rights under the NLRA to engage in concerted activity for mutual aid and protection. Although the U.S. Department of Justice, under the Obama administration, had supported the NLRB's decision, the Trump administration's Justice Department changed its view and now opposes the NLRB's position in this case, arguing that the class action waivers are consistent with Supreme Court precedent upholding the validity of mandatory employment arbitration agreements under the Federal Arbitration Act.¹³

The new Trump administration has continued implementing its anti-regulatory political agenda to restrict the work of federal agencies created to protect the public welfare. The Department of Health and Human Services has narrowed a federal requirement that employers must include birth control coverage in their health insurance plans. Under the new rules, an employer will be exempt from providing such insurance coverage if the employer objects to covering contraception services based on sincerely held religious beliefs or moral convictions.¹⁴ Additionally, the U.S. Attorney General has instructed federal agencies and prosecutors to take the position in court that employees, employers and organizations may claim broad exemptions from nondiscrimination laws based on religious objections.¹⁵

With the current control of the executive and legislative branches of the federal government by the Republican Party, the Trump administration has appointed conservatives to federal agencies empowered to enforce labor laws. At the time of Trump's inauguration, there were two vacancies in the five-member National Labor Relations Board (NLRB). The U.S. Senate has confirmed Trump's nominees to fill these positions, resulting in a conservative majority on the NLRB. In late December 2017, however, the NLRB will be

¹¹ 136 S.Ct. 1083 (2016).

¹² 808 F.3d 1013 (5th Cir. 2015), cert. granted, 137 S. Ct. 809 (2017). This case was consolidated with two other cases raising the same issue, *Epic Systems Corp. v. Lewis*, and *Ernst & Young LLP v. Morris*.

¹³ See, Lawrence E. Dubé and Madison Alder, "Class Action Labor Disputes Get their Day in Court, 189 Daily Labor Report 4 (Oct. 2, 2017).

¹⁴ Robert Pear, Rebecca R. Ruiz and Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, New York Times (Oct. 6, 2017).

¹⁵ *Id.*

reduced to four members, with the expiration of Philip Miscimarra, a conservative Board member who Trump designated as NLRB Chairman soon after the presidential inauguration. Trump is considering at least two management-side attorneys as potential nominees to fill the seat to be vacated by Miscimarra. The conservative majority on the NLRB will likely look for opportunities to reconsider decisions by the more liberal Board under the Obama administration. Such decisions include *Columbia University*,¹⁶ finding that private university teaching and research assistants are employees under the National Labor Relations Act (NLRA)¹⁷ and *Browning Ferris Industries of California*,¹⁸ which broadened the definition of joint employers under the NLRA to more accurately reflect the economic circumstances of current employment relationships, including the growing percentage of workers employed through temporary agencies.

¹⁶ 364 NLRB No. 90 (2016).

¹⁷ 29 U.S.C. Sec. 151, et seq.

¹⁸ 362 NLRB No. 186 (2015).