

The Term That Almost Was: A Look Back at the Supreme Court's Work Law Docket in 2016–17

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Introduction

The labor and employment law docket of the 2016–17 Term will be remembered less for the important questions that the United States Supreme Court answered and more for the questions it declined to address. But for many of these questions, the day of reckoning arrived during the 2017–18 Term. Part I discusses how this came to pass.

The 2016–17 Term was a quiet one in most respects. Court-watchers used words like “shrunk,”¹ “transitional,”² “holding pattern,”³ and “pretty boring”⁴ to describe the Term during which the justices produced only seventy opinions, of which sixty-two were issued in argued cases and thirty-five were unanimous.⁵ This “remarkable consensus”⁶ represented just the second time in modern Supreme Court history that the number of unanimous decisions surpassed the number of non-unanimous decisions.⁷ Overall, the Court has not produced “a lower total opinion output since the mid-1800s.”⁸

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1. Kimberly Strawbridge Robinson, *‘Remarkable’ SCOTUS Consensus out the Window Next Term?*, 86 U.S.L.W. 12, 12 (July 6, 2017).

2. *Id.*

3. *Id.* at 13.

4. Kimberly Strawbridge Robinson, *SCOTUS Finds Equilibrium After Vacancy Shake-up*, 85 U.S.L.W. 20, 23 (June 29, 2017).

5. Robinson, *supra* note 1, at 12.

6. *Id.*

7. *Id.* at 13.

8. *Id.*

The Court's labor and employment law docket fit this pattern. Though the future may reveal otherwise, it appears the Court decided no landmark cases. And the cases for which it issued opinions were both few in number and narrow in scope. In fact, only five cases decided questions dealing directly with the law of the workplace.⁹ But the Court also denied certiorari in one significant work law case¹⁰ and granted certiorari in another, which could have proved to be among the most influential cases on workplace law in a generation.¹¹ Part II summarizes these cases.

I. The Term That Almost Was

Justice Antonin Scalia's death in February 2016 largely explains why the work law docket of the 2016 Term will be remembered less for the important questions that the Court answered and more for the questions it failed or refused to address. The seat occupied for almost thirty years by Justice Scalia went unfilled for fourteen months.¹² That vacancy haunted most of the 2016 Term because the Court, evenly divided along ideological lines, tended to avoid more politically charged cases—including workplace disputes—that might have required a tie-breaking fifth vote.¹³

Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit was confirmed as Justice Scalia's replacement in April 2017.¹⁴ Justice Gorsuch is now widely expected to cast the fourth conservative vote on labor and employment matters that Justice Scalia often provided.¹⁵ A study of voting patterns in the Court's employment dis-

9. See *infra* Section II.A.

10. See *infra* Section II.B.

11. See *infra* Section II.C.

12. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

13. *Id.* For example, after Justice Scalia's death during the 2015–16 Term, the Court was unable to muster a majority in a case posing this question: does requiring a public employee to pay a “fair share” or “agency” fee to cover the cost of union representation activity germane to collective bargaining violate the First Amendment rights of employees who object to joining the union or paying the fee? See *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam) (affirming by an equally divided court lower court judgment upholding fee). With Justice Gorsuch confirmed, a slim majority of the Court decided to revisit the issue during the 2017–18 Term and, predictably, went on to declare all agency fees in the public sector to be unconstitutional in *Janus v. AFSCME Council 31*, 585 U.S. ___ (2018) (5-4 decision).

14. *Id.* Republicans controlling the U.S. Senate steadfastly refused to hold hearings on President Barack Obama's nominee, Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia Circuit, until President Obama's term ended and he was succeeded by President Donald J. Trump. See Nina Totenberg, *170-Plus Days and Counting: GOP Unlikely to End Supreme Court Blockade Soon*, NPR (Sept. 6, 2016), <https://www.npr.org/2016/09/06/492857860/173-days-and-counting-gop-unlikely-to-end-blockade-on-garland-nomination-soon>.

15. See Liptak & Flegenheimer, *supra* note 12. The other reliably conservative, or pro-management, votes are usually cast by Chief Justice John Roberts and Associate

crimination cases during Justice Scalia's tenure suggests that, as the appointee of a Republican president, Justice Gorsuch is more likely to vote for employers than employees.¹⁶ During Justice Scalia's tenure (1986–2015), the Court decided ninety-eight employment discrimination cases.¹⁷ Of these, seventy-nine produced clear outcomes:¹⁸

- Workers won forty-four cases and employers won thirty-five.
- Republican appointees voted for workers in 40% of these cases and for employers in 34%.
- Democratic appointees voted for workers in 58% of cases and for employers in 19%.
- Twelve of these cases—about 15%—were decided by a five-to-four vote.

Therefore, as one conservative Republican appointee replacing another conservative Republican appointee, it is unlikely that Justice Gorsuch will substantially alter voting patterns, at least in employment discrimination cases. On the other hand, the recently announced departure of Justice Anthony Kennedy,¹⁹ who for years was the key swing vote on most close questions, is expected to have far greater consequences, because the Court's "fragile conservative majority" [went] only as far as Kennedy [would] go."²⁰

II. The 2016–17 Term

Only five cases decided in the 2016–17 Term presented questions dealing directly with workplace law. But the Court also issued one notable certiorari denial and granted certiorari in another highly significant work law case during the Term.

A. Work Law Cases Actually Decided by the Court

The "sweet spot" of the Court's docket—that is, its decision of traditional labor and employment law business—included five cases during the 2016–17 Term.

Justices Clarence Thomas and Samuel Alito. The reliably liberal, or pro-worker votes, are typically cast by Associate Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. The swing vote is often cast by Associate Justice Anthony Kennedy. See *Current Members*, USA.gov, <https://www.supremecourt.gov/about/biographies.aspx> (last visited May 27, 2018).

16. See Patrick Dorrian & Jasmine Ye Han, *In Wake of Gorsuch Debut, a Look at How Justices Voted on Job Bias*, 85 U.S.L.W. 65, 65–66 (Apr. 20, 2017).

17. *Id.* at 65.

18. *Id.* at 66.

19. See Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

20. Robinson, *supra* note 1, at 15.

1. Limit on Acting Agency Head's Ability to Continue in Acting Capacity After Nomination to Serve in Permanent Capacity

Does the Federal Vacancies Reform Act of 1998 (FVRA)²¹ limit the ability of the acting General Counsel of the National Labor Relations Board (NLRB) to continue to serve in that role once nominated by the President as its permanent General Counsel? The Supreme Court answered yes, by a six-to-two margin, in *NLRB v. SW General, Inc.*²²

Article II of the Constitution requires the President to obtain “the Advice and Consent of the Senate” before appointing “Officers of the United States.”²³ As a result, responsibilities of an office requiring Presidential appointment and Senate confirmation (a PAS office) may go unperformed if a vacancy arises and the President and Senate do not promptly agree on a replacement. This has occurred often in recent years at both the NLRB and other federal agencies.²⁴ Congress has long responded to the problem by authorizing the President to direct certain officials temporarily to carry out the duties of a vacant PAS office in an acting capacity without Senate confirmation.²⁵

The FVRA is the latest version of such legislation. Section 3345(a) permits three classes of government officials to become acting officers.²⁶ The default rule is that the first assistant to a vacant office becomes the acting officer, but the President may override that default by directing either a person serving in a different PAS office or a senior employee within the relevant agency to become the acting officer.²⁷ Section 3345(b)(1), however, prohibits certain persons from serving as acting officers if the President has nominated them to fill the vacant office permanently.²⁸ The key issue in *SW General* was whether this prohibition applied only to first assistants who automatically assumed acting duties, or whether it also applied to PAS officers and senior employees serving as acting officers at the President's behest.²⁹

Writing for six justices, Chief Justice Roberts found that the prohibition in section 3345(b)(1) applies to all three acting officer categories.³⁰ This opinion effectively invalidated the decision by Lafe Solomon, the acting General Counsel of the NLRB whom President Obama nominated to fill that position permanently for the balance of its term, to issue a complaint against an employer, a provider of

21. 5 U.S.C. §§ 3345–3349 (2012).

22. 137 S. Ct. 929, 938 (2017).

23. U.S. CONST. art. I, § 2, cl. 2.

24. See, e.g., *Board Members Since 1935*, NLRB, <https://www.nlr.gov/who-we-are/board/board-members-1935> (last visited May 27, 2018) (showing then-current vacancies on the NLRB).

25. 5 U.S.C. § 3345(a).

26. *Id.*

27. *Id.*

28. *Id.* § 3345(b).

29. NLRB v. SW Gen., Inc., 137 S. Ct. 929, 932 (2017).

30. *Id.* at 938.

ambulance services, for various unfair labor practices.³¹ President Obama could have avoided this problem by directing someone else to serve as acting General Counsel while Solomon's nomination was pending, but did not. Writing separately, Justice Thomas concurred.³² Justice Sotomayor, joined by Justice Ginsburg, dissented.³³

This decision's effects will not be as sweeping as those of *NLRB v. Noel Canning*,³⁴ which caused the NLRB to review, reconsider, and reissue hundreds of decisions after the Court held that a depleted, two-member Board lacked the three-member quorum necessary to take official action.³⁵ By contrast, *SW General* affects only unfair labor practice complaints issued by Solomon or other agency officials during Solomon's acting appointment from January 5, 2011, to November 4, 2013, if the respondents in each case timely objected to Solomon's action as outside his FVRA authority.³⁶ Few cases meet these criteria.

2. Enforcement of Equal Employment Opportunity

Commission Subpoenas

Is "abuse of discretion" or "de novo" the proper standard for reviewing a district court order enforcing or denying a subpoena issued by the Equal Employment Opportunity Commission (EEOC) as part of an investigation into a workplace discrimination claim? In *McLane Co. v. EEOC*,³⁷ the Court ruled "abuse of discretion" is the proper standard by a seven-to-one vote.³⁸

The plaintiff in *McLane*, after working for eight years in a physically demanding job for a supply-chain services company, took a three-month maternity leave.³⁹ When she was ready to return to work, she was subjected to a fitness-for-duty physical examination in accord with company policy.⁴⁰ The plaintiff failed the examination three times and was terminated.⁴¹ Under Title VII of the Civil Rights Act of 1964,⁴² she filed a charge contending that both the examination and her discharge constituted unlawful sex discrimination.⁴³ While investigating

31. *Id.* at 932.

32. *Id.* at 945 (Thomas, J., concurring).

33. *Id.* at 949 (Sotomayor, J. dissenting).

34. 134 S. Ct. 2550 (2014).

35. *Id.* at 2578.

36. The Obama administration asserted in its petition for a writ of certiorari that *SW General* might affect the actions of a half-dozen appointees currently serving, as well as an unspecified number of appointees who previously held temporary positions at other agencies, including the Environmental Protection Agency, the Justice Department, the Defense Department, and the Export-Import Bank. Petition for Writ of Certiorari at 27, *SW Gen., Inc.*, 137 S. Ct. 929 (No. 15-1251), 2016 WL 1377754.

37. 137 S. Ct. 1159.

38. *Id.* at 1170.

39. *Id.* at 1165.

40. *Id.*

41. *Id.*

42. 42 U.S.C. § 2000e-2 (2012).

43. *McLane Co.*, 137 S. Ct. at 1165.

the charge, the EEOC requested so-called “pedigree information”—the names, Social Security numbers, addresses, and telephone numbers of other employees asked to submit to the physical evaluation.⁴⁴ When the company refused to comply, the EEOC issued subpoenas for the information and sought enforcement in the district court as authorized by the relevant provision of Title VII.⁴⁵ The district court quashed the subpoenas on the ground that the information sought was irrelevant, but the Ninth Circuit reversed.⁴⁶ Reviewing the matter *de novo*, the appellate court determined that the information was relevant and held that the subpoenas should be enforced.⁴⁷

The Supreme Court reversed.⁴⁸ Writing for seven members of the Court, Justice Sotomayor explained that the long-standing practice of the courts of appeals is to review the issuance of subpoenas for abuse of discretion, rather than *de novo*,⁴⁹ mainly because the district judge is in a better position to develop the record and determine whether the subpoenas are proper.⁵⁰ This has been true of subpoenas issued by the NLRB and other federal agencies. Justice Ginsburg concurred in part and dissented in part.⁵¹

Although this decision’s short-term effect was to withhold from the EEOC key information related to the plaintiff’s discrimination charge, the long-term effect is likely to be increased deference to district court decisions, including the more common decision to enforce such subpoenas.

3. Review of “Mixed Case” Decisions by the Merit Systems Protection Board

Is a federal district court or the U.S. Court of Appeals for the Federal Circuit the proper forum for appealing the dismissal by the Merit Systems Protection Board (MSPB) of a “mixed case” claim due to lack of jurisdiction? A “mixed case” is one in which an employment discrimination claim is joined to a civil service claim challenging a serious personnel action, such as discharge (as authorized by the Civil Service Reform Act (CSRA) of 1978).⁵² The Supreme Court ruled seven-to-two in *Perry v. Merit Systems Protection Board*⁵³ that the proper forum in which to appeal the MSPB’s dismissal of a mixed case is a federal district court.⁵⁴

44. *Id.* at 1166.

45. *Id.*; see also 42 U.S.C. § 2000e–9 (2012).

46. *McLane Co.*, 137 S. Ct. at 1166.

47. *Id.*

48. *Id.* at 1170.

49. *Id.* at 1167.

50. *Id.* at 1167–68.

51. *Id.* at 1170 (Ginsburg, J., concurring in part and dissenting in part).

52. 5 U.S.C. §§ 1101–1105 (2012).

53. *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975 (2017).

54. *Id.* at 1987–88.

Writing for the majority, Justice Ginsburg carved out an exception to the general rule that an appeal from an adverse MSPB decision must be brought before the Federal Circuit.⁵⁵ This exception for mixed cases abrogated long-standing authority directing review by the Federal Circuit.⁵⁶ So the outcome is in accord with the Court's 2012 decision recognizing special procedures for mixed cases in *Kloeckner v. Solis*.⁵⁷ Justice Gorsuch, joined by Justice Thomas, dissented.⁵⁸

Perry's effect will be limited to employees in the federal civil service. It is unclear exactly what those effects will be.

4. The ERISA "Church Plan" Exemption

May an employee benefit plan administered by an organization whose "principal purpose" is religious in nature, but that is not itself a "church," claim the exemption granted to a "church plan" under the Employee Retirement Income Security Act of 1974 (ERISA)? Yes, the Court ruled eight-to-zero in *Advocate Health Care Network v. Stapleton*,⁵⁹ the lead case from the Seventh Circuit,⁶⁰ which was consolidated with cases from the Third⁶¹ and Ninth Circuits.⁶²

ERISA imposes on most employee benefit plans an array of rules designed to protect participants from plan insolvency and other risks.⁶³ Complaining that such rules can be onerous, religious organizations successfully persuaded Congress to exempt any "church plan" from compliance.⁶⁴ Writing for a unanimous Court, Justice Kagan explained that, although ERISA defines a "church plan" as "a plan established and maintained . . . by a church,"⁶⁵ the exemption applies to any plan maintained for the employees of churches or church-affiliated non-profits, "even though not actually administered by a church."⁶⁶ This is true even if the plan originally was not "established" by a church, so long as the plan is maintained by a church-affiliated organization whose

55. *Id.* at 1979.

56. *See, e.g.*, *Powell v. Dep't of Def.*, 158 F.3d 597 (D.C. Cir. 1998), *abrogated by Perry*, 137 S. Ct. 1975.

57. 568 U.S. 41, 44–45 (2012).

58. *Perry*, 137 S. Ct. at 1988 (Gorsuch, J., dissenting).

59. 137 S. Ct. 1652, 1663 (2017).

60. *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), *rev'd*, 137 S. Ct. 1652 (2017).

61. *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015), *rev'd*, 137 S. Ct. 1652 (2017).

62. *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1652 (2017).

63. *See generally* Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (2012); *see also* Employee Retirement Income Security Act (ERISA), U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/retirement/erisa> (last visited June 3, 2018).

64. *See generally* Jeffrey A. Herman, *Resolving ERISA's "Church Plan" Problem*, 31 A.B.A. J. LAB. & EMP. L. 231 (2016); *see also* 29 U.S.C. § 1003(b)(2) (2012).

65. 29 U.S.C. § 1002(33)(A).

66. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1656 (2017).

“principal purpose” “is to fund or manage a benefit plan for the employees of churches or . . . church affiliates.”⁶⁷

Stapleton is likely to affect millions of employees of religiously affiliated organizations like schools and hospitals,⁶⁸ and not necessarily for the better. The decision may give religious non-profits more leeway in fashioning employee benefit plans, but it may also subject exempt church plans to state-law causes of action, because such claims are not likely to be preempted by ERISA.⁶⁹

5. Federal Employee Health Benefits Preemption

Does the Federal Employee Health Benefits Act (FEHBA) of 1959⁷⁰ preempt a Missouri state law barring contractual reimbursement and subrogation provisions on the ground that such provisions “relate to” the payment of benefits to employees of the federal government? Yes, the Court ruled eight-to-zero in *Coventry Health Care of Missouri v. Nevils*.⁷¹

FEHBA authorizes the Office of Personnel Management (OPM) to contract with private carriers to provide health insurance to federal employees.⁷² The statute’s express preemption provision states: “The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law . . . which relates to health insurance or plans.”⁷³ OPM contracts have long required private carriers to seek subrogation and reimbursement.⁷⁴ Accordingly, OPM regulations state that a carrier’s “right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan’s coverage.”⁷⁵

In *Coventry Health Care*, the plaintiff was insured under a FEHBA plan.⁷⁶ After the plaintiff’s automobile accident injury, the defendant insurer paid the plaintiff’s medical expenses.⁷⁷ Later, the insurer asserted a lien against part of the settlement the plaintiff recovered

67. *Stapleton*, 137 S. Ct. at 1657–59, 1663; see also 29 U.S.C. § 1002(33)(C)(i) (“A plan established and maintained . . . by a church . . . includes a plan *maintained* by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church . . . if such organization is controlled by or associated with a church . . .”).

68. See Herman, *supra* note 64, at 233.

69. See *id.*

70. 5 U.S.C. §§ 8901–8914 (2012).

71. 137 S. Ct. 1190, 1197 (2017).

72. 5 U.S.C. § 8902(a).

73. *Id.* § 8902(m)(1).

74. *Nevils*, 137 S. Ct. at 1195.

75. 5 C.F.R. § 890.106(b)(1) (2018).

76. *Nevils*, 137 S. Ct. at 1192.

77. *Id.*

from the driver who caused his injuries.⁷⁸ The plaintiff satisfied the lien and filed a class action in state court alleging that, under Missouri law, which does not permit subrogation or reimbursement in this context, the insurer unlawfully obtained reimbursement.⁷⁹ The insurer countered that FEHBA's express preemption provision barred application of Missouri's anti-reimbursement and subrogation laws.⁸⁰

Writing for a unanimous Court, Justice Ginsburg reasoned that, although the plaintiff's construction was plausible, the insurer's reading was more consistent with the "text, context, and purpose" of the express preemption provision.⁸¹ In particular, the words "relate to" express "a broad, pre-emptive purpose" when applied to a host of different conflicting state laws.⁸² Justice Thomas concurred.⁸³ This decision is further confirmation of Congress's supremacy in regulating federal benefits law, which long has been recognized in ERISA litigation.⁸⁴

B. Work Law Case Raising Enforceability of Forum Selection Clauses in Employee Benefit Plans in Which Certiorari Was Denied

One certiorari denial in the 2016–17 Term is also significant to the law of the workplace. In *Clause v. U.S. District Court for the Eastern District of Missouri*,⁸⁵ the Court declined to consider whether a forum selection provision in an ERISA-governed employee benefit plan is enforceable. This denial was notable both because a split of authority as to how to answer this question is developing in the lower federal courts,⁸⁶ and because this was the third time in four years that the justices declined to resolve the split.⁸⁷

Courts commonly enforce forum selection clauses in commercial and consumer contracts, so it seems odd that the law would remain unsettled regarding forum-selection clauses in employee benefit plans. The issue is complicated by ERISA having its own venue provisions.⁸⁸

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1193.

82. *Id.* at 1197; see also *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (in Airline Deregulation Act, "relate to" preempts state law claim for breach of implied covenant of good faith and fair dealing).

83. *Nevils*, 137 S. Ct. at 1199.

84. *Id.*; see also *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 86 (1983) (in ERISA, "relate to" preempts anti-discrimination provisions of New York Human Rights Law).

85. 137 S. Ct. 825 (2017).

86. Compare *In re Mathias*, 867 F.3d 727, 728 (7th Cir. 2017) (holding forum selection clause enforceable), and *Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922, 925 (6th Cir. 2014) (same), with *Dumont v. Pepsico, Inc.*, 192 F. Supp. 3d 209, 223 (D. Me. 2016) (denying enforcement of forum selection clause), and *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901, 909 (N.D. Ill. 2013) (same).

87. The Court previously denied certiorari in *Smith*, 769 F.3d 922, cert. denied, 136 S. Ct. 791 (2016), and *In re Mathias*, 867 F.3d 727, cert. denied, 138 S. Ct. 756 (2018).

88. See, e.g., 29 U.S.C. §§ 1342(g), 1370(c), 1451(d).

In the event of conflict, it is unclear whether Congress intended the parties' agreement or the statute to prevail. The U.S. Department of Labor (DOL) has a "long and unsuccessful history" of arguing against forum selection clauses in ERISA-governed benefit plans.⁸⁹ Despite filing four separate briefs on this topic over the past eight years, the DOL lacks a single court victory to show for its efforts.⁹⁰ Perhaps the Court will take up the issue in the near future.⁹¹

C. *Work Law Case Raising Enforceability of Arbitration Agreements in Individual Employment Contracts in Which Certiorari Was Granted*

Midway through the 2016–17 Term, the Court granted certiorari in a trio of cases raising the question whether an arbitration agreement purporting to waive an individual employee's right to join co-workers in pursuing a class or collective action is an unfair labor practice under the National Labor Relations Act (NLRA), unenforceable under the Federal Arbitration Act (FAA), or both.⁹² This is one of the most important questions affecting the law of the workplace to reach the Court in a generation.⁹³ In *Murphy Oil USA, Inc. v. NLRB*,⁹⁴ the Fifth Circuit held that such agreements do not violate the NLRA and are enforceable. In *Lewis v. Epic Systems Corp.* and *Morris v. Ernst & Young LLP*,⁹⁵ the Seventh and Ninth Circuits held that such agreements do violate the NLRA and are unenforceable under the FAA.

Near the end of the 2017–18 Term, the Court ended the suspense by upholding such agreements. With *Epic Systems Corp. v. Lewis*⁹⁶ as

89. Jacklyn Wille, *Forum-Selection Clauses Won't Get High Court Review*, 2017 BNA DAILY LAB. REP. No. 10, at A-7 (Jan. 17, 2017).

90. *Id.*

91. See also Michelle Streifthau-Livizos, *Protecting the Loyal Hard Worker: The Need for a Fair Analysis of Venue Clauses in ERISA Plans*, 33 A.B.A. J. LAB. & EMP. L. (forthcoming 2018).

92. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (employer-employee arbitration agreement prohibiting class or collective arbitration violates the NLRA and is also unenforceable under the Federal Arbitration Act (FAA)), *cert. granted*, 137 S. Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d. 975, 984 (9th Cir. 2016) (same), *cert. granted*, 137 S. Ct. 809 (2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015) (employer-employee arbitration agreement that prohibits class or collective arbitration is valid, enforceable, and does not violate the National Labor Relations Act (NLRA) if employees would not reasonably construe the agreement as prohibiting the filing of any unfair labor practice charges with the National Labor Relations Board (NLRB)), *cert. granted*, 137 S. Ct. 809 (2017).

93. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), in which the Court held that claims under the Age Discrimination in Employment Act may be subjected to compulsory arbitration, may have been the last time the Court agreed to take a case that, in retrospect, had similar potential for a sweeping impact on everyday management practice.

94. *Murphy Oil*, 808 F.3d at 1020.

95. *Lewis*, 823 F.3d at 1154–55 (finding NLRA violation, but no FAA violation); *Morris*, 834 F.3d. at 893 (finding NLRA violation, but no FAA violation).

96. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

the lead case, it affirmed the Fifth Circuit and reversed the Seventh and Ninth Circuits. Justice Gorsuch, writing for a five-to-four majority, explained that the right of employees under section 7 of the NLRA “to engage in . . . concerted activities for . . . mutual aid or protection”⁹⁷—which over the years has been interpreted by the NLRB to include the prosecution of group litigation—does not trump the FAA’s command to enforce arbitration agreements between employers and employees as written.⁹⁸ As a result, the widespread management practice of extracting from employees a take-it-or-leave-it waiver of their right to pursue class or collective litigation before a judge and jury in a court of law, rather than to pursue individual claims before an arbitrator in a closed-door proceeding, is preserved and likely will continue to thrive. Justice Thomas concurred.⁹⁹ Justice Ginsburg, in a dissent joined by Justices Breyer, Sotomayor, and Kagan, described the majority’s opinion as “egregiously wrong.”¹⁰⁰ It should be noted that *Epic Systems* does not affect the enforcement of collectively bargained agreements to arbitrate grievances arising under a union contract.

Conclusion

Although the labor and employment law docket of the 2016–17 Term will be remembered less for the important questions that the United States Supreme Court answered and more for the ones it declined to address, many of these questions were answered as early as the 2017–18 Term. Unlike the relatively narrow work law decisions in the Court’s 2016–17 Term, the cases decided during the 2017–18 Term were eagerly awaited and potentially far-reaching.

97. 29 U.S.C. § 157 (2012).

98. *Epic Sys. Corp.*, 138 S. Ct. at 1619.

99. *Id.* at 1632 (Thomas, J., concurring).

100. *Id.* at 1633 (Ginsburg, J., dissenting).

