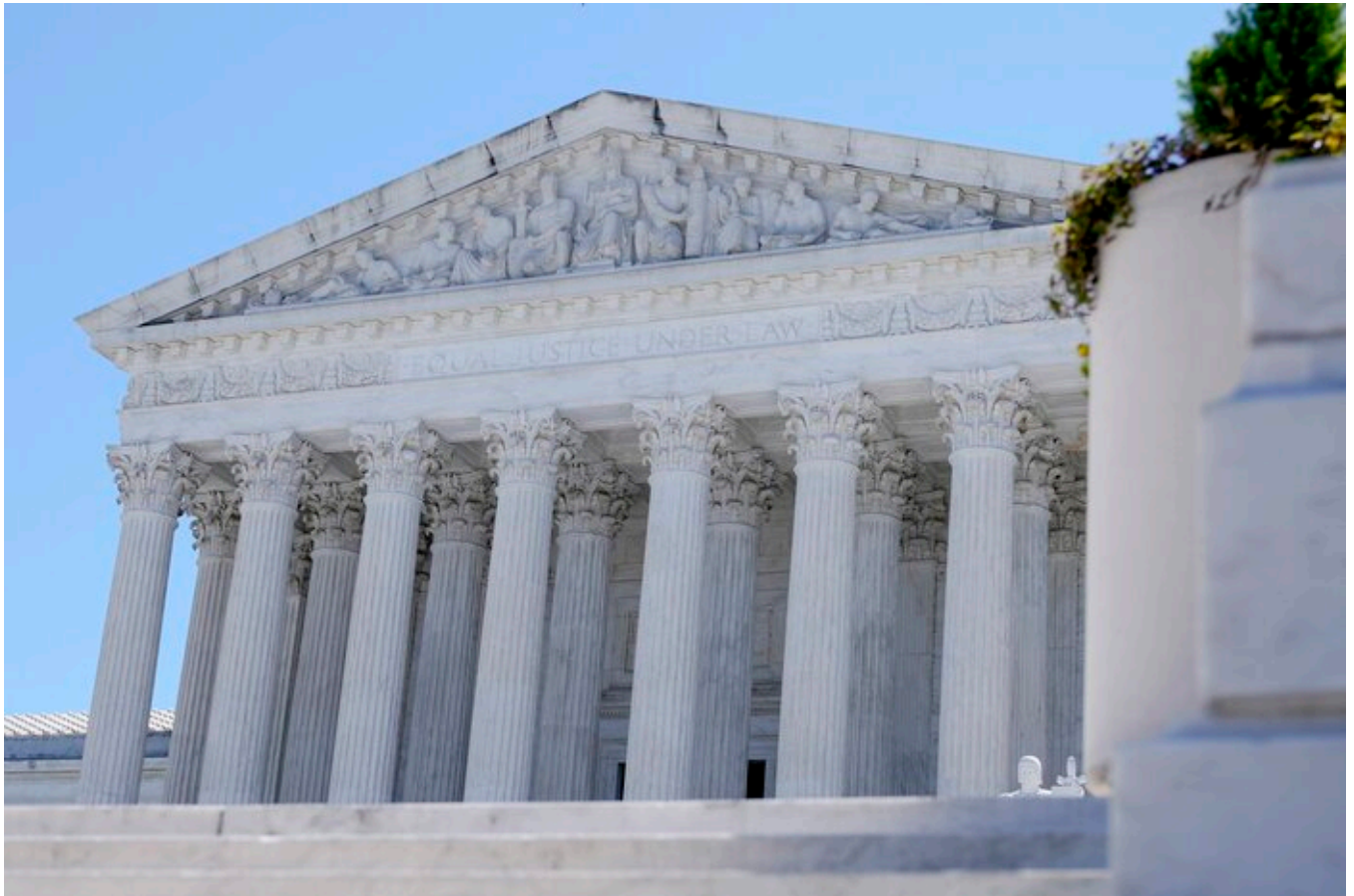


3 Wage Cases To Watch As Justices Return To Bench

By **Max Kutner**

Law360 (October 8, 2024, 4:58 PM EDT) -- The U.S. Supreme Court is set in the coming weeks to hear arguments regarding the overtime exemption for outside sales employees, and the justices are also weighing petitions related to the minimum wage for federal contract workers and a California worker classification law.



Cases U.S. Supreme Court justices are poised to review as they return to the bench include hearing arguments about the overtime exemption for outside sales employees, weighing petitions related to the minimum wage for federal contract workers and examining a California worker classification law. (AP Photo/Mariam Zuhaib, File)

In the outside sales employees case, in which the parties are scheduled to go before the high court in November, the justices will hear from each side about the standard for proving the overtime exemption.

Meanwhile, the contract worker wages certiorari petition could pave the way for a ruling on an issue playing out in three federal circuits. And the petition involving California's Assembly Bill 5, by Uber, Postmates and two drivers, is perhaps the only remaining high-profile challenge to that statute.

Alex MacDonald of management-side firm Littler Mendelson PC's Workplace Policy Institute said the A.B. 5 case could have implications for lawmaking beyond California. MacDonald represents amici backing the argument that the statute unlawfully targets certain companies or groups of companies.

"If the Ninth Circuit's decision is allowed to stand as is, it is going to encourage the same kind of activity in other places," MacDonald said.

As the federal justices return to the bench this month, here are wage and hour cases before them.

Uber, Drivers Push Constitutional Challenge

Coming up before the justices is a petition by Uber, Postmates and two drivers **arguing that** A.B. 5 violates their equal protection rights under the U.S. Constitution by singling out such companies and workers for worse treatment. They are seeking to undo a Ninth Circuit en banc **decision from June** that said there was no such equal protection violation.

A.B. 5 codified an ABC test for companies to classify workers as independent contractors, who typically don't get the benefits and protections mandated for employees.

The Ninth Circuit's ruling "means it's OK for states to target businesses, it's OK for them to write laws that specifically carve out individual companies," said MacDonald, who represents groups that **are backing** Uber, Postmates and the drivers.

Christian Schreiber of worker-side firm Olivier & Schreiber LLP said he does not buy the companies' argument.

"They don't like how they're being regulated, but the fact remains that companies in differing industries are regulated differently," Schreiber said.

"Companies don't like the test because it affirms what we've been saying for so many years, which is that most people are employees, not independent contractors, and the scam of misclassifying someone in order to avoid the benefits that come from being a W-2 employee is bad," he said.

The petition has been distributed for the justices' Oct. 11 conference. The state of California waived its right to respond to the petition.

The case is Lydia Olson et al. v. California et al., case number 24-269, in the U.S. Supreme Court.

Overtime Carveout Burden of Proof

On Nov. 5, the justices will hear arguments regarding the evidentiary standard for employers to show that workers are exempt from overtime under a Fair Labor Standards Act carveout for outside sales employees. Those workers are "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty," according to the Code of Federal Regulations.

Food distributor EMD Sales Inc. is seeking to undo a Fourth Circuit panel's July 2023 **upholding of a** finding of misclassification. The panel said that the lower court had properly held the company to a "clear and convincing" standard of proof.

In its high court petition, EMD Sales argued that there is a circuit split regarding the standard for establishing the overtime exemptions and that the heightened burden of proof now in place in the Fourth Circuit creates an unfair standard for employers there.

Meanwhile, the workers **argued in** a filing that resolving that standards question would not substantially impact the circuit court's ruling.

"The Fourth Circuit has held that employers' evidence must meet a clear and convincing standard since 1993, and not once in 30 years has the Fourth Circuit identified a case where the standard of proof made a difference," the workers said in the brief.

The U.S. Chamber of Commerce and food retail trade groups **are backing** the company, **as is** the U.S. Department of Justice.

The case is EMD Sales Inc. et al. v. Faustino Sanchez Carrera et al., case number 23-217, in the U.S. Supreme Court.

Contract Worker Wage Fight Continues

Another petition pending before the high court comes in a challenge to a 2021 U.S. Department of Labor

rule raising the minimum wage for federal contract workers to \$15 an hour, and President Joe Biden's executive order directing the agency to do such rulemaking. The rule also applies to outdoor companies and other vendors operating on federal lands.

An outdoor company is seeking to undo a Tenth Circuit panel majority's April **ruling that** Biden's executive order is entwined with promoting economy and efficiency and thus permissible under the Federal Property and Administrative Services Act, also known as the Procurement Act.

In its petition, Arkansas Valley Adventure LLC and owner Duke Bradford **argued that** Biden's executive order went beyond the Procurement Act because the statute doesn't authorize wage increases. Twenty states with Republican attorneys general **urged the** justices to grant the petition.

The U.S. government has until Oct. 30 to file a response, and the high court has not yet distributed the companies' petition for conference.

Eric Leonard of Cozen O'Connor, who represents government contractors, said that while there isn't a circuit split yet on the issue, the issue is playing out in two other circuits. Those are the Fifth and the Ninth circuits, **where arguments** have **taken place** in two challenges to the same rule, but decisions have not yet come down.

Guidance from the high court would be helpful, following its striking down of Chevron deference **in June**, Leonard said. Under that doctrine, courts were supposed to defer to a federal agencies' reasonable interpretation of an ambiguous statute.

"The judicial framework for analyzing these questions is different now than it might have been three or four years ago," he said. "It would be interesting to see how the court would interpret" it.

The case is Duke Bradford et al. v. Department of Labor et al., case number 24-232, in the U.S. Supreme Court.

--Additional reporting by Irene Spezzamonte and Emmy Freedman. Editing by Nick Petruncio.