

# Supreme Court Spotlights Retaliation, Privacy

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## ***Justices Also Set To Consider Hiring Unauthorized Aliens***

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During the 2010-2011 term, the high court has agreed to hear seven cases that involve employment and labor related issues, or are likely to impact employers. The cases scheduled to be addressed by the Court include the following.

On October 5, the justices heard oral argument in *National Aeronautics and Space Administration v. Nelson*. This case was brought by 28 scientists working for the California Institute of Technology, which runs the Jet Propulsion Lab under a contract with NASA.

The issue before the Court is whether the government violates these federal contract employees' constitutional right to informational privacy by:

- Asking, during the course of a background investigation, whether they have received counseling or treatment for illegal drug use within the past year; and
- Asking the employees' references for any information that may have bearing on their suitability for employment at a federal facility (when the responses are used only for employment purposes and any information obtained is protected under the Privacy Act).

On October 13, the justices heard oral argument in *Kasten v. Saint-Gobain Performance Plastics Corp.* to decide what constitutes “protected activity” under the retaliation provisions of the Fair Labor Standards Act (FLSA). The Court will consider whether the FLSA protects employees from retaliation for verbally complaining about violations or whether such complaints must be submitted in writing.

On November 2, the Court will hear oral argument in a case that examines the “cat’s paw” theory of employment liability. *Staub v. Proctor Hospital* was brought by an Army Reservist who claimed that he was fired in violation of the Uniformed Services Employment and Reemployment Rights Act. The Court will decide whether an employer can be held liable for the discriminatory acts of supervisors who do not themselves make employment-related decisions, but may influence the decision-makers.

On November 8, the justices will hear oral argument in a case involving Social Security taxes for student employees. Currently, colleges and universities are not required to pay social security taxes for students they employ. The issue in *Mayo Foundation for Medical Education and Research v. United States* is whether this exemption applies to medical students working as residents in a university hospital.

On November 30, the Court will hear oral argument in a case concerning the notice requirements of the Employee Retirement Income Security Act (ERISA). In *CIGNA Corp. v. Amara*, the Court will decide whether a showing of “likely harm” is sufficient to entitle participants in, or beneficiaries of, an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description (or similar disclosure) and the terms of the plan itself.

The Court will hear oral argument in a second retaliation case on December 7. Unlike *Kasten*, however, *Thompson v. North American Stainless* concerns retaliation against workers who have not engaged in protected activity but are “associated with” someone who has. The case was brought by Eric Thompson, who claims that North American Stainless fired him after learning that his fiancée/co-worker had filed a discrimination charge with the Equal Employment Opportunity Commission. The Court will decide whether Thompson is protected under the anti-retaliation provision of Title VII based on his association with a co-worker who has engaged in protected activity.

Finally, on December 8, the Court will hear oral argument in a case challenging the Legal Arizona Workers Act, which imposes sanctions on employers that hire unauthorized aliens. The issue in *Chamber of Commerce of the United States v. Whiting* is whether the statute is valid under the federal Immigration Reform and Control Act, which arguably preempts state or local laws imposing civil or criminal sanctions on those who employ unauthorized aliens. The Court also will decide whether the Arizona law, which requires all employers to participate in E-verify, is preempted by the federal Illegal Immigration Reform and Immigrant Responsibility Act (which specifically designates that system as voluntary).

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