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Recent Trends and Developments in Employment, Labor & Benefits Law

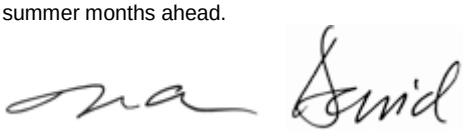
Employment Matters Monthly

JUNE 2014

A Note from the Editors

Through our *Employment Matters* blog, Mintz Levin's Employment, Labor & Benefits Practice tackles the noteworthy employment law issues of the day. We typically post content on *Employment Matters* several times a week. If you haven't done so already, we invite you to visit the blog and, better yet, to subscribe so any new content we post will automatically hit your inbox. You can subscribe here.

Going forward, we will consolidate the previous month's blog posts for our clients in this newsletter. If you have any suggestions about content that you would like us to feature in the blog, or if you have any questions about any of the issues raised in our posts, please do not hesitate to contact one of our attorneys. We look forward to your feedback, and to connecting with you in the summer months ahead.



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RELATED BLOGS

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- Health Law & Policy Matters
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- Privacy & Security Matters

Posts from *Employment Matters* Blog

Waivers of Age Discrimination Claims in Reduction in Force Cases Continue to Face Intense Scrutiny

Written by George Patterson

May 29, 2014

A Federal court in Colorado recently permitted a former employee to advance an age discrimination claim despite his prior execution of a severance and release agreement after his employment ended in connection with a reduction in force. The Court in *Foster v. Mountain Coal Company, LLC* invalidated the release of the age discrimination claim because it did not fully satisfy the Older Workers' Benefit Protection Act's "knowing and voluntary" requirement; in particular, it did not properly "advise" the employee to consult with an attorney before executing the agreement.

Continue Reading …

Employees Need Not Identify Specific Law, Rule or Regulation Violation in Pleading Retaliation Claim Under New York's Whistleblower Statute

Written by David Katz

May 28, 2014

Earlier this month, in *Webb-Weber v. Community Action for Human Services, Inc.*, New York's highest court overruled several appellate court cases in holding that an employee need not identify the specific law, rule or regulation allegedly violated by his or her employer in pleading a retaliation claim under New York's whistleblower statute.

Continue Reading …

Congress Poised to Pass the Workforce Innovation and Opportunity Act; Modernize the Nation's Workforce Development Program

Written by Michael Arnold

May 23, 2014

Wait, are parties from both sides of the congressional aisle finally coming together to pass an employment-related law? It appears that way. This law is by no means a game changer; it's not even a traditional employment law that would impose new obligations on employers or afford new rights to employees, but given the ever-growing legislative gridlock, Al Michaels' famous "Do you Believe in Miracles" call still popped into my head. After months of negotiations, the parties are set to pass the "Workforce Innovation and Opportunity Act."

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School is Almost Out and Summer Interns are (Still) In

Written by Jill Collins

May 23, 2014

With the Memorial Day weekend approaching, many people are looking forward to hitting the beach, firing up the grill and polishing off their golf clubs, which are, for many Northeasterners, covered in cobwebs after this long winter. For employers, summer often means the arrival of (potentially unpaid) interns.

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Pennsylvania Court Refuses to Enforce Non-Competition Agreement; Holds that Continued Employment Alone is Insufficient Consideration; What Does Your Jurisdiction Say on this Issue?

Written by Gauri Punjabi

May 20, 2014

Most jurisdictions in the United States hold that continued employment constitutes sufficient consideration in exchange for entering into a non-competition agreement. A handful of jurisdictions however – Minnesota, North Carolina, Texas, Washington, West Virginia and (in some cases) Illinois – require employers to provide additional consideration to an employee in order for the non-competition agreement to be enforceable. Add Pennsylvania to this list.

Continue Reading …

EEOC Invites Public to Comment on Regulations Aimed at Clarifying What It Means to Be a "Model Employer" of Individuals with Disabilities

Written by Erin C. Horton

May 20, 2014

The EEOC recently invited public input on potential revisions to the regulations implementing Section 501 of the Rehabilitation Act, which governs the federal government's employment of individuals with disabilities. Specifically, the EEOC seeks to explain, for the first time, what Section 501's mandate that the federal government "shall be a model employer of individuals with disabilities" means in concrete terms. Any resulting regulations would apply solely to public employees. But private employers should keep abreast of how the EEOC defines a "model employer," as such definition could help inform future interpretations of the Americans with Disabilities Act, which apply to most private employees.

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Rollover Contributions: What Plan Administrators Need to Know

Written by Ann Fievet

May 9, 2014

Retirement plan administrators routinely receive requests from employees to accept rollover contributions

of amounts held in a prior employer's qualified plan or, in some cases, an IRA. When processing these requests, plan administrators must be mindful of IRS guidelines that require them to be reasonably certain that the distribution is being made from another qualified plan or plan permitted to make a rollover distribution before accepting the rollover and contributing it to the plan's trust. Failure to follow IRS guidelines in accepting rollover contributions could compromise the tax qualified status of the plan and trust, so the plan should have and follow written procedures when processing rollover requests. Recent IRS guidance provides a good refresher on the guidelines that retirement plan administrators should follow when a request is received to roll money into the plan and also provides some updates to current guidance on accepting rollover contributions should make it easier for plan administrators to process rollover funds received.

Continue Reading …

What Screams Summer Fun in California? How 'Bout California's July 2014 Minimum Wage Increase?

Written by Brandon Willenberg

May 8, 2014

Beach towel – check, sunscreen – check, beach tunes playlist – check, make sure the company complies with California's July 2014 minimum wage increase – che…wait, what?! You ask, "how is it possible that a California employment law is now part of my summer plans?!" And I say, "come on, it's California and nothing screams summer fun like making sure your company complies with the July 2014 increase in California's minimum wage."

Continue Reading …

Another Judge Finds that Obesity May be a "Disability" Under the ADA

Written by David Katz

May 6, 2014

Yet another federal court judge, the Honorable Stephen N. Limbaugh, Jr. of the Eastern District of Missouri, recently ruled, in *Whittaker v. America's Car-Mart, Inc.*, that an employee's severe obesity could constitute a "disability" under the Americans with Disabilities Act.

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Malingering: Yes, It May Get You Fired

Written by Robert Sheridan

May 6, 2014

A recent submission in an advice column on Boston.com struck my eye and the scenario should be no surprise to the modern worker. A Massachusetts at-will worker decides to take a "mental health day" and calls in sick, despite the fact that he is not actually sick. He then meets some of his friends at his favorite lunch spot. His manager, however, spots him at lunch and fires him the next day for abusing the company's sick leave policy. Is this termination legal?

Continue Reading …

ACA Countdown to Compliance: A 51-Week Series for Employers

Alden Bianchi, Chair of the our Employee Benefits & Executive Compensation Practice, provides a weekly installment on the Affordable Care Act as he counts down to the January 1, 2015 ACA pay-or-play deadline). Below are the posts from May. Access all of Alden's posts here.

The Affordable Care Act — Countdown to Compliance for Employers, Week 31: ERISA Section 510 and Limiting Employee Hours

Written by Alden J. Bianchi and Edward A. Lenz

May 27, 2014

In last week's post, we examined the appropriateness of capping the annual hours of new "variable hour employees" as a way to limit exposure under the Affordable Care Act's employer shared responsibility rules. (These rules are codified at Internal Revenue Code § 4980H and implemented in final regulations issued in February of this year. The IRS has also published a helpful set of Frequently Asked Questions on the subject.) We asserted that the strategy does not work in the case of new employees during the initial measurement period. This week's post examines its application to "ongoing employees."

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The Affordable Care Act — Countdown to Compliance for Employers, Week 32: Why Capping Annual Hours at 1560 Does Not Work

Written by Alden J. Bianchi and Edward A. Lenz

May 19, 2014

Whenever Congress draws a line in the sand — such as with exposure for assessable payments under the Affordable Care Act's employer shared responsibly rules—entities subject to regulation (here, applicable large employers) will inevitably seek ways to avoid having to comply. Also inevitably, some compliance strategies will be perfectly legitimate, while others will not. One approach that falls into the latter category involves capping annual hours of certain "variable hour" and other employees at 1,560 hours. Simply put, the approach does not work. This post explains why.

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 33: The Impact of Value-Based–Plan Designs and Reference Pricing Models on Minimum Value

Written by Alden J. Bianchi

May 12, 2014

Whether a group health plan provides minimum value is central to the application of the Affordable Care Act's employer shared responsibility rules. The particulars of the role of minimum value in determining assessable payments due from applicable large employers are explained in detail in final regulations issued on February 12 of this year. Simply put, an employee who is offered coverage under an eligible employer-sponsored plan that is both affordable and provides minimum value is ineligible for subsidized coverage from a public insurance exchange. As a consequence, the employer will not be liable for any assessable payments under Internal Revenue Code § 4980H(b) with respect to the employee if the employee declines the employer's offer of coverage and instead enrolls in exchange-provided coverage.

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The Affordable Care Act — Countdown to Compliance for Employers, Week 34: When Can Carriers Impose Minimum Participation and Minimum Employer Contribution Requirements? (It's Complicated)

Written by Alden J. Bianchi

May 5, 2014

Commencing with plan and policy years beginning on or after January 1, 2014, the Affordable Care Act amends the Public Health Service Act ("PHS Act") to make three important changes to the rules governing health insurance underwriting practices that apply to the individual and group markets (but not to grandfathered arrangements):

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Employment-Related Posts from Other Mintz Levin Blogs

Cyber Risks for the Boardroom: A Five-Part Series on What Directors Need to Know

Written by Heidi Lawson and Danny Harary

May 9, 2014

Our sister blog, *Privacy & Security Matters*, has recently published a terrific series of blog posts on cybersecurity for the boardroom. This series explores the recent increase in focus on privacy issues, why directors should be concerned about data security breaches, the top questions directors should ask when it comes to coverage for cyber investigations, and what kind of cover is available for investigations and privacy violations. You can (and should) access the complete series, starting with this post.

Are You an F-1 Student? Here Is What You Need to Know Before October 1

Written by Mike Arnold

May 8, 2014

My colleagues in the firm's Immigration Practice recently posted an advisory on F-1 students with OPT employment eligibility, and what those students should keep in mind before October 1. If this applies to you and you find yourself in one of the below situations, read the advisory to get more info.

- My OPT employment card has not expired and my H-1B petition has been accepted, but not yet approved;
- My OPT employment card has not expired and my H-1B has been approved;
- My OPT employment card has expired;
- I need to depart the US and will not return until October 1 or later and will apply for the H-1B visa; or
- My H-1B petition was denied by USCIS.

To follow all of our immigration law news, subscribe to the blog *Immigration Law*.

Will Trade Secrets Finally Get Federal Civil Protection?

Written by Sandra J. Badin

May 6, 2014

Bi-partisan support has resulted in the introduction of the Defend Trade Secrets Act (S. 2267), a proposed amendment to the Economic Espionage Act of 1996, which made trade secret theft a federal crime. Senators Christopher Coons (D-Del.) and Orrin Hatch (R-Utah), both members of the Senate Judiciary Committee, proposed the legislation which would enhance trade secret protection by creating a federal private right of action for the misappropriation of trade secrets related to products or services used in interstate or international commerce.

Read more about the Defend Trade Secrets Act from our colleagues in the IP practice on the *Global IP Matters* blog.

Free Webinar Recording: Tips for Drafting Restrictive Covenants

Protecting your trade secrets and restricting competition is important, and getting the right restrictive

covenant is part of that protection. On May 28, 2014, attorneys Bret Cohen and Mitch Danzig, along with Jeff Lambert, the Chief Legal Officer of The Active Network, a Mintz Levin client, provided an informative discussion on how to draft effective restrictive coventants.

Access the recording here. Please note you must register to access the link.

What We're Reading

Week of May 26, 2014

2014 Work and Well-Being Survey, American Psychological Association (April 2014)

Week of May 19, 2014

Old and Fired at IBM: Tech Trendsetter Changes the Game, Guards Age Data, by Alex Barinka. *Bloomberg* (May 12, 2014)

Week of May 12, 2014

EEOC Releases Informal Discussion Letter Addressing the ADA's Reasonable Accommodation Requirement (Feb. 25, 2014)

Week of May 5, 2014

The Best Evidence Suggests the Effects of the ACA on Employment Will Be Small, by Bowen Garrett and Robert Kaestner, Urban Institute (April 2014)

Notable Quotes – May 2014

Week of May 26, 2014

"The country's election authority said a preliminary tally showed 76% voted against the proposal and 24% voted for it."

CNN Money's Mark Thompson writing about the resounding defeat of a proposal to raise Switzerland's minimum wage to $25 per hour, from *Swiss Voters Reject $25 Minimum Wage* (May 18, 2014).

Week of May 19, 2014

"Imagine a CEO explaining to his employees that they're losing their jobs or having to move … because he's unwilling to make no more than 100 times what they make."

It's California's Chance to Strike a Blow for Workers' Rights, by Harold Meyerson, *Los Angeles Times* (May 20, 2014), on a bill that would raise corporate tax rates on companies whose CEOs make more than 100 times the wages of their median employees.

Week of May 12, 2014

"Providing 12 weeks of leave for many categories of employees continues to become the norm in the U.S." but "[t]he lengths of leave for new fathers, adoptive parents and employees caring for seriously ill family members have declined as has disability pay."

From the Family and Work Institute's 2014 National Study of Employers.

Week of May 5, 2014

"If an employee has not been constructively discharged, her duty to mitigate damages may require her to continue working for her discriminatory employer." However, "the Court holds that Title VII, the NYSHRL, and the NYCHRL do not categorically bar post-resignation backpay for plaintiffs who have not been constructively discharged."

Chief Judge Preska in *Patricot v. Bloomberg LP*, in finding that the former Bloomberg employee did have a duty to mitigate under the circumstances here and granting Bloomberg's motion for summary judgment dismissing her claim for backpay.

Contributors

Learn more about *Employment Matters* blog and its contributors here.

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