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Recent Trends and Developments in Employment, Labor & Benefits Law

Employment Matters Monthly

JULY 2014

A Note from the Editors

Through our *Employment Matters* blog, attorneys from Mintz Levin's Employment, Labor & Benefits Practice aim to share noteworthy information in matters relating to employers' complex human resource and employment law issues. Below is a list of the blog posts and other content from June 2014, providing timely insights on legal developments. If you have any questions, please contact us or one of our team's attorneys.

You can subscribe to our *Employment Matters* blog here.

Michael Arnold, *Member*, Employment, Labor & Benefits Practice

David Barmak, *Chair*, Employment, Labor & Benefits Practice

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Posts from *Employment Matters*

Massachusetts Federal Court Refuses to Transform Non-Disclosure Agreement into a Non-Competition Agreement

Written by Gauri Punjabi

June 30, 2014

A recent decision from the Massachusetts federal district court serves as a good reminder to Massachusetts employers that courts are unlikely to view the breach of a non-disclosure/confidentiality agreement as justification to impose a non-competition restriction on a former employee where no such express restrictive covenant exists.

Continue Reading …

California Supreme Court Upholds Employment Class Action Waivers, but Rejects Waivers of PAGA Claims

Written by Dominique Windberg, Jennifer Rubin, Evan Nadel, and Michael Arnold

June 30, 2014

The California Supreme Court issued an important decision last week on the enforceability of employment class action waivers included in arbitration agreements. The result: private parties can contract for the waiver of the right to pursue a class action in any forum. The California Supreme Court had considered this question before in 2007 in *Gentry v. Superior Court*, finding that an employment class action waiver could be struck down on the grounds that it violated public policy or because it was unconscionable. But in *Iskanian v. CLS Transportation Los Angeles, LLC*, the Court recognized that recent U.S. Supreme Court precedent now required it to reverse course. In doing so, it made some other noteworthy pronouncements as well.

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The Family is Getting Bigger: Starting July 2014 California's Paid Family Leave Expands

Written by Brandon Willenberg

June 29, 2014

I'm not quite sure why California felt it was necessary to effectuate key changes to employment laws in the middle of summer when most of us are trying to break away from work and enjoy our vacations. As we recently discussed here, California's minimum wage goes up to $9.00/hr starting July 1, 2014, and now California's Paid Family Leave (PFL) law is making the "family" bigger starting July 1, 2014 as it expands the definition of family member to include grandparents, grandchildren, siblings, and parent-in-laws.

Continue Reading …

Supreme Court Finally Decides Noel Canning and Says President Obama's Recess Appointments to the NLRB Are a No Go.

Written by Erin Horton

June 26, 2014

Today, the Supreme Court issued its long-anticipated decision in *NLRB v. Noel Canning*, unanimously affirming an appellate court decision striking down three of President Obama's recess appointments to the National Labor Relations Board on the grounds that they were unconstitutional. I briefly discuss the case and its impact on employers below.

Continue Reading …

A Tale of Two Jurisdictions: Human Rights Laws in New York City and Tennessee Head in Opposite Directions

Written by Michael Arnold

June 25, 2014

Sitting here in the Big Apple, the thought of the New York City Council voting to narrow the reach of the New York City Human Rights Law seems roughly equivalent to the thought of a *Game of Thrones* episode without any violence. It's just not going to happen.

Continue Reading …

Wait, Now I Can't Fire My Employees for Stealing? California Federal Court Holds Application of Anti-Grazing Policy to Diabetic Employee May Violate the Americans with Disabilities Act

Written by George Patterson

June 24, 2014

A California federal court recently permitted a disability discrimination claim to proceed to a jury trial in a lawsuit alleging that Walgreens unlawfully terminated a diabetic employee for violating its "anti-grazing" policy by eating potato chips on the job without first paying for them. In *EEOC v. Walgreen Co.*, the court refused to toss the EEOC's claim it brought on behalf of the employee because of a factual dispute as to whether "business necessity" required Walgreens to treat the employee the same as other workers who violated its anti-grazing policy.

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Governor Cuomo Set to Sign Law Repealing the New York Wage Theft Prevention Act's Annual Pay Notice Requirement; Law Also Extends Wage Payment Liability to Ten Largest Members of New York LLCs

Written by Michael Arnold

June 20, 2014

New York is set to end its requirement under the Wage Theft Prevention Act that employers annually distribute

notices to employees detailing certain wage payment information. In just the short time it was in effect, this requirement proved an administrative headache for most employers. While the repeal will be welcomed by employers, they should also take note of the law's other important changes.

Continue Reading …

Supreme Court to Review Whether Rulemaking Is Required When DOL and Other Agencies Flip-Flop on Regulatory Interpretations

Written by David Katz

June 20, 2014

Earlier this week, the U.S. Supreme Court agreed to review whether the Department of Labor must engage in notice-and-comment rulemaking in order to significantly alter its interpretation of the agency's Fair Labor Standards Act regulations (*Perez v. Mortgage Bankers Association* and *Nickols v. Mortgage Bankers Association*). This decision will certainly impact employers by giving them a better sense of how "permanent" or "reliable" an agency's interpretive rules are (in this case, the DOL's stance on a particular overtime exemption), which will in turn shape employment policies.

Continue Reading …

Second Circuit Court of Appeals Addresses FLSA's Public Agency Volunteer Exception, but Withholds Comment on Private Sector Volunteers

Written by Michael Arnold

June 20, 2014

For the first time the Second Circuit Court of Appeals tackled the Fair Labor Standards Act's public agency volunteer exception. In *Brown v. New York City Board of Education*, the Court outlined the contours of the exception and affirmed a lower court decision finding that the individual at issue was a volunteer and not an employee entitled to minimum and overtime wages. This opinion, however, does not alleviate the concerns of private sector employers susceptible to wage and hour class/collective action lawsuits by volunteers.

Continue Reading …

Connecticut Employer Alert: Changes to Paid Sick Leave Requirements Effective January 1, 2015

Written by Erin Horton

June 18, 2014

Connecticut Governor Dannel Malloy recently signed a new law that amends Connecticut's Paid Sick Leave Statute. Connecticut was the first state to mandate paid sick leave policies for service workers back in January 2012. The new bill, which goes into effect on January 1, 2015, aims to streamline the 2012 law and places an important new restriction on employers.

Continue Reading …

Another Example of Owner Liability for Unpaid Wages and Liquidated Damages for Employee Misclassification

Written by Jessica Catlow

June 17, 2014

Do you still think that business owners aren't responsible for wage and hour law violations? Do you think that a court will only award liquidated damages where the violation is wilful? Think again. Following an investigation into certain residential treatment facilities for the elderly, disabled and mentally ill, the DOL obtained a default judgment against the husband and wife owners of the facilities for various wage and hour violations under the Fair Labor Standards Act, including an award of liquidated damages.

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President Obama to Sign Executive Order Prohibiting Federal Contractors from Discriminating Against LGBT Employees

Written by Jill Collins

June 17, 2014

White House officials reported today that President Obama intends to sign an executive order prohibiting federal contractors from discriminating against employees on the basis of their sexual orientation or gender identity. The order would protect up to 16 million employees working for employers with federal contracts.

Continue Reading …

First Circuit Court of Appeals Holds That Employer Can Be Found Liable Under Quid Pro Quo Sexual Harassment Negligence Theory for Discriminatory Actions of Co-worker

Written by Gauri Punjabi and Michael Arnold

June 16, 2014

In a case of first impression, the First Circuit Court of Appeals recently held that an employer can be held liable under Title VII for *quid pro quo* sexual harassment based on the discriminatory actions of a *non-supervisory* employee where the employer knew or should have known of the employee's discriminatory actions.

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California Employers Catch One of Those Rare Wage and Hour Class Action Breaks from the California Supreme Court

Written by Brandon Willenberg

June 11, 2014

Sometimes California employers do get a win when battling in the minefield of California's wage and hour laws. So California employers, please pause to rejoice in this moment because you know you may not get another one for a while. In a case that has been going on for more than a decade, the California Supreme Court issued an employer-favorable opinion in *Duran v. U.S. Bank National Association* – a case the California Supreme Court called a "rare beast: a wage and hour class action that proceeded through trial to verdict."

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Summer Semester Checklist — Revisiting Your Coach's Contract

Written by Tyrone P. Thomas
(follow Tyrone on Twitter at https://twitter.com/tyronepthomas)

June 11, 2014

In the "quiet" period for intercollegiate athletic competition, compensation to college coaches has taken center stage. During the ongoing trial in the *O'Bannon v. NCAA* litigation, the plaintiff's expert economist highlighted the financial benefits to coaches from the current amateurism structure. This testimony came one week following the announcement of a significant contract extension for the head football coach of the University of Alabama, with an average annual compensation value of $6.5 million. With the significant funds invested in these employment arrangements, universities would be well advised to take a fresh look at whether their contracts truly protect the institution.

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Dangers of Misclassifying an Employee as an Independent Contractor Highlighted Once Again in New York Appellate Court Decision

Written by Michael Arnold

June 10, 2014

The issue of employee misclassification was once again on display, this time in *Nance v. NYP Holdings*, where a New York appellate court affirmed an earlier finding that the *New York Post* failed to classify one of its

photojournalists properly.

Continue Reading …

Questions You Should Be Asking About Employment Practices Liability (EPL) Insurance

Written by Heidi Lawson, CPCU

June 10, 2014

Every firm has employees, as well as individuals that it has "failed" to hire, or promote, or recognize and reward to the extent that the individuals believes befitting. This is what makes it difficult to completely avoid employment disputes and possible litigation. Even if the firm and its employees don't take action, it is possible that the Equal Employment Opportunity Commission or other enforcement agency may do so on its own recognizance. In fact, 6 out of 10 employers faced an employee lawsuit between 2006 and 2011, and that trend is expected to continue. Also, almost 75% of all litigation against companies involves employment disputes.

Continue Reading …

EEOC Will Release Enforcement Guidance Addressing an Employer's Obligation to Reasonably Accommodate Pregnant Workers; Employers Should Continue to Pay Careful Attention to These Accommodation Requests

Written by Michael Arnold

June 9, 2014

The Equal Employment Opportunity Commission — the agency responsible for enforcing most of the federal discrimination laws — is preparing to issue new guidance addressing an employer's obligation to reasonably accommodate pregnant workers. Will the guidance offer a new interpretation of the law or just cement what we already know?

Continue Reading …

Minimum Wage Groundswell? Seattle, Others Raise Their Statutory Minimum Wage Rates

Written by Robert Sheridan

June 3, 2014

It's official. The Seattle City Council has voted to raise Seattle's minimum wage to $15 per hour by 2021. Is this the sign of groundswell?

Continue Reading …

IRS Begins Audit of Deferred Compensation Plans Subject to Section 409A

Written by Jessica Catlow

June 2, 2014

The IRS announced at recent bar association meeting that it is commencing a formal compliance initiative program (CIP) of selected employers and their deferred compensation arrangements that are subject to Section 409A of the Internal Revenue Code.

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 25 (Early Edition): What Hobby Lobby Means for the Affordable Care Act — Absolutely Nothing

Written by Alden J. Bianchi

June 30, 2014

To call the Supreme Court's recent decision in Burwell v. Hobby Lobby Stores, Inc. much-anticipated or highly controversial is an understatement. And, to be clear, any time the Supreme Court weighs in on bed-rock constitutional principle — particularly as it affects the church-state relationship, it is a big deal. But for anyone seeking intelligence on the prospects, efficacy, or fate of the Affordable Care Act, this is not the place to look.

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The Affordable Care Act — Countdown to Compliance for Employers, Week 26: Fitting a Round Peg (the Public Health Service Act 90-day Waiting/Orientation Period Rule) into a Square Hole (the 4980H Three-Month Offer of Coverage Rule)

Written by Alden J. Bianchi

June 30, 2014

The Departments of the Treasury/IRS, Labor and Health and Human Services (the "Departments") recently issued a final regulation under the 90-day waiting period limitation, which is included among the Affordable Care Act's (the "Act") insurance market reforms. Though technically included as an amendment to the Public Health Service Act ("PHS Act"), the provision is carried over into ERISA and the Internal Revenue Code. As a result, the requirement applies broadly to group market products issued by state-licensed carriers (or "issuers" in the parlance of the applicable law), and private sector, governmental, tax-exempt and other group health plans, whether fully-insured or self-funded.

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The Affordable Care Act — Countdown to Compliance for Employers, Week 27: COBRA, Marketplace Coverage, Stability Periods, and Cafeteria Plan Elections

Written by Alden J. Bianchi

June 23, 2014

Recent developments under the Affordable Care Act and COBRA, and existing rules governing mid-year election changes under cafeteria plans, have combined to make it challenging for certain terminating employees and those employees who experience a reduction in hours to continue health care coverage seamlessly. These developments include newly-issued COBRA notices, rules governing an individual's ability to enroll in qualified health plans through a public exchange or Health Insurance Marketplace (Marketplace) other than during an open enrollment period, and rules relating to offers of coverage by applicable large employers under rules governing stability periods. The challenge relates to the transition from employer-sponsored group health plan coverage into Marketplace coverage.

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The Affordable Care Act — Countdown to Compliance for Employers, Week 28: The Logic, Calculus, and Limits of "Skinny" Plans

Written by Alden J. Bianchi

June 16, 2014

It was just over a year ago that the Wall Street Journal published an article entitled, "Employers Eye Bare-Bones Health Plans Under New Law," which highlighted a compliance strategy to minimize employer exposure for assessable payments under the employer shared responsibility provisions of the Affordable Care Act (the "Act") using what has now come to be called either a "skinny" plan or an "MEC" plan. (For an explanation of the issues and the initial stir that the article created, you can read our June 18, 2013 advisory.) Over the last year, skinny plans have gained some grudging acceptance. And a consensus appears to have emerged to the effect that, while a skinny plan might be limited to preventative services only, the skinny plans appearing in the marketplace

generally include a handful of other features, e.g., wellness programs and perhaps an elective (i.e., "non-coordinated") hospital…

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The Affordable Care Act — Countdown to Compliance for Employers, Week 29: Wellness Programs, Smoking Cessation, and e-Cigarettes

Written by Alden J. Bianchi

June 9, 2014

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally prohibits discrimination in eligibility, benefits, or premiums based on a health factor, except in the case of certain wellness programs. Final regulations issued in 2006 established rules implementing these nondiscrimination and wellness provisions. The Affordable Care Act largely incorporates the provisions of the 2006 final regulations (with a few clarifications), and it changes the maximum reward that can be provided under a "health-contingent" wellness program from 20 percent to 30 percent. But in the case of smoking cessation programs, the maximum reward is increased to 50 percent. Comprehensive final regulations issued in June 2013 fleshed out the particulars of the new wellness program regime.

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 30: The IRS Tells Us That Employer Payment Plans (Really, Really, Really) Don't Work

Written by Alden J. Bianchi

June 2, 2014

The IRS recently issued two Q&As on the subject of employer payment plans, the purpose of which was to again underscore that arrangements purporting to allow an employer to reimburse employees on a pre-tax basis for premiums used to purchase health coverage in the individual market (either inside or outside of a public exchange) violate certain of the Affordable Care Act's insurance market reforms.

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Relevant Posts from Other Mintz Levin Blogs

Can A Relator Be Held Liable For Using Confidential Company Documents To Support A Qui Tam Case?

June 26, 2014

Check out this insightful post from my colleagues Samantha P. Kingsbury and Karen S. Lovitch over at our sister blog, *Health Law and Policy Matters*, discussing a recent decision about a relator that allegedly breached a confidentiality agreement by filing a *qui tam* case. These types of cases against relators are becoming more common in the *qui tam* context.

Continue Reading …

What We're Reading

Week of June 30, 2014

U.S. Increases Scrutiny of Employee-Stock-Ownership Plans, by Ruth Simon and Sarah E. Needleman, *Wall Street Journal* (June 22, 2014)

Week of June 23, 2014

Detroit Rolls Out New Model: A Hybrid Pension Plan, by Mary Williams Walsh, *Dealbook* (June 18, 2014)

Week of June 16, 2014

Noncompete Clauses Increasingly Pop Up in Array of Jobs, by Steven Greenhouse, *New York Times* (June 8, 2014)

Week of June 9, 2014

Why You Hate Work, by Tony Schwartz and Christine Porath, *New York Times* (May 30, 2014)

Week of June 2, 2014

From War Zone to Workplace, Can Veterans Fill a Void?, by Kyle Weston, *New York Times* (May 21, 2014)

Notable Quotes

Week of June 30, 2014

"ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets."

Supreme Court Justice Breyer in *Fifth Third Bancorp v. Dudenhoeffer* (June 25, 2014), holding that Employee Stock Ownership Plan fiduciary is not entitled to a defense-friendly presumption of prudence when that fiduciary's decision to buy or hold employer stock is challenged in court.

Week of June 23, 2014

"Although we have held that an employee may introduce evidence of harassment which he is not personally aware to prove that his employer is responsible for the harassment or to rebut an affirmative defense … our Court has not ruled that this kind of 'me too' evidence can prove that a work environment is objectively hostile. We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile."

11th Circuit Court of Appeals in *Adams v. Austal*, U.S.A L.L.C. (June 17, 2014).

Week of June 16, 2014

"In sum, it is clear that Hernandez was fired because of her 'misconduct' in taking the chips without paying for them. Under the Ninth Circuit case law, misconduct resulting from a disability has to be considered as part of Hernandez's disability and creates a question of fact as to whether Hernandez's disability was causally related to her termination. In other words, whether or not Hernandez's disability was, in fact, a cause of her misconduct is a question of fact for the jury. Similarly, whether Walgreens should have been required to 'accommodate' her stealing as a 'reasonable' accommodation is for the jury to determine."

Judge William H. Orrick in *EEOC v. Walgreens* (N.D. Cal., Apr. 11, 2014), denying Walgreen's motion for summary judgment on an ADA reasonable accommodation claim.

Week of June 9, 2014

"Much has changed in our social norms, but in many of the cases we continue to see, there are often these notions about women's place at home, in society, that underscore some of the decisions that we see in workplaces. We've brought many cases at the EEOC today that involve women who are excluded entirely from certain occupations that have been traditionally male."

EEOC Vice Chairwoman Jenny Yang at a June 5, 2014 Conference at NYU commenting on the EEOC's continuing priorities in combatting discrimination.

Week of June 2, 2014

"A trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced."

California Supreme Court Justice Corrigan in affirming an appellate court decision reversing a class-wide judgment that USB has misclassified each of its loan officers in *Duran v. US Nat'l Bank Assoc.*.

Contributors

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

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4074-0714-NAT-ELB