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Recent Trends and Developments in Employment, Labor & Benefits Law

# *Employment Matters* Monthly

AUGUST 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 July 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* Blog

### Interfere at Your Own Risk: Legal Fees Awarded as Damages for Violating a Non-Compete Agreement

Written by Jen Rubin and Jacqulyn Lewis

July 31, 2014

We all know the default American Rule for attorneys' fees: unless you get fees in a contract or from a statute, you shouldn't count on someone else paying the freight if you win your case. But a recent non-compete case brings home an exception to this rule: attorneys' fees were awarded as a component of damages to a former employer against the employer who hired away an employee subject to a restrictive covenant.

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### LIRR Strike Averted, but Employers Should Remain Aware of Wage and Hour Requirements When Outside Events Prevent Workers from Reaching the Workplace

Written by George Patterson

July 30, 2014

Recently, union leaders at the Long Island Railroad and representatives of the Metropolitan Transportation Authority finally reached a deal to avoid a strike. If a strike had occurred, businesses would have faced a potentially significant loss of employee productivity as more than 300,000 daily commuters travel to and from Long Island each day. While employers thankfully avoided the worst, it did leave them scrambling to understand their payroll obligations in preparation for the strike. We thought it prudent to quickly revisit some of the wage and hour issues that have arisen over the past few weeks so that you won't be caught off guard during the next threatened strike, weather emergency or other event that may prevent your employees from reaching the workplace.

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## New Jersey Likely Next To Ban Discrimination Against the Unemployed

Written by David Katz

July 25, 2014

Earlier this month, we wrote about New Jersey's proposed "ban the box" measure — a law that would prohibit employers from inquiring about job candidates' criminal histories early in the hiring process — heading to Governor Chris Christie's desk. It's still sitting there, so no news on that front. However, New Jersey employers will likely soon be dealing with additional hiring process restrictions because also sitting on Governor Christie's desk is legislation aimed at prohibiting discrimination against the unemployed.

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## Having Employees Sign Non-Compete Agreements after They Have Already Started Working Could Be a Big Problem for Some Employers

Written by Brandon Willenberg

July 16, 2014

A non-compete agreement is a vital tool that companies use to protect their confidential and trade secret information and their customer and employee relationships. Employers, of course, want to avoid the trouble of running to court to enforce their non-compete agreements, but if they do, they better make sure their non-competes will withstand a judge's scrutiny. Otherwise, they'll end up learning the hard way, like WorkflowOne did this week courtesy of the federal district court in Hawaii.

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## California Supreme Court Nixes Certification Denial Ruling against Newspaper Carriers Classified as Independent Contractors

Written by George Patterson

July 16, 2014

The California Supreme Court recently held that a trial court needed to revisit its class certification decision regarding newspaper carriers who alleged that they should have been classified as employees rather than independent contractors. The trial court erred, the Court said, by focusing not on differences in the newspaper's right to control the individual plaintiffs' work, but on variations in how it exercised that right.

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## Back to the Basics: Non-Compete Lost to a Superseding-Agreement Clause

Written by Jennifer Rubin and Erin Horton

July 16, 2014

With so much focus on the reasonableness of restrictive covenants, it's easy to forget that non-competes are plain old contracts — nothing more. And when it comes to enforcing non-competes, basic contract law still applies.

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## The EEOC Releases Updated Enforcement Guidance on Pregnancy Discrimination and Related Issues

Written by Michael Arnold

July 15, 2014

The EEOC released its updated enforcement guidance on pregnancy discrimination yesterday — the first time it's done so in more than 30 years. You can access the guidance and related documents here.

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## Employee Benefits: Important Wellness Plan and Mental Health/Substance Use Disorder Parity Effective Dates Have Arrived!

Written by Patricia Moran

July 10, 2014

Employers and insurers offering medical plans: take note! Two important final regulations issued jointly by the IRS, DOL and HHS (the "Departments") are now in effect. New Mental Health/Substance Use Disorder Parity regulations apply for plan years (or, in the individual market, policy years) beginning on or after **July 1, 2014**. For plans and policies which operate on a calendar year, there is still time (until **January 1, 2015**) to comply; however, plans and policies with a July 1 plan or policy year must comply **now**. In addition, new wellness regulations are effective for plan or policy years beginning on or after January 1, 2014.

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## Pay Careful Attention to Pregnancy Accommodation Requests as EEOC Plans New Enforcement Guidance

Written by Michael Arnold

July 8, 2014

My article on pregnancy accommodations, the EEOC's updated Enforcement Guidance and the *Young v. UPS* case, which the Supreme Court will hear in its next term, was published in Thompson's *ADA Compliance Guide* August 2014 Newsletter.

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## A Recent D.C. Circuit Court of Appeals Decision Calms Employer Fears that Internal Investigations May Not Be Privileged and Lays Out Roadmap to Protect Attorney-Client Privilege

Written by Brian Dunphy

July 8, 2014

A recent decision from the D.C. Circuit Court of Appeals, one of the most important courts in the nation, reaffirmed that a company's internal investigations — if structured properly — are protected from disclosure in litigation by the attorney-client privilege. The Court's decision *In re: Kellogg, Brown, and Root, Inc.* has significant practical application, especially for companies operating in heavily regulated environments that may be required to conduct internal investigations, and it offers a roadmap for structuring an internal investigation to protect the privilege.

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## New Jersey's "Ban the Box" Bill Sent to Governor Christie's Desk; Final Version More Employer-Friendly

Written by David Katz

July 7, 2014

Last December, we wrote about New Jersey's proposed "ban the box" measure, known as the Opportunity to Compete Act, making its way through the legislature — a law that would prohibit employers from inquiring about job candidates' criminal histories early in the hiring process. On June 26, the New Jersey Legislature gave final approval (including a 32-1 Senate vote and a 49-24 Assembly vote) to a slightly more employer-friendly version of the bill, which now heads to Governor Chris Christie's desk.

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## Uncertain Fate of Non-Competes in Massachusetts: Senate Passes Compromise; Legislation Heads to Conference Committee Negotiations

Written by Michael Arnold

July 2, 2014

Since Governor Deval Patrick proposed banning non-compete agreements in his economic development proposal in April, the subject has generated fierce interest among Massachusetts lawmakers and the business community. On July 1, 2014 the Massachusetts Senate voted for a compromise on employee non-compete agreements, and the Joint Economic and Emerging Technology Committee heard testimony on the same issue.

In this excellent advisory, my colleagues Julie Cox, George Atanasov and Amarynth Sichel outline the details of the Senate compromise and a corresponding House compromise, examine the arguments on both sides of the issue, and consider where the state will go from here.

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### Massachusetts Becomes Latest State to Raise its Minimum Wage

Written by Robert Sheridan

July 2, 2014

Massachusetts is the latest state to take up the minimum wage mantle, as Governor Deval Patrick signed a law raising minimum wage in the state on June 26th. As we have discussed on this blog, there is a movement afoot nationally to raise the minimum wage for low wage workers, and states and cities keep upping the minimum wage ante. With its new law, Massachusetts will now have the highest minimum wage of any state in the union.

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### Supreme Court Declines to Hear Appeal on Enforceability of FLSA Collective Action Waivers

Written by Jill Collins

July 2, 2014

Yesterday, the Supreme Court denied a request to review the issue of whether the Fair Labor Standards Act grants employees a non-waivable right to bring a collective action and thus, renders arbitration agreements with collective action waivers unenforceable.

The Court denied a group of former auto repair employees' petition for review of an Eleventh Circuit opinion that upheld a lower court ruling that an arbitration agreement with a collective action waiver was valid because the FLSA does not explicitly bar such agreements.

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

*Alden Bianchi, Chair of 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 July. Access all of Alden's posts here.*

### The Affordable Care Act — Countdown to Compliance for Employers, Week 22: Charting the Future of the Premium Subsidies (and Employer Penalties): Halbig v. Burwell and King v. Burwell

Written by Stephen M. Weiner, Alden J. Bianchi, and Roy M. Albert

July 28, 2014

On July 22, 2014, two federal appellate courts issued conflicting decisions, within hours of each other, regarding the IRS final rule published on May 23, 2012 (the "IRS Rule"), intended to implement the exchange-related tax credit provisions of the Affordable Care Act ("ACA" or the "Act"). The decisions will likely lead to another Supreme Court decision addressing fundamental provisions of the ACA. How these issues are reconciled and resolved will affect the further implementation of Obamacare, and even whether its core policies will survive.

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## The Affordable Care Act — Countdown to Compliance for Employers, Week 23: The Impact of Employment Contract Terms on Variable Hour Employee Status

Written by Alden J. Bianchi

July 20, 2014

For applicable large employers (i.e., employers who employed at least 50 full-time and full-time equivalent employees on business days during the preceding calendar year) endeavoring to comply with the Affordable Care Act's employer shared responsibility rules, determining an employee's status as "full-time" is critically important. Final regulations implementing the Act's employer shared responsibility requirements establish two methods — (1) the monthly measurement method and (2) the look-back measurement method — for making that call. The latter — the look-back measurement method — further classifies newly-hired employees as full-time, variable hour, seasonal or part-time. Of these, what constitutes a "new variable hour employee" has proved to be far and away the most confusing. A recently published set of Questions & Answers made available by the American Bar Association's Section of Taxation, Employee Benefits Committee, provides some helpful insights into the IRS's view of which employees may be properly classified as "variable hour."

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## The Affordable Care Act — Countdown to Compliance for Employers, Week 24: Can Offers of Group Health Plan Coverage Under Code Section 4980H Qualify as "Bona Fide Fringe Benefits" for Service Contract Act Purposes?

Written by Alden J. Bianchi

July 15, 2014

The Employer Shared Responsibility provisions of the Affordable Care Act ("ACA") generally require "applicable large employers" (i.e., employers who employed at least 50 full-time and full-time equivalent employees on business days during the preceding calendar year) to offer group health plan coverage or face the prospect of having to pay an assessable payment. The McNamara-O'Hara Service Contract Act of 1965 — a/k/a the "Service Contract Act" or "SCA" — generally applies to Federal contracts. Contractors subject to the SCA must pay prevailing wage rates and fringe benefits to service employees employed on contracts to provide services to the federal government. The latter fringe benefit obligation may, however, be discharged by paying cash in lieu of fringe benefits. Under the SCA, fringe benefit payments required by Federal or state law ("mandated benefits") may not be used to satisfy the employer's fringe benefit obligations. The Wage and Hour Division of…

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## The Affordable Care Act — Countdown to Compliance for Employers, Week 25: What Hobby Lobby Means for the Affordable Care Act — Absolutely Nothing

Written by Alden J. Bianchi

July 7, 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 bedrock 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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# Media Mentions

## SHRM: FMLA Continues to Challenge Employers

Posted by Michael Arnold

July 24, 2014

My colleague Drew Matzkin is quoted in this Society for Human Resource Management piece in which he

comments on the importance of employers keeping an employee's performance issues separate from the individual's use of FMLA-leave. The article focuses on the rising rate of FMLA abuse and specific tactics employers can take to contain it.

### NY Wage Law Repeal a Mixed Blessing for Companies

Posted by Michael Arnold

July 9, 2014

*Corporate Counsel* followed up on my entry on the amendments to the New York Wage Theft Prevention Act, which we expect Governor Cuomo to sign shortly.

### 5 Attributes of a Successful Non-Compete Agreement

Posted by Michael Arnold

July 8, 2014

JD Supra's *Business Advisor* recently asked my colleague Jennifer Rubin "what is the one thing that a business's non-compete agreement should accomplish?" Read the article and what she had to say here.

## Contributors

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

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