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Recent Trends and Developments in Employment, Labor & Benefits Law

***Employment Matters* Monthly**

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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.

Each month we will consolidate the previous month's blog posts for our clients into 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 months ahead.

Posts from *Employment Matters* Blog

Is a FLSA Collective Action Waiver by Itself in a Severance Agreement Enforceable? Sixth Circuit Says "No."

Written by Brandon Willenberg
August 26th, 2014

Employers have recently enjoyed some victories in the U.S. Supreme Court and in the California Supreme Court regarding the use of class/collective action waivers in employment arbitration agreements (e.g. *Italian Colors* and *Iskanian*). Class/collective action waivers in arbitration agreements generally prohibit the employee from forming or joining a class or collective action litigation or arbitration addressing employment-related claims against an employer, including, for example, violation of the Fair Labor Standards Act. This is an effective tool for employers to limit exposure and liability in wage/hour class and collective action litigation. So, if an employer can utilize a class/collective action waiver in an employment arbitration agreement then it makes sense that the employer can include one in a severance agreement just the same, right? Wrong said the Sixth Circuit, in *Killion v. KeHE Distributors, Inc.*

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Appellate Courts in New Jersey and New York Both Rule that a Contract May Reduce Statute of Limitations on Employment Claims

August 22nd, 2014

Written by David Katz

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

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

RELATED BLOGS

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Earlier this summer, a New Jersey appellate court, in *Rodriquez v. Raymours Furniture* enforced a provision in an employment application that reduced the period in which an employee could sue an employer to ***six months*** from the date of the adverse employment action. This ruling – the first of its kind in the employment context by a New Jersey appellate court – is consistent with a New York appellate court ruling just last year involving the same employer and the same employment application (*Hunt v. Raymour & Flanigan*). These rulings are significant to employers because they provide a concrete yet seldom-used tool to limit exposure to employment lawsuits.

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Maryland Court of Appeals: Contrary to Federal Court Rulings, Maryland Employees Are Eligible to Recover Treble Damages from Employers Failing to Pay Overtime

Written by David Barmak

August 21st, 2014

More bad news for employers: Maryland's Court of Appeals (its highest court) has now put to rest any question about an employee's right to recover treble damages in connection with an unpaid overtime claim.

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Labor Department Adds Gender Identity and Transgender Status to Prohibition on Sex Discrimination

Written by Jonathan Cain

August 20th, 2014

On August 19, 2014, the Department of Labor's Office of Federal Contractor Compliance Programs issued a directive advising that it will consider cases of discrimination based upon gender identity and transgender status to be violations of Title VII of the Civil Rights Act and Executive Order 11246 (which prohibits employment discrimination by federal contractors). According to the guidance, "disparate treatment of a transgender employee because he or she does not conform to the gender stereotypes associated with his or her biological sex is a form of sex discrimination." This policy takes effect immediately and does not require any additional rulemaking as it is merely an interpretive ruling under existing regulations.

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National Labor Relations Board Majority Holds That Seeking Co-Worker Assistance with an Individual Harassment Complaint is Protected Activity Under the Act; Overrules Holling Press, Inc.

Written by Erin C. Horton

August 19th, 2014

Last week, the NLRB took an exceptionally broad view of what constitutes "concerted activity" and what kind of efforts are aimed at "mutual aid or protection" under the National Labor Relations Act. For employers, this could mean increased Board scrutiny of internal investigations into employees' complaints of harassment.

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Governor Christie Vetoes New Jersey Unemployment Discrimination Bill

Written by David Katz

August 18th, 2014

In somewhat of a surprise move, in the same week that New Jersey Governor Chris

Christie signed into law the Opportunity to Compete Act, which prohibits employers from inquiring about job candidates' criminal histories early in the hiring process (which we wrote about here), the Governor vetoed a bill prohibiting discrimination against the unemployed (a measure which we wrote about here just last month).

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Governor Christie Signs Scaled-Back Opportunity to Compete Act – New Jersey's Ban the Box Bill

Written by David Katz

August 12th, 2014

We previously wrote (here and here) about New Jersey's proposed "ban the box" measure, known as the Opportunity to Compete Act, a law that would prohibit employers from inquiring about job candidates' criminal histories early in the hiring process. As expected, Governor Chris Christie signed the scaled-back, more employer-friendly version of the Opportunity to Compete Act into law yesterday.

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A Lesson on the ADA: Engaging in Good Faith in the Interactive Process is Essential

Written by Jessica Catlow

August 12th, 2014

Understanding the mandates of the Americans with Disabilities Act and similar state and local laws is easy: employers cannot discriminate against individuals with disabilities. However, navigating the reasonable accommodation requirements under these laws is no easy task for employers, especially when the laws only require employers to provide an accommodation that enables the employee to perform the essential duties of the position, rather than the one that employee necessarily prefers. A recent New York federal district court case, *Goonan v. Federal Reserve Bank of New York*, in which the employer failed to win early dismissal of a disability discrimination claim, highlights the importance of engaging in the interactive process correctly.

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Do as I Say, Not as I Do: Even the Government Falls Victim to Wage and Hour Violations Sometimes

Written by Michael Arnold

August 11th, 2014

Remember last fall when all we could talk about was the government shutdown? The 16-day government shutdown captured the attention of a nation once again gripped by seemingly-manufactured political crisis. Last week, two news items reminded me that while the shutdown is now long behind us, its effects are still being felt. The first was an article in the *Washington Post*, which reported about the existence of a shutdown baby boom.

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Colorado Federal Court Walks Back Rejection of ADEA Waiver in RIF Case

Written by George Patterson

August 11th, 2014

In a previous post we discussed *Foster v. Mountain Coal Company LLC,* the District of Colorado's decision invalidating a waiver of an employee's claims against his employer under the Age Discrimination in Employment Act (ADEA) after the employee was

terminated in connection with a reduction in force (RIF). The court concluded that under the Older Workers' Benefit Protection Act (OWBPA), the waiver the employee signed did not adequately "advise" him of his right to consult with an attorney prior to executing a severance agreement because the waiver merely contained passive language in the past tense stating that the employee had been given an "opportunity … for consultation with an attorney." We now alert you to the Court's reversal of that decision in response to the employer's motion for reconsideration.

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Two All-Beef Patties, Special Sauce, Lettuce, Cheese, Pickles, Onions, on a Sesame Seed Bun – NLRB Rocks Franchise World by Authorizing Complaints Against McDonald's as a Joint Employer; Signals Significant Step Toward Broadening the Joint Employer Test

Written by Gauri Punjabi

August 11th, 2014

The National Labor Relations Board is attempting to expand the reach of the National Labor Relations Act once again – this time the NLRB's Office of the General Counsel authorized formal complaints against McDonald's USA, LLC, despite the fact that the alleged unfair labor practices occurred in restaurants owned by franchisees, and not McDonald's. (Franchisees own roughly 90% of the 14,000 McDonald's restaurants). In announcing that franchisors like McDonald's may be named as respondents in unfair labor practice charges, the Board not only has rocked the future of the franchise business model, but is also trying to broaden its joint employer test in determining who qualifies as an employer for labor relations purposes.

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A Terrible, Horrible, No Good, Very Bad Year: President Obama Targets Federal Contractors Again, This Time on Labor Law Compliance

Written by Jill Collins

August 7th, 2014

Federal contractors must be straining their necks to see if they have an actual target on their backs. Last week, President Obama signed an executive order that requires federal contractors to disclose labor and employment law violations dating back three years. This latest Order follows a number of other executive directives from President Obama this year that target the labor and employment practices of government contractors, including a hike in the minimum wage, an expansion of overtime eligibility, and a ban on discrimination on the basis of sexual orientation or gender identity. The Order also requires government contractors to give their employees information concerning their hours worked, overtime hours, pay, and any additions to or deductions made from their pay. The stopgap measures come in a year where Congressional gridlock has thwarted many of the President's more wide-reaching labor law initiatives.

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Revenge Porn: A Disturbing Picture

Written by Michael Arnold

August 6th, 2014

I recently wrote an article for SHRM's *HR Magazine* about Revenge Porn – a vicious new way to smear someone's professional reputation.

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PLEADING A NON-COMPETE CLAIM: Sometimes the Bare Minimum Is Just Enough

Written by Jennifer B. Rubin

August 5th, 2014

There is no such thing as "per se" unenforceability of non-compete agreements (with a few notable exceptions). Instead, a court will enforce a non-compete if it meets whatever criteria a particular jurisdiction establishes – those criteria typically involve some combination of facts that show that a post-employment covenant is reasonably tailored to protect an employer's legitimate business interests. But if you don't plead the facts to support those legitimate interests, you may find yourself on the wrong side of a motion to dismiss. That was almost, but not quite, the result in *Installed Building Products, LLC v. Cottrell*, a recent Western District of New York case, where the court found that a plaintiff sufficiently alleged the minimum of facts necessary to advance its non-compete claims against its former employee and his new employer.

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Conflicts & Nepotism – A Dangerous Employment Cocktail

Written by Tyrone P. Thomas

August 4th, 2014

Last week, Alabama Governor Robert Bentley removed Alabama State University Trustee Marvin Wiggins for violating the University's conflict of interest rules. The removal proved once again that if you are responsible for the oversight of an organization's governance or operations, you must be mindful of your family's relationship to that organization. Given the broad range of employment and service provider relationships of public and private universities, now is as good a time as any to assess the content and application of conflict of interest policies.

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Shuffleboard, Early Bird Specials, and … Whistleblowing?

Written by Jessica Catlow

August 1st, 2014

When most employers hear the word "whistleblower," they think of their current employees and various anti-retaliation laws; however, under the SEC's "Whistleblower Program," the "whistleblower" may be a current or former employee. Indeed, as reported recently by *The Wall Street Journal*, retirees make up the largest group of individuals providing information under the Whistleblower Program.

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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 August. Access all of Alden's posts here.

The Affordable Care Act—Countdown to Compliance for Employers, Week 18: Emerging Strategies to Reduce or Eliminate Exposure for Assessable Payments under the Affordable Care Act's Pay-or-Play Rules

Written by Alden J. Bianchi

August 25th, 2014

The Affordable Care Act's employer shared responsibility, or "pay-or-play," rules require "applicable large employers" (generally employers with 50 or more full-time and full-time equivalent employees) to offer group health plan coverage (i.e., "play") or face the prospect of having to pay money to the government (i.e., "pay"). These provisions are included in a new section of the Internal Revenue Code, Code § 4980H, as implemented by final regulations issued earlier this year, and the IRS has provided a useful summary of the rules in a set of Questions and Answers. The impact of the Act's employer shared responsibility rules varies widely from employer-to-employer. Employers with stable workforces to whom they have traditionally provided broad-based, robust, major medical coverage—e.g., banking, finance, and information technology—will have little difficulty satisfying the Act's pay-or-play rules. In contrast, employers with large cohorts of variable and contingent workers to whom robust…

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The Affordable Care Act—Countdown to Compliance for Employers, Week 19: Changes in Employment Status under the Look-Back Measurement Method

Written by Alden J. Bianchi

August 18th, 2014

An earlier post explained the two principle methods—the "monthly measurement method" and the "look-back measurement method"—available to applicable large employers to identify full-time employees for purposes of determining exposure for "assessable payments" under the Affordable Care Act's employer shared responsibility rules. (Final regulations implementing rules are available at here.) This post focuses on how the look-back measurement method handles changes in employment status. While these rules appear simple and straightforward, this is not always the case in practice.

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The Affordable Care Act—Countdown to Compliance for Employers, Week 20: 9.5% ≠ 9.56% (And Why It Matters to Applicable Large Employers)

Written by Alden J. Bianchi

August 11th, 2014

While employers sometimes view the Affordable Care Act's employer shared responsibility (or "pay-or-play") rules in isolation, they don't operate that way. Instead, they exist side-by-side with other provisions of the Act. In particular, the Act's rules providing premium tax subsidies to low- and moderate-income individuals correlate with an employer's liability for assessable payments. Of interest to employers is that, generally, where there are no individual subsidies, there are no employer penalties. In a recently issued revenue procedure (Rev. Proc. 2014-37), the Treasury Department announced adjustments to parameters that impact premium tax subsidies. One of the adjustments made changes to a table used to calculate an individual's premium tax credit. While the adjustments addressed premium tax credits under the Act, it was not immediately apparent what impact, if any, the change would have on employers. As it turns out, the answer is, none.

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The Affordable Care Act—Countdown to Compliance for Employers, Week 21: Self-Funded Group Health Plans, the Affordable Care Act and National Health Plan Identifier Numbers (HPIDs)

Written by Alden J. Bianchi

August 4th, 2014

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) ushered in broad national standards aimed at improving the efficiency and effectiveness of the U.S. health care system. Referred to generically as “administrative simplification,” these rules govern the areas of privacy and security of health information, electronic health care transactions and code sets, and unique health identifiers. In the years that followed, the Department of Health and Human Services (HHS) issued comprehensive rules in each of these areas. A summary of these rules is available here.

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Media Mentions

Sirius Decisions: Whose LinkedIn Profile Is It, Anyway?

August 18th, 2014

Mintz Levin attorney Jennifer Rubin is quoted in this Sirius Decision blog post in which she responds to questions about employee LinkedIn use and other social media websites. The post focuses on establishing company guidelines for online behavior and networking.

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Law360: Rising Tide of FMLA Claims Unlikely to Recede, Attorneys Say

August 15th, 2014

Law360 recently quoted Mintz Levin attorney Michael Arnold in an article about the rise of FMLA lawsuits. You can read the article here.

Continue Reading …

Law 360: NCAA Concussion Deal Discourages Future Recovery Suits

August 7th, 2014

Mintz Levin attorney Tyrone Thomas is quoted in this Law 360 piece in which he comments on universities’ potential legal exposure if the NCAA implements a new monitoring system for all concussion-related injuries of student-athletes. The article focuses on the proposed settlement reached between the NCAA and former student-athletes regarding a concussion-screening framework to track injuries in college sports.

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Corporate Counsel: NLRB Boosts ‘Micro Units’ with Macy’s Decision

August 6th, 2014

Mintz Levin attorney Donald Schroeder is quoted in this Corporate Counsel piece in which he comments on the potential effects of the legalization of micro labor unions on employers and the unionization landscape as a whole. The article focuses on the July 22nd ruling by the National Labor Relations Board in support of micro union organization efforts in the retail industry.

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Contributors

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

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