MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

Recent Trends and Developments in Employment, Labor & Benefits Law

Employment Matters Monthly

DECEMBER 2014

A Note from the Editors

Through our *Employment Matters* blog, attorneys from Mintz Levin's Employment, Labor & Benefits Practice share noteworthy information about matters relating to employers' complex human resource and employment law issues. In November, our contributors blogged about discrimination matters, the use of big data in employment, employee wellness program participation, employees and social media, compliance with the Affordable Care Act, and other legal issues of interest to employers.

In this newsletter you'll find a list of these posts and additional items on HR issues and employment law.

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

RELATED BLOGS

- Global IP Matters
- Health Law & Policy Matters
- Immigration Law
- Privacy & Security Matters

Posts from *Employment Matters* Blog

Sixth Circuit Decision Confirms that Employers May Lawfully Choose Not to Hire a Job Applicant with a Prior History as a False Claims Act Whistleblower

Written by David Barmak

November 21st, 2014

Some employers in the health care and other industries who regularly deal with the federal government and are subject to the False Claims Act ("FCA") have felt helpless in trying to weed out serial whistleblowers in the hiring process. After all, most anti-retaliation provisions prohibit retaliation against both employees and applicants. For example, Title VII of the Civil Rights Act of 1964 expressly prohibits retaliation against both employees and "applicants for employment." Therefore, it is unlawful under Title VII to refuse to hire an applicant for employment because she complained about discrimination in prior jobs. A recent Sixth Circuit decision in the case of *Gary Vander Boegh v Energy Solutions, Inc.* has confirmed, however, that job applicants who have a history of reporting alleged FCA violations do not enjoy the same protection: employers can lawfully refuse to hire an applicant because of his prior history as an FCA whistleblower.

Continue Reading …

Juries and the EEOC Take Aim at Pregnancy Discrimination

Written by Jessica Catlow

November 19th, 2014

Back in the summer, we wrote about the Equal Opportunity Commission's release of its updated enforcement guidance on pregnancy discrimination claims under the Pregnancy Discrimination Act. Under the PDA, discrimination based on pregnancy, childbirth or related conditions is a form of sex discrimination. Two recent cases highlight that both juries and the EEOC intend to take pregnancy discrimination claims seriously.

Continue Reading …

The Massachusetts Health Insurance Mandate: Some Good News for Massachusetts Taxpayers

Written by Patricia Moran

November 17th, 2014

Since 2007, most Massachusetts residents have been required to either obtain health insurance coverage meeting Massachusetts "minimum creditable coverage" standards, or pay a state tax penalty (for 2014, the penalty ranges from $240 to $1104 per year, depending on income). Effective January 1, 2014, Massachusetts residents are also subject to federal health care reform, which requires most United States citizens to either obtain health insurance meeting federal "minimum essential coverage" standards, or pay a federal tax penalty (for 2014, the federal penalty is generally $95 per person, and increases to $325 in 2015 and $695 in 2016). (For more information about these minimum requirements, click here and here.) Many have wondered: could an individual without medical coverage be required to pay both penalties in full?

On November 7, 2014, the Massachusetts Department of Revenue amended its individual mandate regulations (830 CMR 111M.2.1) to answer this question. In sum: if an individual is required to pay both a Massachusetts and a federal penalty for failure to obtain adequate health care coverage, the amount of the Massachusetts penalty is reduced by the amount of the federal penalty.

Continue Reading …

Lawsuit against LinkedIn Latest in Battle over Use of Big Data in Employment

Written by Robert Sheridan

November 7th, 2014

Following up on a topic discussed recently in this space, a class action filed last month against LinkedIn represents just the latest development in the burgeoning battle over defining the permissible and impermissible uses of big data in the employment arena.

Continue Reading …

Federal Judge Denies EEOC's Petition for Temporary Restraining Order; Allows Employer to Penalize Employees Who Decline to Participate in Employee Wellness Program

Written by Gauri Punjabi

November 5th, 2014

Last week, we blogged about the EEOC's recent litigations involving employee wellness programs, including the Honeywell case where the EEOC sought to prohibit Honeywell from penalizing employees who decline to participate in the company's wellness program. On Monday, a Minnesota federal district court judge denied the EEOC's TRO application, striking an initial blow to the EEOC's attempts to impose restrictions on such programs.

Continue Reading …

NLRB Shows Some Restraint in its Protection of Employee Social Media Communications: Employee Termination Arising From "Egregious" and "Insubordinate" Facebook Posts Was Legal Under the NLRA

Written by Erin C. Horton

November 4th, 2014

In the wake of the NLRB's aggressive crackdown on social media policies, many employers have asked: "Is there any limit to what employees can post on social media about their employers?" It appears that there is. Just last week, a former employee of the Richmond District Neighborhood Teen Center in San Francisco learned this the hard way when the Board dismissed his complaint that the Center violated Section 8(a)(1) of the National Labor Relations Act after it pulled a rehire offer after it discovered that he participated in an inappropriate Facebook exchange.

Continue Reading …

Lights Out for a 401(k) Investment Fund? Don't Forget the Blackout Notice Rules

Written by Michael Arnold

November 2nd, 2014

My colleague Patty Moran authored an advisory about reviewing Sarbanes-Oxley Blackout Notice Rules when changing a 401(k) investment fund. The advisory describes the origin of the Blackout Notice Rules, the rules' requirements and penalties for noncompliance, and next steps.

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 November. Access all of Alden's posts here.

The Affordable Care Act — Countdown to Compliance for Employers, Week 5: Health and Human Services (HHS) Wastes No Time Issuing Proposed Rules Modifying Minimum Value Rules

Written by Alden J. Bianchi and Edward A. Lenz

November 24th, 2014

Over the last couple of months, we have followed and reported on a particular ACA compliance strategy under which an employer subject to the Affordable Care Act's employer shared responsibility (or "pay-or-play") rules satisfies the requirement to make an offer of coverage under a group health plan that has the look-and-feel of major medical coverage with one significant modification: the plan offers no inpatient hospital coverage or physician services. (For a discussion of the development of these plans, please see our previous posts of September 16, October 14 and November 10.) Following the convention established by promoters of these arrangements, we refer to these arrangements as "minimum value plans" or "MVP arrangements." Because the monthly premium cost of MVP plans is far less expensive than the cost of traditional major medical coverage that includes inpatient hospital services or physician services, the…

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 6: Labor and Treasury Departments Play Whack-a-Mole with Employer Payment Plans

Written by Alden J. Bianchi

November 17th, 2014

Last year, the Department of Labor and the Treasury Department/IRS (Departments) issued guidance on the application of certain of the Affordable Care Act's insurance market reforms to health reimbursement arrangements (HRAs), certain health flexible spending arrangements (health FSAs) and certain other employer health care arrangements. For an explanation of this guidance, please see our client advisory dated September 25, 2013. The Departments issued further clarifications in May of this year, which we covered in a previous post. Collectively, these guidance items addressed plan designs in which employers attempt to subsidize the purchase of health insurance coverage (whether on a pre-tax or after-tax basis) in the individual market (whether or not under a qualified health plan offered through a public exchange). In each of these pronouncements, the Departments clarified that arrangements of all stripes that seek to provide cash subsidies for the purchase of individual market coverage…

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 7: IRS Puts the Kibosh on Health Plans that Fail to Cover Hospital or Physician Services

Written by Alden J. Bianchi

November 10th, 2014

In a previous post, we described an Affordable Care Act compliance strategy — referred to commercially as a "minimum value plan" or "MVP" — that involves an offer of group health plan coverage that, while similar in most respects to traditional major medical coverage, carves out inpatient hospital services. A subsequent post warned of rumors that regulators were less than thrilled with these arrangements, and that in all likelihood the Treasury Department/IRS and the Department of Health and Human Services (the "Departments") would take steps to require that plans purporting to provide minimum value cover such services. On November 3, 2014, the Departments announced their intent to retroactively revise their respective minimum value regulations so that plans that fail to provide substantial coverage for in-patient hospitalization services (or for physician services) will not qualify as minimum value. The Departments' announcement also included some limited transition relief, and imposed some…

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 8: Breaking HPID News

Written by Alden J. Bianchi

November 2nd, 2014

In a surprise move, the Centers for Medicare & Medicaid Services (CMS) announced an indefinite delay in enforcement of regulations pertaining to "health plan enumeration and use of the Health Plan Identifier (HPID) in HIPAA transactions" that would have otherwise required self-funded employer group health plans (among other "covered entities") to take action as early as November 5, 2014.

Continue Reading …

What We're Reading

Week of November 24, 2014

Sodexo America LLC, 21-CA-039086 (Nov. 19, 2014) Post-*Noel Canning* Board decision vacating its earlier decision that Sodexho's off-duty employee access policy was unlawful.

Week of November 17, 2014

Brief in Support of Defendant R.G. & G.R. Harris Funeral Homes, Inc.'s Motion To Dismiss seeking dismissal of the EEOC Title VII's gender discrimination claim based on an individual's "gender identity" (Nov. 19, 2014)

Week of November 10, 2014

Email at Work: Unions Await Key Ruling by Melanie Trottman (WSJ Nov. 9, 2014)

Week of November 3, 2014

Employers Using Personality Tests to Vet Applicants Need Cautious 'Personalities' of Their Own by Sara A. Begley, Julia Y. Trankiem and Sarah T. Hansel (Forbes.com Oct. 30, 2014)

Employment Quote(s) of the Week

Week of November 24, 2014

"Two very different outcomes resulted in these cases — in one, the court granted summary judgment to the plaintiffs; in the other, the court denied summary judgment…. These very different

outcomes demonstrate the uncertainty that the parties face. The proposed settlement alleviates this uncertainty."

Two former interns in *Ballinger v. Advanced Media Publications, Inc.*, No. 13 Civ. 4036(HP) (S.D.N.Y. Nov. 13, 2014), seeking preliminary approval of a class action settlement with Condė Nast to settle all claims for just shy of $6 million.

Week of November 17, 2014

"While the jury is still out about whether workplace wellness programs improve health, the programs have great potential…. Our goal was to evaluate what motivates people to participate in these programs and what strategies companies and insurers can use to get everyone involved. Our data show that financial incentives clearly work to motivate participation in a health coach program."

Jason Block, MD, TOS Member and Assistant Professor at Harvard Medical School's Department of Population Medicine explaining the results of his study, "Do Financial Incentives Promote Uptake of Telephonic Health Coaching Within a Health Plan?" (Nov. 7, 2014)

Week of November 10, 2014

"Ergo, the FLSA does not expressly preclude defendants from offsetting plaintiffs unpaid donning and doffing and shift relief time with the paid meal period time."

Judge Munley in entering summary judgment for defendants on plaintiffs' FLSA claims in *Smiley v. E.I. Du Pont De Nemours & Co.* (M.D. Pa. Nov. 5, 2014).

Week of November 3, 2014

"The Court finds a genuine issue of material fact exists regarding whether effective verbal communication is an essential function of the HR Analyst position. Although Defendants have undoubtedly established that some degree of communication is necessary to carry out the essential functions of the HR Analyst position, this Court is not convinced verbal communication is the only means by which employees can effectively communicate. Rather, as Plaintiff contends, verbal communication might merely be considered a method by which the other essential functions explicitly listed in the job description are performed. On the other hand, if the ability to effectively speak is necessary to carry out the essential functions of the HR Analyst position, then a jury may find that oral communication is an implicit part of those same essential functions and thus an essential function in itself. Accordingly, because a reasonable jury could find that effective verbal communication is not an essential function of the HR Analyst position, this Court declines to grant Defendants' motion for summary judgment on this issue."

Judge Thomas O. Rice of the Eastern District of Washington in *Carlson v. City of Spokane* (Oct. 20, 2014)

Contributors

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

Alden Bianchi

Erin Horton

Gauri Punjabi

Jessica Catlow

David Katz

Jennifer Rubin

Jill Collins

Patricia Moran

Robert Sheridan

Ann Fievet

George Patterson

Tyrone Thomas

4474-1214-NAT-ELB