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Recent Trends and Developments in Employment, Labor & Benefits Law

Employment Matters Monthly

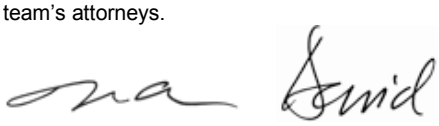
JANUARY 2015

A Note from the Editors

Happy New Year from all of us at Mintz Levin! In our first issue of 2015, we are pleased to bring you December's posts and additional items from our *Employment Matters* blog, including articles on the Affordable Care Act, San Francisco's new worker protection laws, class actions pertaining to the Fair Credit Reporting Act, and many other legal matters of interest to employers. Written by attorneys from the firm's Employment, Labor & Benefits Practice, our blog is dedicated to addressing legal issues relating to employers' complex human resource and employment law concerns. You can subscribe to our *Employment Matters* blog here.

We wish you and yours all the best for 2015.

If you have any questions about any of the topics addressed in this newsletter, please contact us or one of our team's attorneys.



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

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

RELATED BLOGS

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Posts from *Employment Matters* Blog

Latest Update on the New York State Wage Theft Act Annual Pay Notices: No Need to Distribute Them. But NY Employers, Don't Forget About What the Rest of the Law Says

Written by Michael Arnold

December 31st, 2014

Confirming earlier reports, New York employers will **not** have to distribute New York State Wage Theft Act Annual Pay Notices in January 2015 or thereafter.

Continue Reading …

Did the NLRB Really Just Grant Employees the Presumptive Right to Use Employer-Provided Email Systems? We Break Down the Purple Communications Decision and What It Means for Employers.

Written by Michael Arnold and Daniel Long

December 30th, 2014

In a 3-2 decision divided along party lines, the National Labor Relations Board has ruled that employees have a presumptive right to use their employers' email systems during non-working time to discuss unionization and the terms and conditions of their employment. In so holding, a three-member majority of the Board explicitly overruled the Board's Bush-era 2007 *Register Guard* decision in order to make "[n]ational labor policy . . . responsive to the enormous technological changes that are taking place in our society." We explore the NLRB's controversial decision below.

Continue Reading …

Yet Another Tale of (Alleged) LinkedIn Indiscretion in a Non-Compete Matter

Written by Jen Rubin

December 22nd, 2014

For those of you following the saga our Employee Mobility Practice Group has been documenting about the many ways in which social media appears to be impacting the non-compete world, I present to you yet another case that highlights the treasure trove of evidence that LinkedIn may provide.

Continue Reading …

San Francisco Board of Supervisors Continues to Reshape Working Environment for Low-Wage and Part-Time Workers; Becomes First Jurisdiction in Nation to Approve So-Called "Retail Workers Bill of Rights"; Forces Large Retailers to Address Automated Scheduling Practices

Written by Michael Arnold and Brent Douglas

December 19th, 2014

Just before the Thanksgiving break, as retailers were gearing up for "Black Friday," "Cyber Monday," and the newly-minted "Gray Thursday," San Francisco's Board of Supervisors unanimously approved two new ordinances collectively known as the "Retail Workers Bill of Rights" — the first of its kind in the nation.

This controversial new law, which will go into effect next summer, is the latest in a series of laws enacted by the Board, including laws regarding the payment of a living wage, the provision of paid sick leave, flexible working arrangements and healthcare, and the curbing of background checks, all of which are designed to provide protections to the growing number of low-wage and part-time workers in San Francisco. This time, the Board said it believed the Retail Workers Bill of Rights was necessary to limit a retailer's ability to force individuals to work part-time, unpredictable, and often fluctuating hours.

Below, we discuss (i) the basis for the new law; (ii) the obligations it imposes on large retailers; (iii) its potential impact; and (iv) recommendations for compliance.

Continue Reading …

Update to the Update: New York Employers Will Likely Be Relieved of the Requirement to Distribute Annual Pay Notices in January 2015 After All

Written by Michael Arnold

December 18th, 2014

Okay, so despite our previous post saying the opposite, employers likely *will not* have to distribute New York State Wage Theft Act Annual Pay Notices after all. We had good reason to report it the other way a couple of weeks ago as the Governor still had not signed the bill repealing this requirement and even if he did so, it wouldn't have taken effect for 60 days — well after this January's notice distribution requirement.

But we just learned, courtesy of Bond, Schoeneck & King's John Bagyi, Esq., that the legislature just sent the bill to the Governor, who is expected to sign it. At the same time, apparently the legislature and the Governor have agreed to amend the bill in early 2015 to make the repeal effective *immediately* so that employers will be relieved of the need to distribute the notices. This is welcome news for employers (even those who have already taken steps to prepare their notices and are probably rightfully frustrated).

We will confirm when the Governor signs the bill and if the repeal is actually effective immediately. Stay tuned.

Supreme Court Finds Post-Shift Employee Security Screenings Noncompensable Activity Under the Fair Labor Standards Act

Written by Frank Hupfl

December 16th, 2014

Last week, in *Integrity Staffing Solutions, Inc. v. Busk*, the United States Supreme Court issued a rare unanimous opinion holding that post-shift employee security screenings were noncompensable activities under the Fair Labor Standards Act because those screenings were neither the principal activity the employees were hired to perform nor integral or indispensable to the principal activity they were hired to perform.

Continue Reading …

EEOC's Attempt to Limit Reach of Severance Agreements Hits Roadblock… Again

Written by Daniel Long with Michael Arnold

December 16th, 2014

A federal judge in Colorado has once again stymied the EEOC's efforts to successfully challenge an employer's standard separation agreement as violating the Age Discrimination in Employment Act. The decision in *Equal Employment Opportunity Commission v. CollegeAmerica Denver, Inc.* comes on the heels of another recent federal court decision in Illinois dismissing similar claims against CVS. As in the *CVS* decision, the judge here also faulted the EEOC for failing to engage in conciliation with CollegeAmerica before filing a lawsuit.

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Staffing Companies Hit with Class Action Alleging Violation of Fair Credit Reporting Act

Written by Gauri Punjabi

December 15th, 2014

Fair Credit Reporting Act class actions remain on the rise. The latest one of note was recently filed in Maryland federal court against staffing agencies Aerotek, Inc. and Allegis Group, Inc., alleging that they violated the FCRA after they fired an employee without providing him with advance notice and an opportunity to dispute certain criminal history information identified on a background report.

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Back at it Again: NLRB Invalidates Employer's "Overbroad" Solicitation Rule

Written by David Katz

December 15th,2014

We have posted extensively about the NLRB's crusade against overbroad workplace policies (see our most recent posts here and here), ranging from social media policies to workplace conduct and disciplinary policies and everything in between. Well the Board is back at it again—handing down two solicitation decisions in the past couple of weeks. On November 26, it invalidated Mercedes-Benz's seemingly innocent solicitation and distribution policy in its employee handbook. On December 11, the NLRB handed down a controversial decision regarding an employee's right to use company-provided email systems on non-working time to send NLRA-protected communications. Today we cover the former decision; later this week, the latter.

So let's take a look at Mercedes-Benz's offending handbook policy:

Continue Reading …

Massachusetts Becomes the Latest Jurisdiction to Require Paid Sick Leave

Written by George Patterson

December 12th, 2014

Massachusetts voters recently approved a ballot initiative amending the Commonwealth's labor statute to require employers to provide workers with up to 40 hours of paid sick time per year. The new law follows the enactment of similar statewide measures in California and Connecticut and city ordinances in various municipalities across the country, including New York City.

Continue Reading …

NLRB Again Attempts to Invalidate Mandatory Arbitration Clauses for Employment Claims

Written by Brent Douglas

December 10th, 2014

In its *Murphy Oil* decision, the National Labor Relations Board affirmed its 2012 holding in *D. R. Horton*, which found an employer violates the NLRA when it requires employees "as condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer." Employment attorneys were waiting to see how the NLRB would react to the Fifth Circuit Court of Appeals' reversal of its 2012 *D. R. Horton* decision. Unpersuaded, the Board indicated it "independently reexamined" *D. R. Horton* and concluded: "Today we reaffirm that decision."

Continue Reading …

Update: New Jersey Supreme Court to Address Contractually Shortened Statute of Limitation Provisions

Written by David Katz

December 9th, 2014

Over the summer, we posted about an interesting New Jersey appellate court decision (*Rodriquez v. Raymours Furniture*) enforcing a provision in a job application that reduced the period in which an employee could sue an employer to six months from the date of the adverse employment action. We also noted a 2013 New York appellate decision involving the same employer, the same policy and the same result. Well, not so fast on revising those job applications to abridge limitations periods (at least in New Jersey). We learned that just last week New Jersey's highest court granted the plaintiff's petition for certification, agreeing to review the June 2014 appellate court decision. We will of course follow the New Jersey Supreme Court proceedings so stay tuned.

Update: New York Employers Will Still Be Required to Distribute Annual Pay Notices in January 2015

Written by Michael Arnold

December 4th, 2014

To the consternation and bewilderment of many, the New York State Legislature never sent to Governor Cuomo the bill it passed earlier this year repealing the New York State Wage Theft Act's Annual Pay Notice Requirement. As a result, employers will be forced next month to once again distribute pay notices to all of their employees. Employers must distribute these notices at some point between January 1 and February 1, 2015.

Social Media and Non-Solicitation Covenants — Another LinkedIn Cautionary Tale, but this One for Employers

Written by Jen Rubin

December 3rd, 2014

Those of you who joined us for our November 13 webinar on "Post-Employment Solicitation of Customers & Employees in the Social Media Age" will be interested in a recent social media-related non-solicitation case from Connecticut that — you guessed it — echoes some of the guidance that I, together with my partners Michael Arnold and Bret Cohen, provided about how to take social media developments into consideration when drafting your post-employment non-solicitation covenants.

Continue Reading …

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

In 2014, Alden Bianchi, Chair of the our Employee Benefits & Executive Compensation Practice, provided a weekly installment on the Affordable Care Act as he counted down to the January 1, 2015 ACA pay-or-play deadline. Below are the posts from December. Access all of Alden's posts here.

The Affordable Care Act — Countdown to Compliance for Employers, Week 0: Final Thoughts and Acknowledgements

Written by Alden J. Bianchi

December 29th, 2014

The Affordable Care Act is the single most important piece of Federal social legislation in more than a generation. While there was and is broad agreement on the law's principal goals — to expand medical coverage, increase the quality of medical outcomes, and constrain costs — there is little agreement on the "means whereby." This is perhaps both unavoidable and unfortunate. Unavoidable given the partisan political environment from which the ACA sprang and in which it now lives; unfortunate because, at bottom, there are few viable alternatives. If Congress was considering health care finance for the first time, as if on a blank slate, no one thinks that they would design anything remotely like our current fragmented system. But Congress did not and does not have that luxury.

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 1: Going Live with the Affordable Care Act's Employer Shared Responsibility Rules on January 1, 2015 . . . What Can Possibly Go Wrong?

Written by Alden J. Bianchi

December 22nd, 2014

Regulations implementing the Affordable Care Act's (ACA) employer shared responsibility rules, including the substantive "pay-or-play" rules and the accompanying reporting rules, were adopted in February. Regulations implementing the reporting rules in newly added Internal Revenue Code Sections 6055 and 6056 came along in March. And draft reporting forms (IRS Forms 1094-B, 1094-C, 1095-B and 1095-C) and accompanying instructions followed in August. With these regulations and forms, and a handful of other, related guidance items (e.g., a final rule governing waiting periods), the government has assembled a basic — but by no means complete — compliance infrastructure for employer shared responsibility. But challenges nevertheless remain. Set out below is a partial list of items that are unresolved, would benefit from additional guidance, or simply invite trouble.

Continue Reading …

The Affordable Care Act — Countdown to Compliance for Employers, Week 2: Explaining the Look-Back Measurement Method to Employees

Written by Alden J. Bianchi and Edward A. Lenz

December 16th, 2014

Many applicable large employers — i.e., employers that are subject to the Affordable Care Act's (ACA) employer shared responsibility rules — have a pretty good sense of what these rules are, how they work, and what they plan to do to comply. A subset of these employers has gained a sophisticated understanding of the employer shared responsibility rules, while another (hopefully much smaller) subset has only a vague sense that they need to do something by or in 2015 in connection with extending coverage to full-time employees. Employers with large groups of employees who were previously not offered coverage, or those with large variable and contingent workforces, have generally been relieved to learn that, in the case of employees with unpredictable hours, they may be able to determine the employee's status as full-time using the "look-back measurement method." (For a description of the look-back measurement…

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The Affordable Care Act — Countdown to Compliance for Employers, Week 3: Group Health Plan, Cafeteria Plan and Health FSA Nondiscrimination Theory and Practice

Written by Alden J. Bianchi

December 8th, 2014

As applicable large employers grapple with the Affordable Care Act's (ACA) employer shared responsibility (pay-or-play) rules, two questions arise with notable frequency: Do I have to offer the same group health insurance coverage on the same terms to all my full-time employees? Do I have to offer pre-tax treatment of premiums to all my employees? These questions — which arise under Internal Revenue Code §§ 105(h) and 125, and Public Health Service Act § 2716 — are important as employers endeavor to navigate the penalty provisions of Code § 4980H. They are particularly relevant in the case of employers that previously did not offer coverage to a large group of employees (e.g., in industries such as staffing, restaurants, retail, hospitality and franchising, among others). As we explain below, what makes these questions challenging is that theory varies widely from practice for various reasons. The present issues are ripe for regulatory attention,…

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The Affordable Care Act — Countdown to Compliance for Employers, Week 4: EEOC v. Honeywell and the Future of Wellness Programs

Written by Alden J. Bianchi

December 1st, 2014

While my entries have focused principally on the employer shared responsibility rules of the Affordable Care Act (ACA), every once in a while an item comes along that nevertheless grabs my attention. The treatment of wellness plans at the hands of the Equal Employment Opportunity Commission (EEOC) is such an item.

Continue Reading …

What We're Reading

Week of December 29, 2014

CalChamber Releases List of New Employment Laws Affecting Businesses in 2015, The California Chamber of Commerce (November 15, 2014)

Week of December 22, 2014

NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers, NLRB Office of Public Affairs Press Release (December 19, 2014)

Week of December 15, 2014

Babcock & Wilcox Construction Co., Inc. and Coletta Kim Beneli,, Case 28-CA-022625 (NLRB December 15, 2014) (setting new Board standard for deciding whether to defer to an arbitration proceeding decision)

Week of December 8, 2014

The Social and Economic Effects of Wage Violations: Estimates for California and New York, USDOL (December 2014)

Week of December 1, 2014

Fiscal Year 2014 Performance and Accountability Report, published by the EEOC on Nov. 17, 2014.

Employment Quote(s) of the Week

Week of December 29, 2014

"2. WHEN DO THE EMPLOYER SHARED RESPONSIBILITY PROVISIONS GO INTO EFFECT? The Employer Shared Responsibility provisions generally are not effective until Jan. 1, 2015, meaning that no Employer Shared Responsibility payments will be assessed for 2014. See Notice 2013 45. Employers will use information about the number of employees they employ and their hours of service during 2014 to determine whether they employ enough employees to be an applicable large employer for 2015. See question 4 for more information on determining whether an employer is an applicable large employer and questions 29 through 39 for more information about transition relief for 2015."

Q&A on Employer Shared Responsibility Provisions Under the ACA.

Week of December 22, 2014

"[P]laintiff's decision to knowingly flaunt the work requirement that he report to work fifteen minutes before his shift started was not protected activity but instead was insubordination. Plaintiff has provided no support for his argument that knowing refusal to report on time for work is protected activity. . . . [The FLSA's anti-retaliation provision] states that it is unlawful to discriminate against anyone who filed a complaint or instituted a FLSA related proceeding, or who testified in a proceeding or who is on an industry committee. The statutory language, therefore, protects against discrimination caused by plaintiff's complaints. The language does not protect a police officer who does not report on time for work because he is upset he is not paid for the time. Quite simply, the FLSA does not prohibit an employer from appropriately disciplining an employee who is insubordinate. If plaintiff's argument is accepted, an employer may be liable for retaliation every time it disciplined its employee. This would create chaos in the workplace."

Magistrate Judge Joel Schneider in *Zielinski v. The City of Wildwood*, 12 Civ. 7195(JS) (D. Md. Dec. 10, 2014), granting the City's summary judgment motion on the plaintiff's FLSA retaliation claim.

Week of December 15, 2014

"The Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity per se (including transgender discrimination)."

U.S. Department of Justice Attorney General Memorandum, dated December 15, 2014.

Week of December 8, 2014

"[L]ess than a quarter of [Chief HR Officers surveyed] indicated that their wellness program has significantly reduced costs at the company."

2014 Chief HR Officer Data Survey (Consero Group, Oct. 2014).

Week of December 1, 2014

"The U.S. Department of Labor today awarded $10,225,183 to 19 states to implement or improve worker misclassification detection and enforcement initiatives in unemployment insurance programs. . . . While several states have existing programs designed to reduce worker misclassification, this is the first year that the Labor Department has awarded grants dedicated to this effort."

USDOL Press Release (Sept. 15, 2014).

Contributors

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

Alden Bianchi

Erin Horton

George Patterson

Jessica Catlow

Frank Hupfl

Gauri Punjabi

Jill Collins

David Katz

Jennifer Rubin

Brent Douglas

Daniel Long

Robert Sheridan

Ann Fievet

Patricia Moran

Tyrone Thomas

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