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Recent Trends & Developments in Employment, Labor & Benefits Law

Employment Matters Monthly

APRIL 2015

A Note from the Editors

While the NCAA is gearing up for the championship game on Monday, we've had a tournament of our own on *Employment Matters* — The 2015 Employment Law Issues Bracket. At press time, our matchup for the most important employment law issue of 2015 is Wage & Hour Collective Actions vs. Noncompetition Covenants. Heading into Monday, not only will blog readers know which way the scales have tipped in our employment-focused tournament, they'll also know what to do if workplace issues arise after the NCAA bracket pools in the office wrap up.

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

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RELATED BLOGS

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March 2015 Blog Posts

U.S. Supreme Court Revives Suit Against UPS, Extending McDonnell-Douglas Burden Shifting Framework to Pregnancy Discrimination Cases

March 26, 2015

Written by Brent Douglas

The U.S. Supreme Court vacated a Fourth Circuit decision Wednesday, reviving a pregnancy bias case against the United Parcel Service brought by a former delivery driver who was denied a light-duty work accommodation while pregnant. In doing so, the Court for the first time applied the well-known *McDonnell-Douglas* burden shifting framework to these types of pregnancy discrimination cases. However, this case may have limited impact because Congress has since amended federal discrimination laws to make pregnancy-related accommodations much more likely and because states and other locales have begun to pass laws explicitly mandating pregnancy accommodations.

Continue Reading …

March 23, 2015 Marks the 5th Anniversary of the Affordable Care Act

March 23, 2015

Written by Patricia Moran

On Tuesday, March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act into law. We want to take this opportunity to share with you some highlights of the past five years, and also to thank you for following our updates and insights on this momentous law! It has been a pleasure to work with all of you and we look forward to many more years of service.

Highlights of the Affordable Care Act's First Five Years

March 23, 2010: President Obama signs the Affordable Care Act into law.

September 23, 2010: The first wave of insurance reforms takes effect, including the "age 26" coverage mandate, the prohibition on rescissions of coverage, and the ban on lifetime and annual limits. Learn more here and here.

June 28, 2012: The Supreme Court declares the ACA constitutional. Learn more here.

September 23, 2012: Summary of Benefits and Coverage requirement takes effect. Learn more here.

July 31, 2013: First PCORI fees due. Learn more here.

October 1, 2013: Exchange notices required. Learn more here.

January 1, 2014: Individual mandate takes effect.

January 1, 2014: Prohibition on pre-existing conditions takes effect. Learn more here.

January 1, 2015: Employer Shared Responsibility provisions take effect (after a one-year delay). Learn more here.

What's Next?

Early 2016: Applicable large employers and minimum essential coverage providers required to report to the IRS and provide reports to individuals. Learn more here.

2018: "Cadillac Tax" takes effect.

Continue Reading …

Webinar: Responding to Insider Data Theft and Disclosure – March 25

March 20, 2015

Written by Michael Arnold

The Privacy & Security Matters blog is hosting a monthly webinar series. Last month, Jen Rubin and Gauri Punjabi discussed privacy issues in the workplace. On Wednesday, March 25, our colleagues Jonathan Cain and Paul Pelletier offered practical advice about responding to data theft and disclosure by employees and former employees.

Discussion topics include:

- Conducting a proper investigation
- Utilizing state and local civil court processes to deter, halt and remediate data thefts
- When and how to engage local and/or federal law enforcement

Click here for the recording.

Restrictive Covenants: The Employee Choice Doctrine Explained … Yet Again

March 19, 2015

Written by Jennifer Rubin

The “employee choice” doctrine is one of those employment terms that is as misunderstood as “right to work,” “employment at will” and my personal favorite, “labor lawyer”. But a recent New York Federal court in *IBM v Smadi*, spelled it out pretty clearly: the employee choice doctrine is alive and well and has just a few simple components.

Continue Reading …

D.C. Issues Pay Notice Templates for New Wage Theft Law

March 17, 2015

Written by Frank Hupfl

The D.C. Mayor’s office recently issued employee pay notice templates that employers may use to satisfy the pay notice requirements under D.C.’s new Wage Theft Prevention Amendment Act. The Act, which took effect on February 26, 2015, requires employers, among other things, to provide written pay notices to all new employees at the time of hire, and to existing employees by May 27, 2015. The Department of Employment Services’ website has now made available a template for general employers and a template for temporary staffing firms. Employers should now move forward with providing notices to all new and existing employees, but they need only do so in English and not in the employee’s primary language unless and until the Mayor’s office releases a template in that language.

Continue Reading …

High Court Sides with DOL, Holding that Agencies May Flip-Flop on Regulatory Interpretations Without Engaging in Notice-and-Comment Rulemaking; But Questions Remain Over Judicial Deference to Those Interpretations

March 10, 2015

Written by David Katz

In June, we wrote that the U.S. Supreme Court agreed to address whether a federal agency (in this case, the Department of Labor) must engage in formal notice-and-comment rulemaking in order to significantly alter its interpretation of the agency’s regulations (in this case, a rule interpreting a particular FLSA overtime exemption). Yesterday, in a unanimous decision authored by Justice Sonia Sotomayor (with three separate opinions concurring in the judgment), the high court in *Perez v. Mortgage Bankers Association* sided with the DOL and held that the Administrative Procedure Act (APA) does not require agencies to engage in notice-and-comment procedures when flip-flopping on a previously adopted interpretation unless required by the statute being interpreted. However, several concurring opinions demonstrated that the justices remain split over the level of deference courts must provide to agency interpretations, a much larger issue that may soon come to the forefront.

Continue Reading …

D.C.’s New Law Protecting Pregnant Workers Is Now Effective

March 9, 2015

Written by Frank Hupfl

On March 3, 2015, the D.C. Protecting Pregnant Workers Fairness Act of 2014 became effective. The Act provides increased protections for pregnant workers and requires employers to provide reasonable workplace accommodations for workers whose ability to perform job functions are limited by pregnancy, childbirth, a related medical condition, or breastfeeding. The Act, which applies to all D.C. employers, contains several important components, which are briefly described below.

Continue Reading …

Daylight Savings Time Begins Sunday; When "Springing Forward" Employers Should Make Sure to Stick the Landing

March 6, 2015

Written by Dan Long

Though snow still blankets the ground in many states and winter continues to drag on, there is a telltale sign that spring is nigh: daylight savings time begins on Sunday March 8, 2015 at 2:00 a.m. At that time, the clocks "spring" forward from 2:00 a.m. to 3:00 a.m. – a change that carries several implications for employers.

Continue Reading …

Some Thoughts on Employee Appreciation Day, including a Potential Wage and Hour Pitfall

March 5, 2015

Written by Michael Arnold

"And you're wondering . . . am I appreciated . . . I'm not really appreciated, should I play like I'm appreciated, but I'm not that appreciated . . .but I think my employer might appreciate me . . . but do I want to be appreciated . .. but now my employer doesn't really appreciate me . . . and then all of the sudden I'm getting, I'm starting to be appreciated."

Jeremy Grey, Workplace Crashers (2005)

Okay, so I retooled that quote and the movie title slightly, but it still makes me laugh and certainly works as a nicer teaser to a post on Employee Appreciation Day, which is celebrating its 20th anniversary tomorrow, Friday, March 6.

Continue Reading …

Potential Shareholder Liability Arising From Subsidiary WARN Act Violations

March 3, 2015

Written by Michael Arnold

My colleagues Kevin Walsh and Eric Blythe wrote an advisory discussing *Blough v. Voisard Mfg.*, and how the corporate shield protecting shareholders from a subsidiary's WARN Act violations is not necessarily impenetrable. Indeed, the protections become increasingly suspect as the shareholders become more entangled in a subsidiary's affairs. Learn more here.

You Take the Good, You Take the Bad: NJ High Court Offers Employers Avenue to Limit Vicarious Liability in Harassment Suits; But Broadens Definition of "Supervisor"

March 3, 2015

Written by David Katz

In *Aguas v. State of New Jersey*, the New Jersey Supreme Court recently adopted an affirmative defense — available under federal law since 1998 — allowing employers to use their anti-harassment policies to limit vicarious liability under the New Jersey's Law Against Discrimination (LAD) to the employer for a supervisor's harassment. At the same time, however, the Court adopted the more expansive definition of "supervisor" used by the EEOC as opposed to the narrower definition adopted by the U.S. Supreme Court in 2013.

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2015 Employment Law Issues Tournament

2015 Employment Law Issues Tournament: The Bracket Revealed

March 12, 2015

Written by Michael Arnold

Folks, this is the postest with the mostest; the entry of the century. That's right ladies and gentlemen, employers of all industries, it's time for a little fun; it's time for the 2015 Employment Law Issues Tournament, brought to you by your friends over at Mintz Levin's Employment, Labor and Benefits practice. We couldn't think of a better way to help kick off the March Madness season than by creating an employment law issues bracket and picking the winners over the next few weeks.

Continue Reading …

2015 Employment Law Issues Tournament: First Round Results and Recaps

March 16, 2015

Written by Michael Arnold

This past weekend, while college basketball teams across America finished up their conference tournaments, 64 employment law issues played in the first round of our tournament, and boy did it live up to the hype. Filled with upsets galore and exciting finishes, employment law fans everywhere were not disappointed.

Kevin, a Human Resources professional at a Midwest-based butter sculpting company and die hard Paid Sick Leave fan even remarked: "I deal with employment madness all day, and I've simply never seen madness like this and it's Awesome with a capital A baby." Rebecca, the General Counsel at the same company as Kevin said: "I'm really not amused by this; my entire HR department is now a lost cause for the next two weeks – thank you Mintz Levin!" And then there was Marvin, the CFO at a second-tier nap pod manufacturer and distributor, who asked: "What is happening right now? Seriously, someone tell me."

We'll tell you what is happening Marv – we are trying to figure out the most important employment law issue of the day, and while there is no real answer to this question, we thought we'd take a stab at it anyway. And now, below, we are pleased to present you with the results from the round of 64, including some recaps of the best matchups.

Continue Reading …

2015 Employment Law Issues Tournament: Second Round Results and Recaps

March 19, 2015

Written by Michael Arnold

If you thought the Round of 64 was wild, then wait until you see what happened during the second round. Let's just say that some shocking upsets left many a bracket busted wide open.

Carl, the head of operations at a well-known micro-macro brewery wrote to us after round two to say that he almost fell off a barrel of their famed Williamsburg Long-Bearded Pilsner after No. 8 Wellness Programs defeated the No. 1 seed Disability Discrimination on a buzzer beater. And an excited Lisa, the owner of an inactivity tracker bracelet company, said that No. 13 Accrued But Unused PTO's win over heavily-favored No. 4 Minimum Wage, while absolutely making no sense, put her squarely in front of her colleagues in the office pool – the winner of which, coincidentally, gets a free paid day off.

But the best comment we received thus far was from Tim, a pastry chef at a bakery that features the first ever Sticky Hamamuffamonut Claw™ (which is illegal in 29 states and is comprised of a sticky bun, hamantashen, muffin, cinnamon roll, doughnut and bear claw). Tim said: "This is officially way out of control. The Mintz ELB Team has reached a level of nerdom few have surpassed. Kudos to you and the next round of Sticky Hamamuffamonut Claws™ are on the house. I will be calling you on Monday to arrange for an audit of my

employment practices, which your tournament has made me realize I clearly need to revisit."

We can now say two things with certainty: First, Tim's Sticky Hamamuffamonut Claws™ are generally delicious, and second, it's becoming harder and harder for us to figure out which employment law issue is the most important. But have no fear; we will follow through on our promise to answer that question as coverage of the 2015 Employment Law Issues Tournament continues below.

Continue Reading …

2015 Employment Law Issues Tournament: Sweet Sixteen Results and Recaps

March 25, 2015

Written by Michael Arnold

The Sweet Sixteen has come and gone and it was glorious. Streamed live over our new Apple Watches, 16 employment law issues battled it out for the right to move onto the Elite Eight, which will be held next week at Sixth Circuit Stadium in Cincinnati. The Sweet Sixteen featured some of our closest and most exciting games to date.

Before we move on though, let's quickly recap what we've learned during the first two weeks of the 2015 Employment Law Issues Tournament (previous coverage of which you can access here and here).

1. No, the Sticky Hamamuffamonut Claw™ is not actually a real pastry, but it should be, and we have made it the official sponsor of this tournament on a going forward basis.
2. Don't make your employment law bracket selections or confess your crimes while hot mic'd in a hotel bathroom.
3. Our tournament bracket is not white and gold; it is white and blue, and if you can't see that, it's on you.
4. And finally, never, ever, underestimate the ridiculousness of our readers' reactions.

For example, take Stella, SVP of Talent Management at Tabimals, the first-ever tablet made exclusively for pets. After reading our matchup analysis where the Reasonable Accommodations ran Off-the-Clock Work off the court(room), she actually emailed us a blank FMLA leave request form, told us to complete it, and then submit it to our HR department because "you all really need professional help." And Richard, the Chief Legal Officer at second-tier e-mail sarcasm translation service, added "you guys are like totally knocking this concept out of the park ;) #electroniceyerolls4eva."

Thanks Stella and Richard. Let's move on.

Continue Reading …

Workplace Challenges in 2015

Recently, Mintz Levin held a seminar in New York City that addressed some of the major challenges employers are facing in the New Year. Our program contained segments on New York City's paid sick leave law, effective management of HR Issues, the Affordable Care Act, employment practices liability insurance coverage, and workplace privacy. Over the next few weeks we will be posting a series of entries following up on the critical workplace issues raised during these segments.

Workplace Challenges in 2015, Part 5 of 5: Workplace Training Programs Remain a Critical Component to Eliminating Employment Claims

March 17, 2015

Written by Michael Arnold and Frank Hupfl

Today's topic: Making Workplace Training a Priority

During our segment on effective management of HR issues, our moderator, Andrew Bernstein of Mintz Levin, and presenters, Lisa Barse Bernstein, the Global Head of Human Resources at Apollo Global Management, LLC, Remy Nicholas, Vice President of HR at Alma Bank, and Leslie Ballantyne, Vice President, Absence Management & Employee Wellness at Memorial Sloan Kettering Cancer Center, discussed a variety of issues and challenges HR managers face in attempting to minimize exposure to employment law claims. Among the topics discussed by our panelists: ensuring compliance with the complex web of Federal, state and local employment laws, issues raised in the context of hiring, social media in the workplace, and the topic we will discuss in this post: the importance of workplace training.

Continue Reading …

Workplace Challenges in 2015, Part 4 of 5: Monitoring Wage and Hour Compliance Remains Paramount for Employers Seeking to Avoid Damaging FLSA Collective Actions

March 11, 2015

Written by Michael Arnold and George Patterson

Today's topic: ***Limited Insurance Coverage Options for Wage and Hour Claims Make Compliance Efforts All the More Necessary***

Heidi Lawson, the head of Mintz's Crisis Response, Risk Management & Executive Protection practice, and Dean Constantine, the Global Head of Employment Practices Claims in the Financial Lines Claims division of AIG Property Casualty, presented on various employment-related insurance issues. Topics included the surprising number of employers subject to employment law claims, EPLI Insurance coverage for private equity companies in connection with their portfolio companies, employer claim reporting misconceptions and obligations, and finally, the issue we address in more detail below, the continuing struggle of insurance companies to offer a viable product covering wage and hour claims.

Continue Reading …

Parts 1, 2, and 3 from this series occurred in February. Access them here!

Part 1:
New York City Paid Sick Leave Law Update …

Part 2:
Continued Focus on Social Media Policies that the NLRB Will Endorse …

Part 3:
Beware of Stop-Loss Coverage Gaps When Choosing a Self-Funded Major Medical Plan …

Relevant Posts from Other Mintz Levin Blogs

Key Takeaways from Privacy in the Workplace Webinar

March 3, 2015

Written by Michael Arnold

My colleagues Jennifer Rubin and Gauri Punjabi presented on privacy issues in the workplace in a recent webinar. They discussed the latest statutory and common law developments concerning employer monitoring of employee email, access to employee social media accounts, social media policies, and bring your own device ("BYOD") policies. They also outline key takeaways for employers. Check out the post on our sister blog *Privacy & Security Matters*.

Media Mentions

Law360: High Court UPS Ruling Means Changes to EEOC Guidance

March 27, 2015

Michael Arnold was quoted in a *Law360* article entitled *High Court UPS Ruling Means Changes to EEOC Guidance,* in which he comments on the significance (or lack thereof) of the U.S. Supreme Court's *Young v. UPS* decision where it introduced a new "significant burden" standard in pregnancy discrimination cases. The article also outlines the decision's discussion of the EEOC's updated pregnancy discrimination guidelines. Read the full article here.

MLW: New Parental Leave Act Offers More Than Gender Neutrality

March 5, 2015

Robert Sheridan was quoted in a *Massachusetts Lawyers Weekly* article entitled *New Parental Leave Act Offers More Than Gender Neutrality*, in which he explains the implications of a new parental leave law in Massachusetts for small businesses and employers generally. Read the full article here.

Law360: A Blurry Line on Employment Discrimination Protection

March 3, 2015

Angel Feng wrote a *Law360* article entitled *A Blurry Line on Employment Discrimination Protection*, in which she comments about the implications of the case *Juarez v. Northwestern Mutual Life Insurance Company* on DACA recipients and potentially for future beneficiaries of the President's November 20 executive order on immigration. The article also describes the decision's impact on employers. Read the full article here.

What We're Reading

Week of March 30, 2015

The Algorithm That Tells the Boss Who Might Quit, by Rachel Emma Silverman and Nikki Waller (Wall Street Journal, March 13, 2015)

Week of March 23, 2015

Report of the General Counsel Concerning Employer Rules, NLRB Office of the General Counsel Memorandum 15-04 (March 18, 2015)

Week of March 16, 2015

Office Pools Cost Millions, But Boost Morale, Challenger, Gray & Christmas, Inc. March Madness Report (March 11, 2015)

Week of March 9, 2015

Manon v. 878 Education, No. 13-3476(RJS) (S.D.N.Y. Mar. 4 2015) (permitting plaintiff's associational disability discrimination claims to advance to trial)

Week of March 2, 2015

Battle's Transportation, Inc., 05-CA-098088 (NLRB Feb. 24, 2015) (confidentiality agreement unlawfully chilled employees' NLRA Section 7 rights)

Employment Quote(s) of the Week

Week of March 30, 2015

"We believe paid time off is an important benefit for workers in our economy. Today we're announcing that over the next year we will make changes to ensure that a wide variety of suppliers that do business with Microsoft in the U.S. provide their employees who handle our work with at least 15 days of paid leave each year."

Microsoft's GC, Brad Smith, in a blog post entitled *"Paid time off matters: Ensuring minimum standards for the people at our suppliers"* (*Microsoft on the Issues* Blog, March 26, 2015)

Week of March 23, 2015

"Simply tendering a check and having the employee cash that check does not constitute an 'agreement' to waive claims; an agreement must exist independently of payment. Indeed, an employee may waive his rights to sue even if he does not cash a settlement check, provided that he signs a waiver of any legal claims and receives a valid check from the employer. . . . This process must also be 'supervise[d]' by the DOL."

Beauford v. ActionLink, LLC, No. 13-3265 (8th Cir. Mar. 20, 2015) (J., Melloy) (internal citations omitted) (reversing summary judgment for ActionLink because the release language on the checks was insufficient to notify employees of the consequences of cashing the checks, and the employees therefore, did not waive their FLSA claims by cashing the checks).

Week of March 16, 2015

"A person need not live as a hermit in order to be 'substantially limited' in interacting with others. . . . Thus, the fact that [the Plaintiff] may have endured social situations does not per se preclude a finding that she had social anxiety disorder. Rather, [she] need only show she endured these situations "with intense anxiety."

Jacobs v. N.C. Administrative Office of the Courts, No. 13-2212 (4th Cir. Mar. 12, 2015) (J., Floyd) (reversing summary judgment against former employee and finding that an issue of fact existed over whether the plaintiff was substantially limited in her ability to interact with others and thus disabled within the meaning of the ADA).

Week of March 9, 2015

"[The Plaintiff] cites no case holding that an employer has a duty to guess an employee's disability and force that employee to take leave, and we decline to so hold here."

Circuit Judge Gruender in *Walz v. Ameriprise Financial, Inc.,* No. 14-2495 (8th Cir. Mar. 9, 2015) (affirming summary judgment where employee did not adequately disclose her bipolar disorder nor request a reasonable accommodation).

Week of March 2, 2015

"The justification defense against a claim of tortious interference with contract may be satisfied by a defendant's good-faith reliance on advice of outside counsel, provided that the legal advice is obtained through a reasonable inquiry."

Sysdyne Corporation v. Rousslang, A13-0898 (Minn. Sup. Ct. Mar. 4, 2015) (Page, J.)

Contributors

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

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