Recent Trends & Developments in Employment, Labor & Benefits Law

Employment Matters Monthly

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A Note from the Editors

Through our Employment Matters blog, attorneys from Mintz Levin’s Employment, Labor & Benefits Practice share noteworthy information relating to employers’ complex human resource and employment law issues. In this newsletter, you will find blog posts and additional content from May 2015, 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.

May 2015 Blog Posts

Duty to Monitor Investments Extends Statute of Limitations for Fiduciary Breach Claim Says Supreme Court

Written by Ann Fievet
May 20, 2015

The Supreme Court has decided an important statute of limitations issue in an ongoing fiduciary breach case, Tibble v. Edison International. Tibble has attracted attention up to this point for its substantive claim: that plan fiduciaries breached their duty of prudence when they failed to use the plan’s status as an institutional investor to gain an edge on fund fees. Instead of offering lower-cost institutional-class mutual funds, which were available to the plan because of its pooled investment resources, the plan fiduciaries in Tibble offered 401(k) plan participants the option of investing only in retail-class funds, with higher fees and expenses that were passed on to participants.

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Lowering the Bar: Fourth Circuit Rules Single Incident Sufficient to Trigger Title VII Hostile Work Environment Claim

Written by Frank Hupfl
May 17, 2015

Out with the old and in with the new. In a decision issued last week, the 4th Circuit Court of Appeals held that a single incident of harassment was sufficient to move a harassment claim forward. This decision is certainly a win for employee-plaintiffs, and marks a stark departure from the state of the law in the Fourth Circuit for the past decade.

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Surprise! You Get to Arbitrate! Massachusetts Courts Continue to Permit Third Parties to Enforce Arbitration Agreements

Written by Jane Haviland with Bret Cohen
May 17, 2015
Two Massachusetts decisions — including one from the state’s highest court — applied the same standard regarding enforcement of an agreement to arbitrate. In each case, plaintiffs signed arbitration agreements with another party. Others that were not a party to and did not therefore sign those agreements sought the protections of the arbitration provision, and the courts required the plaintiffs in both instances to arbitrate their claims even against the non-sigantory defendants.

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**Employer’s Use of DNA Test to Catch Employee Engaging in Inappropriate Workplace Behavior Violates Federal Law, Says U.S. District Judge**

Written by George Patterson
May 14, 2015

If someone continually, yet anonymously, defecated on the floor of your workplace, you’d probably want to use any and all legal means at your disposal to identify and discipline the perpetrator. Your methods might include surveillance or perhaps some form of forensic or other testing to link the offensive conduct to a specific individual. You would probably not be overly concerned that your efforts to rid the workplace of this malefactor might give rise to a discrimination claim, but is that really a safe assumption?

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**NLRB Holds Firm on Its View That Class/Collective Action Waivers in Arbitration Agreements Violate the NLRA**

Written by Michael Arnold
May 11, 2015

Despite overwhelming judicial disapproval, the NLRB simply will not relent in its view that mandatory arbitration agreements containing class/collective action waivers violate the National Labor Relations Act.

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**Quick Update on the Obama Administration’s Efforts to Update the FLSA White Collar Exemptions**

Written by Michael Arnold
May 6, 2015

As has been widely reported, President Obama has ordered the US Department of Labor to update existing federal regulations on overtime in order to account for the changing nature of the workplace and to allow both workers and businesses to better understand and apply the exemptions. Reports have centered on the expectation that the updated regulations will, in part, increase the salary basis requirement, which will in effect allow millions of workers to qualify for time and a half pay for the first time. Today, only 12% of salaried workers fall below the current threshold whereas it was as high as 65% back in 1975.

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**Mach Mining, LLC v. EEOC: Supreme Court Holds EEOC Conciliation Efforts Are Subject to Limited Judicial Review**

Written by Robert Sheridan
May 5, 2015

In a unanimous decision, the Supreme Court said that conciliation efforts by the Equal Employment Opportunity Commission are subject to limited judicial review. Justice Kagan authored the decision in Mach Mining, LLC v. EEOC, which resolved a circuit split over (1) whether judicial review of EEOC conciliation efforts was permitted and (2) if so, the scope of this judicial review. This post will briefly summarize the background of the case, examine the Court’s analysis and conclusions, and then offer some employer takeaways.

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Massachusetts Attorney General’s Office Issues Much-Anticipated Proposed Regulations on Massachusetts Sick Time Law
Written by Jill Collins
May 5, 2015
The Massachusetts Attorney General’s Office has issued proposed regulations to the Massachusetts Earned Sick Leave Law, which was approved by voters in November 2014 and goes into effect on July 1, 2015 – less than two months from now. The proposed regulations, available here, address a number of key issues regarding when and how employees will accrue and may use sick leave under the law.

These Taxi Drivers Are Not Employees Says Massachusetts Supreme Judicial Court
Written by Jessica Catlow
May 5, 2015
We have been following the high-publicity battle between Uber and Lyft, on the one hand, and the drivers on the other, over whether the drivers are properly classified as independent contractors. Uber and Lyft argue they are mere technology companies facilitating the connections between drivers and would-be passengers. The drivers say they are employees of the companies because the companies exercise significant control over how they provide the taxi services. However, it appears that disputes over proper classification of taxi drivers are not unique to Uber and Lyft.

U.S. Department of Labor Re-Purposes Rules Governing the Definition of “Fiduciary”

Part 1: The Rule and Its Exceptions
Written by Alden Bianchi
May 14, 2015
The U.S. Department of Labor recently issued proposed regulations that make sweeping changes to the definition of the term “fiduciary” under the Employee Retirement Income Security Act (ERISA). To call this proposal controversial is an understatement. The proposed regulations pit the Department of Labor’s mission to protect retirement income against entrenched compensation practices of the behemoth U.S. financial services industry, practices that will be largely uprooted with respect to retirement plans and IRAs if the proposed regulations become law. Caught in the middle are retirement plan participants and Individual Retirement Account (IRA) investors who seek nothing more than reliable advice in an effort to save for a secure retirement.

Part 2: The “Best Interest Contract” Exemption
Written by Alden Bianchi
May 19, 2015
In Part 1 of this series, we reported on recently proposed regulations issued by the U.S. Department of Labor amending the definition of the term “fiduciary” under the Employee Retirement Income Security Act (“ERISA”) and the Internal Revenue Code (the “Code”). This post will examine a key feature of the Department’s proposed regulatory scheme — the “Best Interest Contract” exemption — that allows advisers to small retirement plans and IRA investors to receive commission-based compensation without triggering a fiduciary breach or incurring excise tax exposure under rules governing prohibited transactions.
Part 3: The Impact on Large Retirement Plans
Written by Alden Bianchi
May 27, 2015

In Part 1 of this series, we reported on recently proposed regulations issued by the U.S. Department of Labor amending the definition of the term “fiduciary” under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (the “Code”). Part 2 of the series covered a key feature of the Department’s proposed regulatory scheme — the “Best Interest Contract” Exemption — that allows advisers to small retirement plans and IRA investors to receive commission-based compensation without triggering a fiduciary breach or incurring excise tax exposure under rules governing prohibited transactions. This post focuses on the proposal’s impact on large plans, i.e., plans with more than 100 participants or more than $100 million in assets.

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What We’re Reading

Week of May 25, 2015

For Hackers, People Are an IT system’s Weak Link, by Priyanka Dayal McCluskey and Deirdre Fernandes (Boston Globe, May 13, 2015)

Week of May 18, 2015

NLRB Office of the General Counsel Advice Memorandum (Released May 11, 2015) (advising on the joint employer standard)

Week of May 11, 2015

This is the latest way employers mask age bias, lawyers say, by Vivian Giang (Fortune, May 4, 2015)

Week of May 4, 2015

An HR Perspective: Affordable Care Act (‘ACA’) reporting survey results, conducted by PwC and Equifax (April 2015) (Only 10% of employer have implemented a solution to comply with ACA reporting requirements.)

Employment Quote(s) of the Week

Week of May 25, 2015

“If we try to do everything, we can't do anything. That's why we have the strategic enforcement plan.”

Peggy Mastroianni, EEOC Legal Counsel, at Minnesota CLE's Upper Midwest Employment Law Institute (May 20, 2015)

Week of May 18, 2015

“We now vacate the judgment of the district court and remand for further proceedings on [plaintiff’s]. In so doing, we underscore the Supreme Court’s pronouncement in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), that an isolated incident of harassment, if extremely serious, can create a hostile work environment. We
also recognize that an employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone.”


Week of May 11, 2015

“Despite Wal-Mart’s reshaping of the class action landscape, we hold that the district court has for a second time erred in refusing to certify the workers’ class, where (1) statistics indicate that promotions at Nucor depended in part on whether an individual was black or white; (2) substantial anecdotal evidence suggests discrimination in specific promotions decisions in multiple plant departments; and (3) there is also significant evidence that those promotions decisions were made in the context of a racially hostile work environment.Against that backdrop, the district court fundamentally misapprehended the reach of Wal-Mart and its application to the workers’ promotions class.”


Week of May 4, 2015

“[W]e hold that an employer’s forbearance in exercising its right to terminate an at-will employee constitutes lawful consideration for a restrictive covenant. Although, theoretically, an employer could terminate an employee’s employment shortly after having the employee sign a restrictive covenant, the employee would then be protected by other contract formation principles such as fraudulent inducement or good faith and fair dealing, so that the restrictive covenant could not be enforced.”


Contributors

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