

LABOR, EMPLOYMENT AND EMPLOYEE BENEFITS

Labor Law | Employment Litigation | Human Resource-Related Advice and Training
Employee Benefits and Executive Compensation

Labor, Employment and Employee Benefits

Attorneys in Mirick O'Connell's Labor, Employment and Employee Benefits Group represent private and public employers in all facets of labor and employment law, including employment litigation, grievance arbitration, collective bargaining, human resource-related advice and training and employee benefits. We represent clients in industries ranging from health care to banking and finance; from education to life sciences; from high technology to manufacturing; and from construction to insurance. In addition, we have extensive experience representing government entities and municipalities.

Labor Law

Our attorneys have extensive experience in negotiating collective bargaining agreements, having successfully negotiated hundreds of agreements over the past 30 plus years. We also routinely handle union representation matters, defend our clients against unfair labor practice charges before the National Labor Relations Board and the Massachusetts Division of Labor Relations, and represent our clients at arbitration in both the public and private sector. In addition, we advise non-unionized clients that are being targeted by organizing drives, and we assist unionized clients with strike-contingency planning.

Employment Litigation

We have an extensive track record of success in the defense of wrongful termination claims, workplace torts and employment litigation, including claims of sex, age, race, sexual orientation and disability discrimination and retaliation. We appear regularly on behalf of employers in state and federal courts and before the Massachusetts Commission Against Discrimination, the Equal Employment Opportunity Commission, the Civil Service Commission, and the State Ethics Commission. We also have extensive experience in the litigation of wage and hour disputes and in the enforcement of non-disclosure, non-competition and non-solicitation agreements.

Representative Matters:

- Successfully defended an office solutions company in the U.S. District Court against a race discrimination claim brought by a regional sales manager. The plaintiff had rejected a settlement offer of several hundred thousand dollars before proceeding to trial
- Obtained a high-seven-figure award for our minority shareholder client following a jury-waived trial for "freeze-out" in Worcester Superior Court. This was one of the few cases in which the Court ordered the repurchase of a minority shareholder's stock interest in the company at a percentage of the company value without any discount for marketability or minority interest
- Successfully defended an automobile dealership and leasing company in Middlesex Superior Court against age discrimination claim brought by a former sales manager
- Secured preliminary and permanent injunctions in the Business Litigation Session of the Suffolk Superior Court on behalf of a nano-particulate business against a former chief chemist for trade secret misappropriation
- Successfully defended a warehouse and bulk supplier in Bristol Superior Court in separate age discrimination and workers' compensation claims brought by a driver and a warehouse worker, respectively
- Successfully defended an accounting firm against a pregnancy discrimination claim brought by an accountant in Worcester Superior Court



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**Excellence in our work.
Excellence in client service.
Excellence in value.**

Employment Litigation (Representative Matters - continued)

- Obtained a summary judgment in favor of our accounting firm client in a disability discrimination claim in the U.S. District Court. On appeal, dismissal was affirmed by the U.S. Court of Appeals for the First Circuit
- Obtained a summary judgment in favor of our aerospace manufacturing client in a race discrimination claim in the U.S. District Court. The plaintiff's appeal was dismissed by the U.S. Court of Appeals for the First Circuit
- Obtained enforcement of a non-competition agreement on behalf of an educational software company, resulting in the removal of a former executive from a competitor's workforce and the recoupment of attorneys' fees
- Successfully defended multiple executives facing numerous counts of discrimination, wrongful termination, and whistleblower retaliation in federal court. The case was won with an initial motion to dismiss prior to discovery
- Successfully defended a municipality facing breach-of-contract claims in federal court following termination of an employee's contract for poor performance. The case was won prior to summary judgment based on admissions by the plaintiff at her deposition
- Successfully defended a major medical institution facing breach-of-contract claims, intentional interference with contractual relations and defamation in federal court. The case was won with an initial motion to dismiss prior to discovery
- Successfully defended a service provider and its executives against age discrimination claims. The case was won based on admissions obtained at the plaintiff's deposition

Human Resource-Related Advice and Training

Our attorneys advise clients on a broad range of human resource-related issues. In addition, we conduct client training and offer seminars addressing the myriad employment-related issues that HR professionals face. Our advice and training cover the following topics:

- Managing employee discipline
- Administering leaves of absence under the FMLA and ADA
- Conducting reductions in force and layoffs
- Ensuring compliance with the WARN Act in the event of a mass layoff or plant closing
- Implementing effective personnel policies and employee handbooks
- Preventing Sexual harassment
- Training Supervisors
- Administering affirmative action programs and audits
- Implementing wage and hour classification and audits
- Implementing independent contractor classification
- Complying with OSHA
- Conducting hiring and pre-employment drug testing
- Performing background checks

In addition, our attorneys assist clients in reviewing and drafting job applications, offer letters, employment agreements, independent contractor agreements, severance agreements, employee handbooks and restrictive covenants designed to protect the employer's intellectual property (including confidential and proprietary information) and to safeguard against unfair competition or raiding of its customers or employees.

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Employee Benefits and Executive Compensation

The Employee Benefits and Executive Compensation Group advises clients with respect to designing and implementing the following:

- Executive compensation plans, including SERPs, top-hat plans, and 457(b) and 457(f) plans, as well as counseling regarding Section 409A compliance and executive compensation disclosure under the new proxy rules
- Tax-qualified retirement plans, including 401(k), 403(b) and 457 plans, defined benefit plans, and ESOPs
- Welfare benefit plans, including health reimbursement arrangements, section 125 cafeteria plans, Health FSAs, DCAPs and “wrap” plans, as well as counseling regarding the implementation of HSAs, wellness plans, severance plans and claim administration
- Fringe benefit plans, including transportation and educational assistance plans

We also advise clients with respect to the day-to-day administration, operation and interpretation of executive compensation and workforce benefit plans; the legal compliance, reporting and disclosure requirements related to such plans; and the administrative procedures required to administer such plans.

We provide counsel regarding HIPAA's portability, privacy and security rules; COBRA; USERRA; FMLA; Medicare and other group health plan federal mandates, as well as new legislation affecting welfare plans, including the Genetic Information Nondiscrimination Act of 2008, Michelle's Law and the Children's Health Insurance Program Reauthorization Act of 2009. We also provide counseling regarding the Massachusetts Health Care Reform Act and the related federal tax implications of extended health coverage for those who are not “dependents” under federal tax law.

We also advise clients with respect to the following:

- Designing a fiduciary governance structure to manage ERISA fiduciary liability risk and counseling fiduciaries regarding their ERISA duties and the prohibited transaction rules
- Planning audits for legal compliance
- Correcting plan failures under the IRS and DOL voluntary correction programs
- Periodically reviewing management compensation arrangements and compliance with intermediate sanctions
- Conducting negotiations and due diligence related to executive compensation and workforce benefit plans in business mergers, initial public offerings, acquisitions and dispositions, including multi-employer withdrawal liability
- Handling executive compensation and workforce benefits issues arising in bankruptcy transactions

We have extensive experience practicing before federal agencies, including the Internal Revenue Service, the DOL and the Pension Benefit Guaranty Corporation, as well as in state and federal courts. We have served as special counsel for companies, other law firms and accounting firms providing executive compensation and workforce benefits advice, and we work with our Trusts and Estates Group, advising clients on the complex income, excise and estate tax rules governing plan distribution to estates and individuals.

Representative Matters:

- Counseled for-profit and not-for-profit employers regarding the new COBRA premium assistance subsidy rules under The American Recovery and Reinvestment Act of 2009 and the expansion of the HIPAA privacy and security rules; developed a legal compliance strategy, drafted documents and designed compliance practices and procedures
- Counseled for-profit and not-for-profit employers regarding the impact of the Children's Health Insurance Program Reauthorization Act of 2009 on their welfare benefits plans; developed a legal compliance strategy; and drafted amendments of health care and section 125 cafeteria plans for board approval
- Counseled for-profit employers regarding their claims procedures for handling claims of breach of fiduciary duty related to their tax-qualified retirement plan, including an ESOP

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Employee Benefits and Executive Compensation (Representative Matters - continued)

- Counseled for-profit and not-for-profit employers regarding the impact of IRC 409A on their non-qualified deferred compensation arrangements, separation pay agreements and change of control agreements; develop a legal compliance strategy and draft related documentation for board approval
- Counseled for-profit and not-for-profit employers regarding the Massachusetts Health Care Reform Act, including counseling related to the employer "fair share" contribution, the "free rider surcharge" and the employer and employee HIRD forms; developed a legal compliance strategy and drafted related documentation for board approval
- Counseled for-profit and not-for-profit employers regarding operational or plan defects related to their tax-qualified retirement plans, developed a legal compliance strategy and submitted voluntary compliance filings to the IRS under its Employee Plan Compliance Resolution System
- Counseled for-profit and not-for-profit employers regarding failure to file Annual Return/Report (Form 5500) on time, developed a legal compliance strategy and submitted filings to the DOL under its Delinquent Filer Voluntary Compliance Program
- Counseled a for-profit plan sponsor regarding action required to "freeze" its defined benefit pension plan; drafted documents and submitted plan to the IRS for a determination letter
- Counseled for-profit plan sponsors regarding action required to terminate 401(k) plans and terminate defined benefit pension plans; drafted documents and submitted the plan to the IRS for a determination letter
- Counseled for-profit and not-for-profit employers with respect to the amendments required to conform their tax-qualified retirement plans to the Heroes Earnings and Assistance and Relief Act of 2008; the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007; and the Pension Protection Act of 2006; also developed a legal compliance strategy, drafted related amendments for board approval and submit for-profit tax-qualified retirement plans to the IRS for a determination letter
- Developed and implemented a fiduciary governance structure for a for-profit employer to manage ERISA fiduciary liability risk

Education Law

The attorneys in the Education Law Group counsel and represent public and private schools and colleges on issues related to policies, compliance, discrimination, student rights and school construction and project financing. We provide ongoing advice to our clients regarding federal and Massachusetts laws that affect educational administration, and we assist school administrators in effectively delivering educational services in an increasingly demanding legal environment.

We also advise our public and private educational clients on labor and employment issues, including collective bargaining, personnel issues, grievance arbitration, unfair labor practices and the negotiation of employment agreements with school administrators. In addition, we represent educational clients in governmental investigations and defend against charges before state and federal administrative agencies, including the Massachusetts and federal departments of education, the National Labor Relations Board and the State Division of Labor Relations, the Massachusetts Commission Against Discrimination, the Equal Employment Opportunity Commission and the U.S. Department of Labor, as well as before state and federal courts.

We counsel school clients in the complexities of disciplining students, drafting student handbooks and interpreting the Education Reform Act. Our attorneys also review school committee policies, student codes of conduct and policies under the Drug-Free Schools and Communities Act and provide advice on students' participation in athletic and other extracurricular activities.

Massachusetts legal requirements related to public school construction, innovation and repair are complex and frequently amended. Our attorneys counsel public school clients on projects ranging in scope from new school design and construction to general purchasing matters.

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