



## SUMMER 2022 NEWSLETTER

*Many thanks to our clients, colleagues, and friends for their confidence, trust, and support over the last 16 years.*

### ANNOUNCEMENTS



K&S is pleased to welcome Rachel Eisenhaure & Greg Vanden-Eykel to the Firm.

[Rachel Eisenhaure](#) has experience navigating disputes in all postures. A fearless advocate, her extensive appellate experience gives her confidence in approaching novel issues in the law. Rachel has extensive and diverse civil litigation experience in both state and federal court in areas including predatory lending, real estate and foreclosure, insurance coverage, employment law, and business litigation.



[Greg Vanden-Eykel](#) is an employment lawyer who counsels companies on all aspects of the employer-employee relationship. Often serving as outside general employment counsel, Greg guides management in all employment related needs including contracts, employee handbooks, personnel policies, non-competition agreements, workplace safety, employee discipline, and hiring and terminations.

Welcome to the team, Rachel & Greg!

Partner [J. Nathan Cole](#) has been recognized by The BTI Consulting Group as a Client Service All-Star for 2022. Nate was one of only 36 attorneys selected nationally for this recognition in the Business Litigation category. The award honors attorneys delivering notably high-level client service. Those recognized were nominated by 350 in-house corporate counsel at large organizations with \$700 million or more in revenue. Congratulations, Nate!

Read more here: <https://lnkd.in/ghBGme3z>.



[Michael P. Dickman](#) & [Emyr T. Remy](#) graduated from the Massachusetts Bar Association's Leadership Academy on May 16, 2022. Individuals chosen for the MBA Leadership Academy participated in monthly panel discussions with community and bar leaders. After successful completion of the academy's curriculum of educational programming and mentoring, MBA Leadership Academy graduates will be better prepared to assume leadership roles at the bar, in their firms or organizations, and in government. Congratulations Mike & Emyr!

Read more here: [https://lnkd.in/gWjz\\_mdj](https://lnkd.in/gWjz_mdj)

## CLIENT VICTORIES

[Mike Sams](#) and [Michael P. Dickman](#) recently obtained insurance coverage and reimbursement of all fees incurred in defending against a personal injury lawsuit. K&S represented a developer, which has a separate entity that performs its construction work. A plaintiff claimed to have slipped and fallen on snow and ice around the development area and sued the developer. To trigger insurance coverage for the developer, K&S filed a third-party complaint against the developer's construction entity based on an indemnification provision of the construction contract. Despite this, the construction entity's insurer repeatedly denied coverage. K&S subsequently sent a letter pursuant to G.L. c. 93A/176D, the statute protecting against unfair claims practices, demanding immediate coverage and reimbursement of all legal fees and costs. The insurer eventually agreed to our demands and reimbursed the developer for all costs incurred since the lawsuit was filed.





[Mike Sams](#) won a motion to enforce a settlement. After settling a case in which the opposing side agreed to dismiss its counterclaim and pay our client, the opposition attempted to add conditions/contingencies to the agreement. K&S eventually went to the court and successfully argued that the original agreement was binding. The court ordered enforcement of the settlement in a detailed 12 page order.



[J. Nathan Cole](#) and [Alex Zwillinger](#) successfully resolved a case brought against their client, a subcontractor, by a general contractor over an alleged violation of a non-solicitation agreement. When suit was filed against the Firm's client, the general contractor demanded damages exceeding \$10M. The Firm brought counterclaims against the GC,

alleging damages of its own for unpaid work performed on various projects. In a significant turn of events, K&S was able to secure payment to its client for close to \$100,000 for its unpaid invoices and had all claims against the Firm's client dismissed.

## ARTICLES OF INTEREST

### COMPLEX COMMERCIAL LITIGATION



#### **Businesses Beware: Certain Financing Products Contain Sham Clauses Leading to Default**

By: [Rachel J. Eisenhaure, Esq.](#)

Businesses looking to access capital have several options in today's environment, from traditional bank loans to alternative financing arrangements. In a traditional receivables sale (or factoring agreement), a business sells an existing debt at a discount and transfers the risk of collection to the buyer: the business gets immediate cash, and the buyer potentially profits on collection. One riff on the traditional discounted sale of receivables is the merchant cash advance: an arrangement where instead of buying an existing debt, a merchant cash advance company buys a percentage of future receipts. But not all merchant cash advances are what they seem.

[Read More Here](#)

### CONSTRUCTION LAW & LITIGATION



## **Construction Law Update: Massachusetts Appeals Court Enforces the Massachusetts Prompt Pay Act, G.L. c. 149, § 29E**

By: [Anthony Fioravanti, Esq.](#)

As we reported last month, the Massachusetts Appeals Court recently affirmed a trial court's decision that construed the requirements of the Massachusetts Prompt Pay Act, G.L. c. 149, § 29E. That decision was the first appellate court opinion interpreting the Act and its requirements for rejections of pay applications.

[Read More Here](#)

## **EMPLOYMENT LAW & RISK MANAGEMENT**



## **Employer on the Hook for Treble Damages for Failure to Pay Earned Vacation on Employee's Termination Date - And Paying Wages Before Employee Files Complaint is No Excuse**

By: [David R. Kerrigan, Esq.](#) & [Michelle De Oliveira, Esq.](#)

A recent decision by the state's highest court has reinterpreted the Massachusetts Wage Act's damages calculation for a late wage payment to a discharged employee, holding that an employer that does not pay earned wages in full on an employee's termination date is liable for treble damages, attorney's fees, and costs regardless of whether the employer pays the employee in full before the employee files a complaint. This case has significant consequences for employers moving forward.

[Read More Here](#)



---

## **The FLSA Preempts Massachusetts' Wage Act When the FLSA Provides the Sole Basis for an Employee to Recover Unpaid Overtime Wages**

By: [Gregory Vanden-Eykel, Esq.](#)

On April 14, 2022, the Massachusetts Supreme Judicial Court ("SJC") issued a nuanced and limited decision in *Devaney v. Zucchini Gold*,



LLC holding that the Fair Labor Standards Act (“FLSA”) is the sole statutory scheme under which Massachusetts restaurant employees can recover damages related to their employer’s failure to pay overtime wages. The SJC held that under the circumstances before the Court, the FLSA preempts the Massachusetts Wage Act (“Wage Act”), and employees are not entitled to the treble damages and attorneys’ fees available under the Wage Act. This decision, however, is limited in its application.

[Read More Here](#)

---



**Employees Have a Statutory Right to Rebut Information Placed in Their Personnel Records and Cannot Be Terminated or Retaliated Against for Exercising Their Right**

By: [Laura M. Raisty, Esq.](#) & [Julianne C. Fitzpatrick, Esq.](#)

The Massachusetts Supreme Judicial Court (“SJC”) ruled in *Meehan v. Medical Information Technology, Inc.*, 488 Mass. 730 (2021) that an employee cannot be discharged for submitting a written rebuttal to information placed in their personnel file.

[Read More Here](#)

---



**Massachusetts Federal Court Awards Employer \$1.6 Million for Ex-Employee’s Non-Compete Breach**

By: [Andrew M. Winston, Esq.](#)

On March 28, 2022, the U.S. District Court for the District of Massachusetts ruled an ex-employee of a medical products manufacturer owes the company \$1.6 million for his breach of a non-compete agreement. In *NuVasive, Inc. v. Day*, the Court held the Defendant, Timothy Day (“Day”), responsible for the lost profits he



caused to the Plaintiff, NuVasive, Inc. ("NuVasive"), by luring away its customers in breach of non-compete and non-solicitation agreements.

[Read More Here](#)

---

### Employers: The Time Is Ripe For Management Training

By: [Michelle De Oliveira, Esq.](#)



Employment law is constantly changing as courts issue groundbreaking decisions and new statutes are enacted at both the state and federal level. For this reason, the importance of regularly conducting employment-related risk management trainings for a company's management team has become critically important.

[Read More Here](#)

## FIRM HAPPENINGS

[Mike Sams](#) and [Michelle De Oliveira](#)

co-authored The Massachusetts Independent Contractor chapter in the MCLE's 5th Edition 2020, with 2022 Supplement of Massachusetts Employment law. The chapter provides a detailed overview of the independent contractor statute, M.G.L. c. 149, §

148B, and highlights noteworthy cases in the independent contractor arena. This is a terrific resource and tool for lawyers to access and utilize. The Massachusetts Continuing Legal Education, Inc. (MCLE | New England) book link may be accessed here: <https://lnkd.in/e8R7SX6>.



[Alexander R. Zwillinger](#) was quoted in Massachusetts Lawyers Weekly, weighing in on a recent decision concerning the medical records privilege in emotional distress cases.

Read more here: <https://lnkd.in/gUQB3wJM>

---

[Anthony Fioravanti's](#) client alert, entitled, *Construction Law Update: Massachusetts Appeals Court Enforces the Massachusetts Prompt Pay Act, G.L. c. 149, § 29E* was

published in Associated Subcontractors of Massachusetts newsletter.

To read the full article, please click here: <https://lnkd.in/gkAhR8cQ>



[Michelle De Oliveira](#) was quoted in Massachusetts Lawyers Weekly regarding a Middlesex Superior Court decision involving workplace discrimination claims.

Read more here: <https://lnkd.in/gvAKqzez>

## SPEAKING ENGAGEMENTS

On April 13, 2022, [J. Nathan Cole](#) presented on negotiating and drafting liquidated damages and how to ensure LD provisions are enforceable. He spoke to members of the Massachusetts Defense Lawyers Association (MassDLA). For more information, click here: <https://lnkd.in/ebUkKWM3>

On May 4th, [Laura Raisty](#) served on a panel of experienced employment law practitioners at the Boston Bar Association's Virtual CLE: *Keeping Up with the Wage Act*. Laura and her co-panelists discussed the latest developments under the Wage Act, including recent important decisions by courts in this constantly evolving area of the law, which warrant careful attention from practitioners, employers, and employees alike. For more details, please click here: <https://lnkd.in/e8a2gUVz>

On May 12, 2022, [Christopher A. Kenney](#) presented on *How to 'Win' At Mediation* to members of the Massachusetts Defense Lawyers Association's Young Lawyers Division. Chris discussed how counsel can best present their cases at mediation, focusing on logistics, planning, and preparation. To read more, click here: [https://lnkd.in/gT9\\_ZEF](https://lnkd.in/gT9_ZEF)

[Michelle De Oliveira](#) co-chaired the Massachusetts Bar Association's 43rd Annual Labor & Employment Spring Conference, and moderated a panel on *COVID-19's Everlasting Impact in the Workplace: Vaccine Mandates, Returning to the Office, Managing Remote Work, Reasonable Accommodations & Interjurisdictional Employers*. For more details, click here: <https://lnkd.in/gWeR9xRe>

On June 3rd, [Michael P. Dickman](#) presented on *Artificial Intelligence and Its Impact on Legal Practice: Now and Moving Forward* at the Massachusetts Defense Lawyers Association Annual Meeting. For more information, click here: <https://lnkd.in/gNZJUUMH>

[Michelle De Oliveira](#) presented at Massachusetts Continuing Legal Education, Inc. (MCLE | New England)'s *What All Law Firm Managers Need to Know About Employment Law* on June 16, 2022. Michelle was joined by co-panelist, Andrea Zoia. Together, they discussed the rapidly changing legal landscape with hybrid work becoming the norm and the implications that this has on managing the workplace. They covered a wide range of topics applicable to law firm work environments and gave a roadmap to successfully navigate these challenges in compliance with applicable law and in accordance with best practices. For more details, please click here: [https://lnkd.in/g\\_hniDNU](https://lnkd.in/g_hniDNU)

Mike Sams, Paul Patalano and Jordan Tirone presented in Associated Builders and Contractors of Massachusetts's webinar *Contract "Gotchas" - Protecting Yourself When Negotiating Construction Contracts*. They shared their insight into what to watch out for when negotiating construction contracts to ensure your firm stays out of any trouble from "Gotcha" clauses. Mike discussed the value of taking the time to review your contracts to avoid potential legal issues should complications from a poorly negotiated contract arise, and Jordan and Paul covered what they see from the insurance perspective in the same instance. For more information, click here: <https://lnkd.in/gSiw6Tt>

## WHAT CLIENTS ARE SAYING

*"I just want to thank you for your commitment these past few weeks to making all of this happen. Michelle and Nathan have been outstanding lawyers throughout this case and have advocated for me in ways that I didn't think were possible. I want to say that I am forever grateful."*

## WEBINARS



**KENNEY  
& SAMS**

### WEBINARS

## 30 Minute Construction Risk Series

K&S continues to offer our clients substantive updates on key issues affecting the construction industry. Join us live at one of our upcoming webinars or if you missed any, you can view past webinars here: <https://kslegal.com/webinars/>

### PREVIOUSLY RECORDED WEBINARS:

- **Mastering Prompt Pay Traps and Obligations**  
by [Anthony Fioravanti](#) & [Alexander Zwillinger](#)
- **Key Issues in Public Construction - Bid Protests & Payment Bond Claims**  
by [Mike Sams](#) & [Drew Colby](#)

In preparation for this next year's webinar series, we are looking for input on topics. If you have any topic requests to be covered in 2022, please contact [Drew Colby](#) at [dwcobly@kslegal.com](mailto:dwcobly@kslegal.com).

## GET TO KNOW YOUR K&S TEAM MEMBER: RACHEL EISENHAURE



### **Best advice you were ever given as a professional:**

Facts are important. When I was a very young lawyer, I drafted an appellate brief about whether the residual clause of the dangerousness statute was intended to include the crime of possessory gun offenses. (Note: the application of the dangerousness statute to possessory gun offenses has changed since the time of this story.) The law was clear: whether a particular crime fell within the residual clause of the dangerousness statute should not turn on the facts of the given case. In other words, the question was simply whether the legislature intended *any* possessory gun offense to trigger a dangerousness hearing, not how whether the facts of this case presented a danger. Obedient to the rubric, I argued only the abstract question and left off any discussion of the facts of the instant case. A more experienced lawyer critiqued this approach: in *this* gun possession case, the handgun was concealed in the sheets of a baby's crib. He pointed out that, even within a categorical approach, there is room for the facts of the case because they expand our imagination as to what is possible in the abstract.

### **Favorite part about working for K&S:**

K&S has a passionate and skilled team. Every member of the team brings a positive can-do attitude to the workplace every day.

### **Best non-legal job you've ever had:**

Before having children, I used to volunteer playing music. I played piano during dinner hour in a nursing home as a teenager. As an adult, I would play the harp for fundraisers and other community events.

### **Something we may not know about you:**

You can lose me for hours in large jigsaw puzzles.



[Unsubscribe {recipient's email}](#).

[Update Profile](#) | [Constant Contact Data Notice](#)

Sent by events@kandslegal.com powered by



Try email marketing for free today!

---