



NEWSLETTER

- Winter 2023 -

Many thanks to our clients, colleagues, and friends for their confidence, trust, and support over the last 17 years.

ANNOUNCEMENTS

K&S is pleased to announce the promotions of J. Nathan Cole and Greg Vanden-Eykel



Kenney & Sams, PC proudly announces that J. Nathan Cole has been elected a Shareholder of the firm.

Nate has been practicing at K&S since 2016 and has served on the firm's Council of Directors. Nate currently serves on the Board of Directors for the Massachusetts Defense Lawyers Association ("MassDLA") where he is Chair of the Construction Law Committee. Nate is also Chair of the International Association of Defense Counsel's ("IADC") Construction Law and Litigation Committee.

In 2022, Nate was named to Boston Magazine's Top Lawyers List (Construction), recognized in The Best Lawyers® in America (Commercial Litigation and Personal Injury), named to the Massachusetts Super Lawyers® list (Business Litigation), and recognized by BTI Consulting Group as a Client Service All-Star.

Nate represents clients in construction, business, and employment-related litigation in the Commonwealth and throughout New England. He frequently presents to industry groups and bar associations on risk management, construction, and insurance matters.

Greg Vanden-Eykel has been promoted to Partner. This is a direct result of Greg's hard work, outstanding accomplishments, and dedication to the firm.

Greg is an experienced litigator and counselor representing businesses, schools, and individuals in a wide array of employment, construction, education, and general litigation matters in Massachusetts and Rhode Island. Prior to joining Kenney & Sams, Greg was a partner at a full-service law firm with offices throughout the northeast.



Greg has repeatedly been named to the Massachusetts Super Lawyers® list as a Rising Star in Civil Litigation and is regularly asked to present on employment, litigation, and education topics by industry and trade organizations.



Kenney & Sams is proud to announce that [Nate Cole](#), [Chris Kenney](#), and [Mike Sams](#) have been included in Boston Magazine's 2022 "Top Lawyers" list, which recognizes the top law professionals in Greater Boston.

For more details, please click [here](#).

[Mike Sams](#) received the David V. Wilson Award from the Defense Research Institute's Construction Law Committee at its Annual Conference in January. The award was presented to Mike as the Committee's Lawyer of the Year in recognition of his years of service, achievement and leadership.



Kenney & Sams was recently recognized as "Frequently Recommended" in the **BTI Most Recommended Law Firms 2022** report compiled by BTI Consulting Group, Inc. K&S was one of only 77 law firms nationally that received the "Frequently Recommended" ranking. Firms in this category "separate themselves by exceeding client expectations, earning the coveted unprompted client recommendation."

BTI's Most Recommended Law Firms 2022 draws on data collected in BTI's ongoing Annual Survey of General Counsel. The report is based on responses from more than 340 top legal decision makers surveyed between March 2022 and September 2022.

The full BTI Most Recommended Law Firms 2022 report can be found [here](#).

CLIENT VICTORIES

[Anthony Fioravanti](#)

and [Mike Sams](#)

obtained a \$2.7 million separate and final judgment for a general contractor client after moving for summary judgment based on the



project owner's violations of M.G.L. c. 149 § 29E, the Massachusetts Prompt Payment Act. In entering separate and final judgment, the Superior Court relied upon the recent Massachusetts Appeals Court decision in *Tocci Bldg. Corp. v. IRIV Partners, LLC* and focused on the owner's failure to timely respond to pay applications and, when the owner did respond, its failure to certify those responses as having been made in good faith.



[Nate Cole](#) and

[Brittany Darcy](#)

recently defeated an opposing party's motion to dismiss in a case currently pending in the United States District Court for the District of Massachusetts.

Our client, a European computer-aided designer (CAD) working in the construction industry, sued a Massachusetts-based software designer for breach of contract, breach of the covenant of good faith and fair dealing, breach of warranty, misrepresentation, and violations of the Massachusetts Consumer Protection Statute, Chapter 93A, § 11. The parties transacted using an online third-party platform that functions as a digital marketplace, connecting customers with freelancers from across the world.

The defendant software designer, citing to an arbitration agreement in the online marketplace's terms of service, argued that the claims must be arbitrated and moved to dismiss the lawsuit. The defendant also argued that our client had impliedly waived its claims when it made periodic payments using the online marketplace's payment platform. Nate and Brittany successfully argued that the mere act of having made periodic payments, absent express contractual language, did not constitute a waiver of claims and that the online platform's limited arbitration provision did not apply. The court agreed and denied the defendant's motion to dismiss and ordered our client's lawsuit to proceed. K&S prevailed and our client will have its day in court.

ARTICLES OF INTEREST

BUSINESS LITIGATION

Liquidated Damages Provisions Are Powerful, But Only If They Are Enforceable

By: [Alexander R. Zwillinger, Esq.](#)

The goal of any contract is predictability. The parties want to know from the outset what their rights and obligations are, what they need to do,



and what they can expect from the other side. To that end, a well-drafted contract will be clear, unambiguous, and thorough about each side's promises and expectations. It will consider and address in advance as many risks and contingencies as possible.

[Read More Here](#)

CONSTRUCTION & REAL ESTATE LITIGATION

Unique Situations Confronting Contractors Seeking Liens In the Commonwealth

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

The Massachusetts Mechanic's Lien Statute, Mass. G.L. c. 254, enables general contractors and subcontractors to attach properties for which they have supplied labor and/or materials to secure payment for their work. Although the basic parameters of obtaining a lien are familiar to most contractors in the Commonwealth, there are unique and unfamiliar situations that complicate, or bar entirely, obtaining a lien on a property.



[Read More Here](#)

EMPLOYMENT LAW & RISK MANAGEMENT

Federal Trade Commission Proposes Rule To Ban Non-Competition Agreements

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



On January 5, 2023, the Federal Trade Commission ("FTC") proposed a rule to ban non-competition agreements. If enacted, this new rule would also require employers to rescind all existing non-competition agreements. The proposed rule is based on, among other things, the FTC's preliminary finding that non-competition agreements constitute an unfair method of competition.

[Read More Here](#)

DOL's Proposed Rule Regarding Independent Contractor Classification

By: [Brittany M. Darcy, Esq.](#)

On October 13, 2022, the U.S. Department of Labor ("DOL") issued a proposed independent contractor classification rule, *Employee of Independent Contractor Classification Under the Fair Labor Standards Act* ("Proposed Rule"). If implemented, the Proposed Rule will: (1)

rescind the existing federal Independent Contractor Rule (the "2021 IC Rule"); and (2) serve as the new practical guide directing employers to focus on a multifactor economic reality test to assess whether an individual is an independent contractor. The DOL closed the period for public comments on December 13, 2022.

[Read More Here](#)



Rhode Island Pay Equity Act: Questions And Answers For Employers

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



On January 1, 2023, the Rhode Island Pay Equity Act ("Act") went into effect. The Act significantly impacts multiple phases of the employment life cycle. Namely, the Act prohibits wage discrimination based upon membership in protected class, limits an employer's use of an employee's / applicant's wage history, provides employees with access to certain wage

information, and requires equal pay for comparable work. These questions and answers address a few of the legal issues raised by the Act.

[Read More Here](#)

Plaintiff Succeeds In Establishing Prima Facie Case Of Discrimination Where Employer's Overarching Discriminatory Animus Tainted an Otherwise Neutral Reduction In Force Decision

By: [Michelle De Oliveira, Esq.](#)
and [Andrew M. Winston, Esq.](#)

The Massachusetts Appeals Court held in [Adams v. Schneider Elec. USA](#) that a plaintiff could bring a discrimination claim against his former employer based on evidence that corporate efforts to reduce the workforce were motivated by discriminatory bias, even where the person who selected the plaintiff for termination did so based on nondiscriminatory criteria.



[Read More Here](#)

First Circuit Re-Examines the Administrative Exemption Test Under the Fair Labor Standards Act

By: [Herling Romero, Esq.](#)

In a recent U.S. Court of Appeals for the First Circuit decision, *Walsh v. Unifit Service Corporation*, the court reminded employers



of the necessary fact-intensive analysis that employers must use before classifying an employee as overtime exempt under the Fair Labor Standard Act's ("FLSA") administrative exemption.

[Read More Here](#)

MEDIATOR'S CORNER

[Chris Kenney](#) has built a burgeoning practice as a mediator. In that role he helps parties to resolve pending lawsuits before trial. The cases Chris has mediated range from business disputes, personal injury claims, and wrongful death claims to employment disputes, real estate matters, and construction claims.



Tip: When negotiating settlement at mediation, factor in the prospect for accrued interest to be added to any damages awarded at trial.

Massachusetts law is generous. Simple interest of 12% per year (1% per month) is added to any damages awarded at trial. The interest accrues from the date of breach in a contract dispute, but from the date of filing suit in a tort case. Securing (or avoiding) prejudgment interest is a major factor in settlement. For example, in a negligence claim in which defendant expects damages to be reduced by plaintiff's comparative negligence, defense counsel should also consider how that reduction might be offset by plaintiff's accrued prejudgment interest.

The most generous interest rate in MA is for claims against attorneys for withholding funds due to a client. So be sure to disburse settlement funds promptly, fully and fairly to the client after mediation. Otherwise, they are entitled to 5 times the amount withheld. Mass. Gen. L. Ch 221, sec 51, and the court's have no discretion to reduce the punitive rate of interest. [DeLano v. Milstein](#), 56 Mass. App. Ct. 923 (2002).

For more information, please visit our site: [here](#)

FIRM HAPPENINGS



Partner [Matt Welnicki](#) has been appointed to the Massachusetts Board of Bar Examiners for a five-year term. The Board of Bar Examiners reviews all petitions for admission to the Massachusetts bar submitted by eligible candidates to ensure that all persons admitted to the bar are fully qualified by education, knowledge, and character and fitness.

[Mike Dickman](#) had an article published in the November/December 2022 issue of the Massachusetts Bar Association Section Review. The article discusses artificial intelligence and its potential impact on the future of legal practice.

Read more [here](#).



SPEAKING ENGAGEMENTS

[Nate Cole](#) led a panel for the Massachusetts Defense Lawyers Association "Lunch n Learn" program on January 25th. The program focused on the Massachusetts Mechanic's Lien Statute, G.L. c. 254. Nate and his fellow panelist discussed the basics for complying with the Commonwealth's strict lien laws, areas to challenge a lien and traps for the unwary.

[Mike Dickman](#) will be speaking with Boston College law students from a variety of backgrounds regarding his experience as a young lawyer and tips on how to succeed in the industry. His participation in the BC Law "Round Robin" discussion will expose law students to potential career opportunities, including working for a dedicated and passionate firm such as Kenney & Sams.

[Chris Kenney](#) recently served on a panel of judges, law professors and senior trial lawyers reviewing best practices for mediating settlement of civil lawsuits. The panel was sponsored by the New England Legal Foundation, and Chris served on the MA Advisory Council for NELF.

WHAT CLIENTS ARE SAYING

"You have done exceptional work!"

"You guys crushed it for me and are very easy to work with."

"I cannot thank you enough for your meticulous, detailed execution of everything I requested to exit and close out this chapter. You gave me the ability to hold my head high and be confident in my convictions and contributions. Thank you so much!"

"Thank you so much for your service and all your help in this matter. I would recommend you to anyone."

WEBINARS



**BUSINESS LITIGATION SERIES | EMPLOYMENT LAW SERIES
CONSTRUCTION RISK SERIES**



K&S continues to offer our clients substantive updates on key issues affecting the construction, business litigation and employment law industries. Join us live at one of our upcoming webinars or, if you missed any, you can view past webinars here:

PREVIOUSLY RECORDED WEBINARS:

Employment Law Series

- *Interactive Process for Reasonable Accommodations & Best Practices* | [Watch here](#)
- *Leaves of Absence: Do's and Don'ts* | [Watch here](#)
- *What You Should Know About Massachusetts Paid Family & Medical Leave* | [Watch here](#)

Construction Risk Series

- *Hot Employment Issues* | [Watch here](#)
- *Liability Insurance and "Your Work"* | [Watch here](#)
- *Dispute Resolution Processes: Mediation, Arbitration & Litigation* | [Watch here](#)

Business Litigation Series

- *First Steps in Responding to a Claim or Lawsuit* | [Watch here](#)
- *Pre-Litigation Protection and Risk Management* | [Watch here](#)

GET TO KNOW YOUR K&S TEAM MEMBER: Jen Duplin - Office Coordinator



Best advice you were ever given as a professional: Be confident in your abilities and keep cultivating the ones that are really important to you.

Favorite part about working for K&S: My coworkers are awesome. Everyone is always willing to jump in to help when needed and it's such a warm feeling to know that everyone here has your back.

Best non-legal job you've ever had: My first job was in a restaurant as a dishwasher. The dishwashing itself wasn't great, but what a fun place to work! I later worked in a few other restaurants as a busser, hostess, server, bartender, you name it. What I enjoyed most about the restaurant industry was getting to meet new people from all walks of life. I'm a pretty outgoing person, so it was a lot of fun chatting with different customers.

Something we may not know about you: I'm completely deaf in one ear. It's terrible when I'm in a loud setting and trying to talk with someone (my favorite word is "WHAT?"), but it definitely comes in handy while sleeping.



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