



Primerus

X P R E S S

**International Society of Primerus Law Firms XPress e-Newsletter**  
*December 2016*

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**The Primerus Client Resource Institute**

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## Primerus Client Resource Institute



PRIMERUS  
CLIENT RESOURCE  
INSTITUTE

### **The Primerus Client Resource Institute**

The Primerus Client Resource Institute (PCRI) is the client section of the Primerus membership intended for in-house counsel, risk managers, claims managers, and corporate executives who are responsible for the legal affairs of their companies. Given the challenges of doing business in today's fast-paced, global economy, it has never been more important for companies around the world to develop trusted relationships with law firms that offer high quality legal services at reasonable fees. Primerus seeks out, screens and audits our firms to make sure we have only

the finest, so companies in need of legal services can call upon any Primerus lawyer with complete confidence that he or she is reasonably priced, highly competent, and worthy of your trust.

The PCRI was created with the help of some long-standing Primerus corporate clients, and offers in-house counsel and corporate executives an opportunity to connect with not only great law firms and lawyers, but also with other similarly situated in-house and corporate professionals.

### Membership Benefits

- There is no cost to join
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- Access to free Primerus educational webinars
- Access to the PCRI Listserv to communicate with other PCRI members

### It's Easy to Join the PCRI

[CLICK HERE](#) to complete a brief online application. Once submitted, membership applications are reviewed and approved by the Primerus Client Resource Institute Executive Committee. Apply today, and you will hear from us soon.

## Copyright Infringement

### UNITED STATES

**Don't Lose Your Website's Safe Harbor Protection Under the DMCA: New Procedures for Registering Agents**

**By: [Natasha Shabani, Esq.](#)**

**Greenberg Glusker**

**Los Angeles, California**

On October 31, 2016, the U.S. Copyright Office announced significant changes to its system for registering an agent to receive notifications of claimed copyright infringement, as required in order to take advantage of the safe harbor provisions of the Digital Millennium Copyright Act ("DMCA").

[Full Article](#)

## Cyber Security

### AUSTRALIA

**How Small To Medium Enterprises Can Respond To Trolling And Online Abuse**

**By: [Selwyn Black, Esq.](#)**

**Carroll & O'Dea**

**Sydney, Australia**

Businesses are often the target of online trolling and abuse. The importance of a strong social media and online presence to the overall success of a business means that small-to-medium enterprises (SMEs) should know of how to respond to online abuse if and when they encounter it.

[Full Article](#)

### UNITED STATES

**FINRA Flexes Its Cybersecurity Muscle: Broker-Dealer Fined \$650,000 for Data Breach by Third Party**

**By: [Kenneth N. Rashbaum, Esq.](#)**

**Barton LLP**

**New York, New York**

The Financial Industry Regulatory Authority (FINRA) made a bold statement about its commitment to cybersecurity on November 14, 2016. It issued a Resolution Waiver and Consent ("RWC") indicating a settlement of a proceeding against Lincoln Financial Securities for \$650,000. All broker-dealers who use third parties to provide platforms for online trades - which are just about all broker-dealers - should take notice.

[Full Article](#)

#### **UNITED STATES**

##### **Retailer Websites' Terms and Conditions Targeted By NJ Plaintiffs**

**By: [Khizar A. Sheikh, Esq.](#)  
*Mandelbaum Salsburg P.C.*  
*Roseland, New Jersey***

Plaintiffs filed a putative class action in the District of NJ alleging Sony Entertainment's Playstation websites' terms and conditions (TOCs) bind customers to an unfair and illegal contract that requires them to waive consumer protection and warranty rights, specifically violating the NJ Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). Plaintiffs seek statutory penalties (\$100) for each violation of the TCCWNA, interest, costs, attorneys' fees and injunctive relief.

**[Full Article](#)**

## **Finance and Banking**

#### **AUSTRALIA**

##### **Damage or Damages - The Issue in the Second ANZ Fees Case**

**By: [Gordon Perkins, Esq.](#)  
*Mullins Lawyers*  
*Brisbane, Australia***

Recently the High Court handed down their decision in *Paciocco v ANZ*, the second ANZ fees case regarding credit card arrears fees. In doing so they clarified the extent to which you can take into account damage to a business which is not damages which can be claimable in litigation.

**[Full Article](#)**

#### **UNITED STATES**

##### **CFPB Employs "Mystery Shopper" Strategy in Fair Lending Investigation**

**By: [Caren D. Enloe, Esq.](#)  
*Smith Debnam Narron Drake Saintsing & Myers, LLP*  
*Raleigh, North Carolina***

The CFPB and the Department of Justice have partnered together to enter into a proposed consent order with BancorpSouth Bank regarding allegations the bank engaged in a practice of redlining in its mortgage lending practice, including discrimination in its underwriting and pricing of individual mortgage loans to minorities, and implementing an explicitly discriminatory denial practice. The investigation marks the first time that the CFPB has used testers or "mystery shoppers" to support an allegation of discrimination. The consent order, if approved, requires the bank to invest \$4 million in loan subsidies, pay \$2.78 million in settlement to African-American consumers harmed by the bank's practices, spend at least \$300,000 on targeted advertising in majority-minority neighborhoods in its Memphis MSA, spend at least \$500,000 on local partnerships with community or governmental organizations that provide financial literacy and pay a \$3 million civil penalty. The proposed consent order also requires the bank to extend credit offers to previously denied African-American consumers who were denied mortgage loans as a result of the bank's allegedly discriminatory underwriting policies and add at least one additional branch in a majority-minority neighborhood in its Memphis MSA.

**[Full Article](#)**

## **HealthCare**

#### **UNITED STATES**

##### **CMS Issues Regulations To Prohibit Nursing Homes From Using Pre-Dispute Arbitration Agreements**

**By: [Marc Antonucci, Esq.](#)  
*Iseman, Cunningham, Riester & Hyde, LLP*  
*Albany/Poughkeepsie, New York***

The Centers for Medicare & Medicaid Services (CMS) issued final regulations on September 28, 2016, that bring major changes to long-term care facilities participating in the Medicare and Medicaid programs. The new regulations, totaling more than 700 pages, impact nearly all aspects of nursing home care, and are targeted at: reducing unnecessary hospital readmissions and infections; improving the quality of care; and strengthening safety measures for residents in long-term care facilities.

**[Full Article](#)**

## Insurance

### UNITED STATES

#### **Court Dismisses Bad Faith Claim Based on Litigation Conduct**

**By:** [Thomas Paschos, Esq.](#)

**Thomas Paschos & Associates, P.C.**

**Haddonfield, New Jersey**

In *Homer v. Nationwide Mut. Ins. Co.*, 2016 U.S. Dist. LEXIS 114548 (W.D. Pa. Aug. 26, 2016), Homer was injured in a motor vehicle accident on May 24, 2008. He suffered a number of medical problems as a result of the accident. Homer eventually settled with the third-party driver. At the time of the accident, Homer was driving a car owned by his mother, who had Underinsured Motorist ("UIM") coverage through Nationwide up to \$500,000 for bodily injury. Homer made a written demand for the full \$500,000 to compensate him for the injuries he sustained. Nationwide offered \$12,500, which Homer rejected, and the case proceeded to trial in the Court of Common Pleas of Allegheny County.

[Full Article](#)

## Intellectual Property & Technology

### HONG KONG

#### **The Right to Use Your Name Again After Selling It**

**By:** [ONC Lawyers](#)

**Hong Kong, Hong Kong (SAR)**

On 16 August 2016, the English High Court delivered its Judgment on *Karen Denise Millen v Karen Millen Fashions Limited & Anor* [2016] EWHC 2104 (Ch), which denied the claimant her use of trade marks deriving from her name, after she sold off her namesake fashion business to the defendants' predecessors. This case touches upon a number of issues in interpretation of contracts involving assignment of intellectual property rights.

[Full Article](#)

### UNITED STATES

#### **Websites and E-Commerce: Where the Virtual World Can Present Real Problems**

**By:** [Joseph A. Merlino, Esq.](#)

**Rudolph Friedmann LLP**

**Boston, Massachusetts**

In 1990 Congress passed Title III of the Americans with Disabilities Act, which states in relevant part that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." Since then, significant progress has been made to provide individuals with disabilities the same access to goods and services in commercial settings. For instance, many stores are now specifically designed to ensure that individuals who rely upon wheelchairs or other walking aids can have the same access to goods and services as individuals who are not impaired.

[Full Article](#)

## Labor and Employment

### HONG KONG

#### **Can My Employer Make Deductions From My Wages After Summary Dismissal?**

**By:** [ONC Lawyers](#)

**Hong Kong, Hong Kong (SAR)**

Summary dismissal is a serious disciplinary action. If you are being summarily dismissed by your employer, what are your rights and entitlements under the law? Can your employer make deductions on your wages on the ground that you have breached the employee handbook or failed to discharge your duties properly at work?

[Full Article](#)

### NETHERLANDS

#### **Can the Employer Avoid Payment of Transition Compensation after two years of Illness?**

**By:** [Gelske M. Speerstra, LL.M.](#)

**Russell Advocaten B.V.**

**Amsterdam, Netherlands**

Employers are not allowed to terminate the employment contract of sick employees unilaterally during the first two years of illness. During these two years, the employer is obliged to continue to pay (part of) the salary of the sick employee. If the employee will still be sick after two years, a so-called "dormant employment contract" will be the result. The employee is unable to perform his or her work and the obligation to continue to pay wages has come to an end.

[Full Article](#)

#### **UNITED STATES**

##### **Federal Court Blocks December 1 Implementation of New Overtime Rule**

By: [Peter Bennett, Esq. & Rick Finberg, Esq.](#)

*The Bennett Law Firm, P.A.*

*Portland, Maine / New Hampshire*

In a stunning rebuke of the Obama administration's two year effort to game change the overtime pay rules, the United States District Court for the Eastern District of Texas yesterday afternoon issued a preliminary injunction effective immediately preventing the implementation of the new white collar salary rule. As discussed in previous e-alerts, the Department of Labor's final rule, that was scheduled to take effect on December 1, 2016, more than doubled the minimum salary threshold an employer needed to pay a white collar employee in order for that employee to qualify to be exempt from overtime. The minimum salary threshold was scheduled to increase from a weekly salary of \$455.00 to a weekly salary of \$913.00.

[Full Article](#)

#### **UNITED STATES**

##### **Balancing Employers' Business Interests with Transgender Employees' Workplace Rights**

By: [David B. Walston, Esq. & Jonathan W. Macklem, Esq.](#)

*Christian & Small LLP*

*Birmingham, Alabama*

The EEOC's Strategic Enforcement Plan, adopted in 2012, makes coverage of gay, lesbian, bisexual and transgender (GLBT) individuals under Title VII's prohibition of gender discrimination a top enforcement priority. The Commission has filed several well-publicized lawsuits seeking Title VII protection for GLBT employees under Title VII's prohibition of gender discrimination. While the issue Title VII protection of sexual orientation in and of itself is in flux, in the Eleventh Circuit - Alabama, Georgia and Florida - it has long been the law that Title VII prohibits employment discrimination against a transgender individual.

[Full Article](#)

#### **UNITED STATES**

##### **Federal Court in Texas Issues Nationwide Injunction Stopping Implementation of New Overtime Rule**

By: [Brian Culnan, Esq.](#)

*Iseman, Cunningham, Riester & Hyde, LLP*

*Albany/Poughkeepsie, New York*

On May 23, 2016, the United States Department of Labor published the final version of a rule that would significantly alter the "white collar" or "EAP" (executive/administrative/professional) exemption to the Fair Labor Standards Act's overtime requirements. Scheduled to become effective on December 1, 2016, the rule would have, among other things, required an employee to be paid \$47,892 (or \$921 per week), up from the current \$23,660 (or \$455 per week), to qualify for the EAP exemption. The Department of Labor estimated that 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, would have automatically become eligible for overtime under the rule without a change to their duties.

[Full Article](#)

#### **UNITED STATES**

##### **Legislative Developments Affecting California Employers in 2017 and Beyond**

By: [Greenberg Glusker](#)

*Los Angeles, California*

This year has brought many changes that will impact all California employers. This annual report from Greenberg Glusker's Employment Department summarizes some of the most important employment law developments that will affect California employers in the upcoming year.

[Full Article](#)

## **UNITED STATES**

### **Implications of the Act to Establish Pay Equity**

By: **Robert P. Rudolph, Esq.**

**Rudolph Friedmann LLP**

**Boston, Massachusetts**

On August 1, 2016, Governor Baker signed An Act to Establish Pay Equity to ensure equal pay for comparable work performed by Massachusetts employees. While the act represents a significant step forward for equal pay, provides for increased transparency, precludes screening job applicants based on wage or salary history and encourages employers to be proactive about pay equality, it also presents new ground for litigation.

**[Full Article](#)**

## **UNITED STATES**

### **EEOC Issues Updated Guidelines Regarding Investigation of Workplace Harassment**

By: **Connie Elder Carrigan, Esq.**

**Smith Debnam Narron Drake Saintsing & Myers, LLP**

**Raleigh, North Carolina**

For the past year, the Equal Employment Opportunity Commission (EEOC) has been investigating and evaluating the prevalence of workplace harassment around the country. Led by Commissioners Chai Feldblum and Victoria Lipnic, the EEOC recently released a report outlining its findings and recommendations for eliminating harassment in the workplace.

**[Full Article](#)**

## **Tax Law**

## **GERMANY**

### **Internal Control Systems (ICS) to Prevent Criminal Intent**

By: **Dirk Pohl**

**WINHELLER Attorneys at Law & Tax Advisors**

**Frankfurt, Germany**

If you detect a tax infringement in your company, you do not necessarily have to directly resort to self-incrimination (German Selbstanzeige). Even a simpler correction notification may be possible in some cases. The Federal Ministry of Finance has commented on this issue in May 2016 and explained how to draw the line between simple correction notifications and self-incriminations. Major novelty: The Ministry considers the existence of an internal control system (ICS) as an indicator that the responsible managers of a company had no intent to evade tax.

**[Full Article](#)**

## **Wills & Estates**

## **AUSTRALIA**

### **Withholding Tax Regime Modifications to Deceased Estates**

By: **Michael Klatt, Esq.**

**Mullins Lawyers**

**Brisbane, Australia**

We have previously identified problems for deceased estates arising from the introduction of the withholding tax regime on 1 July 2016 in our July edition of the Report Newsletter (page 2). Clearly there had not been sufficient consultation in relation to the ramifications of the new legislation.

**[Full Article](#)**

## **Paradigm Magazine**



The [2016 Fall Paradigm Magazine](#) delivers articles regarding developments and trends in legal issues relevant to corporate clients around the world, while showcasing Primerus members as leaders with the expertise to assist clients with any legal needs they may have. It is published twice a year and mailed to Primerus members as well as clients around the world.

If you would like to be added to our hard copy mailing list please include your mailing address in a brief email to Joan Bartosh at [jbartosh@primerus.com](mailto:jbartosh@primerus.com)

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#### [Compendiums](#)

[A Survey of the Law of Legal Malpractice - A Professional Liability Practice Group Compendium - September 2015](#)

[A Survey of The Law of Non-Contractual Indemnity and Contribution - Products Liability Practice Group Compendium - April 2015](#)

[Compendium of Principles of Law Regarding Bad Faith in the Fifty States and D.C. - 2013 Edition](#)

[A State by State Update of Tort Reform - 2013 Edition](#)

[Principles of Law Regarding Establishment and Operation of a Business in Various Countries Compendium - International Transactional Services Practice Group - March 2012](#)

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