

2014  
EMPLOYMENT LAW  
UPDATE

HENRY H. PERRITT, JR.



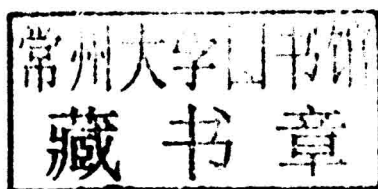
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# 2014 EMPLOYMENT LAW UPDATE

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**Henry H. Perritt, Jr.**

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Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers and Kluwer Law International products.

Printed in the United States of America.

ISBN 978-1-4548-4510-2  
ISSN 1523-8679

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## ABOUT THE EDITOR

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**Henry H. Perritt, Jr.**, is professor of law and former dean at Chicago-Kent College of Law. For 15 years, he was a professor at Villanova University School of Law. Formerly the top labor and employment lawyer for Consolidated Rail Corporation, Dean Perritt also served as deputy undersecretary of labor during the Ford administration. He was vice chairman of a commission appointed by Secretary of Labor Elizabeth Dole to develop measures to preserve health care for retired coal miners, resulting in recommendations subsequently enacted by Congress. He served as secretary of the American Bar Association's Section on Labor and Employment Law. He has represented and counseled a variety of employers, employees, and unions on employment law issues. Mr. Perritt is the author of the following publications: *Americans with Disabilities Act Handbook, Fourth Edition*; *Law and the Information Superhighway, Second Edition*; *Civil Rights in the Workplace, Second Edition*; *Employee Benefits Claims: Law and Practice*; *Workplace Torts: Rights and Liabilities*; and 17 editions of the *Aspen Employment Law Update*. He has written more than 75 law review articles on labor and employment law, administrative law, dispute resolution, international law, and technology applications in law. Mr. Perritt received his S.B. and S.M. degrees from M.I.T. and his J.D. degree from Georgetown. He is a member of the bars of Virginia, Pennsylvania, District of Columbia, Maryland, Illinois, and the United States Supreme Court.



## ABOUT THE CONTRIBUTORS

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**John Campbell** (Chapter 9) is a lawyering process professor at the University of Denver Sturm College of Law. His scholarship focuses heavily on consumer issues, class actions, and arbitration. Mr. Campbell also remains Of Counsel at Campbell Law LLC, a consumer, class action, and appellate firm that handles cases around the country. Mr. Campbell has extensive experience as an appellate and trial attorney, arguing before the Missouri Supreme Court, the Illinois Court of Appeals, the Missouri Court of Appeals, and the Eighth Circuit Court of Appeals. While in full time practice, he also managed a consumer and class action department, which settled dozens of class actions and individual cases resulting in tens of millions of dollars in relief to individuals.

**Michael Congiu** (Chapter 2) is a shareholder at a nationally recognized labor and employment law firm where, among other examples, his practice focuses on employee benefit and plan litigation. He is a repeat contributor to this publication, and wishes to thank Professor Perritt for the opportunity to pursue the ideas in this chapter. He would also like to dedicate this chapter to Willa Simone Congiu.

**Donald Dowling, Jr.** (Chapters 5 and 7), International Employment Partner at White & Case LLP in New York City, leads a team of lawyers who exclusively practice cross-border employment law for multinational employer clients. Mr. Dowling and his team advise on multi-jurisdictional employment-law compliance on matters including: global M&A deals, global reductions-in-force, global codes of conduct/HR policies, global HR information systems/data privacy, and expatriates. He is ranked in the top tier (“Leading”) in the only competitive ranking of U.S. international labor/employment lawyers, London-based *PLC Which Lawyer?*, he is ranked by *Chambers* as one of the top 34 labor/employment lawyers in New York, and he is ranked by *Legal 500* and ABA/IBA *Who’s Who of Management Labour & Employment Lawyers*. *Ethisphere* named Dowling as the only employment lawyer in the U.S. on its list of “2010 Attorneys Who Matter.”

As an adjunct law school professor, Mr. Dowling teaches International Employment Law and European Union Law. He has spoken worldwide (in English and Spanish) and published dozens of articles on international employment and international data privacy law, including articles in law journals of the ABA and of Cornell and Northwestern University law schools, and including chapters in books published by Matthew Bender, Thomson/West, Kluwer, PLI, Aspen, and others. One of his articles is excerpted in two different West Group

casebooks, and another has been cited by a state supreme court. He is a member of the advisory boards of editors of the publications *EuroWatch*, *International HR Journal*, *PLC Labour & Employment USA*, and the *International Labor & Employment Laws* treatise series. He is a member of the board of the NYU Center for Labor and Employment Law.

Mr. Dowling is an officer of the International Bar Association Discrimination Law committee, a former officer of the ABA International Law Section, and a former chair of the ABA International Employment Law Committee and the Chicago and Cincinnati Bar Associations' International Law Committees. He is member of the New York bar, and (inactive status) member of the bars of Illinois and Ohio. He graduated from the University of Chicago and the University of Florida College of Law.

**Andrew Goldberg** (Chapter 4) is a partner at Laner, Muchin, Dombrow, Becker, Levin and Tominberg, Ltd. Since his graduation with Order of the Coif honors from University of California, School of Law-Los Angeles in 1996, his practice has included representing employers in collective bargaining negotiations, matters before the National Labor Relations Board, arbitrations, matters before state and federal civil rights agencies, and wage and hour matters. He counsels employers on their strategic employment relations initiatives and day-to-day employment-related matters, including compliance with the multitude of state and federal laws governing the employment relationship and termination thereof. He has presented numerous times for the Chicago Region of the Equal Employment Opportunity's Technical Compliance Seminar. Mr. Goldberg co-authored the following articles for the Employment Law Updates from 2009 to 2013: "Capturing the Benefits and Avoiding the Dangers to Employers of Managing in an Electronic Age"; "Highlights and Commenting on the Revisions to the Family and Medical Leave Act"; "Restricted Credit: How Do Employers Screen Candidates Now that States are Moving to Ban Credit Checks on Job Applicants?"; "Hidden Perils: Obscure Employment Law"; and "You're Guilty: How to Survive the Rigorous Scrutiny of the EEOC When Rejecting Applicants Based on an Arrest or Conviction Record." He has been named as an Illinois "Super Lawyer" by Chicago Magazine each year from 2006 to 2014, a recognition awarded to only 5% of the lawyers in the state of Illinois.

**Stefanie Kastrinsky** (Chapter 2) is an employee benefits associate with a nationally recognized employment law firm. She counsels employers and plan administrators on all aspects of the design and administration of health, welfare, and retirement plans and compliance with ERISA fiduciary duties. With respect to health plans, she advises clients on issues involving PPACA, COBRA, HIPAA, and Medicare. She also represents employers in disputes, audits, and applications for relief from the Internal Revenue Service (including the IRS's Employee Plans Compliance Resolution System) and the U.S. Department of Labor and has extensive experience drafting benefit plan documents and summary plan descriptions. Following law school, Ms. Kastrinsky was a law clerk for Judge Robert G. Millenky, New Jersey Superior Court, Camden County, New Jersey.



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**Jason Keck** (Chapter 8) received his J.D. degree in May 2010 from the Illinois Institute of Technology, Chicago-Kent College of Law. Currently, he is an Associate at Fisher & Phillips LLP where he practices complex employment and labor law. Mr. Keck has previously externed at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, Netherlands wherein he served on a defense team representing an internationally accused war criminal. Prior to enrollment at Chicago-Kent, Mr. Keck received his Bachelor of Business Administration from the University of Iowa, Henry B. Tippie College of Business where he double majored in both Finance and Management.

**Lavanga Wijekoon** (Chapter 2) is a labor and employment associate with a nationally recognized law firm. He counsels and represents private employers in a wide range of issues, including discrimination, retaliation, wage-hour, traditional labor, and international labor. He has experience in both class action and single-plaintiff cases. He has also developed a *pro bono* practice focusing on representing asylum seekers. Following law school, he was a law clerk to Hon. Marywave Van Deren of the Washington State Court of Appeals in Tacoma, WA.

# PREFACE

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Employment law continues to develop. Counsel must pay particular attention to new developments in the regulation of employment relations by transnational enterprises, employee rights when their employers go out of business, judicial deference to benefit plan administrator decisions, restrictions on employee competition with former employers, and vicarious employer liability based on supervisory conduct. In addition, employment lawyers are likely to be drawn in to resolving growing controversy over the treatment of college athletes, including proposals that they be treated as employees. The chapters in this *Update* provide guidance on all of these subjects.

In **Chapter 1**, I analyze employee rights when business entities are dissolved.

In **Chapter 2**, Mr. Congiu, Ms. Kastrinsky, and Mr. Wijekoon consider the role of judicial deference to plan-administrator decisions when beneficiaries or unions sue for delinquent contributions.

In **Chapter 3**, I consider covenants not to compete, analyze the limitations necessary to make them “reasonable,” and explain how judicial review of such covenants differs from review of confidentiality agreements.

In **Chapter 4**, Mr. Goldberg considers the effect of a 2013 Supreme Court decision on the status of “supervisors” whose conduct increases the likelihood of employer liability for sexual harassment under Title VII.

In **Chapter 5**, Mr. Dowling explains how the law regulating employment terminations is radically different from U.S. law in many states in which U.S. companies do business, both with respect to individual terminations and with respect to layoffs.

In **Chapter 6**, I review the controversy over whether student athletes should be treated as employees, and propose an alternatives means of sharing revenue from big-time college sports.

In **Chapter 7**, Mr. Dowling suggests how multinational employers should deal with the differences in national law that govern resolution of claims of employment discrimination.

In **Chapter 8**, Mr. Keck explores the ground rules for imposing liability on employers based on the conduct of their supervisors after the Supreme Court’s decision in *Vance v. Ball State University*.

In **Chapter 9**, Mr. Campbell examines covenants not to compete and protection of confidential employer information under the law of Florida, which is hospitable to such restrictions and California, which is hostile to them.

## ACKNOWLEDGMENTS

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I appreciate the good work the chapter authors have done in analyzing recent developments in a style that makes them accessible to practitioners. Patricia O'Neal, once again, has done great work in helping to keep everyone organized and on time. I also appreciate Mitchell Bergmann's continued support until his untimely death in July, 2010.

H.H.P.

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