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MASSACHUSETTS

2024 Edition

State & Federal Employment Laws

EMPLOYMENT LAWS FOR MASSACHUSETTS COMPANIES

A Reference Guide

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McLane Middleton

Employment Laws for Massachusetts Companies: A Reference Guide.

ASSOCIATED INDUSTRIES OF MASSACHUSETTS
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Boston, MA 02196-0134

Associated Industries of Massachusetts is pleased to share the 2024 edition of the *Employment Laws for Massachusetts Companies* reference guide. The guide is updated annually to reflect changes to federal and state law, as well as regulatory and case-law developments. The Employment Laws reference guide has for decades been an indispensable resource for AIM-member companies seeking to manage the all-important relationship with their employees.

We offer the Employment Laws reference guide to you at no charge. It's a member benefit made possible through the generous support of the law firm McLane Middleton. We deeply appreciate McLane Middleton's continued support of this unique effort to keep our members informed.

The past 12 months produced some significant changes to employment laws and regulations, from the introduction of "topping off" to the state Family and Medical Leave Law to new federal definitions of independent contractors. New and significantly updated information is highlighted in color throughout the 2024 reference guide.

Thank you for your support of AIM and the important work we continue to do on behalf of Massachusetts employers.

Brooke M. Thomson
President and Chief Executive Officer

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* **Orange Text** is new for 2024

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We're a community of more than 3,400 employers of every possible description from small neighborhood shops to Fortune 500 companies.

With our breadth and influence, we create real, lasting, and positive change for Massachusetts businesses through our public policy and advocacy work. We also provide a broad and unique offering to meet the diverse needs of any company, from Human Resources training and the Helpline to workers' compensation insurance.

Over the last year, we worked on behalf of Massachusetts businesses to address challenges ranging from the ongoing COVID-19 pandemic to a labor shortage to massive supply chain disruptions. We did so guided by two overarching objectives — to forge a lasting economic recovery in Massachusetts and to ensure that the recovery includes the full diversity of the people in the state.

We take extraordinary pride in the work done by our organization to empower our members with the information, education and resources needed to successfully navigate a complex business world.

To learn more about our offerings, contact Bob Paine, Executive Vice President, Membership at rsp@aimnet.org or visit www.aimnet.org

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For more information, contact Kyle Pardo, Executive Vice President, AIM HR Solutions at kpardo@aimhrsolutions.com or visit www.aimhrsolutions.com

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Questions about AIM membership?

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McLane Middleton

Founded in 1919, the McLane Middleton law firm has been committed to serving its clients, community and colleagues for over 100 years. As one of New England's premier full-service firms, it has offices in Woburn and Boston, Massachusetts, as well as Manchester, Concord and Portsmouth, New Hampshire.

Given the firm's depth of sophistication and unwavering commitment to client service, McLane Middleton has built collaborative and lasting relationships with a broad spectrum of domestic and international clients. The firm holds the honor of being listed as one of America's leading law firms in Chambers USA: America's Leading Business Lawyers. McLane is also included in The Best Lawyers in America, Martindale Hubbell and Super Lawyers.

McLane Middleton's **Employment Law Practice Group's** risk management approach and client-focused responsiveness helps to ensure compliance with an abundance of complex state and federal laws. The firm's employment attorneys assist in the prevention of difficult personnel problems before they arise. When legal suits occur, the firm's highly skilled litigators work collaboratively with McLane Middleton's other practice groups to provide comprehensive client representation. The primary goal of the firm's employment attorneys is to help resolve employment-related disputes successfully, and in a cost-effective manner.

For more information on McLane Middleton's Employment Law Practice Group, visit McLane.com.

Special thanks to McLane Middleton attorneys:
Adam Hamel (practice chair); Peg O'Brien; Jennifer Parent;
John Rich; Brian Garrett; Vineesha Sow; and Amy Cann

Your Employment Partners

McLane Middleton's employment group has the knowledge and experience to find solutions for your human resource and employment law needs.

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About This Guide

This Employment Laws Reference Guide has been prepared by the staff of Associated Industries of Massachusetts (AIM) and is intended as a quick reference for use by AIM members in understanding and familiarizing themselves with state and federal laws, regulations, and policies affecting employers in Massachusetts. The laws and regulations listed reflect the most common areas of concern. Substantive new or updated information added for 2024 is presented in orange. The reference guide, however, must always be used within the context of each individual company's human resources practices and policies, as well as within the context of any collective bargaining or other employment agreement. Please consult with your employment law attorney before taking any action based on this reference guide. The laws are current as of the time of this guide's publication. Significant changes will be reflected in subsequent annual updates. Members are encouraged to sign up to receive AIM's biweekly e-newsletter, the HR Edge. AIM regularly publishes articles in the HR Edge updating members on new employment-related developments based on statutory and regulatory changes, as well as court decisions throughout the year. All citations for the statutes are to the Massachusetts General Laws (M.G.L.) and to the Code of Massachusetts Regulations (CMR).

The Guide also includes frequent references to federal and state enforcement agencies. Readers are encouraged to visit those agencies' websites (listed in the back of the guide) to learn more about each agency's mission and activities such as specific laws and regulations it enforces as well as guidance and recommended best practices it publishes and penalties for violations.

This year's guide includes two recent additions first introduced in last year's guide. The first is Case Notes, which provides a summary of recent significant court decisions. The second is New Laws, which provides a summary of recent, significant law and/or regulatory changes.

Posters

AIM does not sell workplace compliance posters as all required posters are published and made available on their web sites by the relevant state or federal enforcement agency or by private vendors. At the end of this guide is a list of websites where you can access these required posters and other compliance-related information.

Compliance Tips

This edition of the reference guide also includes occasional compliance tips, highlighting actions an employer should or must take to comply with the law.

AIM HR Service

The guide also contains AIM HR Solutions tags in cases where AIM HR Solutions offers training or services on the topic in question.

As the federal and state governments continue to alter and amend its policies, some of the laws and regulations contained in this guide may be changed, amended, or eliminated throughout the year. As it is impossible to know if or when any of these changes may occur, we have prepared this version based on actual information that we know as of the time of publication. We have attempted to identify likely topics in the text of the guide that may change; these are highlighted with a short statement.

A note about the impact of differences in federal and state law:

Conflicts between state and federal laws and rules occur throughout employment law. Generally, federal law is seen as being "permissive"—that is, it establishes a minimum threshold that all parties must adhere to but "permits" states to adopt and enforce other standards more favorable to employees.

To cite an example, the federal minimum wage is $7.25 per hour while the Massachusetts minimum wage is $15.00 per hour—the rate established as of January 1, 2023 after a multi-year incremental increase. Massachusetts employers must follow the higher or stricter standard state law. Exceptions to this permissive doctrine do exist. For example, the federal Occupational Safety and Health Act (OSHA) generally preempts state health and safety laws, creating a uniform national standard. Likewise, the federal Employee Retirement Income Security Act (ERISA) generally preempts state laws relating to retirement or welfare benefit plans.

Hiring

Background and Credit Checks

It is lawful for employers to conduct background and credit checks on applicants for employment. In fact, it is highly recommended that employers perform very thorough background checks. Employers that use a third party to carry out investigations should be aware of certain compliance issues discussed below.

The federal Fair Credit and Reporting Act (FCRA)

This law typically requires an employer to get an applicant's written consent prior to initiating third-party background or credit checks or obtaining reports. Employers who rely on such reports to take an adverse employment action (e.g., denying an applicant a job, reassigning or terminating an employee, or denying an employee a promotion) must give the affected individual a pre-adverse-action disclosure and a reasonable period of time in which to correct any misinformation in the report. After the adverse action has been taken, the employer must give the affected individual notice of the action and provide the individual with additional disclosures, including the name, address, and toll-free telephone number of the agency that made the report; a statement that the agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished.

The FCRA exempts certain third-party investigations—including those related to employee misconduct, such as sexual harassment and violations of state and federal law—from the prior approval requirement discussed in the paragraph above.

The Federal Trade Commission (FTC) rule on the disposal of consumer-report information states that employers may contract with a third party to properly dispose of the information. The employer must monitor the third party's performance to ensure compliance. An employer may also create its own policies and procedures to shred or use other forms of document destruction. Massachusetts has data-security laws relating to the disposal of records containing certain information on Massachusetts residents; these laws are discussed in detail in this guide's section on Employment (Data Security).

New Form Required

As of March 20, 2024, employers must use the updated "Summary of Your Rights Under the Fair Credit Reporting Act" notice. The updated form must be provided to applicants and employees before conducting background checks and before taking an adverse employment action based on a background check response. Updated forms may be obtained through the Consumer Financial Protection Bureau (CFPB). This form replaces the October 2018 version.

Case note: Applicant alleged that the employer used a noncompliant FCRA disclosure form that authorized the employer to obtain applicant's consumer report without her having been advised about her rights in the manner Congress mandated. "Although the plaintiff may not be able to articulate concrete, actual damages arising from the employer obtaining her consumer report by using a noncompliant disclosure form and requiring her to agree to a release of liability in addition to a background check, the FCRA liability provision recognizes that the injury to the consumer may not be measurable. Thus, in an action for a willful violation, the statute provides for the option of the plaintiff recovering actual damages caused by the FCRA violation or, if the plaintiff cannot prove actual damages, nominal damages between $100 and $1,000. ... In this regard, the plaintiff's allegation of employer's willfulness is critical... The judgment dismissing the plaintiffs FCRA claims for lack of standing is vacated and the plaintiff may proceed on a claim in Superior Court." (*Kenn v Eascare* (Jan 8, 2024)) .

Criminal Offender Record Information (MA only)

The Massachusetts Criminal Offender Record Information (CORI) process allows employers to request CORI on an applicant to determine if the applicant has a criminal record in Massachusetts.

The law prohibits most employers from asking questions on an initial written application form about an applicant's CORI, which includes information about criminal charges, arrests, convictions, and incarceration. Employers, therefore, are urged to remove all inquiries concerning criminal history from their employment applications. The only exceptions expressly provided in the CORI law are for employers that are (1) hiring for positions for which a federal or state law or regulation disqualifies an applicant based on a conviction, or (2) subject to an obligation under a federal or state law, regulation, or accreditation not to employ persons who have been convicted.

The Department of Criminal Justice Information Services (DCJIS) is responsible for maintaining a CORI database and providing employers with access to it. The law establishes several additional requirements to the CORI system:

- Private employers have access to CORI records through an online database accessible for a fee of $25 per record. Employers that were previously ineligible to access the CORI database now have the option of using the CORI system.
- The law limits the information that most employers may obtain through the CORI system to:
  - felony records for 7 years following the disposition of the felony;
  - misdemeanor records for 3 years following the disposition of the misdemeanor; and
  - pending criminal charges.
- Convictions for murder, voluntary manslaughter, involuntary manslaughter, and certain sexual offenses are available in the CORI database permanently. The law does not affect the scope of the information available to employers that are required by law to conduct criminal background searches on job applicants.
- Criminal justice agencies continue to have virtually unlimited access to CORI, including sealed records. In addition, others submitting a request for CORI to the DCJIS will continue to have access to CORI to the extent authorized by law. These include individuals and agencies required by statute to have access to CORI (e.g., employers that provide services to vulnerable communities, such as children, the elderly, or individuals with disabilities) and those that request CORI to evaluate current and prospective employees, including full-time, part-time, and contract employees; interns; and volunteers.
- Employers must provide an applicant with a copy of his or her criminal record before questioning the applicant about the record or before making an adverse decision based on the record.
- Unless otherwise required by law or court order, an employer must properly discard CORI obtained from the DCJIS no later than 7 years from an individual's last date of employment or volunteer service, or from the date of the final decision regarding the individual, whichever occurs later.
- Employers are required to limit and monitor the dissemination of CORI, which may be shared only with employees who "need to know" the information, and to maintain a "secondary dissemination log," which details when and to whom the CORI information was given beyond the requesting organization.
- Employers are protected from failure-to-hire claims based on erroneous information on a candidate's CORI and from negligent hiring claims if the employer relies on CORI when making its decision.
- Employers may not ask applicants about sealed or expunged criminal records
- Employers who request criminal record information must include the following language on any requests provided to applicants:

  " An applicant for employment with a record expunged pursuant to law may answer "no record" with respect to an inquiry herein relative to prior arrests, criminal court appearances, or convictions."

Recent updates to the law include enhanced legal protections for employers in cases of a negligent hiring claim. The law now presumes that an employer does not have notice of:

- records that have been sealed or expunged;
- records about which employers may not inquire under Massachusetts anti-discrimination law; and
- records concerning crimes that the DCJIS may not lawfully disclose to an employer.

Compliance Tip: *Employers who annually conduct five or more criminal background investigations through the CORI system must establish and maintain a written CORI policy that provides that they will, in addition to any obligations required by regulation:*

- *notify the applicant of the potential of an adverse decision based on CORI,*
- *provide a copy of the CORI and the policy to the applicant, and*
- *provide information concerning the process for correcting a CORI.*

The laws and regulations define CORI as records and data compiled by a Massachusetts criminal justice agency concerning an identifiable individual and relate to the nature or disposition of any of the following: a criminal charge; an arrest; a pretrial proceeding; any other judicial proceedings; previous hearings in which the defendant was detained prior to trial or released with conditions, sentencing, incarceration, rehabilitation, or release.

- CORI now applies only to people 18 years of age or older, unless the person under 18 years of age was adjudicated as an adult. (CORI previously applied to people 17 years of age or older.) CORI does not include any offenses not punishable by incarceration.
- The regulations define employees as individuals currently employed by the requestor. These include volunteers; subcontractors; contractors; vendors; and special state, municipal, or county employees. This is a significant broadening of the term "employee" and is not consistent with many other state law definitions, such as that in the Massachusetts Independent Contractor Law.
- Any employer requesting CORI must enter into an iCORI Agency Agreement, which provides that the employer (the "Requestor"):
  - Agrees to comply with the CORI laws and regulations.
  - Must maintain an up-to-date "need to know" list and provide all staff members who request, review, or receive CORI with the CORI training materials.
  - Shall request only the level of CORI access authorized under statute or by the DCJIS.
  - Is liable for any violations of the CORI laws or regulations; individual users of the employer's account may also be liable for said violations.
- DCJIS has developed model CORI Acknowledgment Forms, which are available from its website. The website link is listed at the back of this guide.

PENALTIES

- DCJIS has the authority to audit employers for compliance with forms and the secondary dissemination log.
- An employer may be fined up to $50,000 for each knowing violation of the CORI law. The Criminal Record Review Board (CRRB) may also refer a complaint for criminal prosecution.
- Certain violations of the CORI law can carry criminal sanctions including:
  - knowingly requesting, obtaining, or attempting to obtain criminal record information from DCJIS under false pretenses;
  - knowingly communicating or attempting to communicate criminal record information to any other individual or entity not in accordance with the law;
  - knowingly falsifying criminal record information; and
  - requesting or requiring a person to provide a copy of his or her own criminal record except as authorized by the law.
- A criminal conviction for these crimes is punishable by imprisonment for not more than one year and/or a fine of not more than $5,000 for each offense

Private right of action

Individuals may sue on their own behalf for an alleged violation of the law. In a private right of action case, the individual may recover actual damages, plus attorney's fees and costs. An individual may also seek to restrain violations of certain sections of the law. If the individual can establish that any violation is willful, the individual is also entitled to exemplary damages in the amount of $100 to $1,000 for each violation. M.G.L. c 6, § 177. This is like the damages available for violations of the FCRA, except that under FCRA the punitive damages are not specifically limited in amount. In addition, a willful violation prohibits any qualified or absolute privilege being asserted as a defense.

The CORI law may create additional Questions for employers regarding the hiring process. AIM will continue to monitor and communicate regarding legislative and regulatory developments. AIM members are encouraged to call the HR Helpline with questions related to criminal background checks.

Compliance Tip: *Employers are advised to consult legal counsel to determine if they are legally obligated to conduct CORI checks. CORI covers only Massachusetts criminal records. An employer seeking criminal background information from other jurisdictions will need to use other background checking services to conduct a broader search.*

Employment Applications

While no state or federal law requires the use of employment applications, AIM strongly urges employers to adopt and use them for every hiring decision to follow consistent practices. For employers that use employment applications as part of the hiring process, various Massachusetts employment laws require the following:

1. **No Pre-employment Medical Inquiries.** Any question designed to ascertain the current or past health status of an applicant is illegal. Omit any reference to disabilities or impairments, excessive absences due to illness, prior workers' compensation claims, injuries, and so on. It is permitted to ask about disabilities as part of a voluntary affirmative action data-collecting section of the form that is not seen by the person conducting the interview(s). (American with Disabilities Act, 1990)
2. **Lie Detector Language.** All employment application forms in Massachusetts must contain the following specific language regarding the use of lie detector tests before or during employment: "*It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.*"
3. **Verifiable Volunteer Work.** When employers ask for employment history, they must include language that invites applicants to list any verifiable volunteer work but that explains that the applicant need not include organizational names that would indicate possible membership in a protected class, such as race, color, religion, sex, national origin, ancestry, sexual orientation, or gender identity.
4. **No Criminal Record Inquiries.** It is illegal for an employer to ask about a job applicant's criminal history on a job application. This so-called 'ban-the-box' provision prohibits employers from asking questions on an initial written application form about an applicant's criminal offender record information, which includes information about criminal charges, arrests, convictions, and incarceration. Employers, therefore, are urged to remove all inquiries concerning criminal history from their employment applications. The only exceptions expressly provided in the CORI law are for employers that are (1) hiring for positions for which a federal or state law or regulation disqualifies an applicant based on a conviction, or (2) subject to an obligation under a federal or state law, regulation, or accreditation not to employ persons who have been convicted. (M.G.L. ch. 6 §172), (See CORI discussion above.)

Under the law, questions may be asked about criminal history later in the employee selection process. The Massachusetts Commission Against Discrimination (MCAD) takes the position that the first time an employer can ask an applicant about the applicant's criminal history is during or after an in-person or telephone interview.

Case Notes: In one case reported by the MCAD in 2015, an employer's application contained an inappropriate inquiry into criminal related information and the employer later terminated the employee for being "too ghetto." The employer was fined $30,000 in compensatory damages and managers and supervisors had to attend anti-discrimination awareness training. (*Suffolk County employer*)

In another MCAD case from 2021 involving allegations of harassment, disparate treatment, and retaliation based on the employee's criminal record, gender identity, retaliatory animus, and employment termination, the parties settled for $7,500 and fair employment training for the HR director and the manager. (*Barnstable County employer*)

Note: Federal law does not prohibit employers from asking about criminal history. However, Title VII of the Civil Rights Act prohibits employers from discriminating when they use criminal history information to make employment decisions.

Title VII also prohibits employers from treating people with similar criminal records differently because of their race, national origin, or other Title VII–protected characteristics. Title VII prohibits employers from using policies or practices that screen individuals based on criminal history information if:

- they significantly disadvantage Title VII–protected individuals; AND
- they do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

5. **Age/Date of Birth.** The applicant may only be asked to confirm the applicant is at least 18 years old and is not subject to the child labor laws.
6. **Pay Equity.** The Massachusetts Pay Equity Law, discussed in more detail in the Payment of Wages section of this guide, explicitly prohibits an employer from "seek[ing] the wage or salary history of a prospective employee from the prospective employee or a current or former employer." Employers must remove such inquiries from their employment applications to ensure compliance.

AIM HR Service

AIM HR Solutions provides reference and background checking services and workplace incident investigations. For further information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Note: An employer may not legally act against an applicant or an employee for answering an unlawful question on an application untruthfully. On the other hand, if an applicant answers an illegal question truthfully, any adverse action taken based on the answer may be grounds for a discrimination claim against the employer.

The following are not required, but employers should consider them with respect to employment applications:

1. **Social Security Number (SSN).** In light of the Massachusetts data security law, AIM recommends that employers do not require or request an applicant's SSN on an employment application. The Massachusetts data security law provides that this number, when combined with the individual's last name plus either first name or first initial, is considered "personal information," and any breach of security involving personal information, must be reported to the affected individual(s) and potentially to the state government. This is true for both paper and electronic information. If a SSN is needed—for a background check, for example—it can be requested separately and made available on a need-to-know basis. (201 C.CH.M.R 17.00).
2. **Company EEO Statement.** Including an Equal Employment Opportunity (EEO) statement on an employment application is optional. If an employer chooses to do so, however, the statement must include "sexual orientation" and read as follows: "Our company is committed to a policy of nondiscrimination and equal opportunity for all employees and qualified applicants without regard to race, color, religious creed, protected genetic information, gender identity, national origin, ancestry, sex, age, disability, veteran status, or sexual orientation or any other characteristic protected by federal, state, or local laws."
3. **Genetic Discrimination.** Although not required by law, AIM recommends that employers include on their employment application a statement to the effect that Massachusetts anti-discrimination law (M.G.L. ch. 151B) prohibits employers from (1) terminating or refusing to hire individuals on the basis of genetic information; (2) requesting genetic information concerning employees, applicants, or their family members; (3) attempting to induce individuals to undergo genetic tests or otherwise disclose genetic information; (4) using genetic information in any way that affects the terms and conditions of an individual's employment; or (5) seeking, receiving, or maintaining genetic information for any nonmedical purpose.

AIM HR SERVICE

AIM HR Solutions has compliant job applications for purchase; these are downloadable from the AIM HR Solutions website at www.AIMHRSolutions.com.

Independent Contractors

Massachusetts has multiple laws defining independent contractors (IC). In general, ICs are defined very narrowly, making it very difficult to classify an individual as an independent contractor. For an employer to demonstrate that someone is an independent contractor and not an employee under Massachusetts wage and hour law, for example, the employer must be able to show that the worker meets *all three of the following statutory requirements*:

1. The individual is free from control and direction in connection with the performance of the service, both under their contract for the performance of service and in fact, and
2. The service is performed outside the usual course of the business of the employer, and
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

(M.G.L. ch. 149 §148B)

Failure to meet any one of the three tests means that the person is an employee. Pursuant to this law, the Attorney General published an advisory that discusses the law in detail and is available on its website. The website link is available in the back of this guide.

PENALTIES | The statute authorizes the Attorney General to impose substantial civil and criminal penalties, and in certain circumstances, to debar violators from public works contracts. The penalties and length of debarment depend upon the nature and number of violations. The law creates liability for both business entities and individuals, including corporate officers, and those with management authority over affected workers.

New Law

In early January of 2024, the U.S. Department of Labor released a new federal rule establishing 6 criteria for determining whether an individual is an employee or independent contractor.

The final rule rescinds a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. Under the new rule, employers apply a totality-of-the-circumstances analysis, in which none of the factors carry any greater weight than another factor.

The new test includes the following six factors:

1. The degree to which the employer controls how the work is done.
2. The worker's opportunity for profit or loss.
3. The amount of skill and initiative required for the work.
4. The degree of permanence of the working relationship.
5. The worker's investment in equipment or materials required for the task.
6. The extent to which the service rendered is an integral part of the employer's business.

NOTE: The new rule takes effect on March 11, 2024. The DOL intends to release further guidance to help employers comply with the new rule. While Massachusetts employers should continue to follow the state's independent contractor law, the new federal rule will apply in any state that a company operates in that does not have a state law-based IC law.

Compliance Tip: The IRS, the U.S. Department of Labor, the National Labor Relations Board, the Massachusetts Department of Revenue, the Massachusetts Department of Unemployment Assistance and the Department of Family and Medical Leave use different less stringent tests to determine independent contractor status. The Massachusetts wage and hour three-factor test, however, is the most restrictive definition, and AIM recommends that Massachusetts employers follow it to minimize their legal risk.

Job Descriptions

While there is no legal requirement that an employer have formal job descriptions, there are many benefits to having well-defined duties, responsibilities, expectations, and physical and mental skill/education requirements. The job description is essential:

- when sending an applicant for a post-offer, pre-employment medical examination;
- when determining if an employee is "fit for duty" to return to work following an injury or an illness;
- when determining how to accommodate an individual under the Americans with Disabilities Act (ADA);
- when classifying employees as exempt or non-exempt under the Fair Labor Standards Act (FLSA);
- when providing a description of the employee's position in response to an employee's application for benefits under the Massachusetts Paid Family and Medical Leave (PFML); and
- are very useful in the employee selection process and in setting clear performance expectations.

A carefully and clearly prepared and maintained job description is also necessary to ensure compliance with many recent Massachusetts employment laws including the Pay Equity Law and the Pregnant Workers Fairness Act and the PFML. (These laws are discussed in more detail elsewhere in this guide.) Job descriptions must also be carefully drafted to avoid weakening the "at will" status of the employment relationship by inadvertently assuring long-term or permanent employment if the terms of the job description are met.

Joint Employment

Joint employment is when an employee is under the authority and supervision of two or more employers. Examples of joint employment relationships include outsourcing employment through an employment agency or contracting temporary employees from a temporary employment agency. Because of questions as to who is legally responsible for the employee in a joint employment relationship, joint employment status is frequently a source of litigation over issues such as overtime and wage issues. Massachusetts does not have a specific law defining joint employment, meaning that parties interested in this issue need to rely on case law (court decisions) for guidance.

New Law

The National Labor Relations Board (NLRB) issued a final rule titled "Determining Joint Employer Status" in Oct. 2023. Under the new rule, a joint employer relationship can be established if "the employer possesses the authority to control (whether directly, indirectly or both) or exercises the power to control (whether directly, indirectly or both) one or more of the employees' essential terms and conditions of employment, regardless of whether the employer exercises such control or the manner in which such control is exercised (emphasis added)." The rule separates "essential terms and conditions" into seven categories: 1) wages, benefits and other compensation; 2) hours of work and scheduling; 3) the assignment of duties to be performed; 4) the supervision of the performance of duties; 5) work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline; 6) the tenure of employment, including hiring and discharge; and 7) working conditions related to the safety and health of employees.

The NLRB final rule was initially scheduled to become effective on December 26, 2023, but the NLRB postponed the implementation date until February 26, 2024. A Federal Court in Texas issued a stay delaying its implementation until March 11, 2024. The NLRB has issued a fact sheet for guidance of this new rule. While the new federal rule would not supersede federal rules established under Title VII of the Civil Rights Act or the Fair Labor Standards Act (FLSA), it but rather adds another test. Courts generally analyze joint employment in Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) cases the same as Title VII. Effective date of this rule delayed pending further litigation

Case Note: The Massachusetts Supreme Judicial Court (SJC) last year considered a joint employment case brought under state wage and hour law and the federal FLSA. In making its decision that a joint employment relationship did not exist, the SJC noted that Massachusetts wage and hour laws "include the concept of joint employment;" aligning Massachusetts with federal law, the SJC found that the better test for determining who controls the employee (and thus should be considered a joint employer) is the multifactor, "totality of the circumstances" standard established under the FLSA. The 4 factors include whether the entity:

1 had the power to hire and fire the individual,
2 supervised and controlled the individual's work schedules or conditions of employment,
3 determined the rate and method of payment, and
4 maintained employment records.

While no one factor is dispositive of the relationship, courts will look to and consider all the evidence surrounding the 4 factors in reaching its determination as to whether joint employment exists. *(Jinks v Credico, 12-13-22)*

Non-Compete Agreements

Massachusetts non-compete agreement (NCA) law contains many provisions limiting or preventing the use of NCAs. Among the key provisions of the law are a definition of NCA, limits on its duration and geography, a garden leave provision, and a limitation on the categories of employee's subject to an NCA.

Under the law, an NCA is defined as an agreement between an employer and an employee in which the employee or prospective employee agrees not to engage in competitive activities with the employer after the employment relationship has ended. In return, the employer must provide consideration (i.e., something of value) to the employee.

To be valid and enforceable, an NCA must meet the following requirements:

1. **Pre-hire, post offer of employment.** It must be in writing and signed by both the employer and the incoming employee and expressly state that the individual has the right to consult with counsel prior to signing. It must be provided to the incoming employee by the earlier of the following: a formal offer of employment or 10 business days before the commencement of the employee's employment.
2. **Existing employee.** It must be in writing, signed by both parties, and supported by fair and reasonable consideration (something of value) apart from continued employment. Notice of the agreement must be provided at least 10 business days before the agreement is to be effective. It must include language stating that the employee has the right to consult with counsel prior to signing.
3. **NCA purpose.** It must be limited to what is necessary to protect one or more of the following legitimate business interests of the employer: the employer's trade secrets, as defined by state law; the employer's confidential information, which would otherwise not qualify as a trade secret; or the employer's goodwill. It will be presumed necessary in cases in which the legitimate business interest can't be protected any other way.
4. **Duration.** It is capped at 12 months from the end of employment. It may be extended to up to two years only if the employee has breached fiduciary duty to the employer or has unlawfully taken property belonging to the employer.

5. **Geography.** It must be limited to the areas in which the employee has provided services to the company or had a material presence during the previous two years of employment.
6. **Period of covered employment.** It must be reasonable in scope to protect a legitimate business interest and is limited to the specific types of services provided by the employee at any time during the previous two years of employment.
7. **Consideration.** It must be supported by a garden leave clause or other mutually agreed upon consideration between the employer and the employee. The garden leave must provide for the payment of at least 50% of the employee's highest annualized base salary paid within the two years preceding the employee's termination and not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments unless the period has been increased beyond 12 months due to a breach (see number 4 above).
8. **The agreement** must be consonant with public policy.

Case Note: In a 2022 decision, a Massachusetts court considered the question of whether a specific NCA was enforceable. The court determined that the NCA failed on at least two counts. It took effect immediately without the employee receiving at least ten days' advance notice (violation of provision 2 above) and, and because the 2020 NCA did not expressly state that the employee had the right to confer with an attorney before entering into the NCA. (Also, a violation of provision 2 above). (*Lighthouse Insurance Agency, Ltd. v. Lambert,* June 8, 2022)

Case Note: In a 2023 case, the Business Law section of the Superior Court ruled that the noncompete agreement an employer had with a former employee was overly broad and therefore unenforceable as written. The court based its determination on the fact that because of the change in the employee's responsibilities, the noncompete agreement no longer reflected the employee's duties at the company. The court "blue penciled" the agreement to narrow the geographic scope of the agreement and allowed the employer to enforce the narrowed version for one year. As an aside, the employee had argued that his one-year noncompetition obligation had begun to run earlier when he accepted a demotion under the "material change doctrine," but the court found that the employee had waived this argument in writing when the employee agreed that the "non-competition obligations would remain in effect notwithstanding any changes in his position, duties, geographic location, responsibilities or compensation." (*Genzyme Corp. v. Melvin*, April 4, 2023)

The Massachusetts courts generally view each NCA based on its own unique circumstances. For example, over the years the Courts have held that a permanent/long term change in an employee's duties (for example, a promotion or a demotion) voids an NCA that is not modified to cover the new duties. This has been referred to as the "material change doctrine," which may result in a court voiding an NCA covenant if there are subsequent material changes to the employee's employment. On the other hand, a change in an employee's duties on a temporary basis may not be considered sufficiently material to result in voiding an NCA. This is determined by the courts on a case-by-case basis.

Massachusetts courts generally take an activist posture regarding modifying (i.e., blue penciling) an NCA to ensure equity in its application. Therefore, a court may enforce an NCA to the extent necessary to protect legitimate business interests, essentially redrawing the terms of the agreement.

NCAs signed prior to the 2018 adoption of the law may still be enforceable under the common law depending on the facts and circumstances. However, courts are likely to interpret these agreements consistent with the standards established under Massachusetts' NCA law for purposes of public policy. An employer should consult with legal counsel for assistance in review of those agreements entered into prior to this 2018 date.

An employer cannot require an NCA for certain classes of employees, including non-exempt employees under the Fair Labor Standards Act; undergraduate or graduate students in an internship or a short-term employment program with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; employees terminated without cause or laid off; and employees aged 18 or younger.

Massachusetts law also bans noncompetition agreements for certain professions: physicians; nurses; psychologists; social workers; broadcasting industry; lawyers.

The following types of restrictive covenants are not covered by the NCA statute:

- covenants not to solicit or hire employees of the employer;
- covenants not to solicit or transact business with customers, clients, or vendors of the employer;
- NCAs made in connection with the sale of a business entity, or substantially all the operating assets of a business entity or partnership, or the disposal of the ownership interest of a business entity or partnership (or division or subsidiary thereof) when the party restricted by the noncompetition agreement is a significant owner

of, or member or partner in, the business entity that will receive significant consideration or benefit from the sale or disposal;

- noncompetition agreements outside an employment relationship;
- forfeiture agreements;
- nondisclosure or confidentiality agreements;
- invention assignment agreements;
- garden leave clauses;
- noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given 7 business days to rescind acceptance; or
- agreements by which an employee agrees to not reapply for employment to the same employer after termination.

Any employer considering requiring an NCA should contact its legal counsel for assistance in preparing the document.

Compliance Tip: *Merely referencing a non-compete standard or norm in a company handbook without any other written agreement will not be sufficient to make it an enforceable NCA contract.*

New Rulemaking

In January 2023, the Federal Trade Commission (FTC) issued a proposed rule to prevent employers from entering into agreements with noncompetition clauses with employees and workers and a requirement that any such clauses contained in current agreements be rescinded. Public comment was extended. The FTC is expected to vote on the proposed rule in April 2024.

Non-Disclosure Agreements

Non-disclosure agreements require employees not to reveal, make available, or use any confidential information—such as trade secrets, recipes, or inventions—after they leave the company. The non-disclosure agreement should specifically discuss the types of information the employees will be exposed to during employment and are prohibited from disclosing. A non-disclosure agreement typically does not cover information that could easily be obtained from other sources or that becomes public knowledge (without fault of the employees).

Because non-disclosure agreements do not seek to limit the ability of former employees to work, they are often more easily enforced in the courts than are non-compete agreements. An employer considering requiring a non-disclosure agreement should contact its legal counsel for assistance in preparing the document.

Non-Piracy/Non-Solicitation Agreements

A non-piracy, or anti-piracy, agreement is similar to non-compete and non-disclosure agreements. It prevents former employees from soliciting former customers and clients to leave the former employer and patronize the former employees' new employer. It can also seek to prevent former employees from soliciting their former colleagues at the old employer to leave and join the former employees at their new place of business. Also known as non-solicitation agreements, these agreements must be reasonable in the geographical area covered and in their duration, and will typically be enforced only for customers with whom the former employees actually had a relationship. Courts are sensitive to protecting a customer's choice of vendor, so the free choice of a customer to leave and join with former employees, without actual solicitation, cannot generally be prevented. As with all such clauses, employers should draft these restrictive covenants as narrowly as possible to increase the likelihood of enforcement while protecting their important client and employee relationships.

An employer considering requiring a non-piracy agreement should contact its legal counsel for assistance in preparing the document.

Compliance Tip: *Employers who require non-compete, non-disclosure, or non-piracy agreements should regularly update them to ensure that they cover any new duties, responsibilities, titles, and knowledge the employee may acquire over the life of their employment with the company. Failure to do so may result in the agreement being voided or blue penciled (i.e. edited/rewritten) by a court.*

Polygraph Testing

Massachusetts law prohibits the use of polygraphs (lie detectors) with applicants or employees. Massachusetts General Laws Chapter 149, § 19b, requires employers to include the following language as part of their employment application:

"*It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer that violates this law shall be subject to criminal penalties and civil liability.*"

Federal law requires employers to display a poster disclosing limitations on the use of polygraphs. The link for the poster is at the end of this reference guide.

Pre-Employment Physicals and Medical Inquiries

An employer may legally inquire about an applicant's present or past health only after it has made a bona fide offer of employment. If a company requires or requests a physical examination following the offer of employment and designates the physician for prospective or current employees, the company must pay for the examination (M.G.L. ch. 149 § 159B). A more detailed discussion of drug testing appears later in this publication.

If a company requires a physical examination of an employee, the employer must pay for the employee's time spent obtaining the physical. Additionally, a copy of the medical report from the examination must be furnished to that individual upon request (M.G.L.ch. 149 § 19A).

Retention of Applications

For more information, please refer to AIM's Personnel Records and Federal and State Recordkeeping Requirements Reference Guide.

Federal law requires that employers retain applications for candidates who were not hired for at least one year from the date of the hiring decision. Retaining applications also enables employers to respond to Title VII, ADA or ADEA discrimination charges. In addition, under Title VII, application forms for persons applying for apprenticeship programs must be kept for two years following the date of the application.

For employers that must have an affirmative action plan (AAP) (see Discrimination in Employment section below for requirements), applications should be kept for the current and past AAP years. The employer subject to the AAP is responsible for designating an AAP year. Examples of AAP years include calendar year, fiscal year, or year beginning with the date of the commencement of coverage. Employers subject to an AAP for the first time need only retain applications for that year and going forward.

It is recommended that an employer not keep applications any longer than is required by law.

Discrimination in Employment

Affirmative Action Plans

Under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973, supply and service contractors having a total of 50 or more employees are required to develop written affirmative action plans (AAPs) within 120 days of the start of a contract for each of the contractor's separate establishments and updated annually documenting the employment for females, minorities, and individuals with disabilities if meeting one of the following four criteria:

- have entered into at least one federal contract for $50,000 or more in any 12-month period
- are transporting federal goods (have government bills of lading), which in any 12-month period total, or can reasonably be expected to total, $50,000 or more
- serve as a depository of government funds in any amount (e.g. banks, savings and loans, and credit unions).

AIM HR Service

AIM HR Solutions provides AAP-related services. For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Vietnam Era Veterans

Covered contractors required by the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) to develop a written AAP must also establish a hiring benchmark for protected veterans each year or adopt the national benchmark provided by the Office of Federal Contract Compliance Programs (OFCCP). Under either approach, contractors must compare the percentage of employees who are protected veterans in each of their establishments to the hiring benchmark set for that establishment.

Age Discrimination

The federal Age Discrimination in Employment Act (ADEA) applies to employers with 20 or more employees and is enforced by the Equal Employment Opportunity Commission (EEOC). The law prohibits an employer from discriminating based on age against an employee 40 years of age or older in any employment actions. Massachusetts anti-discrimination law (enforced by the Massachusetts Commission Against Discrimination) also prohibits employers from discriminating against employees who are 40 years of age or older based on their age.

Case Note: The Massachusetts Supreme Judicial Court (SJC) has ruled that a case alleging age discrimination must be based on a "substantial" difference in age, which it defined as no less than five years, unless there is other evidence to prove discriminatory intent by the employer. (*Knight v. Avon Products*, 2003)

Reasonable Factors Other Than Age (RFOA)

The ADEA provides employers with an affirmative defense against a limited range of age discrimination claims. The defense is based on a standard known as RFOA (reasonable factors other than age). The Equal Employment Opportunity Commission (EEOC) has issued rules clarifying when an employer may use this defense, limiting its application. Specifically, it applies to employment practices that:

- are neutral on their face,
- might harm older workers more than younger workers, and
- apply to groups of people.

For instance, RFOA may apply to tests used to screen employees or to procedures used to identify persons to be laid off in a broad reduction in force (RIF).

An employer would be required to prove the defense only after an employee has identified a specific employment policy or practice and established that the practice harmed older workers substantially more than younger workers. To show that an employment practice is an RFOA, the employer must prove that the practice was reasonably designed and administered to achieve a legitimate business purpose considering the circumstances, including its potential to harm older workers.

The extent to which the employer defined and applied the factor fairly and accurately refers to the steps the employer took to make sure that the practice was designed and applied to achieve the employer's intended goal while considering potential harm to older workers. The EEOC offers a couple of examples to illustrate the point:

EXAMPLE 1: LEGAL

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity based on objective factors, such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

EXAMPLE 2: ILLEGAL

The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as the least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer's stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few simple steps, such as those discussed in Example 1.

MANDATORY RETIREMENT

In general, requiring employees to retire is prohibited. There are, however, exemptions for bona fide executives, high level policymaking employees, and bona fide seniority or benefit plans (M.G.L. c. 149 § 24A–K; M.G.L. c. 151B). There is no upper age limit on this protected class.

Anti-Discrimination

The federal Civil Rights Act of 1964 includes Title VII and applies to employers with 15 or more employees. It prohibits all forms of discrimination based on race, color, sex, religion, and national origin in all phases of the employment relationship. The law also prohibits retaliation which is discussed in more detail below. The federal law is enforced by the EEOC. Massachusetts anti-discrimination law covers employers of six or more employees and includes all the protected classes under federal civil rights law as well as ancestry, traits historically associated with race (including, but not limited to, hair texture, hair type, hair length and protective hairstyles), age, genetic information, disability, veteran status, military status, gender identity, and sexual orientation, and pregnancy or a condition related to said pregnancy (M.G.L. ch. 151B § 4). The Massachusetts Commission Against Discrimination (MCAD) enforces Massachusetts anti-discrimination law. The Massachusetts Appeals Court has agreed with the MCAD position that an individual may be held personally liable for certain discriminatory actions under the state's anti-discrimination law. An individual alleging discrimination must file a complaint with the MCAD or the EEOC within 300 days of the alleged occurrence.

The Massachusetts Supreme Judicial Court (SJC) has ruled that employees may sue employers of fewer than six employees for employment discrimination under the Massachusetts Equal Rights Act (MERA), a law granting equal rights to all persons in the following protected classes: race, color, religious creed, national origin, sex, age (if over 40 years of age) and handicap. The SJC stated that although Chapter 151B excludes small employers of five or fewer employees from its coverage, the legislature intended to create an alternative avenue for relief under MERA.

Compliance Tip: *Massachusetts and federal anti-discrimination laws, regulations and legal decisions include frequently used terms that HR professionals should be aware of. These key terms include "bona fide occupational qualification," "disparate impact," and "disparate treatment." These terms are briefly discussed below.*

Bona Fide Occupational Qualification (BFOQ) Refers to a qualification for a position that is discriminatory but is legally permissible provided the employer can demonstrate that the qualification is reasonably necessary to the normal operation of the business. According to the law, in very limited situations, an employer may discriminate on the basis of age, sex, religion, or national origin, but never race.

Examples include the following:

- **Age** | When the federal government imposes a mandatory retirement age for safety reasons (e.g., pilots, bus drivers)
- **Sex** | When a position is limited to a single sex based on the privacy interests of third parties or physical safety (e.g., restroom attendant, clothing model)
- **Religion** | When an employer hires someone of a certain faith to perform certain faith-based activities (e.g., religious teacher)
- **National origin** | When an employer has a certain level of security clearance and has federal contract(s) stating that only U.S. citizens or U.S. persons (those born in the United States or naturalized citizens) may perform work on that contract.

Disparate impact exists when an employer has an apparently neutral policy that has an adverse impact on a member or members of a legally protected class. The burden of proof is on the employee, but if the employee provides evidence of disparate impact, the employer may be able to defend itself by showing that the policy is a BFOQ or that the policy is necessary for the operation of the business.

Disparate treatment exists when an employer intentionally and blatantly treats a member of a protected class less favorably than other employees in terms of employment. The burden is on the employee to prove the disparate treatment.

For employers to better understand their responsibilities in responding to a discrimination claim, it is helpful to be familiar with the McDonnell Douglas burden-shifting test described below.

Burden of Proof

In employment discrimination cases, the plaintiff (employee) must prove the employee is the victim of unlawful discrimination. In making a charge of discrimination, an employee must prove all of the following:

- the employee is a member of a protected class;
- the employee possessed the necessary qualifications and adequately performed their job;
- the employee was nevertheless dismissed or otherwise suffered an adverse employment action at the hands of the employer; and
- that the employer sought someone of roughly equivalent qualifications to perform substantially the same work.

It is rare that an employee has direct evidence of discrimination and as such the U.S. Supreme Court established in its *McDonnell Douglas* decision the three-step burden-shifting test to govern an employee's discrimination allegation. The three steps are as follows:

1. Plaintiff (employee) must state a "prima facie" case, one that does not offer direct evidence, but that meets the burden of proof described above.
2. The burden shifts to the defendant (employer) who must provide a legitimate, nondiscriminatory reason for the challenged employment decision.
3. If the defendant (employer) demonstrates a legitimate, nondiscriminatory reason, the plaintiff (employee) must show that the reason offered by the defendant in step 2 is a "pretext" for discrimination.

The MCAD follows this process in determining whether to grant probable cause (i.e., the right to move a case forward at the MCAD) to a complainant. A lack of probable cause (LOPC) determination means that pending the outcome of an appeal, the claim is dismissed and closed as far as the MCAD is concerned.

According to its FY 2023 annual report, the MCAD found LOPC in 80.4% of the claims it investigated. Given an employer's responsibility to

respond with a legitimate reason supporting the claim that its employment action was not discriminatory, the 80.4% success rate shows that clear and accurate documentation of a personnel action is essential when responding to any discrimination complaint.

Armed Services

Massachusetts law prohibits employment discrimination against members of the armed services. The law specifically bans employers from denying employment, reemployment, retention of employment, promotion, or any benefit of employment to any person because of their membership in the armed services or obligation to any military service. The law covers discrimination against any person who applies to perform military service as well. The law does not impose any greater compliance burdens than the ones already imposed by the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). (See Military Service Leave section [Federal and Massachusetts] for a more detailed discussion of USERRA.)

Disability: Federal Law

The Americans with Disabilities Act (ADA) applies to employers of 15 or more employees. It is enforced by the EEOC. Title I of the law prohibits an employer from discriminating against a qualified individual with a disability in employment decisions.

"Disability" is defined by the ADA as:

- having a physical or mental impairment that substantially limits one or more of the individual's major life activities;
- having a record or past history of such impairment; or
- being regarded as having such impairment.

A "qualified individual with a disability" is a person who meets bona fide skill, experience, education, or other requirements of an employment position that the employee holds or seeks, and who can perform the "essential functions" of the position either with or without a "reasonable accommodation."

Reasonable Accommodation

The ADA, in addition to prohibiting disability discrimination, requires an employer to provide reasonable accommodation to qualified individuals with a disability who are employees or applicants. A reasonable accommodation is a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to ensure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees.

An employer is responsible for providing a reasonable accommodation when: (1) the employer knows or should have known of an individual's disability; (2) the employer knows or should have known that the individual is experiencing job-related issues due to the disability; or (3) knows or should have known that the individual has a disability that prevents the individual from requesting a reasonable accommodation. Examples of reasonable accommodations include adjustments to an employee's working conditions, work schedule, working remotely, or possible reassignment to an open position.

Employers must engage in an interactive process, with the employee to determine what, if any, reasonable accommodations are necessary to enable qualified individuals to perform essential job functions. This process may include the following:

- Assess the job and determine the purpose and essential function;
- Consult with the qualified individual with a disability to determine job-related limitations and how a reasonable accommodation will address those limitations;
- Consult with the qualified individual with a disability to identify potential accommodations and assess effectiveness in enabling the individual to perform essential duties of the job; and
- Consider the individual's preference and select and implement accommodations deemed appropriate for both the employer and employee.

As part of the interactive process, the employer has the right to request medical documentation to support the disability statement.

When an employee requests a leave of absence as a reasonable accommodation employers may have issues determining the amount of leave that is reasonable. The EEOC requires that employers consider providing leave to an employee with a disability as a reasonable accommodation so long as it does not result in an undue hardship to the employer (see below). However, reasonable accommodation does not require that the employer provide paid leave beyond what it provides as part of paid leave policy and as required under law. When the need for extended leave becomes apparent, an interactive dialogue is

necessary to determine – on a case-by-case basis – if it is reasonable to extend leave beyond the leave policy.

There is no pre-determined duration of leave time that is required to be granted as an accommodation under the ADA. Nor does the EEOC enforcement guidance dictate how much additional leave is required to be granted. However, employers must remember that they cannot simply fall back on the requirements of their maximum leave policy to shut the door when it is possible that the ADA may apply to the leave request.

Undue Hardship

An employer does not have to provide reasonable accommodation that would cause an "undue hardship" on its operations and finances. An undue hardship exception must be based on an individualized assessment of present circumstances that shows that a specific reasonable accommodation would cause significant difficulty or expense. Factors considered in assessing whether reasonable accommodation will impose an undue hardship include: the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Additionally, employers can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances. The EEOC provides information to help employers determine when reasonable accommodation becomes an undue hardship.

Consequences

Employers that fail to adhere to the ADA, including but not limited to a failure to engage in the interactive process outlined above, may subject themselves to a lawsuit. If found liable, remedies may include hiring, reinstatement, back pay, injunctive relief and provision of reasonable accommodation. Attorneys' fees and compensatory damages may be awarded for actual monetary losses and for future monetary losses and mental anguish. Punitive damages may be available as well if an employer acts with malice or reckless indifference.

Case Note: In 2016 the EEOC sued Lowe's Home Centers alleging violations of the ADA for its denial of reasonable accommodations to and termination of disabled employees whose medical leave of absences exceeded the company's leave policy. Lowe's agreed to pay $8.6 million to settle the disability discriminations claims brought against it and agreed to adjust the company's leave policy to ensure compliance with the ADA.
(EEOC v. Lowe's, settled in May 2016)

In 2008, the ADA Amendments Act (ADAAA) greatly expanded the definition of disability and, therefore, the statute's coverage. The ADAAA was passed in response to several Supreme Court decisions that limited the coverage of the ADA, often by narrowing the definition of what it meant to be disabled. In adopting the ADAAA, it appears that Congress's intent was to shift the focus away from whether the plaintiff (applicant/employee) met the definition of what it means to be disabled to whether the employer complied with its obligations to engage in an interactive process to determine if the qualified individual can perform the job, with or without a reasonable accommodation.

The ADAAA reinforces the concept that an impairment must substantially limit a major life activity in order to be considered a disability;

- expands the list of major life activities to include, but not be limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working;
- prohibits the consideration of mitigating measures—such as medication, prosthetics, and assistive technology—in determining whether an individual has a disability, except for ordinary eyeglasses and contact lenses;
- provides coverage to people who experience discrimination based on a perception of impairment, regardless of whether the individual experiences a disability; this does not, however, apply to transitory and minor impairments for which the impairment is expected to last less than six months;
- broadens coverage under the "regarded as" disabled definition, but clarifies that an individual must first establish that they have an actual disability and have a record of such disability in order to qualify for a reasonable accommodation;
- retains the requirement that the employee/applicant has the burden of proof in demonstrating that the employee/applicant is qualified and able to perform the job.

EEOC guidance establishes that the ADA also protects qualified applicants and employees from discrimination based on their relationship or association with an individual who has a disability. The ADA prohibits this type of discrimination to protect individuals from employer actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's

unfounded assumption that the applicant would use excessive leave to care for the spouse.

The key to determining if discrimination has occurred is whether the employer's actions are motivated by either an individual's own disability or the individual's relationship or association with a person who has a disability. Note, however, that the employer is required to provide a reasonable accommodation only to the person who has a disability.

The ADA also applies to the hiring process. Employers may not request medical information (or ask about prior workers' compensation claims) before the employer has made a bona fide offer of employment to an individual.

Compliance Tip: *Private litigants in U.S. courts and the EEOC continue to focus on how an employer may make a reasonable accommodation to an applicant with a disability via the employer's web page, to enable jobseekers with disabilities to investigate job opportunities and apply for a position. An employer that relies on its web presence to invite applicants should review its site to make sure it is ADA compliant, i.e. that the website presents no obstacles to a disabled person applying for a position.*

Disability: State Law

Similar to the ADA, Massachusetts law provides protection against employment discrimination for "qualified" (able to perform the essential functions of the position either with or without a reasonable accommodation) individuals with disabilities. Massachusetts law applies to employers with six or more employees. Such employers must reasonably accommodate a qualified individual unless doing so would cause undue hardship to the employer. In addition, an employer may not make any pre-employment inquiries as to whether an applicant has a disability or as to the nature or extent of the disability. A company may condition an offer of employment on the applicant successfully passing a medical examination conducted to ascertain whether the applicant can, with or without a reasonable accommodation, fulfill the essential functions of the position (M.G.L. ch. 151B § 4). Once employed, the employee may be asked to submit to a medical examination only when it is job related and consistent with business necessity.

The Massachusetts Appeals Court ruled that allowing an employee to work from home might be considered a reasonable accommodation for an employee's disability. Whether or not the employer must make such an accommodation depends on many factors, including whether the essential functions of the job can be performed at home, whether the employer allows other employees to telecommute, whether the employee can perform the job without direct supervision, and the amount and type of equipment the employee may need at home to perform the job.

The Massachusetts Supreme Judicial Court (SJC) now recognizes that state anti-discrimination law extends to prohibiting employers from discriminating against employees based on their association with a person who has a disability. This means that an employer may not make an employment decision based on its concern that continuing to employ someone will increase the company's health insurance expenses or otherwise adversely affect the company, even if those expenses flow from the physical or mental impairment of someone who is associated with that employee and covered under the employer's health insurance plan.

The Massachusetts SJC has ruled that a qualified handicapped individual includes a disabled person who uses medical marijuana to treat the disability. This ruling means that an employer may need to make a reasonable accommodation for the applicant's or employee's disability. To determine the nature of the reasonable accommodation, if any, the employer must enter into an interactive dialogue with the disabled person. Please see the discussion on medical marijuana in Employment section for more details.

Case Notes: Employer denied an employee's request to work remotely two days per week. Employee sued arguing lack of reasonable accommodation. The MCAD agreed, stating that the employer's actions constituted a failure to provide a reasonable accommodation of the employee's disability and a violation of M.G.L.ch. 151B.

In a case that arose prior to the COVID-19 pandemic, the question was whether the employer had successfully met the burden of showing it was an undue hardship to provide two days of working from home as a reasonable accommodation for the employee's disability. The MCAD determined that it was reasonable for the employer to grant the employee a two days/week remote work schedule and its refusal to do so constituted a violation of the state anti-discrimination law. As part of the decision, the employee was awarded emotional distress damages of $75,000. (MCAD, et al. v. Organogenesis, Inch., June 9, 2023.)

English-Only Rules

English-only rules are presumed by the EEOC to violate anti-discrimination law when they require that English be spoken at all times (e.g., even during breaks) in the workplace. The federal court in Massachusetts has ruled that an employer may require employees to speak English during work time if the policy is based on a legitimate business necessity, such as communication with customers, workplace safety, or cooperative work assignments. Even if there is a need for an English-only rule, an employer may not take disciplinary action against an employee for violating the rule unless the employer has notified workers about the rule and the consequences of violating it. Any employer considering adopting an English-only policy should carefully consider what situations the policy is intended to address and explore if there is another way to resolve the matter.

Gender Identity

Massachusetts law extends equal rights protections to transgender individuals by prohibiting discrimination on the basis of gender identity in employment, housing, credit, and education. Under this law, employers are prohibited from refusing to hire; discharging; or discriminating against any individual in compensation or in terms, conditions, or privileges of employment because of that individual's gender identity.

Gender identity is defined as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." In addition to medical history and care or treatment as possible evidence that an individual belongs to this protected class, evidence that the gender-related identity is a sincerely held belief is sufficient.

Note: The Massachusetts Attorney General's Office published gender identity guidance in 2016 to help employers understand and comply with the law. MCAD also published guidance in late 2016 explaining its point of view on the law. Both are available on their websites, which are available at the back of this guide.

Gender Discrimination and Social Stereotyping

In *Chadwick v. WellPoint, Inc.* (Mar 26, 2009), the mother of four young children brought a claim of gender discrimination against her employer after she was denied a promotion. At the time of her application for promotion, the employee had worked for the employer for seven years and had received excellent performance reviews. When she questioned why she was not promoted, the decision maker stated, "It wasn't anything you did or didn't do. It was just that you're going to school, you have the kids, and you just have a lot on your plate right now."

The U.S. Court of Appeals for the First Circuit (which includes Massachusetts) found that a jury could infer from the above statements that the employee was denied the promotion due to the assumption that a woman with four young children might not "give her all" to the job. The opinion makes the point that employers should not assume that a woman, because she is a woman and a mother, will be a less productive employee due to family responsibilities. Additionally, employers may not take an adverse job action based on the assumption that a woman will neglect her job responsibilities in favor of her presumed childcare responsibilities.

Genetic Discrimination

The federal Genetic Information Nondiscrimination Act (GINA) applies to employers of 15 employees or more and:

- prohibits employers from discriminating against an employee or a job applicant based on genetic information;
- places broad restrictions on an employer's deliberate acquisition of genetic information;
- mandates confidentiality for genetic information that employers lawfully collect;
- strictly limits disclosure of such information; and
- prohibits retaliation against employees or job applicants who complain about genetic discrimination.

The EEOC's regulations implementing GINA are helpful to understand the applicability of the law. The regulations provide examples of genetic tests; more fully explain GINA's prohibition against requesting, requiring, or purchasing genetic information; provide model language employers can use when requesting medical information from employees to avoid acquiring genetic information; and describe how GINA applies to genetic information obtained via electronic media, including websites and social-networking sites.

The regulations also provide guidance regarding GINA's impact on requests for health-related information (e.g., to support an employee's request for reasonable accommodation under the ADA or request for sick leave). When making such requests, the employer should warn the employee and/or health-care provider not to provide genetic information. The warning may be in writing or oral (if the employer typically does not make such requests in writing).

Massachusetts state law also prohibits employers of six or more employees from requiring or requesting genetic test results, as well as from discriminating against an individual in terms and conditions of employment based on genetic information. M.G.L. ch. 151B defines "genetic information" as any written record or explanation of a genetic test of a person's family history with regard to the presence, absence, or variation of a gene. A genetic test is broadly defined as "any test of DNA, RNA, mitochondrial DNA, chromosome, or proteins for the purpose of identifying genes or genetic abnormalities." The law expressly excludes drug and alcohol tests from this definition, meaning that employers may continue to conduct those tests in accordance with existing legal requirements.

Compliance Tip: Massachusetts employers should take the following measures to comply with state and federal law:

1. Confirm that any required physical examinations do not require the disclosure of genetic information.
2. Ensure that genetic information is not inadvertently provided to the employer and that no employee's file includes genetic information of any kind. Wellness plans should be reviewed to ensure GINA compliance.
3. Train human resources personnel, managers, and recruiters about compliance with GINA, especially the provisions generally prohibiting deliberate acquisition of genetic information.
4. Post the required "Equal Employment Opportunity Is the Law" poster.
5. Ensure that EEO policies include prohibitions against discrimination based on genetic information and associated retaliation.

Investigations

Whenever an employer receives a complaint of discrimination from an employee, the employer must respond immediately by investigating to determine if a discriminatory act occurred. An employer's failure to investigate may form an independent basis for liability if the underlying claim for discrimination succeeds. The MCAD's guidance also states that an employer should make every effort to keep its investigation as confidential as possible. Although Massachusetts law makes it clear that investigating and addressing a claim of discrimination is not decisive in enabling an employer to overcome a discrimination complaint, a failure to investigate and resolve a complaint will likely enhance the possibility that the employee will prevail.

Investigative Confidentiality

Supervisors, managers and Human Resources should make it clear to any employee alleging discrimination that they and the employer will make every effort to maintain confidentiality, but that the employer will have to confront the employee(s) accused of discrimination and may have to speak with witnesses, and will have to document the investigation.

National Origin/Ancestry

National origin discrimination is illegal under the 1964 Civil Rights Act. The law applies to employers with 15 or more employees. It is illegal to discriminate against an applicant or an employee on the basis of characteristics associated with national origin or ancestry, such as being married to a person of a particular national origin, having participated in organizations identified with a particular national origin, or having a name associated with a particular national origin.

Due to the significant increase in Form I-9 compliance audits by U.S. Citizenship and Immigration Services (USCIS), employers should be very alert to the fact that they may face increased scrutiny over possible disparate treatment of employees not born in the United States during the Form I-9 preparation process. (See the Employment Eligibility Verification (Form I-9) section).

Note: The EEOC issued an enforcement guidance on national origin discrimination in 2016 to help employers understand and comply with the law.

Pregnancy

An employer subject to state and/or federal anti-discrimination laws may not deny a woman the right to work or restrict her job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. Any employer questioning a pregnant employee's ability to perform her job should seek a fitness-for-duty report on the employee before taking any action. The mere fact of pregnancy does not automatically establish a disqualifying disability. An employer may not legally use a woman's pregnancy, childbirth, or potential or actual use of maternity leave as a reason for any adverse job action, such as refusing to hire or promote her, discharging her, laying her off, failing to reinstate her, or restricting her duties.

The federal Pregnancy Discrimination Act (PDA) states that the employer must treat pregnancy-related disabilities in the same manner as any other temporary disability. The EEOC has issued guidance informing employers that they must provide pregnant workers with light-duty positions if they provide light duty for other workers. Although the guidance does not require employers to create a light-duty policy where none exists, employers that offer light duty for work-related injuries but not for any other situations, such as following a short-term disability absence, face two options. They can either open up light duty to include pregnancy or revise their light-duty policy to include all return-to-work situations, including post-work injury, pregnancy, and non-work injury.

While EEOC guidance does not require employers to provide a "reasonable accommodation" for all pregnant employees, it reiterates the position that the ADA and PDA require accommodations beyond light duty for only those pregnancy-related impairments that substantially limit a major life activity.

Please see the section below on the Pregnant Workers Fairness Act for more details on Massachusetts laws regarding pregnancy.

All health insurance and disability plans must provide benefits and consideration for pregnancy-related conditions on the same basis that they are provided for other medical conditions.

Case Note: In a 2015 U.S. Supreme Court case, an employer claimed that it was not required to provide modified duty to a pregnant employee, while the employee and the U.S. government argued that the EEOC's guidance required the employer to do so. The Supreme Court rejected both approaches, instead deciding that if an employee can show that the employer has a modified duty plan for others, such as injured employees, then the employer has the burden to prove why it cannot accommodate a pregnant employee. In addition, the employer cannot use reasons such as "too expensive" or "too inconvenient" as a valid justification for refusing the accommodation. (*Young v. U.P.S.*)

Pregnant Workers Fairness Act

This law prohibits all Massachusetts employers with six or more employees from discriminating due to an employee's pregnancy or pregnancy-related condition and requires such employers to make reasonable accommodation for an employee's pregnancy or pregnancy-related condition, such as to express milk for a nursing child, unless doing so would impose an "undue hardship" on the employer,

Examples of accommodations include, but are not limited to, more frequent or longer paid or unpaid breaks; time off to attend to a pregnancy complication or to recover from childbirth, with or without pay; acquisition or modification of equipment or seating; temporary transfer to a less strenuous or less hazardous position; job restructuring; light duty; private non-bathroom space for expressing breast milk; assistance with manual labor; and a modified work schedule.

The law prohibits:

- taking adverse action against an employee who requests a reasonable accommodation for her pregnancy or lactation;
- denying an employment opportunity (e.g., refusing to hire or promote) if the denial is based on the employer's need to make a reasonable accommodation based on an employee's pregnancy;
- requiring an employee to accept an accommodation that the employee chooses not to accept if it is unnecessary for the employee to perform the essential functions of the job;
- requiring an employee to take leave if another reasonable accommodation can be provided;
- refusing to hire a person who is pregnant because of the pregnancy or because of a condition related to the pregnancy if the person can perform the essential functions of the position with a reasonable accommodation, and if that reasonable accommodation would not impose an undue hardship on the business.

An employer has the burden of proving undue hardship and must show that it cannot provide an accommodation considering the following: the nature and cost of the needed accommodation; the overall financial resources of the employer; the overall size of the business with respect to the number of employees and the number, type, and location of its facilities; and the effect of the accommodation on expenses and resources, or any other impact of the accommodation on the employer's business.

Employers may seek documentation about most aspects of the need for one or more of the accommodation requests from an appropriate health-care or rehabilitation professional but may not seek documentation on the need for more frequent restroom, food, or water breaks; seating; limits on lifting over 20 pounds; and private non-bathroom space for expressing breast milk.

Employers must notify their employees in writing of their rights under this law. The notice should include statements about the right to be free from discrimination when exercising their rights under this law, and the right to reasonable accommodation for conditions related to pregnancy. The notice may be distributed via employee handbook, pamphlet, or other means to all employees, including new employees at or prior to the commencement of employment; in addition, any employee who notifies the employer of a pregnancy or who notifies the employer of a condition related to the employee's pregnancy—including but not limited to lactation or the need to express breast milk for a nursing child—must receive the notice not more than 10 days after such notification.

Note: The MCAD issued guidance in 2018 on the enforcement of and compliance with this law.

AIM HR Service

AIM HR Solutions has developed a model policy to assist employers in complying with the Pregnant Workers Fairness Act. For further information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com

Anti-Pregnancy Anti-Discrimination Laws

Although other federal laws (e.g., Title VII, the ADA, and the Family Medical Leave Act) effectively prohibit pregnancy discrimination, as of June 27, 2023, the federal Pregnant Workers Fairness Act (PWFA) requires employers with 15 or more employees to grant temporary and reasonable accommodations for pregnant job applicants and employees. The law references the reasonable accommodation language set forth in the ADA. The Equal Employment Opportunity Commission (EEOC) and the U.S. Attorney General's Office enforce the PWFA. The EEOC, within two years of the enactment of the law, must develop guidance providing examples of what constitutes reasonable accommodation under this new law. Until the EEOC guidance is published, Massachusetts employers should adhere to the state pregnant workers fairness statute and guidance.

Note: The EEOC began receiving claims alleging violations under the law as of June 27, 2023. The agency has also begun the process of developing compliance guidance as of the summer of 2023.

The Providing Urgent Maternal Protections for Nursing Mothers Act (the PUMP Act) was also passed as part of the same legislation. The PUMP Act amends the FLSA to require employers with 50 or more employees to provide reasonable break time to all employees (exempt and nonexempt) to express milk as needed for up to one year after birth. Time spent to express milk is only considered hours worked if the employee is also working. Just a quick reminder that under the Fair Labor Standards Act (FLSA) any break of 20 minutes or less is a paid break for nonexempt employees. The most significant impact of the PUMP Act is the expansion to include exempt employees, providing that they must be paid their full weekly salary notwithstanding their taking time for nursing breaks. The PUMP Act took effect on December 29, 2022, though the penalty provision did not take effect until April 2023. The penalty provision provides an employee with the right to sue an employer for failure to comply with the law.

Remedies may include employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate. These remedies are available regardless of whether the employee has also experienced retaliation. An employee may file a complaint with the Department of Labor's Wage and Hour Division or may file a private cause of action seeking appropriate remedies.

Race/Skin Color

The EEOC *Compliance Manual* provides guidance on analyzing charges of race and skin color discrimination in violation of Title VII. The law does not define race or skin color, nor has the EEOC adopted its own definitions.

The *Compliance Manual* states that Title VII prohibits racial discrimination based on ancestry, physical characteristics, race-linked illness, culture, perception, association, racial subgroup characteristics, or reverse race discrimination. It also prohibits skin-color discrimination.

Religion

Federal and state anti-discrimination statutes protect individuals from discrimination in the workplace based on their sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed, or required by an established church or other religious institution or organization. To help employers understand and comply with the law regarding religious discrimination, the EEOC issued an update to its Compliance Manual on religious discrimination, along with a fact sheet of questions and answers and a best-practices guide. The update contains information on religious discrimination in employment, including materials on avoiding religious discrimination in hiring, promotion, and other employment decisions; employer liability for religious harassment; accommodating employees' religious beliefs and practices in the workplace; retaliation; and exemptions for religious-based institutions. The Compliance Manual also contains many employee best practices, intended to instruct employees on the best ways to advise employers of their religious practices, give employers the information they need to resolve conflicts between those practices and work rules, and handle discussions about religious faith and proselytizing in the workplace. The manual is available on the EEOC website: www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

Case Note: The US Supreme Court resolved the question of what the appropriate standard is for determining an undue hardship when an employer believes it is unable to comply with a religious accommodation request under Title VII of the Civil Rights Act. The Court ruled that employers can only deny an employee's request for religious accommodation under federal law if they can prove the accommodation would result in "substantial increased costs" for the business. While the substantial increased costs threshold sets a higher bar for employers to demonstrate undue hardship then the prior de minimis cost standard, the lack of specificity as to what constitutes increased cost suggests there will be future litigation to resolve this issue. This decision overturns the 1973 Hardiman decision which established the de minimis standard for demonstrating undue hardship and had been in effect for 50 years. (*Groff v. Dejoy*, June 29, 2023)

This decision supersedes any information to the contrary on the EEOC website.

Under Massachusetts law, an employer may require an employee intending to be absent from work for religious reasons to notify it at least 10 days in advance. An employer may refuse to accommodate such a request if it can show that such an accommodation would be an undue hardship on the business. The employer always has the burden to demonstrate the hardship.

The MCAD regulations offer examples of undue hardship. They include:

- Inability to provide services that are required by federal or state law or regulation;
- Situations which compromise public health and safety;
- Inability to transact business without the employee's presence, where the work cannot be performed by another employee who has substantially similar qualifications during the period of absence; and
- The employee's presence is needed to alleviate an emergency.

The employer need not pay the employee for the day and can, whenever practicable in the judgment of the employer, arrange to have the employee work another day to make up the time. The employee has the burden of proof as to the required practice of his or her employee's creed or religion.

Creed or religion means any sincerely held religious belief, whether part of an established church or part of another religious organization. Caution is recommended before refusing to grant days off for religious observances, since even significant inconvenience may not meet the "undue hardship" standard.

Considering the Supreme Court Groff decision, employers need to proceed cautiously when arguing that a religious accommodation request presents an undue hardship.

In *Brown v. F.L. Roberts & Co.* (the so-called Jiffy Lube case), the Massachusetts Supreme Judicial Court ruled that a Rastafarian man was entitled to a trial on possible religious discrimination for refusing to cut his hair or beard to comply with his employer's policy on grooming. Although the court recognized the employer's right to institute a grooming policy, it disagreed that providing an exemption from a grooming policy constitutes an undue hardship as a matter of law.

The court ruled that blanket assertions of "public image" are not sufficient to determine which employees deal with customers because they could lead to a practice that favors members of so-called majority religions. The court found that because the employer never discussed possible alternatives with the employee, it could not show conclusively that a total exemption from the grooming policy was the only accommodation. Therefore, because it could not show that it could not provide a reasonable accommodation, the company would not be able to assert the defense of undue hardship.

On the other hand, in a 2004 federal court decision (*Cloutier v. Costco*) involving a dress code policy that would, among other things, ban facial

piercings at Costco, an employee claimed that her faith (the Internet-based Church of Body Modification, which promotes piercings and tattoos) required her to wear her facial piercing at all times. Costco told the employee she could either cover it with a bandage or replace it with a clear space holder during the workday. She refused to comply, citing religious discrimination. In deciding the case, the U.S. Court of Appeals for the First Circuit ruled that the employee's claim of religious rights were not essential tenets of the church and that therefore the accommodations offered by Costco were reasonable and did not violate the anti-discrimination law.

Employers should proceed cautiously when implementing dress/grooming policies or when dealing with such issues as facial hair, body and facial piercings, and tattoos, since these can be based on religious practices (M.G.L. ch. 151B § 4). For additional information, please see the Dress Codes section.

Compliance Tip: *When an employee seeks an exemption from a grooming policy on religious grounds, employers must, at a minimum, engage in a meaningful dialogue about a possible accommodation and document the matter, while avoiding a discussion on the tenets of any particular employee's faith.*

Retaliation

In addition to prohibiting employment discrimination generally, Title VII and the Fair Employment Practices laws of Massachusetts (Ch. 151B) protect employees who allege discrimination or cooperate with an investigation from any employer-initiated retaliation. The U.S. Supreme Court has clarified that Title VII's anti-retaliation provision should be interpreted broadly in order to allow an employee to allege discrimination or participate as a witness in an investigation without fear of reprisal. In defining what "interpreted broadly" means, the court held that employer conduct that would dissuade a reasonable employee from making or supporting a charge of discrimination would violate the law. Thus, even if the action or harm does not affect the employee's compensation, terms, conditions, or privileges of employment, the employer's conduct may open the employer to a retaliation lawsuit. While the court stressed that the context within which the alleged behavior occurred is important, employers should be very careful in making personnel decisions following the filing of a discrimination complaint.

Under Massachusetts law, even if the underlying actions are not ultimately found to be discriminatory, an employer may still be liable for retaliating against an employee engaged in protected activity, such as reporting or seeking redress for that non-discriminatory action. Additionally, the Massachusetts Supreme Judicial Court has recognized that an employer may be liable for retaliation even when the employee has only made an internal complaint and never filed a complaint with a governmental agency.

In its FY 2023 annual report (the most recent available), the MCAD reported that retaliation was the most frequently (22.4% of all charges) cited claim. Almost 52% of all claims filed with the EEOC involved retaliation charges. While retaliation is sometimes an independent claim, in many cases involving allegations of discrimination filed with the MCAD or the EEOC, the employee or former employee includes an allegation of retaliation.

Given the increase in successful retaliation claims and the breadth of the court's rulings, employers should take extra care to train supervisors and managers on how to manage current employees who have filed a complaint or been called as a witness on any employment matter, ranging from discrimination and harassment to nonpayment of wages and FMLA, whether such a complaint has been filed internally, with a government agency or in the courts.

Same-Sex Harassment

The U.S. Supreme Court has held that same-sex harassment claims, in which an employee claims harassment by another employee of the same sex, are actionable under Title VII, the federal anti-discrimination law, and the same applies under Massachusetts anti-discrimination law. The harassing conduct need not be motivated by sexual desire but must nonetheless be severe, pervasive, and offensive to a reasonable person.

Same-Sex Marriage

Both Massachusetts and U.S. courts have ruled that same-sex marriage is legal and that same-sex couples must be treated the same as heterosexual couples in terms of rights under state and federal employment law.

Federal Marital Equality Law

The Respect for Marriage Act (RFMA) was signed into law by the president in December 2022. The law provides legal protections for same-sex and interracial married couples. Legal protections for same-sex marriage were originally established in the Supreme Court's 2015 Obergefell decision. RFMA will prohibit any state from denying full

faith and credit to a marriage entered into between two individuals in another state on the basis of the individual's sex, race, ethnicity, or national origin. The law also repeals the federal Defense of Marriage Act originally passed in 1996.

While the law requires all states to recognize the validity of same-sex marriages, it does not require all states to license same-sex marriage, nor does it prohibit states from banning or restricting same-sex marriage if the Supreme Court were to overturn Obergefell. The act also allows the Department of Justice to bring a civil action for declaratory or injunctive relief in federal court for violations and establishes a private right of action by individuals for violations.

Same-sex families still have the same company benefits and protections as they did before the passage of the Act.

Employer health plans governed by the Employee Retirement Income Security Act must encompass spousal benefit coverage for same-sex spouses. Employees from same-sex families remain protected under Title VII of the Civil Rights Act of 1964 from discrimination based on sexual orientation or gender identity, regardless of state or local laws.

Compliance Tip: *Employers should review their existing handbooks, benefits, and operations to ensure compliance with the RFMA.*

Sexual Harassment

Sexual harassment is a form of illegal sex discrimination under both state and federal law. In Massachusetts, all employers of six or more employees must have a sexual harassment policy that is distributed to new employees when they are hired and to all employees annually. The policy must also include the name and contact information of at least one person to whom an employee can report a complaint of harassment. Volunteers may not sue under the Massachusetts sexual harassment law.

As noted above, the Massachusetts Supreme Judicial Court (SJC) has ruled that employees may sue employers of fewer than six employees for employment discrimination under the Massachusetts Equal Rights Act (MERA). The SJC stated that although Chapter 151B excludes small employers of five or fewer employees from its coverage, the legislature intended to create an alternative avenue for relief under MERA.

The Massachusetts Commission Against Discrimination has developed a model policy that employers may use. The Commission has also issued sexual harassment prevention guidelines outlining employer responsibilities in responding to a sexual harassment complaint, including the duty to investigate. The model policy and the guidelines are available at www.mass.gov/mcad. These guidelines indicate that training of managers and supervisors is strongly encouraged.

The Massachusetts Supreme Judicial Court has ruled that the state recognizes liability if an employer is unable to protect one of its own employees from harassment by third parties, such as an outside vendor or a subcontractor. The employer can protect itself from liability by showing it took reasonable steps to address the harassment in a timely manner. An employee will not be disqualified from receiving unemployment benefits if the employee voluntarily left work due to sexual harassment.

In January 2024 the MCAD released a proposed updated version of its harassment guidelines available here. The MCAD is currently seeking comments through March 24. It is assumed that the MCAD will publish the final version of the guidelines later in the year.

AIM HR Service

For information on AIM HR Solutions' sexual harassment training programs, please call the Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Sexual Orientation

A Massachusetts employer may not discriminate against an individual in compensation or in terms, conditions, or privileges of employment due to that person's sexual orientation.

Veteran Status

Massachusetts law provides legal protections to veterans wishing to celebrate Veterans Day or Memorial Day. Under the law, employers must provide time off to a veteran for Veterans Day if the veteran chooses to observe the holiday. Employers must also provide time off to a veteran on Memorial Day to participate in a Memorial Day exercise, parade or service in the employee's community of residence. It is within the employer's discretion whether to pay the veteran for this time off on either day.

The Massachusetts Fair Employment Practices Law (M.G.L. c. 151B) includes "status as a veteran" in its definition of protected classes. As a result, employers may want to consider including non-discrimination language regarding veterans' status in their recruiting materials, handbooks, employer websites, and employment applications.

Compliance Tip: *Under the law, qualifying veterans must provide their employer with a reasonable notice of intent to take time off. While this particular law does not define what a reasonable period of time is, under existing anti-discrimination law, employees seeking religious accommodations must provide their employer with at least 10 days of advance notice. On the other hand, if an employer has a long-standing practice of allowing time off with one day's notice, the employer may not change the rules when a veteran seeks time off under this law.*

New Hire Documentation

Hiring an employee requires employers to take a number of steps to ensure compliance with the relevant laws. This section consolidates these obligations, including some that are addressed in other sections of this guide.

Employment Eligibility Verification Form (I-9 Form)

An employer must have a completed I-9 on file for every employee hired on or after November 7, 1986, per the Immigration Reform and Control Act. Section 1 of Form I-9 must be filled out by the employee by the first day of employment. The act requires that employers complete Section 2 of Form I-9 by verifying the identity and work authorization of all employees within three business days of hire, and also sets forth record-keeping requirements. Please see the document retention provision in the Employment Separation section.

U.S. Citizenship and Immigration Services (USCIS) released its most recent version of the Employment Eligibility Verification Form (Form I-9) dated August 1, 2023. It is in effect until July 31, 2026. The USCIS made significant formatting changes to the form. Updated forms can be downloaded from the USCIS website listed in the back of the guide. Please see the Employment section, for more detailed information on the new Form I-9.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996

This law requires every employer to report all new hires and independent contractors who will be paid over $600 in a calendar year to the Massachusetts Department of Revenue (DOR), which will then transmit the information to the National Directory of New Hires.

The required information must be submitted to the Massachusetts DOR within 14 days of the employee's effective date of employment or for seasonal or rehired employees the effective date of reinstatement after a lapse in pay of 30 or more days). This report must contain the employer's identification number, name, and address, as well as the employee's name, address, social security number, and hire or reinstatement date. There are more reporting requirement details spelled out in Massachusetts Department of Revenue regulations 830 CMR 62E.2.1.

Personnel Practice Reminders

Have employees receive and sign for their employee handbook, any specific policies (conflict of interest, sexual harassment, ethics, non-compete, non-disclosure, data security), rate of pay and relevant company materials and maintain copies of these signed acknowledgement forms in the employee's personnel file.

Employment

Alternative Dispute Resolution

Some employers may elect to require or offer alternative dispute resolution. The two most popular forms are arbitration and mediation. They are briefly discussed below.

Arbitration

Arbitration is a form of alternative dispute resolution (ADR) designed to avoid litigation of employment disputes by the courts. Through arbitration, parties select a neutral arbitrator or panel of arbitrators who review briefing and hear arguments, and then render binding decisions on the parties.

In recent years many employers have required their employees to agree to arbitrate employment-related disputes through written agreements. Some of the apparent benefits of using arbitration are that it can be a quicker process to resolve disputes, attorneys' fees may be reduced, and the dispute itself remains private and outside of the legal system and public dockets.

The federal court system has generally been very supportive of employers' use of mandatory arbitration. However, using arbitration to keep certain claims private caused a strong backlash from employees and legislators because arbitration agreements were being used to keep sexual assault and harassment cases shielded from the public and to deny employees the opportunity to present their claims in open court. Congress responded by passing the law discussed below.

On March 3, 2022, the president signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. While parties may continue to enter into arbitration agreements on issues such as sexual harassment, the new law prohibits an employer from mandating the use of arbitration clauses for claims involving sexual misconduct. The Act provides that employees alleging sexual harassment or assault, whether individually or as a class representative, may pursue their claims in court or through arbitration. The right to go to court applies notwithstanding the fact that employees previously agreed with their employer to arbitrate such claims.

Additional provisions include that a court (rather than an arbitrator) will decide whether the Act applies, and that the Act applies to any dispute or claim arising on or after March 3, 2022. The Act is also retroactive, meaning arbitration clauses are also void in existing contracts.

Mediation

Mediation is a separate ADR process wherein the parties meet with a mutually selected impartial and neutral person who assists them in negotiating a resolution of their dispute. Unlike a court proceeding or an arbitration, the mediator does not make a decision that is binding on the parties. Rather, the mediator acts as catalyst to attempt to bring the parties together. The mediator seeks to define the issues, facilitate discussion, and may seek concessions from each party to achieve a resolution to a dispute. A mediator may seek an agreement to forego litigation for the duration of the mediation and may require the parties to agree that the issues discussed in the mediation will remain confidential and off-limits for use in any future proceeding if mediation fails.

Data Security

The Massachusetts data security law consists of two major sections. The first one, M. G. L. Chapter 93H, mandates that any employer that knows or has reason to know of a breach of security concerning the personal information of any current or former employee or applicant (or any other Massachusetts resident) must notify that individual. The law applies to all entities engaged in commerce that maintain electronic or paper files containing personal information about employees and/or clients who are residents of Massachusetts.

Personal information consists of an individual's last name plus either first name or first initial, combined with one or more of the following: social security number; driver's license or state-issued identification number; financial account numbers; or credit or debit card numbers, whether in paper or electronic form.

"Breach of security" is defined by statute as "the unauthorized acquisition of unencrypted data or, encrypted electronic data and the confidential process or key that is capable of compromising the security,

confidentiality, or integrity of personal information, maintained by a person or agency that creates a substantial risk of identity theft." If a breach occurs, the employer must notify the affected individuals "as soon as practicable and without unreasonable delay." The notice must be in writing and include information on how the individuals can obtain a police report, how they can ask consumer reporting agencies to impose a security freeze, and any fees required for the freeze. The employer must also provide notice to the Massachusetts attorney general and the director of consumer affairs and business regulation.

In addition to requiring notification in the event of breach, Chapter 93H and its implementing regulations (17 CMR sections 17.01 to 17.05) require all entities with personal information of a Massachusetts resident to "develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to … the size, scope and type of business …; the amount of resources available [to the business]; …the amount of stored data; and … the need for security and confidentiality" of such information. That security program must assess and address, at a minimum, the following matters:

- Identify and categorize reasonably foreseeable internal and external risks and evaluate and improve the effectiveness of existing safeguards (i.e., conduct a comprehensive risk assessment).
- Develop written security policies and practices governing the acquisition, retention, access to, transmission, transportation, and disposal of personal information in both hard copy and electronic formats.
- Implement reasonable technological safeguards, including, but not limited to, appropriate user authentication, appropriate access controls, encryption of all personal information transported physically or transmitted in both hard copy and electronic formats, and appropriate firewalls, patching/updating, anti-virus/anti-malware/anti-ransomware, and intrusion detection.
- Implement reasonable safeguards for physical access to records and equipment that contain personal information in both hard copy and electronic formats.
- Designate an employee who is responsible for maintaining the information security program.
- Train employees on information security, discipline them for violations of the information security program rules and terminate the access of terminated employees to information.
- Take all reasonable steps to verify that third-party service providers with access to personal information are complying with the Massachusetts law and regulations and enter into appropriate Confidentiality and Information Security Agreements with such third-party service providers.
- Regularly test and monitor to determine if the information security program is effective and to detect weaknesses and remedy such weaknesses.
- Investigate, respond to, and document any incident (including any breach and potential breach) involving protected information.
- Review and adjust the security program at least annually, or more frequently if there is a material change in business practices that may implement security.

The second part of the law, Chapter 93I, defines how employers may properly dispose of documents or data containing personal information of any Massachusetts residents who are current or former employees, job applicants, or customers/clients. Paper records containing personal information must be "redacted, burned, pulverized or shredded," and electronic data must be "destroyed or erased."

The regulations, issued by the Massachusetts Office of Consumer Affairs and Business Regulation, require employers to develop and implement a comprehensive written information security program ("WISP") that is consistent with industry standards and based on a technical feasibility and reasonableness standard. Employers are allowed greater flexibility based on risk, size of company, and resources available. Employers must also designate an employee who is responsible for maintaining the information security program. Employers are required to train employees on information security and discipline them for violations of the information security program rules.

Massachusetts employers must have WISPs in place and ensure that their data security technology complies with the law. They must also take all reasonable steps to verify that third-party service providers with access to personal information have the capacity to protect that personal information, and that such third-party service providers are applying protective security measures at least as stringent as those required under the regulations.

All organizations and individuals in commerce who deal with personal information of Massachusetts residents must comply with these new data management requirements or face monetary penalties and potential suits brought by the Massachusetts Attorney General.

Dress Codes

The establishment, scope and enforcement of a workplace dress code is generally left to the discretion of the employer. Employers adopting and enforcing a dress code should be mindful of possible discrimination issues associated with its enforcement.

Case Note: Employees of a grocery store chain brought a lawsuit to the National Labor Relations Board in Boston arguing that the employer engaged in unfair labor practice when it refused to allow the employees to wear clothing bearing Black Lives Matter wording. The NLRB's administrative law judge determined that wearing BLM -related apparel was not connected with their employment or working conditions and was therefore not a protected activity. (*Whole Foods case*, Dec 22, 2023*)*

The second development related to dress codes was the adoption in Massachusetts of the "Create a Respectful and Open World for Natural Hair" (CROWN) Act, which took effect in October 2022. While the CROWN Act is directed toward the enforcement of dress codes in schools, the law is enforced by the Massachusetts Commission Against Discrimination (MCAD) and it is possible that enforcement efforts may arise in other workplaces in the future. The law defines race discrimination to include discrimination based on "traits historically associated with race, including, but not limited to, hair texture, hair type, hair length and protective hairstyles".

Drug Testing

To date, Massachusetts has no statute governing an employer requiring drug testing of employees or applicants for employment. However, the Massachusetts Supreme Judicial Court has established principles for testing through case law, generally holding that random drug testing violates an employee's rights under the state privacy statute unless the job is safety sensitive. While an employer is permitted to define what positions or duties may constitute safety sensitive and thus be subject to random testing, any such decision is subject to a legal challenge by an employee under the Massachusetts privacy statute, M.G.L. ch. 214, §1B. Examples of safety sensitive positions include driving a vehicle on behalf of the company or operating various types of machinery.

Under Massachusetts Commission Against Discrimination (MCAD) guidelines and the Americans with Disabilities Act (ADA), employers are advised to test only after a bona fide offer of employment has been made and to conduct all testing of prospective and current employees under a specific policy that has been made known to these individuals. According to the EEOC, it is permissible under the ADA if the employer tests applicants or employees for illegal drugs only and makes its employment decisions based on the results.

Massachusetts law recognizes four types of employee drug testing:

1. **Post-offer pre-employment testing:** may be required of all applicants post job offer.
2. **Post-accident:** limited to testing employees following workplace injuries (see the OSHA discussion in the Safety section, for more details.) Drug testing may be used to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.
3. **Reasonable suspicion:** testing applied on a case-by-case basis when the employer has a reasonable basis for doing so. Employers are strongly urged to have corroborative documentation including statements from two managers/supervisors to support any referral to drug testing for reasonable suspicion.
4. **Random testing:** limited to the testing of employees in safety-sensitive occupations as defined by the employer

Compliance Tip: *: Employers interested in adopting drug testing protocols should develop a written policy that addresses the scope of its drug testing initiative (e.g., how extensive should its drug testing be) and the consequences of an employee or applicant failing the test. Employers interested in developing a policy should contact the AIM Helpline at 1-800-470-6277 or Kelly McInnis at 617-488- 8321or kmcinnis@aimhrsoluitions.com.*

Drug-Free Workplace Act

The federal Drug-Free Workplace Act of 1988 requires federal government contractors and employers receiving contracts or grants of $100,000 or more to take specific steps to ensure a drug-free workplace. The act does not require testing for illegal drugs. However, testing of certain employees is required if the company must comply with Department of Transportation (DOT) commercial driver's license regulations or has contract work with the DOT. For more information, visit the DOT website at www.dot.gov.

DOT's Office of Drug and Alcohol Policy and Compliance (ODAPC) requires mandatory direct observation collections in the following circumstances:

- The employee attempts to tamper with the specimen at the collection site.
- The specimen temperature is outside the acceptable range.
- The specimen shows signs of adulteration.
- A substitution or adulteration device is discovered by the collector prior to the initial collection.
- A medical review officer orders the direct observation.
- The test is part of a follow-up or return-to-duty situation.

If an employee refuses to permit any part of the direct observation procedure, this is considered a refusal to submit to a test and may lead to termination of employment.

Although some employers and labor organizations may have entered into collective bargaining agreements that prohibit or limit the use of direct observation collections in return-to-duty and follow-up testing situations, it is now a requirement of federal law and supersedes any such contractual agreements. Additionally, employers covered by DOT drug and alcohol testing rules must ensure that labs properly conduct collections to comply with direct observation procedures.

Federal CDL Driver Drug Testing

The Federal Motor Carrier Safety Administration (FMCSA) established the Commercial Driver's License (CDL) Drug and Alcohol Clearinghouse to house information pertaining to violations of the U.S. Department of Transportation (DOT) controlled substances (drug) and alcohol testing program for CDL drivers.

The new program requires FMCSA-regulated employers to report to the Clearinghouse information related to violations of the drug and alcohol regulations by current and prospective employees.

As part of compliance with the law, employers will be required to:

- ask the Clearinghouse for current and prospective employees' drug and alcohol violations before permitting those employees to operate a commercial motor vehicle (CMV) on public roads.
- annually ask the Clearinghouse for drug and alcohol information about each driver they currently employ.

The Clearinghouse will provide employers the necessary tools to identify drivers who are prohibited from operating a CMV based on DOT drug and alcohol violations and ensure that such drivers receive the required evaluation and treatment before operating a CMV on public roads. Specifically, information maintained in the Clearinghouse will enable employers to identify drivers who commit a drug or alcohol program violation while working for one employer, but who fail to subsequently inform another employer.

Records of drug and alcohol program violations will remain in the Clearinghouse for five years, or until the driver has completed the return-to-duty process, whichever is later.

EMPLOYER RESPONSIBILITIES

1. Register with the Clearinghouse. Registration is valid for five years, unless cancelled or revoked.
2. Revise Drug and Alcohol Testing Policy. FMCSA regulations require employers to add language to their FMCSA drug and alcohol testing policies to notify drivers and driver-applicants that the following information will be reported to the Clearinghouse:
   - A verified positive, adulterated, or substituted drug test result;
   - An alcohol confirmation test with a concentration of 0.04 or higher;
   - A refusal to submit to a drug or alcohol test;
   - An employer's report of actual knowledge;
   - On duty alcohol use;
   - Pre-duty alcohol use;
   - Alcohol use following an accident;
   - Drug use;
   - A substance abuse professional's report of the successful completion of the return-to-duty process;
   - A negative return-to-duty test; and,
   - An employer's report of completion of follow-up testing.
3. Employers must seek information from the Clearinghouse before allowing a newly hired commercial motor vehicle driver to begin operating a commercial motor vehicle. Drivers must sign a consent form allowing the employer to do so.
4. Employers must seek information from the Clearinghouse at least once per year for each driver they currently employ. Drivers must sign a consent form allowing the employer to do so. The employer must maintain records of all requests and information obtained in response to the information request for a period of three years.
5. Employers must report drivers' drug and alcohol program violations, (see above) to the Clearinghouse within three business days after the employer learns of the information. Employers must prohibit drivers who have violated FMCSA's drug and alcohol program regulations from performing safety-sensitive duties unless the

driver complies with the return-to-duty process including requiring a substance abuse professional evaluation, possible treatment, return-to-duty testing, and follow-up testing.

6. Employers are required to conduct the drug and alcohol testing portion of the safety performance history investigation of driver-applicants through the Clearinghouse. Employers must also obtain the other information required by the safety performance history investigation regulations (e.g., accident history) directly from the driver-applicants' previous DOT-regulated employers, because that information is not reported to the Clearinghouse.

PENALTIES | The new initiative includes civil and/or criminal penalties. Civil penalties are capped at $2,500 for each offense.

More detailed information is available at the clearinghouse website which is clearinghouse.fmcsa.dot.gov.

EEO-1 Reports

All employers with at least 100 employees, and all employers with 50 or more employees and $50,000 or more in primary federal government contracts or first-tier contracts (subcontracts), must file an EEO-1 report annually with the EEOC. All covered employers must use the EEO-1 form when filing the report. The revised form features changes to the racial and ethnic categories, as well as changes to the job categories. The form strongly endorses self-identification of race and ethnic categories by employees, as opposed to visual identification by employers. The effective date and content requirements of the EEO-1 were shifted frequently under the previous administration. The filing date has been changed numerous times in the past few years so employers subject to the EEO-1 reporting requirements should regularly check the EEOC website (www.eeocdata.org/eeo1) for current deadlines and other requirements.

Employment at Will

In general, the employer's decision to hire an employee does not represent a commitment to employ that person for any definite period, unless the employer and employee have an employment contract defining the terms of employment. The employee may quit at any time and for any reason, and the employer may terminate the employee at any time and for any reason except those that are against public policy or are specifically forbidden by state and federal law, including anti-discrimination law. Public policy exceptions include terminating an employee for being a whistleblower, participating in jury duty, being subpoenaed as a witness in a criminal prosecution, or filing a workers' compensation claim.

Employee Handbooks and Personnel Policies

Employers are not required by law to have employee handbooks. Many employers choose to create handbooks to establish in writing the employer's policies, practices and benefits. It is important that handbook language be carefully drafted and that it contains sufficient disclaimers to avoid creating unintended contractual obligations. All employee handbooks should adopt clear and prominent disclaimer language stating that no policy represents an enforceable promise, that employees gain no rights from the policies expressed, that the employer has complete discretion to interpret policies and to unilaterally alter any policies at any time, and that the handbook is an informational guide only and should not be interpreted to alter an employee's at-will employment relationship, as applicable. While employers may include a reference to policies such as non-compete, non-disclosure, or non-piracy, employers are strongly recommended to adopt stand-alone policies that employees must sign on a regular basis to ensure awareness of the new policy. Furthermore, any non-compete policy created after October 1, 2018, must adhere to the provisions of the Massachusetts non-compete law (see Employment Applications section above). Employers should also regularly review and update their employee handbooks to ensure that they remain consistent with any new developments in company policy and with changes in regulations and laws.

The Massachusetts Supreme Judicial Court has ruled that an employer-issued employee handbook forms an implied contract with a long-time employee due in large part to the language in the handbook. Thus, to avoid employees having a reasonable belief that past policies will not be changed retroactively, handbooks should make clear that any change to policies may apply retroactively. Any updates of handbooks or policies should specifically state that they supersede and replace the old policies, that the old policies are of no continuing force or effect, and that the changes apply retroactively. Handbooks should not be given to applicants until they have begun employment.

Employers are not required by law to have written personnel policies except for those related to Sexual Harassment, the Pregnant Workers Fairness Act, Earned Sick Time, the Family and Medical Leave Act, Massachusetts Paid Family and Medical Leave law, and in some cases Criminal Offender Record Information (for employers that request five or more

per year). An employer of 20 or more employees that elects to have a written personnel policy regarding the terms and conditions of employment must keep an updated copy of such policy on the employment premises. See below for discussion of personnel records.

AIM HR Service

AIM HR Solutions provides a variety of handbook-related services, including creating, reviewing, and editing handbooks, as well as model policies, a complete model handbook, and a handbook policy subscription service. For further information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Employment Eligibility Verification/Form I-9

Please call AIM for additional information on this topic. The current Form I-9 is available from the USCIS website at www.uscis.gov/I-9central.

Note: The USCIS released an a revised updated version of the Form I-9 effective August 1, 2023. The new form will remain in effect until July 31, 2026. The new Form includes a total of four pages. Page 1 is the actual Form I-9. It has been reduced from two pages to one. Page 2 is the list of acceptable identification documents. The new version also includes a list of acceptable receipts at the bottom of page 2. Page 3 is for the Preparer/Translator to complete (if applicable) will. The final page is for reverification and rehire. There is also an eight-page instruction booklet to assist employees and employers in completing the Form I-9.

At the same time, the USCIS released the new Form I-9, it also adopted a limited remote verification process. To participate in the remote verification process an employer must be participating in and in good standing with the E-Verify program. If an employer chooses to utilize the alternative procedure to verify new employees at an E-Verify hiring site, it must do so consistently for all employees at that site. However, an employer may choose to offer the alternative procedure for remote hires only and continue to conduct physical review of documents for employees who work onsite or in a hybrid capacity, so long as it does not adopt such a practice for a discriminatory purpose or treat employees differently based on their citizenship, immigration status, or national origin.

There is more information below on the E-verify program. Employers may also learn more about the E-Verify program by selecting the link on the inside cover of the back page of the guide.

In addition to being in good standing in the E-Verify program, to examine an employee's documentation remotely, the employer must complete the following steps:

1. Examine copies (both sides, if warranted) of Form I-9 documents or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine;
2. Conduct a live video session with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1 above) and then present the same document(s) during the live video session;
3. Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification in Supplement B, as applicable; and
4. Retain a clear and legible copy of the documentation (front and back if the documentation is two-sided).

The federal Immigration Reform and Control Act of 1986 ("the Act") prohibits the hiring of undocumented immigrants and prohibits discrimination against individuals who are legally authorized to work in this county. USCIS has significantly increased its compliance enforcement efforts around the proper preparation of Form I-9s. Employers are required to maintain strict compliance with I-9 completion deadlines and to ensure that the form is properly and thoroughly filled out by the employee and the employer.

Section 1 of Form I-9 must be filled out by the employee by the end of the first day of employment. Employers must complete Section 2 of Form I-9 by verifying the identity and work authorization of all employees within three business days of the employee's first day of employment and sets forth record-keeping requirements. To verify the identity and work authorization of an employee, the employer must view the actual identification document—not copies. This means that an employer may not rely on remote viewing technologies such as Zoom to view the documents and verify them, unless they participate in the E-Verify program in which case they must follow the procedures set out above. If an employer is hiring a remote employee and is not using E-Verify, the employer must use a local agent (local manager, notary public, etc.) to view and verify the documents. Employers must not specify which documents should be presented to demonstrate citizenship or work authorization. An employer may, but is not required to, make copies of an employee's documents. AIM recommends that

employers make and retain copies on a consistent basis. Employers that choose to retain document copies must ensure that they make copies of all relevant documents, that their handling of Form I-9s is fully compliant with the statute, and that their practice of retaining copies is documented and followed consistently.

Form I-9s may be filled out and signed electronically. The completed form may be stored electronically if the specified electronic filing system standards are met. Otherwise, an employer may retain the I-9 in paper form. Although the law permits the commingling of personnel and I-9 files, AIM strongly recommends that employers maintain them separately to facilitate compliance with an I-9 audit. Employers must have an I-9 on file for every employee currently working unless the employee was hired prior to November 7, 1986.

Immigration law further requires employers to retain a copy of the completed I-9 for three years from the date of hire or one year following the employee's termination, whichever is later. Failure to comply with the law may lead to significant monetary and criminal penalties.

- Penalties for violations of the law are adjusted annually for inflation. Current penalties range from $272 to $2701 depending upon the nature of the violation for the first offense.
- For recruiting, referral, and rehiring unauthorized non-citizens violations, the penalties range from $676 to $5,404 for first offenses for each knowingly employed unauthorized workers to $5,404 to $27,108 for second and subsequent offenses.

An employer may also be subject to criminal penalties in certain circumstances.

GOOD FAITH DEFENSE

If an employer shows that in response to an investigation or audit, it complied with Form I-9 requirements, then the company may have established a "good faith" defense, unless the government can show the employer had actual knowledge that the employee(s) was not authorized to work.

All employers should have a system in place to remind them that they may need to reverify an employee's I-9 documentation. Employers are neither required nor permitted to reverify the employment authorization of U.S. citizens and resident aliens who have presented a green card (resident alien or permanent resident card) to satisfy the I-9 requirement.

Employees whose immigration status, employment authorization, or employment authorization documents expire should file the necessary application or petition sufficiently in advance to ensure that they maintain continuous employment authorization or valid employment authorization documents. If the employee is authorized to work for a specific employer (as in the case of an H-1B or L-1 nonimmigrant) and has filed an application for an extension of stay, he or she may continue employment with the same employer for up to 240 days from the date the authorized period of stay expires. An employer must reverify an employee's employment authorization on the I-9 no later than the date that the employee's employment authorization or employment authorization document expires, whichever is sooner.

Note: Occasionally the U.S. government issues temporary protected status (TPS) documents to people from other countries in the U.S. due to exigent circumstances in their home country. People with TPS are legal to work for the duration of the TPS period. TPS status may be renewed occasionally as well. Any TPS employees should present documentation explaining this situation at the time they become eligible.

Employers should regularly check the USCIS website, www.uscis.gov/i-9, for any updates to policies regarding individual's status to work in the U.S. and I-9 policies. Also, employers will find answers to many of their I-9 questions in the Handbook for Employers M-274, published by the USCIS.

E-VERIFY

Federal contractors and their subcontractors that meet certain criteria are required to electronically verify the employment eligibility of their employees through a free electronic system known as E-Verify. Federal contractors who are awarded a new contract that includes the Federal Acquisition Regulation (FAR) E-Verify clause must use the E-Verify system.

Federal contractors must use the system for these employee categories:

- All new employees, following completion of Form I-9, within three business days of their start date. The system may be used only after an employment offer has been accepted.
- All existing employees who are classified as "employees assigned to the contract." Employees who have already been verified through E-Verify should not be reverified by the same federal contractor.

Employers participating in E-Verify must post a notice indicating participation in the program. The notice must be posted in a location clearly visible to job applicants.

Non-governmental contractors may also elect to participate in the E-Verify system. For more information about the program, including the required poster, please visit www.uscis.gov/everify.

EMPLOYMENT OF MINORS

Child labor is subject to both federal and state law. According to the U.S. Department of Labor's Wage and Hour Division (WHD), the purpose of the child labor laws is to foster permissible and appropriate job opportunities for working youth that are healthy, safe, and not detrimental to their education. Employers must comply with the stricter of either the federal or the state laws while employing minors in Massachusetts.

Before being allowed to work, all minors from 14 to 17 years of age must secure an employment permit from their school superintendent's office as well as written permission from a parent or guardian. Employers may include a question on their employment application such as "Are you at least 18 years of age?" to determine whether the child labor laws apply to an applicant. Certain maximum daily and weekly work restrictions apply during school and non-school hours depending on age (14 and 15, 16 and 17). The minor's weekly schedule of hours and breaks must be posted in a conspicuous area. There are many categories of hazardous areas in which minors under the age of 18 may not work at all. For example, no minors under the age of 16 may work in a manufacturing facility. Certain exemptions from these provisions are available for agriculture, for theaters and restaurants, and for minors in vocational education programs (M.G.L. ch. 149, §§ 60–98).

Under the Massachusetts and federal child labor laws, 14- and 15-year-olds are not allowed to work before 7:00 a.m. on any day, regardless of whether school is in session. During the school year, they can work as late as 7:00 p.m., but they cannot work during the school hours of the local public school where they reside. The law extends the work hours of 14- and 15-year-olds to 9:00 p.m. during the summer, which is defined as July 1 through Labor Day.

Massachusetts law restricts the work hours of 16- and 17-year-olds to between 6:00 a.m. and 10:00 p.m. on nights preceding a regularly scheduled school day and between 6:00 a.m. and 11:30 p.m. on any night that does not precede a regularly scheduled school day. Exceptions to these restrictions are as follows: they may continue to work until 10:15 p.m. on a school night if they work at an establishment that stops serving clients or customers at 10:00 p.m., and they may continue to work until midnight on a non-school night if they work at a racetrack or a restaurant.

In addition to the restrictions stated above, children under the age of 18 may not work after 8:00 p.m. unless they are under the direct and immediate supervision of an adult, acting in a supervisory capacity, who is situated in the workplace and who is reasonably accessible to the minor. The sole exception to this requirement is minors who are employed at a kiosk, cart, or stand located within the common areas of an enclosed shopping mall that employs security personnel, a private security company, or municipal police detail every night from 8:00 p.m. until the mall is closed to the public.

Note: Please see back cover for link to child labor chart.

MARIJUANA

Massachusetts has two state laws governing the personal possession and use of marijuana. Both are briefly discussed below. Although state law permits the use of marijuana, it remains an illegal substance under federal law, meaning certain employers that are subject to federal law or have some employees subject to federal law (DOT regulated drivers) will need to adhere to federal law for those employees.

MEDICAL

In November 2012, Massachusetts voters passed by ballot referendum (popular vote) a law legalizing the use of marijuana for medical purposes (medical marijuana). This law is under the jurisdiction of the Massachusetts Department of Public Health (DPH), which promulgated implementation regulations in 2014. The commonwealth oversees authorized medical marijuana dispensaries.

The law does not require employers to tolerate any on-site use of medical marijuana in any place of employment. In most employment settings and situations, employers may treat marijuana use as one more item subject to its drug-testing policy, relying on the testing to determine whether employees are impaired in their ability to perform their job due to the use of marijuana. If employers want to ban marijuana, they should revise their existing drug-testing and drug-use policies to state that medical marijuana use will not be permitted in the workplace (see note below). Employers should also confirm that their employment application is consistent with its policies. Federal contractors and U.S. Department of Transportation regulated entities remain subject to the federal Drug-Free Workplace Act, which does not recognize state medical marijuana laws.

Case Note: In 2017, the Massachusetts Supreme Judicial Court (SJC) ruled for the first time on the question of medical marijuana use by an employee or applicant. The SJC stated (in *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017)) that an applicant or employee who uses medical marijuana to treat a qualifying medical disability is a "qualified handicapped person" under the state's anti-discrimination law. Therefore, if marijuana is determined by the applicant's or employee's doctor to be the best medical treatment for the disability, the employer must enter into an interactive dialogue with the person about providing a reasonable accommodation for the disability. The employer may raise the defense of undue hardship if it can prove the proposed accommodation would impair the employee's performance of his or her work; pose an unacceptable safety risk to the public, fellow employees, or the employee; or violate an employer's statutory or contractual obligations (i.e., compliance with the federal Drug-Free Workplace Act). The burden of proof is on the employer to show the undue hardship.

Please see the section on Workers' Compensation for a discussion of medical marijuana and workers compensation.

Employers that have a zero-tolerance policy banning all drug use in the workplace should revise their policies to reflect the need to engage in a reasonable accommodation process based on an interactive dialogue when an applicant or employee seeks a reasonable accommodation under this ruling and presents a medical marijuana card to support the request. Granting accommodation pursuant to the *Barbuto* ruling does not affect the employer's right to prohibit the use of marijuana in the workplace or being under the influence of marijuana while at work.

RECREATIONAL

In November 2016, Massachusetts voters passed by ballot referendum (popular vote) a law legalizing marijuana for recreational use. The commonwealth now permits the establishment and operation of recreational marijuana dispensaries. At the same time, the law also allows individuals to possess and use up to 6 plants per person or 12 per household.

Nothing in the recreational marijuana law requires an employer to accommodate any on-site use of marijuana in any place of employment. The recreational marijuana law states the following:

> *This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter (i.e., the use of recreational marijuana) in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.*

Compliance Tip: *Given that the law only references the word "workplace," employers should consider revising their drug use and testing policy to ensure that it prohibits the use of marijuana and covers all aspects of their workplaces, including vehicles used for business purposes and company-owned parking lots and garages; off-site duties, such as visiting customer sites and attending seminars; and even mandatory company events, such as parties and picnics.*

National Labor Relations Act (NLRA)/National Labor Relations Board (NLRB)

Note: Based on Presidential appointments, the NLRB five-member Board now has a Democratic majority. The NLRB's General Counsel is also a Biden appointee. The new Board majority is likely to reconsider and overturn many key decisions made by the NLRB during the Trump administration. The NLRB is also likely to rescind some of the Trump-era rule-making on "joint-employers," independent contractor status and election rules. However, prior NLRB rulings will only change after a new decision or regulation is issued. Otherwise, the current NLRB rulings will remain in effect. The NLRB's General Counsel is responsible for the investigation and prosecution of cases as well as the supervision and processing of cases by field staff.

In carrying out its enforcement activities, the NLRB continues to be a significant force intent on reshaping the American workplace, despite the fact that year after year U.S. union memberships has declined. The National Labor Relations Act (NLRA) was adopted in 1935 to encourage the growth of labor unions. Since 1954, the number of private employers with a unionized workforce has steadily decreased, and the activities and reach of the NLRB has decreased as well. Under the Obama Administration, the NLRB sought to expand its reach by reviewing handbooks of non-unionized companies, requiring employers to make company email systems accessible to employees during nonwork time, implementing "quickie" elections, and narrowing the scope of what it means to be a bargaining unit within a company. This section highlights some of the recent developments. Under the Biden administration the NLRB is pursuing a more aggressive pro-worker agenda than under the Trump administration.

The NLRB can also act through memoranda of the General Counsel. The General Counsel may issue memoranda setting enforcement priorities and directing NLRB attorneys to pursue a specific course of action. The current General Counsel has issued memoranda regarding: the establishment of a new definition for joint employment; her intention to protect employees from what she describes as "intrusive or abusive" and "omnipresent" electronic monitoring of employees that interferes with employee's rights under the NLRA; and her intent to broaden the concept of mutual aid or protection discussed immediately below.

MUTUAL AID OR PROTECTION

Though little known, there is language in the NLRA protecting two or more employees acting in concert, notwithstanding if those employees belong to a union. This provision allows the NLRB to respond to disputes that arise in non-unionized settings. An example of this would be a discussion between two or more workers about the terms and conditions of their employment (i.e., working conditions such as wages, salaries, overtime, or safety), which is discovered by their employer, and then takes disciplinary action against the employees. Depending on the facts and circumstances, the mutual aid clause may justify the NLRB in ruling that the employees are engaged in protected concerted activity and overturn the employer's actions. The expansion of what constitutes protected activity will continue to be a focus of the NLRB. Recently, the General Counsel argued that an "expressed concern" by a single employee through a posting to a social media platform blaming bad management for employee attrition problems at the workplace amounted to protected activity under the NLRA, because other employees had liked or posted favorable comments about the original post.

SOCIAL MEDIA

Employers must be careful when adopting and enforcing any social-media policy that may be viewed as limiting an employee's ability to discuss the terms and conditions of employment. For example, in a 2011 case, the NLRB held that employee confidentiality agreements limiting an employee's ability to discuss terms and conditions of employment—including wages—violated the NLRA.

The NLRB issued a model social -media policy in 2012. Any employer that has or is considering adopting its own social -media policy should review the NLRB model policy and strongly consider using it as the basis for its own policy. It is available from NLRB's website

www.employmentlawwatch.com/wp-content/uploads/sites/53/2012/05/May-2012-Social-Media.pdf and click on the third document and go to the end of the memo to locate the social media policy.

EMPLOYEE HANDBOOKS AND THE AT-WILL CLAUSE

In recent years, the NLRB has raised questions about what criteria must be met for an employer to use the term "at-will" in employee handbooks or other documents. The NLRB focus is on whether the "at-will" language presents a chilling effect on employees' ability to organize (so-called Section 7 rights) into a union. The NLRB has stated that the at-will policy will not violate the NLRA as long as it includes language such as this: "Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employee and the President."

The NLRB's General Counsel has stated that she wishes to reassess the Trump-appointed Board's decisions that established a more employer-friendly test for analyzing when an employer's facially neutral work rules infringe on protected concerted activity under the NLRA. The policies at issue usually include social media rules, media communication rules, and civility rules.

Case Note: In 2023 the NLRB adopted a new standard of review for evaluating workplace rules and policies for compliance with Section 7 of the National Labor Relations Act (NLRA), which prohibits interference with workers' rights to engage in "concerted activities," including the right to organize and bargain collectively. The NLRB's new standard provides that a workplace rule is "presumptively unlawful" if an employee "could reasonably interpret a rule to restrict or prohibit Section 7 activity." Once this presumption is established, "it is the employer's burden to prove that its legitimate and substantial business interests cannot be accomplished with a more narrowly tailored rule."

The employer will have to demonstrate that the rule was adopted to further "legitimate and substantial business interests" that cannot be addressed by a less restrictive rule. The Stericyle decision also indicates that the new standard will be applied retroactively, meaning that rules that were implemented and enforced prior to the decision are subject to the new analysis. (*Stericycle*, Aug 2, 2023)

MICRO-UNIONS

In 2011, the NLRB issued the *Specialty Healthcare* ruling, recognizing the concept of micro-unions (i.e., subsets of employees defined by function or department within a bigger workplace). This decision upended a long-standing NLRB precedent that when a union attempted to organize a workplace, it did so on a "wall to wall" basis, meaning it had to win the support of a majority of all the eligible-to-vote employees, rather than a subset of the employees in a reduced-size unit. In permitting micro-union elections, the NLRB laid the foundation for numerous small-scale organizing drives across the economy.

Note: In a December 2017 ruling, the NLRB overturned the Specialty Healthcare case in a decision known as PCC Structurals, Inc., in which the NLRB held that a union must organize an entire labor force, not just a department. However, the decision leaves unresolved earlier elections creating micro-unions and does not address multiple federal appeals courts that have ruled in favor of micro-unions. Furthermore, despite the NLRB's overruling of Specialty Healthcare, at the regional director and administrative law judge level the NLRB continues to certify petitions for elections that are for employee units smaller than the traditional "community of interest" standard allegedly contained in *PCC Structurals,* Inc. While a small group might not qualify as a target of organizing, it can serve as the catalyst for change in the larger organization.

Case Note: In a December 2022 decision the NLRB overturned the 2017 decision discussed above and reinstated the 2011 "micro union" standard for determining the appropriate size of the bargaining unit for purposes of an election. Attempting to unionize a smaller subset "micro-union" within a large employer typically represents an opportunity for a union to attempt to incrementally organize a workplace by starting small and expanding upon that success.

Under the new standard, the Board's regional offices should approve a proposed unit if the petitioner establishes that the unit:

- shares an "internal community of interests" and
- is readily identifiable as a group and sufficiently distinct from other employees in the workplace.

An employer may only challenge the appropriateness of the proposed unit by establishing that excluded employees share an "overwhelming community of interest" (emphasis added) with employees in the proposed unit, a significant hurdle for many employers to overcome. (*American Steel Construction*, 2022

Compliance Tip: *Employers concerned about the potential for the union drive should prepare for the possibility of micro-units becoming organized or at least becoming subject to an organizing drive in advance of any actual efforts by employees to form a union; once organizing activity commences an employer's options for responding will be curtailed by the NLRA and its governing regulations. Preparing may include steps such as working with outside counsel with a specialty in labor laws to determine the appropriate steps to take.*

QUICKIE ELECTIONS

The NLRB issued so-called quickie election rules in April 2015 that limit the time for an employer to respond to a union-organizing campaign by reducing the election cycle from approximately 42 days to approximately 21 days, and in some cases even less time. In December 2019, the Republican controlled Board announced a rule change that would overturn many of the prior administration's quickie election rules, restoring some of the pre-2014 timetables while also establishing some new ones. The final rule was overturned by a federal court in 2020, meaning that the Obama era standards remain in effect.

Note: the NLRB issued a new rule effective December 26, 2023 superseding a 2019 Trump decision on the NLRB's election process. The new rule provides for the following:

- Allowing pre-election hearings to move more quickly,
- Disseminating election information more quickly
- Making hearings more efficient, and
- Ensuring that elections are held more quickly.

COMPANY EMAIL

In its 2014 *Purple Communications* decision, the NLRB ruled that employee use of email for statutorily protected (in this case, union-related) communications on work time must presumptively be permitted by employers who have chosen to give employees access to their email systems. The decision does not, however, require employers to give email access to employees who currently do not have it. This ruling means that any company policy intended to limit the use of the company email system to "business purposes only" is likely to run afoul of this ruling.

In late 2019 the NLRB overturned the *Purple Communications* ruling in a decision called Caesar's Entertainment. In doing so, the NLRB determined that employees possess no statutory right to use employer-provided email for non-work purposes, and because employers possess a property right in their email systems, they are entitled to control the use of such systems as they see fit.

The current General Counsel for the NLRB has stated an intent to reassess cases where there was a "doctrinal shift" in NLRB policy under the Trump administration and has cited to the Caesar's Entertainment opinion as evidencing such a shift.

REMEDIES

The NLRA provides that the NLRB may take a number of remedial steps to correct a violation and make a wronged employee "whole." These steps include issuing cease-and-desist orders, ordering reinstatement and back pay, and requiring employers to post a notice explaining employees' rights under the NLRA. In extreme cases, the NLRB may grant a union the right to represent the employees *without* an election if the Board views the employer's anti-union activities as malicious or creating a climate in which a fair election cannot be held regarding representation. In a recent NLRB decision, *Thryv*, Inc 372 NLRB No. 22 (December 13, 2022), the Board expanded the scope of "make-whole" remedies available to employees who allege unfair labor practices. Pursuant to *Thryv*, employees may now request the Board to require an employer who is responsible for committing an unfair labor practice to pay for any "direct and foreseeable" financial hardship the employee alleges to have suffered as a result of the employer's actions.

In addition to Board expansion of remedies, the General Counsel has also expressly stated an intent to expand the NLRB's make-whole remedy to include consequential damages of job loss as well, such as emotional harm, injury to character, professional standing, or reputation. Many employer-friendly organizations oppose this proposed expansion of available remedies noting that consequential damages are too far removed from the traditional remedies of back pay and reinstatement.

Note: Many recent decisions and actions by the NLRB that impact non-union employers are subject to ongoing political debate and legal challenges, which may limit the authority of the NLRB and lead to any or all of the above provisions being changed during 2022. AIM will continue to monitor this issue and inform members of changes as they occur.

Other NLRB Focus Areas

Under the landmark United States Supreme Court decision, *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), unionized employees have the right to request union representation during an investigatory interview. Under current rules, nonunion employees are not entitled to coworker representation.

However, there is a push to expand Weingarten rights to non-union settings or to include nonunion employees. In 2021, the General Counsel issued a memorandum stating a desire to expand this so-called "Weingarten" right to non-union settings.

A 2022 NLRB decision held that employees hired as replacement workers during a strike were entitled to union representation at a disciplinary hearing because notwithstanding the strike, the union was the exclusive bargaining representative. While the Board confirmed that an employer has the right to employ strike replacements, the NLRB ruled that an employee's *Weingarten* right is held by the individual and based on Section 7 of the NLRA, rather than a right held as a term or condition of employment. *Troy Grove a Div. of Riverstone Group Inc., (Sep 14, 2022)*

Case Note: The NLRB issued a decision in 2023 that will allow it to issue bargaining orders when an employer's actions are found to interfere with a "free and fair election." The decision overturns a longstanding precedent. In the new ruling, the NLRB determined that if there is evidence that the employer has committed an "unfair labor practice" during the "critical period" (the time between filing of a petition and the election), the NLRB can issue a mandatory bargaining order. The bargaining order eliminates the need for an election and was previously used only when the employer had committed an egregious violation.

The former standard allowed an employer to reject authorization cards as proof of majority support for unionization thus forcing the union to file an election petition. The new standard requires employers to either: (1) recognize the union's majority status, or (2) if the union has not already filed an election petition, within two weeks the employer must file an "RM petition" (i.e., representation petition) for an election to test the union's majority. The employer can file the RM petition without a good faith doubt as to the veracity of the cards.

The NLRB's decision involved an employer who was found to have committed unfair labor practices before, during and after the "critical period" of an election campaign, with a union that had signed authorization cards from a majority of the affected employees. "(Cemex Construction Materials Aug 25, 2023)

New Hire Reporting

The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires every employer to report all new hires and independent contractors who will be paid over $600 in a calendar year to the Massachusetts Department of Revenue (DOR), which will then transmit the information to the National Directory of New Hires.

The required information must be submitted to the Massachusetts DOR within 14 days of the employee's effective date of employment or effective date of reinstatement after a lapse in pay of 30 or more days (M.G.L. ch. 62E § 2). This report must contain the employer's identification number, name, and address, as well as the employee's name, address, social security number, and hire or reinstatement date.

Any employer with 25 or more employees is required to report new hires electronically, which may be done through the DOR's website at www.mass.gov/dor (search for "report new hires").

Performance Evaluations

There is no law requiring that employees be appraised on their performance. However, an accurate and well-written performance evaluation can provide justification for, and potentially defense of, adverse employment actions, such as corrective action or discharge.

Performance appraisals should highlight areas of excellence, opportunity, and needed training and development. It is also a good management practice to offer feedback and coaching to all employees. Except in certain jobs that, by law, require training to be ongoing, training in general is not mandated. Certain types of training, however, have been proven to assist greatly in the defense of employment decisions and, perhaps most importantly, shown to potentially prevent claims and lawsuits. These include training on supervisory and management skills, as well as harassment and discrimination prevention.

Personnel Records

Certain records kept by an employer relating to an employee's qualifications, compensation, disciplinary action, promotion, and transfer are considered personnel records in Massachusetts and are subject to state regulation.

Employers that maintain personnel files must notify employees within 10 days of any information added to their personnel files that "has been used or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action."

The law also requires that if an employee requests it, an employer must provide the employee with a copy of the employee's personnel record, or the opportunity to review the employee's personnel record at the place of employment during normal business hours, within five business days of a written request. The law does add, however, that an employer does not have to allow an employee to review the employee's personnel record on more than two separate occasions in a calendar year. It is important to note, however, that a review caused by notification that negative information has been placed in a personnel file will not count toward the two annually permitted reviews.

If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and employee. If an agreement is not reached, the employee may submit a written statement explaining his or her position, which must become part of the employee's personnel file. Employers of 20 or more employees must retain a copy of the personnel record for at least three years after the employment relationship ends or throughout the duration of any ongoing litigation, whichever is longer.

PENALTY | Fines of up to $2,500 may be imposed on employers that do not allow appropriate employee access to these records.

Case Note: In a unanimous decision, the Massachusetts Supreme Judicial Court (SJC) ruled in *Terrence Meehan v. Medical Information Technology, Inc.* SJV-13117 (Dec. 17, 2021), that the statutory right of rebuttal (described above) provided in G.L.c. 149, §52C, is a legally guaranteed right of employment, and therefore, termination from employment for the exercise of this legally guaranteed right fits within the ... public policy exception to employment at will." The SJC reasoned that an employee could sue the former employer for wrongful discharge where the termination was a result of the employee's written rebuttal, if the rebuttal was directly in response to the negative information placed in the file.

Privacy

Employee's privacy rights are protected under Massachusetts law against unreasonable, substantial, or serious interference with their privacy (M.G.L. ch. 214 § 1B). Unlike many of the commonwealth's employment laws, the privacy law is enforced by individuals via lawsuits. In interpreting the law, Massachusetts courts have held that this law must balance the employer's legitimate business concerns versus the employee's reasonable expectation of privacy in the workplace. This balancing test has been applied in such areas as drug testing, changing of clothing, release of medical or personal information, use of electronic communications, searching of desks and lockers, and employee surveillance. In cases of drug testing, searches, and surveillance, the expectation of privacy may be eliminated through well-communicated policies explaining why the employer will, or reserves the right to, conduct these actions. Particular care should be exercised regarding the release of personal or medical information, as there could be ADA and HIPAA issues as well as those related to privacy. Employers should carefully document situations and their resulting decision-making processes.

While employers may visually record employees except in circumstances where employees have a reasonable expectation of privacy such as restrooms and changing rooms, it is a violation of the state's eavesdropping law found at M.G.L. ch. 272, § 99 to secretly record their voices because Massachusetts is an all-party consent state. That means that an employer must get the employee's consent, which should be confirmed in writing to avoid any challenge to scope of authority to record, of everybody (i.e., all parties) involved in a conversation or phone call before the conversation can be recorded. Any violation of the eavesdropping law carries a fine up to $10,000 or imprisonment for up to five years or both. The law also provides for civil enforcement rights available to any aggrieved party which may include actual damages, liquidated damages, punitive damages, reasonable attorneys' fees and litigation related costs. For example, an employee who secretly records a coworker's voice could be sued by their coworker.

Right to Work

Due to an amendment to the NLRA, each state has the right to elect to become a right-to-work state. "Right to work" means that although an employer may have a union, all employees that would normally be in the bargaining unit and pay dues are not required to become or remain union members. Massachusetts does not have a right-to-work statute. Therefore, if an employer or a unit of an employer is unionized, an employee may, after a stated period of time, be required to join a union or pay union dues as a condition of employment. Employees have the right to bargain collectively (with or without a union) and to engage in other concerted activities with respect to their employment. For more information about this topic, please see the NLRA/NLRB section above.

Smoking

Massachusetts law requires all employers of one or more employees to provide smoke-free workplaces. Employers may designate a smoking area outside the workplace, but it must be far enough away from the building that the smoke cannot enter the workplace through any door, window, air vent, or other opening. An employer may treat e-cigarettes the same as regular cigarettes. Employers bear primary responsibility and liability for enforcement. No Smoking signs must be conspicuously posted so that they are clearly visible to all employees, customers, or visitors while in the workplace. No Massachusetts or federal law requires an employer to provide smoking breaks throughout the workday.

The law allows for limited exemptions in certain businesses, such as smoking bars and hotels and motels with designated smoking rooms.

With respect to smoking in company vehicles, Massachusetts DPH documents state that company vehicles must be smoke-free if more than one employee may use the vehicle or if more than one person occupies it at any given time.

PENALTIES | The law imposes fines of $100 to $300 per violation assessed against the employer, with harsher punishment possible for repeat offenders. The law also calls for fines of $100 to be levied against individual violators (i.e., employees). The law is enforced by local boards of health, the Massachusetts Department of Public Health (DPH), local inspection departments, the municipal government, and the Alcoholic Beverage Control Commission.

AIM HR Service

AIM HR Solutions offers a variety of sample policies, including a model No Smoking Policy. For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Texting/Electronic Devices While Driving

TEXTING

Among other things, the Massachusetts Safe Driving Law bans text messaging while driving. The law

- bans all operators of motor vehicles—including law enforcement officers—from text messaging while operating the vehicle; drivers caught texting will be assessed fines of $100 for a first offense, $250 for a second offense, and $500 for a third offense;
- prohibits drivers less than 18 years of age from using any type of cell phone or mobile electronic device, whether handheld or hands-free; those found to be in violation of the law will be punished with a 60-day license/learner's permit suspension, a $100 fine, and the completion of an "attitudinal" course for a first offense; a 180-day license/learner's permit suspension and a $250 fine for a second offense; and a one-year license/learner's permit suspension and a $500 fine for subsequent offenses;
- requires drivers aged 75 and older to renew their license in person at a Registry of Motor Vehicles (RMV) and to undergo a vision test every five years;
- permits physicians or law enforcement officers who have cause to believe an operator is not physically or medically capable of driving safely to report their opinion to the RMV for a medical evaluation;
- prohibits operators of public transportation vehicles from using any type of cell phone or mobile electronic device, whether handheld or hands-free;
- makes drivers who have three or more surchargeable incidents within a 24-month period subject to an examination to determine their capacity for driving safely.

Considering the Massachusetts Safe Driving Law, employers should adopt and consistently enforce a written policy prohibiting texting while driving. Such a policy will put employees on notice that the company takes the law seriously and requires compliance.

AIM recommends that employers have a clearly written policy regarding cell phone use by employees who drive on company business, and that they carefully consider its provisions. This is especially important if cell phones are provided by the employer. While the law prohibits only texting while driving, employers should be clear about their expectations of employees who might make/receive business-related calls or send/receive email on their mobile devices while driving for either business or personal reasons. In the case of a business driver or an employer-provided mobile device, it also increases the potential for employer liability.

It is important to remember that if an employer's policy imposes greater or different requirements for employee conduct than the applicable state, federal or local laws, then the company must assess employee conduct in light of both the written policy as well as any applicable laws. This means that if an employee violates the company's written policy, even though the conduct may not violate any applicable state, federal or local law, then the company should nevertheless hold the employee accountable in light of the governing Company policy. Enforcement of policies is critical for employers to avoid liability for unsafe practices.

ELECTRONIC DEVICES

Massachusetts has a law called "An Act Requiring the Hands-Free Use of Mobile Telephones While Driving," which governs the use of "electronic devices" while driving. While the statute does not define an electronic device, the presumption is that it will cover any iPhone, smart phone, tablet, GPS system or other electronic gadget that someone may use in a vehicle will be subject to this law.

The law defines hands-free mode to mean that a user engages in voice communication or receives audio without touching or holding the device. The measure permits drivers to execute a single tap or swipe to activate, deactivate or initiate the hands-free mode feature.

The law prohibits an operator of a motor vehicle from holding a mobile electronic device while driving, using a mobile electronic device unless the device is being used in hands-free mode and reading or viewing text, images or video displayed on a mobile electronic device.

The law permits an operator of a motor vehicle to view a map generated by a navigation system or application on a mobile electronic device that is mounted on or affixed to a vehicle's windshield, dashboard or center console in a manner that does not impede the operation of the motor vehicle. The law also allows an operator to use an electronic device if the vehicle is stationary and not located in a part of the public way intended for travel by a motor vehicle or bicycle.

The law provides for limited exceptions such as the use of a mobile electronic device in response to an emergency. The law defines an emergency as when the vehicle's operator needed to report that the vehicle was disabled, medical attention or assistance was required,

police intervention, fire department or other emergency services were necessary for the personal safety of the operator or a passenger or to otherwise ensure the safety of the public or a disabled vehicle or an accident was present on a roadway.

An operator who commits a second or subsequent offense shall be required to complete a program selected by the registrar of motor vehicles that encourages a change in driver behavior and attitude about distracted driving. The law also provides that if a person commits a third or subsequent offense it will be a surchargeable event against the driver's insurance.

AIM HR Service

AIM HR Solutions has developed a model policy for member companies to use. It is available to all handbook subscription service members as part of their annual policy program.
For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Training

The Workforce Training Fund Program (WTFP) funds a variety of training through grants offered by the Commonwealth of Massachusetts, Executive Office of Labor and Workforce Development. The grant program is administered by the Commonwealth Corporation. Employers may apply for grants on a rolling basis.

Massachusetts employers who voluntarily contribute to the Massachusetts Unemployment Insurance (UI) system are eligible to apply for and receive grants. This includes all for-profit employers and some nonprofits. Nonprofit employers who pay UI benefits on a reimbursable basis are ineligible to apply for grants. See the Unemployment Insurance section for more detailed discussion of contributory and reimbursable status.

All businesses requesting grants or training funded by any WTFP must provide a valid Certificate of Good Standing from the Massachusetts Department of Revenue (not to be confused with a Certificate of Incorporation), issued within the last six months.

Use this link www.mass.gov/service-details/certificate-of-good-standing-from-department-of-revenue-dor for more information and to learn how to apply for a Certificate of Good Standing.

General Program Training Grants

Businesses may apply for a grant of up to $200,000. Commonwealth Ccorporation has reinstated the one year waiting period between grants as well. Once awarded, they may use training providers of their choice. The grant funds most training programs, with the exception of those legally mandated (e.g., OSHA training). Examples of acceptable training topics include English Speakers of Other Languages (ESOL), Customer Service, Sales, Supervisory Skills, Adult Basic Education, Train the Trainer, and Lean Continuous Process Improvement. Grant value must be matched on a 50/50 basis between the grant and the employer's financial contribution. Employers typically meet their obligations by paying employees' wages for the time spent in training. The grant must be completed within two years of receipt. The program is available by clicking here. www.workforcetrainingfund.org/programs/general-program.

Express Program

This grant is available for businesses with 100 or fewer employees. Grant awards are limited to $20,000 per company per calendar year and $3,000 per employee per course. Approved businesses will be reimbursed up to 100% of the actual training cost. A Certificate of Good Standing is required. The program is available by clicking here: commcorp.org/subprogram/wtfp-express-program-for-applicants/.

AIM HR Service

AIM HR Solutions offers a variety of training programs supported by the range of workforce training fund grants. Please contact Kelly McInnis at 617.488.8321 or kmcinnis@aimhr-solutions.org at AIM HR Solutions for additional information on how to apply for grants and other assistance related to the WTFP.

W-2s and Employee Social Security Statements

The year-by-year display of earnings listed in the Social Security Statement is a compilation of information reported on (1) paper Form W-2, (2) electronic/magnetic media equivalents that employers send to the Social Security Administration (SSA) each year, or (3) self-employment income reported to the Internal Revenue Service (IRS). The earnings record has a direct bearing on the eligibility for, and amount of, Social Security benefits payable to eligible individuals and their families. Therefore, it is essential that timely and accurate Form W-2 information be submitted to the SSA.

Whistleblower

There are many federal and state laws that afford whistleblowers an opportunity to report criminal activity or fraud. There are other state and federal laws that contain whistleblower protection designed to encourage employees to come forward to report potential concerns about health and safety or other activities and offer them protection against any retaliation for doing so. Examples of federal laws with whistleblower protections include:

- Occupational Safety and Health Administration: provides protection for reporting issues relating to the Occupational Safety and Health Act, the Sarbanes-Oxley Act, and 20 other federal laws that have whistleblower protection provisions, including but not limited to employee safety, consumer product and food safety, environmental protection, fraud and financial issues, health insurance, and transportation services.
- Mine Safety and Health Administration: provides protection for identifying hazards, asking for inspections, or refusing to engage in unsafe acts.
- Office of Federal Contract Compliance Programs: provides protections against, retaliation, intimidation, threats, coercion, harassment, and discrimination for engaging in protected activity under any equal employment opportunity law enforced by OFCCP. Employers subject to affirmative action requirements are covered by the whistleblower protections contained in Executive Order 11246.
- Wage and Hour Division: provides protection for reporting issues relating to minimum wage, overtime pay, recordkeeping, lie detector testing, family and medical leave, and youth employment (regardless of immigration status).
- Veterans Employment and Training Service: provides protection based on employees' current or former military status.

Other whistleblower protection laws provide employees with financial incentives to report fraud. They are typically known as false claims act laws. There are both federal and Massachusetts False Claims Act. These laws enable individuals or nongovernmental organizations with specific knowledge of fraud to file a lawsuit, in federal or state court on behalf of the United States or Massachusetts government. If the lawsuit leads to a recovery of some or all the funds taken from the government fraudulently, the whistleblower(s) may receive up to 30% of the collected proceeds. In addition, Massachusetts also has enacted specific whistleblower statutes to protect health care providers (M.G.L. c. 149, § 187) who report practices of a health care facility that post a risk to public health, as well as to protect public employees (M.G.L. c. 149, § 185) who report, testify about or refuse to participate in activities that the employee reasonable believes poses a risk to public, health, safety or the environment.

Payment of Wages

Bonuses

The Fair Labor Standards Act (FLSA) recognizes two types of bonus payments to employees, discretionary and nondiscretionary.

Discretionary bonuses are paid at the discretion of the employer. If the bonus is truly discretionary it does not need to be calculated as part of employees' regular rate of pay or overtime calculation.

To be deemed discretionary the following two criteria must be met:

- The decision to make the payment and the amount of the payment are determined at the sole discretion of the employer; and
- The bonuses are not paid under any prior contract, agreement, or promise causing the employee to expect such payments regularly.

Discretionary bonuses include those awarded:

- For overcoming a challenging or stressful situation
- To employees who made unique or extraordinary efforts, when not awarded according to pre-established criteria
- For employee-of-the-month, and
- As a referral bonus to employees not primarily engaged in recruiting activities provided that:
  - employee participation is strictly voluntary;
  - employee's recruitment efforts do not involve significant time; and
  - the activity is limited to after-hours solicitation done only among friends, relatives, neighbors and acquaintances as part of the employee's social affairs.

Non-discretionary bonuses are paid pursuant to a contract or agreement that has been made between the employer and employee in advance. A typical nondiscretionary bonus covers activities such as:

- production, quality, attendance,
- continued employment with the employer, or
- another form of employee performance.

A non-discretionary bonus is one that the employee expects to be paid, and it is usually given on some form of schedule such as monthly, quarterly or annually.

Exceptions

Several narrow exemptions provide employers with some relief from the requirement that bonuses be included in an employee's regular rate of pay. The burden is on the employer to prove that a payment meets one of the exemption requirements. The exemptions include:

- Gifts, or payments in gifts, made at the holiday season or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.
- Vacation, holiday, or sick leave pay; payment for failure of the employer to provide sufficient work (i.e., reporting pay), or other similar cause; reasonable payments for traveling expenses, and other similar payments to an employee that are not made as compensation for his or her hours of employment.
- Sums paid in recognition of services performed during a given period if either:
  - both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not under contract, agreement, or promise causing the employee to expect such payments regularly; or
  - the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, if the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees paid to performers, including announcers, on radio and television programs.
- Contributions to a trustee for retirement, life, accident, or health insurance or similar benefits for employees.
- Premium overtime pay.
- Premium pay for working holidays or weekends.
- Extra compensation provided by a premium rate paid to the employee under an employment contract or collective-bargaining agreement.
- Certain stock option compensation.

The US Department of Labor Wage and Hour Division Fact Sheet 56c (www.dol.gov/agencies/whd/fact-sheets/56c-bonuses) offers a very detailed discussion on the laws governing bonuses, including offering examples computing overtime pay when bonuses are paid, and guidance on complying with FLSA relative to bonus payments.

Classification of Employees (FLSA)

Note: The federal wage and hour division (WHD) issued a proposed increase in the weekly salary threshold amount in late August 2023 from the current $684 per week to a proposed $1,059 per week or $55,068 per annum. As of this writing, the proposal is scheduled to be released in April 2024. But is likely to be subject to litigation that may delay the implementation date.

The Fair Labor Standards Act (FLSA) establishes two classifications of employees: non-exempt and exempt. Non-exempt employees may be paid on an hourly or a salary basis. They must earn at least the minimum wage and must be paid one and one-half times their regular rate of pay for all hours worked in excess of 40 in each week. Exempt employees must be paid on a salary basis and must meet the salary and duties test for administrative, professional, executive, computer-related, or outside salesperson positions as stated by the FLSA. Exempt employees are not entitled to overtime pay or a guaranteed minimum wage no matter how many hours they work in a week. Employees earning less than $684 per week or $35,568 per year are automatically classified as non-exempt, regardless of the duties they perform.

Misclassifying employees and making them exempt from overtime pay is one of the most frequent mistakes made by employers, especially for positions such as customer service representative, inside sales representative, and administrative assistant. This failure to appropriately pay overtime creates the potential for significant legal and financial liability under both federal and state law. (See the discussion on treble damages below) AIM encourages all employers to review their job descriptions and employment classifications to correctly determine which employees are exempt and which are non-exempt and to take corrective action to properly classify employees as soon as it is determined that one or more of them are misclassified.

Note: The DOL has also changed the test for determining whether an intern should be paid. In doing so, the DOL stated that it was abandoning the previous six-factor test and shifting to the "primary beneficiary" test. This standard had been created and endorsed by a number of federal appeals courts, which had rejected the six-factor test. The primary beneficiary test focuses on the economic realities of the relationship, with the key issue being whether the intern or the employer is the primary beneficiary of the relationship. If it is the employer, the intern must be paid; if it is the intern, the intern need not be paid.

Given the complexities associated with any decision to reclassify employees, an employer may want to contact the AIM Helpline or their legal counsel to discuss how to handle reclassification.

AIM HR Service

AIM HR Solutions can assist employers with employee classification issues. For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Deceased Employee Final Wages

M.G.L. ch. 149, §178A provides that an employer may pay final wages or salary to a surviving spouse or adult child of a deceased employee, not to exceed $100, owed to an employee who dies intestate, if 30 days have elapsed since the death of the employee and a representative of the estate has not come forward or otherwise made a demand for final wages, and the employer has no actual notice of the commencement of probate proceedings, If the employer is satisfied that there is no surviving husband or wife or adult child, such payment may be directly paid to the surviving father or mother of such employee.

This law was originally enacted in 1932 and the legislature has never increased the amount of final wages to be paid.

There is currently proposed legislation that would eliminate the $100 cap on the payment of wages to the survivors of a deceased employee. If the legislation passes an employer receiving a proper demand from a former employee's survivor(s), will be required to pay all wages owed at the time of the employee's death to their survivors, including accrued but unused vacation time.

Direct Deposit

According to the Massachusetts Fair Labor Division—the wage and hour enforcement division of the Office of the Attorney General—an opinion letter from the Commissioner of Banks concludes that the Electronic Fund Transfer Act does not prevent an employer from requiring its employees to participate in the company's direct-deposit program. However, the employee must be allowed to choose the bank, and participation in the program must not cost the employee anything. Therefore, an employer may not require participation in a direct-deposit program if the employee is forced to open a bank account that he or she does not want—and incur fees associated with that account—unless the employer is prepared to pay for the establishment and maintenance of the account.

Equal Pay

Both federal and state acts related to equal pay currently require that men and women be paid the same for performing essentially the same work for the same employer. Consideration is allowed for factors such as bona fide seniority systems. The Massachusetts Equal Pay Act contains a one-year statute of limitations. The statute of limitations begins on the date the employee receives the unequal paycheck or the date on which the employee discovers the unequal pay violation, whichever is later.

The Lilly Ledbetter Fair Pay Act of 2009 redefined the federal Equal Pay Act's 180-day statute of limitations so that it now restarts each time the employer issues an unequal paycheck. Additionally, the law allows not only an employee but also other individuals who were affected by pay discrimination to file a claim. This means that family members, including spouses and children, might become plaintiffs in discrimination suits over an employee's pay, even after the employee is no longer living. The Act overturned a U.S. Supreme Court decision that had limited the application of the law. For more information on equal pay issues, see the discussion on the Massachusetts Pay Equity Law.

Garnishment of Wages

Under federal law, garnishments are limited to the lesser of 25% of disposable earnings (earnings after taxes and the employee's share of Social Security payments) or the difference between disposable earnings and 30 times the federal minimum wage rate (currently $7.25 per hour). An employer is prohibited from firing an employee whose earnings are subject to garnishment for any one debt. However, the law does not prohibit discharge because an employee's earnings are separately garnished for two or more debts. The U.S. Department of Labor enforces this law against any violations.

Massachusetts Lesser Amount Standard

Massachusetts state law provides that an amount not exceeding the greater of 85% of the debtor's gross wages or 50 times the greater of the federal ($7.25 per hour) or Massachusetts ($15.00 per hour) minimum wage rate for each week or portion thereof shall be exempt from such attachment. For example, assume an employee earns gross wages of $1,000 per week. Relying on the method outlined above, the amount subject to garnishment is as follows: 15% (i.e., 100%–85%) of the gross wages equals $150, or disposable earnings less 50 times the Massachusetts minimum wage of $15.00 equals $750.00. Once these two amounts (i.e., $150 and $750.00) are determined, apply the two steps of the Massachusetts garnishment standard:

- Step 1: 50 x $15.00 = $750.00 (amount automatically exempt from any garnishment)
- Step 2: $1,000 – $750.00 = $250.00.

Due to the lesser amount provision in the law noted above, a creditor may garnish only up to $150 of the employee's wages per week (M.G.L. ch. 246 § 28).

The limits explained here do not apply to child support, student loans, or unpaid taxes. If an employee owes child support, student loans, or unpaid taxes, the government or creditor can garnish wages without getting a court judgment. The amount that can be garnished is different as well.

Child Support

The amount that may be garnished for child support varies depending on the employee's circumstances:

- Up to 50% of an employee's disposable earnings may be garnished to pay child support if the employee is currently supporting a spouse or a child not the subject of the order.
- Up to 60% of an employee's disposable earnings may be garnished if the employee is not supporting another family.
- An additional 5% may be garnished for support payments over 12 weeks in arrears.

Student Loans in Default

In this case, the U.S. Department of Education (DOE) or any entity collecting on its behalf can garnish an employee's wages through an administrative garnishment without first getting a court judgment. The most that the DOE can garnish is capped at 15% of an employee's disposable income, but not more than 30 times the state minimum wage.

Unpaid Taxes

The federal government can garnish wages if an employee owes back taxes, even without a court judgment. The amount of the garnishment depends on the number of dependents an employee has and the employee's deduction rate. States and local governments may also be able to garnish wages to collect unpaid state and local taxes.

If a judge orders an employee to obtain health-care coverage for his or her child, the employee must do so if such coverage is available through the employer. Employers are obligated to cover a child subject to such an order and may be liable for the full amount of the assigned income or the full amount of medical costs incurred if they fail to comply with an order of income assignment or a health-care order (M.G.L. ch. 119A §§ 12, 14, 16).

Holiday Work

Public employers must close on all Massachusetts legal holidays, whereas private employers have the option, with some exceptions, of remaining open. An employer cannot require an employee to work more hours on other days or in any one day to make up time lost by reason of a legal holiday (M.G.L. c. 149 § 46). Some special rules apply, as follows:

MANUFACTURERS

Overtime or premium pay is not required for work performed on any of the legal holidays unless it is established by company policy, time worked on the holiday results in the employee exceeding 40 hours per week, or pursuant to a union contract. However, on those days designated as "Sunday law" holidays—to which blue laws apply—manufacturers, unless they are a continuous operation, must secure a permit from the local chief of police to open, and work must be voluntary on the part of employees (M.G.L. ch. 149 § 45; M.G.L. ch. 136 § 15). The continuous operation exception is a very limited one, requiring the employer to show that the work is necessary and that, for technical reasons, the company must operate continuously. Examples include military and pharmaceutical emergencies.

RETAIL

Note: As part of a law adopted in 2018, changes were made to the Blue Laws regarding the gradual elimination of premium pay over a five-year period for employees that worked on certain holidays. Premium pay was originally set at 1.5 times an employee's base pay for all hours worked on Sundays and certain holidays. The holidays subject to the declining premium pay rates included New Year's Day, Memorial Day, Juneteenth, (June 19th), Independence Day, Labor Day, Columbus Day, and Veteran's Day.

As of January 1, 2023, the premium pay differential no longer exists. Any employee working on Sunday will be paid their regular wages unless work on Sunday constitutes overtime. If it does, the employee must be paid 1.5 times their regular hourly rate.

Retail stores may open at any time on New Year's Day, Martin Luther King Jr. Day, Presidents' Day, Patriots' Day, Memorial Day, Juneteenth, Independence Day, and Labor Day. Retail stores may open on Columbus Day and Veterans Day after noon and 1:00 p.m., respectively. Retailers wishing to open either or both holidays before these times must obtain permission from the local chief of police.

Retailers with seven or more employees cannot require work on New Year's Day, Memorial Day, Juneteenth, Independence Day, Labor Day, Columbus Day, or Veterans Day. Retailers can require employees to work on Martin Luther King Jr. Day, Presidents' Day, and Patriots' Day. Only retail stores exempted by statute may open on Christmas and Thanksgiving. Examples of stores exempt from the Blue Laws include convenience stores, pharmacies, bakeries, florists, cosmetology services, and banks (M.G.L. ch. 136 §§13,16).

NON-MANUFACTURERS, NON-RETAIL

Establishments that are neither manufacturing nor retail must obtain a permit from the local chief of police to operate on the restricted holidays of Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day, as well as on Columbus Day before noon and Veterans Day before 1:00 p.m. If the permit is obtained, employees may be required to work. Pay would be at the employee's regular rate of pay unless otherwise required by union contract or by the employer's policies and practices.

INTERNS/STUDENTS

Courts have used the "primary beneficiary test" to determine whether an intern or student is, in fact, an employee under the FLSA and Massachusetts law, and entitled to both minimum wage and overtime pay under FLSA. In short, this test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship. Courts have identified the following seven factors as part of the test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Under the "primary beneficiary test" no single factor is determinative, whether an intern or student is an employee will depend on the unique circumstances of each case.

AIM HR Service

A calendar of the 12 legal holidays and related requirements is available through the AIM store and in the AIM HR Resource Center.

Meal Breaks and Rest Periods

MEAL BREAKS

This law provides that no person shall be required to work for more than six continuous hours during a calendar day without an interval of at least 30 minutes for a meal. The employer may choose to pay for the meal break (M.G.L. c. 149 § 100). If the meal break is unpaid, the employer should take care to ensure that the employee does not perform any work during the meal break. An employee may waive a meal break by voluntarily stating this choice in writing. Employees who fill out the waiver should understand that they are waiving their meal break, that they must be paid for any time worked (including overtime if applicable), and that they may revoke the waiver at any time.

The Fair Labor Division of the Massachusetts Attorney General's Office may also grant an exemption from the meal break law if it can be made without injury to the persons affected and for the following reasons:

- certain industries: iron works, glassworks, paper mills, letterpress establishments, print works, bleaching works, or dyeing works
- the continuous nature of the process
- collective bargaining agreements (see M.G.L. c. 149 § 101)

REST PERIODS

There is no requirement for an employer to provide employees with rest periods (e.g., coffee breaks) under either federal or Massachusetts law. The Fair Labor Standards Act (FLSA) requires that if a rest period is given, and it is for 20 minutes or less, it must be paid. Rest periods are part of a company's voluntary benefits practice.

Minimum Wage

Effective January 1, 2023, the Massachusetts minimum wage is $15.00 per hour. Increases in the minimum wage will cease as of January 1, 2023. Under Massachusetts law, if the federal minimum wage (presently $7.25 per hour) increases, the Massachusetts minimum wage must exceed it by at least $0.50 per hour. Tipped employees will be paid $6.75 per hour as of January 1, 2023. The service rate is premised on the expectation that tips from customers will increase it to the minimum wage. If a tipped employee does not receive at least minimum wage, the employer must make up the difference. As of 2018, a tipped employee must be paid at least the full minimum wage, a calculation that the employer must perform daily rather than weekly as previously required. All employers must display on the company bulletin board a poster stating the updated minimum wage (M.G.L. c. 151 § 1).

Nursing Mothers

The Affordable Care Act amended the FLSA to require employers to provide "reasonable" unpaid breaks for nursing mothers in the following manner:

- a reasonable unpaid break every time an employee needs to express breast milk for her nursing child for up to one year after the child's birth; **and**
- a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which the employee may use to express breast milk.

Employers of fewer than 50 employees are exempt from this requirement if it would "impose an undue hardship by causing the employer significant difficulty or expense." The burden is on the employer to demonstrate the undue hardship.

Note: The Massachusetts Pregnant Workers Fairness Act expands the PUMP Act by requiring employers with six or more employees to provide nursing break rights as well as other accommodations for an employee's pregnancy or pregnancy-related condition. Massachusetts law does not limit the nursing breaks to the first year of the child's life, rather it is open ended and is required for as long as the child is nursing. For a more detailed discussion of the Pregnant Workers Fairness Act, see Discrimination in Employment section.

Please also see discussion about the PUMP Act in the Discrimination in Employment section for more information about nursing in the workplace.

On-Call Pay

Whether or not an employee's time must be paid as "on-call" time depends on whether that time predominantly benefits the employer (i.e., engaged to wait) or whether employees are able to use the time for their own purposes (i.e., waiting to be engaged). For example, on-call time is generally not compensated for an employee who is required to wear a pager and answer emergency calls but who can travel within a reasonable distance and can otherwise use the time as he or she chooses. Employees may be compensated at less than their regular rate of pay for their on-call time. However, if the employee is called in to work, the employee must be paid his or her regular rate or overtime, if appropriate.

Pay Equity

In 2016, the state amended the Massachusetts Equal Pay Act (M.G.L. ch. 149 § 105A-C) with the intent of creating pay equity between the sexes. The statute changes the focus in gender pay comparison from equal pay for equal work to equal pay for comparable work. Comparable work is defined as work that is substantially similar in skill, effort, and responsibility and is performed under similar working conditions. Employers may not rely on job titles alone to identify employees performing comparable work. Instead, employers should develop robust job descriptions that clearly identify the skill, effort, responsibility, and working conditions required for each position, and then review pay by gender across positions identified as comparable. While not required, employers are encouraged to conduct regular self-evaluations of pay to ensure equal pay for employees in comparable positions regardless of gender.

The law allows employers to rely on the following six reasons to justify different salaries for comparable work:

- seniority (provided it is not applied against an employee for taking lawful leave due to pregnancy or taking parental, family, or medical leave under the Massachusetts Parental Leave Act or FMLA)
- merit system (this remains undefined in the law)
- geographic location (this remains undefined in the law)
- system that measures earnings by quantity or quality of production, sales, or revenue
- education, training, or experience to the extent that such factors are reasonably related to the job in question
- travel, if the travel is a regular and necessary part of the particular job

Employers may not ask an applicant's pay history on an employment application or in an employment interview. However, the statute allows an employer, with the written permission of the applicant following any offer of employment with compensation, to confirm wages and benefits or other compensation and salary history from the applicant's prior employer. The new law also makes it clear that employers may not prohibit employees from voluntarily discussing their pay with coworkers. The law also prohibits an employer from reducing certain employees' pay (i.e., that of higher-paid males) to create equity among employees. Under the law, employers that perform self-audits to identify gender-based pay inequities and enact plans to address them receive a safe-harbor protection period from legal actions related to employee pay equity.

One or more employees may bring a lawsuit against an employer alleging a violation of the statute. The attorney general (AG) may also bring an enforcement action. Damages include unpaid wages, liquidated damages, court costs, and attorney's fees. Although not required, the AG may issue regulations to enforce the law.

AIM HR Service

AIM HR Solutions provides pay equity analysis services to help employers stay compliant with the Equal Pay Act. For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Compliance Tip: *The Massachusetts Attorney General's Office has developed a pay equity calculator that employers may use to analyze pay between genders. The pay calculator is available at www.mass.gov/massachusetts-equal-pay-law.*

Payment of Overtime

Massachusetts recognizes the right of an employer to make overtime work mandatory. State and federal law requires employers to pay time and a half for **all work actually performed in excess of 40 hours in a given workweek** by non-exempt employees. The FLSA and Massachusetts wage and hour law do not consider holiday pay, sick pay, or vacation pay as hours worked for purposes of calculating overtime. An employer may, however, choose to adopt a policy to include time paid but not worked in the calculation of overtime.

Note: Some industries/job classifications are exempt from the time-and-a-half requirement—for example, mechanics and truck drivers subject to the federal motor carrier act need not be paid overtime. To see the full list, please view the statutory language in M.G.L. ch. 151 § 1A.

Employers may require overtime as a condition of employment or continued employment. (See restriction for Sunday work for retail stores and shops.) If an employee works overtime that was not authorized, that employee may be subject to disciplinary action but must be paid for all time worked. The FLSA and the Massachusetts minimum wage law do not impose any limitation on the number of hours that an employee may work. Instead, they require that employers pay non-exempt employees additional wages (e.g., overtime pay at one and one-half times the employee's regular wage) for hours worked in excess of 40 hours in a workweek. In addition, Massachusetts requires that employees must have one day of rest in seven (see below) and that the employer shall post in a conspicuous place on the premises a schedule containing a list of employees who are required or allowed to work on Sunday and designating the day of rest for each.

For more information regarding rules governing retail employers and Sunday work, please see the Sunday Work section below.

Payment of Wages

Under Massachusetts law, employers may elect to pay all employees on a weekly or biweekly basis. In addition, employers may pay certain employees semi-monthly or, with the employees' consent, on a monthly basis. Those employees include

- executive, administrative, or professional (exempt) employees; and
- non-exempt employees who are paid on a salary basis for a workweek of substantially the same number of hours from week to week.

This means that non-exempt employees whose hours are subject to fluctuation for any reason, including overtime, should be paid either weekly or biweekly.

In all cases, employees must be paid within six days of the close of the pay period.

Employers are required to withhold various state and federal taxes from employees' paychecks for remittance to governmental agencies and must maintain forms (such as Form W-4) and records of these withholdings.

Employers must furnish each employee with a written indication (e.g., a pay statement/stub) containing certain specific information, including notification of deductions or contributions from the employee's pay at the time such deductions or contributions are made. Employers are also required to provide new employees with written notification concerning the nature of deductions and contributions (M.G.L. c. 148 § 150A).

Any employer paying wages by check must ensure that facilities are available for cashing the check (at a bank or elsewhere) without any fee to the employee (M.G.L. c. 149 § 148).

Note: Massachusetts has long-established minimum wage regulations that cover topics such as reporting pay, uniforms, minimum wage, on call pay, etc. State regulations are important to review because state regulations that are stricter on the employer or more generous to the employee must be adhered to. The regulations are available at 454 CMR 27.00.

The current Massachusetts Wage and Hour Law poster is available on the website of the Attorney General's Fair Labor Division.

Compliance Tip: *An employee involuntarily discharged from a company for any reason must be paid his or her wages in full on the day of discharge. An employer unable to pay a terminated employee on the day of discharge/termination may consider paying the individual an extra day or two to have time to produce a final paycheck and comply with the strict requirements of the law. An employee voluntarily separated from employment may be paid full wages on the next regularly scheduled payday. The Massachusetts Attorney General has stated that the word "wages" includes any vacation pay that is earned by an employee under an oral or a written company policy or union contract but is unused as of the date of discharge (M.G.L. ch. 149 § 148). Wages do not include any accrued but unused sick time. Employers who provide paid time off (PTO) instead of vacation leave should designate and track the number of hours or days of PTO that are considered vacation time to limit the amount owed to a separating employee. Absent a well-documented and consistently applied policy and practice, the entire PTO bank is likely to be deemed payable to the separating employee.*

Massachusetts courts place very strict limits on an employer's ability to set off any financial obligation to the company by withholding all or a portion of an employee's final wages. An example of a valid offset would be a company-issued loan or advance, provided there is written authorization of the employee acknowledging the debt and repayment terms and conditions. An example of an unauthorized offset would be unreturned company property provided to an employee, such as a uniform or laptop. Notwithstanding the legitimacy of the offset, a nonexempt employee must be paid for each hour worked during the final week of employment. For example, if an employee works 40 hours during the final week and earns $1,000 but owes the company $900, the employer may only set off $400 ($1,000 – $600 [min. wage] = $400). Any final amount before an offset may also be reduced by all required withholdings, including taxes and child support. If the remaining funds are insufficient to repay the debt, the employer may attempt to negotiate a repayment agreement with the former employee or sue the former employee in small-claims court for the difference.

The Attorney General's office issued guidance on recoupment of inadvertent wage overpayments that is available from the AG's website. The link is available here.

The word "wages" also includes commissions when the commissions are definitely determined and there is no good-faith dispute regarding how to calculate the amount due.

Case Notes: This year Massachusetts courts, in two separate cases, have provided guidance relative to the applicability of the Massachusetts Wage Act when an employee does not reside in Massachusetts or when the employer is not a Massachusetts business. In the first case, an employee residing in Virginia and employed by a Massachusetts employer demonstrated sufficient contacts with Massachusetts to bring a claim under the state's Wage Act. In the second case, a Massachusetts employee established sufficient contacts in Massachusetts to establish that Massachusetts had jurisdiction over the employer to address the employment dispute between the employee and their employer, an entity with a principal place of business in Texas, and that the employee's wage claim would be adjudicated under the Massachusetts Wage Act. Although the employee signed an employment agreement with a choice-of-law clause specifying Texas law governed the relationship, the Massachusetts court determined that the employment agreement did not clearly make reference to the applicability of the clause to statutory causes of actions. Therefore, the Court applied the, the "choice of law" standards of Massachusetts, and held that the state had the most significant relationship to the litigation to warrant applicability of the Massachusetts Wage Act. (Wilson v. Recorded Future, Inc., 669 F. Supp. 3d 53 (D. Mass. 2023); Berrey v. Evolve Cellular, Inc. et al, 1:23CV11433).

Reporting Pay

Massachusetts minimum wage regulations provide that a non-exempt employee who is scheduled to work three hours or more and reports for duty at the time set by the employer must be paid for at least three hours, even if the employee is sent home early due to lack of work, poor weather conditions, and so on. The employee must be paid at the employee's regular rate of pay for time actually worked and at the state minimum wage rate (at least) for the balance of the three hours if no work is performed. If the employee performs no work, the employee needs to be paid for only three hours at the minimum wage rate. Reporting pay also applies if a person shows up for work and has not been notified by the company that work is unavailable for that day or is sent home for lack of work. Union contracts or company policy may indicate a higher rate of pay and/or payment for more than three hours (455 CMR § 27.04).

An employer may schedule an employee to work for less than three hours as part of a regularly scheduled work shift (e.g., lunch hours). Since the regulation covers only workers who are scheduled for three hours or more, the reporting pay provision appears not to require employers to pay reporting pay when a worker is scheduled to work less than three hours and is prevented from finishing the shift.

Sunday Work

MANUFACTURERS

All manufacturers—except continuous operation companies—need to secure a permit from the local chief of police to perform necessary work on Sunday. Even where a permit is secured, non-continuous operation manufacturers cannot require employees to work on Sunday. When employees do agree to work on Sunday, they may be paid at their regular rate unless such work constitutes overtime under the provisions of the FLSA or unless more generous payment is provided by company policy or union contract. Continuous operation companies can require employees to work on Sunday and are not required to pay overtime or premium pay unless the Sunday work constitutes overtime under the provisions of the FLSA or unless such pay is provided by company policy or union contract. Any manufacturing, mechanical, or mercantile employer must post the names of those employees working on a Sunday along with their designated day of rest (M.G.L. ch. 149 § 51). Please see the discussion below regarding the work schedule/one-day-of-rest law.

There are no restrictions on Sunday work for employers that are non-manufacturing and non-retail.

Training Pay

Training required by an employer is considered "hours worked," and non-exempt employees must be paid at their regular rate of pay. Generally, attendance at training programs does not constitute "hours worked" if *all four of the following factors are met*:

- Attendance is outside normal working hours.
- Attendance is completely voluntary.
- Attendance is not directly related to the employee's current job assignment.
- No work of value to the employer is performed by the employee during the training.

Travel Pay

The general rule is that commuting time is not paid work time. However, the FLSA covers three forms of travel time that may constitute paid work time for non-exempt employees:

- **Travel during the workday** - Travel during the workday that occurs after the employee has reported for work and that is for the benefit of the employer is paid time. Commuting time to the place of departure (airport, train station) is excluded from paid work time;
- **Out-of-town travel** - Employees who travel out of town must be compensated for the time spent traveling during normal work hours; and
- **Overnight Travel** - Trips that take employees away overnight are also compensable when the travel time occurs during the employee's regular work hours, even if the employee is traveling on non-regularly scheduled workdays (e.g., Saturday or Sunday).

Employers may always choose to be more generous than the law requires when compensating non-exempt employees for travel.

In a federal case from 2020, the Massachusetts district court decided that where an employer does not keep a record of delivery drivers' actual travel expenses, the IRS mileage reimbursement rate should be used. .

Treble Damages

Massachusetts employers are automatically liable for mandatory treble damages (three times the actual damages awarded) plus attorney's fees for any violation of the Massachusetts Wage Act, regardless of the employer's good faith efforts to comply with the law. This means that treble damages will be awarded once a violation is demonstrated, even in cases in which the employer made an unintentional mistake.

Given the increased exposure to employers under the treble damages law, it is important for employers to pay close attention to the various technical requirements and changes to the Massachusetts Wage Act and the FLSA—such as the recent changes to premium pay, minimum wage, and employee classification standards—to ensure that they are in full compliance.

Case Notes: There were two Important Massachusetts Supreme Judicial Court (SJC) decisions in 2022 involving nonpayment of wage claims. Both cases are discussed below.

1. A major decision by the Massachusetts Supreme Judicial Court (SJC) in the spring of 2022 reminded employers of the consequences (mandatory treble damages) of failing to comply with the strict requirements of the state's wage and hour laws including the payment of the final paycheck. The statute is a strict liability one, meaning it does not matter whether the mistake was an accident, or in some other manner inadvertent.

   The employer terminated the employee in 2013 after she was convicted of larceny. The employer failed to pay unpaid vacation at the time of termination. The employer paid the unpaid vacation within three weeks of termination but did not pay the unpaid interest until a year later in response to a demand letter. The former employee then filed suit in the Superior Court seeking treble damages, attorneys' fees, and interest. The Superior Court entered judgment in favor of the employee only for the attorneys' fees and interest. The decision was appealed to the SJC.

   The SJC ruled unanimously that the employer violated the Wage Act. In determining the appropriate penalty, the SJC ruled that the statutory remedy was clear in that the purpose of the law was to "require prompt payment of wages and the trebling of those wages as liquidated damages when they are paid late. The remedy for late payment is therefore not the trebling of interest payments on those wages as found by the trial judge, but the trebling of the total wages." (*Reuter v. City of Methuen*).

2. In the other decision issued in April of 2022, the SJC held that when an employee's sole claim for the failure to pay overtime wages on a timely basis relies upon the FLSA overtime requirements, the employee can only rely on FLSA-based remedies and may not bring a claim under the Massachusetts Wage Act. The consequence of this decision is that the employee is unable to seek treble damages.

   This ruling makes it clear that treble damages are not available when an employer violates only the FLSA overtime provisions. *(Devaney v. Zucchini Gold, LLC).*

Uniforms

Massachusetts minimum wage regulations (454 CMR 27.00) establish certain rules governing employer provided uniforms. The regulation defines uniforms as all special apparel, including footwear, which is worn by an employee as a condition of employment. The regulation also presumes that a uniform worn by an employee of any establishment is worn as a condition of employment if it is of similar design, color, or material, or it forms part of the decorative pattern of the establishment to distinguish a person as an employee of the place of work. On the other hand, a uniform does not include situations where an employer requires a general type of basic street clothing, permits variation in details of dress, and the employee chooses the specific type and style of clothing.

The regulation also provides that for employers requiring uniforms, the following shall apply:

- Where uniforms require dry-cleaning, commercial laundering, or other special treatment, the employee shall be reimbursed for the actual costs of such service.
- Where uniforms are made of "wash and wear" materials, that do not require special treatment, and that are routinely washed and dried with other personal garments, the employer need not reimburse the employee for uniform maintenance costs.
- No deposit shall be required by the employer from an employee for a uniform, except by application granted by the Director of the Department of Labor Standards.
- An employee or prospective employee who is required to purchase or rent a uniform shall be reimbursed for the actual purchase or rental cost of the uniform.

Volunteers

Volunteers provide services to not-for-profit or charitable organizations and may work without pay. The Massachusetts Department of Labor Standards (DLS) determines who can work as an unpaid volunteer. DLS considers the following factors in determining whether an individual may be classified as an unpaid volunteer:

1. The nature of the entity receiving the services
2. The receipt by the worker of any benefits, or expectation of any benefits, from their work
3. Whether the activity is less than a full-time occupation
4. Whether regular employees are displaced by the "volunteer"
5. Whether the services are offered freely without pressure or coercion
6. Whether the services are of the kind typically associated with volunteer work.

Employers interested in learning more about volunteers should contact the Massachusetts Department of Labor Standards.

Vacation

Employers are not required to offer paid vacation. However, once an employer establishes a vacation policy, the employee must be paid for all accrued but unused vacation at year end (unless it is stated that vacation may be carried forward into the next year or there is a clear "use it or lose it" statement) or at the time employment terminates. It is important that an employer's policy be very specific as to how vacation is accrued and under what circumstances it is deemed to be "due" the employee. The Vacation Advisory of the Massachusetts Attorney General's Fair Labor Division (www.mass.gov/ago/docs/workplace/vacation-advisory.pdf) states that paid vacation is to be regarded as deferred wages; thus, a company may want to issue a written statement or policy that clearly separates paid vacations from any paid personal and/or sick time. If this isn't done, all paid time off will be considered vacation time and therefore subject to an end-of-employment payout.

AIM HR Service

AIM HR Service: AIM HR Solutions provides assistance with developing an effective vacation and/or paid-time-off policy. For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Wage Theft

Allegations of wage theft typically arise when an employee claims not to have been paid the wages and related benefits they are entitled to under the law for their work. This includes wages, meal breaks, overtime pay, and any other "benefit" that the employee has earned but has not received. Bear in mind that it also does not require an intentional act on the part of the employer. Lapsed record-keeping or poor judgment on the part of a manager regarding an employee's work time could be sufficient to trigger employer liability under the law.

It is important to remember that nonexempt (hourly) employees must be paid for all time they work in Massachusetts.

EXAMPLES OF WAGE THEFT

While some of the more common examples include minimum wage and overtime violations, other examples include:

- Withholding an employee's final paycheck after the employee leaves the job.
- Making illegal deductions from an employee's paycheck.
- Withholding tips.
- Asking employees to work off the clock or after they punched out.
- Cutting employees' meal break short or asking them to work through the break.
- Making employees pay for work-related purchases without eimbursement.
- Misclassifying workers as independent contractors.
- Misclassifying workers as "exempt".

Work Schedule/One Day of Rest

Employers are generally free to set whatever hours of work they wish for employees. However, every employee in manufacturing, mechanical, or mercantile establishments must be given an unbroken 24-hour period of rest in every consecutive seven days of work, which effectively means after six days (M.G.L. ch. 149 § 48). There are certain statutory exemptions from the day-of-rest requirement, including specific types of establishments and certain types of work (M.G.L. ch. 149 §§ 49, 50). *For more information on these exemptions, please call the AIM Helpline at 1-800-470-6277.*

An exemption to this provision may be requested in writing from the Massachusetts Attorney General's Fair Labor Division. The requestor must show that special circumstances require the granting of the waiver. Such an exemption will be granted for a 60-day period and can be renewed (M.G.L. ch. 149 § 51A).

Health Insurance

Employee Retirement Income Security Act (ERISA)

The federal Employee Retirement Income Security Act (ERISA) was passed in 1974 to govern how some benefit plans must operate in the areas of documentation, record keeping, and fiduciary obligations, and to ensure that such plans are not operated in ways that discriminate in favor of highly compensated employees. Unlike other situations related to the interaction of state and federal law, ERISA will generally preempt any state law related to employee benefits for those plans subject to ERISA, even when the state law would be more favorable to employees.

ERISA has various notification and reporting requirements for health and welfare plans, and retirement plans. For more information, visit the Department of Labor's ERISA compliance page at www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance.

Massachusetts Health-Care Reform

In April 2006, Massachusetts enacted a comprehensive health-care reform law. As a result, all residents of Massachusetts age 18 or older are required to have health insurance unless they are granted a waiver based on affordability, sincerely held religious beliefs, or a personal hardship situation. This obligation is commonly called the "individual mandate." Each individual's coverage must meet certain standards, called "minimum creditable coverage." The underlying concept of the law is that of shared

responsibility, with individuals, the government, and employers having significant roles and obligations.

The Massachusetts Department of Revenue is responsible for enforcement of the individual mandate, and penalties for noncompliance are meted out through the individual income tax system. The maximum penalty for noncompliance, absent an approved waiver, is 50% of the cost of the lowest cost policy available through the Commonwealth Health Insurance Connector (the Connector). The Connector is a quasi-public agency created by the law to facilitate the purchase of health insurance by individuals and by businesses with 50 or fewer employees.

Penalty amounts may differ for young adults under age 26 and for individuals with incomes between 150.1% and 300% of the federal poverty level (FPL). There is no penalty for individuals with incomes up to 150% of the FPL. Penalties apply for any break in coverage more than 63 days.

In 2013, most aspects of Massachusetts health-care reform were repealed as the Commonwealth sought to integrate Massachusetts health-care reform with federal reforms under the Affordable Care Act (ACA).

Federal Health-Care Reform

The Patient Protection and Affordable Care Act (PPACA or ACA) also known as Obamacare was passed in 2010 to expand access to health care coverage. Among the key provisions of the law were sections that expanded Medicaid eligibility, created a Health Insurance Marketplace, and prevented insurance companies from denying coverage due to pre-existing conditions.

The ACA requires most insurance plans, including those sold on the Health Insurance Marketplace, to cover a list of preventive services at no cost to policyholders including checkups, patient counseling, immunizations, and numerous health screenings. All ACA-compliant health insurance plans must cover specific "essential health benefits," such as emergency services, family planning, maternity care, hospitalization, prescription medications, mental health services, and pediatric care.

The ACA requires employers to cover their workers and provides tax credits to certain small businesses that cover specified costs of health insurance for their employees. The law allows young adults to remain on parents' policies until the age of 26.

The individual mandate, a provision requiring all Americans to have health care coverage, either from an employer or through the ACA or another source, or face tax penalties was repealed by the Congress in 2017.

The COVID-19 relief legislation, the American Rescue Plan Act (ARPA), extended eligibility for ACA health insurance subsidies to those buying their health coverage on the marketplace with incomes over 400% of poverty. The passage of the Inflation Reduction Act, includes an extension of financial assistance for people enrolled in ACA through 2025 instead of 2022. It also expands eligibility, allowing more people to receive premium assistance.

OVER-THE-COUNTER MEDICATIONS

The Coronavirus Aid, Relief, and Economic Security (CARES) Act that was signed into law on March 27, 2020 permanently eliminates the ACA rule requiring that over-the-counter medicines and drugs (other than insulin) be prescribed in order to be eligible for reimbursement and payment by Health Savings Accounts, Flexible Spending Accounts, Health Reimbursement Accounts, and Archer Medical Savings Account dollars. Use of these accounts for over-the-counter medicines has been an ever changing dynamic since they came into existence. This new provision is effective for expenses incurred after December 31, 2019.

EFFECTIVE 2021 AND 2022

- **SECTION 125 PLANS AND FSAS AND DEPENDENT CARE PLANS**

  The COVID-Related Tax Relief Act of 2020, part of H.R. 133, the Consolidated Appropriations Act, 2021 signed into law on December 27, 2020 (the "Act") made several temporary changes to the rules for Section 125 cafeteria plan health flexible spending arrangement ("FSAs") and dependent care flexible spending arrangements ("DCSAs") for 2021. Employers are permitted to allow employees to carry over any unused benefits or contributions remaining in FSAs and DCSAs from 2020 to 2021 and from 2021 to 2022. Employers are also permitted to extend the grace period for a plan year ending in 2020 or 2021 to 12 months after the end of the applicable plan year, with respect to unused benefits or contributions remaining in an FSA or DCSA account. Employers were also permitted to allow employees to change FSA or DCSA elections in 2021 without a change in status and are permitted to allow former employees who stop participation in a plan during calendar year 2020 or 2021 to receive reimbursements from unused FSA benefits or contributions through the end of the plan year in which participation ceased (including any grace period). The Act also contains a special carry forward rule for DCSAs where the dependent aged out during the pandemic. Employers were generally required to amend their cafeteria plans to adopt the FSA and DCSA changes prior to the end of the 2021 plan year.

- **COST TRANSPARENCY AND CONTROLS**

  The Act also contains numerous welfare benefit plan changes designed to provide greater cost transparency and improve employee health care plan outcomes. For example, the Act contains several provisions prohibiting health plans and insurers from entering contracts that keep cost and quality of care information from plan participants, employers or referring providers. The Act requires disclosure of direct and indirect compensation for brokers and consultants to employer-sponsored health plans and enrollees in plans on the individual market.

  Effective January 1, 2022, The Act requires group health plans to implement procedures to prevent surprise medical bills typically occurring in connection with out-of-network medical providers when an emergency or other issue forces the use of the out-of-network provider.

Health Insurance Coverage in Massachusetts

Massachusetts requires that health insurance policies written in the state cover biologically based mental illnesses in the same manner as they do physical illnesses with respect to diagnosis, treatment, and capitation. Any insured plan regulated by the state's Division of Insurance must also extend coverage to spouses in same-sex marriages. In the case of a plan termination, a company must comply with appropriate state and federal law regarding plan participants' rights for coverage continuation.

The expansion of Medicaid under the ACA has eliminated the Massachusetts Insurance Partnership.

If a judge orders an employee to obtain health-care coverage for his or her child, the employee must do so if such coverage is available through the employer. Employers are obligated to cover a child subject to such an order and may be liable for the full amount of the assigned income or the full amount of medical costs incurred if they fail to comply with an order of income assignment or a health-care order (M.G.L. c. 119A §§ 12, 14, 16).

Leaves of Absence

This guide provides information on federal and state laws that establish mandated job protected leave for employees. It also includes information on discretionary leaves. Given the number of new and amended leaves of absence laws that apply in Massachusetts, this section of the guide has been updated and rewritten to encompass all the new developments. The applicability, eligibility, frequency, and duration elements of each leave law vary by statute. That means that coverage under some of the laws may overlap and thus run concurrently though not always. The applicability of these laws to a particular employer is governed by different eligibility thresholds including number of employees, duration of employment and employee status (full-time, part-time, etc.). Each employer should pay careful attention to these thresholds to determine if that law applies to its business. Employers should also be aware that the ability to administer one or more of these laws concurrently may be contingent upon the need to harmonize one or more provisions in the different laws to ensure consistency.

This section covers two federal laws, the Family and Medical Leave Act (FMLA), and the Uniformed Services Employment and Reemployment Act (USERRA). It also includes information on six Massachusetts leave laws, including the Paid Family and Medical Leave Act (PFMLA), the Parental Leave Act (MPLA), the Small Necessities Leave Act (SNLA), the Domestic Violence Leave Act (DVLA), the Earned Sick Time (EST) and voting leave. All citations for the employment statutes are to the Massachusetts General Laws (M.G.L.).

Compliance Tip: *An employer may be able to administer some of the leave of absence laws described below concurrently. An employer should always investigate whether job-protected time off from two or more laws may run concurrently and decide if it wishes to do so. If it decides to do so, the employer should notify employees via company handbook and other written policies to minimize any misunderstanding about the practice in the future.*

Domestic Violence Leave (Massachusetts)

Massachusetts has a leave law that provides up to 15 days of job-protected leave in a 12-month period for victims of domestic violence. This leave is in addition to all other forms of leave available to employees. The law applies to employers of 50 or more employees. The leave must be directly related to the abusive behavior. An employee may take this leave to obtain medical attention, counseling, victim services, or legal assistance; secure housing; obtain a protective order from a court; appear in court or before a grand jury; meet with a district attorney or another law enforcement official; attend child custody proceedings; or address other issues directly related to the abusive behavior against the employee or family member of the employee.

According to the law, the employer has sole discretion on whether any leave taken under this section shall be paid or unpaid. The law also requires employees to give appropriate advance notice consistent with the employer's leave policy unless the employee faces imminent danger to their health or safety.

There is no notice required if there is a threat of imminent danger to the health or safety of an employee or the employee's family member, but the employee must notify the employer within three workdays that the leave was taken or is being taken due to domestic violence. Any one of the following people notifying the employer is sufficient:

- the employee
- a family member of the employee
- the employee's counselor, social worker, or health-care worker
- a member of the clergy or a shelter worker
- a legal advocate or another professional who has assisted the employee.

Employers cannot take an adverse action against any employee using this leave for an unauthorized absence within 30 days of the unauthorized absence (or within 30 days of the last day of a multi-day unauthorized absence), if the employee provides the necessary documentation to support the absence. Examples of necessary documentation covering either the employee or the employee's family member include the following:

- a court-issued protective order
- an official document from a court, provider, or public agency
- a police report or statement of a victim or witness provided to police
- documentation attesting to the perpetrator's guilt
- medical documentation of treatment for the abusive behavior
- a sworn statement provided by a professional who has assisted the employee
- a sworn statement from the employee attesting to being a victim of abusive behavior

Any of the documents provided by the employee to support time off for domestic violence may only be maintained in the employee's employment record for as long as is needed for the employer to determine whether the employee is eligible for leave under this section.

All information related to the employee's leave under this section must be kept confidential by the employer and not disclosed unless

- requested or consented to, in writing, by the employee;
- ordered to be released by a court of competent jurisdiction;
- otherwise required by applicable federal or state law;
- required during an investigation authorized by law enforcement, including but not limited to an investigation by the attorney general;
- necessary to protect the safety of the employee or others employed at the workplace.

It is in the employer's sole discretion as to whether the leave is paid or unpaid.

The law also makes it clear that an employer cannot "coerce, interfere with, restrain, or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether the victim maintains contact with the alleged abuser".

An employer cannot terminate or discriminate against an employee for exercising their rights under this law.

In the case of employers with fewer than 50 employees, the provisions of the Earned Sick Time law (see the following section) will apply to leave taken to address the effects of domestic violence".

Earned Sick Time (EST) Law (Massachusetts)

The Massachusetts Earned Sick Time (EST) law requires employers with 11 or more employees to provide one hour of paid sick time for every 30 hours worked up to a maximum of 40 hours per calendar year, with a right to carry over up to 40 hours of unused sick time into the new year. For employers with less than 11 employees, the same amount of sick time must also be offered to employees, however, the time can be unpaid. The regulations broaden this provision to allow employers to award up to the 40 hours at the start of the calendar year, without employees having to accrue time throughout the year. The regulations address several ambiguous details in the law, including how an employer may handle EST carryover; EST retention in the case of a break in service; how EST may be charged in initial increments of one hour and subsequent increments of the smallest increment of time tracked for other purposes; when an employer may refuse to pay sick leave in cases of suspected fraud; and how an employer may use its existing PTO policy to cover the 40 hours of EST.

The law applies to full-time, part-time, seasonal, and temporary employees. The regulations state what criteria an employer must use to determine whether it has 11 employees. Employees begin earning sick leave as of the first day of employment, but to be eligible to use earned sick time, an employee must have worked at least 90 days for the employer.

Exempt employees earn paid sick time based on the assumption of a 40-hour workweek. If their normal workweek is less than 40 hours, paid sick time would accrue based on their normal workweek.

EST may be used to care for a physical or mental illness, an injury, or a medical condition, or to attend routine medical appointments for the employee or one of the following relations: child, spouse, parent, or parent of a spouse. Earned sick time may also be taken to address the physical, psychological, or legal effects of domestic violence. It may also be used for trips to the doctor or pharmacy.

Employers may require certification of the need for sick time when more than 24 consecutive hours of earned sick time are taken. However, employers may not delay the taking of, or payment for, EST if they haven't received the necessary certification. The employee does not need to provide documentation for absences of fewer than 24 consecutive hours of scheduled work. An employer may require an employee to give notification every day for an absence being taken under the EST law and may also require employees to verify in writing that they have taken sick time. The law also allows employees to file a lawsuit in court to enforce their EST rights.

The law is enforced by the Office of the Attorney General, which has promulgated regulations governing the operation of the law. The office of Attorney General's website includes the regulations, a frequently updated FAQs section and an EST poster that employers must print out and display. The link is at the end of this guide.

Compliance Tip: *The Office of the Attorney General's website includes EST regulations, a regularly updated FAQ site, and an EST poster that employers should print out and display.*

Federal Family and Medical Leave Act (FMLA)

Employers of 50 or more employees (for at least 20 calendar work weeks per year) must provide eligible employees up to 12 workweeks of job-protected unpaid family and medical leave during a 12-month period. It is the responsibility of the employer to designate which 12-month period it will use for purposes of calculating its employees' 12-week entitlement. The 12-month period may be:

- The calendar year
- Any other fixed 12-month "leave year" such as a fiscal year, or a year starting on an employee's "anniversary" date
- The 12-month period measured forward from the date each individual employee's first FMLA leave begins
- A "rolling" 12-month period measured backward from the commencement date, each time any employee uses FMLA leave

Failure to designate an FMLA 12-month period will result in the employee being given the most beneficial leave period available (typically calendar year) among the various options. If an employer intends to change its 12-month period designation, it must give its employees at least 60 days advance notice of the change. Meeting this timetable may be an issue for employers intending to synchronize their FMLA policy with their paid leave policy.

To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months, which need not be consecutive, and must have worked at least 1,250 hours during the 12 months immediately preceding the leave. An employee may request up to 12 workweeks of job protected leave for one or more of the following reasons:

- the birth of a child and to care for the newborn child.
- for placement of a child for adoption or foster care;
- to care for the employee's spouse, child, or parent with a serious health condition;
- because of a serious health condition that makes the employee unable to perform the functions of their job;
- because of any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status; and
- to care for a covered servicemember with a serious injury or illness if the employee is the child, parent, or next of kin of the covered servicemember.

The FMLA definitions of a "serious health condition" are varied and often complex, though the regulations do provide some clarification. For example, one of the definitions requires more than three consecutive days of incapacity plus at least two visits to a health-care provider for treatment. The two visits to a health-care provider must occur within 30 days of the start of the period of incapacity, and the first visit must occur within seven days of the first day of incapacity. Additionally, the regulations provide a list of common ailments, such as colds and flu, which the Department of Labor believes will be helpful in identifying ailments that will not ordinarily qualify for FMLA leave. Employers are encouraged to call AIMHR Solutions or other professional counsel for clarification regarding specific situations.

It is the responsibility of the employer to notify the employee of his or her rights under the law. Covered employers must post a general FMLA notice even when they do not have FMLA-eligible employees. If an employer has written policy documents or a written handbook informing employees about their employment rights and obligations, the employer must include an FMLA policy. If a significant portion (generally considered 20% or more) of an employer's workforce speaks another language, a poster must be displayed in that language as well. (It is the employer's responsibility to translate or have the poster translated into other languages. The DOL website includes a Spanish-language poster.) Employers that do not have written materials describing benefits and leave must provide the general FMLA notice to each employee upon hire.

An eligible employee may elect, or the employer may require, the substitution of the employee's accrued vacation, personal leave, or sick leave for any of the leave period. Under the regulations, when an employee substitutes accrued paid leave for unpaid FMLA leave, the employee must follow the terms and conditions of the applicable leave policy. The employer may voluntarily waive any such requirements to permit employees to substitute paid leave more liberally.

An employee on FMLA leave is entitled to have health insurance benefits maintained at the same employee contribution rate as if the employee were not on leave. Employees on FMLA must be reinstated to the same or an equivalent position and must not be penalized in any way for taking protected leave. If an employee is on FMLA leave and is laid off from employment pursuant to a reduction in force, the employee's right to FMLA leave ends when the layoff becomes effective. The employer should be able to demonstrate that the employee's layoff was not in any way related to the use of FMLA leave.

Absences resulting from a workers' compensation injury or illness that meets the definition of a "serious health condition" under the FMLA may, at the employer's discretion, be designated as FMLA leave, to be counted against the employee's 12-week entitlement. The employer's policy must include this provision, and employees must be notified up front. (See the discussion in Workers' Compensation.) An employer may also elect to run the Massachusetts Earned Sick Time benefit concurrently with the FMLA benefit. FMLA leave may also run concurrently with Paid Family and Medical Leave and/or Massachusetts Parental Leave if leave is taken for a qualifying reason under those statutes, provided the employer has designated a "rolling forward" measuring period.

Compliance Tip: *The FMLA regulations and poster are available at www.dol.gov/whd/fmla by clicking on the links at the bottom of the page.*

Military FMLA Leave

As of 2009, the FMLA statute includes leave for military families in certain circumstances. There are two forms of protected leave:

INJURED SERVICE MEMBER FAMILY LEAVE

The FMLA permits an employee who is the spouse, child, parent, or next of kin of a member of the armed forces to take up to 26 workweeks of leave. This leave is provided to care for a "member of the Armed Forces, including a member of the National Guard or Reserves," who is "undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." This includes veterans who are undergoing treatment for a serious illness or injury incurred in the line of active duty and who were members of the armed forces, including the National Guard or Reserves, within the five years preceding the treatment. A covered condition is any injury or illness incurred in the line of duty while on active duty "that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating".

Exigency leave is up to 26 workweeks during a single 12-month period. The regulations clarify that the single 12-month period for military caregiver leave begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. The regulations further provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a single 12-month period provided that the employee does not take more than 12 workweeks of leave for any other FMLA-qualifying reason.

FAMILY MEMBER MILITARY DUTY EXIGENCY LEAVE

Employees may use FMLA leave for (1) a qualifying exigency arising out of a covered family member's active duty or call to active duty in the armed forces in support of a contingency plan or operation, or (2) a qualifying exigency arising out of a covered family member's active duty in the regular armed forces when that family member is deployed to a foreign country. "Qualifying exigencies" include:

- short-notice deployment,
- military events and related activities,
- childcare and school activities,
- financial and legal arrangements,
- counseling,
- rest and recuperation,
- post-deployment activities,
- additional activities in which the employer and employee agree to the leave.

Jury Duty and Witness Leave (Massachusetts)

Massachusetts law requires that an employee called for jury duty be given time off from work to serve as a juror. A person cannot be disciplined or discharged for serving as a juror.

Under Massachusetts law, jurors traditionally serve one day or serve on one trial, and employers are required to pay their employees in full for up to the first three days of service. After the third day, the court will pay the juror a daily stipend of $50. It is the employer's option to pay the difference between jury pay and regular pay, pay the employee's full regular pay, or pay nothing more (M.G.L. ch. 234A §§ 41, 48, 49). Exempt employees who serve more than three days of jury duty must be paid their full salary (less any stipend paid by the court) if they perform any work during a week in which they serve jury duty.

Persons who are subpoenaed to appear in criminal cases because they are victims of or witnesses to a crime may not be discharged from employment on that basis. Although no law directly addresses whether they should be paid for this time, other state statutes provide guidance by saying that individuals should not be penalized for missing work to serve as a witness, meaning they should not be docked in pay or otherwise disciplined (M.G.L. ch. 268 §§ 14A, 14B).

On the other hand, employees participating in civil hearings, trials, or other proceedings that have no relation to the employee's job may be required to use personal or vacation time or may take unpaid time.

Military Service Leave (Federal and Massachusetts)

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the rights of all those who serve in a branch of the military and reservists to return to their jobs after completing their time in voluntary or involuntary service. The Act protects against discrimination and retaliation because of military service, prevents service members from suffering disadvantages due to performance of their military obligations, and affords them ample time to report back to jobs following completion of their service obligations. The protections of USERRA apply to employees who are absent from their jobs due to military service for up to five years. Employees

who are called up for at least 31 days of active duty must be offered the right to the continuation of healthcare benefits, similar to provisions under COBRA. USERRA does not limit the frequency of leaves unless they cause undue hardship to the company. In addition, employees have the right to the same or a similar position if they reapply within a certain period following their release from military service or training. The rules require that employers post a notice of USERRA rights where employee notices are customarily placed. Please see the end of this document for a link to the USERRA poster at the DOL website.

Massachusetts law requires employers to provide up to 17 days of unpaid job-protected leave per year for an employee performing military training.

Paid Family Medical Leave Act (PFMLA) (Massachusetts)

To be subject to the PFMLA, an employer must have one or more employees and the employee(s) must have worked a sufficient amount of time for the employer to qualify for unemployment benefits. In addition to the partial wage replacement during the PFMLA leave, an eligible employee must be allowed to continue group health insurance coverage on the same basis as if the employee were working, and must generally be reinstated into the same, or equivalent, position after the leave, though certain exceptions to reinstatement may apply. Employers are prohibited from taking any retaliatory employment action against employees who exercise their right to take PFMLA leave.

The law is administered by the Department of Family and Medical Leave (DFML).

The PFMLA provides eligible employees partial wage replacement up to a maximum of $1149.90 (adjusted annually) per week for the following leave benefits.

- up to 12 weeks for family leave related to birth, adoption, or foster placement of a child
- up to 12 weeks for a qualifying exigency leave arising out of a family member on active duty or being called to active duty
- up to 20 weeks for medical leave for covered individuals for a serious health condition that incapacitates them from work
- up to 12 weeks of family leave to care for family members with a serious health condition
- up to 26 weeks of combined leave for family leave and medical leave.

Employers with an annual average of fewer than 25 employees are exempt from paying the employer's portion of the cost.

CONTRIBUTIONS TO THE PFML TRUST FUND

For 2023, the total cost is based on .88% of the employee's wages up to the federal taxable wage base for social security. The current taxable wage base maximum is $160,200. Although payments are remitted by the employer, the law provides that all employers may require their employees to contribute up to 100% of the family leave cost, and employers with 25 or more employees may require their employees to contribute up to 40% of the medical leave cost. Employers with fewer than 25 employees may require their employees to contribute 100% of the medical leave cost. Contribution charges will be adjusted annually based on benefit payouts and solvency needs of the trust fund.

The PFML regulations also explain how an employer may opt out of participating in the state plan by obtaining private insurance or by self-insuring. To download a copy of the PFML regulations and learn more about PFML, please visit the Massachusetts Department of Family and Medical Leave (www.mass.gov/orgs/department-of-family-and-medical-leave)

Leave administrator. As part of the PFML registration process, employers are required to designate a leave administrator. A leave administrator is responsible for reviewing and processing employee claims. The DFML relies on the leave administrator to provide important details about employee applications to verify the accuracy of these claims. To find out more information about registering as a leave administrator please visit the DFML website. mass.gov/dfml and search for leave administrator.

NEW LAW

Effective on all application for benefits filed after November 1, 2023, the legislature authorized employees receiving paid family medical leave benefits to "top off" their weekly benefits by using any available accrued paid leave (sick time, vacation, PTO, personal time, etc.). For employees who choose to supplement their PFML benefits in this way, the combined weekly sum of PFML benefits and employer-provided paid leave benefits cannot exceed the employee's Individual Average Weekly Wage (IAWW). Employers will be responsible for monitoring and ensuring that the combined weekly sum of employer-provided paid leave benefits and PFML benefits does not exceed an employee's IAWW.

Note: At the time of drafting this guide there is an ongoing series of questions about exactly how this benefit will operate. Members are encouraged to visit the Department of Family and Medical Leave website to see if there are changes in the operation of the program.

Parental Leave Act (Massachusetts)

The Massachusetts Parental Leave Act (MPLA) is gender neutral and requires employers of six or more employees to provide up to eight weeks of unpaid (paid at employer's discretion) parental leave to eligible full-time employees (full-time as defined by employer) for the purpose of childbirth or for adopting a child under 18 years of age (or under 23 if the child is mentally or physically disabled). To be eligible, an employee must have completed an initial probationary period set by the terms of employment, but which is not greater than three consecutive months. The provisions about employment protection and benefit protection remain in effect. Among the expanded provisions of the law are the following:

- requires an employer that allows an employee to take more than eight weeks of leave to inform the employee in writing before the start of the leave that the extended leave will not result in extended job and benefits protection; otherwise, all reinstatement rights will continue beyond eight weeks;
- provides that two parents with the same employer get an aggregate of eight weeks, not eight weeks each;
- changes the notification provision to state "two weeks' notice" or "notice as soon as practicable" if the delay is for reasons beyond the individual's control;
- requires that this law be posted in a conspicuous place in the workplace (M.G.L. ch. 149 § 105D).

In cases where the FMLA and Massachusetts Paid Family Medical Leave also apply, employers may administer the leaves concurrently.

Small Necessities Leave Act (Massachusetts)

Under the Small Necessities Leave Act (SNLA), employers of 50 or more employees must provide eligible employees with 24 hours of unpaid leave per year to participate in school activities directly related to the educational advancement of the employee's child or to accompany the employee's child to routine medical or dental appointments. The law also covers employees who need to accompany an elderly relative to routine medical, dental, or other appointments related to professional care of the relative. An "elderly relative" is defined as an individual 60 years of age or older who is related to the employee by blood or marriage. This leave is in addition to any leave the employee may have under the FMLA (M.G.L. ch. 149 § 52D). In some cases, paid time under the Earned Sick Time law may run concurrently with SNLA leave.

To be eligible, employees must have worked for the employer for 12 months and must have worked 1,250 hours in the year immediately preceding the leave. Employees may be required to give seven days' notice of the leave if the need is foreseeable. Notice "as soon as practicable" is to be provided in all other cases. Employers may require an employee to substitute any accrued paid vacation, personal, medical, or sick leave for leave under this law.

Voting Leave (Massachusetts)

Employees are entitled to vote in any federal, state, or municipal election. All polling places in Massachusetts must be open a minimum of 13 hours—7:00 a.m. to 8:00 p.m.—which eliminates most requests for leave to vote (M.G.L. ch. 149 § 178; M.G.L. ch. 53 § 43). However, Massachusetts law requires that employees who request it be granted a leave of absence to vote during the two hours after the polls open. There is no requirement that the employee be paid for this leave. Employers may request proof that the employee voted.

Safety

The Occupational Safety and Health Act (OSHA) is the principal law governing safety in federal government and private workplaces in the United States. In enacting OSHA in 1970, Congress explicitly stated that OSHA would "occupy the field" regarding worker safety. At its core, this federal law requires employers to provide a safe and healthful workplace for employees, thereby preempting state laws to the extent that there is an OSHA standard addressing the safety hazard.

Private employers in Massachusetts still fall under the federal OSHA regulations. However, many state and local government workplaces have adopted OSHA-approved State Plans, such as Massachusetts by adopting M.G.L. ch. 149 § 6 1/2, known as 'An Act Relative to Standards of Employee Safety.' This state law will be reviewed at the end of this section.

Occupational Safety and Health Act (OSHA)

Employers have a general duty to provide a place of employment that is free from recognized health and safety hazards. The federal Occupational Safety and Health Administration conducts random inspections, investigates complaints, and issues fines and citations for violations of its laws. OSHA has specific record-keeping requirements that employers must adhere to, including Form 300, Log of Work-Related Injuries, and Illnesses; Form 300A, Summary of Work-Related Injuries and Illnesses; and Form 301, Injury and Illness Incident Report.

- A company that had 10 or fewer employees at all times during the prior calendar year and certain industries regardless of size are not obligated to keep OSHA injury and illness records unless instructed to do so by OSHA or the Bureau of Labor Statistics.
- For a complete list of partially exempt industries see Appendix A to Subpart B: www.osha.gov/laws-regs/regulations/standardnumber/1904/1904SubpartBAppA
- Employers with 11 or more employees in nonexempt industries are required to maintain the required records at each establishment that is in operation for 12 or more months and to post them annually.
- Temporary workers must be included in any reporting If an employer provides day-to-day supervision of that individual.

All employers covered by OSHA must report any workplace incident that results in a fatality, an amputation, a loss of an eye, or an in-patient hospitalization for treatment. www.osha.gov/report.

Compliance Tip: *A recordable injury or illness must be reported on OSHA Form 300 as soon as possible but within seven (7) calendar days after the employer receives the information. Recordable injuries include fatalities, lost workday cases, nonfatal cases involving transfer of the employee to another job or termination of employment, medical treatment beyond first aid, and loss of consciousness or restriction of work or motion.*

Even if no reportable injuries or illnesses occurred, the employer must still complete and post Form 300A from February 1 through April 30 of each year, with zeros in each section of the log. A company executive must certify that they has examined the Form 300A log and that they reasonably believes, based on their knowledge of the process by which the information was recorded, that the annual summary is correct and complete. Employers need to keep this form for five years.

COVID-19 can be a recordable illness if it is determined that a worker is infected as a result of the worker's job-related duties. Responsibility arises if the case (1) is confirmed COVID-19; (2) is work-related; and (3) involves one or more of the general recording criteria (for example, medical treatment beyond first aid, days away from work). OSHA guidance is available at www.osha.gov/coronavirus/standards

AIM HR Service

AIM HR Solutions offers an OSHA training series. For more information, please contact Kelly McInnis at 617-488-8321 or kmcinnis@aimhrsolutions.com.

Electronic Submission of Records

The OSHA electronic data submission rule requires certain categories of employers (see applicability thresholds below) to electronically submit the previous year's injury and illness data by March 2nd each year. Some of the data submitted by employers will ultimately be posted to the OSHA website. The amount of data submitted will vary depending on the size of the company and the type of industry.

OSHA will provide a secure website that offers three options for data submission:

- Users will be able to manually enter data into a web form.
- Users will be able to upload a CSV file to process single or multiple establishments at the same time.
- Users of automated record-keeping systems will have the ability to transmit data electronically via an API (application programming interface).

The OSHA website link is available here: www.osha.gov/injuryreporting/index.html.

Compliance Thresholds and Schedule

Electronic submissions are due by March 2nd each year for the previous year's data, but employers can begin submitting date on January 2nd. If you miss the deadline, OSHA will accept your Form 300A information through end of the calendar year, but late submissions may result in citations and penalties.

Employers must submit 300A data if your establishment meets one of the following criteria:

- 250 or more employees and is not in an industry listed in the Exempt Industries list in Appendix A to Subpart B of OSHA's recordkeeping regulation of 29 CFR Part 1904 or
- 20-249 employees and is in an industry listed in Appendix A to Subpart E of 29 CFR Part 1904.

Employers must also submit 300/301 data if your establishment(s) has 100 or more employees and is in an industry listed in Appendix B to Subpart E of 29 CFR Part 1904.

You can also use the ITA Coverage Application to help determine if your establishment is required to submit this data.

Note that all employers must retain their OSHA logs for at least five years.

OSHA No Retaliation Rule

OSHA prohibits any company policy or practice that discourages workers from reporting an injury or an illness. This rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation, which can be satisfied by posting the already-required OSHA workplace poster. OSHA also provides a Recommended Practices for Anti-Retaliation Programs guide: www.osha.gov/Publications/OSHA3905.pdf.

A Reasonable Reporting Policy

A policy is defined as reasonable when the reporting process is not unduly burdensome and would not deter a reasonable employee from reporting an injury. OSHA includes the following comparative explanation of reasonable and unreasonable policies:

Reasonable: to require employees to report a work-related injury or illness as soon as practicable after realizing they have the kind of injury or illness that they are required to report to the employer, such as the same or the next business day when possible, or to require employees to report to a supervisor through reasonable means, such as by phone, by email, or in person.

Unreasonable: to discipline employees for failing to report before they realize they have a work-related injury that they are required to report or for failing to report right away when they are incapacitated because of the injury or illness; to require ill or injured employees to report in person if they are unable to do so; or to require employees to take unnecessarily cumbersome steps or an excessive number of steps to make a report.

A rigid prompt-reporting requirement that results in employee discipline for late reporting even when the employee could not reasonably have reported the injury or illness earlier violates the law.

No Retaliation

The OSHA rule seeks to prohibit the use of programs as retaliation against employees for reporting work-related injuries or illnesses, as it would discourage or deter accurate record keeping. Programs that may be used to violate the rule are:

- disciplinary programs,
- post-incident drug-testing programs,
- safety incentive programs.

While not prohibiting these kinds of programs categorically, OSHA is concerned about employers using these programs to retaliate against employees for reporting an injury or illness; under this rule, such action would be illegal. In all cases, determining a violation will be fact specific.

OSHA Seasonal Guidance

OSHA provides extensive seasonal (both summer and winter) information on how to protect workers in the workplace against weather extremes. Please visit the OSHA website links provided in the back for more detailed information about protecting employees from weather extremes.

OSHA's Standard Interpretation—Safety-Incentive Programs

In its October 11, 2018, Standard Interpretation Memorandum, OSHA clarified that the 2016 Rule does not prohibit safety-incentive programs. In an important shift, OSHA now acknowledges that safety-incentive programs "can be an important tool to promote workplace safety and health."

OSHA also describes types of incentive programs it believes are permissible under the Rule. A safety-incentive programs that "reward workers for reporting near-misses or hazards, and encourages involvement in a safety and health management system," is "always permissible" under the 2016 Rule to the extent that such programs provide positive reinforcement for reporting illnesses and injuries.

The Standard Interpretation Memorandum also discusses rate-based safety-incentive programs ("rate-based programs", which focus on reducing the number of reported injuries and illnesses by offering prizes or bonuses based on injury- or incident-free periods, or evaluating managers based on their work unit's number of injuries. OSHA now indicates that these rate-based programs are permissible "as long as they are not implemented in a manner that discourages reporting [of injury or illness]." The agency warns that "if an employer takes a negative action against an employee" under a rate-based program, such as withholding a prize or bonus, the program remains permissible only if the employer has "implemented adequate precautions to ensure employees feel free to continue reporting injury or illness." Precautions are deemed sufficient if the rate-based program includes elements such as:

- an incentive program that rewards employees for identifying unsafe conditions in the workplace;
- a training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy; and
- a mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

Adverse Action

The new rule prohibits taking adverse action against employees simply because they report work-related injuries or illness. Penalizing an employee without regard for the circumstances surrounding the injury or illness is not objectively reasonable and therefore not a legitimate business reason for taking adverse action against the employee. OSHA offers two contrasting examples to explain this issue:

- **Illegal**: Employer promises to raffle off a $500 gift card at the end of each month in which no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a month simply because an employee reported a lost-time injury, without regard to the circumstances of the injury, such a cancellation would likely violate the regulation.
- **Legal**: Employer conditions a benefit on compliance with legitimate safety rules or participation in safety-related activities—for example, raffling off a $500 gift card each month in which employees universally complied with legitimate workplace safety rules, such as using required hard hats and fall protection and following lockout-tagout procedures. Likewise, rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule.

OSHA Seafood Industry Safety Initiative

OSHA announced on June 1, 2023, that it was beginning to operate a safety initiative targeting the New England seafood industry. The Local Emphasis Program (LEP) is geared toward reducing fatalities, injuries, and serious safety hazards in the seafood processing industry. OSHA has more information on its website about the intent and scope of the program.

AIM hosted an OSHA presentation session on this topic on September 21, 2023.

OSHA's Standard Interpretation—Post-Incident Drug/Alcohol Testing

In a development favorable to employers, OSHA has moved away from its initial 2016 claim that post-incident testing was permitted only when the employer believed there was a "reasonable possibility" that illegal drug (or alcohol) use "could have contributed" to the incident. Now, a request for a post-accident test would violate OSHA injury-reporting retaliation prohibitions only "if the employer took action to penalize the employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health." The new interpretation eliminates any suggestion that post-incident testing be based on "suspicion" that employee drug or alcohol use contributed to an accident.

Pronouncing that "most instances of workplace drug testing" are allowed under the injury reporting rule, OSHA specifically deemed the following types of drug testing to be permissible:

- Random drug testing.
- Drug testing unrelated to the reporting of a work-related injury or illness.
- Drug testing under a state workers' compensation law.
- Drug testing under other federal law, such as a U.S. Department of Transportation rule.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

Thus, employers will want to make sure they state somewhere in their post-incident testing policy that the company "reserves the right to test all employees whose conduct may have contributed" to the incident. Broader testing without a "contributed to" standard continues to be allowed when no workplace injury occurs, such as situations in which an accident leads to property damage but is subject to state law and any regulated testing requirements.

Impermissible Testing Practices

Drug-testing an employee whose injury could not possibly have been caused by drug use would likely violate the OSHA rule. For example, drug-testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable, because drug use could not have contributed to the injury. And the rule prohibits employers from administering a drug test in an unnecessarily punitive manner, regardless of whether the employer had a reasonable basis for requiring the test.

PRIOR INTERPRETATIONS SUPERSEDED; ENFORCEMENT UNDER NEW STANDARD REQUIRED

Two other statements in OSHA's 2018 Memorandum also are very helpful for employers, both with respect to incentive programs and post-incident drug/alcohol testing:

- "To the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them."
- "Regional Administrators shall enforce 29 C.F.R. § 1904.35(b)(1)(iv) in a manner consistent with this memorandum and shall consult DEP before issuing any citations under this provision related to workplace safety incentive programs or post-incident drug testing."

Agency commentary and guidance that severely limited both incentive programs and post-accident testing policies will therefore no longer be enforced under the injury reporting rule; rather, employers need only adhere to the more flexible approaches identified in the 2018 Standard Interpretation Memorandum. www.osha.gov/laws-regs/standardinterpretations/2018-10-11

All employers must have an OSHA poster displayed in the workplace. See end of guide for the OSHA website.

Citations and Employer Options

If OSHA inspects a private employer's workplace and/or investigates a complaint or incident, and finds violations of OSHA regulations, that employer will generally be cited for the violations which include penalties and abatement requirements.

As an employer who has been cited, you may:

- Correct the condition by the date set in the OSHA Notice and/or,
- Request an Informal Conference within 15 working days from the time you received the OSHA Notice with the OSHA Area Director to discuss the violations and/or the abatement dates.

Learn more about employer rights and responsibilities following an OSHA inspection: www.osha.gov/publications/fedrites#:~:text=Employer%20Options,and%2For%20the%20abatement%20dates.

Massachusetts Workplace Safety and Health Program (WSHP) through the Department of Labor Standard (DLS)

The Massachusetts State Plan, enforced under the 2019 amendment, M.G.L. 149 § 6-1/2, has adopted OSHA's occupational safety and health standards in public sector workplaces, including: state, county, and municipal workplaces; public schools, colleges, universities; and quasi-government agencies, such as water districts and transportation. The State Plan is responsible for enforcement, inspections, and penalties. Learn more at www.mass.gov/service-details/learn-about-the-massachusetts-state-plan.

Employers can learn more about accident prevention, compliance assistance, self-audits, safety programs, training, and recordkeeping here: www.mass.gov/workplace-safety-and-health-program-wshp and www.mass.gov/doc/safety-and-health-orientation-booklet-for-the-public-sector-0/download. Organizations are eligible for up to a $25,000 training award to fund workplace safety training. To learn more about the program, please contact AIM or visit the DIA website at www.mass.gov/dia.

Protection from Workplace Safety Retaliation

Employees have a right to a safe workplace; to raise safety and health concerns; to report work related injuries and illnesses; and to receive information and training on job hazards.

Under 454 CMR 25.07, the Department of Labor Standards' Workplace Safety and Health Program protects employees exercising their workplace safety and health rights from retaliation by public sector employers. www.mass.gov/service-details/protection-from-workplace-safety-retaliation

Inspections and Self-Audits

The Department of Labor Standards (DLS) will conduct inspections through a site walkthrough to evaluate tasks, equipment or conditions and provide recommendations to prevent work-related injuries and illnesses at public employee workplaces. At the conclusion of the inspection, the DLS representative will conduct a closing conference to discuss observations and any corrective actions required.

Over the past ten years, WSHP has issued a Written Warning and Order to Correct before issuing a fine. WSHP expects to continue this practice so that funds can be used towards equipment maintenance and training instead of fines. Employers are required to provide documentation that violations have been corrected.

A civil citation with a penalty may be issued which contains a fine of up to $1,000 per violation if an employer repeatedly allowed an unsafe condition to occur, the condition has already caused a serious work-related injury, or if the employer has ignored a previous written warning.

The DLS provides extensive self-audit resources for employers for each type of work environment in the Safety and Health Orientation Booklet: www.mass.gov/doc/safety-and-health-orientation-booklet-for-the-public-sector-0/download

Licenses

Many operations commonly performed in facilities require state licensing of individual operators in addition to any OSHA requirements. For instance, employees engaged in driving forklifts or operating other hoisting equipment, supervising, or operating wastewater treatment plants, or operating steam boiler equipment may need to be individually licensed by the Department of Environmental Protection or the Department of Public Safety. Employers should research these and other laws and regulations to make sure their operations are in compliance with all permitting requirements.

Massachusetts Department of Public Safety (DPS) and Hoisting

The Massachusetts Hoisting Machinery regulation 520 CMR 6.00 states that all businesses that have hoisting machinery (e.g., manufacturing facilities, retail outlets, warehouses and warehouse-type stores, and even commercial buildings) must do one of the following:

- Every employee who operates hoist machinery must be individually licensed by the State of Massachusetts via the Office of Public Safety and Inspections (OPSI).
- The company must submit an approved training plan to the OPSI and have at least one Massachusetts licensed employee named as the program administrator to manage and oversee the program.

In late 2013, the Massachusetts Department of Public Safety (DPS) amended its long-standing hoisting regulations to include those companies that operate forklifts, overhead cranes, and other hoisting equipment used exclusively on company property.

In November 2014, the DPS released a new administrative ruling that clarifies the responsibility of the company exemption with regard to OSHA-regulated industrial forklifts and the overlapping jurisdiction of the two agencies. In this administrative ruling (6.06: Exempt Companies; Exemptions for Licensing Requirements, Pursuant to M.G.L. c. 146 § 53), the DPS determined that any company normally required to have licensed operators for industrial forklifts and lift trucks used on company property may be exempt from the requirements of state licensing if the general public does not have access to any area where industrial lift trucks and forklifts are operated.

Companies unable to take advantage of the expanded licensing exemption must continue to operate under the existing individual license program, a requirement that has been in place for many years.

Any person who believes that full compliance with 520 CMR 6.00 is overly burdensome may apply to the OPSI for a variance. The burden is on the applicant to demonstrate in writing to the OPSI that the granting of the variance would not compromise public safety or otherwise undermine the purpose of 520 CMR 6.00, pursuant to 520 CMR 6.13.

Other hoisting equipment, even if used in areas where the public is not allowed, is not covered by this administrative ruling and must still be operated by licensed personnel.

A copy of the regulations is available at this link www.mass.gov/regulations/520-CMR-600-hoisting-machinery

Educational facilities or individuals seeking to offer continuing education courses for hoisting machinery operations must apply to the DPS for approval.

The state regulations are in addition to any federal OSHA requirements that cover hoisting equipment. The rules also affect temporary permits that may be issued by a short-term rental entity for the operation of compact hoisting machinery.

Employers need to pay attention to these rules and carefully understand their applicability. Because state officials have rarely enforced hoisting rules over the years, many companies will find themselves confronting the regulations for the first time. Recent agreements between the state DPS and the federal OSHA allow for exchanges of enforcement information.

Workers' Compensation

Nearly all Massachusetts employers are required to obtain workers' compensation insurance along with along with any out-of-state employers operating in Massachusetts.

The law also allows corporate officers who own at least 25% interest to request an exemption from e workers' compensation coverage while allowing sole proprietors, members of LLCs, the partners of LLPs to elect to obtain coverage.

Workers' Compensation Insurance protects the employer from civil lawsuits from injured or ill employees that arise out of and in the course of employment while covering those employees for lost wages and reasonable and necessary medical expenses due to a work-related injury or illness. Any employer covered by the workers' compensation law must display a posting showing proof that it has insurance. An employer without insurance will be issued a stop-work order and be subject to a fine of up to $250 per day until coverage is obtained.

If an employee is disabled for less than five (5) full or partial calendar days, a medical only claim is promptly reported to the employer's workers' compensation carrier.

If an employee is disabled for more than five calendar days, the injury or illness must also reported to the Department of Industrial Accidents (DIA). Form 101 must be filed electronically on the DIA website at www.mass.gov/dia. The employer should always work closely with its workers' compensation insurer before sending the form to the DIA, as most insurers will file Form 101 on their behalf to verify the accuracy of the information contained in the form. Timely completion of Form 101 is important, as it is the basis for the insurer's ability to defend the claim and failure to report timely may subject the employer to fines from the DIA. The insurer must then investigate the report to determine if it is a work-related injury. If so, the insurer is obligated by statute to pay benefits.

In response to an injury claim, the insurer can pay a claim for up to the first 180 days of disability without accepting liability for the claim. During this 180-day pay-without-prejudice period, the insurer may stop or modify the payments after giving a seven-calendar-day notice to the injured worker and the DIA. The period can be extended for up to a year with the agreement of all the parties and the approval of the DIA.

Compliance Tip: If the insurer denies the claim or terminates or modifies benefits within the pay without prejudice period, the employee may file a claim with the DIA to have it adjudicated. Employers should work with their insurer to defend against claims that they believe are not compensable. If it is determined that the employee has a compensable injury or illness, they may collect temporary total or partial disability benefits for a defined period.

Alternatively, the insurer may offer to settle the claim by making a one-time payment (lump-sum settlement) in return for an agreement to release future claims arising from the same injury. For experience-rated insureds ($5,500 or more in annual workers' compensation premiums), the insurer must obtain the policyholder's consent before agreeing to a lump-sum settlement if the settlement will affect the employer's current experience rating (M.G.L. c. 152 § 48).

Here is an additional resource for employers: www.mass.gov/workers-compensation-for-employers

Benefits

MEDICAL BENEFITS

WC insurers are required to provide an injured employee with adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services.

Note: Under Wright's Case, 486 Mass 98 (2020), the MA Supreme Judicial Court found that a workers' compensation carrier cannot be compelled to pay for an employee's medical marijuana. However, in the neighboring state of NH, the NH Supreme Court found the opposite, "in Appeal of Andrew Panaggio" so employers should continue to pay attention to changes and differences in laws and court decisions in any state in which they are operating.

WAGE REPLACEMENT

All disability benefits are based on a percentage of the individual employee's pre-injury average weekly wage (AWW) including overtime and bonuses, up to the state's average weekly wage (SAWW) in effect on the date of the injury or illness. The SAWW is established and adjusted annually by statute in October effective October 1. All benefits to an injured employee are tax-free.

As of October 1, 2023, the SAWW is $1796.72 which is the maximum benefit available and $359.34 is the minimum benefit available when

an individual is unable to work due to a work-related injury or illness. In cases where the AWW is less than the minimum, the AWW is the compensation rate. All benefits to an injured employee are tax-free.

TEMPORARY TOTAL BENEFITS (M.G.L. CH.152, §34)

Temporary total benefits provide an injured employee 60% of their pre-injury AWW (subject to a maximum of the SAWW and a minimum of 20% of the SAWW), up to a maximum of 156 weeks. This benefit recognizes the employee's total inability to work while eligible for this benefit.

PARTIAL DISABILITY BENEFITS (M.G.L.CH.152, §35)

Partial disability benefits provide an injured employee 60% of the difference between the employee's pre-injury AWW and the weekly wage an employee is earning or is capable of earning after the injury but not more than 75% of what the employee would receive if they were eligible for temporary total benefits. The benefit is for a maximum of 260 weeks except under certain limited circumstances. This benefit is often coupled with a return-to-work effort, in which the injured employee is working part time while collecting partial benefits.

Taken together, temporary total and partial disability benefits may not exceed 364 weeks unless a judge finds that there is a permanent and total disability, or the employee is left with very substantial loss of function.

PERMANENT AND TOTAL DISABILITY BENEFITS (M.G.L. CH. 52, §34A)

Permanent and total disability benefits provide a totally incapacitated employee with two-thirds (66.67%) of their pre-injury AWW up to a maximum of the SAWW for the duration of the disability (potentially for life).

SURVIVOR BENEFITS (M.G.L. CH.152, §31)

Two-thirds (66.67%) of an employee's pre-injury AWW up to a maximum of the SAWW are paid to the surviving spouse or surviving children of an employee who dies as a result of a workplace injury or illness. There are limitations on the length of survivor benefits.

COST OF LIVING ADJUSTMENTS (COLA) (M.G.L. CH. 152, §34B)

COLA is a cost-of-living adjustment program that provides for the adjustment of weekly benefits for dependent spouses, as well as permanently and totally disabled employees. Any adjustment in COLA benefits is tied to the increase or decrease in the SAWW, determined each October.

PERMANENT LOSS OF FUNCTION AND DISFIGUREMENT BENEFITS (M.G.L. CH.152, §36)

These benefits provide the injured employee with a one-time payment for the loss of certain body functions and/or disfigurement/scarring on the face, neck, and hands. This benefit is in addition to any other wage replacement benefits the employee may receive.

Experience Rating

An employer's workers' compensation premium is generally based on its experience rating (frequency and severity of injuries and illnesses in its workplace), its industry (and related risks), and its payroll dollars. The experience rating charge is calculated annually based on the employer's injury and illness data. The impact of the claim remains with the employer for the next three premium years.

Employers seeing their premiums rise should work with their workers' compensation carrier to implement more effective safety programs, provide more worker training, and investigate all incidents, including near misses, and identify the root cause of the incident and the corrective actions.

Modified Duty/Return to Work

The most effective way to reduce a claim's cost and duration is to get the employee back to work as quickly as possible in a modified/light-duty position Thus, employers should always consider how they can create a modified duty plan to help an injured employee return to productive full-time employment. At the same time, employers should keep in mind that the light-duty position is not meant to become a permanent job; rather, it is designed to return the person to their prior employment as quickly as medically possible. Apart from the positive-morale aspect of this, the employer is likely to derive a financial benefit by reducing its experience rating cost based on shortening the duration of the claim.

Since workers' compensation incidents sometimes result in lengthy absences, it is important that employers carefully determine, document, and communicate their policies and practices related to job protection and continuation of benefits. AIM recommends that the policy be established in advance of the need to make a decision in a specific case, since to do otherwise could create the perception that the policy was determined based on an individual situation rather than on more objective business criteria. It is further recommended that the policy be written to apply to all types of medical leave, instead of singling out workers' compensation cases.

See discussion below on the interplay of the FMLA, ADA and workers' compensation laws.

Employment Separation

An employee separation immediately raises several HR issues for an employer. This section consolidates separation-related topics, including some that are addressed in more detail in other sections of this guide.

A voluntary separation occurs when the employee resigns, fails to appear at work without an authorized justification for the absence (no call, no show), fails to return from an authorized leave, or retires. An involuntary separation occurs when the employer terminates the employee's employment by layoff, reduction in force, or discharge.

Document Retention

Under Massachusetts law, employers must retain a separated employee's personnel record for three years from the date of separation of employment. Employers must also comply with other federal laws regarding record retention, such as retaining Form I-9 for one year from the date of separation or three years from the date of hire, whichever is later, and certain medical records under OSHA for the duration of employment, plus 30 years.

Both current and former employees may make a written request for a copy of their personnel record. Employers have five (5) business days to comply with the request. Read more about personnel record requirements: malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section52C

Health Insurance Continuation: COBRA (Federal Law)

COBRA requires employers of 20 or more employees that offer group health coverage to offer covered employees and/or dependents the right to elect to continue that coverage at their own expense for 18 to 36 months, depending on their eligibility. Termination of employment is among these qualifying events and results in eligibility to continue coverage for up to 18 months. Please see the Unemployment Insurance section, for a more detailed discussion of COBRA.

Mini-COBRA (Massachusetts)

The Massachusetts Mini-COBRA law applies to employers of between 2 and 19 employees. Please see the Benefit Continuation section below for a more detailed discussion of Mini-COBRA.

Payment of Outstanding Wages

In all cases, a terminated employee **must** be paid all outstanding wages, including commissions (when determined), plus any earned but unused vacation pay.

In the case of a voluntary separation, the employee **must** be paid no later than the time of the next normal pay date.

In the case of an involuntary separation, the employee **must** be paid wages (including earned but unused vacation pay and commissions determined) on the day of termination. Any late wages (even if only one day late or with a good excuse) will result in treble damages, plus attorney fees, if applicable.

In either case, an exempt employee may be paid on a pro rata daily basis for the final week of work.

Employers that provide paid time off (PTO) instead of specific vacation leave are encouraged to have a well-communicated policy designating that amount of hours or days of PTO that are considered vacation time. Absent a well-documented and consistently applied policy and practice, the entire PTO bank is likely to be deemed payable to the separating employee according to the Attorney General's Advisory: www.mass.gov/doc/attorney-generals-advisory-on-vacation-policies/download

Employers must avoid making any unauthorized deductions out of a terminated employee's final check, such as charges for damaged or lost equipment. Only deductions which the law allows (such as wage withholding taxes), or the employee requests and authorizes for their own benefit are allowed.

Please see Payment of Wages section for a more detailed discussion.

Release of Claims, Severance Pay, and Termination Agreements

There are no laws requiring employers to pay severance benefits to a separating employee. An employer may elect to do so through a termination agreement known as a release of claims. To be valid, a release of claims requires payment from the employer to the employee in exchange for the employee forgoing a legal right to sue the employer over matters arising out of employment, such as discrimination.

The payment must be above and beyond any payment of final wages owed. In the context of unemployment, a release of claims is treated separately from severance pay and does not delay a claimant's right to collect unemployment. Please see the Employment Separation section for a more detailed discussion of severance pay and termination agreements.

Unemployment Insurance

Unemployment Insurance Benefits

An employee who loses their job or experiences a significant reduction on their work hours, through no fault of their own, and are able and willing to accept suitable work may be eligible for unemployment insurance (UI) benefits for a period of up to 30 weeks (capped at 26 weeks during period of extended benefits or low unemployment). The DUA announced last summer that the maximum duration was 26 weeks because the state is currently in a period of low unemployment. That means that any new claim for benefits filed on or after July 2, 2023, duration will be capped at 26 weeks.

The calculation is based upon the twelve-month average unemployment rate for each of the Commonwealth's measured metropolitan areas being equal to or below 5.1%. If that happens, the maximum number of weeks for which a claimant may receive unemployment benefits is reduced from 30 to 26 weeks.

Note: The reduction from 30 weeks to 26 weeks is subject to ongoing review at the DUA and will likely be adjusted at some point in the future.

The Department of Unemployment Assistance (DUA) determines benefit eligibility and duration. Claimants are subject to a one-week waiting period. The maximum UI benefit is 50% of an employee's average weekly wage, up to a ceiling of 57.5% of the state's average weekly wage (SAWW).

As of October 1, 2023, the SAWW is established at $1796.72. The current maximum weekly benefit is $1,033.00 per week.

A claimant may also receive a dependency allowance of $25 per week per dependent, up to a maximum of one-half of the employee's weekly UI benefit.

Employers have the right to appeal a determination of eligibility. The DUA has an administrative process to determine a claimant's eligibility for benefits if it is in dispute.

QUARTERLY CONTRIBUTION REPORT

Employers must file the Quarterly Contribution Report, Form 0001. An employer who has filed all required reports and has paid all contributions due may elect to make voluntary contributions. Upon timely payment of a voluntary contribution, the contribution is credited to the employer's account balance and the employer receives a re-computation of its contribution rate for that calendar year.

UNEMPLOYMENT NOTICE AND POSTER

Employers are also required to display the DUA's poster, "Information on Unemployment Insurance Benefits," informing workers about the filing requirements necessary to collect UI benefits. Failure to comply with this posting requirement may result in a warning for the first offense, fines of $100 and $250 for the second and third offenses, and a fine of $500 for more than three violations. Please visit the DUA website at www.mass.gov/orgs/department-of-unemployment-assistance, or contact the DUA at 617-626-5400 for posters and forms.

Compliance Tip: *Employers are required to distribute DUA Form 590-A, How to File for Unemployment Insurance Benefits, to all separated employees as soon as practicable but within a period not to exceed 30 days from the last day compensable work was performed. According to the DUA, separated employees include those employees who have been fired for cause, voluntary quits, and layoffs due to lack of work. The information may be delivered in person or mailed to the employee's last known address. Employees who do not receive the information and who are otherwise eligible to receive unemployment insurance benefits will have their claims backdated to the time of initial eligibility.*

Contributory/Reimbursable

The DUA recognizes 2 classifications of employers for the purpose of collecting payments into the unemployment insurance trust fund.

CONTRIBUTORY

Most employers are classified as contributory meaning that they pay contributions on a quarterly basis into the unemployment insurance trust fund and the money is credited to their individual employer account. Any charges arising from an unemployment insurance claim are assessed against that individual employer account.

There are 2 significant benefits associated with being a contributory employer. The 1st is access to the solvency account. The solvency account is a reserve funded by all contributory employers that pays for claims that are not otherwise chargeable to that employer's account. The 2nd benefit is access to the workforce training fund program which is funded by employers through their quarterly contributions.

REIMBURSABLE

The other employer classification is known as a reimbursable employer. In this case the employer contributes nothing to the UI trust fund on a regular basis. Rather the employer must only pay the DUA when it incurs charges because it laid off one or more employees. When this occurs, the employer reimburses the UI Trust Fund on a dollar for dollar basis for all the benefits the laid off employee receives while collecting unemployment.

Reimbursable employers do not have access to the solvency account or the workforce training program. The reimbursable classification is only available to governmental entities such as local governments, school districts, etc. or nonprofits which elect to be reimbursable. Even so, many reimbursable eligible employers elect to participate on a contributory basis.

Experience Rating

In most cases, charges for UI benefits are paid from the specific employer's UI trust fund account. Under Massachusetts law, all unemployment benefits paid through the UI program are funded through employer contributions (extended unemployment compensation is funded by the Federal government.) www.mass.gov/workers-compensation-for-employers.

All employer charges are based on the UI tax rates contained within the statutorily established "table of contribution rates and schedules" ranging from A (lowest) to G (highest). Under current MA law, UI tax charges for 2024 are based on schedule "C". The schedul'e is based on the overall UI trust fund balance (i.e., the greater the balance, the lower the schedule and vice versa.) While the reduction to a schedule is good news for employers, the Commonwealth will also be charging employers a Covid – 19 recovery assessment discussed below.

Each contributing employer is assigned a tax rate based on its UI experience rating (i.e., employer's trust fund balance, layoffs, benefits paid out from employer's account, contributions paid, etc.). For 2023, the COVID-19 Recovery Assessment Rate portion of each employer's effective rate is equal to 126.4% of their UI rate or a total of $915 million. In 2024 the total COVID charge will be $365 million. An employer can view their 2024 UI rate and their COVID-19 Recovery Assessment rate on their UI Online account by clicking on "**Account Maintenance**" then "**View Rate Notice**."

To determine the annual UI assessment for the following year, the DUA reviews:

- the employer's wages subject to contribution (current taxable wage base, $15,000);
- the contributions actually paid by the employer;
- the amount of benefits charged to the employer;
- any account balance adjustments.

Once a final annual balance is determined, it is divided by the company's average annual payroll, which is then represented as a percentage. That percentage is plotted on the UI rate schedule to determine the legally required rate. Once established, employers receive a UI assessment that may be paid in total or on a quarterly basis throughout the year.

COVID-19 Recovery Assessment

In response to the impact of the pandemic on the payout of unemployment benefits, and the fact that this occurred due to circumstances beyond the control of any particular business, the U.S. (CARES Act) and Massachusetts amended the experience rating provisions of the UI law to transfer all COVID-19 related UI claims to the solvency fund until December 31, 2020.

The practice of charging pandemic-based unemployment claims to the solvency account ceased in the spring of 2021 as a part of legislative reforms to mitigate the solvency charge spike increase on employers. The cost of the COVID-19 related UI claims (roughly $4 billion) was removed from the solvency fund and placed in a separate account to be paid down over subsequent years through a combination of bonding and special assessments.

Beginning in calendar year 2023 the Commonwealth will begin to charge contributory employers a COVID recovery assessment to pay off debt referred to above. The special assessment will raise the following amounts over the next 3 years:

- 2024 $365 million
- 2025 $349 million
- 2026 $335 million

Employers received a special notice from the Department of Unemployment Assistance at the end of 2022 explaining this in more detail.

Health Insurance for the Unemployed | Employer Medical Assistance Contribution (EMAC)

The EMAC assessment is administered quarterly by the DUA. Proceeds from the EMAC assessment support the provision of subsidized healthcare services funded by the Commonwealth Care Trust Fund and the Health Safety Net Trust Fund.

Employers are required to pay contributions on the first $15,000 of each employee's wage. The amount for each employer is calculated by multiplying said wages by an assigned rate. New employers subject to EMAC will be exempt for the first three years of operation. Employers will not be liable for EMAC payments in a quarter where the average employee count is fewer than six.

EMAC Rates effective Jan 1, 2024:

Year 1, 2, 3	New employers subject to EMAC are exempt for the first three years.
Year 4	The rate for employers in the 4th year of being subject to EMAC is **0.12%**
Year 5	The rate for employers in the 5th year is **0.24%**
Year 6 and Up	The rate for employers in the 6th year and beyond is **0.34%**

Lockouts and Strikes

Unemployment benefits may be available to employees involved in a lockout. The law does not deny benefits to any employee unless the employer can prove that the lockout is in response to acts of repeated and substantial damage or repeated threats of damage with the express or implied approval of the officers of the bargaining unit. Strikers can receive UI benefits only if it can be shown to the DUA's satisfaction that the strike was economic in nature or resulted from an unfair labor practice (M.G.L. c. 151A § 25).

Severance Pay and Termination Agreements

There are no laws requiring an employer to make a payment of severance benefits to a separating employee. However, severance benefits granted for past service generally count as earnings for purposes of unemployment benefits unless the employer receives something of value in exchange for the pay, such as the employee's signature on a release-of-legal-claims agreement (M.G.L. c. 151A § 1[r][3]).

Any employer considering offering an employee a release of claims should consult with legal counsel prior to making the decision to do so. To be valid, a release of claims requires payment from the employer to the employee in exchange for the employee forgoing a legal right to sue the employer over matters arising out of employment, such as discrimination. In the context of unemployment, a release is treated separately from severance pay and does not delay a claimant's right to collect unemployment.

The Older Workers Benefit Protection Act of 1990 requires that releases of legal claims for workers 40 years old and older be knowing and voluntary; be part of a written, clearly understood agreement that specifically lists ADEA rights or claims; exclude a waiver of any claims and rights arising after the date of the waiver; be for consideration (i.e.,

something of value, such as additional pay and/or benefits); advise the individual to consult an attorney; provide up to 21 days for the individual to consider the waiver (up to 45 days if part of a group [i.e., 2 or more employees] offer); and allow the individual up to 7 days to revoke the waiver.

An employer should not make the final payment as provided for in the release until after the 7-day revocation period has expired. When group layoffs or exit incentive programs are involved, the employee must be given information on the class of employees covered, eligibility factors, applicable time limits, and the job titles and ages of individuals eligible or selected and the ages of individuals in the same job classification or unit not selected.

Solvency Account

DUA maintains a general solvency account to pay benefits that are not assigned to an individual employer. The solvency account is only available to UI contributory employers and not to reimbursable employers. Reimbursable employers include public sector enterprises and those nonprofits that operate on a dollar-for-dollar payment for all UI benefits incurred. Permissible charges to this account include

- employers that have ceased operation with insufficient funds in their account to pay claims;
- dependency allowance;
- state-funded extended benefits;
- benefits for domestic violence;
- benefits not otherwise chargeable to a specific employer; and
- benefits paid when claimants are in DUA-approved training programs.

The solvency assessment is established annually by the DUA, which multiplies wages subject to contribution by a determined solvency adjustment factor for all covered employers in Massachusetts. The solvency assessment for 2024 is .41%, an increase from .37% in 2023. The result is an actual dollar amount that represents an employer's share for the computation period. This factor changes from year to year, depending on the charges made to the solvency account during that period and DUA's projections of solvency needs for the upcoming year.

Work Sharing

The Division of Career Services WorkShare Program provides an alternative to layoffs. To participate, an employer must apply to and be approved by the DUA. Once the employer is certified to participate, the WorkShare Program allows employees of an entire company, a complete department, or even a small unit within the company to share reduced work hours while also collecting unemployment insurance benefits to supplement their reduced wages. The decrease in the normal weekly hours must be shared equally by all workers in the participating unit(s) as defined by the employer. The reduction in hours may range from 10% to 60%. To be eligible, an employer must have a positive UI trust fund balance at the time the work-sharing application is approved; alternatively, if an employer has a negative balance, the employer must reimburse the trust fund on a dollar-for-dollar basis (M.G.L. c. 151A § 29D).

Benefit Continuation

Health Insurance

Virtually every Massachusetts employer that offers its employees' health insurance is required, under either federal or state law, to offer health insurance continuation rights to eligible employees and dependents at group rates, but at the employee's and/or dependent's expense. Federal COBRA covers all employers with 20 or more employees. Massachusetts Mini-COBRA applies to all employers with 2 to 19 employees.

COBRA (Federal Law)

Under COBRA, employers of 20 or more employees must offer continuation of benefits to employees and covered dependents, called "qualified beneficiaries," who would otherwise lose coverage due to certain "qualifying events."

Qualifying events for employees and dependents include termination of employment or a reduction in the employee's hours below the eligibility threshold for health insurance, which result in continuation eligibility for up to 18 months. Additional qualifying events for dependents include death of the employee, divorce or legal separation of the employee, or a loss of dependent status as defined by the plan, allowing benefits continuation of up to 36 months. An 18-month period may be extended up to an additional 11 months in certain cases of disability or up to an additional 18 months in cases of multiple qualifying events. If an employee is on active military duty, he or she may be eligible for up to 24 months of continuation coverage under USERRA requirements.

Continuation must be offered for all coverage in effect at the time of the qualifying event, including medical, dental, vision, and flexible spending accounts (health-care reimbursement only). Each qualified beneficiary has individual election rights, and COBRA participants have the same rights as active employees to add or drop dependents, switch plans, and so on.

Compliance Tip: *COBRA places stringent timetables, notice requirements, and other obligations on both employers and employees. Employers are required to give their employees COBRA-related notices (1) when the employee (and spouse, if applicable) becomes covered under the health insurance plan; (2) when a qualifying event occurs; (3) when COBRA coverage terminates; and (4) for unavailability of coverage.*

Mini-COBRA (Massachusetts)

The Massachusetts Mini-COBRA law applies to employers of between 2 and 19 employees. It differs from COBRA in that it does not apply to fully self-insured plans, it applies to medical coverage only (not dental, vision, etc.), and its extension of the continuation of coverage for disability applies only to the employee. Otherwise, the law generally mirrors COBRA provisions (M.G.L. c. 176J § 9).

Coverage for Divorced or Legally Separated Spouses (Massachusetts)

Plans subject to Massachusetts insurance law (i.e., Blue Cross/Blue Shield, health maintenance organizations, and preferred provider organizations) must continue health and dental insurance benefits for legally separated spouses and ex-spouses of employees under an employer's group plan(s). This is true even if the divorce or legal separation decree is silent on the issue. On the other hand, if the decree specifies that the spouse has no right to continuation, the decree will supersede the law. The employee and/or spouse can be required to pay the cost of coverage, and the obligation generally ends on the date specified in a decree or upon the remarriage of the former spouse.

In cases in which an employer continues to cover an ex-spouse, it is very likely that the employee will have to pay income tax on the fair market value of the coverage as imputed income. These amounts would also be subject to Social Security and Medicare taxes—both employee and employer portions. All employer-provided fringe benefits are taxable income unless they are explicitly exempted by IRS rules. Coverage for an ex-spouse will only be exempted if he or she meets the IRS Code Section 152 definition of a "qualifying relative." The definition includes "other individuals" who are not related to the employee but who live in the employee's household for the entire tax year and who were not the spouse of the employee at any time during the tax year. An ex-spouse may qualify under the "other individuals" definition, but only if the ex-spouse continues to live in the same household for an entire tax year. In these cases, if the employer continues to cover the ex-spouse, it is more likely than not that the income will be imputed to the employee.

Life Insurance (Massachusetts)

Group life insurance policies in Massachusetts have a number of regulations to protect employees as addressed in M.G.L. c. 175 § 134. One such requirement is that if insurance ceases because of:

- termination of employment or of membership in the class or classes eligible for coverage under the policy, or
- termination of the policy or amendment of the policy to terminate the insurance or any part thereof on the class of insured persons to which he then belongs after he has been insured thereunder for five or more years immediately preceding any such termination date,
- the employee shall continue to be insured thereafter for a period of thirty-one days, for the amount of life insurance which they were entitled to have issued to them under an individual policy.

Conversion rights information to elect an individual policy should be sent to the employee with their regular benefit continuation options.

Plant Closings

Federal Law and the Worker Adjustment and Retraining Notification Act (WARN)

A WARN notice is required when an employer with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) is laying off at least 50 people at a single site of employment or employs 100 or more workers who work at least a combined 4,000 hours per week, and is a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government.

WARN notices also apply when an employer lays 500 or more employees (not counting part-time workers) at a single site of employment during a 30-day period, or lays off 50-499 workers (not counting part-time workers), and these layoffs constitute 33% of the employer's total active workforce (not counting part-time workers) at the single site of employment. If the employer announces a temporary layoff of less than 6 months that meets either of the two criteria above and then decides to extend the layoff for more than 6 months, or reduces the hours of work for 50 or more workers by 50% or more for each month in any 6-month period, a WARN notice must also be submitted. Thus, a plant closing or mass layoff need not be permanent to trigger WARN.

Failure to submit these notices to the affected employees, the State Rapid Response Dislocated Worker Unit, and local chief elected official in each affected location may result in legal and financial consequences through individual or class action lawsuits.

However, there are three exceptions to the WARN requirement:

- Faltering company that was actively seeking capital in good faith to avoid or postpone a shutdown;
- Unforeseeable business circumstances; and
- Natural disaster

Employers should carefully read the DOL's Employer Guide: www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf.

Massachusetts Law

Massachusetts does not have a mini-WARN Act, but it does have two plant closing laws. Under the first, the Standards for Companies Financed by Quasi-Public Agencies Law, Massachusetts companies that receive financing from specified Massachusetts quasi-public agencies must accept voluntary standards of corporate behavior relating to plant closings. (M.G.L. ch. 149 §182). Such companies must make a good faith effort to give every employee affected by a plant closing or partial closing as much practicable advance notice, and assistance with reemployment (if possible).

The second law, the Massachusetts Plant Closing Law requires covered employers to provide notice of any plant closing promptly to the Massachusetts Department of Unemployment Assistance so reemployment assistance benefits can begin as soon as possible for affected workers. (M.G.L. ch. 151A, §§ 71A; 71B(a)).

Resources: Posters | Websites

Massachusetts and federal websites provide very useful compliance information for employers, including posters, regulations, opinion letters, guidance, advisories, and Frequently Asked Questions page.

Federal

COBRA Notification | Employers of 20 or more employees must provide eligible employees the option to continue employer-based health insurance after separating from employment. www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra (rev 2020)

Employee Polygraph Protection Act | Prohibits most private sector employers from using a polygraph on an individual for pre-employment testing or during the course of employment www.dol.gov/agencies/whd/posters/employee-polygraph-protection-act (rev. 2016)

Employment Eligibility Verification (Form I-9) | www.uscis.gov/i-9-central

Equal Employment Opportunity | Poster covers Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Vietnam Era Veterans Readjustment Act, Executive Order 11246, and the Rehabilitation Act of 1973 www.dol.gov/general/topics/posters.) (rev. 2023)

E-Verify | E-Verify Participation posters must be displayed in English and Spanish by participating employers to inform their current and prospective employees of their legal rights and protections. www.e-verify.gov/sites/default/files/everify/posters/EVerifyParticipationPoster.pdf. (rev. 2017),

Right to Work poster available from website here www.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster Eng_Es.pdf. (2019)

Family & Medical Leave Act | Poster summarizes the major provisions of the law and informs employees how to file a complaint; poster must be displayed at all locations of a covered employer even if there are no eligible employees www.dol.gov/whd/regs/compliance/posters/fmla.htm (rev. 2023)

Job Safety and Health Poster | Occupational Safety and Health Act (OSHA) covers employers engaged in interstate commerce www.osha.gov/Publications/poster.html (rev. 2019)

Military Leave | Uniform Service Employment and Reemployment Rights Act www.dol.gov/vets/programs/userra (rev. 2022)

OSHA 300 Log | Employer must post an annual summary of occupational illnesses and injuries (Form 300A) each year from February 1 to April 30 (retail, finance, insurance, and real estate are exempt from this requirement) www.osha.gov/recordkeeping/RKforms.html (rev. 2004)

OSHA Publications | OSHA provides hundreds of online resources including Recommended Safety and Health Practices and Training Programs www.osha.gov/publications

OSHA seasonal resources | Heat www.osha.gov/heat and Cold www.osha.gov/winter-weather/cold-stress.

Wage and Hour Laws | Minimum wage poster www.dol.gov/sites/dolgov/files/WHD/legacy/files/minwagep.pdf (rev 2016)

Massachusetts

Attorney General's Advisory on the Independent Contractor Law www.mass.gov/doc/attorney-generals-advisory-on-the-independent-contractor-law/download

Attorney General's Advisory on vacation policies | www.mass.gov/doc/attorney-generals-advisory-on-vacation-policies/download.

Child Labor | Includes both state and federal laws www.mass.gov/doc/child-labor-laws-in-massachusetts-poster-english-0/download (rev. 2012)

Criminal Offender Record Information (CORI) policy | www.mass.gov/massachusetts-criminal-offender-record-information-cori

Earned Sick Time Law | Available from the Attorney General's website in multiple languages: www.mass.gov/doc/earned-sick-time-notice-of-employee-rights-english/download (pub. 2016)

Fair Labor Division Advisories (MA Attorney General's office) | www.mass.gov/lists/workplace-rights-publications#advisories

Fair Employment Law | Poster covers notification of protection for discrimination on the basis of race, color, religious creed, national origin, sex, sexual orientation, genetic information, military service, age, ancestry, disability, and harassment. www.mass.gov/doc/fair-employment-poster/download# (rev. 2015)

Gender Identity Guidance | Massachusetts Commission Against Discrimination (MCAD) www.mass.gov/doc/gender-identity-guidance-0/download

Massachusetts Paid Family and Medical Leave | Department of Family and Medical Leave PFML poster | www.mass.gov/lists/pfml-workforce-notifications-and-rate-sheets-for-massachusetts-employers (rev. 10-23)

No Smoking Signs | Must be posted and visible in the workplace. Available from the Department of Public Health or through your local board of health www.mass.gov/files/documents/2016/07/tu/no-smoking-sign-8x11.pdf

Sexual Harassment in the Workplace | Poster encourages reporting and provides contact information to MCAD. www.mass.gov/doc/sexual-harassment-poster/download. Though listed on the poster, New Bedford office is closed.

Undue Hardship | www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada

Unemployment Insurance | Information on Employees' Unemployment Insurance Coverage www.mass.gov/doc/information-on-employees-unemployment-insurance-coverage-form-2553a/download (rev. 1-8-24) (Document available in many languages)

Unemployment Insurance | How to apply for UI benefits. Pamphlet to distribute to employee at time of separation. Link to pamphlet not working.

Wage and Hour Laws | Covers MA Wage and Hour Laws, Hours Worked, Pay Deductions, Paystub Information, Child Labor, Overtime, Tips, Reporting Pay, Earned Sick Time, Domestic Violence Leave, and Meal Breaks www.mass.gov/doc/massachusetts-wage-hour-laws-poster/download (rev. 6-2021)

Workers' Compensation | Notice to Employees of WC coverage www.mass.gov/service-details/notice-to-employees-poster
(Poster available in multiple languages)

Monthly Roundtable

AIM offers a monthly virtual HR Roundtable on the third Wednesday morning of the month from 8:30 to 10:00 am to provide HR professionals an opportunity to meet and network about new human resource and employment law related developments in Massachusetts and the U.S. The Roundtables last 90 minutes and occur in Zoom format. Anyone looking for more information about the Roundtable and how to sign up should contact Melissa Wotus at mwotus@aimnet.org.

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