



**MASSACHUSETTS AND FEDERAL  
EMPLOYMENT LAW AND WORKPLACE REGULATIONS  
A SYNOPSIS FOR EMPLOYERS  
UNDERSTANDING YOUR COMPLIANCE OBLIGATIONS  
2017 EDITION**

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## EDITOR'S NOTES

- *The information provided in this Synopsis is intended to assist you with issue spotting and provide a basic understanding of the law. This Synopsis is by no means an exhaustive analysis of the issues an employer may face. Therefore this Synopsis is **not intended to be, nor should be**, a substitute for legal or professional advice and counsel. The issues we address in this Synopsis are often complicated and driven by specific facts.*
  
- *We also write, publish and distribute the following employment law resource documents for employers:*
  - *A Synopsis of Connecticut and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Vermont and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Minnesota and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Kansas and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Missouri and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of New Hampshire and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Oregon and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of California and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of New York and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Texas and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of New Jersey and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Pennsylvania and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Ohio and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Utah and Federal Employment Law and Workplace Regulations;*
  - *A Synopsis of Georgia and Federal Employment Law and Workplace Regulations.*

*The Synopses provide a concise explanation of your company's compliance obligations and are widely used as a handy resource for the management team.*

- *Should you have questions about the laws and regulations that govern today's workplace please contact us at [questions@foleylawpractice.com](mailto:questions@foleylawpractice.com). At least one of our firm's lawyers are admitted in: Connecticut, Massachusetts, New Hampshire, Vermont, Texas, Missouri, Kansas, Wisconsin, Minnesota, Oregon, North Carolina, Utah, New York, Georgia, Illinois, Maine, California and Pennsylvania, Washington, D.C., and Maryland.*
  
- *When your business has an issue involving its employees, we recommend that you consult with experienced labor and employment counsel.*
  
- ***This Synopsis may be considered an advertisement or a solicitation under pertinent rules and regulations.***

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## INTRODUCTION

The regulations that govern today's workplace are extensive and expanding. HR-related risk continues to expand exponentially each year. Compliance obligations are burdensome and the liability created by state and federal laws and regulations is extraordinary. We all recognize that in some circumstances human resource professionals and C-suite executives have personal and vicarious liability which could include: back pay; front pay; emotional distress; attorney's fees; civil fines; and criminal sanctions.

Our mission is to help you navigate the twists and turns of vexing labor and employment laws. We recognize that employers must be well informed in order to operate their businesses within the boundaries of the law. As Benjamin Franklin stated: an ounce of prevention is worth a pound of cure. It is with this in mind that we provide employers with this Synopsis. We are confident that the resources we offer: this Synopsis; our Guides to Understanding Employment Law and Workplace Regulations; Employment Law Compliance resource material including the FMLA Survival Guide; the Employer's Risk Management Toolbox; our HR-related risk management program (which includes the employment counsel on-call triage service, handbook preparation and other updates, and attorney-client privileged diagnostic audit of personnel practices); and our monthly e-newsletter will provide the necessary tools that your business needs to better manage risk.

If you have any questions or concerns that go beyond the information provided in this Synopsis, please do not hesitate to give us a call. Our dedicated toll free number is (844) 204-0505.

## I. THE EMPLOYMENT RELATIONSHIP

### Establishing the Employment Relationship

- **Recruiting** – Ensure that all newspaper and online advertisements, brochures, job postings, interview queries and your employment application, if any, avoid wording that can be relied upon for employment litigation.
- **At-Will** – The “at-will” status allows employers to terminate employees at any time, for any reason, with or without notice. Nevertheless, employers remain liable for any termination that violates the law, such as those resulting from discrimination in the workplace or an employee exercising his or her right to engage in protected, concerted activity under the National Labor Relations Act.
- **Independent Contractors** – An employer is responsible for appropriately classifying a worker as an “employee” or an “independent contractor.” Classification is crucial for determining the worker's right to unemployment compensation, workers' compensation, overtime and other benefits and protections. The misclassification of a worker as an independent contractor will expose an employer to significant liability under federal law.

The independent contractor law in **Massachusetts** creates the presumption that *a work arrangement is an employer/employee relationship*, unless the party receiving the services can overcome the legal presumption by meeting *each factor* in a rigid three-part test:

- The worker must be free from the presumptive employer's control and discretion in performing this service both under a contract and in fact;
- The service provided by the worker must be outside the employer's usual course of business; and
- The worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

Massachusetts recently fine-tuned the meaning of “individual” for the purpose of the independent contractor analysis. Massachusetts courts have held that, even where the “worker” is a separate legal entity rather than a person, the employer-employee relationship will be found if the entity acts in substance as an independent contractor. This is a fact-sensitive distinction that relies upon fulfilling the three-part test set out above.

Massachusetts imposes an additional burden on employers in conforming to the independent contractor classification. In 2013, the Supreme Judicial Court of Massachusetts held that the Commonwealth's independent contractor law also applies to employees working out of state, where the employee's employment law contract is governed by Massachusetts law.

- **Independent Contractor Assessment Under Federal Law** – Both the United States Department of Labor (DOL) and the Internal Revenue Service (IRS) provide rules for determining whether a worker should be classified as an employee or independent contractor.

The Department of Labor uses the Fair Labor Standards Act (FLSA) definition of employ very broadly to include “to suffer or permit to work.” This is one of the broadest definitions of employment under the law. When applying the FLSA's vague definition, workers who are economically dependent upon the business of the employer, regardless of skill level, are considered to be employees, and most workers could be employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves. There are a number of “economic realities” factors that guide the DOL's assessment of whether an individual should be appropriately classified as an independent contractor. While there is no one definitive set of factors, the following factors are generally considered when determining whether an employment relationship exists under the FLSA:

- The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer.
- Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skills may be indicated by the hiring and supervision of workers or by investment in equipment.

- The relative investments in facilities and equipment by the worker and the employer. The worker must make some investment compared to the employer's investment (bear some risk for loss) in order for there to be an indication that she or he is an independent contractor in business for herself or himself.
- The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment.
- The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee.
- The nature and degree of control by the employer. Does the employer set pay amounts, work hours and/or determine how the work is performed? An independent contractor generally works free from control by the employer.

In 2015, the Department of Labor issued a far-reaching, interpretive memorandum expressing the DOL's belief that "most workers [classified as independent contractors] are employees under the FLSA's broad definitions." According to the DOL, the 15-page memorandum (entitled "Administrator's Interpretation No. 2015-1") was issued in the context of "numerous complaints from workers alleging misclassification," and the DOL's "successful enforcement actions against employers who misclassify workers." While the memorandum is not the law and is not legally binding on courts interpreting the law, it is significant because courts often give deference to an agency's interpretation of a statute or regulation that the agency is tasked with enforcing. Further, the memorandum signals the DOL's intention to aggressively pursue enforcement actions against companies that utilize independent contractors.

**IRS 20-factor "right-to-control test"** is used to assess an employer's tax liability. A similar test is used in most cases to determine the status under workers' compensation laws. The economic realities test summarized above is used to determine employee status under the Family Medical Leave Act, the Fair Labor Standards Act, the Worker Adjustment and Retraining Act, Title VII of the Civil Rights Act, the Age Discrimination and Employment Act and the Americans with Disabilities Act.

**The IRS 20-factors are:**

1. Level of Instruction – If the company directs when, where, and how work is done, this control indicates an employment relationship.
2. Amount of Training – Requesting workers to undergo company-provided training suggests an employment relationship.
3. Degree of Business Integration – Workers whose services are integrated into business operations or significantly affect business success are likely to be considered employees.

4. Extent of Personnel Services – Companies that insist upon a particular person performing the work assert a degree of control that indicates an employment relationship.
  5. Control of Assistants – If a company hires, supervisors, and pays a worker’s assistant, this control indicates an employment relationship.
  6. Continuity of Relationship – A continuous relationship between a company and a worker indicates an employment relationship.
  7. Flexibility of Schedule – Individuals whose hours or days of work are dictated by the company are apt to be employees.
  8. Demand for Full-Time Work – Full-time work gives a company control over most of the person’s time which supports a finding of an employment relationship.
  9. Need for On-Site Services - Requiring someone to work on the company premises, particularly if the work can be performed elsewhere, could indicate an employment relationship.
  10. Sequence of Work – If a company requires work to be performed in a specific order or sequence this control indicates an employment relationship.
  11. Requirements for Reports – If a worker is regularly required to provide written or oral reports on the status of a project, this arrangement indicates an employment relationship.
  12. Method of Payment – Hourly, weekly, or monthly pay schedules are characteristic of an employment relationship.
  13. Payment of Business or Travel Expenses – Independent contractors typically bear the cost of travel or business expense; and therefore, direct reimbursement of those expenses indicates an employment relationship.
  14. Provision of Tools and Materials – Workers who perform most of their work using company-provided equipment, tools and materials are most likely considered employees.
  15. Investment in Facilities – Independent contractors typically invest in and maintain their own work facilities.
  16. Realization of Profit or Loss – Workers who receive predetermined earnings and have little chance to realize significant profit or loss are typically considered employees.
  17. Work for Multiple Companies – Individuals who simultaneously provide services for several unrelated companies are usually considered independent contractors.
  18. Availability to Public – If a worker generally makes services available to the general public, this supports an independent contractor status.
  19. Control Over Discharge – A company’s unilateral right to discharge a worker suggests an employment relationship.
  20. Right of Termination – While most employers have a unilateral right to terminate the employment relationship at-will, contracts with independent contractors can only be terminated pursuant to the contracts.
- **Correcting Independent Contractor and Employee Misclassification Under Federal Law** – The “Voluntary Classification Settlement Program” (VCSP) is a coordinated initiative by the IRS and DOL. It provides an opportunity for employers to reclassify independent contractors for federal employment tax purposes as employees with modified amnesty. To participate in this program, the business must meet specified

eligibility requirements and apply to participate. Further information regarding the VCSP Program and employer eligibility can be found in the Instructions for Form 8952, located at <http://www.irs.gov/pub/irs-pdf/i8952.pdf>.

- **Joint Employer Liability** – In 2016 the U.S. Department of Labor (DOL) issued a new Administrator’s Interpretation (AI) that emphasized the agency’s intention to apply the joint employer status more broadly under the Fair Labor Standards Act (FLSA). The DOL made clear that it would examine dual employer relationships closely in an attempt to find joint employer status in more circumstances. All companies engaged in the business of providing employees to clients or co-employing workers are affected by this AI.

The DOL identified the two most likely scenarios where joint employment will be found to exist. One type of joint employment, referred to as vertical joint employment, is where there is an “intermediary employer,” such as a staffing agency, subcontractor, or other provider of workers to a client. Where such a relationship exists, the DOL will focus on the economic realities of the relationship to determine whether a worker is economically dependent on two or more employers, and if so, will be inclined to find joint employer status. The second type of joint employment under scrutiny by the DOL is where the employee has two or more separate, but related employers, each benefitting from a person’s work during the same period of time. An example of this is two related businesses owned by the same entity that jointly schedule the same employee.

In light of this new guidance and the emphasis by the federal government on broad application of joint employment, staffing agencies, subcontractors, and employers that contract with them should examine their relationships, including but not limited to, the degree of control, supervision, termination rights, setting of pay rates, and provision of tools, training, and policies exerted by the client company. Foley & Foley has developed a Joint Employer audit to assist with this complex analysis.

- **EEOC Regulated Employment Tests and Selection Procedures** – Employers often use tests and other selection procedures to screen applicants for hire or promotion. There are many different types of tests and selection procedures, for example: cognitive tests; personality tests; medical examinations; credit checks; and criminal background checks. These tests are appropriate and comply with the law if used correctly.

However, use of tests and other selection procedures can violate the federal anti-discrimination laws if they disproportionately exclude people in a particular protected class, unless the employer can justify the test or procedure under the law. For example, under the Americans with Disabilities Act, testing can only be administered after the extension of a conditional offer. Selections procedures that adversely impact protected classes must be both “job-related,” and “consistent with business necessity.”

- **Fair Credit Reporting Act Compliance** – The Fair Credit Reporting Act (FCRA) was enacted to regulate the consumer credit reporting industry. Employers that use and request consumer background checks from consumer reporting agencies are automatically subject to the following FCRA regulations:

- **Acquire Written Consent:** Before an employer may seek to procure a consumer credit card report, a criminal background, or a background check from a credit reporting agency, applicants or employees subject to that screening must provide written consent.
- **Provide Adequate Notice:** The CFPB issued new regulations modifying the forms that employers must use to notify employees and applicants of their rights.
- **Background Checks** – Subject to state and federal legal restrictions, employers are permitted to conduct background checks, which can include credit checks and criminal history. We strongly recommend that you do so. However, if conducted without appropriate planning and training, a pre-employment investigation can be a potential source of liability. Pre-employment investigations should not be used as an off-the-record investigation into an applicant’s background. Therefore, when conducting pre-employment investigations, employers should consider the following general guidelines:
  - Employers should use pre-employment investigation tools that are reasonable, appropriate, and relevant to the position for which the applicant is applying.
  - Pre-employment investigations should be consistently implemented with all candidates, regardless of class or position.
  - Pre-employment investigations should be conducted by persons with special training, such as a reputable investigative service.
  - All information must be evaluated in compliance with the Fair Credit Reporting Act (FCRA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and any other applicable state and federal law.

With these guidelines in mind, employers should consider which background checks are appropriate given the nature and scope of the position sought by the applicant.

In 2014, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Federal Trade Commission (FTC) co-published technical assistance documents that explain how the agencies' respective laws apply to background checks performed for employment purposes. One document is for employers, the other is for job applicants and employees. This is the first time that the two agencies have partnered to create resources addressing concerns in this key area. The documents are available on the EEOC's website: [Background Checks: What Employers Need to Know](#) and [Background Checks: What Job Applicants and Employees Should Know](#).

- **Credit Checks** - Credit checks may be appropriate for certain employment positions, such as positions involving handling of money or spending authority over large amounts of money. However, they are regulated by both state and federal law and must be relevant to the job.

**The Federal Bankruptcy Act** bars an employer from refusing to hire someone solely because the applicant or someone associated with the applicant:

- Has filed for bankruptcy.
- Was insolvent prior to filing for bankruptcy.
- Has failed to pay a debt dischargeable in bankruptcy.

**The Massachusetts Consumer Credit Act** is very similar to the FCRA, and requires that an organization must be able to prove that an applicant's financial condition is relevant to the job before conducting a credit check. Employers that are not able to prove relevance could face discrimination charges, since requiring a clean credit history may disproportionately screen out some job applicants.

- **Consumer Reports** – Massachusetts and federal law also sets forth certain restrictions on the use of consumer reports for employment purposes. Consumer reports provide information about a person's creditworthiness, credit standing or capacity, work habits, and mode of living, as reported by consumer-reporting agencies. Consumer reports may also include personal interviews with a person's neighbors, friends, or associates to obtain information on the person's character, general reputation, personal characteristics. Employers typically use the information obtained from a consumer-reporting agency for verifying the following information:
  - Criminal history.
  - Driving records.
  - Employment history.
  - Education.
  - Social Security numbers.
  - Professional licenses.

Similar to credit checks, employers must be able to prove that the information gleaned from a consumer report is relevant to the job before the report can be conducted. If an applicant is denied employment for reasons relating to the credit report, the applicant must be informed of this fact and furnished with the name of the credit agency that issued the report.

Before an employer may obtain an investigative consumer report, the employer must:

- Receive written permission to obtain the report; and
- Inform the individual in writing that the consumer report may contain information concerning his or her character, general reputation, personal characteristics, and mode of living.

The disclosure must also inform the individual about the precise nature and scope of any consumer report requested about the individual, and that the individual has a right to obtain a copy of the report. An employer can notify current employees that a credit report will be required simply by including such notice in an employee manual.

If the employer denies employment based on a consumer report, the employer must inform the individual within 10 business days from the date the decision was made.

- **Criminal Background Checks** – Employers may also consider broadening their pre-offer investigations to include searches of public records on felony and misdemeanor convictions. To do so, employers should obtain certified copies of all conviction records (instead of relying on verbal information) and should check all jurisdictions where an applicant lived or worked. If a search turns up a criminal conviction, employers must

consider the relationship between the conviction and the applicant's fitness for a particular job before rejecting an applicant because of any particular conviction.

A significant overhaul of the Commonwealth's Criminal Record Information (CORI) system occurred in 2010. *Under the CORI law, criminal record inquires must be eliminated from application forms but are still allowed within the recruitment process.* This means that under Massachusetts law, employers may inquire about criminal records after the initial applicant screening process, during a verbal interview. Information about the use of arrest records in personnel decisions can be found on our website under our Resource page, within our e-newsletter titled *Time to Arrest the Status Quo*.

- **Ban-the-Box** – Currently, 24 states and over a hundred cities and counties have adopted what is widely known as “**ban the box**” initiatives that require employers to remove the conviction history question on the job application and delay the background check inquiry until later in the hiring process. Momentum for the policy has grown in recent years. The EEOC endorsed removing the conviction question from the job application as a best practice in its 2012 guidance making clear that federal civil rights laws also regulate employment decisions based on arrests and convictions. Specifically, the EEOC guidelines limit employers' consideration of criminal arrests and conviction records in making hiring or other employment decisions. The guidelines state, in part, that employers must limit their review to “convictions for which exclusion would be job related for the position in question and consistent with business necessity.”

President Obama issued an Executive Order in 2015 “banning the box” in federal recruitment. A federal “ban-the-box” bipartisan effort titled the Federal Fair Chance Act, is expected to be put forth again in 2017 by the Senate.

**Massachusetts** adopted ban-the-box legislation as part of the overhaul to the CORI system in 2010. The legislation bars employers from requiring applicants to check a box if they have a criminal history.

- **Negligent Hiring and Retention** – The common law theories of negligent retention, negligent hiring, and negligent supervision impose a duty on an employer to both select and retain employees who will not endanger their fellow employees. A claim of negligent retention will arise when an employer becomes aware of problems with a particular employee but fails to take further action such as investigating, disciplining, discharging, or reassigning the employee. In such cases, the employer has a duty to take appropriate action to protect other employees and the public.
- **EEO-1 Survey** – The EEO-1 Form is a report filed with the Equal Employment Opportunity Commission (EEOC), mandated by Title VII of the Civil Rights Act of 1967, as amended by the Equal Employment Opportunity Act of 1972. The Act mandates that employers report on the racial/ethnic and gender composition of their workforce by specific job categories. All employers with at least 100 employees are required to file the EEO-1 survey annually with the EEOC. Federal government contractors and first-tier

subcontractors with 50 or more employees and at least \$50,000 in contracts must also file. In the past, reports had to be filed by September 30<sup>th</sup> of each year.

In 2016 the EEOC announced a new EEO-1 form that will require companies to report pay data in addition to the makeup of their workforce. The [updated EEO-1 reporting form](#) will require covered employers to provide employee pay data beginning in March 2018. The additions to the form are intended to improve EEOC investigations into pay discrimination based on gender, race and ethnicity.

- **Affirmative Action** – An employer’s Affirmative Action obligations should be a consideration when a recruitment process is initiated. Companies that contract or sub-contract with the Federal Government may have Affirmative Action obligations under federal law. In general terms:
  - Each contractor or sub-contractor that has 50 or more employees and a contract with the Federal Government of \$50,000 or more must develop a written Affirmative Action Plan (AAP) that covers minorities, women, the disabled, and veterans. The AAP is developed by the contractor to assist the contractor in a self-audit of its workplace. The AAP is kept on file and carried out by the contractor; and is submitted to the federal Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) only if the agency requests it for the purpose of conducting a compliance review. The AAP is intended to identify those areas, if any, in the contractor’s work force that reflect under-utilization of women, minorities, veterans or individuals with disabilities. When determining availability or assessing under-utilization the contractor must consider, among other factors: the presence of minorities, women, veterans and individuals with disabilities having the requisite skills in an area in which the contractor can reasonably recruit. Based upon the utilization analysis and the availability of qualified individuals, the contractors then establish goals to reduce or overcome the under-utilization, if any.

The OFCCP Final Rules released in 2013 define significant new requirements for contractors related to the employment of veterans under the Vietnam Era Veterans’ Readjustment Assistance Act (“Veterans Rule”) and the employment of individuals with disabilities under Section 503 of the Rehabilitation Act (“Disability Rule”) (collectively known as the “Final Rules”). Attorney Timothy Kenneally manages our OFCCP AAP Compliance Program and we encourage you to contact him should you have any questions about these new obligations.

- **Federal Contractors** – Federal contractors are subject to a number of specific laws and reporting requirements regarding wage and hour, discrimination, and equal pay and non-discriminatory hiring.
  - **Wage and Hour Requirements:** Can be found in the following:
    - Executive Order 13658, Establishing a Minimum Wage for Contractors (only contracts entered into on or after January 1, 2015): Provides that executive departments and agencies must, to the extent permitted by law, ensure that new covered contracts, contract-like instruments, and solicitations (collectively referred to as “contracts”) include a clause, which the contractor and any

subcontractors must incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers performing on or in connection with the contract or any subcontract thereunder, must be at least: \$10.20 per hour beginning January 1, 2017; and annually thereafter, an amount determined by the Secretary.

Coverage of EO 13658 and the Department's final rule generally extends to four major categories of contractual agreements:

- a. Procurement contracts for construction covered by the DBA;
- b. Service contracts covered by the SCA;
- c. Concessions contracts, including any concessions contract excluded from the SCA by the Department's regulations at 29 C.F.R. 4.133(b); and
- d. Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Executive Order only applies to prime contracts covered by the DBA that exceed \$2,000 and prime contracts covered by the SCA that exceed \$2,500. For procurement contracts where workers' wages are governed by the FLSA, the Order specifies that it applies only to contracts that exceed \$3,000. There is no value threshold requirement for subcontracts awarded under such prime contracts. The Executive Order minimum wage generally applies to workers performing on or in connection with the above types of contracts if the wages of such workers are governed by the DBA, the SCA, or the FLSA (defined below).

- The Davis-Bacon and Related Acts, apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Davis-Bacon Act and Related Act contractors and subcontractors must pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area.
- Contract Work Hours and Safety Standards Act, as amended, prime contracts in excess of \$100,000, contractors and subcontractors must also pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. The overtime provisions of the Fair Labor Standards Act may also apply to DBA-covered contracts.
- The McNamara-O'Hara Service Contract Act, requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The Department of Labor issues wage determinations on a contract-

by-contract basis in response to specific requests from contracting agencies. These determinations are incorporated into the contract.

- Fair Labor Standards Act: For contracts equal to or less than \$2,500, contractors are required to pay the federal minimum wage as provided in Section 6(a)(1) of the FLSA.
- For prime contracts in excess of \$100,000, contractors and subcontractors must also, under the provisions of the Contract Work Hours and Safety Standards Act, as amended, pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. The overtime provisions of the Fair Labor Standards Act may also apply to SCA-covered contracts.
- The “Fair Pay and Safe Workplaces” Executive Order, requires bidders on federal procurement contracts for goods and services (including construction) in excess of \$500,000 to disclose labor law violations that have occurred within the three-year period immediately preceding the bid. In addition, the Executive Order requires federal contractors to provide individuals who perform work under the federal contract with information regarding hours worked, overtime hours, pay, and any additions made to or deductions made from pay. The Executive Order also prohibits federal contractors with contracts in excess of \$1,000,000 from entering into mandatory pre-dispute arbitration agreements with their employees or independent contractors to resolve complaints under Title VII of the Civil Rights Act or tort claims arising out of alleged sexual assault or harassment.
- **Paid Sick Leave**: Federal contractors operating under construction, service, and concessions contracts, and contracts in connection with federal property or lands, must provide paid sick leave in the amount of 1 hour of leave for every 30 hours worked on or in connection with a covered contract, or 56 hours of paid sick leave at the beginning of each accrual year. Contractors may limit the accrual of paid sick leave to 56 hours per year. These changes affect contracts issued on or after January 1, 2017.
- **Non-Discrimination and Affirmative Action**:
  - Executive Order 13672 prohibits federal contractors from discriminating on the basis of sexual orientation and gender. The Office of Federal Contract Compliance Programs (“OFCCP”) recently published a list of resources to assist federal contractors in better understanding how to create an inclusive workplace for lesbian, gay, bisexual, or transgender (“LGBT”) employees. These resources are intended to assist federal contractors in complying with Executive 13672 and can be found here: [http://www.dol.gov/ofccp/LGBT/LGBT\\_resources.html](http://www.dol.gov/ofccp/LGBT/LGBT_resources.html).
  - Executive Order 13665 and 11246, as amended. Effective January 1, 2016, federal contractors are prohibited from discharging or discriminating against any employee or applicant because the employee or applicant has “inquired about,

discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.” This law also prohibits Federal contractors and subcontractors from discriminating in employment and requires affirmative action to ensure equal employment opportunity on the basis of race, color, religion, sex, or national origin. The Executive Order applies to all contractors, but construction contractors and companies participating in a construction project receiving Federal funds (“federally assisted construction contractor”) have different affirmative action obligations than non-construction (“supply and service”) contractors. The OFCCP regulations implementing the EO 11246 can be found at [http://www.dol.gov/dol/cfr/Title\\_41/Chapter\\_60.htm](http://www.dol.gov/dol/cfr/Title_41/Chapter_60.htm). Contracts below a minimum threshold value and certain other contracts are exempt from coverage.

Covered contractors are also prohibited from having formal or informal policies that prohibit or tend to restrict employees from discussing or disclosing their compensation. Contractors are also required to disseminate the Office of Federal Contract Compliance’s new “*Pay Transparency Policy Statement*” posting found on the OFCCP’s website to employees and applicants electronically or by posting a copy in conspicuous places available to applicants and employees.

- Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA), as amended. This law prohibits supply and service and construction contractors (and their subcontractors) from discriminating in employment against veterans. It also requires that these contractors take affirmative action to employ and advance veterans. Despite its name, this statute is no longer limited to veterans from the Vietnam Era. VEVRAA applies equally to: 1) disabled veterans; 2) Armed Forces service medal veterans; 3) recently separated veterans, and; 4) other protected veterans who served during a war or in a campaign or expedition for which a campaign badge has been authorized. Contracts below a minimum threshold value and certain other contracts are exempt.
- Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended. This law prohibits supply and service and construction contractors (and their subcontractors) from discriminating in employment on the basis of disability. It also requires that these contractors take affirmative action to employ and advance in employment qualified individuals with disabilities. The OFCCP regulations implementing Section 503 can be found at 41 CFR Part 60-741 at <http://www.dol.gov/cgi-bin/leave-dol.asp?exiturl=http://s.dol.gov/9S&exitTitle=www.ecfr.gov&fedpage=yes>. Contracts below a minimum threshold value and certain other contracts are exempt from coverage.
- **Social Media** – Ubiquitous social media use in today’s workplace is a fact of life. Everyone is connected all the time. There is no one-size-fits-all solution on how a company can harness the benefits of employee participation while mitigating the risks. Your company should develop an effective policy for social media use. We can help.

Did you know for example that the National Labor Relations Board and the Federal Trade Commission both govern your workplace? The NLRB is aggressively protecting employees' rights to engage in protected, concerted activity (whether those employees are represented by a union or not). The Federal Trade Commission is monitoring consumer-generated media and endorsements, including employee endorsements of employers. Handbook provisions related to social media, confidentiality, insubordination and electronic media are all targets and should be reviewed for compliance.

Additionally, the EEOC is targeting the misuse of protected information gained by accessing a job applicant's social media information. Freely available information regarding race, marital status, and other protected class information may trigger anti-discrimination lawsuits. Job applicants may claim that the employer's use of this protected class information was the cause of their rejection from a prospective employment position.

**Massachusetts** law guarantees individuals the right to be secure from "unreasonable, substantial, or serious interference" with their privacy, and intrusions into areas in which the person has a legitimate expectation of privacy are prohibited. State law also prohibits the use of a person's "name, portrait, or picture" for purposes of trade without the person's written consent. Massachusetts employers must obtain employee written consent prior to use of photos, videos, and voice recordings of employees for commercial or advertising purposes.

- **Employment Eligibility – I-9 Documentation** - Under state and federal immigration laws and regulations, employers may legally hire workers only if they are U. S. Citizens or aliens authorized to work in the United States.

The Federal Immigration and Nationality Act requires all U. S. employers to verify that their employees are authorized to work in the United States. Verification is completed upon the submission of form I-9.

A revised Form I-9 is now [available](#). The previous version of Form I-9 with a revision date of 03/08/2013 is now invalid. The new Form I-9 is NOT an electronic I-9 as defined by the regulations. If a company uses this new form on a computer, it would still need to print the form, have the employee sign Section 1 and the employer would sign Section 2 and retain the original form.

All new hires must complete the Employment Eligibility Verification (Form I-9). Employers use the e-Verify to submit the information taken from Form I-9 to the Social Security Administration and the U. S. Citizenship and Immigration Services to determine whether the information matches government records.

In addition, the Illegal Immigration and Reform Enforcement Act and federal law established procedures for hiring certain aliens, including skilled workers and professionals in occupations with shortages of qualified U. S. workers, on a temporary or permanent basis.

The federal guest worker programs are:

- H-1B Temporary Labor Certification (Specialty Occupations);
- H-2A Temporary Labor Certification (Seasonal Agriculture);
- H-2B Temporary Labor Certification (Non-Agricultural);
- H-1C Nurses in Disadvantaged Areas;
- D-1 Crew Members Certification;
- Permanent Labor Certification.

More information regarding guest worker programs can be found on the USCIS [website](#).

- **Employment of Minors** – Federal and state laws closely regulate the employment of minors, imposing special restrictions on the terms and conditions of their employment. These laws and regulations impose restrictions and compliance obligations on employers, subjecting employers to criminal penalties, civil liability, and other exposure.

Federal labor laws prohibit children under the age of 18 from operating most work-assist vehicles and power-driven hoists. The laws also prohibit the use of chainsaws, wood chippers, reciprocating saws and performance of all forest-related services. There are some additional protections for 14 and 15 year olds: 15 years old is the minimum for lifeguarding at a traditional pool; and 14 and 15 year olds are prohibited from “youth peddling activities or non-charitable door-to-door sales.”

All individuals between the ages of 14 and 17 must secure an employment permit and written permission from the child’s parent or guardian prior to performing any work. The minor’s weekly schedule or hours and breaks must be posted in a conspicuous area in the workplace and must comply with the maximum daily and weekly hour restrictions contained within the law. All minors must be under adult supervision during work hours and must avoid hazardous areas. No minor under the age of 16 may work in a manufacturing facility.

**Massachusetts** law allows minors aged 16 and 17 to work between 6 a.m. and 10 p.m. on school nights. In establishments that serve customers until 10 p.m., the new law allows them to work until 10:15 p.m. and on non-school nights until 11:30 p.m. If they are employed by a racetrack or restaurant, they may work until midnight. Minors in this age group may work a maximum of 48 hours a week, 9 hours a day, and 6 days a week.

During the summer season, 14 and 15 year olds may work only between 7 a.m. and 9 p.m., no more than 8 hours a day, 40 hours per week and not more than 6 days a week. During the school year, 14 and 15 year olds may work a maximum of 18 hours a week, 3 hours a day on school days and up to 8 hours a day on weekends and holidays.

Most teenagers under the age of 18 are not permitted to use most kinds of power tools, and may not drive while at work. The law provides the Attorney General with the authority to immediately issue civil citations when investigators identify violations, which can include employers being personally liable for fines and penalties. The Attorney General also provides a “splash page” to give teenagers information regarding their job rights at [www.laborlowdown.com](http://www.laborlowdown.com).

- **Personnel Files** – The contents of personnel files are heavily regulated by a variety of federal and state laws. When determining whether to place a document in the personnel file, a best practice is to consider whether the document contains sensitive information, such as date of birth, marital status, dependent information, Social Security numbers, medical information, immigration status, national origin, race, gender, religion, sexual orientation, criminal history, financial history, subjective statements or accusations. If it does, the general personnel file is likely not the best place to store the document.

Employers should also consider where and how they maintain these files, limiting access to only those with a need to know and protecting applicants and employees from discrimination, identity theft, breach of privacy, GINA, FMLA, ADA and Health Insurance Portability and Accountability Act (HIPAA) violations.

Our office can assist you with the creation of a personnel file classification system, document retention schedule, and record disposal system and log.

Under the Commonwealth's Personnel Records Law, any employer who employs 20 or more employees must have a personnel record for each employee and retain a copy of the personnel record for at least three years after the employment relationship ends; or through the duration of any ongoing litigation, whichever is longer. Employers that employ fewer than 20 employees can, but do not have a legal obligation to, create personnel records for their employees. An employer who maintains a personnel record and receives a written request from an employee to inspect or obtain a copy of the record must comply with that request within five business days. Employees can request access to and/or a copy of his or her personnel file up to two (2) separate occasions each calendar year.

Under Massachusetts law, an employer that maintains a personnel record must notify an employee within 10 days of the employer placing in the employee's personnel record any information that has been or may be used to negatively affect the employee's qualifications for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action. If there is a disagreement as to the accuracy of the information contained within an employee's personnel record, the removal of the information can be mutually agreed upon by the employee and the employer. If the employer refuses to remove the information, the employee may submit a written statement explaining his or her position, which then becomes part of the employee's personnel record.

- **Reporting of New Hires** – Federal law requires all employers to report the hiring, rehiring and return to work of all paid employees. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, directs all states to adopt laws requiring employers to report information on newly hired employees to the state child support agency.

As a result of the pervasive use of independent contractors, the Massachusetts Department of Revenue is aggressively pursuing employers who fail to comply with

these reporting requirements and imposing strict fines. If you believe you are not in compliance, please refer to our discussion of The “Voluntary Classification Settlement Program.”

- **Smoking** – Any Massachusetts employer with even one employee must ban smoking in their workplace. Employers may continue to designate a smoking area outside of the workplace, but the area must be of sufficient distance away from the building so that the smoke does not enter the workplace. It is important to note that smoking breaks aren't required, but if allowed, employees must be compensated for that time.
- **Written Information Security Plan (WISP)** – Massachusetts law requires any business that collects personal information from a resident of Massachusetts must safeguard personal information contained in both paper and electronic records. In plain language, this means that all employers that employ residents of Massachusetts must have a Written Information Security Plan in place that covers the following:
  - Details measures adopted to safeguard personal information;
  - Designates at least one person to manage the security program;
  - Imposes disciplinary measures for violations of the program;
  - Limits access to personal information;
  - Monitors security to prevent unauthorized use; and
  - Documents all incidents involving breach and all corrective actions taken as a result.

We have developed a comprehensive compliance program that includes a compliance audit and the preparation of a Written Information Security program. We also work in tandem with an IT specialist to ensure that our clients' systems comply with the law's encryption requirements. Please call us if you would like our assistance in achieving compliance with this workplace regulation.

- **Temporary Worker's Right to Know** – For each new assignment, staffing agencies (also referred to as “temporary agencies”) must provide each employee with a written job order containing certain information such as: the name, address, and telephone number of the staffing agency and its workers' compensation carrier; the name, address and telephone number of the worksite employer; the name of the department within which they will be assigned; the kind and character of the employment, including any requirement for special clothing, accessories, tools, equipment, training or licenses, and any costs that will be charged to the employee; the designated payday and the actual hourly rate of pay, overtime pay, and compensation; the daily starting time, anticipated end time, and, where known, the expected duration of employment; any meals provided by the staffing agency or worksite employer and the cost of such meals; details of the transportation required or offered to the employee by the staffing agency, the worksite employer, or any person acting on either's behalf and the cost of such transportation; and a multilingual notice that the job order contains important information about the employment and that the notice should be translated.

Additionally, staffing agencies are prohibited from charging workers for registering with the agency to receive its services, the cost of criminal background checks, or any other

goods that would cause the employee's rate of pay to fall below minimum wage.

Please note that professional, administrative, and secretarial employees are exempt from this law.

- **Employment Tests and the EEOC** – Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many types of tests and selection procedures, including: cognitive tests; personality tests; medical examinations; credit checks; and criminal background checks just to name a few. The use of these tests and selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. At the same time, the use of these tools can violate federal anti-discrimination laws if an employer uses them to discriminate based on a protected class. Title VII permits employment tests as long as the tests are not designed, intended, or used to discriminate based upon a protected class.
- **Post-Offer Pre-Employment Physicals and Medical Inquiries** – Physical examinations and medical inquiries are permissible only after an offer of employment has been made. However, the Americans with Disabilities Act places three restrictions on post-offer inquiries:
  - All prospective employees in the same category must be subjected to the same inquiries;
  - The medical records must be retained separately from the personnel file to ensure confidentiality of the information contained therein; and
  - The examination or inquiry addresses only essential, job-related abilities.
- **Non-Medical Tests** – Employers may administer non-medical, pre-employment tests to job applicants without first making a conditional offer of employment, provided all the following elements are met:
  - The test is required of all applicants for the same position;
  - The test measures only essential, job-related abilities; and
  - The test accurately measures aptitude or achievement, rather than reflecting an applicant's impaired sensory, manual or speaking skills, except when those particular skills are the factors the tests are designed to measure.
- **Lie Detectors and Polygraph Testing** – The federal Employee Polygraph Protection Act (EPPA) is administered by the Wage and Hour Division (WHD) of the United States Department of Labor. The EPPA prohibits most private employers from using lie detectors, either for pre-employment screening or during the course of employment.

Additionally, employers are prohibited from taking retaliatory action against employees or prospective employees for refusing to submit to a lie detector test, and may not discriminate on the basis of test results. Every employer subject to EPPA must post and keep posted on its premises a notice explaining the Act.

- **Volunteer Service** – If your employment application invites applicants to list volunteer service under their employment history, the form must explain that the applicant need not include organization names that would indicate possible membership in a protected class such as race, national origin, religion, sex, and/or age.
- **Drug and Alcohol Tests** – Employers may test applicants for illegal drug use before extending a job offer, or after extending a conditional job offer. Typically, where a conditional job offer is extended, the applicant agrees to be tested as a condition of employment and further agrees that they will not be hired if they fail to produce a negative test result. However, employers must be aware that under the ADA an individual who has been diagnosed by a physician as an alcoholic likely has a disability as defined by the ADA. While an employer may be required to provide a reasonable accommodation to an alcoholic, an employer can discipline, discharge or deny employment to an individual who engages in the use of illegal drugs or alcohol if that use affects job performance or conduct.

### **Ending the Employment Relationship**

- **Compensation** - Employees whose employment has been involuntarily terminated must be paid their final paycheck and must receive payment for any and all accrued vacation time on their last day of work. Employees who voluntarily resign must be paid all wages, including accrued vacation time, by their next scheduled payday.
- **Group Health Insurance Continuation** – Under federal law and many state laws, employees have the right to continue health insurance coverage for themselves and their covered dependents when they lose coverage due to certain “qualifying events.”
- **COBRA** – COBRA is an acronym for the federal law that covers all employers with twenty or more employees (the Consolidated Omnibus Reconciliation Act). Under federal law, employers with twenty (20) or more employees must offer health insurance continuation to employees and their covered dependents when they lose coverage due to certain “qualifying events.” Continuation must be afforded for all coverage in effect at the time of the qualifying event, including medical, dental, and vision coverage.
  - **Notice:** The Employee Benefits Security Administration has issued an updated model election notice under COBRA to include additional information regarding health coverage alternatives offered through the Marketplace. Please see: [www.dol.gov/ebsa/healthreform](http://www.dol.gov/ebsa/healthreform).

Qualifying events occur in three major categories under federal COBRA:

- **Employee** – A qualifying event affecting an employee may be: voluntary or involuntary termination of employment for reasons other than gross misconduct; or a reduction in the number of hours of employment;
- **Spouse** – A qualifying event affecting a spouse may be: a voluntary or involuntary termination of the covered employee’s employment for any reason other than gross misconduct; reduction in the hours worked by the covered employee; covered

- employee becoming entitled to Medicare; divorce or legal separation from the covered employee; death of the covered employee;
- **Dependent Child** – A qualifying event affecting a dependent child may be: the same events listed for spouse, above; and loss of dependent child status under the plan rules.

General and election model notices are currently located in the appendix to COBRA regulations. The proposed rule would eliminate the current model notices from the regulation and instead provide model notices through guidance to make it easier to update the model notices. The new model notices reflect that coverage is now available in the Marketplace and the updated model election notice provides information on special enrollment rights in the Marketplace.

- **Massachusetts Continued Coverage** - Massachusetts has a “Mini-COBRA” law that applies to employers with between two and nineteen employees. This law applies to medical coverage only but otherwise mirrors COBRA.
- **Do Plant Closing Laws Apply?** - Employers having 100 or more employees are subject to the federal Worker Adjustment and Retraining Notification Act (WARN). WARN requires employers with 100 or more employees to give 60 days’ notice prior to a “plant closing,” a lay-off, or when terminating 50 or more employees. There are penalties and fines for failing to comply with WARN’s requirements, including attorney’s fees.

**Notice to the state?** Except in the event of a mass layoff, no notice to the state is required for any kind of work separation, but if the employee was subject to a wage garnishment order for child support or alimony, the employer must notify the New Hire division of the Attorney General's office within seven days of the work separation. In the case of certain lump-sum payments of severance pay, bonuses, commissions, accrued leave, or similar post-termination payments, any child support or alimony amounts must be taken out of such payments.

- **Unpaid Intern or Employee** –The FLSA defines the term “employee” very broadly as including to “suffer or permit to work.” Covered and non-exempt individuals who are “suffered or permitted” to work must be compensated under the law for the services they perform for an employer. Internships in the “for-profit” private sector will most often be viewed as employment, unless the test described below relating to trainees is met. Interns in the “for-profit” private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for any hours worked over 40 in a work week.

There are some circumstances under which individuals who participate in “for-profit” private sector internships or training programs may do so without compensation. The U.S. Supreme Court has held that the term “suffer or permit to work” cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The

determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern. This exclusion for the definition of employment is necessarily quite narrow because the FLSA's definition of "employee" is very broad.

There is no exception in the **Massachusetts Minimum Fair Wage Law** generally applicable to "interns." Rather, anyone performing services while undergoing "training" is considered to be an employee who is working and subject to the state's minimum wage guarantees, unless the work is under a training program in a charitable, educational or religious institution. Accordingly, interns and trainees performing services in Massachusetts workplaces must be paid minimum wage as a matter of state law unless they are under a training program in some type of charitable, educational or religious institution. Additionally, the Massachusetts standard for when interns must be paid minimum wages applies across the board, in both the for-profit and the non-profit sectors. Finally, it is also worth noting that the Massachusetts Department of Labor Standards has adopted the six-part test used by the DOL to determine whether a particular program in an educational or charitable institution qualifies as a "training program" within the meaning of the state statute. This means that, as a matter of Massachusetts state law, interns and trainees in Massachusetts workplaces generally must be paid state minimum wages unless the employer can satisfy the state's criteria as well as the six-part test used by the DOL for purposes of federal law.

## II. **WORKPLACE HARASSMENT AND DISCRIMINATION**

Here is a brief summary of state and federal law:

- **Discrimination Charges with State and Federal Administrative Agencies** – A combination of federal administrative agencies and courts enforce laws prohibiting employment discrimination. In general, a claim of discrimination typically begins with the filing of a discrimination charge with an administrative agency. The agency is then given an opportunity to investigate the charge and attempt to resolve the dispute between

the employee and the employer. If the charge is not resolved, the employee may proceed with the administrative process through a decision or may sue the employer in civil court.

- **Discrimination Under Federal Law** - The federal law covers employers who employ fifteen or more employees, and prohibits all forms of discrimination based on age, disability, race, color, creed, sex, sexual harassment, genetic information, religion (both beliefs and practices), and national origin. Federal law does not directly prohibit the basing of employment decisions on an applicant's criminal history. However, employers must insure that such an inquiry is based upon a business necessity and does not have a direct impact on a protected group. In general terms, the Equal Employment Opportunities Commission (EEOC) enforces the federal law, known as Title VII.
  - **The Equal Employment Opportunity Commission (EEOC)** – The EEOC has primary responsibility for enforcing federal employment discrimination laws. All laws enforced by the EEOC, except the Equal Pay Act, require filing a charge with the EEOC or a state agency before a private lawsuit may be filed in court. The charging party must file a charge with the EEOC within 180 days from the date the alleged violation occurred. The deadline is extended to 300 days if state or local anti-discrimination laws also cover the charge, or if the charge is brought under the Age Discrimination in Employment Act (ADEA).
  - **EEOC Procedures** – Within ten days after filing a charge, the EEOC will send a notice of such charge to the employer with the name and contact information for the investigator assigned to the case. The charge itself does not constitute a finding that the employer engaged in discrimination. The EEOC has responsibility to investigate and determine whether there is a reasonable cause to believe discrimination occurred. As part of the investigation, the EEOC will require the employer to respond to the employee's allegations by submitting a statement of position. Employers should fully investigate the allegations and charges before filing a position statement. Untrue or inaccurate statements in a position statement will be used against the employer as evidence that the employer is attempting to cover up the alleged discriminatory actions. For the purposes of investigation and resource allocation, the EEOC categorizes each claim as follows:
    - **Category A** – Further investigation is likely to result in a finding of discrimination. The charge will receive priority treatment and will be investigated further.
    - **Category B** – It is unclear whether discrimination has occurred and the charge requires further investigation.
    - **Category C** – It is unlikely that further investigation will disclose a violation because the claims include non-jurisdictional or unsupported charges. The charge will be dismissed without further investigation.

A successful plaintiff may be entitled to back and front-pay, compensatory and punitive damages, reinstatement, and attorney's fees.

- **The Massachusetts Equal Rights Act (MERA)** – The Massachusetts Anti-Discrimination Law (Chapter 151B) prohibits discrimination in the workplace, and includes more protected classes than those defined by federal law. Massachusetts employers are prohibited from discriminating against prospective employees based on race, color, religious creed, national origin, ancestry, sex, gender identity, age, criminal record, handicap (disability), mental illness, retaliation, sexual harassment, sexual orientation, active military personnel, veteran status, and genetics. In addition, employers have an affirmative responsibility to provide maternity leave to biological and adoptive parents. The Massachusetts Commission Against Discrimination (MCAD) enforces Chapter 151 B.
  
- **Poster** – The Massachusetts poster regarding Chapter 151B can be found at: <http://www.mass.gov/mcad/documents/FairEmploymentLawPoster.pdf>.
  
- **Disability and the ADA** – The Americans with Disabilities Act (ADA) is the federal law that prohibits discrimination against a qualified individual who is disabled. The ADA applies to employers with fifteen or more employees. A “qualified individual” is a person who meets the legitimate skill, experience, education or other requirements of a position and who can perform the essential functions of that job, with or without accommodation. In 2008, Congress passed the ADA Amendments Act of 2008 (ADAAA), in response to a number of Supreme Court cases that had narrowed the list of impairments that qualify as a disability. The ADAAA made important changes to the ADA’s definition of the term “disability,” making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. *See* 42 U.S.C. 12102(1)(A)-(C). In 2016, the Department of Justice revised the ADA to include the ADAAA amendments. The revisions state that the definition of disability “shall be interpreted broadly,” expanding the definition of “major life activities” by providing a non-exhaustive list of major life activities, specifically including the operation of major bodily functions. The revisions also add rules of construction that should be applied when determining whether an impairment substantially limits a major life activity. The rules of construction state the following:
  - That the term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;
  - That an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;
  - That the primary issue in a case brought under the ADA should be whether the covered entity has complied with its obligations and whether discrimination has occurred, not the extent to which the individual’s impairment substantially limits a major life activity;
  - That in making the individualized assessment required by the ADA, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA;
  - That the comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;

- That mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability;
- That an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- That an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

Finally, the revisions clarify that the definition of “regarded as” does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity and provides that individuals covered only under the “regarded as” prong are not entitled to reasonable modifications.

- **Disability Under Massachusetts Law** - In Massachusetts, employers with six or more employees must reasonably accommodate a qualified disabled person unless to do so would cause undue hardship to the employer. For example, the Massachusetts Commission Against Discrimination found that the employer had grounds for termination where an employee failed to monitor her diabetes, and frequently required her employer to assist her in seeking medical attention. These major disruptions to the workplace were found to impose an undue burden on the employer.

In contrast, an employer was not found to be subject to an undue hardship where an employee was consistently absent for medical reasons and the employer had a rotating schedule of receptionists to conveniently fill her position.

- **Genetic Discrimination – Federal** – The EEOC enforces Title II of GINA, which stands for the Genetic Information Nondiscrimination Act. GINA prohibits the use of genetic information in making employment decisions in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment. Genetic information is a written record or an explanation of a genetic test with regard to the presence, absence or variation of a gene.

Under the GINA, family medical history is "genetic information," employers are not allowed to obtain, directly or indirectly from your employees. (There are a few exceptions, but this is the general rule.) This creates a risk for employers that request documentation for purposes of sick leave, or send an employee for a medical examination that fully complies with ADA and state law requirements, because if the doctor asks about the employee’s family history (even if the employer does not know that the doctor is doing so), the company could be liable for a GINA violation. Fortunately, the GINA regulations also provide certain “safe harbor” language. An employer who provides this language to the health care provider will be protected, even if the health care provider asks questions that he or she should not. Please contact us if you need the “safe harbor” language or have any questions.

- **Genetic Discrimination – Massachusetts General Laws, Chapter 151 B** - prohibits employers from:
  - Terminating or refusing to hire individuals on the basis of genetic information;

- Requesting genetic information concerning employees, applicants, or their family members;
- Attempting to induce individuals to undergo genetic tests or otherwise disclose genetic information;
- Using genetic information in any way that effects the terms and conditions of an individual's employment; or
- Seeking, receiving or maintaining genetic information for any non-medical purpose.

Genetic information is a written record or an explanation of a genetic test with regard to the presence, absence or variation of a gene.

- **Caregiver Discrimination** – As the number of employees with child and elder care responsibilities continues to grow, more workers are filing lawsuits claiming discrimination on the job as a result of their caregiver duties. Claims of “family responsibilities discrimination” have seen a 400% rise in the last decade.
- **Age Discrimination - ADEA** – All employees who are 40 years old or older are in a protected class and therefore cannot be discriminated against based upon their age. The Age Discrimination in Employment Act of 1967 (ADEA) applies to employers with 20 or more employees, including state and local governments, and protects individuals from adverse employment decisions relating to hiring, firing, promotion, layoff, compensation, benefits, job assignments and training, based in whole or in part upon the employee's age.

The Massachusetts Commission Against Discrimination is the state agency that enforces this state's prohibition against discrimination based upon an employee's age. Employers of six or more individuals are covered by the Massachusetts law.

- **Military Service Discrimination** – The current law in Massachusetts prohibits employers from denying employment, re-employment, and retention of employment, promotion or any benefit of employment to any person because of their membership in the armed services or obligations to any military service. In 2016, the HOME Act extended this protection to veterans. A veteran is any person with an honorable discharge who served in any branch of the U.S. military or who served full time in the National Guard under certain conditions. Any person who served in wartime and was awarded a service-connected disability or Purple Heart is also a qualifying veteran. Refusal to comply with these obligations constitutes discrimination based upon military service. Massachusetts law does not impose any greater obligations than those defined within the Federal Uniformed Employment and Re-Employment Rights Act (USERRA). We address military leave under Section VII, Leave from Work, in this Overview.
- **Volunteer Firefighters** – Volunteer Firefighters are protected from termination by their employers for responding to an emergency related to a fire, rescue, emergency medical service call, hazardous materials incident, or a disaster.

- **Transgender Equal Rights Act** – In July 2012, Massachusetts joined sixteen states and the District of Columbia in providing legal protection against discrimination based on gender identity or expression in employment, housing, education, credit and hate crimes.
- **Drug and Alcohol Testing** – According to the National Survey on Drug Use and Health, most illicit drug users are employed. Not surprisingly, the U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration has reported that, compared with non-substance abusers, substance abusing employees are more likely to: change jobs frequently; be late to or absent from work; be less productive employees; be involved in a workplace accident; or file a workers’ compensation claim. Many employers who have implemented drug and alcohol workplace programs or testing programs have experienced positive results: improvements in morale and productivity with decreases in absenteeism, accidents, down time, turn over, theft; better health status among employees; decreased use of medical benefits; and decreased cost for workers’ compensation.

Surprisingly, the issue of drug testing has not been addressed on a broad level by either federal or state legislators. The Drug Free Workplace Act of 1988 requires federal government contractors and employers receiving contracts to ensure a drug-free workplace, but curiously does not require testing to achieve compliance. Employers who employ drivers who are required to possess a commercial driver’s license (CDL) are governed by the Department of Transportation (DOT) regulations requiring testing for alcohol and controlled substances.

It is important to remember that illegal use of drugs, controlled substances, or prescription drugs, is not protected by the ADA regardless of whether the employee is considered an addict or an occasional user. Current alcohol use, in contrast, may be protected by the ADA if the employee is diagnosed as an alcoholic by his or her treating physician.

Upon the implementation of a drug-free workplace program, in accordance with the specified legal requirements, employers will qualify for a premium discount certified under the employer’s workers’ compensation insurance policy.

The following elements must be included in an employer’s drug-free workplace program in order to qualify for the workers’ compensation premium discount:

- A written policy statement;
- Substance abuse testing;
- Resources of employee assistance providers;
- Employee education;
- Supervisor training; and
- Confidentiality standards.

- **Marijuana** – Under the Federal Controlled Substances Act (“CSA”) (21 U.S.C. § 811), marijuana is classified as a Schedule I drug, which means the federal government views marijuana as highly addictive and having no medical value. Doctors may not prescribe

marijuana for medical use under federal law, but they may recommend its use under the First Amendment.

However, while marijuana remains illegal under the CSA, which does not recognize a difference between medical and recreational use of marijuana, the number of states passing laws to legalize marijuana in some form has grown in recent years and several more states are expected to vote on further legalization before the end of next year. Twenty-eight states and the District of Columbia have legalized medical marijuana, with eight states including Massachusetts protecting the use of recreational marijuana as well. While it is still a best practice to follow a zero tolerance policy for drug and alcohol use at work, many employers are choosing to carve out exceptions for medicinal marijuana use outside of the workplace rather than a blanket prohibition on drug use outside of work.

In 2016, recreational marijuana possession and use was decriminalized in Massachusetts. In 2018 retailers will be able to begin selling marijuana. This change in the law requires employers to revisit their policies related to drug and alcohol use at work. Massachusetts law does not yet provide anti-discrimination protections for medicinal or recreational marijuana users. However, the first Massachusetts workplace medical marijuana lawsuit was filed in September of 2015 by an employee alleging she was improperly fired from her job for using marijuana legally obtained for medical reasons.

- **Pregnancy** – Employers are prohibited from using a woman’s pregnancy, childbirth or potential use of maternity leave as a reason for any adverse employment action. Adverse employment actions include refusing to hire or promote, lay-off, failure to reinstate, or restricting duties. Pregnancy-related complications qualify as a bona fide disability under the ADA, and obligate the employer to consider reasonable accommodations.

After the U.S. Supreme Court decision in *Young v. UPS*, which sets forth the test for determining when to accommodate a pregnant employee, the EEOC updated the Enforcement Guidance on Pregnancy Discrimination and Related Issues in June of 2015. The updated enforcement documents can be found at:

[http://www.eeoc.gov/laws/guidance/enforcement\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm).

- **Religious Freedom** – Both federal and state statutes protect workers from discrimination in the workplace based upon their sincerely held religious beliefs. Religious discrimination charges relating to a wide range of issues have steadily increased.

The EEOC has issued two technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming under Title VII of the Civil Rights Act of 1964. The question-and-answer guide, entitled "[Religious Garb and Grooming in the Workplace: Rights and Responsibilities](#)," and an [accompanying fact sheet](#), provide a user-friendly discussion of the applicable law, practical advice for employers and employees, and numerous case examples based on the EEOC’s litigation.

In July 2016 the EEOC released a one page fact sheet entitled “Religion & Your Job Rights” as part of its Youth@Work outreach, which aims to inform younger workers of

their right. [www.eeoc.gov/youth](http://www.eeoc.gov/youth) The prior year, the U.S. Supreme Court held that “[t]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” The court found that the retailer Abercrombie & Fitch’s decision not to hire a Muslim applicant because she wore a hijab that did not meet the company’s dress code amounted to discrimination even though the applicant did not specifically request religious accommodation. The Court also clarified that even if an employer has a neutral dress policy (e.g. Abercrombie’s policy of “no headwear”) and applies it to everyone, regardless of religion, the employer can still be liable for discrimination.

In **Massachusetts**, an employer may refuse to accommodate an employee’s request to be absent from work due to a religious reason if the employer can show that such accommodation would be an undue hardship on the business.

- **Race** – Employers are prohibited from engaging in conduct that would discriminate on the basis of race and color.
- **Sexual Harassment** – Sexual harassment is considered a form of gender discrimination under state and federal law. In Massachusetts, employers with six or more employees must have a written policy that addresses the prohibition against sexual harassment. Employees must also distribute the policy to all new hires, and to all existing employees annually. We have developed a model sexual harassment prevention policy and training program. Please contact us for more information about these resources.
- **Sexual Orientation and Gender Identity as Protected Classes** –The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) has a rule that prohibits federal contractors from discriminating in employment on the basis of sexual orientation or gender identity. Although this protection has not been explicitly extended to all private employers, the EEOC has interpreted Sex Discrimination to include discrimination on the basis of sexual orientation and gender identity and filed sex discrimination suits throughout the country against employers who allegedly discriminated on the basis of sexual orientation or gender identity.

**Massachusetts** law specifically prohibits discrimination on the basis of sexual orientation and/or gender identity.

- **The Ledbetter Fair Pay Act** – As we know, it is unlawful for employers to discriminate against an employee based on an employee’s gender with respect to hiring, firing, promotion, job training, compensation, or any other term, condition, or privilege of employment. The right of employees to be free from discrimination in compensation is protected under several federal and state laws. Under the Ledbetter rules, the date of the initial offense is no longer relevant for purposes of a limitations defense if there is a continuing violation. In fact, the continuing violation keeps the discriminatory claim alive indefinitely.
- **Massachusetts Pay Equity Act** – In 2016, the Massachusetts Pay Equity Act was passed in 2016 to provides greater clarity on what constitutes unlawful pay discrimination and

imposes new rules and restrictions on employers. The law goes into effect January 1, 2018, and includes a number of new obligations for employers.

The Act makes it generally illegal for an employer to pay employees compensation at a lower rate than the rate paid to employees of a different gender for comparable work. The law eliminates the requirement that “comparable work” involve similar duties. Instead, under the new law, comparable work is “work that is substantially similar in that it requires substantially similar skill, effort, and responsibility and is performed under similar working conditions.” The law also provides that “a job title or job description alone shall not determine comparability.”

Although the Act’s prohibition on unequal compensation is broadly worded, it also contains important new defenses for employers that were not available under the old law. Under the new law, an employer is not liable if it can demonstrate that a pay difference for comparable work is based on one or more of the following factors:

- A bona fide seniority system; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority;
- A bona fide merit system;
- A bona fide system that measures earnings by quantity or quality of production or sales;
- The geographic location in which a job is performed;
- Education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or
- Travel, if the travel is a regular and necessary condition of the particular job.

Notably, the Act also establishes an affirmative defense for employers who have audited their pay practices within the prior three years. Specifically, employers who voluntarily review their pay practices and “demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work,” have an affirmative defense to pay discrimination claims. Foley & Foley can conduct Pay Equity Audits that will assist employers with utilizing the affirmative defense in the event of an Equal Pay Act claim.

In addition to the equal pay requirements, the Pay Equity Act also makes it illegal for an employer to: (1) require that an employee refrain from inquiring about, discussing or disclosing information about the employee’s own wages, or any other employee’s wages; (2) screen job applicants based on their wages; (3) request or require an applicant to disclose prior wages or salary history; or (4) seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment – including proposed compensation – has been made.

An employer may, however, prohibit human resources employees, or any other employee whose job responsibilities require access to other employees’ compensation information, from disclosing such information. The new law also contains anti-retaliation provisions for any employee who opposes an action or practice made illegal under this section.

Prior to 2018, employers must remove salary history questions from applications, and understand that they can no longer seek this information prior to making an offer of employment.

### III. WAGE AND HOUR OBLIGATIONS

- **Fair Labor Standards Act (FLSA)** – Federal law establishes minimum wage, overtime pay, record keeping, and child labor requirements for full-time and part-time employees in the private sector and in federal, state and local governments.
- **Massachusetts Fair Wage Act (MFWA)** - Massachusetts law and regulations also address minimum wage, overtime eligibility and several issues not addressed by the FLSA such as: meal periods, vacation pay, and reporting time pay. Massachusetts was the first state to enact what many consider to be an anti-business wage law in 2008. The law - “*An Act to Clarify the Law Protecting Employee Compensation*” - makes practically any violation of Massachusetts wage and hour laws subject to mandatory treble damages, and leaves the courts with virtually no discretion to limit the employee’s recovery to single damages. The First Circuit expanded on the Act in 2013, finding that employees may collect damages arising from common law causes of action (such as breach of contract), as long as the common law remedy was not in direct conflict with the FLSA. The ramifications of this decision are significant. The statute of limitations for violations of the Massachusetts Wage Act has been extended to three years, up from two years, as of the fall of 2014. Additionally, the time for filing is put on hold (tolled) from the time an employee files a complaint with the AG’s office to when the AG issues a right to sue letter or its enforcement action becomes final. Employees are now empowered to collect damages arising from common law claims as well as from violations of the FLSA, the Massachusetts Fair Wage Act (MFWA), and other applicable statutes.
- **Overtime Eligibility** – The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping, and child labor requirements for full-time and part-time employees in the private sector and in federal, state and local governments. For the purposes of determining overtime eligibility, the law defines two categories of employees, non-exempt and exempt:
  - **Non-exempt** employees may be paid on an hourly basis or salaried basis and must receive time-and-a-half for all hours worked in excess of forty hours in a workweek.
  - **Exempt** employees must be paid on a salaried basis and must meet the salary and duty tests for administrative, professional, or executive employee as defined under the Fair Labor Standards Act (FLSA). Exempt employees are not entitled to overtime, regardless of the number of hours worked in a workweek.
- **Updated Rules on Overtime Eligibility** – In July 2015 the Department of Labor released a proposed update to the regulations governing which executive, administrative, and professional employees (white collar workers) are entitled to the Fair Labor Standards Act’s minimum wage and overtime pay protections. In 2016 a Final Rule was published and set to go into effect on December 1, 2016 that would raise the minimum salary to \$913 per week or \$47,476 per year. In late November, 2016 a judge issued an

injunction preventing the Final Rules from going into effect on December 1, 2016. Until this matter is determined by trial or by Congressional action, the current salary threshold for the exemptions will remain \$455 per week (\$23,660 per year).

## **EXEMPT CATEGORIES UNDER FEDERAL LAW**

1. **Executive Exemption** – To qualify for the executive employee exemption, *all* of the following tests must be met:

### **Compensation Test:**

- The employee must be compensated on a salary basis at a rate not less than \$455.00 per week.

### **Duties Test:**

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise – these duties must consume close to 50% of the time the employee works on a regular workday;
- The employee must customarily and regularly direct the work of at least two or more other full time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

2. **Administrative Exemption** – To qualify for the administrative employee exemption, *all* of the following tests must be met:

### **Compensation Test:**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455.00 per week.

### **Duties Test:**

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duties include the exercise of discretion and independent judgment with respect to matters of significance.

3. **Professional Exemption** – To qualify for the learned professional employee exemption, *all* of the following tests must be met:

**Compensation Test:**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455.00 per week.

**Duties Test:**

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominately intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

4. **Creative Professional Exemption** – To qualify for the creative professional employee exemption, *all* of the following tests must be met:

**Compensation Test:**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455.00 per week.

**Duties Test:**

- The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

5. **Computer Employee Exemption** – To qualify for the computer employee exemption, *all* of the following tests must be met:

**Compensation Test:**

- The employee must be compensated either on a salary or fee basis at a rate not less than \$455.00 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 per hour.

**Duties Test:**

- The employee must be employed as a computer system analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below.
- The employee's primary duty must consist of: 1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design

specifications; 3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4. Combination of the aforementioned duties, the performance of which requires the same level of skills.

6. **Outside Sales Exemption**– To qualify for the outside sales employee exemption, *all* of the following tests must be met:

**Compensation Test:**

- The employee must be compensated on a salary basis at a rate not less than \$455.00 per week.

**Duties Test:**

- The employee’s primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer’s place or places of business.

7. **Highly Compensated Employees Exemption** – Highly compensated employees who perform office or non-manual work and are paid total annual compensation of \$100,000.00 or more are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard test for exemption.

**Compensation Test:**

- The employee must be compensated on a salary basis at a rate not less than \$100,000 or more annually.

**Duties Test:**

- Customarily and regularly performs at least one of the duties of an exempt executive, administrative or professional employee.

**\* The salary levels in the compensation test will remain at the current levels until the DOL’s rules take effect or Congress issues a new law. At that time, if the Final Rules are adopted the salary levels will rise to \$913 per week (\$47,476.00 per year), and the total for Highly Compensated Employees will rise to \$134,000.00.**

We can help you audit and classify your employees to attain compliance with applicable state and federal wage and hour laws. Please contact us to discuss options and request assistance.

**Under Massachusetts law, all employees must be paid overtime with the exception of the following limited categories of employees:**

- Janitor or caretaker of residential property, who when furnished with living quarters is paid a wage of not less than thirty dollars per week.

- Golf caddy, newsboy or child actor or performer.
- Bona fide executive, or administrative or professional person or qualified trainee for such position earning more than eighty dollars per week.
- Outside salesman or outside buyer.
- Learner, apprentice or handicapped person under a special license as provided in section nine.
- Fisherman or as a person employed in the catching or taking of any kind of fish, shellfish or other aquatic forms of animal and vegetable life.
- Switchboard operator in a public telephone exchange.
- Driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section two hundred and four of the motor carrier act of nineteen hundred and thirty-five, or as employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act or subject to title II of the Railway Labor Act.
- In a business or specified operation of a business which is carried on during a period or accumulated periods not in excess of one hundred and twenty days in any year, and determined by the commissioner to be seasonal in nature.
- Seaman.
- An employee of an employer licensed and regulated pursuant to chapter 159A.
- An employee employed in a hotel, motel, motor court or like establishment.
- An employee employed in a gasoline station.
- An employee employed in a restaurant.
- An employee employed as a garageman, which term shall not include a parking lot attendant.
- An employee employed in a hospital, sanitorium, convalescent or nursing home, infirmary, rest home or charitable home for the aged.
- An employee employed in a non-profit school or college.
- An employee employed in a summer camp operated by a non-profit charitable corporation.
- An employee employed as a laborer engaged in agriculture and farming on a farm.
- An employee employed in an amusement park containing a permanent aggregation of amusement devices, games, shows, and other attractions operated during a period or accumulated periods not in excess of one hundred and fifty days in any one year.

Massachusetts employers should take note that unless an employee is exempt from both FLSA and Massachusetts overtime law, he or she must be paid overtime.

We can help you audit and classify your employees to attain compliance with applicable state and federal wage and hour laws. Please contact us to discuss options and request assistance.

- **Training Time** – Attendance at courses, lectures, meetings, training programs, and similar activities generally do not constitute hours worked under the following conditions:
  - The attendance is outside normal working hours;
  - The attendance is voluntary;

- The course, lecture, meeting, or training is not directly related to the employee's current job assignment; and
  - No work of value is performed for the employer.
- **Travel Time** – An employer does not have to pay an employee for the time the employee spends commuting to and from work. However, an employer is obligated to compensate an employee for travel during the workday if that travel benefits the employer. If an employee who regularly works at a fixed location is required to report to a location other than the regular work site, the employee must be compensated for the travel time in excess of the employee's ordinary travel time between home and work.

The IRS publishes special per diem rates for taxpayers to use to substantiate ordinary and necessary business expenses incurred while traveling away from home, specifically:

1. The special transportation industry meal and incidental expenses rates (M&IE).
2. The rate for the incidental expenses only deduction.
3. The rates and list of high-cost localities for purposes of the high-low substantiation method. Taxpayers using the rates and list of high-cost localities provided must comply with Rev. Proc. 2011-47, I.R.B. 2011-42, 520.

The 2016-2017 Special Per Diem Rates notice can be found at <https://www.irs.gov/pub/irs-drop/n-16-58.pdf>.

- **Sleep Periods** – An employee required to be on duty at the worksite for less than 24 hours is considered to be working, regardless of whether the employee is permitted to sleep or engage in any other personal activities when not busy. Employees that are required to be on duty at the work site for 24 hours or more may establish an agreement with their employer, prior to performing work, to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period, of no more than eight hours. However, this agreement will be valid only if the employer provides adequate sleeping quarters where employees may enjoy an uninterrupted sleep.
- **Reporting Time Pay** – Employees who are scheduled to work three or more hours and to report for duty on time must be paid for at least three hours of work, at no less than the minimum wage, when the employee is not provided with the expected hours of work.
- **Minimum Wage** – As of January 1, 2017, the current Massachusetts minimum wage is \$11.00 per hour. For tipped employees, the minimum wage is \$3.75 per hour. The federal minimum wage is \$7.25 per hour.
- **Nursing Mothers** – The Patient Protection and Affordable Care Act (ACA) amended Section VII of the FLSA to require employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such an employee has a need to express milk. Employers are also required by the ACA to provide a place for employees to express milk other than a bathroom that is shielded from view and free from intrusion from co-workers and the public.

- **Payroll Cards** – Employers may not require employees to receive wages on a payroll card. This prohibition arises from the impact of the Electronic Fund Transfer Act (EFTA) and the consumer protections that apply to payroll cards, including limited liability for unauthorized transfers and error resolution rights. Employers wishing to implement payment of wages by payroll card must take the following steps:
  - Provide current employees with a written explanation of any fees associated with the payroll card. Such fees can include “withdrawal” or “usage” fees, as well as fees to replace a lost payroll card.
  - Provide employees with a form that allows employees to opt out of the payroll card payment and request either a paper check or direct deposit.
  - Both of these documents must be provided to current employees at least 30 days before an employer implements a payroll card account system. For new employees, the documents must be provided at the time of hire.
  
- **Home Care Workers** – Federal minimum wage and overtime protections under the Fair Labor Standards Act (FLSA) apply to home care workers. Third party employers, such as home care staffing agencies, are not entitled to claim either the FLSA’s companionship services or live-in domestic service employee exemptions.
  
- **Reducing an Employee’s Wage Rate** – Employers are permitted to reduce an employee’s rate of pay, provided the employee received 30-days prior notice. This rule does not apply to situations in which the employer reduces an employee’s hours or transfers the employee to a different position with different duties.
  
- **Required Rest Periods** – Employers must provide each employee who works six or more consecutive hours with a thirty minute unpaid meal break. Unlike many wage and hour rights, an employee may voluntarily waive a meal break in writing. Employers may also decide to pay for the thirty-minute break time.
  
- **Payment of Wages** – Compliance with Massachusetts wage and hour obligations is a tedious responsibility for all employers. The Department of Labor does conduct audits and here are some of the more common areas that are examined for compliance:
  - All non-exempt employees must be paid weekly or bi-weekly;
  - All non-exempt employees must be paid within six days from the end of their pay period;
  - Employers can change from a weekly to a bi-weekly pay period for non-exempt employees but must provide each employee with written notice at least ninety days in advance of the first bi-weekly pay;
  - Exempt employees can be paid weekly, bi-weekly, semi-monthly and, with their consent, monthly;
  - Employers are required to withhold various state and federal taxes from employee’s paychecks and must maintain records of these withholdings;
  - Employers must provide each employee with written notification of such deductions; and

- Employers must pay an employee who is discharged (for any reason) their final check for hours worked on the day of the actual discharge. There are a number of other obligations, which must also be satisfied on an employee's last day of work.
- **Tips on the Massachusetts Tip Statute** – The minimum wage for tipped employees (employees who receive more than \$20.00 a month in tips) is \$3.75 per hour. This minimum wage can be paid only if the tipped employees are informed of the law, receive at least minimum wage when tips and wages are combined (the minimum wage in Massachusetts is currently \$11.00 per hour), and all tips must be retained by the employee or distributed through a valid tip pooling arrangement. Tip pooling arrangements are also governed by Massachusetts General Laws and are permissible within specific parameters. The law requires that all proceeds from tips, gratuities and service charges that are added to bills after customers are served must be distributed only to wait staff. The term wait staff includes waiters, waitresses, bus people, counter staff, bartenders and employees who customarily receive tips and provide services directly to customers. The law prohibits restaurant and bar owners from distributing the money to any other employee, including managers or themselves, even if they also serve food and beverages. The tip statute is enforced by the Attorney General's office and protects complaining workers under the anti-retaliation provisions of the Massachusetts General Laws.
- **Boston Living Wage Ordinance** – Boston Jobs and Living Wage Ordinance requires that any for profit or not for profit employer that employs at least 25 full-time equivalents and has been awarded a city of Boston service contract of \$25,000.00 or more is required to pay employees a wage equal to the poverty level for a family of four indexed annually on July 1, to whichever is higher of the adjusted poverty guidelines or 100% of the state minimum wage. Currently, such vendors must pay a living wage of \$14.11 per hour to any employee that directly expends their time on the services set out under a city of Boston service contract. All subcontractors with the city of Boston service contracts of at least \$25,000.00 or more are also required to pay the living wage.  
[http://www.cityofboston.gov/jcs/Liv\\_wage\\_ord.asp](http://www.cityofboston.gov/jcs/Liv_wage_ord.asp)
- **Mandatory Overtime for Nurses** – Hospitals are prohibited from requiring mandatory overtime except in the case of an emergency, or where the safety of the patient requires its use, and there is no reasonable alternative. The Health Policy Commission's Guidelines for the law may be found at: <http://www.mass.gov/anf/docs/hpc/regs-and-notices/hpc-mno-guidelines.pdf>.

#### IV. INSURANCE

- **Affordable Care Act (ACA) and Massachusetts Health Care Reform Law**

The Patient Protection and Affordable Care Act (PPACA), commonly called the Affordable Care Act (ACA) was enacted in 2010 to increase the quality and affordability of health insurance, lower the uninsured rate by expanding public and private insurance coverage, and reduce the costs of healthcare for individuals and the government. It introduced mechanisms like mandates, subsidies, and insurance

exchanges. The law requires insurance companies to cover all applicants within new minimum standards and offer the same rates regardless of pre-existing conditions or sex. A timeline of the key features of the Affordable Care Act by year may be found here: <http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca-by-year/index.html#>.

In 2017 Donald Trump will become President. Although a full repeal of the ACA is unlikely for a number of reasons, it is virtually guaranteed this law will look very different as early as this year. For now, employers must comply with existing law.

The implementation of the ACA has redefined the landscape of the Massachusetts Health Care Reform Law. Employers must be diligent in achieving compliance with the ACA, as it reshapes health plan obligations. However, if the ACA is repealed or “gutted” as has been promised by a number of lawmakers, employers in Massachusetts may see a return to reporting obligations under the Massachusetts Health Care Reform Law that are currently preempted by the ACA.

- **Health Insurance Exchange** – The federal Affordable Care Act (ACA) allows each state the opportunity to establish a health insurance exchange to facilitate the purchase of health insurance by small employers and individuals. The Massachusetts Health Connector is the health insurance exchange.
  
- **Resources Regarding Federal Health Care Reform** –
  - FAQs about the Patient Protection and Affordability Care Act implementation can be found at <http://www.dol.gov/ebsa/>.
  - A Summary of DOL regulations and guidance related to the Affordable Care Act including links, compliance workshops, marketplace information and related resources may be found at: <http://www.dol.gov/ebsa/healthreform/>.
  - A summary of Affordable Care Act Tax Provisions can be found at: <https://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions>
  
- **Employer Shared Responsibility Provisions** – Employers with 50 or more full-time (or full-time equivalent) employees that do not offer health insurance to their full-time employees (those working 30+ hours/week) and their dependents, or that offer coverage that is not affordable or that does not provide minimum value, may be required to pay an assessment if at least one of their full-time employees receives a premium tax credit to purchase coverage in the new individual Marketplace. Refer to [the IRS’s ALE Information Center](#) for the latest information on the Employer Shared Responsibility rules.

Fewer than 50 employees? Firms of this size are generally not affected by the Employer Shared Responsibility rules and do not have to pay an assessment if their full-time employees receive premium tax credits in the Marketplace.

- **Information Reporting on Health Coverage by Employers** – The Affordable Care Act provides for information reporting by employers with 50 or more full-time employees

(including full-time equivalent employees regarding the health coverage they offer to their full-time employees (known as Section 6056 rules). [The IRS's Information Center](#) contains updated information concerning new reporting requirements.

- **Employer Health Care Arrangements (Employer Payment Plans)** – Employer health care arrangements, also known as employer payment plans, generally include those arrangements where the employer does not establish a health insurance plan for its own employees, but reimburses those employees for premiums they pay for health insurance (either through a qualified health plan in the Marketplace or outside the Marketplace). Under [IRS Notice 2013-54](#), such arrangements do not satisfy the market reforms under the Affordable Care Act and may be subject to \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee) under section 4980D of the Internal Revenue Code.
- **Summary of Benefits and Coverage (SBCs) Disclosure Rules** – Employers are required to provide employees with a standard “Summary of Benefits and Coverage” form explaining what their plan covers and what it costs. The purpose of the SBC form is to help employees better understand and evaluate their health insurance options. Penalties may be imposed for non-compliance. For more information, visit <https://www.federalregister.gov/articles/2013/09/09/2013-21791/information-reporting-by-applicable-large-employers-on-health-insurance-coverage-offered-under>.
- **Medical Loss Ratio Rebates** – Under ACA, insurance companies must spend at least 80% of premium dollars on medical care rather than administrative costs. Insurers who do not meet this ratio are required to provide rebates to their policyholders, which is typically an employer who provides a group health plan. Employers who receive these [premium rebates](#) must determine whether the rebates constitute plan assets. If treated as a plan asset, employers have discretion to determine a reasonable and fair allocation of the rebate. For more information on the federal tax treatment of Medical Loss Ratio rebates, refer to [IRS's FAQs](#).
- **W-2 Reporting of Aggregate Health Care Costs** – Most employers must report the aggregate annual cost of employer-provided coverage for each employee on the Form W-2. The W-2 reporting requirement is informational only and it does not require taxation on any health plan coverage. Reporting is required for most employer-sponsored health coverage, including group medical coverage.
- **Limits on Flexible Spending Account Contributions** – For plan years beginning on or after January 1, 2017, the maximum amount an employee may elect to contribute to health care flexible spending arrangements (FSAs) for any year is capped at \$2,600, subject to cost-of-living adjustments. Note that the limit only applies to elective employee contributions and does not extend to employer contributions. To learn more about FSA Contributions, as well as what is excluded from the cap, refer to this [document](#) provided by the IRS.

- **Additional Medicare Withholding on Wages** – Effective January 1, 2013, the ACA increases the employee portion of the Medicare Part A Hospital Insurance (HI) withholdings by .9% (from 1.45% to 2.35%) on employees with incomes of over \$200,000 for single filers and \$250,000 for married joint filers. It is the employer’s obligation to withhold this additional tax, which applies only to wages in excess of these thresholds. The employer portion of the tax remains unchanged at 1.45%.
- **Workplace Wellness Programs** – The ACA creates new incentives to promote employer wellness programs and encourage employers to take more opportunities to support healthier workplaces. Health-contingent wellness programs generally require individuals to meet a specific standard related to their health to obtain a reward, such as programs that provide a reward to employees who don’t use, or decrease their use of, tobacco, and programs that reward employees who achieve a specified level or lower cholesterol.

In 2016, the Equal Employment Opportunity Commission (EEOC or the Commission) issued a [final rule to amend the Regulations and the accompanying Interpretive Guidance \(also known as the Appendix\) implementing Title I of the Americans with Disabilities Act \(ADA\) as they relate to employer wellness programs](#). A notice of proposed rulemaking was previously issued on April 20, 2015. The final rule says employers may provide limited financial and other incentives in exchange for an employee answering disability-related questions or taking medical examinations as part of a wellness program, whether or not the program is part of a health plan. The key take aways from the Final Rule are:

- Do not discriminate.
- Make it voluntary.
- Give notice of information collected.
- Reasonable accommodation rules apply.
- Confidentiality.
- Incentive limits.

Helpful information regarding compliance with the EEOC’s Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act is located at: <https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm>.

- **Medicaid Coverage** – The ACA provides additional opportunities for Medicaid coverage for adults who earn up to 138% of the poverty level (\$16,394 for an individual and \$33,534.00 for a family of four). The proposed rules will help develop systems that will make it easier for consumers to determine if they are eligible for Medicaid or tax credits through the exchanges.
- **Mental Health Parity And Addiction Equity Act** – The Mental Health Parity and Addiction Equity Act requires the provision of mental health or substance disorder benefits to match that of medical and surgical benefits with regard to financial requirements and treatment limitations under group health plans and group and individual

health insurance coverage.

- **Group Health Plan Waiting Periods** – Group health plans and health insurers offering group health insurance coverage are prohibited from imposing waiting periods longer than 90 days. HHS, IRS, and the Department of Labor have issued [final rules](#) on how employers should apply the 90-day rule.
- **Multi-Employer Welfare Arrangements (MEWAs)** – A MEWA is an arrangement where a group of employers pool their contributions in a self-contributing benefits plan for their employees. The ACA has placed additional restrictions on the use of MEWAs. In response to the high frequency of fraudulent MEWA plans, the final rules authorize the following restrictions:
  - **Cease and Desist Orders:** The Secretary of Labor is authorized to immediately issue a cease and desist order, without notice and a hearing, when it is apparent that fraud is taking place within a MEWA.
  - **Summary Seizure Orders:** The Secretary of Labor can also seize assets from a MEWA to preserve the plan’s funding when there is a probable cause that the plan is in a financially hazardous condition.
  - **MEWA Reporting/Registration:** The ACA requires all non-plan MEWAs to register with the Department of Labor before operating in the State.
- **Employer Mandate** – Referred to as the “employer mandate,” employers with 50 or more full-time employees or full-time equivalents must provide affordable health coverage to employees or face a fine per worker after the first 30 employees. This penalty adjusts with inflation. Employers of 50 or more full-time employees (or full-time equivalents) must have offered qualifying health insurance to 95% of their full-time employees by January 1, 2016 or they will be subject to a penalty.
- **Common Questions Regarding Federal Health Care Reform** – FAQs about the Patient Protection and Affordability Care Act implementation can be found at <http://www.dol.gov/ebsa/>.
  - The Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury guidance (FAQs about Affordable Care Act Implementation Part XIX) regarding the updated Department of Labor model COBRA notices, limitations on cost-sharing, preventive services, Health Flexible Spending Accounts, and Summary of Benefits and Coverage (SBC) can be found at <http://www.dol.gov/ebsa/faqs/faq-aca19.html>.
  - In addition to the FAQs, the Department of Health and Human Services released a bulletin on new special enrollment periods (SEPs) and hardship exemptions: <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/SEP-and-hardship-FAQ-5-1-2014.pdf>.
  - The U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) Frequently Asked Questions (FAQs) regarding implementation of the market reform

provisions of the Affordable Care Act and the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the Affordable Care Act can be found at: <http://www.dol.gov/ebsa/faqs/faq-aca18.html>.

- The updated Internal Revenue Service questions and answers (Q&As) providing guidance on the information reporting requirements under the Affordable Care Act (ACA) can be found at <http://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055> and <http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Reporting-of-Offers-of-Health-Insurance-Coverage-by-Employers-Section-6056>.
- Notice 2014-49 describes a proposed approach for applying the look-back measurement method used to determine full-time employee status for purposes of IRS Code § 4980H in situations when the measurement period applying to an employee changes. This change may occur because the employee transfers within the same applicable large employer (or within the same applicable large employer member) from a position in which one measurement period applies to a position in which a different measurement period applies. This situation may also arise when the applicable large employer member modifies the measurement period applicable to a position.
- Notice 2014-55 expands the application of the permitted change rules for health coverage under a §125 cafeteria plan. This notice addresses two specific situations in which a cafeteria plan participant may wish to revoke, during a period of coverage (commonly a plan year), the employee's election for employer-sponsored health coverage under the cafeteria plan in order to purchase a Qualified Health Plan through an ACA Marketplace. The first situation involves a participating employee whose hours of service are reduced so that the employee is expected to average less than 30 hours of service per week but for whom the reduction does not affect the eligibility for coverage under the employer's group health plan. (This may occur, for example, under certain employer plan designs intended to avoid any potential assessable payment under § 4980H of the Internal Revenue Code.) The second situation involves an employee participating in an employer's group health plan who would like to cease coverage under the group health plan and purchase coverage through a Marketplace without that resulting in either a period of duplicate coverage under the employer's group health plan and the coverage purchased through a Marketplace or in a period of no coverage.

This notice permits a cafeteria plan to allow an employee to revoke his or her election under the cafeteria plan for coverage under the employer's group health plan (other than a flexible spending arrangement) during a period of coverage in each of those situations provided specified conditions are met. The Treasury Department and the IRS intend to modify the regulations under §125 consistent with the provisions of this notice, but taxpayers may rely on this notice immediately.

- **ACA Reporting** – The Affordable Care Act (ACA) added two health coverage reporting requirements to the Internal Revenue Code. Both took effect in 2015, with the first reports in early 2016:
  - IRC § 6056 requires large employers (50 or more full-time employees including full-time equivalents) to file annual reports detailing the health coverage they offer to full-time employees. Information will include employee names and SSNs, along with indicators (codes) about the type of health coverage offered. Large employers will give a Form 1095-C to each employee, and file these forms with the IRS using transmittal Form 1094-C.

**Note:** The deadline to distribute forms to employees in 2017 shifts from Jan. 31 to March 2. The IRS did not change the deadline for filing Forms 1094 and 1095 with the agency. Those deadlines remain Feb. 28 (paper) or March 31 (electronic).

**Caution:** Large employers are those with 50 or more full-time employees (including full-time-equivalents). Although some mid-sized (50-99) employers and/or some employers with non-calendar year plans may have qualified for short-term transition relief under the ACA’s “play or pay” rules, the ACA’s reporting requirements apply for 2016.

- IRC § 6055 requires insurers and self-funded plan sponsors to file annual reports detailing the health coverage provided to each individual. This includes any employer, large or small, that sponsors a self-funded health plan. For this purpose, employers will provide Form 1095-B to plan enrollees and members, and file these forms with the IRS using transmittal Form 1094-B. Large employers that also sponsor a self-funded health plan can use Form 1095-C to satisfy both the § 6056 and 6055 reporting requirements.
- **Wrap Around Plans** - On March 16, 2015, the U.S. Departments of Labor, Health and Human Services, and Treasury released a Final Rule that permits employers to offer “wraparound coverage” to part-time employees with individual policies. This is not, however, a proposal to allow employers to reimburse employees for the cost of individual policies – that is strictly prohibited and can cost employers large sums in tax penalties. In theory, the individual plan together with the wraparound plan will provide a low-wage part-time employee with benefits comparable to the primary employer sponsored group health plan that is available to full-time and part-time employees, but which is unaffordable for the part-time employees.

## V. SAME SEX MARRIAGE: FEDERAL AND STATE

**Massachusetts** – Pursuant to the Massachusetts Constitution, the same laws and procedures that govern traditional marriage also apply to same-sex marriages. There are no special procedures for a same-sex marriage. Moreover, pursuant to St.2008, c.216 which was enacted on July 31, 2008 (repealing the so-called "1913 laws" which prohibited most same-sex couples from other states from marrying in Massachusetts), residents of other states may now follow the same procedures as Massachusetts residents for marrying. The following laws provide additional guidance regarding same sex marriage in Massachusetts:

- A child born of a same-sex marriage is the legitimate child of both people. As a result, when there is a marriage between same-sex couples, there is no need for second-parent adoption to at the very least confer legal parentage on the nonbiological parent when the child is born of the marriage.
- A Vermont civil union is the functional equivalent of a marriage. Therefore, a Vermont civil union must be dissolved prior to either party entering into marriage with a third person in the Commonwealth

**Federal** – On June 26, 2013, the Supreme Court of the United States ruled that the Defense of Marriage Act (DOMA) was unconstitutional on the grounds that it violated the due process and equal protection principals of the Fifth Amendment. DOMA, which was enacted under the Clinton administration in 1996, restricted same-sex couples from being recognized as married spouses under federal law. DOMA’s repeal requires employers to ensure the same extension of privileges and protections to same-sex spouses as to all other married spouses.

On June 25, 2015, the Supreme Court ruled that the Fourteenth Amendment requires states to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Prior to the ruling, many states had already legalized same-sex marriage. However, there were several that had not. As a result, benefits administration — especially among national companies — suffered from uneven policies, procedures, and enforcement. Different states defined spouse differently, meaning two gay employees who worked for the same company, in the same state, but who live in different states, could have different rights. That problem no longer exists.

For ERISA purposes, the Employee Benefits Security Administration had previously determined that the term “spouse” refers to any individuals who are lawfully married under any state law. Thus, all spouses in same-sex marriages across the country are now covered.

Other laws should not change a great deal. While the Supreme Court’s decision may be a springboard to pass legislation, for now, sexual orientation is not a protected class under Title VII of the Civil Rights Act. However, sex is; and a number of courts have found sex discrimination in cases of LGBT discrimination. Moreover, in Massachusetts sexual orientation and gender identity are both protected classes. Therefore, if your company makes it more difficult for gay or lesbian employees to enjoy rights and benefits, there is real exposure for a sex discrimination lawsuit. Contact Mike Foley at our office with questions regarding potential liability.

- **FMLA Benefits** – The U.S. Department of Labor notes that FMLA spousal leave entitlements extend to same-sex spouses in states that recognize same-sex marriage.

On February 23, 2015, the U.S. Department of Labor released a Final Rule that updates the definition of spouse under the Family and Medical Leave Act (FMLA). The Final Rule updates the FMLA regulatory definition of “spouse” so that an eligible employee in a legal same-sex marriage will be able to take FMLA leave for his or her spouse regardless of the state in which the employee resides.

- **Federal Taxation** – The U.S. Department of Treasury and the Internal Revenue Service require that same-sex spouses, married in jurisdictions that recognize their marriage, must be treated as married for all federal tax purposes, including income, gift, and estate taxes. It is important to note that this requirement applies regardless of whether the spouses are currently living in a jurisdiction that recognizes same-sex marriage. However, this requirement does not extend to domestic partnerships, civil unions, or any other similar formal relationship under state laws.
- **ERISA** – For the purpose of interpreting ERISA provisions, the terms "spouse" and "marriage" in Title I of ERISA and in related department regulations should be read to include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live.
- **Retirement for Same-Sex Married Couples** – In April 2014, the IRS issued guidance, found at <http://www.irs.gov/pub/irs-drop/n-14-19.pdf>, stating that sponsors of qualified retirement plans must recognize same-sex spouses of legally married participants retroactively to the U.S. Supreme Court decision regarding section 3 of the Defense of Marriage Act (DOMA) on June 26, 2013. However, the IRS will not require retirement plans to recognize same-sex marriage prior to the Court's Windsor decision.

Employers sponsoring retirement plans qualified for tax-deferred benefits must recognize legally married same-sex couples as of June 26, 2013, the date of the Supreme Court's ruling in *United States v. Windsor*. This recognition requires extending to same-sex married couples the same rights and benefits afforded to opposite-sex married couples. The Windsor decision invalidated Section 3 of the 1996 Defense of Marriage Act (DOMA) that barred married same-sex couples from being treated as married under federal law. Subsequently, the IRS issued Revenue Ruling 2013-17, found at [http://www.irs.gov/irb/2013-38\\_IRB/ar07.html](http://www.irs.gov/irb/2013-38_IRB/ar07.html), clarifying that a same-sex couple is treated as lawfully married for federal tax purposes if the jurisdiction in which they were married recognizes same-sex marriage, without regard for the fact that they may now live in a state that fails to recognize same-sex marriage.

It is important for plan administration to comply in both policy and practice. For example, IRC section 417(A)(4) requires certain plans to obtain the consent of the spouse of a married participant before making a loan to the participant. Compliance requires plan administration to treat all legally married spouses in a consistent manner.

Plan sponsors may, but are not required to, reflect the outcome of Windsor for periods prior to the date Windsor was decided (June 26, 2013). However, IRS guidance cautions employers that retroactively recognizing same-sex spouses for all purposes under a qualified retirement plan could have "unintended consequences," such as triggering ownership attribution requirements and other rules that are "difficult to implement retroactively."

For more information, visit the IRS website with the press release and frequently asked questions at <http://www.irs.gov/Retirement-Plans/Treatment-of-Marriages-of-Same-Sex-Couples-for-Retirement-Plan-Purposes>.

## VI. LEAVE FROM WORK

- **Massachusetts Earned Sick Leave Law**

The Massachusetts Earned Sick Leave Law provides that all employees whose primary place of employment is Massachusetts shall be eligible to accrue and use paid [or unpaid, for employers with fewer than eleven (11) employees] sick time. Sick time accrues at the rate of one (1) hour for every thirty (30) hours worked per benefit year, which is defined as any consecutive 12 month period of time determined by the employer, including calendar year, fiscal year, tax year, or year based on date of hire]. Employers may cap sick leave accruals at 40 hours per benefit year. The law also provides for two alternative schedules for awarding sick leave for employers who do not wish to track accruals: a lump sum award of at least 40 hours at the start of the benefit year; or an accrual schedule that provides full-time employee with 8 hours of sick leave per month for at least five months.

- **Use of Sick Time:** Employees may use up to 40 hours of accrued sick time per benefit year. Accrual of sick time begins on the employee's first date of actual work, but employees may not use such earned sick time until 90 calendar days after their start date. Sick time is provided to allow employees to:
  - care for the employee's own physical or mental illness, injury, or other medical condition that requires home, preventative, or professional care;
  - care for a child, parent, spouse, or parent of a spouse who is suffering from a physical or mental illness, injury, or other medical condition that requires home, preventative or professional care;
  - attend routine medical and dental appointments for themselves or for their child, parent, spouse, or parent of a spouse;
  - address the psychological, physical, or legal effects of domestic violence; or
  - travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

Earned sick time may be used for full or partial day absences. The smallest amount of sick time that an employee can take is one hour. For uses beyond one hour, employees can use sick time in the smallest increment used in the employer's payroll system. If an employee's absence from work requires the Company to call in a replacement worker to cover the absent employee's job functions, the Company may require the absent employee to use an equal number of hours of sick time as were worked by the replacement. If the employee lacks sufficient accrued sick time to cover all such time worked by the replacement, the employer must provide sufficient job-protected unpaid leave to make up the difference in that shift. Up to 40 hours of unused sick time may be carried over into the following benefit year.

- **Notice:** Employers may require employees to give advance notice of the need for sick leave, except in an emergency. If the absence is foreseeable (for example, if the

employee will be absent to attend a previously scheduled appointment), the employer may require the employee to provide up to seven days' advance notice, unless the employee learns of the need to use earned sick time within a shorter period of time.

- **Documentation of Use of Sick Time:** Employers may require an employee to submit a doctor's note or other documentation to support the use of sick time if the absence:
  - Exceeds 24 consecutively scheduled work hours or three consecutive days on which the employee is scheduled to work;
  - Occurs within two weeks prior to an employee's final scheduled day of work (except in the case of temporary employees); or
  - Occurs after four unforeseeable and undocumented absences within a three month period (or three unforeseeable and undocumented absences if the employee is age 17 or under).

Required documentation must be submitted within seven days of the absence. If an employee fails to timely comply with the sick time law's documentation requirements, the employer may recoup the sick time paid from future wages. If the employer provides unpaid sick time and the employee fails to timely comply with the company's documentation requirements for use of unpaid sick time, the employer may deny future use of an equivalent number of hours of accrued sick time until the documentation is provided, but may not otherwise take any adverse action.

- **Discipline for Abuse:** Employers may discipline employees for misuse of earned sick time in the event that an employee shows a pattern of use that indicates fraud including a pattern of calling out on Friday and Monday or on days where duties are perceived to be undesirable.
- **Payout of Sick Time:** Sick time is not payable on termination of employment. Employers that choose to pay out sick leave balances at the end of the year, must provide employees with 16 hours of unpaid leave to start the new benefit year.
- **Interaction with Other Types of Leave:** Massachusetts Earned Sick Leave law runs concurrently with any leave that is also covered under the FMLA, Massachusetts Parental Leave law, Massachusetts Domestic Violence Leave law, or Massachusetts Small Necessities Leave law, or other leave of absence law, shall run concurrently with such leave.
- **Violations** -There are no criminal sanctions attached to the new law. The Attorney General may issue a civil citation to an employer for a violation. The new law also allows an aggrieved employee to file a private civil action against an employer. If the employee prevails, he or she is entitled to mandatory treble damages, costs and reasonable attorney's fees.
  - Employers are not allowed to utilize any adverse employment action against an employee for using earned sick time or for asserting his rights under the new law.

- **Record Keeping** – Employers must keep records of sick leave used and accrued for three years, and must provide such records to employees upon request.
- **Notice Requirements** – Employers must post the following notice in a conspicuous location accessible to employees and provide all employees with a copy:  
<http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-notice-to-post-black-white.pdf>
- **Additional Information:** The Attorney General’s Office is regularly updating an Earned Sick Time FAQ: <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf>

Sick Leave for Federal Contractors is addressed in the Federal Contractor section of this Synopsis. .

- **Vacation** – Employers do not have to provide vacation benefits to employees. However, once an employer establishes a vacation policy, an employee must be paid for earned vacation either when the vacation is taken, at year-end, or at the time employment terminates (even if the termination is for cause and/or misconduct).
- **Massachusetts Parental Leave Act (formerly Massachusetts Maternity Leave Act or MMLA)** – Employers with six or more employees are required to provide eight weeks of unpaid parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under age eighteen. Employees may choose to use vacation or PTO benefits concurrently with Parental Leave under the law, but cannot be required to do so by the employer. The right to leave applies to employees who have completed an initial probationary period set by the terms of employment, but which is not greater than 3 months. Parental leave is also available for the adoption of a child.

Under the law, employers must keep a posting in a conspicuous place describing the law’s requirements and the employer’s policies as to parental leave. Employers may provide parental leave that exceeds 8 weeks, but if the employer agrees to provide parental leave for longer than 8 weeks, the employer must reinstate the employee at the end of the extended leave unless it clearly informs the employee in writing before the leave and before any extension of that leave, that taking longer than 8 weeks of leave shall result in the denial of reinstatement or the loss of other rights and benefits.

Employees seeking leave must provide at least 2 weeks’ notice of the anticipated date of departure and the employee’s intention to return, or as soon as practicable if the delay is for reasons beyond the employee’s control. If two employees of the same employer give birth to or adopts the same child, the two employees are entitled to an aggregate of 8 weeks of leave.

- **Military Service Leave** – State and federal law grant benefits for military leave and this leave time continues to be an issue in today’s workplace.

Under **Massachusetts law**, an employee may receive up to seventeen days in a calendar year for military leave.

Additionally, in July 2016, Governor Baker signed the HOME Act, requiring employers to provide paid leave to qualified veterans on Veterans Day under certain conditions. The act also adds “veteran status” as a protected class under the Massachusetts Fair Employment Practices Act. Before the enactment of the HOME Act, Massachusetts law required employers to grant a paid or unpaid leave of absence to qualifying veterans who wished to participate in a Veterans Day or Memorial Day exercise, parade, or service. M.G.L. 149 § 52A 1/2. The HOME Act amends the law to require employers with 50 or more employees to grant said leave of absence on Veterans Day with pay, provided that the employee provides “reasonable notice” for such leave. As written, the HOME Act does *not* require employers to grant paid leave on Memorial Day.

- **The Federal Uniform Services Employment and Re-Employment Act (USERRA)** provides the following protections:
  - Employees have re-employment rights following military service for up to five years;
  - Employees who are called up for thirty-one days or more of active duty must be offered the right to continue their health care benefits, similar to the provisions under the Consolidated Omnibus Budget Reconciliation Act (COBRA).
  
- **The National Defense Authorization Act (NDAA)** is an expansion of the Family and Medical Leave Act (FMLA). Under the law, FMLA-eligible employees are entitled to the following benefits:
  - Twelve weeks of FMLA leave due to a spouse, son, daughter or parent being on active duty or having been notified of an impending call or order to active duty in the armed services;
  - Twenty-six weeks of FMLA leave during a single twelve-month period for a spouse, son, daughter, and parent or nearest blood relative caring for a recovering service member. A recovering service member is defined as a member of the armed forces who suffered an injury or illness while on active duty that may render the person unable to perform the duties of the member’s office, grade, rank or rating.
  
- The U. S. Department of Labor issued a final rule in 2013, amending FMLA regulations relating to military leave and flight crew eligibility. The FMLA’s military leave provision has been amended to:
  - Expand the definition of serious injury or illness to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty;
  - Expand military caregiver leave to care for covered veterans;
  - Permit eligible employees to obtain certification of a service member’s serious injury or illness from any healthcare provider as defined in the FMLA regulations, not only those affiliated with the Department of Defense;
  - Increase the amount of time an employee may take for qualifying exigency leave related to the military member’s “rest and recuperation” leave from five days to up to fifteen days; and

- Create an additional qualifying exigency leave category for parental care leave to provide care necessitated by the covered active duty of the military member for the military member's parent who is incapable of self-care.
- **Jury Duty** – Massachusetts law requires employers to grant employees time off from work to serve on a jury. Employers must pay their employees regular wages for the first 3 days of jury service. After the third day, the court will pay the juror a daily stipend of \$50.00. The employer has the option to pay the difference between the jury stipend and regular pay. Any employer who fails to compensate an employee who has not been excused from jury service can be held liable for treble damages.
- **Massachusetts Small Necessities Leave Act (SNLA)** – Employers with fifty (50) or more employees must provide eligible employees with 24 hours of unpaid leave per year to allow the employee to accompany a child to routine medical or dental appointments or participate in school or educational activities. These 24 hours are in addition to the 12 weeks provided by the Federal Family and Medical Leave Act (FMLA). To be eligible, employees must have worked for the employer for 12 months and have worked 1,250 hours in the year immediately preceding the leave. Employers may require an employee to use accrued time (vacation, personal, medical or sick) during this leave.
- **Federal Family and Medical Leave Act (FMLA)** – Employers with fifty (50) or more employees must provide up to twelve weeks of unpaid leave to eligible employees each year. To qualify, the employee must have worked for the employer for at least 12 months and at least 1,250 hours in the year immediately preceding the leave. The leave may be requested for any of the following reasons:
  - Birth of a child;
  - Placement of a child for adoption or foster care;
  - A “serious health condition” of the employee or a serious health condition of the employee’s immediate family member (spouse, parent or child); or
  - A "qualifying exigency" that arises out of the fact that the employee's spouse, child or parent is on active duty or has been called to active duty for the National Guard or Reserve in support of a contingency operation.

The FMLA also grants eligible employees up to 26 weeks of leave in a single 12-month period to care for a covered servicemember recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.

- **New FMLA Poster** – In 2016, the DOL issued a new FMLA [Poster](#). A copy of the poster prepared by the DOL (WH 1420) is available for posting in the workplace. Employers who use an FMLA Policy in their handbook in lieu of a poster must update handbook policies to comply with the new poster content.
- **New FMLA Forms** – In 2015, the U.S. Department of Labor (DOL) issued new versions of the agency's template Family and Medical Leave Act (FMLA) notices and certification

forms, which have been approved for use for the next three years. The new forms—some of which the DOL has substantively revised—include the following:

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition;
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition;
- WH-381 Notice of Eligibility and Rights & Responsibilities;
- WH-382 Designation Notice;
- WH-384 Certification of Qualifying Exigency for Military Family Leave;
- WH-385 Certification for Serious Injury or Illness of Current Servicemember – for Military Family Leave; and
- WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

The forms, which are now approved through May 31, 2018, are available through the [DOL's webpage](#).

- **The FMLA, Childcare, and Adult Childcare** – The Department of Labor’s Wage and Hour Division issued additional guidance regarding the definition of “son or daughter” for employees seeking leave under the Family and Medical Leave Act in order to care for adult children age 18 or older. In order to take leave under the FMLA to care for a child under age 18, an employee must only show a need to care for the child due to a serious health condition. However, if an employee needs to take care of an adult child aged 18 or older, the child must have a mental or physical disability and be incapable of self-care because of that disability.

Four requirements must be met for an employee to be entitled to take FMLA leave in order to care for an adult child. The son or daughter must:

- Have a disability as defined by the ADA, which would mean that he or she has an impairment that substantially limits one or more major life activities (or has a record of such impairment or is regarded as having such an impairment);
- Be incapable of self-care due to that disability;
- Have a serious health condition; and
- Be in need of care due to the serious health condition

This clarification also has significant ramifications for the interpretation of impairments under the ADA. Now, impairment is a disability, even if in remission or if merely episodic, if it would substantially limit a major life activity when active, and there is no minimum duration for an impairment to be a disability. Therefore, cancer that is in remission or illnesses like asthma, multiple sclerosis, lupus, or post-traumatic stress disorder could be considered disabilities even during symptom-free periods.

- **FMLA and the ADA** – The amendments to the Americans With Disabilities Act (ADA) have drastically expanded the definition of “disability” for purposes of the law. Where many serious health conditions that are covered by the FMLA will also be considered disabilities under the ADA, employers must often consider the two laws in tandem. If

you are faced with an employee who is unable to return from FMLA due to his or her own serious health condition, it is very likely that he or she may be entitled to additional leave under the ADA. The intersection of these leaves is complex, please call our office for additional guidance on this difficult topic.

- **Massachusetts Voting Leave** – Under Massachusetts law, employers in the manufacturing, mechanical, and mercantile sectors must grant an employee unpaid leave to vote during the period that is 2 hours after the opening of the polls. Violation of the Massachusetts Voting Leave law is punishable by a fine of up to \$500.00.
- **Massachusetts Disaster Services Leave** – Under Massachusetts law, an employer may not discharge or take any other disciplinary action against any employee when the employee failed to report for work at the beginning of a regular shift/working hours because they were responding to an emergency as a volunteer member of a fire department or ambulance department. Employers are not required to compensate employees when they are responding to an emergency and are not at work.
- **Massachusetts Domestic Violence Leave** – As of 2014, employers with at least 50 employees must permit their workers to take up to 15 days of leave, which can be unpaid, in a 12 month period, when requested to deal with domestic violence or other abusive behavior or its effects, whether for themselves or a family member. This can include seeking medical attention, obtaining counseling, dealing with the court system, among other reasons. Employers must not retaliate against employees seeking the leave.

## VII. WORK PLACE SAFETY

- **Occupational Safety & Health Administration Act (OSHA)**

All employers in the United States must comply with the “general duty clause” of the Occupational Safety and Health Act. The clause reads:

Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with the Occupational Safety and Health standards promulgated under the Act.

Given the frequency of work-related accidents and the ancillary cost to employers, we recommend that every business implement a **Health and Safety Protection Plan**. Of note, this is a best practice recommended by the United States Department of Labor’s OSHA Health and Safety Administration.

**The OSHA Top Ten:** OSHA released the top ten most frequent citations of 2016:

1. Fall protection;
2. Hazard communication;
3. Scaffolding;

4. Respiratory protection;
5. Lockout/tag out;
6. Powered industrial trucks;
7. Ladders;
8. Machine guarding
9. Electrical: Wiring; and
10. Electrical: General Requirements.

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) requires employers to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation or loss of an eye. The rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction.

Under the revised rule, employers are required to notify OSHA of work-related fatalities within eight hours, and work-related in-patient hospitalizations, amputations or loss of an eye within 24 hours. Previously, OSHA's regulations required an employer to report only work-related fatalities and in-patient hospitalizations of three or more employees. Reporting single hospitalizations, amputations or loss of an eye was not required under the previous rule.

All employers covered by the Occupational Safety and Health Act, even those who are exempt from maintaining injury and illness records, are required to comply with OSHA's new severe injury and illness reporting requirements. To assist employers in fulfilling these requirements, OSHA is developing a Web portal for employers to report incidents electronically, in addition to the phone reporting options.

In addition to the new reporting requirements, OSHA has also updated the list of industries that, due to relatively low occupational injury and illness rates, are exempt from the requirement to routinely keep injury and illness records. The previous list of exempt industries was based on the old Standard Industrial Classification system and the new rule uses the North American Industry Classification System to classify establishments by industry. The new list is based on updated injury and illness data from the Bureau of Labor Statistics. The new rule maintains the exemption for any employer with 10 or fewer employees, regardless of their industry classification, from the requirement to routinely keep records of worker injuries and illnesses.

On March 5, 2015, the Occupational Safety and Health Administration (OSHA) published a Final Rule governing employee retaliation or whistleblower claims under § 806 of the Sarbanes-Oxley Act of 2002 (SOX). SOX protects employees who report fraudulent activities and violations of Securities Exchange Commission (SEC) rules that can harm investors in publicly traded companies. The Final Rule establishes the final procedures and time frames for the handling of retaliation complaints under SOX.

In April 2015, OSHA released guidelines for preventing workplace violence for healthcare and social service workers. This comprehensive document assesses the risks

present within these industries and offers strategies for preventing violence:  
<https://www.osha.gov/Publications/osha3148.pdf>.

In September of 2015, OSHA released a guidance document related to Restroom Access for Transgender Workers. The document sets forth what OSHA considers to be best practices related to this timely issue. In short, OSHA's core principal is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity. The documents is located here:  
<https://www.osha.gov/Publications/OSHA3795.pdf>.

Finally, and most notably in 2016 (OSHA) issued a [final rule](#) requiring certain employers to electronically submit data from their work-related injury records to OSHA. This final rule also included anti-retaliation provisions intended to prevent employers from discouraging employees from reporting workplace injuries and illnesses. OSHA's initial plan was to begin enforcing the new anti-retaliation provisions in August, but due to litigation, the deadline was pushed back to December 1, 2016.

To comply with OSHA's new rules:

- Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation may be met by posting the OSHA Job Safety and Health — It's The Law worker rights poster from April 2015 or later ([www.osha.gov/ Publications/poster.html](http://www.osha.gov/Publications/poster.html)).
- An employer's procedure for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting.
- An employer may not retaliate against employees for reporting work-related injuries or illnesses

Although the final rule does not specifically prohibit employers from performing drug tests on employees or implementing safety incentive programs, it prohibits employers from using drug-testing and safety incentive programs in a way that deters or discourages employees from reporting workplace incidents. Specifically the new rules require:

- No More Post Incident Drug Testing: According to OSHA, a blanket policy that requires all employees to submit to drug testing following a workplace safety incident violates anti-retaliation protections.
- No Incentive Programs That Reward for Zero Reported Injuries: OSHA is concerned that if employees are sufficiently motivated, they will under-report incidents in order to reach the incentive.

OSHA claims to encourage employers to implement incentive plans that reward employees to improve workplace safety without discouraging reporting. It also states that post-incident drug testing is appropriate in circumstances where employee drug use is suspected to be the cause of the incident.

Commencing July 1, 2017, Organizations with 250 or more employees that are currently required to keep OSHA 300 Logs will be required to submit those records as well as Forms 300 and 301 electronically. Organizations with 20-249 employees that are

classified in certain high-risk industries will also be required to electronically submit OSHA 300 Logs.

**Massachusetts** is not a "state plan" state; and does not have a federally approved occupational safety and health regulatory program. Therefore, OSHA administers and enforces occupational safety and health requirements in private sector workplaces in Massachusetts. Additional Massachusetts workplace safety and health statutes and regulations may be found at: <http://www.mass.gov/lwd/labor-standards/massachusetts-workplace-safety-and-health-program/statutes/>.

- **Violence In The Workplace**

The FBI reports that anecdotal evidence shows that "many active shooters have a real or perceived deeply held personal grievance and the only remedy that they can perceive for that grievance is an act of catastrophic violence against a person or an institution."

Mass shootings have been occurring more frequently in recent years, an FBI study shows, with nearly one incident a month from 2000 to 2013. Seventy percent of the incidents "occurred in either a commerce/business or educational environment. Workplace violence frequently results in:

- Physical and psychological harm.
- Losses to property and productivity.
- Workers' compensation claims.
- Increased litigation.
- Temporarily or perhaps permanently losing a good employee
- Increased security costs.

We recommend that employers train staff, particularly supervisory and HR personnel, to recognize the following potential risk factors:

- Actions and emotions: If a person appears increasingly belligerent, hypersensitive, extremely disorganized or generally has changed his or her behavior noticeably.
- Personality conflicts: Is someone angry at a coworker or boss? If so, how is he or she dealing with it? Conversely, one should also be mindful if a person seems to have become obsessed with a supervisor or co-worker, for better or worse.
- On-the-job disputes: Is he or she upset about something that happened at work, including how he or she might have been disciplined?
- Off-the-job issues: Is the employee having a tough time outside of work, like going through a divorce or dealing with money problems?
- Talk of weapons/violence: Has an employee expressed a fascination with weapons, "violent themes" or recent high-profile killings? Does the employee discuss having a weapon or make veiled or explicit threats of violence?
- Domestic Violence: Has an employee appeared battered, frequently missed work, or have a spouse or significant other that frequently calls or shows up at the workplace? The Department of Labor notes that 27% of all violent events in a workplace are tied to domestic violence. Employers must be mindful not to retaliate against victims of stalking, sexual assault, or domestic violence particularly where the employees need

time off work to take legal action or because they are victim of a crime as these actions could lead to a wrongful termination cause of action against the employer.

We can help you identify the domestic victim in your workplace and develop effective programs and policies to address the issue.

***To combat workplace violence, HR and Management Personnel Can Take the Following Specific Steps:***

- Open your door to employees: Make sure all employees understand the importance of telling a supervisor, internal security or law enforcement if they have concerns about employee violence.
- Take stock of the following:
  - Are employees overloaded or mistreated?
  - Can management be improved?
  - Is counseling available?
- Is there a reorganization or lay-off imminent? If so, police may be called in before and as someone learns they are losing a job, which is exactly the kind of thing that could set off a volatile person.
- **Firearms** – To minimize their legal risk and promote a safe work environment, employers often implement workplace violence policies that include a ban on weapons at the workplace. Currently, there is no federal law that regulates weapons at private workplaces. However, several states have enacted so-called guns-at-work laws. These laws, which are typically designed to protect employees’ rights to possess concealed firearms, vary in terms of their restrictions. Complicating matters somewhat, a number of states also specifically protect employee rights to keep licensed firearms in their vehicles, so employers considering implementation of a firearms policy should review applicable laws prior to do so.
- **Addressing the Impact of Domestic Violence in the Workplace**
  - Laws to be aware of: Occupational Health and Safety Act of 1970 (“OSHA”) - “General Duty” Clause; the Violence Against Women Act (VAWA) of 1994, amended.

In Massachusetts, both the Domestic Violence Victims Leave and Earned Sick Leave law mandate leave for purposes of addressing the effects of domestic violence.
  - Domestic violence has made homicide the leading cause of death for women at work.
  - Employees miss 175,000 days per year of paid work due to domestic violence.

- Forty percent of women personally affected by domestic violence report that the abuse has impacted their work performance in the form of tardiness, missed work, missed career promotions, or loss of employment.
- One-third of employers believe that domestic violence affects their balance sheets.

We can help you identify the domestic victim in your workplace and develop effective programs and policies to address the issue.

## VIII. WORKERS' COMPENSATION

All employers in Massachusetts are required to carry Workers' Compensation insurance covering their employees, including themselves, if they are an employee of their company. This requirement applies regardless of the number of hours worked in any given week. If you know of an injury to one of your employees, or if an employee alleges an injury that has resulted in five calendar days of disability, the employer must file an "Employer's First Report of Injury" form (Form 101). Employers are required to file this form with the Department of Industrial Accidents within seven (7) calendar days. Employers operating without Workers' Compensation insurance are subject to civil fines and/or criminal penalties, including imprisonment or stop work orders. Employers do not have to hold injured worker's jobs open while the worker is unable to work due to an occupational accident. However, the law does require employers to give preferential treatment in the re-hiring of injured workers when they are ready to return to work.

- **Reducing Workers' Compensation Costs** – Many employers have developed several approaches to control the cost of their workers' compensation benefits, including the following:
  - Provision of education and safety programs including comprehensive OSHA health and safety protection plan.
  - Thorough investigation of all claims to safeguard against fraudulent claims. In addition, one of the most effective ways to control costs is to maintain regular communication with the injured or ill employee after the claim is filed and benefits have begun. Such regular contact, among other things, gives the employer the chance to insure that the worker is at home recuperating and not working elsewhere or participating in activities that might inhibit recovery.
  - An effective return-to-work program can also help control costs. These programs often include temporary, modified duty assignments.
  - It is also important for an employer to understand how workers' compensation leaves and benefits interact with state and federal disability discrimination and medical leave laws, including the Americans with Disabilities Act and FMLA. It is important for all employers to understand that just because an individual is receiving workers' compensation benefits does not mean the individual has a disability as defined by the ADA, or eligible for leave under the FMLA.

## IX. UNEMPLOYMENT COMPENSATION

Unemployment compensation throughout our country is designed to temporarily compensate workers who lose their jobs or income through no fault of their own (as determined or defined by applicable law). In order to be eligible for benefits a worker must be capable and available to accept work opportunities. The general rule is that employers who pay unemployment compensation taxes to a state with unemployment laws that are in compliance with federal requirements are usually offered tax credits against federal taxes. If a state law meets minimum federal requirements under the Federal Unemployment Tax Act (FUTA) and Title III of the Social Security Act of 1935 then the employer will receive up to 5.4% basic and additional tax credit against the 6.2% federal unemployment tax. The FUTA imposes a payroll tax on employers based on the wages paid to their employees. All states finance unemployment compensation primarily through contributions from covered employers on the wages of covered workers.

Experience rating is the system under which the employers are assigned tax rates in accordance with their individual experience with unemployment and subject to the needs of their particular state program. Experience is measured by the variable relative incidents of unemployment among workers of different employers. Differences in such experience represent the major justification for differences in tax rates, either to provide incentives for stabilization of employment or to allocate the cost of unemployment. Experience rating calculations are the state's method of measuring each employer's unemployment experience.

Massachusetts laws govern the unemployment insurance program which provides temporary income for eligible workers who become unemployed through no fault of their own and who are seeking new employment.

The Massachusetts agency responsible for administering the unemployment insurance program is the Division of Unemployment Assistance (DUA).

The money for unemployment insurance benefits comes from revenues paid by employers. However, workers may be deemed "ineligible" and have their claims indefinitely disqualified if they become unemployed for the following reasons: voluntarily quitting a job without "good cause" attributable to the employer; quitting a job to join one's spouse or any other person at a new location; being discharged by the employer for deliberate misconduct on the job; willful disregard of the employing unit's interests, or a knowing violation of a reasonable and uniformly enforced rule; and job loss due to conviction of a felony or misdemeanor.

- **Massachusetts Unemployment Insurance Law** – Effective March 24, 2015, the Unemployment Insurance law creates a rebuttable presumption of retaliation against an employee who is terminated or experiences a substantial alteration of the terms of employment within 6 months of providing evidence or testifying at an unemployment hearing. Employers who violate these prohibitions or threaten or coerce employees in connection with an unemployment claim may be required to reinstate the employee and pay costs of suit and attorneys' fees. It is vital that employers keep consistent records regarding employee performance and conduct – contemporaneous records are the best (and sometimes the only effective) defense against a claim of retaliation.

## X. HIPAA PRIVACY RULES AND THE HITECH ACT

- **HIPAA** - A major goal of this privacy rule is to ensure that an individual's health information is properly protected, while allowing the flow of health information needed to provide high quality health care, and to protect the public's health and wellbeing.

Beginning in 2016, The Department of Health and Human Service's Office for Civil Rights (OCR) will begin conducting HIPAA compliance audits. The OCR will target specific common areas of noncompliance identified in pilot audits and enforcement actions, and the audits will consist of a combination of review of policies and onsite reviews.

The most common deficiency found by OCR in the pilot audits was organizational failure to conduct security assessments to identify and mitigate risks to Patient Health Information (PHI) (e.g. PHI on exposed servers, unencrypted laptops, unchanged default passwords, outdated security software and inadequate training).

Preparation for an audit begins with a thorough review of the compliance requirements found in the HIPAA Audit Program Protocol. The audit compliance requirements are divided into three categories: security, privacy, and breach notification.

A common deficiency identified among organizations is a failure to conduct a security risk assessment. A risk assessment identifies and assesses risks to the security of PHI, evaluates security controls put in place to mitigate those risks and monitors the effectiveness of those controls on an ongoing basis. An adequate control environment contains many elements, including policies, procedures, systems, audits, people and training. The risk assessment focuses on evaluating and prioritizing security risks. Risk activities should be prioritized based upon the likelihood of occurrence of a security breach and the likely severity of such a breach. Organizations should consider conducting their risk self-assessment under attorney-client privilege to encourage maximum disclosure without fear of exposure. Attorneys at our offices are available to assist organizations with this process.

In addition to conducting a risk assessment, adequate audit preparation requires a review of HIPAA policy requirements relating to, for example, privacy practices; uses and disclosures of PHI; training; complaint handling; discipline; administrative, technical and physical security safeguards; and security incident management. These policies will likely be requested and examined by OCR in a desk audit prior to an onsite visit.

- **HITECH Act** – The HITECH Act orchestrates a significant makeover to the regulation of the privacy and security of patient health information. Many of the HIPAA standards will now apply directly to business associates, and business associates will be subject to the same civil and criminal penalties as covered entities.

Business associates must implement reasonable and appropriate policies and procedures to incorporate administrative, physical and technical safeguards.

## XI. BEST PRACTICES

While this section of our Guide falls outside of the domain of legal mandates, each subject addressed below is a best practice for preventing workplace distractions:

- **Restrictive Employment Covenants**
  - As addressed in more detail in Section XVIII of this Synopsis, to be enforceable, covenants not-to-compete must be narrowly tailored as to their duration, geographic jurisdiction, and definition of prohibited activity. Recently, drafting considerations for such covenants have become more complicated as a result of the global economy. In the past, a non-compete duration of one or even two years was generally considered conservative and reasonable. Clauses which previously were viewed as valid may now be unenforceable. The market moves too quickly. Likewise, geographical restrictions, measured in counties within the state or miles from the old workplace, may have little meaning in an economy that is without defined borders. Instead, restrictions may be defined in geographical terms as to where the company's products or services are sold. Accurately defining the activity which is prohibited is also crucial to a valid non-compete agreement.
  - Massachusetts employers frequently use non-compete agreements to "protect" their business from competition, as well as protect their customers, clients, vendors, and others from solicitation from recently departed employees, who may leave and go to work for the employer's competitor or even start their own business in the same field. Massachusetts courts consider non-competes often and have generally upheld them, although many have been struck down and ruled unenforceable or partly unenforceable. In balancing the need of the employer for protection against the limitation imposed on the employee to work and make a living, and determining whether such a non-compete will be upheld, the Massachusetts courts consider whether the restrictions are: (1) reasonable in scope, length of time, and geographic area; (2) protective of a legitimate interest of the employer; (3) supported by adequate consideration; and (4) in the public interest.
- **Trade Secrets**
  - **The Defend Trade Secrets Act.** In 2016, President Obama signed into law the Defend Trade Secrets Act (DTSA), legislation that provides businesses with the ability to file claims under federal law for the misappropriation of trade secrets. In other words, misappropriation of intellectual property is now a crime. In the era of breakneck technological innovation and evolution, businesses are forced to rely on intellectual property protections in the form of patents, copyrights, and trademarks to maintain a foothold in the marketplace. Unfortunately, over the last several years, courts have narrowed the class of technologies that can be patented, making this process a frustrating challenge. Partly as a result of these legal trends, and partly because technology is often obsolete by the time a patent is approved, businesses have come to rely more on confidentiality, including trade secrets, to protect the value of their innovations. Under the DTSA, "trade secrets," will now encompass a wide range of confidential business information ranging from product designs and

manufacturing techniques to strategic information like client lists and pricing strategies. In essence, the law will provide protection to all information that is valued because of its secrecy, and is not known to others who might benefit from its use. Businesses will be able to file suit and recover damages for misappropriation of trade secrets while also preventing their competitors from using the improperly obtained information. The law even allows for emergency measures like property seizures in situations where there is a threat the trade secret will be destroyed or taken out of the country.

Under the DTSA, employers are required to provide employees with “notice of the immunity” described above “in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.” This means that documents such as confidentiality, nondisclosure, code-of-conduct, and noncompete agreements, for example, should contain this notice. Notice in such contracts or agreements may also consist of a “cross-reference to a policy document provided to the employee that sets forth the employer’s reporting policy for a suspected violation of law.” The DTSA requires that an employer modify applicable policies and add a reference to the policy in relevant agreements (or attach an addendum to the relevant agreements referencing the policy). The notice requirement is limited to “contracts and agreements that are entered into or updated after the date of enactment of” the DTSA and does not affect acts that are “otherwise prohibited by law, such as the unlawful access of material by unauthorized means” (e.g., the Computer Fraud and Abuse Act).

The Uniform Trade Secrets Act is a model law drafted by the National Conference of Commissioners on uniform state laws to better define rights and remedies of common law trade secrets. It has been adopted by all states except Massachusetts and New York.

Under Massachusetts law, the relevant factors in determining whether information is secret are as follows: "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information can be properly acquired or duplicated by others." Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (1972).

We recommend that our clients conduct a trade secrets audit on a regular basis to identify company information that may be a protectable trade secret. The process is designed to clarify what information is currently subject to trade secret protection (as some previously protectable information may have become obsolete while other vital information has emerged), and what steps the employer can take to protect that valuable information.

We also recommend that employers update all employment agreements that address Trade Secrets to include

- **Non-Compete and Non-Disclosure Agreements** – Non-Compete Agreements and Non-Disclosure Agreements are two of the more heavily litigated employment subjects and therefore should be prepared in consultation with legal counsel; particularly since the National Labor Relations Board has brought new life into employees’ right to engage in “protected and concerted activity.” Covenants not to compete cannot be unduly burdensome on an employee’s freedom of trade. States generally read covenants not to compete "narrowly" by reading the contract in the light most favorable to the employee. For example, courts do not uphold "overbroad" covenants not to compete that prevent a former employee from working in a vast geographic area, for a long period of time, and in a broadly-defined field, profession, or industry.
- **Good Supervisors Are Essential** – They play a critical role in minimizing the risk of harassment complaints, litigation, and high turnover, all of which cost employers money and lost productivity. Here are 15 keys to being a good supervisor:
  - Know your employees as individuals;
  - Be approachable and a good listener;
  - Be responsive to questions and concerns;
  - Always follow-up with your employees;
  - Apply policies and practices consistently and uniformly;
  - Keep your employees informed about the business;
  - Document employee discipline;
  - Communicate employee concerns up the line;
  - Recognize employee efforts;
  - Train your employees in all aspects of their jobs;
  - Be open on how to do things better;
  - Develop your own technical job skills;
  - Expect, believe in, and encourage good work;
  - Constructively counsel your employees;
  - Use your authority with reason and restraint and do not play favorites;
  - Admit your mistakes and correct them.
- **Job Descriptions** – Well worded job descriptions are an invaluable resource and tool. Job descriptions should:
  - Define duties and responsibilities;
  - Allow for the monitoring and objective evaluation of performance;
  - Facilitate the proper classification of positions as exempt or non-exempt under wage and hour laws; and
  - Define essential and non-essential functions for purposes of accommodations under disability laws.

- **Performance Reviews**

**Reviews:** To begin with, a good performance review process analyzes individual performance and sets individual employee goals in the context of organizational goals and objectives. A performance review policy should clearly state standards for a particular job and an accurate statement of job objectives by:

- Identifying job responsibilities;
- Providing measures of each job component; and
- Providing examples of satisfactory and unsatisfactory performance for each component.

The review rating system should be uniform, objective, and useful, in addition to accounting for situational factors affecting job performance. A performance review goes hand in glove with a current, accurate job description. Use this time to update job descriptions if necessary. The review time period should be identified in each review as well.

**Evaluators:** Although it sounds obvious, every evaluator must guard against bias. For example, it should be clear that the evaluator's standing is not dependent on the outcome of subordinate's ratings.

- **Tips for Evaluators**

- Grade the overall performance of an employee during the review period, not just single incidents.
- Tell the truth. The legal and economic benefits of performance reviews are lost if a review is dishonest, even if it is to the employee's benefit. Moreover, even a single favorable performance review that is undeserving may come back to haunt the employer if the employee is discharged for cause and files a claim.
- Cite specific facts and examples to support conclusions.
- Rate employee performance, not personality, except to the extent those personal characteristics embody bona fide job qualifications.
- Undertake reviews in confidence and limit access to the information collected to a need to know basis. Careless disclosure and breach of confidentiality may result in liability for defamation, invasion of privacy, intentional infliction of emotional distress, public policy violations, negligent maintenance of records, or breach of contract, despite qualified privilege protecting employee appraisals.
- Administer reviews regularly, consistently, and on-time.
- Gather information from a variety of sources. This will ensure:
  - Objectivity;

- That no review will be distorted based on a single incident;
  - That consistent standards will be applied to similarly employed individuals;
  - That relevant external factors will be identified, such as the diversion of an employee's time and effort to support other personnel.
- Compare current reviews among supervisors to prior reviews and to relevant statistical data (e.g. attendance records and performance test results) to resolve any questions or inconsistencies.
- Provide the employee with the results.
- Provide a mechanism for the employee to appeal a negative review or provide feedback.
- Develop a performance improvement plan as needed.
- **Final Thought** – Think of employee reviews as the foundation for good management. Well-written performance reviews can assist the workforce in performing the duties they were hired to perform. If there are performance issues, the review is the time to document them to safeguard against liability in the future.
- **Employee Handbooks**
  - There is no state or federal law that requires employers to establish a handbook or written personnel policies, although many states will enforce handbook policies. Thus, well-written and up to date handbooks and corresponding personnel policies are not only a very effective method for employers to communicate terms and conditions of employment in a consistent manner, they also significantly reduce exposure to claims of disparate treatment. Such handbooks and policies must be carefully drafted so as not to convert the at-will employment relationship to a contractual obligation. We recommend that employers work with legal counsel when drafting such documents and also recommend that handbooks be reviewed annually and conspicuously state its effective date. The handbooks that we prepare for our clients consist of a blend of compliance obligations and best employment practices and are one of the building blocks for our clients' HR-related risk management program.
  - On March 18, 2015, the National Labor Relations Board's (NLRB) Office of General Counsel released a report that provides new guidance on employee handbooks. Most employers will need to review and update the following sections of their handbooks to comply with the National Labor Relations Act (NLRA):
    - Confidentiality rules.
    - Professionalism rules.
    - Anti-harassment rules.
    - Trademark rules.
    - Photography/recording rules.
    - Media contact rules.

- **The Electronic Workplace**

- Email, smart phones, and the internet have revolutionized the way most businesses communicate, making communication more efficient and economical. Monitoring employees' use of these technologies can take many forms, and employer surveillance of employees is increasing. Employers have a legitimate business interest in monitoring their employees' work to ensure efficiency and productivity. Workplace electronic monitoring policies that clearly define an employer's expectations and an employee's lack of rights to an employer's electronic communications equipment are absolutely necessary to clarify an employee's privacy expectations. Moreover, companies have recognized the need to implement policies out of concern for electronic evidence and governmental investigations, not to mention matters of efficiency and productivity.

- **Effectively Managing Employee Blogging**

- The "blog" has come to epitomize free speech on the web in an era where internet access is universal. What does this mean for employers when an employee posts information about company products or internal affairs in a public forum? The issue is whether an employee has the right to post his or her opinions about the company publicly without the risk of being fired.
- Employer's Liability - Not only can a blog tarnish the reputation of a company, but it can also raise issues of liability for employers who may be answerable for the comments posted by their employees, which could lead to defamation and harassment complaints.

The Federal Trade Commission regulates truth in advertising across all consumer channels, including blogging. The FTC regulates endorsements made on behalf of a sponsoring advertiser. To comply with the FTC guidance, employers are responsible for ensuring:

- Employee endorsements must reflect the honest opinion, beliefs, or experience of the employee and cannot be used to make a false or misleading claim that the Company cannot directly make, and to comply with the law, any employee who mentions a product of the Company in social networks or on a review site should "definitely disclose" the employment relationship when making an endorsement. Merely listing the employer on the employee's profile page is not enough.
- Solutions – A well written Electronic Communications Policy and Social Media Policy. Employers must clearly define their expectations. By creating clear policies regarding permissible and prohibited internet use, companies can avoid costly and potentially embarrassing termination proceedings. Employees will understand exactly what is considered acceptable to publish on the internet. Making matters more complicated, the National Labor Relations Board (NLRB) recently issued an opinion memo related to a complaint against a national restaurant chain, citing its social media policy (and many other portions of its handbook) as overly-broad and chilling

protected activity. These policies must be carefully constructed. For more information, contact Mike Foley.

- **Employment References**

- The EEOC has viewed negative employment references as retaliation, which puts an employer in an awkward position. How can an employer safely respond to an employment reference check without legal exposure for defamation or retaliation? The EEOC views “the truthfulness of the information in the reference” as a defense unless there is proof of pretext. Employers must be able to weigh the risk of either a possible defamation allegation or civil claim. For instance, a propensity to physically harm a third person may create a duty to disclose information in spite of the risk of a defamation claim.

- **Successful Reductions in Force** – As outlined earlier, it is possible to completely avoid exposure by obtaining a binding release and waiver of claims when an employee is laid off. Please contact us.

## **XII. EMPLOYEE WELLNESS AND ASSISTANCE PROGRAMS**

- **Employee Wellness Programs**

The recent national and state focus on healthcare reform has compelled many employers to re-evaluate their healthcare policies and strategies and seek ways to reduce expenses through the implementation of employee wellness programs. While employee wellness programs may appear to offer significant benefits, and many do, there are some potential liabilities for employers to consider. The patchwork of statutes that may potentially impact wellness programs requires special attention, and employers should be aware that a program that complies with one statute may be prohibited under another. Please contact Tim Kenneally or Mike Foley for guidance on this thorny area.

Did you know that HIPAA prohibits ERISA group health plans from using a health factor as a basis for discrimination with regard to either eligibility to enroll or premium contributions? The enumerated list of “health factors” includes health status, medical conditions, claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability. If a wellness program does not condition a reward on an individual satisfying a standard that is related to a health factor, the wellness program does not violate HIPAA, so long as the participation in the program is made available to all similarly situated individuals.

In addition, employers should take into account two provisions of the ADA when implementing wellness programs: (1) The reasonable accommodation requirement; and (2) the prohibition on disability related inquiries. If a health factor on which a bona fide wellness program conditions a reward constitutes a disability as defined by the ADA, the program must comply with the ADA’s reasonable accommodation requirement, and the employer must engage in an interactive process with the disabled employee to develop a

reasonable alternative that satisfies the goals of the wellness program. Additionally, the ADA prohibits all disability-related inquiries and medical examinations prior to an offer of employment, and after a conditional offer is made, allows disability related inquiries and medical examinations only if they are job related and consistent with business necessity.

The EEOC enforcement guidance on disability-related inquiries and medical examinations of employees under the ADA states that disability related inquiries and medical examinations are permitted as part of a voluntary wellness program. In 2016, the EEOC released Final Rules regarding employee wellness plans. Below are key takeaways for employers:

- **Do not discriminate.** Specifically, employers may not interfere with an employee's ADA rights, or threaten, intimidate, or coerce an employee into participating in a wellness program, or retaliate against an employee for refusing to participate in a wellness program or for failing to achieve certain health outcomes.
- **Make it voluntary.** Employers cannot require employees to participate in wellness programs, or discipline or deny health coverage to employees who do not participate.
- **Reasonable accommodation rules apply.** Employers must provide reasonable accommodation to individuals with disabilities to allow them to participate in wellness programs and to earn the same incentives as non-disabled employees.
- **Confidentiality.** An employee wellness program may include medical examinations or questions about employees' health. However, if this or other medical information is collected, the employee wellness program must promote health or prevent disease. Further, employers may only view medical information in aggregate form, and it must be kept confidential.
- **Incentive limits.** Employers may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs.

The principle concern of the law in this area is to prevent discrimination by and through these programs. As a general rule, wellness programs will be enforceable if: (1) the program is available to all similarly-situated employees; and (2) provided that any rewards/penalties resulting from the program are not conditioned on a "health factor." Health factors under these laws include prior medical care; current medical conditions; medical claim history; health status; prior use of healthcare; genetics; insurability (risky behavior/abuse); and disability. Therefore, if a program were to afford all employees who successfully completed the program with a paid day off and the criteria for completion was to quit smoking, such a program would discriminate against people who could not quit smoking. However, if the program provided two paid hours off to everyone who participated in an anti-smoking education program, regardless of whether or not anyone quit smoking, then such a program would not violate the law. There are various exceptions that are too complex to outline here. Please contact us.

Group health plans must be tailored to the specific needs of the business. Therefore, employers must generally assess their plan's compliance with the law on a case-by-case basis. However, there is one rule that we think applies to all plans: avoid penalizing employees for non-compliance, and instead reward employees for good faith

participation. Also, develop a well drafted written operating plan that explains the program to your employees. Encourage your employees to voice their questions, comments and concerns. These “best practices” will help to diminish your exposure to discrimination claims.

- **Massachusetts Wellness Tax Credit Incentive** – This incentive gives small businesses in Massachusetts a state tax credit for having an employee wellness program. Massachusetts businesses that employ 200 or fewer workers may qualify for the tax credit for up to 25% of the cost of implementing a certified wellness program for their employees. Employers must meet eligibility requirements in addition to wellness program criteria. These requirements include offering health benefits, having a majority of employees working in Massachusetts, not having willful or repeat OSHA violations in the past five years, and meeting all other requirements as set forth in the final regulations. Additional information may be found at: <http://www.mass.gov/eohhs/consumer/wellness/health-promotion/massachusetts-wellness-tax-credit.html>.
- **Employee Assistance Programs** - Employee productivity is a vital aspect of any business’s success; but often, employees are too overwhelmed by personal or behavioral problems to perform at their highest level. An employee assistance program is an employer sponsored program that offers services or referrals to help employees deal with personal challenges. Depending on how an EAP is structured, it could offer employee education, evaluation, hotlines, counseling and/or referrals. It could be an in-house program, outsourced through an independent EAP provider or a combination of the two.

Not surprisingly, the U.S. Department of Labor is a proponent of employee assistance programs (EAPs) as a means of dealing with a multitude of issues that affect job performance. EAPs have been shown to contribute to:

- Decreased absenteeism;
- Reduced accidents and fewer workers compensation claims;
- Greater employee retention;
- Fewer labor disputes; and
- Significantly reduced medical costs arising from early identification and treatment of individual mental health and substance abuse issues.

Many employers today are actively integrating services and resources to support overall employee physical and mental health expanding EAP services to include wellness programs, disease management, and preventive health.

**Legal Considerations** – If an EAP is considered a welfare benefit plan, it must comply with ERISA’s reporting and disclosure requirements. The key distinction, typically, is whether the EAP offers direct counseling or simply referrals. Because employee welfare plans are defined as providing medical benefits, an EAP that provides counseling would generally fit that description and would be subject to ERISA standards. Similarly, the COBRA implications are a bit unclear regarding EAPs. Generally, if an EAP is a welfare benefit plan and provides medical care, it is subject to COBRA.

Offering an EAP could open an employer to certain legal liability situations for actions taken by EAP counselors or outside vendors. We encourage our clients to ensure that their liability insurance covers all aspects of their EAP program. In addition, confidentiality is essential for an EAP.

An effective EAP can help employers attract and retain employees, lower health care and disability claims costs, increase productivity and moral, and lower absenteeism.

### **XIII. FEDERAL AND STATE WORKPLACE POSTING REQUIREMENTS**

**Remember: You need to post but you do not need to buy. All required postings are available free online from the various Federal and State agencies that mandate the postings.**

#### **Federal Posting Requirements:**

- Private employers, state and local governments, and educational institutions are required to post notices in compliance with the following acts:
  - Age Discrimination in Employment Act (ADEA);
  - Americans with Disabilities Act (ADA);
  - Employee Polygraph Protection Act (EPPA);
  - Equal Opportunity Employment Commission (EEOC);
  - Equal Pay Act (EPA);
  - Fair Labor Standards Act (FLSA);
  - Family and Medical Leave Act (FMLA);
  - Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
  - Occupational Safety and Health Act (OSHA);
  - Title VII Civil Rights Act of 1964;
  - Uniformed Services Employment and Re-Employment Rights Act (USERRA).
  
- Government contractors are required to post notices in compliance with the following acts and provisions:
  - Davis-Bacon Act;
  - Drug-Free Workplace Act;
  - Executive Order 11246 – Prohibiting federal contractors and subcontractors and federally-assisted construction contractors and subcontractors that have contracts exceeding \$10,000 from discriminating on the basis of race, color, religion, sex, or national origin.
  - Executive Order 13496 – federal contractors and subcontractors must post employee notices conspicuously in so that the content is prominent and readily seen by employees. <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm>
  - National Labor Relations Act;
  - Section 503 of the Rehabilitation Act of 1973;
  - Vietnam Era Veterans' Readjustment Assistance Act;
  - Walsh-Healy Public Contracts Act.

- McNamara-O'Hara Service Contract Act.
- In addition to the required posters, the federal government also recommends that employers post notices on the following acts:
  - Civil Rights Act of 1991;
  - Consolidated Omnibus Budget Reconciliation Act (COBRA);
  - Consumer Credit Protections Act, Title III;
  - Employee Retirement Income Security Act of 1974 (ERISA);
  - Fair Credit Reporting Act (FCRA);
  - Federal Military Selective Service Act;
  - Immigration Reform and Control Act;
  - Jury Service and Selection Act of 1968;
  - Worker Adjustment and Retraining Notification Act (WARN).

In March 2014, the EEOC issued a Final Rule which adjusts for inflation the civil monetary penalty for violation of the notice-posting requirements in Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Genetic Information Non-Discrimination Act (GINA). As of July 2016, the fine for violation of the EEOC notice-posting requirements, which used to be \$210 per violation, is now \$525 per violation.

We recommend checking the Department of Labor's web page [www.dol.gov](http://www.dol.gov) to keep posters current.

### **Massachusetts Posting Requirements:**

- Child Labor – Employers are required to conspicuously post information regarding permits, time and hour restrictions, and supervision;
- Earned Sick Time;
- Fair Employment Practices: Massachusetts employers with six or more employees must conspicuously post a notice outlining their employees' rights and obligations when apposing unlawful discrimination;
- Prohibition Against Sexual Harassment in the Workplace;
- Parental Leave Act;
- Meal Periods;
- Notice to Employees – Department of Industrial Accidents;
- Safety and Health – “Right to Know” workplace notice;
- Smoking in the Workplace is Prohibited;
- Temporary Worker Right to Know;
- Unemployment Insurance;
- Wages and Hours;
- Whistle Blowing;
- Domestic Workers Rights;
- Workers Compensation.

We recommend checking the state's web page [www.mass.gov/lwd/labor-standards/dls/massachusetts-workplace-poster-requirements](http://www.mass.gov/lwd/labor-standards/dls/massachusetts-workplace-poster-requirements) to keep posters current.

#### **XIV. RESTRICTIVE EMPLOYMENT COVENANTS**

Most states recognize, through common law, that current employees owe their employer a “duty of loyalty.” While the state specific definitions of that duty differ, in general terms, an individual while employed is not permitted to induce current customers, suppliers or other employees to leave the organization nor are they allowed to set up or operate a competing business. When that duty is breached most states permit the employer to collect lost profits, punitive damages, and out of pocket costs incurred. This duty is a creature of common law and employees need not sign any agreement or other document to trigger that duty. That duty of loyalty ends when the employee's employment relationship terminates; and therefore require their employees sign agreements containing a “loyalty provision.” That is, a clause that requires the employee to devote all or most of his/her working time to the employer's endeavors, while the employee remains employed by the employer.

Restrictive covenants, also known as non-competition, non-compete agreements, non-solicitation agreements, or confidentiality agreements are written documents that create binding commitments restricting employees' rights while employed and for a period of time following the termination of the employment relationship.

As a general rule, courts will consider the following factors in determining whether to enforce restrictive covenants:

- Does the employer have a legitimate interest in being protected from the employee's competitive activity? A court may refuse to enforce a restrictive covenant that is too broadly drafted even though the employer may be able to demonstrate a legitimate business interest worth of protection.
- Is the restriction reasonable in light of all the circumstances? By “reasonable,” the courts mean that the Agreement is no more restrictive upon an employee than necessary to protect the employer's legitimate business interests.
- Is the restriction reasonably limited in time and geography? The Agreement must contain a reasonable time restriction. Such a time restriction would be based on such factors as the time it would take to train a new employee or for customers to become familiar with the new employee and eliminate the identification between the employer's business and the former employee. Most states recognize 12 months beyond the employment relationship as a reasonable temporal restriction. The geographical scope of the restriction must be limited to areas necessary to protect the employer's interests.

#### **XV. FREQUENTLY ASKED QUESTIONS**

Our firm handles dozens of client questions every day concerning federal, state, and local employment laws. A few questions are asked of us again and again. Below are some selected questions, along with the answers provided by our attorneys under the Counsel On-Call Service.

**1. An employee has exhausted FMLA and has notified the employer that she is unable to return to work, what is the process for terminating the employee?**

**Answer:** Before terminating an employee who has exhausted FMLA, the employer should consider a number of potential issues. The first is that the FMLA contains anti-retaliation provisions that prevent employers from terminating employees because of exercising FMLA. For this reason, if an employer is inclined to terminate an employee who does not return from FMLA, it is important to have an attendance policy in place, and to follow that policy consistently as to all employees. Furthermore, any time an employee is out on FMLA for his or her own serious health condition, the employer should seek to ascertain whether the serious health condition also qualifies as a disability under the Americans with Disabilities Act (ADA) or state law. Under the ADA, short-term leave is per se a reasonable accommodation for a qualified individual with a disability; so no employer should consider terminating an employee who has exhausted FMLA for a serious health condition, without first engaging in the interactive dialogue required by the ADA.

It may be that termination is ultimately the appropriate course of action, but jumping directly there creates unnecessary risk. Instead, we recommend engaging with each employee prior to his or her return from FMLA to determine whether the employee intends to return and/or whether there are ongoing health issues or accommodations that are necessary. This will alert the employer to a possible problem before the employee is due to be back at work.

**2. An employee has exhausted FMLA, and is remaining out on disability leave, how long must the employer continue to keep the employee on the health insurance plan?**

**Answer:** The FMLA is unique among leave laws in its requirement that employers maintain employees on their health insurance policies. Although other laws, like the ADA, may require employers to provide additional leave to the employee, these laws do not require employers or insurers to continue the employee benefits. For this reason, once an employee exhausts FMLA leave, he or she no longer has a protected right to health insurance benefits. Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), an employee must be offered COBRA coverage following a qualifying event. One such qualifying event is a reduction of hours worked by the covered employee resulting in a loss of health insurance coverage. Most insurance plans require employees to work a minimum number of hours to be eligible for insurance. Once an employee's FMLA has expired, if the employee does not return to work, he or she will not meet these minimum hour requirements, and should be transitioned to COBRA coverage.

**3. We are converting an employee to Long Term Disability (LTD) Insurance, can we have a policy of automatically terminating employees once they are approved for LTD?**

**Answer:** The Americans with Disabilities Act (ADA) requires employers to engage with each disabled employee individually to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. If the employee is a qualified individual with a disability, the only way to avoid a reasonable accommodation obligation is for the employee to establish that the accommodation causes an undue hardship on the employer's business. Much of the litigation under the ADA concerns whether a particular accommodation is reasonable and/or whether it causes the employer undue hardship.

To mitigate potential risk of an ADA claim, it is advisable to regularly reach out to any employee who is on any type of long-term medical leave during regular intervals. We recommend reaching out to the employee in writing so that you have something documented that shows that you attempted to engage in the interactive dialogue required by the ADA.

Any time an employee with a disability is granted leave as a reasonable accommodation under the ADA he or she is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.

Undue hardship can only be claimed after there has been a request for accommodation and the employer has made an individualized assessment of the circumstances that show that the requested accommodation would cause significant difficulty or expense to the organization. Several factors must be considered in making a determination of undue hardship, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the company making the reasonable accommodation; the number of people employed at the company; the effect on expenses and resources of the company;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- the impact of the accommodation on the operation of the facility.

Congress, when it enacted the ADA, wanted employers to consider all possible sources of outside funding before making a determination of undue hardship. For this reason, employers have to be careful to look at all of the applicable factors when making an undue hardship determination. These determinations are often difficult, fact intensive, and determined by case-by-case analyses (even for the courts). It will not be enough to simply say, "Our budget does not allow for that expense." Courts will look at the overall

resources available to the organization, as well as outside resources and tax incentives. It will also look at disruption to operations, and whether the accommodation has been offered to other employees as evidence of whether an unjust hardship exists.

A policy of automatically terminating any employee who is approved for long-term disability without first engaging in the interactive dialogue to determine whether the employee is able to return to work with or without accommodation will violate the ADA.

**4. An employer has approved FMLA for a 30 day stay at a rehab facility. When the employee returns how should they handle any additional leave? Must the employee provide doctor's notes if he or she wants to take additional time off?**

**Answer:** Intermittent leave is described in the FMLA as leave used in separate periods or blocks of time due to a single qualifying reason. In this case, it would be rehab for substance abuse. There are two separate issues that are often at play when an employee seeks treatment for substance abuse.

The first is that active substance abuse is not a qualifying disability for purposes of the ADA or a serious health condition that necessarily qualifies for FMLA. Substance abuse only becomes qualifying for FMLA if the employee seeks treatment. Absence because of the employee's use of the substance, rather than for the treatment, does not qualify for FMLA leave.

The other potential issue that is raised is that the employer has to be careful not to discriminate against this employee once he or she returns.

When the employee returns from rehab, if he or she is not feeling well and needs to take a sick day, he or she must comply with the terms of the employer's sick leave or PTO policy. If the employer is in Massachusetts, it is not allowed to seek a doctor's note unless the employee is absent for 3 consecutive days. If the employee is a no show for work, the employer should treat the absence in the same manner it would for any other employee who violated the attendance policy. If the employee has exhausted PTO and sick leave, the absence is not protected, and the employer should treat it the same way it would for any other employee who is ill after exhausting sick time. This employee should not be treated any differently than any other employee.

If the employee needs additional intermittent time off for substance abuse treatment, this is a slightly separate issue. The initial FMLA certification submitted by the healthcare provider should establish whether follow up treatment will be necessary. The health care provider's certification of medical necessity allows the employer to verify the eligibility of the individual and the circumstances for coverage and the use of intermittent leave.

The FMLA regulations provide an entitlement for use of intermittent or reduced schedule leave only when it is medically necessary. Leave for a voluntary treatment or procedure would not qualify for this purpose because it would not be medically necessary. This is a major limitation in that the leave is not totally for the individual's discretion or

convenience. If the employer requests it, the employee must provide a certification by a health care provider which states that being able to take leave on an intermittent basis, is necessary to provide treatment to the employee. If the condition will require the employee to be absent for treatment, the certification should provide the date that treatment will begin and the expected duration of treatment.

Once the employee finishes the 30 day treatment, he or she should be able continue treatment outside of working time. However, to the extent ongoing treatment is recommended, DOL regulations spell out that an employee is supposed to give the employer at least 30 days advance notice before using FMLA leave if the need for leave is foreseeable. If that is not practical because of a lack of knowledge or uncertainty about when the leave will need to begin or due to a change in circumstances or a medical emergency, notice is supposed to be given “as soon as practicable.” That means both as soon as possible and practical, taking into account all of the facts and circumstances in the individual case.

The regulations also provide that when employees are planning medical treatment, they are required to consult with the employer to make a reasonable effort to schedule leave so as to avoid unduly disrupting the company’s operations. Of course, this is subject to the approval of the health care provider involved and the circumstances of the individual case. If an employee fails to consult with the employer before scheduling the treatment, the employer may initiate discussions and require the employee to attempt to make arrangements that will not disrupt its operations subject to the approval of the health care provider.

All of this means that to the extent this employee requires ongoing doctor’s appointments related to rehabilitation, he or she needs to notify the employer in advance of the time needed. If the employee has a relapse and lands back in treatment, he or she will have to submit a new certification.

#### Verification and Recertification of Medical Necessity

Another important protection provided to employers is that in some circumstances, employers are allowed to ask for recertification of FMLA leave necessity. When intermittent leave is in play, an employer is not permitted to request recertification in less than the minimum period that is specified in the health care provider’s original certification unless:

- circumstances suggest different conditions are present;
- circumstances have changed;
- the employee is seeking a longer period of leave; or
- information comes to the employer that casts doubt on the continuing validity of the initial certification, such as observing the employee performing activities that are inconsistent with what was previously conveyed by the health care provider.

In this case, if the certification returned by the employee is only for the 30 day treatment, the employer can seek a recertification of necessity for ongoing treatment and need for

intermittent FMLA. Doctor's appointments or other absences outside of the FMLA certification will not be protected leave. If the certification returned includes intermittent leave for ongoing treatment, recertification will be appropriate only if one of the listed conditions above is apparent. If the employee relapses and ends up back in in-patient treatment, this would be a change in circumstances that would warrant a recertification.

## 5. How should hourly nonexempt employees be paid for travel time?

**Answer:** The Department of Labor offers the following guidance regarding travel time:

- If the employee actually performs work on a non-workday while he or she is traveling, the employer would need to count the time as hours worked regardless of what time the work is performed.
- Travel time within normal work hours (weekday or weekend) will be paid at the employee's regular hourly rate and will be factored into overtime calculations.
- When an employee travels between two or more time zones, the time zone associated with the point of departure should be used to determine whether the travel falls within normal work hours.
- If an employee is traveling to a location, then the destination is either the hotel or the worksite (if the employee travels directly from the airport to work). If the employee is returning home from a location, the destination is the airport of final arrival.
- Regular meal time periods are not counted as hours worked.

With regard to air travel, the DOL defines compensable "travel time" as time spent traveling during working hours, including the time the employee arrives at the airport to the time the employee reaches his or her destination. Time spent by employees traveling on non-workdays if the travel takes place during the employees' normal work hours is also compensable. For example, if an employee is traveling on Saturday, the employer would be required to count as hours worked the time spent traveling by the employee between 8:00 a.m. and 5:00 p.m. on that Saturday, if the employee's normal workday is 8:00am-5:00pm.

States have varying positions on travel time; however, Massachusetts state law is consistent with federal law outlined above in that it considers all time spent traveling "after the beginning of or before the close of" the workday as compensable time.

### Rate of Pay

Non-exempt employees may be paid for their travel time at a pay rate lower than the usual rate of pay. This rate may be as low as the minimum wage. However, the rate at which the travel must be paid depends upon the nature of the compensation agreement. If the employer has agreed to pay a fixed hourly rate of pay for any work performed, then travel time must be paid at that regular hourly rate or, if applicable, the required overtime rate.

Thus, while you can absolutely establish a separate rate of pay for travel for hourly employees, it must be at least minimum wage, it must be established before the travel is

performed and set forth clearly in the travel policy, and must be explicitly set forth in the employee's pay structure.

## **XVI. CONCLUSION**

So many laws, so little time when running a business. We hope you find our Synopsis to be a valuable resource. Should you need assistance, we are here to help.