



**THE EMPLOYERS' GUIDE**  
**TO**  
**UNDERSTANDING MASSACHUSETTS**  
**WORKPLACE LAW**

**The 2010 Edition**

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**Please note:**

- *The information provided in this Guide is intended to provide accurate and informative information and is not a substitute for legal or professional advice. The issues we address in this Guide are becoming increasingly complicated and we recommend that you consult with Labor & Employment counsel;*
- *This Guide may be considered advertisement or solicitation under federal law.*

## **INTRODUCTION**

We are proud to present the 2010 version of the “Employer’s Guide to Understanding Massachusetts Workplace Law.” We have participated in senior leadership team strategic planning as both in-house counsel and outside special counsel. We know that you are motivated to advance your short-term and long-term goals and objectives and strive to succeed in driving your business forward. Our mission is to free you from the burdens and risks of deciphering the vexing labor and employment standards. Accordingly, we have produced this Guide.

Workplace law continues to be dynamic, and much has changed recently: COBRA, the ADA, and the FMLA have all received significant makeovers; discrimination laws in Massachusetts have expanded to encompass even the smallest employers; virtually any violation of Massachusetts’ wage and hour laws can subject employers to mandatory treble damages, and the Courts have little discretion; there are now new leave rights for military families; President Obama signed the Lily Ledbetter Fair Pay Act; caregiver discrimination became a hot topic in today’s workplace; the Employee Free Choice Act gained momentum; most employers must have an information security program in place on or before March 1, 2010; the independent contractor law in Massachusetts is being aggressively enforced by the Attorney General’s office; and OSHA is recommending new best practices for employers. This list is by no means exhaustive.

Each and every day, employers make personnel decisions that have legal ramifications, most of which they never realize. Have you ever had an occasion to stop and think about workplace regulations: overtime eligibility; minimum wage; meal breaks; tip pooling; healthcare reform; workers’ compensation; discrimination; leaves of absence? If so, this Guide will help. We have provided a comprehensive subject matter index to help you locate the answer to your particular question.

It is essential that you minimize your risk while maximizing your opportunities. How do you do this? By empowering yourself with the knowledge necessary to identify potential legal issues before they arise. We hope that 2010 edition of our Guide empowers you to anticipate issues so that you can focus on business and enjoy success. If you have issues, questions or concerns that go beyond the information provided in this Guide, then be sure to give us a call. We can help!

## I. THE EMPLOYMENT RELATIONSHIP

### ESTABLISHING THE EMPLOYMENT RELATIONSHIP

For every employer, large or small, staff hiring decisions are extremely important. Interviews must be conducted in strict compliance with applicable state and federal privacy, disability and other employment laws. Credentials for all applicants should be confirmed to ensure that the best possible candidate for the particular vacancy is being hired, regardless of the nature of the vacant position. We strongly recommend that employers devote substantial time and attention to the hiring process. Successful hiring decisions will likely result from an objective and thorough evaluation of each applicant, especially if you understand the following obligations and general principles:

- A. Recruiting – Ensure that all newspaper advertisements, brochures and other solicitation forms avoid wording that can be relied upon for employment litigation. Such documents should be:
  - Free from duration expectations;
  - Replete with disclaimers;
  - Free of language that can be construed as evidence of race, sex, religious or national origin or other discrimination; and
  - Updated periodically.
  
- B. Interviewing – Interviewers, like recruiters, should be sufficiently trained on how to conduct proper and statutorily-compliant interviews:
  - All representations made during an interview may be relied upon by applicants; (e.g. statements may turn an at-will relationship into a for-cause relationship);
  - Avoid over-selling positions;
  - Never use the phrases “long-term” or “permanent employment”;
  - Emphasize employee-at-will status where appropriate;
  - Be mindful of the Americans with Disabilities Act – do not ask about the existence, nature, or severity of a disability. Instead, focus on the applicant’s ability to perform specific job functions;
  - Prepare a Do’s and Don’ts checklist of what can be discussed.
  
- C. Employment Applications – Employment Applications are perhaps the most important document in an employment-related lawsuit. Consider whether the application could be the basis of a lawsuit or a defense to a lawsuit.
  - Ensure that questions asked are proper and that the application protects the employer;

Review the application form and consider the following three questions:

- Does this question tend to have a disproportionate effect in the screening out of any protective class?
- Is this information necessary to assess and evaluate the applicant's ability and experience to perform this particular job?
- Are there alternate non-discriminatory means to secure the necessary information?

We have prepared and provide our clients with a list of proper questions/subjects and a list of improper questions/subjects for the recruitment process. To obtain a copy of "*Screening of Employment Applicants*," please contact Mike Foley.

D. What the Law Tells Us:

- **Background Checks** – Employers are permitted to conduct background checks, which can include credit checks on applicants. We strongly recommend that you do so. However, if you use a third party to conduct the background and/or credit checks, you must comply with the Fair Credit and Reporting Act. The FCRA governs gathering and using any communication that can be defined as a "consumer report" and requires employers to obtain an applicant's prior written consent before a third party conducts a background check.

The Massachusetts Criminal Offender Records Information (CORI) procedures and guidelines allow employers to request criminal records on an applicant but an employer's access to such information is regulated and not all employers are eligible to obtain the available information. In order to have access to CORI information beyond that which is publicly accessible, the employer must first be certified by the Criminal Histories Board. The Board restricts eligibility to employers whose employees have the potential of unmonitored access to vulnerable populations including children, the elderly and disabled individuals, as well as employers who hire persons with access to patients. Please note that one of Patrick Administration's priorities is to modify the existing CORI guidelines to further restrict both employer eligibility and the information available to those employers who still qualify.

- In an age of increased technological advances, employers now have access to information about prospective employees by searching sites such as MySpace and Facebook. Although this area of law is evolving, Massachusetts courts have held that an individual who posts information on a public domain has no reasonable expectation of privacy. Therefore, unless an employer uses the information impermissibly, there are currently

no restrictions on using the information on these sites as a part of the background check procedure for prospective employees.

- **At-Will** – Unless an employee is hired under an employment agreement or a collective bargaining agreement or enjoys a statutory for cause relationship (e.g. “professional teachers”), all employees are deemed “at-will” under existing decisional law. The “at-will” employment status allows employers to hire individuals without a commitment to employ them for any definitive period of time. In fact, the “at-will” status allows employers to terminate employees at any time and for any reason, except for those reasons that would violate the law.
  
- **Independent Contractors** – The Massachusetts “independent contractor” law became effective in 2004 and excludes far more workers from independent contractor status than were disqualified under the traditional state and federal law tests. The Attorney General’s office has declared its intent to aggressively enforce this law through the issuance of civil citation or criminal prosecution for both intentional and unintentional violations. The independent contractor law 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 what is described as 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.

Now is the perfect time to go back and review all existing and prospective independent contractor relationships to be prepared for the Attorney General’s aggressive enforcement of these new obligations.

- **I-9 Documentation** – Our Advisory titled “*I-9 Compliance*” provides a comprehensive overview of recent developments with I-9 compliance. Please contact us to obtain a copy of this invaluable resource. In general terms, employers are required to verify the identity and work authorization of all employees within three business days of hiring those employees by completing an Employment Eligibility Verification Form (I-9). The US Department of Homeland Security recently issued an interim rule stating that employers may sign and retain I-9 forms electronically and may also scan and store existing I-9’s as long as all standards are met. I-9 documentation must be maintained in separate files apart from personnel

records and must be maintained for three years from the date of hire or one year from the date of termination.

On February 2, 2009, the United States Citizenship and Immigration Services (USCIS) released a revised I-9 form. Employers who use the new Form I-9 only need to use it for new hires or when employees require re-verification. Employers should periodically check for revised/updated I-9 forms at [www.USCIS.gov](http://www.USCIS.gov).

The USCIS issued a reminder that effective April 3, 2009, all employers are required to use the revised form I-9 Employment Eligibility Verification.

We recommend that all employers create a tickler system to remind them that they may need to re-verify an employee's I-9 documentation.

- **Minors** – All individuals between the ages of fourteen and seventeen must secure an employment permit and a 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 sixteen may work in a manufacturing facility.

In January 2007, Massachusetts enacted legislation relating to employment of minors by expanding permissible work hours while increasing the penalties for violations. The new 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 11:30p.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 new 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 has also provided a "splash page" to provide teenagers with information regarding their job rights at [www.laborlowdown.com](http://www.laborlowdown.com).

- **Personnel Records** – Any employer who employs six or more employees must allow their employees to review their personnel records and to receive copies of them. Any employer employing twenty or more employees must retain a copy of the personnel record for at least 3 years after the employment relationship ends or throughout the duration of any on-going litigation, whichever is longer. When an employee makes a written request to review his or her personnel file, the employer must provide a legible and complete copy of the employee’s personnel file within five (5) business days. Massachusetts laws and regulations do monitor personnel records, which includes information related to qualifications, compensation, disciplinary action, promotion, transfer, and other terms and conditions of employment. We highly recommend that employees adopt a consistent policy with regard to employee personnel files. It is of utmost important to include copies of all records relative to employee discipline, and to make them a part of the personnel file contemporaneously with the disciplinary action.
  
- **Reporting of New Hires and Independent Contractors** – Employers are required to provide the Massachusetts Department of Revenue with notice of all new hires and independent contractors who will be paid more than \$600.00 in a calendar year. The Massachusetts Department of Revenue then transmits that information to the National Directory of New-Hires. Any employer with twenty-five or more employees is required to report new-hires electronically which may be done through the Department of Revenue’s website.
  
- **Smoking** – Since 2004, any Massachusetts employer employing one or more employees 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.
  
- **Personal Information Security Plan** – Massachusetts enacted a new regulation regarding the protection and storage of paper and electronic information. The regulation applies to all who “own, license, store or maintain personal information about a resident” of Massachusetts. Employers must implement a written information security program by March 1, 2010. The plan must:
  - Detail measures adopted to safeguard personal information;
  - Designate at least one person to manage the security program;
  - Impose disciplinary measures for violations of the program;
  - Limit access to personal information;

- Monitor security to prevent unauthorized use;
- Document 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 plan. We have worked in tandem with an IT specialist to ensure that your computer systems comply with the new encryption requirements. Please call Mike Foley if you would like our assistance in achieving compliance with this new workplace regulation.

- **Post Offer Pre-Employment Physicals and Medical Inquires** – Physical examinations and medical inquiries are permissible only after the offer of employment has been made. Our workplace laws in Massachusetts specifically address post-offer physical examinations:
  - Advisory – “*An Overview of Good Employment Practices*” provides a comprehensive review of permissible questions that can be presented throughout the recruitment process;
  - Employers must pay for the physical examination if they designate the position for the prospective or current employee;
  - Employers must provide a copy of the physical examination record if it is requested by the prospective or current employee.
- **Lie Detectors**– Employment applications should contain the following specific caveat, acknowledgement and notification: “It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability”.
- **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.

## **ENDING THE EMPLOYMENT RELATIONSHIP**

- **Successful Reductions in Force, Easier Said than Done** - Unfortunately, reductions in force (RIF) have become a common occurrence in many sectors. The current economic conditions have triggered additional pressures on companies to cut costs, improve profitability, and respond to increasing competition in the marketplace.

Like many employment decisions, a successful RIF is easier said than done.

We advise all of our clients to conduct an analysis of their re-organization through the eyes of an employee who has been laid off. Those who challenge the RIF will raise a series of questions about the manner and implementation of the reduction, such as:

- Who decided the lay-off was necessary?
- What financial circumstances required the RIF?
- Did the employer attempt to reduce its workforce with a voluntary exit incentive program before involuntary furloughs? If not, why not?
- Did the selection process attempt to select the best employees or identify the necessary functions that should be retained?
- Who was responsible for deciding which employees would be laid off and who was involved in making recommendations that led to the decisions?
- What criteria were used by managers in selecting the persons who would be laid off?
- Were the lay-off criteria related to the employer's business justification for the RIF?
- What role did performance evaluations play in the selection process?
- Were the lay-off decisions in fact, consistent with the established criteria and can the employer prove it?
- What records were made and kept to explain the selection decisions and who prepared those records?
- Did the employer train its managers or use any other precautions to ensure that no improper factors were considered by the managers making the lay-off decisions?
- Did the employer determine whether the lay-off adversely affected any protected categories of employees?
- What severance pay or outplacement was provided to employees?

## **BEST PRACTICES**

- Evaluate personnel policies and prepare a lay-off plan;
- Review and/or establish a severance policy and general release;
- Create and document a lay-off plan;
- Train the RIF decision makers;
- Conduct an adverse impact analysis;
- After downsizing is completed, focus on remaining employees.

- **Successful Reductions in Force: Severance Pay and Releases** – Yes, it is possible to eliminate any liability or exposure to litigation or other claims by offering severance in exchange for a binding release.

Common terms within severance packages:

- A letter from the company advising the employee that their position has been eliminated and/or that they have been laid off by date certain (typically immediately). The letter is hand-delivered to the employee along with the final paycheck for services rendered and a check for the value of the accrued vacation time. The letter also informs the individual of the right to elect to continue group health insurance coverage either under the Consolidated Omnibus Budget Reconciliation Act (COBRA) or a Massachusetts mini-COBRA law. The letter may also inform the individual that they may apply to the DUA for unemployment compensation. In Massachusetts, receipt of severance pay does not disqualify an individual from receiving unemployment compensation.
- A comprehensive release and waiver of all employment-related claims.
- A statement of the consideration for release of claims; typically in the form of salary and/or insurance continuation for a period of time.

To be sure, while there is no escaping the emotional impact of a RIF, effective planning can help accomplish your business goals and avoid exposure. The optimal way to avoid litigation challenging a RIF is to encourage employees to sign a release as outlined above.

- We remind our clients that they are not required to have a severance plan or a severance policy in order to offer severance pay and obtain a release when a layoff occurs. If there is a severance plan, however, that plan should be examined to ensure that it complies with the Employee Retirement Income Security Act (ERISA).
- Many employers are requiring employees to sign a release and waiver of claims as a precondition to the receipt of any severance benefits. If your current severance plan or policy or agreement does not require an employee to sign a release as a condition to the receipt of severance benefits, we recommend that you consider amending that document to add that requirement.

## What the Law Tells Us

- Not surprisingly, analysis of potential age discrimination has raised some of the most important issues involving the validity of releases and waivers of claims. The Age Discrimination in Employment Act (ADEA) requires that releases signed by employees over the age of 40 must comply with the Older Workers Benefit Protection Act (OWBPA).

In a group layoff situation, the OWBPA requires that employers allow employees up to 45 days to consider whether to sign a release. An individual layoff situation gives employees 21 days to consider a waiver. All individuals accepting a waiver must have a period of 7 days to revoke the severance agreement. Under the OWBPA, an employer must give something of value, beyond that which the individual is already entitled, in exchange for the waiver of claims, irrespective of whether it is a group or individual layoff situation.

- **Do Plant Closing Laws Apply?** - Massachusetts has its own plant closing law, which covers all employers. Under the Massachusetts law, any employer that is closing a facility must promptly report the intended plant closure to the Director of the Department of Labor and Workforce Development to allow that Department to determine the affected employees' re-employment assistance benefits. Under the state law, a plant closing occurs if the Commissioner determines that at least 90% of the employees of a facility have been or will be permanently separated. Employees are eligible for re-employment assistance benefits for any week of unemployment if the Commissioner finds that:
  - The employee was terminated as a result of a plant closing;
  - The employee is otherwise eligible for regular benefits;
  - The employee is participating in the re-employment assistance program.

In addition to the state law, certain employers are subject to the federal law. Understand your obligations under the Workers Adjustment and Retraining Notification Act (WARN). WARN requires employers with 100 or more employees to give 60 days notice prior to a "plant closing" or to laying off or terminating 50 or more employees. There are penalties and fines for failing to comply with the Act's requirements, including attorney's fees. The sale of a business itself is not a WARN event and does not trigger the Act's notice requirements.

- **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”. COBRA defines a qualifying event to include termination of employment or a reduction in the employee’s hours below the eligible threshold for insurance. Continuation must be afforded for all coverage in effect at the time of the qualifying event, including medical, dental, and vision coverage. Employers are now required to give their employees COBRA-related notices:

- When the employee becomes covered under the health insurance plan;
- When a qualifying event occurs;
- When COBRA coverage terminates;
- When the unavailability of coverage is determined.

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.

- President Obama’s stimulus package (The American Recovery and Reinvestment Act of 2009 or ARRA) extends COBRA benefits and compliance obligations. The ARRA provides a 65% reduction in the premium otherwise payable by certain involuntarily terminated individuals and their families who elect COBRA continuation health coverage. The COBRA subsidy amount is reimbursed to the employer by being claimed as a credit on the Form 941, employer’s quarterly federal tax return. For more information about these significant changes to COBRA, see our “*COBRA’s Teeth Get Sharper*” resource posted on our Website.
- **The Bottom Line** – There is no more effective way to limit litigation challenging a RIF than offering employees a severance package in exchange for a signed release!

## II. WORKPLACE HARASSMENT AND DISCRIMINATION

An analysis of harassment and discrimination issues is a recipe for alphabet soup: ADEA, ADA, EEOC, MCAD, USERRA, FCRA, MGL, CORI, DFWA, DOL. We refer you to our Client Advisory titled “*Workplace Harassment*”. This Advisory addresses the following subject matters: A basic definition and legal history of harassment; new liability standards; the importance of good supervisors; how to protect your workplace from hostile work environment liability; and best practices for investigating allegations of harassment.

Here is a brief summary of state and federal law:

- **Genetic Discrimination** – Genetic information is a written record or an explanation of a genetic test with regard to the presence, absence or variation of a gene. Your employment application must include a statement to the effect that 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 anyway that effects the terms and conditions of an individual’s employment; or
  - Seeking, receiving or maintaining genetic information for any non-medical purpose.
  
- **The Massachusetts Equal Rights Act (MERA)** – The Massachusetts Anti-Discrimination Law (Chapter 151B) excludes employers with fewer than six employees. However, the Massachusetts Supreme Judicial Court recently held that an employee may nonetheless sue a small employer under MERA whenever the Anti-Discrimination Law does not apply. This decision opened the door not only for employers of small companies to bring a discrimination claim but also for non-employees of small or large employers. An ounce of prevention is worth a pound of cure is never more true than in Massachusetts today. For more information about MERA, check out our e-newsletter titled “*Massachusetts Court Expands Rights and Discrimination Nation.*”
  
- **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. The most prevalent claims: alleged violation of the FMLA, ADA and gender discrimination. For more information on best practices, see the resource section of our website under “*The New Cause of Action: Caregiver Discrimination.*”
  
- **Age Discrimination**
  - Have you ever heard the term ageism? Did you know that 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. We also know that our Supreme Judicial Court in Massachusetts has told us that there must be a "substantial" difference in age, defined as no less than five years, between a plaintiff and the younger employee who replaced the plaintiff, unless there is other evidence to prove discriminatory intent by the employer.
- According to the AARP, the percentage of people 65 and older who work has grown from 10.8% in 1985 to 18% in 2008, and the percentage of people who work between the ages of 55 to 64 has increased from 54.2% in 1985 to 64.5% in 2008. Given the financial instability on Wall Street, these figures will likely continue to grow.
- Now is a good time to review your pre-employment inquiries, job notices, and advertisements to make sure they are free of statements or questions that may give rise to a claim of age discrimination. Under federal law, it is unlawful to include age preferences, limitations, or specifications in job notices or advertisements. As a narrow exception to the general rule, a job notice or advertisement may specify an age limit in the rare circumstance where age is shown to be a bona fide occupational qualification.
- **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. Refusal to comply with these obligations constitutes discrimination based upon military service. Our 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 VI of this Guide.
- **Discrimination** – You may not be surprised to learn that our state laws that prohibit discrimination in the workplace include more protected classes than those defined by federal law. The federal law covers

employers who employ fifteen or more employees, and prohibits all forms of discrimination based on race, color, sex, religion, and national origin. The Equal Employment Opportunities Commission (EEOC) enforces the federal law, known as Title VII. Our Massachusetts laws that prohibit discrimination include the protected classes under federal law as well as ancestry, age, disability, arrest record, military service, marital status and sexual orientation. The Massachusetts Commission Against Discrimination (MCAD) enforces Chapter 151 B.

- **Disability** – We have all heard of the ADA but it is always worthwhile to refresh our understanding of disability laws that apply to our workplace in Massachusetts. The Americans with Disabilities Act 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 defined under the Act as a person who meets legitimate skill, experience, education or other requirements of a position and whom can perform the essential functions of that job, with or without accommodation. The term disability is defined under the ADA as:
  - Having a physical or mental impairment that substantially limits one or more of the individuals major life activities;
  - Having a record of such impairment; or
  - Being regarded as having such impairment.

The good news is many questions about the ADA have been answered. The bad news is that the clarifications and answers, which went into effect January 1, 2009, raised the bar for employer compliance. The EEOC will soon issue new regulations addressing the clarifications to the ADA. In the meantime, please see our e-newsletter titled “*The ADA Gets a Makeover but it isn’t Pretty.*” Clearly, a larger percentage of the workforce will be eligible for accommodations under the ADA clarifications. Employers should implement a detailed interactive questionnaire to use during interviews of employees claiming a disability.

In Massachusetts, employers of six or more employees must reasonably accommodate a qualified disabled person unless to do so would cause undue hardship to the employer. While an employer may not make any pre-employment inquiry as to whether the applicant is disabled, an employer may condition an offer of employment on the applicant’s successfully passing a medical examination conducted to ascertain whether that applicant, with or without accommodation, can fulfill the essential functions of the job.

- **Drug Testing** – Surprisingly, the issue of drug testing has not been addressed on a broad level by either federal or state legislators. The

Federal 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 are governed by the Department of Transportation (DOT) regulations requiring testing for alcohol and controlled substances. Massachusetts currently has no statutory restrictions on drug testing but our Supreme Judicial Court has ruled that random drug testing violates an employee's right under the State privacy statute unless the job is safety sensitive.

- **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.
- **Religious Freedom** – Both federal and state statutes protect workers from discrimination in the workplace based upon their sincerely-held religious beliefs, which is somewhat of an amorphous standard. 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. If the requested time-off is granted, the employer does not have to pay the employee for that day.

On July 22, 2008, the EEOC issued a new Section XII to its compliance manual addressing religious discrimination. Title VII of the Civil Rights Act of 1964 requires employers to make a reasonable accommodation for sincerely-held religious beliefs. Religion is broadly defined and has subjective quality because it is measured by the employee's belief and goes beyond traditional, organized religions. These definitions are not terribly helpful but Section XII of the compliance manual provides some guidance on best practices and suggestions for handling some difficult situations. For more information about religious discrimination, please check out our e-newsletter titled "*Religious Discrimination? Know your EEOC Compliance Manual.*"

- **Race** – We all know that employers are prohibited from engaging in conduct that would discriminate on the basis of race and color. The compliance manual published by EEOC contains a relatively new section intended to provide guidance on race discrimination. For a copy of the compliance manual, please visit the EEOC website @ [www.EEOC.gov](http://www.EEOC.gov).
- **Sexual Harassment** – Sexual harassment continues to be a common issue and allegation in today's workplace. 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 and must distribute that policy to all new hires and annually to all existing employees. MCAD provides valuable guidance on sexual harassment:

- Offering a model sexual harassment policy that employers may adopt;
- Offering a model poster which employers may display;
- Issuing sexual harassment prevention guidelines outlining responsibilities and best practices for investigations.

### III. WAGE AND HOUR OBLIGATIONS

Massachusetts was the first state to enact what many consider to be an anti-business wage law on April 14, 2008. The new 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 new statutory penalties are a somber reminder of the significance of up-to-date employment policies. Compliance with Massachusetts wage and hour obligations is a tedious responsibility for all employers. For more information about wage and hour obligations, please see our e-newsletter titled “*Massachusetts Wage Act makes Triple Damages Mandatory*” and continue reading this section of our Guide.

- **The Ledbetter Fair Pay Act** – President Obama extended the statute of limitations for compensation discrimination claims by signing the Lily Ledbetter Fair Pay Act of 2009 and the Paycheck Fairness Act. As we know, it is unlawful for employers to discriminate against an employee because of that 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 their compensation is protected under several federal and state laws. Under the new Ledbetter rules, the date of the initial offense is no longer relevant for the purposes of a limitations defense if there is a continuing violation. In fact, the continuing violation keeps the discriminatory claim alive indefinitely. For more information, see our e-newsletter titled “*The Ledbetter Fair Pair Act Changes the Clock for Equal Pay Claims.*”
- **Overtime Eligibility** – 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 work week. Exempt employees must be paid on a salaried basis and must meet the salary and duty tests for either administrative, professional or executive 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 work week. 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.

Our Massachusetts workplace laws and the Federal Fair Labor Standards Act allow employers a fair level of discretion with respect to overtime:

- Holiday pay, sick pay, and vacation pay are not considered hours worked for the purposes of calculating overtime under the FLSA;
- Employers may require overtime as a condition of employment or continued employment;
- Our federal and state wage and hour laws do not impose any restrictions on the number of hours an employee may work. However, in Massachusetts, employees must have one day of rest in a seven-day period.
- **Training Time** – When an employer requires an employee to participate in training, such time is considered “hours worked” for the purposes of calculating overtime pay. Training programs that fall outside of the normal working hours and are completely voluntary do not constitute “hours worked”.
- **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.
- **Minimum Wage** – The current Massachusetts minimum wage is \$8.00 effective January 1, 2008. Recent legislation has increased the federal minimum wage to \$7.25 per hour, effective July 24, 2009. If the federal minimum wage increases to \$7.50 per hour or more, then the Massachusetts minimum wage must exceed it by at least ten cents per hour.
- **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 of such change 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;
  - Employers must pay an employee who is discharged (for any reason) their final check for hours worked on the day of the actual discharge.
- **Tips on the Massachusetts Tip Statute** – It is true that the minimum wage for tipped employees (employees who receive more than \$20.00 a month in tips) is \$2.63 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 \$8.00 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 anti-retaliation provisions of the Massachusetts General Laws.

## IV. INSURANCE

- **The Massachusetts Health Care Reform**

On October 12, 2006, landmark legislation was enacted with the goal of providing nearly universal health care coverage to State residents. Starting in July 2007, all state residents must carry a minimum level of health insurance, a requirement that will be enforced and monitored through state income tax returns. Coverage under the new legislation may be achieved through an employer, Medicaid, Medicare, or new programs that will facilitate the purchase of private health insurance coverage. Failure to comply with the new law may lead to financial penalties.

Compliance obligations and financial burdens for the expanded health care coverage will fall to varying degrees on the following parties:

- **Individuals** – Residents will be required to purchase health coverage as long as the health coverage is deemed to be “affordable” and if they fail to do so, they will face tax penalties;
- **State and Federal Governments** – Through Medicaid expansions and subsidies and the significant redirection of uncompensated care pool and disproportionate share hospital funds;
- **Employers** – Through a “fair share” contribution and “a free rider surcharge”;
- **Employers’ Responsibilities** – The Act imposes a new responsibility on many employers. Employers who employ eleven or more individuals and do not make a “fair and reasonable contribution” to the cost of their employees’ health insurance coverage, will be charged a fair share assessment currently capped at \$295.00 per full time employee per year. The “Fair Share Premium Contribution Requirement” has come to be known as the “FSC Requirement” and the tests apply to determine compliance are now referred to as the “FSC Tests.”
  - (a) **Threshold Coverage** - Does the employer employ 11 or more full-time equivalent employees in the Commonwealth for the testing period? If the answer is no, then the employer is not subject to the FSC Requirement and need not pay an annual fair share employer contribution to the Commonwealth.
  - (b) **Primary/Percentage Contribution Test** – If the answer to Part 1 is “yes,” (i) does the employer offer a “group health plan” to which the employer makes some (any) contribution and (ii) do 25% or more of employer’s full-time employees participate? Employers

with more than 50 full-time equivalent employees must pass both the percentage contribution and the premium contribution test (described in Section C below) to be exempt from the annual Fair Share Employer Contribution Requirement. Employers with more than 50 full-time equivalent employees can avoid paying the annual Fair Share Employer Contribution if they can pass a 75% percentage contribution test. For employers with 50 or fewer full-time equivalent employees, as long as they pass the percentage test they avoid the obligation to pay the annual Fair Share Employer Contribution.

- (c) Secondary/Premium Contribution Test – If the answer to Part 2 is “no,” does the employer offer to make a premium contribution of at least 33% of the cost of the individual coverage under an employer sponsored plan offered to all full-time employees no more than 90 days after the date of hire?
- (d) Calculation and Payment of the Annual Fair Share Employer Contribution – If the employer passes the test(s) described above, then it has no obligation to make any payment to the Commonwealth Care Trust Fund. Otherwise, it must make a per-employee Fair Contribution not to exceed \$295.00, pro-rated for full-time equivalent status based on a 2000 hour year for years commencing before October 1, 2008 and based on a 500 hour quarter for years commencing after September 30, 2008.
- (e) Temporary Employees and Seasonal Employees – Only employers with 11 or more full-time equivalent employees are subject to the FSC requirement and an individual is not counted until he or she has worked at least a month. An individual who is a full-time employee but has not worked a month is not counted in the numerator or the denominator of the percentage test and is not counted when calculating the FSC penalty.

- **Insurance** – Employers have wide discretion to determine what benefits, if any, it wishes to offer to its employees. However, all employers must remember that the application of those benefits are subject to the discrimination laws reviewed previously within this Guide. Benefits must be applied in a nondiscriminatory manner.

## V. TIME OFF FROM WORK

- **Did You Know** – Did you know that employers are not required to offer paid vacation or sick time? There are multiple forms of paid and unpaid leaves within the Massachusetts workplace which include, but are not limited to: industrial accident leave; personal illness leave; education leave; maternity leave; military service; jury duty; vacation; sick leave and

family leave. This section of the Guide provides an overview of workplace leave requirements in Massachusetts.

- **Vacation** – 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/misconduct).
  
- **Massachusetts Maternity Leave Act (MMLA)** – Employers with six or more employees are required to provide eight weeks of unpaid maternity leave to eligible full-time employees for the purpose of childbirth or for adopting a child under age eighteen. The female employee must have worked full time for three months or completed the employer’s probationary period, whichever is longer, in order to be eligible for such leave. The MCAD provides guidelines that govern maternity leave in our Commonwealth:
  - Female employees are entitled up to eight weeks of leave for each birth or adoption;
  - Employers may require a two-week notice of the date of the employees departure;
  - Leave may be paid or unpaid at the discretion of the employer;
  - The female worker taking the leave must not lose benefits and must be returned to the same or similar job;
  - The female worker cannot be required to use vacation or paid leave concurrently, but may voluntarily choose to do so;
  - Male employees are not currently entitled to benefits under the MMLA, regardless of the constitution of their family;
  - The MMLA must be posted in the workplace.
  
- **Military Service Leave** – State and federal law grant benefits for military leave and it is obvious that such leave time will continue 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. The leave may be paid or unpaid depending upon the employer’s policies, but the leave must be given with re-employment rights and no loss of seniority.

The **Federal Uniform Services Employment and Re-Employment Act (USERRA)** provides additional protections:

- In 2005, the Department of Labor released new regulations regarding employees' rights and responsibilities under USERRA;
- 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).

On January 28, 2008, the Federal government expanded leave rights for military families. The National Defense Authorization Act (NDAA) was an expansion of the Family and Medical Leave Act (FMLA). Under the law, FMLA eligible employees are entitled to the following benefits:

- 12 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;
- 26 weeks of FMLA leave during a single 12-month period for a spouse, son, daughter, 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.

Please see the summary of the FMLA, below, for an overview of the National Defense Authorization Act, which provided the first expansion of the FMLA.

- **Jury Duty** – Massachusetts law requires employers to grant employees time off from work to serve on a jury. Employers must pay their employees for the first three days of jury service and after the third day, the court will pay the juror a daily stipend of \$50.00. The employer has an option to pay the difference between the jury stipend and regular pay.
- **Massachusetts Small Necessities Leave Act (SNLA)** – Employers with fifty or more employees must provide eligible employees with twenty-four 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. To be eligible, employees must have worked for the employer for twelve 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 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 twelve 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).

The revised FMLA took effect on January 15, 2009. In addition to addressing the military caregiver provisions, the amendments allow eligible employees to take protected leave to address “qualified exigency” and allows employees to settle their FMLA claims directly with their employer. For more information about the amendments, see our e-newsletter titled “*How Will the New FMLA Affect my Business?*”

The Department of Labor is working to prepare more comprehensive guidance regarding rights and responsibilities under this new legislation. For more information about this Act, please see the Resource “*New Leave Rights for Military Families*” posted on our Website.

## **VI. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION ACT**

- All employers in the United States must comply with the so-called “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.”
- At present, the penalties assessed by OSHA depend on the seriousness of the violation and whether or not the violation is a repeat violation or willful. The current maximum penalty is \$70,000 per violation and the current minimum penalty is \$5,000 per violation.
- The Act provides for recording and reporting requirements by employers, under certain circumstances, when employees have an accident in the workplace. All employers are required to report all workplace fatalities or any accident that involves the hospitalization of three or more employees to OSHA.

- All Massachusetts employers are required to post the federal OSHA poster to provide their employees with the information on their safety and health rights. The posters are available on-line at the United States Department of Labor's website.
- Given the frequency of work-related accidents and the ancillary cost to employers, not to mention the adverse affect an accident can have on an employer's insurance costs and productivity, 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. For more information about the basic elements to a quality health and safety protection plan, contact Mike Foley.

## VII. 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.

## VIII. UNEMPLOYMENT COMPENSATION

We have prepared a Client Advisory providing a more comprehensive review of the unemployment compensation issues that arise in today's workplace. We direct you to our Advisory titled "*Understanding Unemployment Insurance Law*".

- 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.
- Employees applying for unemployment compensation are subject to a one-week waiting period. The maximum current benefit is \$575.00 per week and the claimant may also receive a dependency allowance of \$25.00 a week per dependent. Employers are required to distribute the Division of Unemployment Assistance (DUA) document titled “*How to File Unemployment Insurance Benefits*” to all separated employees. Employers must file the quarterly contribution report Form 0001. All employers of six or more employees are required to pay annual surcharge of .12% on wage base of \$14,000.00 up to a maximum of \$16.60 per employee. This payroll tax goes into a fund to provide health coverage for unemployed persons.

There are no laws in Massachusetts requiring employers to provide severance pay benefits. However, severance benefits granted to an employee in consideration for a release of all putative employment-related claims, do not disqualify that individual from unemployment benefits. In addition, the Older Workers Benefit Protection Act (OWBPA) requires that releases of claims for workers who are forty years old or older must be knowing and voluntary, clearly written, and revocable for up to forty-five days.

## **IX. BEST PRACTICES**

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

- In difficult economic times, companies necessarily place a premium on hiring and retaining talented employees. The end of an employment relationship presents critical challenges for an employer on many levels. In addition to losing valuable employees, an employer may also find itself facing the loss of its proprietary confidential information, research, technology, client lists and hard-earned goodwill. The cessation of the employment relationship brings with it special considerations which the savvy employer will anticipate and be prepared to address.

- **Restrictive Employment Covenants**
  - It is permissible in Massachusetts to require some employees to sign a Non-Compete Agreement to prevent them from competing directly with you at another company or by establishing their own business. However, to be enforceable, a Non-Compete Agreement must be reasonable in the geographic area covered and in its duration.
  - Non-Compete Agreements are not enforceable against some professional employees, including doctors and lawyers.
  - Non-Disclosure Agreements are quite common and require employees to maintain confidential information such as trade secrets while employed and when they leave the company. These agreements are often designed to protect the employer's good will.
  - The unique aspect of non-compete covenants is that they restrict activities of an employee after the employee stops working for the employer. Because non-compete covenants are post-employment restrictions on an employer's ability to earn a living, they are viewed with disfavor and are narrowly construed. Generally, courts view covenants not-to-compete as enforceable only to the extent they are necessary to protect the employer's interest in its goodwill, confidential information and customer relationships. Courts attempt to strike a balance between the employer's interest in protecting confidential information and the employee's interest in earning a living.
  - 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. Before the internet and the digital economy, a non-compete of duration of one or even two years was generally considered conservative and reasonable. In this new economy, clauses which previously were viewed as valid may now be deemed 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 in non-compete agreements.
- **Trade Secrets**
  - Trade secrets trigger different issues and challenges. Under Massachusetts law, a trade secret is defined as "anything tangible

or intangible, or electronically kept or stored, which constitutes, represents, evidences, or accords a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, inventory, or improvement.” A trade secret must be something that is concrete and identifiable. The company must do more than subjectively believe the information is confidential. It must take affirmative steps to disclose the confidentiality to the persons it then seeks to prevent from using the confidential information. It is also important to remember that what is being protected is the information itself. The fact that no list or document was taken does not prevent the former employee from being enjoined if the information which he gained through his employment and retained in his memory is confidential in nature. While an employee can be barred from using a trade secret even in the absence of an express contract, the existence of such a contract will certainly aid the employer in demonstrating to a court that it has made all requisite efforts to preserve the confidentiality of its information.

- 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 in 46 states, the District of Columbia and the U.S. Virgin Islands. Four states [**Massachusetts**, New Jersey, New York and Texas] have not adopted the UTSA.
- 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.
- 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.
- We advise our clients to conduct an internal audit of their employment practices including recruitment, retention, compensation and reduction in force (“RIF”) policies, among others, to ensure that what appear to be sound business decisions do not create adverse legal ramifications. This Guide will frame issues to allow you to begin that very process. Our employment law audit provides our clients with the information they need to establish safe business practices and protect their bottom line. Please feel free to contact us if you are interested in learning more about our audit.

- In addition to this Guide, we provide regular updates and offer practical advice within our bi-monthly e-newsletter “Management Moxie.” You can view and print our e-newsletters by visiting the resource page on our website [www.Foleylawpractice.com](http://www.Foleylawpractice.com) or call us to be added to the distribution list for that publication.
- **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;
  - 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:
  - 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;
- 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;
  - 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 effecting 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. There are several sources of rating errors to be avoided:
  - The Halo Effect: over-rating based on a favorable impression of a single incident or personality trait or to curry the goodwill of the employee.
  - The Pitchfork Effect: rating based on the most recent incident.
  - The Central Tendency Effect: clustering all ratings near the mean.
  - Length of Service Bias: assuming that past performance is an accurate measure of present performance.
  - Jealousy Rating: under-rating based on personal feelings, including competitive feelings, toward employee.

- The Demanding Rating: under-rating based on unrealistically high standards.
- **Tips for Evaluators**
  - Grade overall performance of 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, a favorable performance review that is undeserving may come back to haunt the employer if the employee is discharged for cause and files a claim or suit.
  - 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 appealing a negative review.
- 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**
  - We have prepared a Client Advisory addressing best practices for the creation of effective employee handbooks. We direct you to our advisory titled “*Developing Effective Employee Handbooks.*” There are no state or federal laws that require employers to establish a handbook or written personnel policies. Well-written handbooks and policies provide an effective method of workplace communication. 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.
- **The Electronic Workplace**
  - Telephones, voicemail, email, and use of the Internet have revolutionized the way many businesses communicate, making communication more efficient and economical. They are fast, easy to use, efficient, and cost-effective. 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. However, workplace electronic monitoring policies that clearly define an employer’s expectations with respect to appropriate use of electronic media and an employee’s lack of rights to, or ownership interest in, an employer’s electronic communications equipment are not only necessary to clarify an employee’s privacy expectations, but are absolutely indispensable in today’s workplace.
  - Misuse of the Internet at work has lead 33% of companies to fire employees for misconduct.
  - Email is now as commonplace as telephone communication – more than 900 billion email messages are sent annually.
  - Companies have recognized the need to implement electronic technology policies out of concern over electronic evidence and

governmental investigations, not to mention matters of efficiency and productivity.

- Please contact us to obtain a better understanding of the Massachusetts Wiretap Statute, the Electronic Communications Privacy Act of 1986 and best practices to address electronic monitoring in your workplace.

- **Effectively Managing Employee Blogging**

- The “blog” has come to epitomize free speech on the web in an era where internet and computer 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.
- Recent Cases - Several companies have received national attention for firing employees because of information posted on blogs. These companies include Starbucks, Microsoft, ESPN, Apple, Google, and Delta Airlines. Two recent cases include a Starbucks supervisor who posted inappropriate comments about his boss and was terminated and Ellen Simonetti, a Delta Airlines Stewardess and the blogger behind “Queen of the Sky: Diary of A Dysfunctional Flight Attendant,” which included photographs in company attire on company airplanes and commentary about Delta. When Simonetti was suspended and eventually fired, she re-named her blog “Diary of a Fired Flight Attendant.” Simonetti filed a lawsuit against Delta, alleging sex discrimination and retaliation among other things.
- 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 liable for the comments posted by their employees, which could lead to defamation and harassment complaints.
- Solutions – A well written **Electronic Communications Policy**. Employers must clearly define their communication policies. By creating clear policies regarding permissible and prohibited internet use, companies can avoid costly and potentially embarrassing termination proceedings; and employees will understand exactly what is considered acceptable to publish on the internet. For more information about the basic elements to a quality electronic communications policy, 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 being found liable 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 waive the risk of either a possible defamation allegation or tort/civil claim.

- When you receive an employment verification or reference request, ask yourself this question: what is the former employee’s risk of harm to the prospective employer? In a California case, an employer failed to disclose disciplinary action taken against a former employee for sexual misconduct. The employer was then held liable for negligent misrepresentation when a student at the school who hired the employee was molested because the risk of harm was a substantial and foreseeable risk.
- Employers should assess risk. A propensity to harm a third person physically or financially may create a duty to disclose information relative to an individual’s competence to practice medicine or law, teach, or provide professional accounting services. Although defamation may still be a risk in these instances, employers must analyze the liability risk against the backdrop of the ethical duty to disclose information.

- **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 of 1994; the Violence Act of 2000; MGL – an act relative to the eligibility of unemployment benefits for victims of domestic violence.
- Domestic violence has helped make 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, miss 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.

- **Successful Reductions in Force** –It is possible to completely avoid exposure by obtaining a binding release and waiver of claims when an employee is laid off. We can help.

## **X. LABOR UNIONS**

There has been a recent flurry of activity by unions to organize workers throughout the Commonwealth. National SEIU leader Andy Stern led the demolition of what he and others had worked so hard to create by leading the revolt that fractured the national AFL-CIO. This revolt triggered the creation of the “Change to Win Coalition,” which consists of seven affiliated unions:

- International Brotherhood of Teamster (IBT);
- Labors’ International Union of North America (LIUNA);
- Service Employees International Union (SEIU);
- United Brotherhood of Carpenters and Joiners of America (UBC);
- United Farm Workers’ of America (UFW);
- United Food and Commercial Workers International Union (UFCW); and
- Unite Here.

The unions have pronounced their goal of building a new labor federation for the first time in fifty years and declared a plan of action to initiate corporate campaigns. While there is a wide range of strategies that can be adopted to achieve strategic results in response to corporate campaigns, this overview is intended to help you become better prepared if you have a visit from organized labor.

### **A. Why Employees Join a Union**

Employees typically will choose to join a union for one or more of the following reasons:

- Insecurity in the job and uncertainty about job performance;
- Favoritism (i.e. the belief that policies and rules are vague and inconsistently applied);
- Poor communications (i.e. the feeling that decisions are made on an impersonal basis and that there is no opportunity for personal input or resolution or individual complaints);
- Revenge (i.e. employee feels that he or she has been mistreated and that the union is an opportunity to “get even”);
- Unfair wages (i.e. employees feel they are not paid fairly and equally for their job, also a lack of understanding of the salary program);
- Insufficient Fringe Benefits (i.e. the feeling that benefits are not competitive with what other workers, friends and neighbors receive);
- Maintaining Trade Union Membership in order to preserve the associated wages and benefits.

## B. The Early Signs of Union Organizing Activity

It is extremely important that a Company's managerial and supervisory personnel react in a quick, positive and aggressive manner following the first signs of union organization. A delayed reaction is almost always damaging and often fatal to later efforts to remain union-free. The key point is to be aware of the early warning signs of union activity. The Company's managers and supervisors should be attuned to early warning signs, including the following:

- The nature of employee complaints differs and/or the frequency increases;
- Employees form in groups that include individuals who do not normally associate with each other;
- New leadership emerges among the employees and complaints are raised by a delegation, not a single employee;
- Inquiries increase, particularly about pay, benefits and disciplinary matters;
- The employees go to work areas they do not normally visit;
- The employees avoid supervision – employees clam up;
- The employees ask argumentative questions in meetings;
- News clippings appear on bulletin boards about union settlements in local companies or other industries;
- Cartoons or graffiti appear directing humorous hostility toward the organization, management or supervision;
- Some vendors and subcontractors show an unusual interest in communicating with employees;
- Strangers appear and linger upon the Company premises or in work areas;
- Employees adopt a new, technical vocabulary, which includes such phrases as protected activity, unfair labor practices, and seniority;
- Union authorization cards, handbills, or leaflets appear on the premises or in the parking areas;
- Union representatives visit or write employees at their homes;
- Any behavior or activity that appears to be out of the ordinary and seems to be separating management from the workforce.

- C. An understanding of the Employee Free Choice Act – The Employee Free Choice Act was resubmitted to both Houses of Congress on May 10, 2009. This legislation will make it easier for unions to organize. Furthermore, it will impose tougher penalties on employers who violate the labor laws. This legislation will also eliminate the crucial campaign period and the secret ballot election. If the union acquires signed authorization cards from 50 percent of the workforce, the NLRB must certify the union. Another significant change is the imposition of mandatory mediation after 90 days if the union and the employer cannot agree on an initial collective bargaining agreement. In addition, if the parties cannot agree after 30 days of mediation, the contract will go to binding arbitration and an arbitrator will determine the terms of the

initial collective bargaining agreement. For more information about the Employee Free Choice Act, see our newsletter titled “*Employers and the Employee Free Choice Act.*”

- D. In our roles as both in-house counsel and special outside counsel, we have developed positive employee relations programs that produce more effective supervision and allow you to be well prepared and control your destiny if and when a union knocks at the door. We refer you to our Employer Advisory titled “*The Changing Organized Labor Climate – Be Well Prepared*”.
- E. If your workplace is already organized, we direct you to our Client Advisory titled “*Overview of the Collective Bargaining Process*”. That Advisory consists of the following categories: subjects of bargaining; mandatory subjects of bargaining; the obligation to bargain in good faith; permissive subjects of bargaining; illegal subjects of bargaining; the relevance of past practice and management rights. Our overview also includes a pop quiz to help you assess your understanding of our federal and state labor laws.

#### **CONCLUSION:**

We formed our law firm to provide employers with a fresh perspective and a new model for delivery of employment-related legal services. We hope you find our Guide to be a valuable resource. We are here to help.

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