Foley & Foley, PC

Your Workplace & Our Solutions

THE EMPLOYERS' GUIDE

TO

UNDERSTANDING MASSACHUSETTS AND FEDERAL

WORKPLACE LAW

2011 Version II
5th Edition

Boston 857.284.7291 Falmouth 508.548.4888 Hingham 781.748.4468

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Please note:

- *The information provided in this Guide is intended to provide accurate and informative information and is **not and should not be** 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 pleased to present the 5th edition of the ***Employer's Guide to Understanding Massachusetts Workplace Law***. We know that you want to drive your business forward. Our mission is to free you from the twists and turns of vexing labor and employment laws. For employers, change is a constant and creates the need to continually monitor laws and regulations. As well as utilizing this Guide, we recommend you sign up for our e-newsletter, ***Management Moxie***. Please go to our website, www.foleylawpractice.com, and while there, check the News section to find out when we are giving an interactive and useful seminar near you.

We also offer an increasingly popular risk-management program: ***Legal Triage***. For a fixed monthly fee (below what most employment firms charge per hour), companies can have unlimited access to one of our six seasoned lawyers. Rather than waiting and wondering about a legal issue, you can call with questions and issues as they arise. We now provide a menu of six service levels of ***Legal Triage*** to meet the needs of businesses large and small.

Workplace law continues to be dynamic. Here are just some areas that have changed in the past year alone:

- The FTC and the National Labor Relations Board aggressively expanded their presence in the workplace;
- Looking to find over $300 million in unreported income, the IRS committed to audit thousands of businesses in the next 2 years, with a focus on worker classification, fringe benefits, reimbursed expenses and officer/owner compensation;
- Health insurance requirements;
- Workplace bullying;
- Crime inquiries of applicants;
- Personnel file mandates;
- Federal child labor regulations;
- The role of social media in the workplace, including recruitment;
- The 401(k) and 457(b) deferral limits changed as did the definition of highly compensated employee;
- The Department of Labor increased enforcement of fiduciary responsibility and participant disclosure under 401(k) and 403(b) plans, as well as the IRS; and
- The ADA regulations reasonable accommodation regulations were finalized.

This version of our Guide provides updates to Volume I and contains the following new sections for your information: employee wellness programs; employee assistance programs; and retirement plan design and compliance issues.

Each and every day, employers make personnel decisions that have legal ramifications, most of which they never realize. This Guide can assist you in your quest for answers. We have provided a comprehensive subject matter index to locate the answer to your particular question.

We hope that the 2011 edition of our Guide allows you to anticipate issues so that you can focus on business and enjoy success. If you have any questions or concerns that go beyond the information provided in this Guide, do not hesitate to give us a call.

We can help.

I. THE EMPLOYMENT RELATIONSHIP

ESTABLISHING THE EMPLOYMENT RELATIONSHIP

For every employer, large or small, hiring decisions are crucial. 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 can be 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:

1. Does this question tend to have a disproportionate effect in the screening out of any protective class?

2. Is this information necessary to assess and evaluate the applicant's ability and experience to perform this particular job?

3. Are there alternate non-discriminatory means to secure the necessary information?

We have prepared a list of proper questions and improper questions and subjects for the recruitment process. To obtain a copy of *Proper 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 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. Not all employers are eligible to obtain this 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.

  A significant overhaul of the Commonwealth's criminal record information (CORI) system occurred in 2010. This legislative makeover of the CORI system requires all employers, large or small, public or private, profit or not-for-profit, to revisit and most likely amend their current

application forms and recruitment practices. ***Under the new CORI law, criminal record inquires must be eliminated from application forms but are still allowed within the recruitment process.*** 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*.

- Massachusetts courts have held that an individual who posts information on a public domain has no reasonable expectation of privacy. 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. If you use social media as part of the hiring process we recommend you develop a social media policy.

- **Social Media** – Social media use in today's workplace has become a fact of life for all employers. Not surprisingly, more workers are using social networks while in the office, on the clock, and at home. Whatever you call it, the social web or the new network economy is about communities, collaboration, and user-generated content. There is no one size fits all solution to how you harness the benefits of employee participation while mitigating the risks. Your company should develop an effective policy for social media use, however, and we can help.

  The NLRB recently created a stir by filing an unfair labor practice charge against AMR Ambulance Company for firing an employee who, among other things, called her supervisor a "psychiatric patient," a "scumbag" and used profanity on a Facebook post read by many coworkers. As it turns out, the Facebook case was just the beginning of what appears to be a trend by the National Labor Relations Board and unions to restrict employers' ability to promulgate and enforce social media policies or other policies that attempt to restrict disparaging or disloyal comments by employees. The Board's regional directors have said that it does not take much to establish the concerted nature of a discussion, so long as it involved or touched upon a term or condition of employment, and anything short of physically threatening activity will likely be protected. We recommend that all of our clients understand the definition of protected concerted activity to inform their decision about when and if they can discipline an employee for disloyal or disparaging comments, whether on social media or otherwise.

  Please proceed with caution to avoid intruding upon an employee's protected concerted activity. Even if your employees are not represented by a union, they are protected by the National Labor Relations Act if they engage in protected concerted activity. When employees are communicating about wages, hours and terms and conditions of

employment, that communication is protected. Like technology itself, this area of the law is constantly on the move.

The Federal Trade Commission issued new guidelines last year addressing concerns about deceptive practices through consumer-generated media and endorsements. While professional bloggers were the focus of the new FTC regulations, any material connection between an endorser and a seller of a product or service must be fully disclosed. A material connection includes employment relationships between an endorser and a seller. An employee-endorser and employer face potential fines of $11,000.00 per violation. An example: Employee gives favorable review of employer's product on employee's blog, Facebook page or Twitter account. The employee is considered an endorser and must disclose the relationship.

- **At-Will** – Unless an employee is hired under an employment agreement, 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 excludes far more workers from independent contractor status now then under the prior state law and the current federal law tests. Although six years old, the legal distinction between employees and independent contractors is still lost on many employers, and exposes them to potential liability. In fact, the Attorney General's office is aggressively enforcing 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 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 enforcement of these obligations.

- **I-9 Documentation** – Our Advisory titled *I-9 Compliance* provides a comprehensive overview of developments in this area. Please contact us to obtain a copy. 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 has issued a rule stating that employers may sign and retain I-9 forms electronically and may also scan and store existing I-9s 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.

The United States Citizenship and Immigration Services (USCIS) released a revised I-9 form in 2009. Employers who use the revised 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.

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.

Child Labor Laws – The United States Department of Labor implemented sweeping changes to existing child labor laws, effective July, 2010. The federal labor laws prohibit children under the age of 18 from operating most work-assist vehicles and power-driven hoists. The law also prohibits the use of chainsaws, wood chippers, reciprocating saws and all forest-related services. There are some new protections for 14 and 15 year olds. The law establishes the age of 15 years as the minimum for lifeguard at a traditional pool. The law also prohibits 14 and 15 year olds from "youth peddling activities or non-charitable door-to-door sales." These are but a few of the many changes to child labor laws. If you have any questions about the changes in the child laws as they may relate to your business, please feel free to contact us.

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 sixteen may work in a manufacturing facility.

Massachusetts enacted legislation relating to employment of minors by expanding permissible work hours while increasing the penalties for violations. The 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 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.

- **Personnel Records** – Massachusetts laws and regulations control personnel records, which include information related to qualifications, compensation, disciplinary action, promotion, transfer, and other terms and conditions of employment. Any employer who employs six or more employees must allow their employees to review their personnel records and to receive copies of them in a timely fashion. 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. 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.

  In August, 2010, Governor Patrick signed into law an economic development bill that included an amendment to the Massachusetts personnel record law Chapter 149 § 52 C. Under the amended law, employers are required to notify an employee within 10 days of the employer placing information that would negatively impact an employment decision in the employee's personnel record. Please contact us if you have other questions about the makeover to the personnel record law. Not surprisingly, the Attorney General has jurisdiction to enforce the statute with violations being punishable by a fine of not less than $500.00 or more than $2,500.00.

- **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 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.

- **Personal Information Security Plan** – Massachusetts regulation mandates 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 (WISP). 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; and
    - 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 encryption requirements. Please call us if you would like our assistance in achieving compliance with this 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:

(1) Our advisory – *An Overview of Good Employment Practices* provides a comprehensive review of permissible questions that can be presented throughout the recruitment process;

(2) Employers must pay for the physical examination if they designate the position for the prospective or current employee;

(3) 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. 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 the 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 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 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 <u>not</u> 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 require employees to sign a release and waiver of claims as a precondition to the receipt of any severance benefits. If your current severance plan, 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.
- **<u>What the Law Tells Us</u>**

  - 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.
- **<u>The Bottom Line</u>** – There is no more effective way to limit litigation challenging a RIF than offering employees a severance package in exchange for a signed release.

- **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 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 (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." Termination of employment or a reduction in the employee's hours below the eligible threshold for insurance is a qualifying event. 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; a qualifying event occurs; COBRA coverage terminates; or 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.

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* for an overview with best practices.

Here is a brief summary of state and federal law:

- **Disability and the ADA** – It is worthwhile to refresh our understanding of disability laws that apply to our workplace in Massachusetts. 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 defined under the Act as a person who meets legitimate skill, experience, education or other requirements of a position and who 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.

  Almost two years after making significant changes to the Americans with Disabilities Act, the EEOC has released final regulations and guidance. Among the highlights:

  - the redefining of disability to broaden the scope and shift the burden from employee to employer;

  - new restrictions on "mitigating measures" which have almost disappeared except for eyeglasses and contact lenses; and

  - a disability does not need to prevent or severely limit a major life activity to be defined as substantially limiting, thereby lowering the standard applied by the courts in the past.

  In spite of the rise in disability claims since 2009, the EEOC did not find reasonable cause in 60% of the ADA complaints filed in the past 12 months. While employers may be getting hit with more complaints, if they have updated policies, good job descriptions, and well informed managers, they can manage the challenges brought by these changes in the law – we can help too.

In March 2011, Attorney General Eric Holder issued the revised regulations that amend the Department's Title 2 and Title 3 regulations. We look forward to helping you understand and achieve compliance with these new regulations as well, which apply to public entities and public accommodation and design at certain private businesses, plus service animal allowances.

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.

- **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:

  (1) Terminating or refusing to hire individuals on the basis of genetic information;

  (2) Requesting genetic information concerning employees, applicants, or their family members;

  (3) Attempting to induce individuals to undergo genetic tests or otherwise disclose genetic information;

  (4) Using genetic information in anyway that effects the terms and conditions of an individual's employment; or

  (5) 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 has 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 under *Expansion of Discrimination Laws* on our website.

- **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 found 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.

    - Under federal law, it is unlawful to include age preferences, limitations, or specifications in job notices or advertisements. 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. 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. 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** – 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.

- **Drug Testing** – 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 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 time.

  The EEOC issued Section 12 to its compliance manual in an effort to address religious discrimination in 2008. 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 a 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 12 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 more information about the EEOC compliance manual, please contact us.

- **Sexual Harassment** – Sexual harassment continues to be a common issue 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. We suggest including a copy of the policy with the first pay check each year. We have developed a model sexual harassment prevention policy and training program. Please contact us for more information about these resources.

III. WAGE AND HOUR OBLIGATIONS

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 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 read below.

- **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:

  (1) **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.

  (2) **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 per hour. The federal minimum wage is $7.25 per hour. 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 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. 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 $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 the anti-retaliation provisions of the Massachusetts General Laws.

IV. RETIREMENT PLANS DESIGN AND COMPLIANCE

The Employer-Employee Relationship and Tax-Qualified 401(k), 403(b) and Pension Plans Paying Attention to Details

Many employers sponsor tax-qualified 401(k), 403(b) and pension plans. These plans are subject to Federal tax, labor and age discrimination laws. An employer maintaining one of these plans needs to be aware of the special requirements that govern these plans. Failure to comply can result in significant tax penalties and fiduciary liability.

Foley & Foley, PC can assist you with these complicated issues. We offer a wider range of services from diagnostics to compliance design. Some of the rules redefine the employer-employee relationship and can affect an employer's leave of employment and compensation practices. The following table provides a summary of some key detail items:

Detail Item	Explanation	Importance
Identifying "the employer"	The "employer" for plan purposes is not just the business entity that directly employs an employee, but also every other business entity that is in the same **"controlled group"** with the entity that directly employs the employee. The typical types of controlled groups include; **"parent-subsidiary"** entities where one entity is 80% or more owned by another, **"brother-sister"** entities where 5 or fewer persons own 2 or more other entities and **"affiliated service groups" and "management function organizations"**, where service providing entities, particularly professional service providers, derive a significant percentage of their income and/or employee support functions from each other. *Tax-exempt employers are also subject to these rules although "board control" is substituted for "ownership".*	•Tax-qualified plans have to satisfy **"coverage"** and **"nondiscrimination"** tests. These tests compare the participation and benefits of "highly compensated employees" (employees earning over $110,000 for 2011 HCEs) to the participation and benefits of "non-highly compensated employees" (NHCEs). In performing these tests **all** of the employees of **all** controlled group employers are must be taken into account. The purpose of this rule is to ensure that any plan maintained by any employer in the controlled group hasn't been set up merely to benefit the controlled group's HCEs. • Plans often require that an employee have a minimum period of employment with the employer to enter the employer's plan and/or "vest" in the plan benefit after entry. Periods of employment with **all** controlled group employers count in determining an employee's initial plan eligibility and future vesting. • Plans often have "break-in-service" rules that result in forfeiture of non-vested benefits if a terminated employee has a 5-year break-in-service period following termination of employment. The former employee's rehire within the 5-year period with **any** controlled group member employer negates the potential forfeiture and the individual's new period of employment with the new employer will count in increasing his/her vesting in the pre-termination benefit. In addition, the prior period of employment will count for eligibility and vesting with the new employer

Detail Item	Explanation	Importance
Identifying "the employee"	Individuals performing "employee type" services for an employer may need to be taken into account when the employer's plan is tested for coverage and nondiscrimination.	• Employers often "lease" the services of individuals to do work that are in support of the employer's business, but are the common-law employees of another employer (or who treat themselves as "self-employed"). Employers leasing these individuals will need to take these **"leased employees"** into account after a year of "full-time" service" in showing that the employer's plan satisfies coverage and nondiscrimination tests. • In addition, the period of service performed by these individuals may need to be taken into account as plan eligibility and vesting service if they ever transition to common-law employment with the employer that had previously leased their services.

Detail Item	Explanation	Importance
Leaves of absence and periods of employment in determining "breaks-in-service", plan eligibility and vesting	An employee's absence from employment may need to be treated as a period of employment for plan purposes, regardless of whether the absence qualifies as an approved leave.	•The 5-year break-in-service period (mentioned previously) of any employee who is absent from work on account of the pregnancy, birth or adoption of a child must be delayed a year following the employee's absence. In effect, such an employee or former employee must incur a 6-year break-in-service before any forfeiture of a non-vested benefit can occur. • The period of absence of an employee in the military who has reemployment rights under **USERRA** must be credited as actual service under the plan's eligibility and vesting rules if the individual is reemployed within the applicable reemployment period. In addition, the employee must be provided the **same** employer contribution or benefit accrual he/she would have received, based on his/her pre-leave pay, for the period of absence. Finally, the employee must be given the opportunity to make employee contributions missed during the period of absence. • An employee who terminates and is reemployed within 12 months of the prior termination date must be given service credit for the period of absence under the "elapsed time" method of counting eligibility and vesting service upon reemployment.

Detail Item	Explanation	Importance
"W-2 Pay" vs. "Plan-Eligible Compensation"	An employer's plan will contain a definition of the pay that is to be used in determining the employee's ability to contribute to the plan or receive employer contributions and/or benefits. In addition, the IRS' tax rules limit the type and amount of pay that can be considered as plan-eligible pay. Contributions made and benefits accrued under the plan must be based on the plan's eligible pay definition and the IRS' rules governing the type and amount of pay that can be considered.	Errors in recognizing and calculating plan-eligible pay are common. Typical errors include: • Severance pay is pay triggered merely on account of an individual's termination of employment. (Unused vacation and sick pay and an employee's last paycheck are not severance pay since these amounts would have been paid in any event.) 401(k) and 403(b) deferrals **cannot** be made on severance pay under IRS rules. The IRS' position is that only pay received as an employee can be deferred. Severance is paid after employment is terminated. In addition, severance pay cannot be counted in determining plan contribution and benefit limits. As a result, it is rarely included in the plan's definition of plan-eligible pay for employer contribution and/or benefits purposes. • Many plans define eligible pay in a general way as total W-2 pay up to the IRS limit on pay ($245,000 for 2011). As a result, items of pay such as spot bonuses, commissions, taxable expense reimbursements and non-cash compensation can be overlooked. • Some employers pay employees on military leave **"differential pay"**, which is some or all of the difference between what the employee on leave is being paid by the military and what he/she had been earning with the employer. This pay **must** be counted for contribution and benefit limits and **can** be counted as plan eligible pay for voluntary 401(k) and 403(b) deferral purposes.

V. INSURANCE

- **<u>The Massachusetts Health Care Reform</u>**

  Landmark legislation was enacted in the Commonwealth in 2006 with the goal of providing nearly universal health care coverage to state residents. 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 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 law can 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 500 hour quarter.

(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 without any discriminatory animus.

- **Federal Health Care Reform** – We are often asked the following questions by clients and participants in the many seminars we give on the subject of federal health care reform.

  Question: We have a fully insured, non-grandfathered plan. What is the best way to describe the non-discrimination testing requirements?
  Answer: All for one and one for all: employee contributions must be identical for each benefit level; all the benefits provided to highly-compensated employees must be provided to all employees; all benefits must have the same waiting periods. The penalties for non-compliance are severe: $100 per day per individual, up to $500,000.

  Question: Will the health care reform legislation force me or our company out of private insurance plans and into a government run plan?
  Answer: No. The Patient Protection and Affordability Act builds on the employer-based coverage we have today. You will continue to be able to receive company-sponsored coverage even after all elements of the health care reform legislation become effective.

  Question: Will my TRI care or VA care change?
  Answer: No. TRI care and VA care are exempt from the legislation. The VA and TRI care programs will not be affected by the federal health care

reform.

Question: If I have been denied coverage because I have a preexisting condition, what will the law do for me?
Answer: Coverage is available to individuals with preexisting conditions who have been uninsured for at least six months through a high-risk pool program in every state. These programs will provide coverage that immediately covers preexisting conditions at premiums that are capped at the average cost of private coverage. In 2014, when the exchange is open for business, insurers will be prohibited from discriminating against individuals with preexisting conditions and offering or pricing health insurance policies.

Question: Did the health care reform law change employer mandates under the COBRA?
Answer: No. The health care reform law did not extend the eligibility time period for the COBRA premium reduction or change COBRA long term.

Question: I have five employees. Will I be required to provide insurance for my employees?
Answer: No. The employer responsibilities under the federal health reform law do not apply to employers with fewer than 50 employees. However, you will be able to enroll your employees in coverage through the exchanges beginning in 2014.

Question: I own a business with 35 employees. I don't provide health care insurance, but I am hoping to soon. How will this new law affect me?
Answer: You are currently not in compliance with the Massachusetts health care reform law and need to achieve compliance immediately. Under the federal law, because you have more than 25 workers, you will not get the employer tax credits that start right away. Instead, you will have to wait until 2014, when states start operating the small business health options program.

Question: What if my business grows from 35 employees to 50?
Answer: Starting in 2014, you will be required to offer either health care insurance or pay a fee of up to $2,000.00 per full time employee if any employee receives government subsidized insurance coverage in the exchanges. However, the first 30 employees who receive government subsidized insurance coverage will be excluded from the assessment.

Question: What does the reasonable break time for nursing mothers' law do?
Answer: Employers must provide breastfeeding employees with

"reasonable break time" and a private, non-bathroom place to express breast milk during the workday, up until the child's first birthday.

Question: Who is covered by the reasonable break time for nursing mothers' obligations?
Answer: All employers are covered but those with less than 50 workers do not have to comply if they show that complying with the law would cause an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business.

Question: Are any categories of workers not covered by the breastfeeding mothers' break time law?
Answer: Yes. Exempt workers are not covered by the law.

Question: How will my health insurance benefits change at the next open enrollment?
Answer:

- Patients cannot be charged a co-payment for preventative services provided within their health plan network.
- Dependents up to age 26 may be covered under the health insurance and you are not required to name them as a tax dependent.
- You must now obtain a doctor's note to buy over the counter medications with your FSA funds.

Question: Will my dependent children receive any new health care benefits as a result of the new law?
Answer: Yes. The new law prohibits health insurers from excluding coverage of children because of preexisting conditions. The new law requires coverage of not only basic pediatric services under all health plans but also oral and vision needs starting in 2014. The new law also provides $25,000,000 in funding for childhood obesity demonstration projects and extends dependent coverage allowing young adults to stay on their parents' health care plan until age 26.

Question: Will I be taxed on any coverage provided to my adult child up to age 26, or did the law change the definition of "dependent" for these purposes so that coverage will not be taxable?
Answer: The coverage of any employee's adult child and reimbursements of their medical expenses, under the employer-provided health plan is not taxable for any year in which the child has not yet turned 27.

Question: How does the federal law impact part-time worker health insurance coverage?

Answer: It does not. Part-time employment status is only relevant under the new law for purposes of determining whether the employer employs at least 50 full-time employees in the prior year.

Question: Does the new federal law affect any of the terms and conditions outlined in our current collective bargaining agreement?
Answer: No.

Question: How does the new law affect our flexible spending accounts?
Answer: A company can no longer reimburse employees for over the counter drug expenses. In 2013, a $2,500.00 cap on contributions will be imposed on flexible spending accounts. In succeeding years, the cap on the contributions will be increased to match the rise in the consumer price index.

Question: What happens when my adult child turns 26 and loses coverage?
Answer: When children age out of a plan, they must be offered an opportunity to extend coverage under COBRA.

VI. LEAVE FROM WORK

- **Did You Know** – Did you know in the Commonwealth 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.

- **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/or 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.

    - 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.

- Employer-sponsored maternity leave beyond eight weeks does not extend the statutory job restoration protection beyond eight weeks.

- **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. 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:

  - 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 federal government expanded leave rights for military families in 2008. 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 the 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).

  In addition to addressing the military caregiver provisions, the most recent 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 has expanded the definition of "son and daughter" to ensure that an employee who assumes the role of caring for a child receives family leave regardless of the legal or biological relationship.

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

VII. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION ACT

- 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."

- The penalties assessed by OSHA depend on the seriousness of the violation and whether 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 without charge at the United States Department of Labor's website.

- 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. 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 $625.00 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.

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 mandates, each subject addressed below is a best practice for preventing workplace distractions:

- **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, notably 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, proprietary 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 global economy, a non-compete of 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 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.

- **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. 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. 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 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 it if 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 date (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**

  - 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 is no state or federal law that requires employers to establish a handbook or written personnel policies with the exception of a written Sexual Harassment Policy. 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 and that Employee Handbooks be reviewed annually.

- **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. However, 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 in today's workplace.

  - Misuse of the internet at work has lead 33% of companies to fire employees for misconduct.

  - 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.

  - 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 well-known 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, which is unresolved.

  - 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.

  - 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. The National Labor Relations Board (NLRB) recently issued a complaint against a New England company, citing its Social Media policy 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 waive the risk of either a possible defamation allegation or 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 (VAWA) of 1994, amended.

  - 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.

- **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.

X. LABOR UNIONS

Difficult economic times can create increased union activity. While there is a wide range of strategies that can be adopted to achieve results in response to union campaigns, this overview is intended to help you better prepare 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).

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 supervisors – 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. 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 to 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*.

D. 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 the federal and state labor laws.

XI. COLLECTIVE BARGAINING

A. Overview of the Collective Bargaining Process

The collective bargaining process and collective bargaining rights and obligations are very similar in the public, private, and not-for-profit sectors under state and federal law. Collective bargaining, to a large extent, is the same for all and consists of the mutual obligation of employers' and employees' representatives to meet at reasonable times and confer in good faith with respect to the wages, hours and other terms and conditions of employment. The Massachusetts Public Employee Collective Bargaining Law also requires the parties to negotiate standards of productivity and performance.

Good Faith

Representatives of employers and employees share a reciprocal obligation to negotiate "in good faith." The obligation to meet and confer in good in good faith with respect to mandatory subjects of bargaining does not require the parties to make concessions or agree to a proposal.

Mandatory Subjects of Bargaining

While the state and federal laws provide some guidance on the issues over which the parties are required to bargain, neither Act provides a specific laundry list of issues that must be bargained. Therefore, the State and National boards have assumed the responsibility of defining the topics that are mandatory subjects of bargaining. The State and National boards have interpreted the phrase "wage, hours and other terms and conditions of employment" (i.e., mandatory subjects of bargaining) to encompass dozens of specific issues, including: Christmas bonus; work schedules; rest periods; subcontracting; supervisors performing bargaining unit work; change in shift hours; transfer of employees; accumulation of seniority; work rules; employee safety; installation of new machinery; health care coverage; benefit contributions; vacation policy; absenteeism policy; implementation of light duty; implementation of physical examinations; among several other issues. This is by no means an exhaustive list.

Impasse

The parties are required to negotiate mandatory subjects of bargaining to impasse. At the point of impasse, unions may strike under the National Labor Relations Act and employers may implement their final offer. Strikes are not permitted under the public employee collective bargaining law. Mediation, fact-finding and interest arbitration are available as impasse resolution procedures in the public sector.

Interest arbitration is the collective bargaining impasse resolution process through which an arbitrator will create contract language for the new or initial collective bargaining agreement. Grievance or rights arbitration is the contractual impasse resolution process through which an arbitrator interprets existing language in a collective bargaining agreement.

B. Interest-Based Employee and Labor Relations

We are frequently asked how interest-based bargaining differs from traditional negotiations. The fundamental goal of the interest-based approach to interactions in the workplace is to develop new skills and strategies that will build effective communication, good relationships, and better results. Those who have adopted the interest-based approach have acknowledged that there is power in: understanding interests; defining creative options; adopting object criteria or standards; drafting well-crafted commitments; committing to effective communication; and being tenacious in pursuing good working relationships. The ultimate goal is to create the power to craft wise,

workable, stable solutions at the collective bargaining table and beyond. Please contact Mike Foley for further information on interest-based bargaining to ascertain how the process works and whether it is suited to your bargaining scenario.

C. Overview of Labor Law Issues in the Construction Industry

The nature of work in the construction industry has produced special laws governing labor relations. Recognition of a union in the construction industry is quite unique. Section 8(f) of the NLRA allows employers to enter into construction agreements with unions without the requirement of elections.

Labor relations in the construction industry are conducted under a legal framework that is both different and more favorable to unions than that in industry in general.

Please contact us for further exploration of the many particulars of construction industry labor relations including salting; trade associations; project labor agreements; and double-breasted operations.

We advise our clients in the construction industry to pay careful attention to the unusual labor laws that govern them.

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.

For instance, new interim final regulations promulgated under the Genetic Information Non-Discrimination Act of 2008 ("GINA") may impact employer-sponsored wellness programs. Additionally, other statutes, including the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Americans with Disabilities Act ("ADA") contain potential legal hurtles for which employers must account when implementing employee wellness programs.

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 inquires 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.

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 (1) if the program is available to all similarly situated employees and (2) provided that any rewards/penalties resulting from the program are <u>not</u> 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.

These plans must be tailored to the specific needs of the business. Therefore, employers must generally assess their plans compliance with the law on a case-by-case basis. However, one rule that we think applies to all plans – avoid penalizing employees for non-compliance; 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.

<u>Employee Assistance Programs</u>

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 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
- Significant 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. HIPAA PRIVACY RULES AND THE HITECH ACT

A major goal of the privacy rule is to ensure that individuals' 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 well being. Please note that compliance with HIPAA does not satisfy compliance with the obligation to secure personal information under 201 CMR 17.00, discussed above.

The standards for privacy of individually identifiable health information ("privacy rule") establish a set of national standards for the protection of certain health information. The privacy rules standards address the use and disclosure of individuals' health information

– called "protected health information" by organizations subject to the privacy rule – called "covered entities."

The HIPAA Privacy Rule

The privacy rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in the electronic form. Health plans are defined as individual and group plans that provide or pay the cost of medical care. All health care providers, regardless of size, who electronically transmit health information in connection with claims, benefit eligibility inquiries, referral authorization requests and more are covered. Health care clearinghouses are entities that process non-standard information they receive from another entity into a standard format. In most instances, health care clearinghouses will receive individually-identifiable health information only when they are providing these processing services to a health plan or health care provider as a business associate.

What information is protected? The privacy rule protects all individually-identifiable health information held or transmitted by a covered entity or its business associate, in any form or medium, whether electronic, paper or oral. Individually-identifiable health information is information, including demographic data, which relates to:

- The individual's past, present or future physical or mental health or condition;
- The provision of health care to the individual; or
- The past, present or future payment for the provision of health care to the individual.

Individually-Identifiable Health Information

Individually-identifiable health information includes many common identifiers such as name, address, birth date, and Social Security number.

Business Associates

Business associates are defined, under HIPAA, as a person or organization, other than a member of a covered entities workforce, that performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involve the use or disclosure of individually-identifiable health information. Business associate functions or activities on behalf of a covered entity include claims processing, data analysis, utilization review, and billing. When a covered entity uses a contractor or other non-workforce member to perform business associate services or activities, the privacy rule requires that the covered entity include certain protections for the information in a business associate agreement. The privacy rule states that the covered entity must impose specific written safeguards on the individually-identifiable health information used or disclosed by its business associates. Accordingly, under HIPAA, the obligation to create a business associate agreement lies with the covered entity and not the business associate.

HITECH Act

The HITECH Act orchestrates a significant makeover to the regulation of the privacy and security of patient health information. One of the most significant changes is the

regulation of business associates under HIPAA. Before the HITECH Act, the HIPAA privacy and security requirements applied only indirectly to business associates. Any privacy or security requirements were made applicable to business associates only through a business associate agreement (BAA) created between a covered entity and a business associate. 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.

Before the HITECH Act, the actual implementation of appropriate safeguards was not required directly of a business associate by the HIPAA security rule, but only indirectly through the BAA with a covered entity. After the HITECH Act, business associates must implement reasonable and appropriate policies and procedures to incorporate administrative, physical and technical safeguards.

Our e-newsletter titled *Have you Heard the One About the Business Associate?* provides more detail about both safeguards and penalties.

CONCLUSION:

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

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Why Choose

InsideOutsource, LLC?

- **YOUR NEEDS**
    - Sometimes you need a human resource professional to provide expertise and assistance.
    - Sometimes you need a payroll professional to provide a workable system and practical advice.
    - Sometimes you need business counseling and best bookkeeping practices.
    - Sometimes you need all those services—and we provide them all.
    - We will meet your needs, lighten your workload, and reduce your costs for all these functions.
- **OUR CAPABILITIES**
    - No local, regional, or national company can match our resources, our experience or the breadth of our services.
    - No local, regional or national company has roots within a workplace law firm.
    - We provide on-call and in-person service to provide or complement your human resource management and payroll and bookkeeping functions. You decide which level you need.
    - Our team of professionals is seasoned and creative. They will tailor options to fit your goals and priorities.
    - Our unmatched resources and unique level of experience allow us to provide services and prices that cannot be matched.
    - Our team of professionals, along with our lawyers, creates a “one-stop shopping” benefit for clients of all sizes.

InsideOutsource, LLC

Menu of Services:

- **Full range of payroll services** – weekly, bi-monthly, monthly or quarterly -
    - Personal service
    - Customized payroll reports and worksheets
    - Tax payments electronically filed and paid
    - Year end W-2s and 1099s and quarterly state and federal returns
    - Workers' Compensation audit assistance
    - Workers' Compensation pay as you go
    - Direct deposit

- **Human Resources Management** –
    - Performance appraisal and organizational development
    - Employment application and policy development
    - On-call or in-person mentoring
    - Time and attendance tracking
    - Wage and hour audit assistance (DOL and Attorney General's Office)
    - Benefit Administration
    - Training

- **Business Counseling-**
    - Bookkeeping Services
    - Bank account reconciliation
    - Monthly financial statements
    - Forecasting and budgeting
    - Accounts receivable billing
    - Accounts payable and cash balances
    - Our business counseling will help you improve profitability