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About the Author

Richard D. Glovsky, a partner in Locke Lord's Boston office who co-chairs the Firm's robust Labor and Employment Practice Group, handles employment litigation, including class actions, wage and hour issues, and discrimination and retaliation claims. Dick prosecutes cases for Fortune 500 companies and other businesses to protect their trade secrets and to prevent former employees from violating non-competition and non-solicitation obligations. He also is a valued counselor on employment related matters. Dick is recognized in both Chambers USA and The Best Lawyers in America for his work in labor and employment law. Dick is a former Assistant United States Attorney and Chief of the Civil Division of the United States Attorney's Office for the District of Massachusetts.

Drafting Employment Applications in Massachusetts

Massachusetts Job Application Requirements

Several Massachusetts laws govern the information that employers must include in their written job applications.

The Massachusetts Lie Detector Statute

The Massachusetts Lie Detector Statute, Mass. Gen. Laws ch. 149, § 19B(2)(b), requires all job applications to contain the following notice in clearly legible print:

> 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.

Law Governing Work History and Job Experience Inquiries, Mass. Gen. Laws ch. 149, § 52B

Job applications that inquire about an applicant's work history or job experience must include a statement indicating that the applicant may provide information about verified volunteer work. Mass. Gen. Laws ch. 149, § 52B.

The Sealed Record Act

The Sealed Record Act, Mass. Gen. Laws ch. 276, § 100A et seq., requires that when an employment application seeks information about an applicant's prior arrests or convictions, the following statement must be included in the application:

> An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer "no record" with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.

Mass. Gen. Laws ch. 276, §§ 100A, 100C.

Note that the Massachusetts "Ban-the-Box" law, Mass. Gen. Laws ch. 151B, § 4 (9½), restricts inquiries about criminal history on an initial job application.

The Uniform Operation of Commercial Motor Vehicles Act

The Uniform Operation of Commercial Motor Vehicles Act, Mass. Gen. Laws ch. 90F, § 1 et seq., requires employers to request certain information from applicants for commercial motor vehicle driver positions. Applicants must provide the following information, and their answers must include information for the ten years prior to the date of application:

- The names and addresses of the applicant's previous employers for which the applicant was a commercial motor vehicle driver
- The dates between which the applicant drove for each employer
- The applicant's reason for leaving that employer

The applicant must certify that this information is true and complete, and the employer may require additional information. Mass. Gen. Laws ch. 90F, §§ 4.A, 3.C.

Massachusetts Job Application Restrictions

Unless required by a bona fide occupational qualification, Massachusetts employment applications may not include questions that would likely require the applicant to disclose his or her

- race, color, national origin, ancestry, birthplace or parents' birthplace, ethnicity;
- religious creed or religion, religious obligations or holidays;
- sex (including marital status discrimination—804 CMR 3.01(4)(a)(5.)), gender identity, or sexual orientation;
- children or child care arrangements;
- age, date of birth (although employers may ask if the applicant is under 18 (804 CMR 3.02);
- physical or mental handicap, drug or alcohol addiction, AIDs;
- admissions to mental health facilities;
- membership in the armed services (Mass. Gen. Laws ch. 33, § 13(b));
- genetic information; and
- certain criminal history information. (Specifically, in an initial written application, an employer may not inquire into an applicant's criminal history, except when under federal or state law or regulation information about criminal convictions (1) creates a mandatory or presumptive disqualification or (2) prohibits employment by the employer. Mass. Gen. Laws ch. 151B, § 4(9½); Mass. Gen. Laws ch. 151B, § 4(9); 804 CMR 3.02.)

See 804 CMR 3.01; 804 CMR 3.02. See also Mass. Gen. Laws ch. 149, § 24A (prohibiting age discrimination against individuals age 40 and over) and the Massachusetts Fair Employment Practices Act, Mass. Gen. Laws ch. 151B, § 1 et seq. Note that while the Massachusetts Fair Employment Practices Act prohibits discrimination due to veteran status, employers may ask about veteran status on employment applications. Mass. Gen. Laws ch. 151B, § 4(18).

Preventing Implied Contract Claims in Massachusetts

Pre-Hire Representations – Avoiding Implied Contract Claims

Statements made during the hiring process about potential salaries, job benefits, a period of employment, or termination procedures can lead to implied contract claims. See, e.g., Boothby v. Texon, Inc., 608 N.E.2d 1028 (1993). In that case, the court found that

an employer's assurances about job security during pre-hire negotiations were sufficient to establish a contract of permanent employment. Employers should include disclaimers in applications and recruiting materials to avoid a court finding that the employer's statements during the hiring process created a binding agreement with an employee.

Post-Hire Representations – Avoiding Implied Contract Claims

A presumption under Massachusetts law is that all employment is at will, and the employer and employee are free to terminate their work relationship at any time. Jackson v. Action for Boston Community Dev., Inc., 525 N.E.2d 411, 412 (Mass. 1988). However, employee handbooks, oral assurances of job security by supervisors, and written company policies may give rise to implied contracts that require employment for a definite term or discharge only for cause.

The existence of an implied employment contract is a factual issue to be determined under the circumstances of the case. Id. at 413-414. An employee must establish all of the elements ordinarily necessary for the formation of a contract in order to prove that an implied employment contract exists. Biggins v. Hazen Paper Co., 953 F.2d 1405, 1422 (1st Cir. 1992), vacated on other grounds, 507 U.S. 604 (1993).

In O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843 (Mass. 1996), the Massachusetts Supreme Judicial Court ruled that a personnel manual created an implied contract that altered the employee's at-will status. However, the court denied the employee's wrongful discharge claim against the employer because she failed to follow the grievance procedures stated in the personnel manual. See O'Brien v. Analog Devices, Inc., 606 N.E.2d 937 (Mass. App. Ct. 1993) (language in employee handbook was insufficiently definite to give rise to an implied contract of permanent employment); Evans v. T.J. Maxx, 2005 Mass. Super. LEXIS 41 (Mass. Super. Ct. 2005) (employee could not reasonably construe terms of employee handbook as an implied contract).

Other cases demonstrate that an employer's inclusion of an at-will disclaimer can help the employer prevent a court from ruling that a handbook and other personnel materials created an implied employment contract with an employee. See Chilson v. Polo Ralph Lauren Retail Corp., 11 F. Supp. 2d 153 (D. Mass. 1998) (applying Massachusetts law, boldface disclaimers prevented employee handbook from being construed as an employment contract) and Joyce v. GF/Pilgrim, Inc., 2003 Mass. Super. LEXIS 281 (Mass. Super. Ct. 2003) (numerous disclaimers and other factors made it unreasonable to view an employee handbook as contractually binding on the employer). Accordingly, employers should include and highlight disclaimers in employment materials to prevent implied contract claims.

The gravitational pull of the case law in Massachusetts is moving in the direction of employee handbooks becoming contractual. Employers need to carefully craft their policies and handbooks to convey the message they intend to convey to employees, while at the same time avoid creating contractual rights in circumstances when it is not intended.

Checking References in Massachusetts

Massachusetts Law Requirements Concerning Job References

Mass. Gen. Laws ch. 111, § 72L1/2 protects nursing homes, home health agencies, and hospice program employers who provide job references about current and former employees. Pursuant to this statute, these employers may disclose the employee's employment history, whether the employee was voluntarily or involuntarily released from service, and the reasons for such employee's release from employment and enjoy immunity from liability for the disclosure. An employer will lose its immunity under the law if the employee can prove that the disclosure was false and made with knowledge that such information was false.

Massachusetts employers have a common law privilege to provide truthful job references about former employees. In Conway v. Smerling, 37 Mass. App. Ct. 1, (Mass. App. Ct. 1994), the court stated that "[i]n response to an inquiry about a former employee, Smerling [the employer] had a privilege, if not a duty, to speak the truth even if the disclosure of the facts might negatively affect the subject's job prospects." 37 Mass. App. Ct. at 7-8. An employer can lose this privilege if the employee proves that the employer made the disclosure with a malicious motive, recklessly disseminated the information, or acted with a reckless disregard for the truth. Bratt v. International Business Machines Corp., 392 Mass. 508, 517 (1984).

Complying with Massachusetts' Mini-FCRA Law

Massachusetts Mini-FCRA Requirements

Massachusetts has its own Consumer Credit Reporting Law, Mass. Gen. Laws ch. 93, § 50 et seq. Mass. Gen. Laws ch. 93, § 51(a) (3) (ii) authorizes employers to obtain credit reports from reporting agencies for employment purposes.

Reporting agencies must exclude the following information from consumer credit reports provided for employment purposes:

- Bankruptcies that predate the report by fourteen years or more;
- Suits and judgments that predate the report by seven years or more or until the governing statute of limitations has expired, whichever is longer;
- Paid tax liens that predate the report by seven years or more;
- Collection accounts that predate the report by seven years or more;
- Records of arrest, indictment, or conviction that predate the report by seven years or more; and
- Any other adverse information that predates the report by seven years or more.

Mass. Gen. Laws ch. 93, § 52.

If an employer seeks an investigative consumer report that contains information about an individual's character and reputation in addition to credit information, the employer is required to:

- Disclose to the employee or job applicant, in writing, its intention to request a report;
- Disclose that an investigative consumer report commonly includes information as to the consumer's character, general reputation, personal characteristics, and mode of living;
- Disclose the precise nature and scope of the investigation requested;
- Disclose the employee's or applicant's right to have a copy of the report provided on request; and
- Obtain the employee's or applicant's written permission prior to making the request for the report.

Mass. Gen. Laws ch. 93, § 53.

Mass. Gen. Laws ch. 93, § 60 prohibits a reporting agency from providing a consumer report to an employer unless the employer agrees to provide written notice to the employee or prospective employee that a consumer report regarding the employee is to be requested. For current employees, notification in an employee manual is sufficient.

Mass. Gen. Laws ch. 93, § 62 requires an employer to notify employees or job applicants if the employer takes an adverse employment action due to information contained in a consumer report. However, this provision is preempted by the federal Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(1)(C).

Conducting Criminal Background Checks in Massachusetts

Massachusetts Law Requirements Concerning Criminal Record Information That Employers May Obtain or Request

The Massachusetts "Ban-the-Box" Law, Mass. Gen. Laws ch. 151B, § 4 (9½)

The Massachusetts "Ban-the-Box" law, Mass. Gen. Laws ch. 151B, § 4 (9½), prohibits all public and private employers with at least six employees from inquiring into an applicant's criminal history on an initial written job application. However, there are two exceptions to this blanket prohibition. An employer may inquire into an applicant's criminal convictions in an initial written application when a state or federal law or regulation

- creates a mandatory or presumptive disqualification based on a conviction; or
- prohibits the employer, or an affiliate of the employer, from employing persons who have been convicted of criminal offenses.

In an oral interview or in a written application thereafter, an employer may ask about the criminal convictions of an applicant or employee. However, at all times, an employer is prohibited from asking applicants about:

- A prior arrest, detention, or disposition that did not result in a conviction;
- A first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
- A misdemeanor conviction or resulting incarceration, whichever is later, that predates the inquiry by more than five years; or
- Sealed criminal records and juvenile offenses.

Mass. Gen. Laws ch. 151B, § 4(9). See Massachusetts Commission Against Discrimination and Hanson v. Mass. Dep't of Social Services, 28 MDLR 42, 43 (2006) (Commission affirmed that juvenile offenses fall within the protection of Mass. Gen. Laws ch. 151B, § 4(9)).

The Sealed Record Act

The Sealed Record Act, Mass. Gen. Laws ch. 276, § 100A et seq., provides that job applicants may answer "no record" with regard to sealed criminal records when responding to an inquiry about prior arrests, criminal court appearances, or convictions. An applicant may also answer "no record" with respect to an inquiry relating to delinquency or juvenile cases that were not transferred to the Superior Court for criminal prosecution. Mass. Gen. Laws ch. 276, §§ 100A, 100C.

The Criminal Offender Record Information (CORI) Reform Law

The Criminal Offender Record Information Reform Law, Mass. Gen. Laws ch. 6, § 171A et seq., prohibits an employer from requesting, or requiring an applicant to obtain for the employer, a copy of the applicant's criminal offender record information (CORI) from the Department of Criminal Justice Information Services (DCJIS). Mass. Gen. Laws ch. 6, § 172(d). However, an employer may ask a job applicant to sign an acknowledgement form that authorizes the employer to obtain the applicant's CORI directly from the DCJIS for purposes of employment screening. Mass. Gen. Laws ch. 6, § 172(c), Mass. Gen. Laws ch. 6, § 172(a)(3).

Laws Mandating Employers to Run Criminal Background Checks

Employers must obtain the criminal offender record information (CORI) from the Massachusetts Department of Criminal Justice Information Services (DCJIS) for applicants for the following positions:

- Employees who care for elderly or disabled persons (Mass. Gen. Laws ch. 6, § 172C);
- Employees who care for residents of a long term care facility, an assisted living residence, or any continuing care facility (Mass. Gen. Laws ch. 6, § 172E);
- Employees of a children's camp (Mass. Gen. Laws ch. 6, § 172G);
- Providers of children's activities (Mass. Gen. Laws ch. 6, § 172H);
- Employees of taxicab companies contracted to transport school children (Mass. Gen. Laws ch. 6, § 172I);
- Children's camp or school employees working with a climbing wall or challenge course program (Mass. Gen. Laws ch. 6, § 172K);
- Child care program or facility personnel (Mass. Gen. Laws ch. 15D, § 7); and
- School personnel (Mass. Gen. Laws ch. 71, § 38R) (school employers must also obtain a state and national fingerprint-based criminal background check, pursuant to 42 U.S.C. § 16962, of applicants and employees who may have direct and unmonitored contact with children).

In order to obtain CORI from the DCJIS, an employer must:

- Register for an account with the DCJIS internet-based service, iCORI (803 CMR 2.04);
- Have the applicant or employee sign an "Acknowledgement Form" authorizing the employer to obtain that person's criminal offender record information (Mass. Gen. Laws ch. 6, §172(c), 803 CMR 2.09(1)(c));
- Submit through the iCORI database, the subject's name, date of birth and first six digits of his or her social security number (Mass. Gen. Laws ch. 6, § 172(c));
- Certify that the requestor is an authorized designee of a qualifying entity; the request is for an authorized purpose; the subject has signed an Acknowledgement Form; and the requestor has verified the identity of the subject by reviewing government-issued identification (Mass. Gen. Laws ch. 6, § 172(c), 803 CMR 2.09);
- Pay the record request fee (Mass. Gen. Laws ch. 6, § 172A);
- Provide a copy of the criminal record to the applicant or employee prior to asking that person about it or prior to making an adverse employment decision on the basis of such criminal history (Mass. Gen. Laws ch. 6, §172(c), Mass. Gen. Laws ch. 6, § 171A, 803 CMR 2.11; 803 CMR 2.17);
- Store any hard copy of the criminal record in a locked and secure location, provide password and encryption security for electronic CORI information, and retain the information no longer than seven years (803 CMR 2.11).

Employers who conduct five or more CORI requests per year must maintain a written CORI policy, which provides the employer will:

- Notify the applicant of the potential of an adverse decision based on criminal offender record information;
- Provide a copy of the CORI and policy to the applicant; and
- Provide information about the process for correcting a criminal record.

Mass. Gen. Laws ch. 6, § 171A; 803 CMR 2.15.

Before taking adverse employment action based on a job applicant's CORI, an employer must:

- Comply with applicable federal and state laws and regulations;
- Notify the applicant of the potential adverse employment action;
- Provide a copy of the applicant's CORI to the applicant;
- Provide the applicant with a copy of the employer's CORI policy, if applicable;
- Identify the information in the applicant's CORI that is the basis for the potential adverse action;
- Provide the applicant with the opportunity to dispute the accuracy of the information contained in the CORI;
- Provide the applicant with a copy of DCJIS instructions regarding the process for correcting the CORI; and
- Document all steps taken to comply with these requirements.

803 CMR 2.17.

Negligent Hiring

The Massachusetts doctrine of negligent hiring provides that an employer has a duty to exercise reasonable care when selecting employees who will come in contact with members of the public through the course of the employer's business. Foster v. Loft, Inc., 26 Mass. App. Ct. 289, 290, 526 N.E.2d 1309 (1988). To establish a case of negligent hiring, a plaintiff must prove the following:

- That an employee of the defendant employer committed the actions that form the basis of the plaintiff's claim;
- That the employee came into contact with members of the public in the course of the employer's business;

- That the employer failed to use reasonable care in the selection of the employee; and
- That the employer's failure to use such reasonable care was the proximate cause of the harm to the plaintiff.

Rabelo v. Nasif, 2012 Mass. Super. LEXIS 368, at *2-3 (Mass. Super. Ct. 2012) citing Limone v. United States, 497 F.Sup.2d 143, 233 (D. Mass. 2007).

A plaintiff can prove an employer's lack of care in hiring by showing:

- That the employer failed to make an adequate pre-employment investigation of the employee;
- That the employee was dangerous, incompetent, or otherwise unfit for the job;
- That the employer's exercise of due care would have disclosed this unfitness; and
- That the plaintiff's injuries were caused by this dangerousness, incompetence, or unfitness.

Ellingsgard v. Silver, 223 N.E.2d 813, 817 (Mass. 1967); Morrisey v. Lieberman, 2005 Mass. Super. LEXIS 339, at *14 (Mass. Super. Ct. 2005).

Massachusetts Laws Barring Discrimination Against Individuals with Criminal Records

The Massachusetts "Ban-the Box" law, Mass. Gen. Laws ch. 151B, § 4(9½)

The Massachusetts "Ban-the Box" law, Mass. Gen. Laws ch. 151B, § 4(9½), effectively prohibits private and public employers from discriminating against applicants when screening initial written applications for employment. Pursuant to that law, employers must not question applicants about their criminal history in an initial written application unless other laws or regulations apply to prevent the hiring of persons with criminal convictions.

Pursuant to Mass. Gen. Laws ch. 151B, § 4(9), it is unlawful for an employer to discriminate against any person for failing to furnish information regarding:

- A criminal arrest, detention, or disposition that did not result in a conviction;
- A first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; or
- Any conviction of a misdemeanor where the conviction date or period of incarceration predates the inquiry by five or more years, unless the person was convicted of any other offense within the immediate past five years.

The Criminal Offender Record Information (CORI) Reform Law

The Criminal Offender Record Information (CORI) Reform Law, Mass. Gen. Laws ch. 6, § 171A et seq., does not prohibit discrimination on the basis of an individual's criminal record. However, before taking adverse employment action based on a job applicant's CORI, an employer must:

- Comply with applicable federal and state laws and regulations;
- Notify the employment applicant of the potential adverse employment action;
- Provide a copy of the applicant's CORI to the applicant;
- Provide the applicant with a copy of the employer's CORI policy, if applicable;
- Identify the information in the applicant's CORI that is the basis for the potential adverse action;
- Provide the applicant with the opportunity to dispute the accuracy of the information contained in the CORI;
- Provide the applicant with a copy of Department of Criminal Justice Information Services instructions regarding the process for correcting the CORI; and
- Document all steps taken to comply with these requirements.

803 CMR 2.17.

The CORI law can be especially challenging for employers to navigate and for employees to understand.

Conducting Credit History Checks in Massachusetts

Massachusetts Law Requirements Concerning Credit History Information that Employers May Obtain or Request

Massachusetts has not passed any laws limiting an employer's rights to obtain credit history information from applicants or employees.

Gathering Information About Job Applicants from Social Media Sites in Massachusetts

Massachusetts Law Requirements Limiting Employers' Access to Individuals' Social Media Accounts

Massachusetts has not enacted any laws that limit employers' ability to gather information about applicants or employees on social media sites.

Understanding Massachusetts Unemployment Discrimination Laws

Unemployment Discrimination Law Requirements

Massachusetts has not enacted any laws prohibiting discrimination in hiring due to an applicant's unemployment status.

Conducting Drug and Alcohol Testing in Massachusetts

Pre-Employment Drug Testing

Public Employers

Drug testing by public employers is restricted by Article Fourteen of the Massachusetts Constitution, ALM Constitution Pt. 1, Art. XIV, which protects against unreasonable searches and seizures. In determining the reasonableness of the government's action, courts weigh the governmental need for drug testing against the test's intrusiveness into the employee's reasonable expectation of privacy. See O'Connor v. Police Comm'r of Boston, 408 Mass. 324 (1990) (drug testing of police cadets constitutional); Guiney v. Police Comm'r of Boston, 411 Mass. 328 (1991) (random drug testing of police officers unconstitutional).

Private Employers

Drug testing by private employers is restricted by the Massachusetts Privacy Act, Mass. Gen. Laws ch. 214, § 1B, which protects an individual's privacy from unreasonable, substantial, or serious interference. To determine whether workplace drug testing violates Mass. Gen. Laws ch. 214, § 1B, courts weigh the employee's interest in privacy against the employer's competing interest in determining whether employees are using drugs. Webster v. Motorola, Inc., 418 Mass. 425, 431-432 (1994). The nature of the employer's business and the employee's duties are relevant factors in this analysis.

In *Webster*, the court held that the employer's drug testing program violated Mass. Gen. Laws ch. 214, § 1B because it required all employees to undergo random testing regardless of their job duties. Although it was proper for the employer to perform random testing on an account executive because he drove a company car long distances, it was improper for the employer to test a technical editor because his job did not affect national security, health, or safety. 418 Mass. at 434.

Drug Testing of Employees

Public Employers

The same considerations that apply to drug testing of job applicants by public employers apply to drug testing of employees by public employers. See Pre-Employment Drug Testing.

Private Employers

The same considerations that apply to drug testing of job applicants by private employers apply to drug testing of employees by private employers. See Pre-Employment Drug Testing.

Using Polygraph Tests in Massachusetts

Limitations on Polygraph Testing

The Employee Polygraph Protection Act of 1988 (EPPA) is a federal law that generally prevents employers from using lie detector tests, either for pre-employment screening or during the course of employment. As a result, employers ordinarily may not require an employee or job applicant to submit to a polygraph test, or discharge, discipline, or discriminate against an employee or job applicant for refusing to do so. For more information on the EPPA and its exceptions, see Using Polygraph Tests when Screening Employees.

In Massachusetts, Mass. Gen. Laws ch. 149, § 19B prohibits employers from requesting or requiring job applicants or employees to take a polygraph test, or any other type of lie detector test.

All employment applications must contain the following statement: “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.” Mass. Gen. Laws ch. 149, § 19B(2)(b).

Verifying Employment Eligibility and Prohibitions on the Employment of Undocumented Workers in Massachusetts

Laws Governing Using or Hiring Undocumented Workers

Mass. Gen. Laws ch. 149, § 19C prohibits a Massachusetts employer from hiring an unauthorized alien. Department of Labor regulations, 453 CMR 3.00-3.04, establish the requirements that employers must follow to insure compliance with the law.

The regulations stipulate that:

- Employers must make a bona fide inquiry to verify the work status of an employee. 453 CMR 3.03(1).
- An employee is considered an unauthorized alien if not lawfully admitted into or otherwise permitted to work in the United States by the U.S. Immigration and Naturalization Service or the U.S. Attorney General. 453 CMR 3.02.
- An inquiry into the employment status of an alien is bona fide if an employer completes and retains U.S. Immigration and Naturalization Form I-9 together with supporting documentation. 453 CMR 3.03(2).
- When completing the Form I-9, employers must examine all documents provided by the employee. 453 CMR 3.03(2).

The employer may accept those documents that reasonably appear related to the person submitting them, genuine, and free of tampering, alterations or desecration. 453 CMR 3.03(2).

Potential Penalties

An employer who hires an unauthorized alien may be fined $200.00 to $500.00. Mass. Gen. Laws ch. 149, § 19C.

Providing Notices and Obtaining Acknowledgements in Massachusetts

Required Notices and Acknowledgments at Hiring

Distribution of Employer's Sexual Harassment Policy

A Massachusetts employer must provide an individual written copy of the employer's sexual harassment policy to all newly-hired employees. Mass. Gen. Laws ch. 151B, § 3A(b)(2). The policy requirements are listed at Mass. Gen. Laws ch. 151B, § 3A(a). You can find a model policy against sexual harassment on the Massachusetts Commission Against Discrimination website.

Notice of Workers' Compensation Coverage

Employers are required to provide employees with notice of workers' compensation insurance coverage that provides for payment to injured employees by an insurer or by self-insurance. Mass. Gen. Laws ch. 152, §§ 21, 22.

Required Postings From The Massachusetts Executive Office of Labor and Workforce Development

Employers are required to post employment law notices available from the Massachusetts Executive Office of Labor and Workforce Development. These include notices regarding the following laws:

- Massachusetts Wage & Hour Laws (Mass. Gen. Laws ch. 151, § 16);
- Fair Employment Law (Mass. Gen. Laws ch. 151B, § 7);
- Maternity Leave Act (Mass. Gen. Laws ch. 149, § 105D);
- Sexual Harassment (Mass. Gen. Laws ch. 151B, § 3A(c));
- Unemployment Insurance Coverage (Mass. Gen. Laws ch. 151A, § 62A(g));
- Industrial Accidents Workers Compensation Coverage (Mass. Gen. Laws ch. 152, § 22);
- Right to Know Workplace Notice for public sector workplaces (Mass. Gen. Laws ch. 111F, § 11); and
- Smoke Free Workplace (Mass. Gen. Laws ch. 270, § 22).

A listing of required notices is available at the Massachusetts Executive Office of Labor and Workforce Development website.

Potential Penalties

Failure to Post Fair Employment Law Notice

An employer who fails to post the required Fair Employment Law notice may be penalized by a fine of ten to one hundred dollars for the first violation and $100.00 to $1000.00 for a subsequent violation. Mass. Gen. Laws ch. 151B, § 7.

Failure to Post Notice of Unemployment Insurance Coverage

The failure to post the required Unemployment Insurance Coverage notice may result in a written warning for a first violation, a civil fine of $100.00 for a second violation, $250.00 for a third violation, and $500.00 for a fourth and subsequent violations. Mass. Gen. Laws ch. 151A, § 62A(g).

Navigating the Massachusetts Fair Employment Practices Law

Unless based upon a bona fide occupational qualification, the Massachusetts Fair Employment Practices Law (the Law), Mass. Gen. Laws ch. 151B et seq., protects employees from discrimination in the terms, conditions, or privileges of employment based on their membership in a protected class. 804 CMR 3.01(1). The Law also prohibits retaliation. Mass. Gen. Laws ch. 151B, § 1(4).

Employer Coverage

An "employer" is defined by the Law as any employer with six or more employees, other than nonprofit exclusively social clubs, fraternal associations, or corporations. Mass. Gen. Laws ch. 151B, § 1(5); 804 CMR 3.01(1).

Individual Liability

The Law imposes liability on an individual for

- coercing, intimidating, threatening, or interfering with another person's exercise or enjoyment of any right under the Law or coercing, intimidating, threatening, or interfering with such other person for having aided or encouraged another person in the exercise or enjoyment of any right granted or protected by the Law;
- aiding, abetting, inciting, compelling, or coercing any person in violating the Law; or
- retaliating against another person who opposed a violation or participated in a hearing or investigation under the Law.

Mass. Gen. Laws ch. 151B, § 4(4A),(5); 804 CMR 3.01(4)(d).

An individual may be held liable for sexual harassment based upon Mass. Gen. Laws ch. 151B, § 4(4A) and (5). Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480 (App. Ct. 2000); Sobocinski v. United Parcel Services, Inc., 31 MDLR 158 (2009).

What Workers Are Covered?

An employee employed by an employer in a full or part-time capacity may bring an action under the Law. See 804 CMR 3.01(1).

The term "employee" does not apply to

- an individual who is employed in the domestic service of an individual;
- an independent contractor; or
- an individual employed by his or her parent, spouse, or child.

804 CMR 3.01(1); Mass. Gen. Laws ch. 151B, § 1(6).

Protected Classes and Characteristics

The Law protects employees from discrimination on the basis of the following:

- Race
- Color
- Religious creed
- National origin
- Sex (including marital status discrimination—804 CMR 3.01(4)(a)(5.))
- Sexual orientation
- Gender identity
- Genetic information
- Ancestry
- Disability
- Military service (see Mass. Gen. Laws ch. 33, § 13(b))
- Veteran status
- Pregnancy

See Mass. Gen. Laws ch. 151B, § 4; 804 CMR 3.01; Mass. Electric Co. v. Massachusetts Commission Against Discrimination, 375 Mass. 160 (1978); 804 CMR 8.01. Note that Massachusetts also prohibits age discrimination against individuals age 40 and older. Mass. Gen. Laws ch. 149, § 24A. See Complying with Massachusetts's Age Discrimination Law. Note also that employers are barred from inquiring about certain criminal history information. See 804 CMR 3.02; Mass. Gen. Laws ch. 151B, § 4(9); Mass. Gen. Laws ch. 151B, § 4(9½).

Transgender Use of Restrooms, Changing Rooms, and Locker Rooms

Effective October 1, 2016, Massachusetts' transgender accommodations bill (which is not part of the Massachusetts Fair Employment Practices Law) will require places of public accommodation, resort, or amusement that lawfully segregate or separate access based on a person's sex to grant all persons admission and the full enjoyment of such places of accommodation consistent with the person's gender identity. Mass. Gen. Laws ch. 272, § 92A, as amended by 2015 Bill Text MA S.B. 2407 § 2. Violations are punishable by a fine of not more than $100, imprisonment for not more than 30 days, or both. Mass. Gen. Laws ch. 272, § 92A.

Religious Discrimination

Massachusetts prohibits employment discrimination based on creed or religion. Mass. Gen. Laws ch. 151B, § 4. "Creed or religion" is defined as "any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization." Mass. Gen. Laws ch. 151B, § 4(1A).

Duty to Accommodate Religion

The Law requires employers to reasonably accommodate religion unless an accommodation would pose an undue hardship. Mass. Gen. Laws ch. 151B, § 4(1A).

Examples of undue hardship include

- the employer's inability to provide services required by law or regulation,
- "[s]ituations which compromise public health and safety,"
- an inability to transact business without the employee's presence, where his or her work cannot be performed by another employee with substantially similar qualifications, and
- when the employee's presence is necessary to alleviate an emergency situation.

804 CMR 3.01(7)(b)(3)(a). See, e.g., Brown v. F.L. Roberts & Co., 896 N.E.2d 1279 (Mass. 2008) (holding it was not a reasonable accommodation for an employer to move a Rastafarian from a position with customer contact to one without such contact for refusing to shave).

Disability Discrimination

The Law defines "handicap" as

- a physical or mental impairment that substantially limits one or more major life activities,
- a record of having such an impairment, or
- being regarded as having such impairment, except for the current, illegal use of controlled substances.

Mass. Gen. Laws ch. 151B, § 1(17); 804 CMR 3.01(5)(a).

The Law defines "major life activities" to include the following:

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing

- Speaking
- Breathing
- Learning
- Working

Mass. Gen. Laws ch. 151B, § 1(20); 804 CMR 3.01(5)(a).

The Supreme Judicial Court of Massachusetts has recognized a claim for "associational discrimination" under Mass. Gen. Laws ch. 151B, § 4(16). While an employee may not be handicapped, he or she may have a claim if he or she is the victim of discrimination directed toward a third person with a handicap with whom the employee associates. Flagg v. AliMed, Inc., 466 Mass. 23 (2013).

"Regarded As" Disability

The Law protects individuals who are regarded as having a handicap, except for individuals currently engaging in the illegal use of controlled substances. Mass. Gen. Laws ch. 151B, § 1(17); 804 CMR 3.01(5)(a).

Temporary Disabilities

Brief periods of incapacity do not qualify as a handicap under the Law. See Hallgren v. Integrated Fin. Corp., 42 Mass. App. Ct. 686 (Mass. App. Ct. 1997). However, not every temporary disability is short-lived and may qualify as a handicap under the law. Dartt v. Browning-Ferris Indus., 427 Mass. 1 (1998).

Duty to Reasonably Accommodate Disabilities

An employer is required to provide a qualified employee or applicant with a handicap, who is otherwise capable of performing the duties of a position, with a reasonable accommodation under the Law. Mass. Gen. Laws ch. 151B, § 4(16).

Under the Law, an employer may decline to provide a qualified employee or applicant with a handicap a reasonable accommodation if that accommodation would impose an undue hardship on the employer's business. Mass. Gen. Laws ch. 151B, § 4(16).

In determining whether an accommodation would impose an undue hardship on the employer's business, the factors to be considered include

- the overall size of the employer's business,
- the type of the employer's operation, and
- the nature and cost of the accommodation.

Mass. Gen. Laws ch. 151B, § 4(16); 804 CMR 3.01(5)(e).

Request for Accommodation Process

Generally, an employer's obligation to provide a qualified employee or applicant with a handicap an accommodation under the Law is triggered when the employee brings his or her need for an accommodation to the employer's attention. However, the employer's obligation to provide an accommodation may arise if the employer knows or should have known that the employee is handicapped and required an accommodation. Leach v. Commissioner of the Mass. Rehabilitation Commission, 63 Mass. App. Ct. 563 (Mass. App. Ct. 2005).

The employee's request for an accommodation triggers the employer's obligation to participate in an interactive process of determining a reasonable accommodation. Ocean Spray Cranberries, Inc. v. Mass. Commission Against Discrimination, 441 Mass. 632 (2004).

Pregnancy Discrimination and Duty to Reasonably Accommodate Pregnancy

The Law protects employees from discrimination on the basis of pregnancy. Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are regarded as temporary disabilities for all employment-related purposes. 804 CMR 8.01. As such, an employer must provide the same conditions and benefits to employees affected by pregnancy as provided to employees with other temporary disabilities.

The Law does not expressly impose upon an employer a duty to reasonably accommodate pregnancy or related conditions. For information concerning leave associated with pregnancy, see Complying with Family and Medical Leave Act Laws in Massachusetts.

Prohibited Conduct

The Law prohibits an employer from the following:

- Failing or refusing to hire, discharging, or otherwise discriminating against an employee or a job applicant of a protected class with respect to the terms, conditions, or privileges of employment
- Retaliation
- Sexual harassment
- Failing to provide a reasonable accommodation to a qualified employee or job applicant with a handicap
- Failing to provide a reasonable accommodation for the religious observance of a job applicant or employee
- Aiding and abetting any prohibited acts under the Law
- Interfering with another person's exercise of any right under the Law
- Printing or circulating a statement or advertisement, employment application, or making an inquiry in connection with prospective employment that expresses a limitation based upon a protected class
- Associational discrimination

Mass. Gen. Laws ch. 151B, § 4; 804 CMR 3.01; Flagg v. AliMed, Inc., 466 Mass. 23 (2013).

Harassment Liability Standards and Defenses

The Law prohibits sexual harassment, which is defined as sexual advances, requests for sexual favors, or other conduct of a sexual nature when

- submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment.

Thus, the Law recognizes quid pro quo and hostile work environment harassment claims. Mass. Gen. Laws ch. 151B, § 1(18); 804 CMR 3.01(4)(a)(4).

To establish a hostile work environment claim, the conduct in question must be severe and pervasive. Muzzy v. Cahillane Motors, 434 Mass. 409 (2001).

The Law does not explicitly recognize harassment claims based upon membership in a protected class, but the Supreme Judicial Court of Massachusetts has recognized a hostile work environment claim based upon racial harassment. Racial harassment hostile work environment claims are to be reviewed under the same standard as sexual harassment hostile work environment claims. Clifton v. Mass. Bay Transp. Auth., 445 Mass. 611 (2005).

Vicarious Liability for Harassment

An employer may be held vicariously liable for sexual harassment by a supervisory employee under the Law. See College-Town, Div. of Interco, Inc. v. Mass. Commission Against Discrimination, 400 Mass. 156 (1987).

The employer also may be held liable for sexual harassment by non-supervisory employees, such as co-workers, if the employer knew or should have known of the harassing conduct and failed to take prompt, effective, and reasonable remedial action. Modern Cont'l /Obayashi v. Mass. Commission Against Discrimination, 445 Mass. 96 (2005).

The *Faragher-Ellerth* defense is not available to sexual harassment claims arising under the Law.

Same-Sex Harassment

The definition of sexual harassment under the Law encompasses a claim for sexual harassment brought by an employee claiming harassment by a member of the same gender. Muzzy v. Cahillane Motors, 434 Mass. 409 (2001).

Retaliation Liability Standards and Defenses

Under the Law, it is unlawful for an employer to discharge, expel, or otherwise discriminate against any employee for

- exercising any right under the Law,
- opposing any unlawful practice under the Law, or
- testifying or assisting in a proceeding or investigation under the Law.

804 CMR 3.01(4)(d); Mass. Gen. Laws ch. 151B, § 4 (4) and (4A).

A former employer may be held liable for retaliation that takes place after the employment relationship has ended. Psy-Ed Corp. v. Klein, 459 Mass. 697 (2011).

To assert a claim of retaliation under the Law, the employee must show that

- he or she engaged in a protected activity,
- he or she suffered an adverse employment action, and
- a causal connection exists between the protected activity and the adverse action.

The causal connection may be inferred. The timing and sequencing of events may be sufficient to give rise to an inference of causation, but the employer's desire to retaliate against the employee must be shown to be a determinative factor in the adverse action. Once the employer has provided non-retaliatory reasons for the adverse action, the employee must prove that the non-retaliatory reasons were pretext. Psy-Ed Corp. v. Klein, 459 Mass. 697 (2011).

Any action that materially disadvantages the employee is an adverse employment action for a retaliation claim arising under the Law. See O'Brien v. Mass. Inst. of Tech., 82 Mass. App. Ct. 905 (Mass. App. Ct. 2012).

Enforcement

Enforcement Agency

The Massachusetts Commission Against Discrimination is tasked with administering and enforcing the Law. Mass. Gen. Laws ch. 151B, § 3.

Private Right of Action

An employee has a private right of action under the Law. Mass. Gen. Laws ch. 151B, § 9.

On February 29, 2016, the Massachusetts Supreme Judicial Court held that to defeat a summary judgment motion under the Law, a plaintiff only needs to present evidence that the employer's reasons for an employment action were false; the plaintiff does not have to prove that the employer's reasoning was pretext for a discriminatory purpose. Bulwer v. Mt. Auburn Hosp., 473 Mass. 672, 682 (2016). In *Mt. Auburn*, a black plaintiff filed suit against Mt. Auburn Hospital alleging discrimination on the basis of race and national origin. Id. at 674. In reaching its decision to reverse the trial court's grant of summary judgment to the defendant, the Court considered the inconsistencies between the plaintiff's performance reviews and the reasons given for not renewing the plaintiff's residency at the hospital, coupled with evidence that the hospital treated the plaintiff differently than similarly situated non-black interns. Id. at 684–86. Under the *Mt. Auburn* standard, an employer may find itself more vulnerable to employment discrimination suits where the court finds that one or more of the reasons offered for an employee's termination is untrue. Id. at 682.

Exhaustion Requirement

Although an employee must first file a complaint under the Law with the Massachusetts Commission Against Discrimination, he or she does not need to wait for a determination before filing a civil action. The employee may as of right bring a civil action ninety days

after filing the complaint with the Commission. Mass. Gen. Laws ch. 151B, § 9; Everett v. 357 Corp., 453 Mass. 585 (2009). With the Commission's approval, which is readily provided, an employee may file a civil action sooner.

Statute of Limitations

An aggrieved employee may file a complaint alleging a violation of the Law with the Massachusetts Commission Against Discrimination with 300 days of the alleged incident. Mass. Gen. Laws ch. 151B, § 5.

The employee may file a civil action ninety days after filing a complaint with the Commission but not later than three years after the alleged unlawful practice occurred. Mass. Gen. Laws ch. 151B, § 9.

Self-Help Discovery

In a 2016 case of first impression, the Supreme Judicial Court held that an employee's acts of self-help discovery in aid of claims under Mass. Gen. Laws ch. 151B, § 4 could be protected activity, but only if the employee's actions were reasonable in the totality of the circumstances. Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 474 Mass. 382, 410 (2016). The court found that employees asserting discrimination claims who accessed, copied, or disseminated confidential material "even under the best of circumstances . . . run the significant risk that the conduct in which they engage will not be found … [ultimately] to fall within the protection[s]" of the statute. Id. at 412. *Verdrager* involved an attorney who exercised self-help discovery methods in a sex discrimination case against her former employer, a law firm, and although the status of a document under the confidentiality and privilege rules was an important consideration in the reasonableness analysis, the Court found that "it was not, by itself, dispositive." Id.

Damages and Penalties

If the Massachusetts Commission Against Discrimination finds that an employer has violated the Law, it may

- enter a cease and desist order;
- order affirmative action, including, but not limited to hiring, reinstatement, or promotion, with or without backpay;
- award damages for emotional distress;
- award reasonable attorney's fees and costs; and
- assess a civil penalty of between $10,000 and $50,000 depending upon the number of discriminatory practices the employer is adjudged to have committed in the past.

Mass. Gen. Laws ch. 151B, § 5; Stonehill College v. Mass. Commission Against Discrimination, 441 Mass. 549 (2004).

If a court finds the employer has violated the Law, it may

- order injunctive relief,
- award actual damages,
- award punitive damages, and/or
- award reasonable attorney's fees and costs.

Mass. Gen. Laws ch. 151B, § 9.

Complying with Massachusetts Equal Pay Laws

The Massachusetts Equal Pay Act, Mass. Gen. Laws ch. 149, § 105A through Mass. Gen. Laws ch. 149, § 105C, protects employees from wage discrimination on the basis of gender and prohibits retaliation.

Massachusetts enacted the Act to Establish Pay Equity, 2016 Mass. Acts 177, which amends the Massachusetts Equal Pay Act. The Act to Establish Pay Equity is effective July 1, 2018. 2016 Mass. Acts 177, Section 4. We discuss below the changes it makes to the Massachusetts Equal Pay Act.

Employer Coverage

"Employer" as used in the Massachusetts Equal Pay Act means any person acting directly or indirectly in the interest of the employer. Mass. Gen. Laws ch. 149, § 1.

Individual Liability

"Employer" as used in the Massachusetts Equal Pay Act means any person acting directly or indirectly in the interest of the employer. Mass. Gen. Laws ch. 149, § 1. Thus, there may be individual liability under the Massachusetts Equal Pay Act.

What Workers Are Covered?

Under the Massachusetts Equal Pay Act, an employee may bring a claim. "Employee" is defined as any person employed for hire by an employer, not including

- persons under the age of eighteen engaged in domestic service,
- persons engaged in agricultural service, or
- employees of any social club, fraternal, charitable, educational, religious, scientific, or literary association, no part of the net earnings of which enures to the benefit of any private individual.

Mass. Gen. Laws ch. 149, § 1.

Protected Classes and Characteristics

The Massachusetts Equal Pay Act prohibits wage discrimination on the basis of gender.

Prohibited Conduct

Under the Massachusetts Equal Pay Act, an employer may not discriminate in the payment of wages between genders for comparable work. Variations in rates of pay are permitted if the difference is based upon a system that rewards seniority, a merit system, a system that measures earnings by quantity or quality of production, sales, or revenue; the geographic location in which a job is performed; education, training, or experience to the extent such factors are reasonably related to the particular job in question; or travel, if travel is a regular and necessary condition of the particular job.

Retaliation Liability Standards and Defenses

The Massachusetts Equal Pay Act imposes a fine of $100.00 against any employer who, among other things, discharges an employee for making a complaint or for participating in a proceeding under the Act. Mass. Gen. Laws ch. 149, § 105B.

The Act to Establish Pay Equity

Effective July 1, 2018, Massachusetts amended its equal pay laws to define comparable work as work that is substantially similar in skill, effort, and responsibility that is performed under similar working conditions. Reliance upon job descriptions alone is not sufficient to determine if work is comparable. Mass. Gen. Laws ch. 149, § 105A(a). Variations in wages are permitted if they are based upon

- a system that rewards seniority, provided that leave due to pregnancy or pregnancy-related conditions or protected family and medical leave does not reduce seniority,
- a merit system,
- a system which measures earnings by quantity or quality of production, sales, or revenue,
- the geographic location in which a job is performed,
- education, training, or experience as they are reasonably related to the job in question, or
- travel if it is a regular and necessary condition of the job.

Employers in violation of these provisions cannot reduce the wages of any employee solely to be in compliance. Mass. Gen. Laws ch. 149, § 105A(b).

It is also an unlawful practice for an employer to

- require an employee to refrain from asking about, disclosing, or discussing information about the employee's wages or about any other employee's wages, although the employer is not required to disclose an employee's wages to another employee or a third party;
- seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or require that the prospective employee's prior wage or salary history meet certain criteria unless
    - the prospective employee voluntarily discloses such information and the employer is seeking confirmation, or
    - the employer is confirming the prospective employee's wage or salary history after compensation has been negotiated and an offer of employment has been made to the prospective employee;
- discharge or retaliate against any employee for
    - opposing a practice made unlawful by the Act,
    - making or indicating an intent to make a complaint or otherwise causing to be instituted any proceeding under the Act,
    - participating in an investigation or proceeding related to a possible violation of these provisions, or disclosing the employee's wages or inquiring about or discussing the wages of another employee.

Mass. Gen. Laws ch. 149, § 105A(c).

Affirmative Defense

The Act to Establish Pay Equity provides an employer against whom an action is brought with an affirmative defense to a claim of wage disparity if within the past three years the employer has completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work. The self-evaluation must have taken place within three years prior to the commencement of the action. The self-evaluation may be of the employer's own design, provided that it is reasonable in detail and scope. If the employer has completed a self-evaluation in good faith but it is not reasonable in detail or in scope, the employer is not entitled to the affirmative defense but will not be liable for liquidated damages. Mass. Gen. Laws ch. 149, 105A(d).

Enforcement

Enforcement Agency

The Massachusetts Attorney General has the authority to enforce the provisions of the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, § 105C.

Effective July 1, 2018, under the Act to Establish Pay Equity, the Massachusetts Attorney General may bring an action to collect unpaid wages and liquidated damages on behalf of one or more employees. The Attorney General also may collect costs and reasonable attorney's fees and has the authority to issue regulations interpreting and applying the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, 105A(b), (e).

Private Right of Action

An aggrieved employee may file an action alleging a violation of the Massachusetts Equal Pay Act in any court of competent jurisdiction. Mass. Gen. Laws ch. 149, § 105A.

Effective July 1, 2018, for violations of the Act to Establish Pay Equity, an employee can bring an action on his or her own behalf as well as on behalf of similarly situated employees in any court of competent jurisdiction. Mass. Gen. Laws ch. 149, 105A(b). If an action is based upon an employer seeking a wage or salary history from a prospective employee, it may be brought on behalf of one or more applicants for employment. Mass. Gen. Laws ch. 149, 105A(c).

Exhaustion Requirement

An employee does not have to submit an administrative claim under the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, § 105A.

Effective July 1, 2018, under the Act to Establish Pay Equity, an employee is not required to file a charge of discrimination with the Massachusetts commission against discrimination as a prerequisite to bringing an action under the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, 105A(b).

Statute of Limitations

An action based upon a violation of the Massachusetts Equal Pay Act must be instituted within one year from the date of the alleged violation. Mass. Gen. Laws ch. 149, § 105A.

Effective July 1, 2018, under the Act to Establish Pay Equity, an action based upon a violation of the Massachusetts Equal Pay Act must be brought within three years of the date of the alleged violation. For purposes of the statute of limitations, a violation occurs when a discriminatory decision or practice is adopted or when an employee becomes subject to or is affected by a discriminatory decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice. Mass. Gen. Laws ch. 149, 105A(b).

Damages and Penalties

Under the Massachusetts Equal Pay Act, an aggrieved employee may recover the amount of his or her unpaid wages plus an additional equal amount of liquidated damages. The employee may also recover reasonable attorney's fees and costs. Mass. Gen. Laws ch. 149, § 105A. An employer who violates the Act may be subject to a $100 fine. Mass. Gen. Laws ch. 149, § 105B.

Effective July 1, 2018, under the Act to Establish Pay Equity, an employee or applicant who is successful in an action under the Massachusetts Equal Pay Act shall recover the amount of any unpaid wages plus an equal amount of liquidated damages. The employee also shall recover reasonable attorney's fees and costs. Mass. Gen. Laws ch. 149, § 105A(b), (c).

Complying with Massachusetts's Age Discrimination Law

Mass. Gen. Laws ch. 149, § 24A et seq., protects employees and job applicants from age discrimination and prohibits retaliation.

Employer Coverage

Any private sector employer is subject to Mass. Gen. Laws ch. 149, § 24A et seq.

Individual Liability

"Whoever" violates the provisions of Mass. Gen. Laws ch. 149, § 24A et seq., may be liable for penalties under its provisions.

Who May Bring Claims?

Any private sector employee over the age of forty may bring an action under Mass. Gen. Laws ch. 149, § 24A et seq., with the exception of farm laborers. Mass. Gen. Laws ch. 149, § 24I.

Protected Classes and Characteristics

Mass. Gen. Laws ch. 149, § 24A et seq. protects employees and job applicants over the age of forty. Mass. Gen. Laws ch. 149, § 24A.

Prohibited Conduct

Mass. Gen. Laws ch. 149, § 24A et seq. prohibits:

- Discharging or refusing to employ a person because he or she is over the age of forty;

- Discriminatory provisions in contracts that prevent the private sector employment of a person over forty because of his or her age;
- Hindering an investigation under Mass. Gen. Laws ch. 149, § 24A et seq. by the Commissioner of the Massachusetts Department of Labor Standards; and
- Retaliation.

Mass. Gen. Laws ch. 149, § 24A; Mass. Gen. Laws ch. 149, § 24B; Mass. Gen. Laws ch. 149, § 24E; Mass. Gen. Laws ch. 149, § 24F.

Retaliation Liability Standards and Defenses

Whoever discharges an employee for furnishing evidence in connection with a complaint or testifying in a proceeding under Mass. Gen. Laws ch. 149, § 24A et seq., is subject to a fine of not less than $50.00 and not more than $250.00. Mass. Gen. Laws ch. 149, § 24F.

Enforcement

Enforcement Agency

The Director of the Massachusetts Department of Labor Standards has the authority to investigate all complaints under Mass. Gen. Laws ch. 149, § 24A et seq.

Private Right of Action

There is no private right of action under Mass. Gen. Laws ch. 149, § 24A et seq.

Exhaustion Requirement

There is no exhaustion requirement under Mass. Gen. Laws ch. 149, § 24 et seq.

Statute of Limitations

There is no private right of action under Mass. Gen. Laws ch. 149, § 24A et seq.

Damages and Penalties

An employer who dismisses or refuses to a hire a person over the age of forty because of his or her age may be subject to a $500.00 fine. Mass. Gen. Laws ch. 149, § 24A. The Director of the Massachusetts Department of Labor Standards may also publish the name of any employer who dismisses or refuses to hire a person over the age of forty because of his or her age. Mass. Gen. Laws ch. 149, § 24G.

Whoever hinders an investigation by the Massachusetts Department of Labor Standards under Mass. Gen. Laws ch. 149, § 24 et seq. may be subject to a fine of not less than $25.00 and not more than $200.00. Mass. Gen. Laws ch. 149, § 24E.

Whoever discharges an employee for furnishing evidence in connection with a complaint or testifying in a proceeding under Mass. Gen. Laws ch. 149, § 24A et seq., may be subject to a fine of not less than $50.00 and not more than $200.00. Mass. Gen. Laws ch. 149, § 24F.

Navigating the Massachusetts Equal Rights Act (MERA)

The Massachusetts Equal Rights Act (MERA) protects employees of small employers from discrimination based on their membership in a protected class. Mass. Gen. Laws ch. 93, § 102 and Mass. Gen. Laws ch. 93, § 103.

Employer Coverage

For purposes of an employment discrimination claim, the MERA applies to employers with fewer than six employees. For employers with six or more employees, the Massachusetts Fair Labor Employment Practices Act, Mass. Gen. Laws ch. 151B et seq., provides the exclusive remedy. Thurdin v. SEI Boston, LLC, 452 Mass. 436 (2008).

Individual Liability

There is no provision for individual liability in the MERA.

Who May Bring Claims?

Any employee of an employer with fewer than six employees may bring a claim under the MERA. Mass. Gen. Laws ch. 93, § 102(a) and Mass. Gen. Laws ch. 93, § 103(a).

Protected Classes and Characteristics

The MERA protects employees from discrimination on the basis of the following:

- Sex, including pregnancy
- Race
- Color
- Creed
- National origin
- Handicap
- Age for persons 40 years and older

Mass. Gen. Laws ch. 93, § 102(a); Mass. Gen. Laws ch. 93, § 103(a); Currier v. Nat'l Bd. of Med. Examiners, 462 Mass. 1 (Mass. 2012).

Disability Discrimination

"Handicap" under Mass. Gen. Laws ch. 93, § 103(a) is assigned the same definition as under the Massachusetts Fair Labor Employment Practices Law, Mass. Gen. Laws ch. 151B et seq. Thus, an individual has a handicap if he or she

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of having such an impairment; or
- is regarded as having such an impairment, except for the current, illegal use of controlled substances.

Mass. Gen. Laws ch. 151B, § 1(17).

The term "major life activities" includes the following:

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working

Mass. Gen. Laws ch. 151B, § 1(20).

"Regarded As" Disability

The MERA protects individuals who are regarded as having a disability, except for individuals currently engaging in the illegal use of controlled substances. Mass. Gen. Laws ch. 151B, § 1(17)

Temporary Disabilities

Because the MERA defines "handicap" by referring to the definition in Massachusetts Fair Labor Employment Practices Law, Mass. Gen. Laws ch. 151B et seq., if an employee is not a "qualified handicapped person," he or she cannot enjoy the protections against handicap discrimination under the MERA. Mass. Gen. Laws ch. 93, § 103. Brief periods of incapacity do not qualify as a handicap under the Law. See Hallgren v. Integrated Fin. Corp., 42 Mass. App. Ct. 686 (Mass. App. Ct. 1997).

Duty to Reasonably Accommodate Disabilities

An employer has a duty to provide a reasonable accommodation to a qualified individual with a handicap under Mass. Gen. Laws ch. 93, § 103.

The MERA does not state whether an employer may decline an accommodation because it will impose an undue hardship.

Request for Accommodation Process

The MERA does not describe the process for determining a reasonable accommodation.

Pregnancy Discrimination and Duty to Reasonably Accommodate Pregnancy

The MERA protects employees from discrimination on the basis of sex, which includes pregnancy. An employer must extend the same benefit and leave to employees affected by pregnancy as those not so affected. Mass. Gen. Laws ch. 93, § 102(a); Currier v. Nat'l Bd. of Med. Examiners, 462 Mass. 1 (Mass. 2012) (where an employee without a disability was granted exceptions to the employer's accommodations policy, the court held that the same should apply to an employee affected by pregnancy to avoid discrimination).

The MERA does not expressly impose upon an employer a duty to reasonably accommodate pregnancy, childbirth or related conditions.

Prohibited Conduct

The MERA prohibits an employer from discriminating against an employee

- in the course of employment; or
- by failing to provide a reasonable accommodation for a qualified handicapped individual with a disability.

Mass. Gen. Laws ch. 93, § 102(a); Mass. Gen. Laws ch. 93, § 103(a).

A violation of the MERA is established if, based upon a totality of the circumstances, an employee shows that he or she was denied any of the rights protected by the MERA. Mass. Gen. Laws ch. 93, § 102(c); Mass. Gen. Laws ch. 93, § 103(c).

Enforcement

Enforcement Agency

There is no state agency charged with enforcing the MERA.

Private Right of Action

An employee may enforce his or her rights under the MERA by commencing a civil action in a superior court of competent jurisdiction. Mass. Gen. Laws ch. 93, § 102(b); Mass. Gen. Laws ch. 93, § 103(b).

Exhaustion Requirement

There is no exhaustion requirement for claims under the MERA.

Statute of Limitations

A civil action under the MERA must be commenced within three years after the alleged violation. Mass. Gen. Laws ch. 260, § 5B.

Damages and Penalties

Under the MERA, a court may award an aggrieved employee

- injunctive relief;
- compensatory damages;
- exemplary damages; and
- reasonable attorney's fees and costs.

Mass. Gen. Laws ch. 93, § 102(b), (d); Mass. Gen. Laws ch. 93, § 103(b), (d).

Understanding Massachusetts's Law Prohibiting Sexual Harassment by Small Employers

Mass. Gen. Laws ch. 214, § 1C protects students and employees of small employers from sexual harassment.

Employer Coverage

An employer with fewer than six employees is covered by Mass. Gen. Laws ch. 214, § 1C. Mass. Gen. Laws ch. 214, § 1C supplements the Massachusetts Fair Employment Practices Law, Mass. Gen. Laws ch. 151B, § 1 et seq., by ensuring that all employees are protected from sexual harassment in the workplace. Lowery v. Klemm, 446 Mass. 572 (2006).

Individual Liability

An individual may be held liable for sexual harassment under Mass. Gen. Laws ch. 214, § 1C based upon the applicability of the sexual harassment provisions of the Massachusetts Fair Labor Employment Practices Law, Mass. Gen. Laws ch. 151B, § 1 et seq., to Mass. Gen. Laws ch. 214, § 1C. Courts have found individuals liable for sexual harassment based upon the provisions of Mass. Gen. Laws ch. 151B, § 4(4A) and (5). Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480 (Mass. App. Ct. 2000); Thomas Sobocinski and Massachusetts Commission Against Discrimination v United Parcel Services, Inc., Russell Ford, Ronald Petro and Ronald Draper, 31 MDLR 158 (2009).

Who May Bring Claims?

Employees and students may bring claims under Mass. Gen. Laws ch. 214, § 1C; Lowery v. Klemm, 446 Mass. 572 (Mass. 2006).

Protected Classes and Characteristics

Mass. Gen. Laws ch. 214, § 1C protects employees and students from harassment on the basis of sex.

Prohibited Conduct

Mass. Gen. Laws ch. 214, § 1C prohibits sexual harassment.

Harassment Liability Standards and Defenses

Mass. Gen. Laws ch. 214, § 1C defines "sexual harassment" as it is defined in the Massachusetts Fair Labor Employment Practices Law, Mass. Gen. Laws ch. 151B, § 1 et seq. and Mass. Gen. Laws ch. 151C, § 1 et seq. Thus, sexual harassment is defined as sexual advances, requests for sexual favors, or other conduct of a sexual nature when:

- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or

- Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment.

Thus, the theories of quid pro quo and hostile work environment harassment are recognized. Mass. Gen. Laws ch. 151B, § 1(18); 804 CMR 3.01(4)(a).

To establish a hostile work environment claim, the conduct in question must be severe and pervasive. Muzzy v. Cahillane Motors, 434 Mass. 409 (2001).

Vicarious Liability for Harassment

As Mass. Gen. Laws ch. 214, § 1C applies the same definition of sexual harassment as in the Massachusetts Fair Labor Employment Practices Law, Mass. Gen. Laws ch. 151B, § 1 et seq. and Mass. Gen. Laws ch. 151C, § 1 et seq., an employer may be held vicariously liable for sexual harassment by a supervisory employee under the Massachusetts Fair Employment Practices Law. See College-Town, Div. of Interco, Inc. v. Mass. Commission Against Discrimination, 400 Mass. 156 (1987).

The employer also may be held liable for sexual harassment by non-supervisory employees, such as co-workers, if the employer knew or should have known of the harassing conduct and failed to take prompt, effective, and reasonable remedial action. Modern Cont'l / Obayashi v. Mass. Commission Against Discrimination, 445 Mass. 96 (Mass. 2005).

The *Faragher-Ellerth* defense is not available to sexual harassment claims arising under Massachusetts law.

Same-Sex Harassment

As Mass. Gen. Laws ch. 214, § 1C applies the same definition of sexual harassment as in the Massachusetts Fair Labor Employment Practices Law, Mass. Gen. Laws ch. 151B, § 1 et seq. and Mass. Gen. Laws ch. 151C, § 1 et seq., an employee may bring a claim for sexual harassment by a member of the same gender. Muzzy v. Cahillane Motors, 434 Mass. 409 (2001).

Enforcement

Enforcement Agency

There is no agency enforcement of Mass. Gen. Laws ch. 214, § 1C.

Private Right of Action

Mass. Gen. Laws ch. 214, § 1C provides that an employee or student may bring an action for sexual harassment in superior court.

Exhaustion Requirement

There is no exhaustion of remedies requirement for claims under Mass. Gen. Laws ch. 214, § 1C.

Statute of Limitations

As Mass. Gen. Laws ch. 214, § 1C applies the limitations period in Mass. Gen. Laws ch. 151B, § 9, an aggrieved employee or student must bring an action within three years of the alleged sexual harassment. Mass. Gen. Laws ch. 214, § 1C; Mass. Gen. Laws ch. 151B, § 9.

Damages and Penalties

Mass. Gen. Laws ch. 214, § 1C gives a superior court the authority to award the relief available under Mass. Gen. Laws ch. 151B, § 9. Thus, if the superior court finds an employer has violated Mass. Gen. Laws ch. 214, § 1C, it may:

- Order injunctive relief;
- Award actual damages;
- Award punitive damages; and
- Award reasonable attorney's fees and costs.

Mass. Gen. Laws ch. 151B, § 9.

Navigating Restrictive Covenants in Massachusetts

Applicable Statutes and/or Common Law

In Massachusetts, common law controls restrictive covenants. The Massachusetts legislature is considering legislation to reform its non-compete laws. While it has not passed, there is a very good chance that a bill will be enacted in 2017, if not before the legislative session concludes in 2016. See discussion online at Fair Competition Law.

Massachusetts law excludes the following from enforcement of non-competition agreements:

- Broadcasters, Mass. Gen. Laws ch. 149, § 186
- Nurses, Mass. Gen. Laws ch. 112, § 74D
- Physicians, Mass. Gen. Laws ch. 112, § 12X
- Psychologists, Mass. Gen. Laws ch. 112, § 129B
- Social Workers, Mass. Gen. Laws ch. 112, § 135C

Massachusetts Rule of Professional Conduct 5.6 prohibits attorneys from entering into non-competition agreements.

Sufficient Consideration

Non-compete agreements must be supported by adequate consideration. Ikon Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 128 (D. Mass. 1999).

Restrictive Covenants Signed Before or at the Inception of Employment

In Massachusetts, continued employment alone suffices as consideration for a restrictive covenant entered into at the start of an employer-employee relationship or soon after its inception. Stone Legal Res. Group v. Glebus, 2002 Mass. Super. LEXIS 555, at *12-13 (Super. Ct. 2002).

Restrictive Covenants Signed After the Commencement of Employment

Massachusetts law is unclear with regard to whether continued employment alone provides sufficient consideration for a non-competition covenant. There is case law that supports the notion that continuation of employment alone suffices as consideration for a restrictive covenant entered into after hire and during an employer-employee relationship. See, e.g., Lunt v. Campbell, 2007 Mass. Super. LEXIS 484, at *11 (Super. Ct. 2007); Wilkinson v. QCC, Inc., 53 Mass. App. Ct. 1109 at *1, 759 N.E.2d 1232 (App. Ct. 2001) (unpublished decision); compare EMC Corp. v. Donatelli, 25 Mass. L. Rep. 399, 2009 Mass. Super. LEXIS 120, at *6 (Super. Ct. 2009) (holding that, where employee signed a non-compete after fifteen years of employment, had access to confidential information, and executed the non-compete agreement under seal, employer showed it was likely to succeed on the merits of its claim that the non-competition covenant was supported by adequate consideration). However, at least one court applying Massachusetts law has questioned whether some additional consideration is required for a post-employment restrictive covenant. See IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 131 (D. Mass. 1999) (explaining that “for a restrictive covenant to withstand scrutiny, some additional consideration ought pass to an employee upon the execution of a post-employment agreement”).

Non-compete Agreements

Enforceability of Non-compete Agreements

In Massachusetts, an employer must show the following elements to enforce a non-compete agreement and demonstrate its reasonableness:

- The restrictive covenant is necessary to protect a legitimate business interest.
- The restrictive covenant is reasonably limited in time and space.
- The restrictive covenant is consonant with the public interest.

Boulanger v. Dunkin' Donuts, Inc., 442 Mass. 635, 639 (2004).

Protectable Interests Justifying Non-compete Enforcement

Massachusetts recognizes the use of restrictive covenants to protect the following legitimate business interests:

- Goodwill
- Confidential information
- Trade secrets

New England Canteen Service, Inc. v. Ashley, 372 Mass. 671, 674 (1977).

Reasonable Time Restrictions for Non-compete Agreements

Massachusetts courts consider the following factors in determining the reasonableness of a time restriction for a non-compete agreement:

- The nature of the plaintiff's business
- The character of the employment
- The situation of the parties
- The necessity of the restriction for the protection of the employer's business
- The right of the employee to work and earn a livelihood

Richmond Bros., Inc. v. Westinghouse Broadcasting Co., 357 Mass. 106, 110 (1970). The reasonableness of the duration of a non-compete agreement depends on the facts in each case. Id.

Massachusetts courts have found one to three year durations to be reasonable time restrictions. Mancuso-Norwak Ins. Agency, Inc. v. Rogowski-Verrette Ins. Agency, LLC, 2012 Mass. Super. LEXIS 310, at *10-11 (Super. Ct. 2012); Boch Toyota v. Klimoski, 2004 Mass. Super. LEXIS 258, at *11 (Super. Ct. 2004).

Reasonable Geographic Scope for Non-compete Agreements

Massachusetts courts have found non-compete agreements containing broad geographic limitations reasonable if they restrict a former employee from doing business in an area in which the employer conducts business. See, e.g., Marcam Corp. v. Orchard, 885 F. Supp. 294, 299 (D. Mass. 1995).

Remedies

In Massachusetts, an employer may be awarded injunctive relief. It also may be awarded contractual damages for the breach of a covenant not to compete, including the following:

- Actual losses
- Liquidated damages
- Lost profits
- Profits gained (by former employee or new employer)
- Attorney's fees
- Prejudgment interest

See Frank D. Wayne Associates, Inc. v. Lussier, 394 Mass. 619, 620 (1985); Lenco Pro v. Guerin, 1998 Mass. App. Div. 10, 11-12 (Ct. App. 1998); Oceanair, Inc. v. Katzman, 14 Mass. L. Rep. 414 (Mass. Super. 2002).

Customer Non-solicitation Agreements

Enforceability of Customer Non-solicitation Agreements

Massachusetts courts will enforce a customer non-solicitation agreement to prevent a former employee from soliciting business from customers of an employer when the employer shows that the agreement is

- necessary to protect a legitimate business interest of the employer,
- supported by consideration,
- reasonably limited in all circumstances, including time and space, and
- consonant with public policy.

BNY Mellon, N.A. v. Schauer, 2010 Mass. Super. LEXIS 209, at *27 (Super. Ct. 2010); Bowne, Inc. v. Levine, 1997 Mass. Super. LEXIS 69, at *5-6 (Super. Ct. 1997);

If a customer non-solicitation agreement is overbroad in scope, duration, territory, or in any other respect, a court will enforce the agreement only to the extent that is reasonable and to the degree that the agreement's terms are severable for purposes of enforcement. All Stainless, Inc. v. Colby, 308 N.E.2d 481, 485 (Mass. 1974).

Protectable Interests and Reasonable Scope of Prohibited Activity for Customer Non-solicitation Agreements

A customer non-solicitation provision is enforceable to protect an employer's legitimate business interests in trade secrets, other confidential information, and customer goodwill. Getman v. USI Holdings Corp., 2005 Mass. Super. LEXIS 407, at *5 (Super. Ct. 2005).

Courts may limit a customer non-solicitation provision to prohibit a former employee from soliciting only those customers with whom the employee interacted on behalf of the former employer. In Neeco, Inc. v. Computer Factory, Inc., 1987 U.S. Dist. LEXIS 15754 (D. Mass. Aug. 19, 1987), a provision that prohibited a former employee from soliciting all of a company's customers, nationwide, was determined to be an unreasonable restraint on ordinary competition. The court enforced the provision only to the extent of prohibiting the former employee from soliciting those customers whom the employee had contact with or came to know as customers when the employee worked for the company. 1987 U.S. Dist. LEXIS 15754, at *6-7.

In A.R.S. Servs. v. Morse, 2013 Mass. Super. LEXIS 52 (Super. Ct. 2013), the court held that a customer non-solicitation provision was overbroad because it prohibited an ex-employee from soliciting a company's prospective customers. The court noted that the term "prospective customers" was vague and conceivably limitless, so the court narrowed the provision to apply only to current customers of the company within 50 miles of any company office. 2013 Mass. Super. LEXIS 52, at *38.

Reasonable Time Restrictions for Customer Non-solicitation Agreements

Determining the reasonableness of the duration of a customer non-solicitation provision is a "fact-sensitive inquiry," involving consideration of the following:

(1) The nature of the employer's business
(2) The type of employment involved
(3) The situation of the parties
(4) The employer's legitimate business interests
(5) The employee's right to work and earn a living

Bowne, Inc. v. Levine, 1997 Mass. Super. LEXIS 69, at *11 (1997).

Massachusetts courts have consistently enforced customer non-solicitation agreements that ran for periods of up to two years following the employee's separation from the employer. See, e.g., Bowne, Inc. v. Levine, 1997 Mass. Super. LEXIS 69, at *11 (1997) (upholding a two-year non-solicitation provision); Zona Corp. v. McKinnon, 2011 Mass. Super. LEXIS 51, at *3 (2011) (upholding a one-year non-solicitation provision); All Stainless, Inc. v. Colby, 308 N.E.2d 481, 485 (Mass. 1974) (upholding a two-year restriction on customer solicitation).

Reasonable Geographical Restrictions for Customer Non-solicitation Agreements

When applying customer non-solicitation provisions against former sales employees, some Massachusetts courts have limited the geographic scope of the provisions to the sales areas in which the employees worked. All Stainless, Inc. v. Colby, 308 N.E.2d 481, 487 (Mass. 1974); Inner-Tite Corp. v. Brozowski, 2010 Mass. Super. LEXIS 159, at *70 (Super. Ct. 2010). Other courts have found it sufficient to restrict a former employee from soliciting business from the employer's customers, wherever they are located. *See, e.g.*, Zona Corp. v. McKinnon, 2011 Mass. Super. LEXIS 51, at *3-4 (Super. Ct. 2011) (the court prohibited a hair stylist from soliciting, for one year, the customers of the stylist's former employer, who marketed services in seven specified towns).

Remedies

Injunctive relief and monetary damages are available for the breach of a customer non-solicitation agreement. All Stainless, Inc. v. Colby, 364 Mass. 773, 777-78 (1974). We have not identified case law that gives more detail concerning the damages for soliciting customers in violation of non-solicitation agreements, but it is likely that the damages available for violations of such agreements will be similar to those for violations of non-compete agreements.

Employee Non-solicitation Agreements

Enforceability of Employee Non-solicitation Agreements

Massachusetts courts will enforce reasonable employee non-solicitation agreements, which are also called anti-raiding or anti-pirating covenants, to prevent former employees from hiring or soliciting their former co-workers to leave their jobs with their employers. Partylite Gifts, Inc. v. MacMillan, 895 F. Supp. 2d 1213, 1224-1225 (M.D. Fla. 2012) (applying Massachusetts law); Filmore & Stern v. Frankel, 2002 Mass. Super. LEXIS 415, at *4 (Super. Ct. Sept. 12, 2002); Modis, Inc. v. Revolution Group, Ltd., 1999 Mass. Super. LEXIS 542 (Super. Ct. Dec. 29, 1999).

Like other types of restrictive covenants, to be valid and enforceable, an employee non-solicitation agreement must be

- supported by consideration,
- necessary to protect a legitimate business interest,
- reasonably limited in time and space, and
- consonant with the public interest.

MacMillan, 895 F. Supp. 2d at 1224-25. An employer's promise of continued employment constitutes sufficient consideration to support an employee non-solicitation agreement under Massachusetts law. Id., at 1223.

Protectable Interests and Reasonable Scope of Prohibited Activity for Employee Non-solicitation Agreements

A reasonable employee non-solicitation agreement is enforceable to protect an employer's legitimate business interest in maintaining its workforce. MacMillan, 895 F. Supp. 2d at 1225.

In Quaboag Transfer, Inc. v. Halpin, 2005 Mass. Super. LEXIS 137 (Super. Ct. 2005), the court refused to enforce an employee non-solicitation agreement to bar a former employee from having any and all contact with an employer's employees. Rather, the court held that the employee non-solicitation agreement was enforceable only to prevent the former employee from contacting the employer's workers for the purpose of enticing them away from their employment or interfering with the employer's business operations. Because the former employees' contact with their former co-workers was of a social nature or not for competitive business purposes, the contact did not violate the terms of the employee non-solicitation agreement. Halpin, 2005 Mass. Super. LEXIS 137, at *12.

Reasonable Time Restrictions for Employee Non-solicitation Agreements

The lack of time or territory restrictions do not necessarily make an employee non-solicitation agreement unenforceable. Courts have the discretion to limit the enforcement of overbroad non-solicitation agreements to the time and territory that is determined to be reasonable and necessary to protect the employer's legitimate business interests. MacMillan, 895 F. Supp. 2d at 1227. Massachusetts courts have found it reasonable to enforce employee non-solicitation agreements for periods of up to two years after an employee separates from the employer. *See, e.g.*, MacMillan, 895 F. Supp. 2d at 1227 (the court enforced a six-month restraint on employee solicitation); Filmore & Stern v. Frankel, 2002 Mass. Super. LEXIS 415, at *4 (Sup. Ct. Sept. 12, 2002) (the court enforced a two-year

restraint on employee solicitation); Modis, Inc. v. Revolution Group, 1999 Mass. Super. LEXIS 542, at *25 (Sup. Ct. 1999) (the court upheld a two-year anti-raiding covenant); State St. Corp. v. Barr, 1999 Mass. Super. LEXIS 432 (Super. Ct. 1999) (the court enforced an 18-month non-solicitation agreement); Browne v. Merkert Enters., 1998 Mass. Super. LEXIS 316, at *16-17 (Sup. Ct. 1998) (the court enforced a six-month employee non-solicitation provision).

Reasonable Geographical Restrictions for Employee Non-solicitation Agreements

Several Massachusetts courts have enforced employee non-solicitation agreements that prohibit the solicitation of any of an employer's employees, wherever they are located. See, e.g., MacMillan, 895 F. Supp. 2d at 1227-28 (the court held that it was reasonable to prohibit the former employee from soliciting any of the company's employees, including those who were not within the employee's direct chain of command); Browne v. Merkert Enters., 1998 Mass. Super. LEXIS 316, at *16-17 (Sup. Ct. 1998) (the court upheld a provision that prohibited the solicitation of all of the employer's employees); Filmore & Stern v. Frankel, 2002 Mass. Super. LEXIS 415, at *4 (Sept. 12, 2002) (the court enforced a provision that prohibited the solicitation of any of the employer's employees).

Remedies

Injunctive relief is available for violations of employee non-solicitation agreements. Hurwitz Group, Inc. v. Ptak, 2002 Mass. Super. LEXIS 565, at *14 (Super. Ct. June 27, 2002). We have not identified case law concerning the availability of monetary damages for breaches of employee non-solicitation agreements, but it is likely that damages available for violations of such agreements are similar to those for soliciting customers in violation of non-solicitation agreements and non-compete agreements.

Confidentiality Agreements

Enforceability of Confidentiality Agreements

A confidentiality agreement, which is referred to at times as a non-disclosure agreement, is enforceable against a former employee if it is

- necessary to protect a legitimate business interest of the employer;
- supported by consideration;
- reasonably limited in all circumstances, including time and space; and
- consonant with public policy.

Browne v. Merkert Enters., 1998 Mass. Super. LEXIS 316, at *8 (Sup. Ct. 1998).

Protectable Interests and Reasonable Scope of Protected Information for Confidentiality Agreements

A confidentiality agreement may be enforced to protect an employer's legitimate business interests in trade secrets, proprietary information, and confidential data. A.R.S. Servs. v. Baker, 2012 Mass. Super. LEXIS 43, at *8 (Super. Ct. 2012); Banner Indus. v. Bilodeau, 2003 Mass. Super. LEXIS 51, at *5 (Super. Ct. 2003). A confidentiality agreement will not be enforced to prevent former employees from using their general knowledge, experience, memory and skill, even if that knowledge and skill was enhanced through their work with the employer. Bilodeau, 2003 Mass. Super. LEXIS 51, at *5.

A confidentiality agreement is not enforceable to protect information that is not in fact a trade secret or proprietary confidential information. Prof'l Staffing Group v. Champigny, 2004 Mass. Super. LEXIS 597, at *4 (Sup. Ct. Nov. 17, 2004). Massachusetts courts examine six factors to determine whether information is confidential and protectable:

(1) The extent to which the information is known outside the employer's business
(2) The extent to which it is known by employees and others involved in the business
(3) The extent of measures taken by the employer to guard the secrecy of the information
(4) The value of the information to the employer and to its competitors
(5) The amount of effort or money expended by the employer in developing the information
(6) The ease or difficulty with which the information could be properly acquired or duplicated by others

Bilodeau, 2003 Mass. Super. LEXIS 51, at *9-10 (citing Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972)).

Remedies

Injunctive relief is available for violations of confidentiality agreements. Browne v. Merkert Enters., 1998 Mass. Super. LEXIS 316, at *16 (Sup. Ct. 1998). We have not identified case law concerning the availability of monetary damages for breaches of employee confidentiality agreements.

Enforcement when Employer Terminates Employee

Can the Employer Enforce Restrictive Covenants After a For-Cause Termination?

Massachusetts may enforce a restrictive covenant when an employer terminates an employee with cause or if the employee quits. However, an inequitable discharge may render invalid an otherwise reasonable non-competition provision. Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310 (Ct. App. 1982) ("Termination of the employment relationship at the initiative of the employer does not itself render a noncompetition provision invalid. This is so in the case of a discharge for obvious cause, as in where the employee stole from the company, and sometimes when cause is not an issue. But if the discharge is inequitable, an otherwise reasonable restraint may not be enforced.")

Can the Employer Enforce Restrictive Covenants After a Without-Cause Termination?

Massachusetts may enforce a restrictive covenant when an employer terminates an employee without good cause, but it will not enforce a restrictive covenant when an employer terminates an employee in an "inequitable" manner. Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310 (Ct. App. 1982).

Enforcement of Choice of Law Provisions in Restrictive Covenant Agreements

A Massachusetts court will enforce a contractual choice of law provision citing the law of another jurisdiction unless

- the law to be applied violates a strong and fundamental policy of Massachusetts,
- the other state has a materially greater interest than Massachusetts does in the determination of the issue of enforcement of the non-competition agreement, and
- the other state's law would have governed absent any choice-of-law provision.

Inner-Tite Corp. v. Brozowski, 2010 Mass. Super. LEXIS 159 at *44-45 (Super. Ct. Apr. 12, 2010).

Party Bearing the Burden of Proof to Enforce a Restrictive Covenant

To enforce a restrictive covenant, an employer has the burden to show that the full extent of the restraint is necessary to protect its interests. See Lajoie Investigations v. Griffin, 1996 Mass. Super. LEXIS 518, at *4-5 (Super. Ct. 1996).

Preliminary Injunctions

Obtaining Restrictive Covenant Preliminary Injunctions in State Court

To obtain a preliminary injunction to enforce a restrictive covenant in Massachusetts, the movant must show the following:

- A likelihood that it will succeed on the merits
- That it will suffer irreparable harm if the injunction is not granted
- That the anticipated harm outweighs the burden imposed on the non-movant by the injunction

See WordWave, Inc. v. Owens, 2004 Mass. Super. LEXIS 661, at *3-4 (Super. Ct. 2004).

Obtaining Restrictive Covenant Preliminary Injunctions in Federal Court

To obtain a preliminary injunction to enforce a restrictive covenant in federal court in Massachusetts, the movant must show the following:

- That the movant will suffer irreparable injury if the injunction is not granted
- That such injury outweighs any harm that the opposing party would suffer if the injunction were granted
- That there is a likelihood that the movant will succeed on the merits at trial
- That the public interest will not be adversely affected if the injunction is granted

Marcam Corp. v. Orchard, 885 F. Supp. 294, 296-97 (D. Mass. 1995).

The Inevitable Disclosure Doctrine

Using the Inevitable Disclosure Doctrine to Imply a Non-compete Agreement or to Obtain a Preliminary Injunction to Enforce a Non-compete Agreement

Massachusetts has not adopted the inevitable disclosure doctrine. See ArchiText, Inc. v. Kikuchi, 2005 Mass. Super. LEXIS 487, at *9 (Super. Ct. 2005) (acknowledging that Massachusetts courts have not adopted the doctrine but have not rejected it either).

Blue-Penciling Restrictive Covenants

In Massachusetts, courts may judicially modify a restrictive covenant to make its terms reasonable. See Trillium, Inc. v. Cheung, 2012 Mass. App. Unpub. LEXIS 195, at *6, n.5 (Ct. App. 2012); Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310 (Ct. App. 1982).

Protecting Trade Secrets in Massachusetts

Adoption of the Uniform Trade Secrets Act (UTSA)

Massachusetts has not yet adopted a version of the Uniform Trade Secrets Act (UTSA).

Currently, Massachusetts has a variety of laws related to trade secret protection. For example, the Massachusetts Trade Secret Protection Act, Mass. Gen. Laws ch. 93, § 42 - § 42A, imposes civil liability for the acquisition of trade secrets through improper means:

> Section 42. Whoever embezzles, steals or unlawfully takes, carries away, conceals, or copies, or by fraud or by deception obtains, from any person or corporation, with intent to convert to his own use, any trade secret, regardless of value, shall be liable in tort to such person or corporation for all damages resulting therefrom. Whether or not the case is tried by a jury, the court, in its discretion, may increase the damages up to double the amount found. The term “trade secret” as used in this section shall have the same meaning as is set forth in section thirty of chapter two hundred and sixty-six.

The Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A §§ 1-11, makes unfair trade practices unlawful:

> Section 2. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Massachusetts statute, Mass. Gen. Laws ch. 266, § 30(4), criminally penalizes trade secret misappropriation:

> (4) Whoever steals, or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, secretes, unlawfully takes, carries away, conceals or copies with intent to convert any trade secret of another, regardless of value, whether such trade secret is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than twenty-five thousand dollars and imprisonment in jail for not more than two years. The term “trade secret” as used in this paragraph means and includes anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement.

Definition of "Trade Secret"

A "trade secret," as defined by Massachusett's criminal statute and also adopted by the Massachusetts Trade Secret Protection Act, means anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention, or improvement. Mass. Gen. Laws ch. 266, § 30(4); Mass. Gen. Laws ch. 93, § 42 - § 42A.

Common law defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which [provides] an opportunity to obtain an advantage over competitors who do not know or use it." TouchPoint Solutions, Inc. v. Eastman Kodak Co., 345 F. Supp. 2d 23, 27 (D. Mass. 2004), quoting Burten v. Milton Bradley Co., 763 F.2d 461, 463 (1st Cir. 1985).

Under Massachusetts law, courts will consider six factors to determine if something is a trade secret:

(1) The extent to which the information is known outside of the business;

(2) The extent to which it is known by employees and others involved in the business;

(3) The extent of measures taken by the employer to guard the secrecy of the information;

(4) The value of the information to the employer and to his competitors;

(5) The amount of effort or money expended by the employer in developing the information; and

(6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

People's Choice Mortg., Inc. v. Premium Capital Funding, LLC, 2010 Mass. Super. LEXIS 61, at *42 (Mass. Super. Ct. 2010), citing Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (1972).

Elements to Demonstrate Trade Secret Misappropriation Claim

In Massachusetts, the elements of a misappropriation of trade secrets claim are:

- A trade secret existed;
- The employer exercised prudent actions to secure the secret;
- The secret was improperly acquired, disclosed, or used; and
- Damages.

TouchPoint Solutions, Inc. v. Eastman Kodak Co., 345 F. Supp. 2d 23, 27 (D. Mass. 2004).

With respect to the first prong, see the section entitled Definition of "Trade Secret".

Under Massachusetts law, with respect to the second prong, courts consider several factors to determine if reasonable measures to protect the secrecy of the trade secret were taken, including:

(1) The existence or absence of a confidentiality or non-disclosure agreement;

(2) The nature and extent of precautions taken;

(3) The circumstances under which the information was disclosed; and

(4) The degree to which the information has been placed in the public domain or rendered readily ascertainable.

TouchPoint Solutions, Inc. v. Eastman Kodak Co., 345 F. Supp. 2d 23, 29 (D. Mass. 2004).

Statute of Limitations for Trade Secret Misappropriation Claim

Under Massachusetts law, the statute of limitations for trade secret misappropriation claims (except those brought under the Massachusetts Consumer Protection Act, see below) is three years after the cause accrues. Mass. Gen. Laws ch. 260, § 2A; Mass. Gen. Laws ch. 93, §§ 42A.

Trade secret misappropriation claims brought under the Massachusetts Consumer Protection Act have a four year statute of limitations which begins to run after the cause of action accrues. Mass. Gen. Laws ch. 260, § 5A.

Remedies for Trade Secret Misappropriation Claims

In Massachusetts, employers have the following possible remedies for trade secret misappropriation claims:

- Actual Damages, Mass. Gen. Laws ch. 93, § 42;
- Enhanced damages, Mass. Gen. Laws ch. 93, § 42; Mass. Gen. Laws ch. 93A § 1 – § 11;
- Injunctive relief, Mass. Gen. Laws ch. 93, § 42A;
- Attorney's fees and costs, Mass. Gen. Laws ch. 93A § 11.

See also Specialized Tech. Res., Inc. v. JPS Elastomerics Corp., 2011 Mass. Super. LEXIS 33, at *19-26 (Mass. Super. Ct. 2011).

Defenses to Trade Secret Misappropriation Claims

Aside from asserting that plaintiff has not demonstrated the elements necessary to prove a trade secret misappropriation claim, defendants also may have a statute of limitations defense. Mass. Gen. Laws ch. 260, § 2A. See Statute of Limitations for Trade Secret Misappropriation Claim.

Navigating Sick Leave Requirements in Massachusetts

State Paid Sick Leave Requirements

On November 4, 2014, voters in Massachusetts passed a sick leave initiative (effective July 1, 2015) granting paid or unpaid sick time to employees (codified at Chapter 149, Section 148C of the laws of Massachusetts). The Massachusetts Attorney General's website contains the text of the initiative and the paid sick leave administrative regulations.

An employee who works for an employer with an average of eleven or more employees is entitled to paid sick time. Employees of employers with an average of ten or fewer employees are entitled to unpaid sick time. An employer determines the average number of employees by counting the number of employees, including part-time, full-time, and seasonal or temporary employees, on the payroll during each pay period and dividing by the number of pay periods. Employees furnished to an employer by a temporary staffing agency and paid by the staffing agency count as employees of both the staffing agency and the employer for the purpose of determining employer size. Mass. Gen. Laws ch. 149 § 148C(d)(4), (6); 940 CMR 33.04.

An employee may use sick time to

- care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;
- care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;
- attend the employee's routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse; or
- address the psychological, physical, or legal effects of domestic violence committed against an employee or the employee's dependent child by a current or former spouse of the employee, a person with whom the employee shares a child in common, a person who is cohabitating with or has cohabitated with the employee, a person who is related by blood or marriage, or a person with whom the employee has or had a dating or engagement relationship; or
- travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

Mass. Gen. Laws ch. 149 § 148C(c); 940 CMR 33.02.

An employee will begin to accrue sick time commencing on his or her date of hire or July 1, 2015, whichever is later. Employees will accrue one hour of sick time for every 30 hours worked. Mass. Gen. Laws ch. 149 § 148C(d); 940 CMR 33.03(4), (5). An employee who is exempt from the federal Fair Labor Standards Act's overtime requirements is presumed to work 40 hours in each workweek, unless the employee's normal workweek is less than 40 hours in which case the employee will accrue earned sick time based on his or her normal work week. Mass. Gen. Laws ch. 149 § 148C(d)., 940 CMR 33.03(6).

Employees can earn and use up to 40 hours of sick time in a calendar year. Mass. Gen. Laws ch. 149 § 148C(d)(4), (6). A "calendar year" is any 12-month period of time as defined by the employer. 940 CMR 33.02.

An employer can provide its employees with a lump sum of 40 hours or more of sick leave or paid time off at the beginning of each calendar year. An employer that elects to do so does not need to track accrual or allow any rollover, provided that such leave is otherwise consistent with the law. 940 CMR 33.07(4).

Employers that prefer not to track its employees' accrual of sick time over the course of the benefit year may also use the schedule set forth in the regulations for providing lump sums of sick time to employees. 940 CMR 33.07(8).

An employee is not entitled to use his or her accrued sick time until the 90th calendar day after the start of his or her employment. After satisfying the 90-day period, an employee may use earned sick time as it accrues. The smallest amount of sick time an employee can use is one hour. An employee who uses more than one hour of sick time may use earned sick time in hourly increments or in the smallest increment the employer's payroll system uses to account for absences or use of other time. 940 CMR 33.03(14).

An employer must pay sick time at the employee's "same hourly rate", as defined in the regulations at 940 CMR 33.02.

If an employee has 40 hours of accrued, but unused time, the employer may delay further accrual until the employee uses some of his or her accrued time. 940 CMR 33.03(9)

An employee may carry over up to 40 hours of accrued, unused sick time into the next calendar year, but he or she is not entitled to use more than 40 hours in one calendar year.

An employer may, but is not required to, pay out any accrued, unused sick leave at the end of the calendar year or if the employee gets a new job with the same employer. Employers that pay out 16 hours or more of sick time must provide 16 hours of unpaid sick time until the employee accrues new paid time, which will then replace the unpaid time as it accrues. Employees paying out less than 16 hours must provide an amount of unpaid sick time equivalent to the amount paid out until the employee accrues new paid time, which will then replace the unpaid time as it accrues. 940 CMR 33.03(27).

An employer is not required to pay out unused earned sick time at the time of separation of the employee from the employer. Mass. Gen. Laws ch. 149 § 148C(d)(7).

An employer cannot require an employee to work additional hours to make up for the hours during which the employee was absent or require that an employee search for or find a replacement employee to cover the hours during which the employee utilizes earned sick time. An employee who is absent from work for a reason eligible for the use of sick time can, with the employer's consent, agree to work an equivalent number of additional hours or shifts during the same or the next pay period as the hours or shifts that the employee missed in lieu of the employee's use of his or her accrued sick time. Mass. Gen. Laws ch. 149 § 148C(e); 940 CMR 33.03(20).

An employer cannot interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected by the sick leave provisions, including, but not limited to, by using an employee's use of sick time as a negative factor in any employment action such as evaluation, promotion, disciplinary action, or termination, or otherwise subjecting an employee to discipline because he or she used sick time. Mass. Gen. Laws ch. 149 § 148C(h); 940 CMR 33.08(1).

It is unlawful for an employer to take an adverse action against an employee because the employee opposes a practice that the employee believes to be in violation of Section 148C, or because the employee supports the exercise of rights of another employee under Section 148C. Exercising rights under that section includes, but is not limited to, filing an action, or instituting or causing to be instituted any proceeding, under or related to that section; providing or intending to provide any information in connection with any inquiry or proceeding relating to any right provided under that section; or testifying or intending to testify in any inquiry or proceeding relating to any right provided under that section. Mass. Gen. Laws ch. 149 § 148C(i); 940 CMR 33.08(2), (3).

An employer can maintain an attendance policy that rewards employees for good attendance and/or a holiday incentive that provides extra pay for employees who come to work on the days immediately before and after a holiday, provided the policy does not subject employees to an adverse action based on their use of sick time. An employee's inability to qualify for a reward for good attendance or to receive a holiday pay incentive based on his or her use of earned sick time is not an adverse action or interference with an employee's rights under the sick time initiative. 940 CMR 33.08(4).

The sick leave provisions do not relieve an employer of its obligation to comply with a contract, collective bargaining agreement, or an employment benefit program or plan in effect on July 1, 2015, that grants employees greater earned sick time benefits than the benefits provided by Section 148C. Mass. Gen. Laws ch. 149 § 148C(j). An employer may require that an employee utilize his or her sick leave concurrent with any leave the employee is entitled to under the FMLA or state law. 940 CMR 33.01(3).

Employers that provide their employees with paid leave pursuant to a paid time off, vacation, or other leave policy that provides an amount of paid leave sufficient to meet the accrual requirements of Section 148C, and that may be used for the same purposes and

under the same conditions as earned paid sick time are not required to provide additional earned paid sick time. Mass. Gen. Laws ch. 149 § 148C(k). Specifically, the employer's time off policy must

- accrue time at a rate of no less than one hour for every 30 hours worked;
- pay for time off at the employee's same hourly rate;
- be accessible, at least, for the same purposes allowed by the sick time initiative;
- be available under the same notice and documentation requirements; and,
- be subject to the same job protections.

940 CMR 33.07(3).

Employers that provide 40 or more hours of paid time off or vacation to employees that also may be used as earned sick time are not required to provide additional sick leave to employees who use all their time for other purposes, such as vacation or personal time, and need to use sick leave later in the year, provided that the employers' leave policies make clear that the employer will not provide additional paid time off. 940 CMR 33.07(5).

An employer has the discretion to adopt or retain a sick time policy that is more generous than the leave provided by Section 148C. Mass. Gen. Laws ch. 149 § 148C(j).

An employer with a paid time off policy in effect on May 1, 2015, that provides full-time employees with at least 30 hours of paid time off during the 2015 calendar year is considered to be in compliance with the initiative with respect to all employees covered by the employer's policy as of May 1, 2015, and to any additional employees to whom the employer extends the policy's coverage.

On and after July 1, 2015, all employees not previously covered by the policy, including part-time employees, seasonal employees, temporary employees, new employees, and per diem employees, must

- accrue paid time off at the same rate of accrual as full-time employees covered by the policy; or
- if the policy provides lump-sum allocations, receive a prorated lump-sum allocation based on the provision of lump sum paid time off/paid sick leave to covered full-time employees. The lump-sum allocations may
    - where lump sums of paid time off are provided annually for the balance of 2015, be halved for employees who receive coverage as of July 1, 2015, and proportionately reduced for employees hired after July 1, 2015; and/or
    - be proportionate for part-time employees.

940 CMR 33.03(36).

To be eligible for the protections of this safe harbor provision, all paid time off, including sick time, that an employer grants to an employee from July 1 to December 31, 2015, must be job protected leave and must be subject to the initiative's non-retaliation and non-interference provisions. Id. Aside from this requirement, an employer can continue to administer all other terms of its time off policy in effect as of May 1, 2015. Id.

The safe harbor period begins on the July 1 effective date of the initiative and ends on December 31, 2015. Id. On or before January 1, 2016, an employer previously protected by the safe harbor provision must adopt a paid time off policy that fully complies with the initiative. Id.

Employer Coverage

For purposes of sick leave, an "employer" is any individual, corporation, partnership, or other private or public entity, including any agent thereof, that engages the services of an employee for wages, remuneration, or other compensation. The United States government is not an employer for sick leave purposes. A city or town is not covered by the sick leave provisions unless it accepts the sick leave law by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth. Mass. Gen. Laws ch. 149 § 148C(a). Additionally, a local public employer that is not a city or town, such as a school committee, is subject to the sick leave provisions only if the governing body of the entity accepts the sick leave law by vote or appropriation. 940 CMR 33.02.

Employer Notice Obligations

Employers must post a notice in a conspicuous location accessible to employees in every establishment where covered employees work. The Attorney General is responsible for preparing the form of notice, which must include the following information:

- Information describing the rights to earned sick time under this section
- Information about notices, documentation, and any other requirements placed on employees in order to exercise their rights to earned sick time
- Information that describes the protections that an employee has in exercising rights under this section
- The name, address, phone number, and website of the Attorney General's office where questions about the rights and responsibilities under this section can be addressed
- Information about filing an action under this section

Mass. Gen. Laws ch. 149 § 148C(o); 940 CMR 33.09(3).

Employers must also provide a hard or electronic copy of this notice to all covered employees, or include the employer's policy on earned sick time or the employer's allowable substitute paid leave policy in any employee manual or handbook. 940 CMR 33.09(4).

Employee Eligibility

For purposes of sick time, an "employee" is a person who performs services for an employer for wages, remuneration, or other compensation. Mass. Gen. Laws ch. 149 § 148C(a).

An employee is not

- an employee of the United States government;
- a city or town employee, unless the city or town accepts the sick time law by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth
- an employee of a local public employer not a city or town, for example, school committees, including regional schools and educational collaboratives, unless the governing body of the employing entity accepts the sick time law by vote or appropriation;
- a student attending a public or private institution of higher education located in the Commonwealth who is
    - participating in a federal work-study program or a substantially similar financial aid or scholarship program;
    - providing support services to residents of a residence hall, dormitory, apartment building, or other similar residence operated by the institution at which he or she is matriculated in exchange for a waiver or reduction of room, board, tuition or other education-related expenses; or
    - exempt from Federal Insurance Contributions Act (FICA) tax pursuant to I.R.C. § 3121(b)(10);
- a school-aged student under 20 U.S.C. § 1400 et. seq., the Individuals with Disabilities Education Act; or
- an adult client who resides in a Massachusetts licensed program and performs work duties within the program setting as part of bona fide educational or vocational training.

940 CMR 33.02.

An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts regardless of the location of the employer. An employee need not spend 1% or more time working in Massachusetts for an employer for Massachusetts to be the employee's primary place of work. 940 CMR 33.03.

An employee who works for an employer with an average of 11 or more employees on the payroll during the preceding calendar year is entitled to paid sick time. Employees of employers with an average of ten or fewer employees are entitled to unpaid sick time. An employer calculates the average number of employees by counting the number of employees, including part-time, full-time or seasonal or temporary employees, on the payroll during each pay period and dividing by the number of pay periods. Employees furnished to an employer by a temporary staffing agency and paid by the staffing agency count as employees of both the staffing agency and the employer for the purpose of determining employer size. Mass. Gen. Laws ch. 149 § 148C(d)(4), (6); 940 CMR 33.04(1).

Employee Notice Obligations

An employee with a foreseeable need to use sick time must make a good faith effort to notify his or her employer in advance of his or her use of sick time. Mass. Gen. Laws ch. 149 § 148C(g).

An employer may have a written policy that requires up to seven days' notice for an employee's foreseeable or pre-scheduled use of sick time, except that the policy must exclude situations where the employee learns of the need to use sick leave within a shorter period of time. 940 CMR 33.05(1)(b).

An employee must provide notice that is reasonable under the circumstances, although the regulations recognize that there are certain situations, such as accidents or sudden illness, for which advance notice might not be feasible. 940 CMR 33.05(1)(c).

An employer may require notification from an employee of the expected duration of a multi-day leave, or, if unknown, then the employee or the employee's surrogate (e.g. spouse, adult family member or other responsible party) must provide notice on a daily basis, unless the circumstances make such notice unreasonable. 940 CMR 33.05(1)(d).

An employer may require written documentation for an employee's use of earned sick time that

- exceeds 24 consecutively scheduled work hours;
- exceeds three consecutive days on which the employee was scheduled to work;
- occurs within two weeks prior to an employee's final scheduled day of work before termination of employment, except in the case of a temporary employee;
- occurs after four unforeseeable and undocumented absences within a three-month period; or
- for an employee aged 17 and under, occurs after three unforeseeable and undocumented absences within a three-month period.

940 CMR 33.06(1).

An employer must accept any reasonable documentation signed by a health care provider indicating the employee's need for sick time if an employee utilizes sick time for one of the following reasons:

- To care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care
- To care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care
- To attend the employee's routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse

Mass. Gen. Laws ch. 149 § 148C(f); 940 CMR 33.06(2)(a).

An employer must consider one of the following documents as acceptable documentation for an absence due to domestic violence:

- A restraining order or other documentation of equitable relief issued by a court of competent jurisdiction;
- A police record documenting the abuse;
- Documentation that the perpetrator of the abuse has been convicted of one or more of the offenses enumerated in Chapter 265 of the laws of Massachusetts where the victim was a family or household member;
- Medical documentation of the abuse;
- A statement provided by a counselor, social worker, health worker, member of the clergy, shelter worker, legal advocate, or other professional who has assisted the individual in addressing the effects of the abuse on the employee or the employee's family member;
- A sworn statement from the individual attesting to the abuse;
- All evidence of domestic violence experienced by an employee, including the individual's statement and corroborating evidence, shall not be disclosed by the employer unless consent for disclosure is given by the employee at the time the evidence is provided.

Mass. Gen. Laws ch. 149 § 148C(f); 940 CMR 33.06(2)(b). An employer may not require the employee to provide documentation to explain the nature of the illness or the details of domestic violence. 940 CMR 33.06(3).

An employer may not delay an employee's use of sick time or delay an employee's pay for the period in which the employee used sick time because the employer has not yet received the required certification. Mass. Gen. Laws ch. 149 § 148C(f).

In response to an employer's request for documentation in lieu of documentation from a health care provider, an employee who does not have health care coverage through a private insurer, the Massachusetts Healthcare Connector and related insurers, or an employer that provides health insurance to employees may provide a signed, written statement evidencing the need for the use of the earned sick time, without being required to explain the nature of the illness, in lieu of documentation by a health care provider. 940 CMR 33.06(5).

Enforcement (Including Whether Private Right of Action Is Available)

The Attorney General is responsible for enforcing Section 148C, and may obtain injunctive or declaratory relief for that purpose. Mass. Gen. Laws ch. 149 § 148C(l).

The Attorney General may make a complaint or seek an indictment against any person for a violation of Section 148C. Mass. Gen. Laws ch. 149 §§ 148C(l), 150.

An employee claiming to be aggrieved by a violation of Section 148C may, 90 days after the filing of a complaint with the Attorney General, or sooner with the agreement of the Attorney General, and within three years after the violation, institute a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. The three-year limitation period is tolled from the date that the employee, for himself or others similarly situated, files a complaint with the Attorney General alleging a violation until the date that the Attorney General issues a letter authorizing a private right of action or the date that an enforcement action by the Attorney General becomes final. Mass. Gen. Laws ch. 149 §§ 148C(l), 150.

Potential Damages/Penalties

The Attorney General may issue a written warning or a civil citation. For each violation, a separate citation may be issued requiring any or all of the following:

- That the infraction be rectified;
- That restitution be made to the aggrieved party; or
- That a civil penalty of not more than $25,000 be instituted for each violation.

Mass. Gen. Laws ch. 149 §§ 148C(l), 27C(b)(1).

The maximum civil penalty that may be imposed upon any employer is no more than $15,000, except that it shall not exceed $7,500 in instances in which the Attorney General determines that the employer lacked specific intent to violate the provisions of Section 148C and has not previously been either criminally convicted of a violation of the provisions of Chapter 149 or Chapter 151 or issued a citation. Mass. Gen. Laws ch. 149 §§ 148C(l), 27C(b)(2).

An employee who prevails in a civil action will be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees. Mass. Gen. Laws ch. 149 §§ 148C(l), 150.

Recordkeeping Requirements

Employers must keep true and accurate records of employees' accrual and use of earned sick time, consistent with the recordkeeping requirements of Mass. Gen. Laws ch. 151, § 15.

If an employer provides time off to employees under a paid time off, vacation, or other leave policy that complies with the sick time initiative, it is not required to track and keep a separate record of accrual and use of earned sick time, except that employers must keep records of the time designated as earned sick time. 940 CMR 33.09(1).

Employers must keep these records for a period of three years and must provide copies upon demand by the Attorney General or his or her designee. An employer must provide within 10 business days a copy of any such records pertaining to an employee who requests them, and, if the employee so requests, the employer must allow him or her to inspect the original paper or electronic records at a reasonable time and place. 940 CMR 33.09(2).

Understanding Protections for Pregnant Workers in Massachusetts

Protections for Pregnant Workers

Massachusetts does not have pregnancy leave laws, but it does have a parental leave law that requires employers to provide eight weeks of parental leave for male and female employees. See Mass. Gen. Laws ch. 149, § 105D (effective April 7, 2015). For a detailed discussion of the Massachusetts parental leave law, see the "Parental Leave" section of Complying with Family and Medical Leave Act Laws in Massachusetts.

Complying with Family and Medical Leave Act Laws in Massachusetts

Family and Medical Leave Requirements

While Massachusetts does not have a law applicable to private sector employees that is directly analogous to the federal Family and Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et seq., it does have a parental leave law (effective April 7, 2015), which is addressed below. In addition, any employer that is required to comply with the federal FMLA is also required to comply with the Massachusetts Small Necessities Leave Act, Mass. Gen. Laws ch. 149, § 52D, which we address in Examining School-Related Leave Requirements in Massachusetts.

Note also that Massachusetts requires employers to treat employees affected by pregnancy in the same manner as employees who have temporary disabilities. 804 CMR 8.01.

Parental Leave

As of April 7, 2015, Massachusetts provided eight weeks of parental leave for both male and female employees. Mass. Gen. Laws ch. 149, § 105D.

Eligible employees are entitled to eight weeks of parental leave for one of the following reasons:

- To give birth
- For the placement of a child for adoption who is under the age of 18 with an employee who adopts or intends to adopt the child
- For the placement for adoption of a child mentally or physically disabled who is under the age of 23 with an employee who adopts or intends to adopt the child
- For the placement of a child with an employee pursuant to a court order

Mass. Gen. Laws ch. 149, § 105D(b).

To be eligible for a parental leave, an employee must have

- worked as a full-time employee for the same employer for at least three consecutive months, or
- completed his or her initial probationary period, as defined by the terms of his or her employment, but not to exceed three months.

Mass. Gen. Laws ch. 149, § 105D(b).

Employees who work for same employer are entitled to an aggregate total of eight weeks of parental leave for the birth or adoption of the same child. Mass. Gen. Laws ch. 149, § 105D(b).

Parental leave may be with or without pay at the discretion of the employer. Mass. Gen. Laws ch. 149, § 105D(b).

An employee's use of parental leave must not affect the employee's right to earn vacation time, sick leave, bonuses, advancement, seniority, service credit, or other employment rights or benefits, or to participate in any plans or programs for which the employee was eligible as of the date of his or her leave. However, an employee will not accrue benefits or other rights or advantages of employment while he or she is on a parental leave, and an employer need not provide for the cost of any benefits, plans, or programs during an employee's parental leave, unless the employer so provides for all employees who are on a leave of absence. Mass. Gen. Laws ch. 149, § 105D(d).

An employee must give at least two weeks' notice to his or her employer of the anticipated start and end dates of his or her parental leave, or as soon as practicable if the delay is for reasons beyond the employee's control. Mass. Gen. Laws ch. 149, § 105D(b).

At the conclusion of an employee's leave, the employer must restore the employee to his or her previous position, or a similar position with the same status, pay, service credit, and seniority, as applicable, as of the date of the leave. Mass. Gen. Laws ch. 149, § 105D(c); Mass Gen. Laws ch. 151b § 4(11A). An employee does not have a right to reinstatement if the employer has laid off other employees with equal service credit and status in the same or similar positions due to economic conditions or other changes in operating conditions affecting employment during the period of parental leave, provided that the employee on parental leave retains preferential consideration for another position for which the employee may be qualified. Mass. Gen. Laws ch. 149, § 105D(c).

An employer has the discretion to provide more than eight weeks of parental leave, but if it does so, it cannot deny an employee his or her rights under Mass. Gen. Laws ch. 149, § 105D unless the employer clearly informs the employee in writing prior to the commencement of the parental leave, and prior to any subsequent extension of that leave, that any leave time beyond eight weeks will result in the denial of reinstatement or loss of other rights and benefits. Mass. Gen. Laws ch. 149, § 105D(b).

A collective bargaining agreement or an employer's policy can provide for greater or additional benefits beyond those required by Mass. Gen. Laws ch. 149, § 105D. Mass. Gen. Laws ch. 149, § 105D(d).

Employers must post and keep posted in a conspicuous place or places upon their premises a notice describing Mass. Gen. Laws ch. 149, § 105D and the employer's policies related thereto. Mass. Gen. Laws ch. 149, § 105D(e).

Potential Damages/Penalties

An employer's failure to comply with the parental leave requirements set forth in Mass. Gen. Laws ch. 149, § 105D is subject to the provisions of Mass. Gen. Laws ch. 151B.

If the Massachusetts Commission Against Discrimination finds that an employer has violated the parental leave law, it may

- enter a cease and desist order;
- order affirmative action, including but not limited to hiring, reinstatement, or promotion, with or without back pay;
- award damages for emotional distress;
- award reasonable attorney's fees and costs; and/or
- assess a penalty of between $10,000 and $50,000 depending upon the number of discriminatory practices the employer is adjudged to have committed in the past.

Mass. Gen. Laws ch. 151B, § 5; Stonehill College v. Mass. Comm'n Against Discrimination, 441 Mass. 549 (2004).

If a court finds the employer has violated the parental leave law, it may

- order injunctive relief,
- award actual damages,
- award punitive damages, and/or
- award reasonable attorney's fees and costs.

Mass. Gen. Laws ch. 151B, § 9.

Complying with Military Leave Laws in Massachusetts

This practice note discusses the rights and obligations of private employers concerning employee military leaves of absence under Massachusetts state law.

For federal requirements concerning military leave, see Navigating the Uniformed Services Employment and Reemployment Act (USERRA); Understanding Employer Coverage and Employee Eligibility Under the FMLA's Military Leave Provisions; Navigating Military Leave Certification Rules Under the FMLA and USERRA; and Understanding FMLA Interference and Retaliation Claims.

Military Leave Requirements

Application of USERRA Law to Armed Forces of the Commonwealth

Massachusetts law extends the rights, protections, privileges, and immunities of the Uniformed Services Employment and Reemployment Rights Act (USERRA) as set forth in 38 U.S.C. § 4301 et seq. to all members of the armed forces of the Commonwealth

who are employed within the Commonwealth and ordered to active duty. Mass. Gen. Laws ch. 33, § 13(b). The members of the armed forces of the Commonwealth include:

- The state defense force or similar organization composed as permitted by law
- The state staff –and–
- The armed forces of another state or territory

Id.

Consistent with USERRA, these service members are entitled to a workplace that is free of conduct that has the purpose or effect of unreasonably interfering with their work performance by creating an intimidating, hostile, humiliating, or offensive work environment. Mass. Gen. Laws ch. 33, § 13(a).

Public Employees

Massachusetts state law requires that an employee of the Commonwealth receive paid leave if the employee is a member of the Massachusetts armed forces of or a member of a reserve component of the U.S. Armed Forces during his or her annual training or drills and parades. Such paid leave is not to exceed 34 days in any state fiscal year or 17 days in any federal fiscal year. See Mass. Gen. Laws ch. 33, § 59(a).

Special rules apply to Massachusetts public employees serving in certain emergency military capacities, carrying out duties of the U.S. Armed Forces or National Guard, or who serve in a reserve component of the U.S. Armed Forces. See Mass. Gen. Laws ch. 33, § 59(b)-(c).

Eligible employees shall retain their seniority, accrued vacation leave, sick leave, personal leave, compensation time, or earned overtime during their military service. See Mass. Gen. Laws ch. 33, § 59(a).

Veterans – Time Off to Participate in Veterans Day or Memorial Day Services

An employer with 50 or more employees must grant a paid leave of absence to any eligible veteran to participate in a Veterans Day exercise, parade, or service, if the employee provides reasonable notice for the leave. If the employer has fewer than 50 employees, the employer must provide Veterans Day leave to eligible veterans, but the leave may be unpaid. See Mass. Gen. Laws ch. 149, §52A1/2, as amended by Chapter 141 of the Acts of 2016, approved July 16, 2016.

Employers of any size also must grant eligible veterans a leave of absence to participate in a Memorial Day exercise, parade, or service. This leave may be provided with or without pay at the discretion of their employer. Mass. Gen, Laws ch. 149, §59A1/2.

These provisions do not apply where the employee's services are "essential and critical to the public health or safety and determined to be essential to the safety and security of each such employer or property thereof."

Employer Coverage

Public Employees

The provisions governing military leave for public employees apply to the Commonwealth and any county, city, or town which has voted to accept its provisions. Mass. Gen. Laws ch. 33, § 59(d).

Understanding Meal Period Requirements in Massachusetts

Meal Period Requirements

No person shall be required to work for more than six hours during a calendar day without an interval of at least thirty minutes for a meal. Mass. Gen. Laws ch. 149, § 100. Employers do not have to provide employees with paid meal breaks unless an employee must perform job functions during a meal period.

Applying for Exceptions to Meal Period Requirements

The attorney general has authority under Mass. Gen. Laws ch. 149, § 101 to grant exemptions from meal break requirements for those employed in factory, workshop, or mechanical establishments if he or she deems it necessary and the exemption can be made without injury to persons affected thereby.

Do the Meal Period Requirements Apply to All Classes of Employees?

Mass. Gen. Laws ch. 149, § 101 provides exceptions to the meal break requirements of Mass. Gen. Laws ch. 149, § 100 for those employed in certain industries, including iron works, glass works, paper mills, letterpress establishments, print works, bleaching works, or dyeing works.

Enforcement (Including Whether Private Right of Action Is Available)

The attorney general is granted enforcement power under Mass. Gen. Laws ch. 149, § 2. Mass. Gen. Laws ch. 149, § 100 does not grant a private right of action.

Potential Damages/Penalties

Any employer, superintendent, overseer, or agent who violates Section 100 shall be punished by a fine of not less than $300 nor more than $600.

Determining Whether Break Periods Are Compensable in Massachusetts

Compensability of Rest Breaks

Massachusetts does not require paid rest breaks.

Understanding Lactation/Nursing Accommodation Requirements in Massachusetts

Lactation/Nursing Accommodation Requirements

Massachusetts does not have lactation/nursing accommodation requirements.

Determining When On-Call Time Is Compensable in Massachusetts

Compensability of On-Call Time

An on-call employee who is not required to be at the work site, and who is effectively free to use his or her time for his or her own purposes, is not considered an employee working while on call. 454 CMR 27.04.

Understanding Split Shift Payments in Massachusetts

Paying Split Shift Wages to Employees

Massachusetts law does not have split shift wage requirements. “Working time” is defined in 455 Mass. Code Regs. § 2.01 as all time during which an employee is required to be on the employer’s premises or to be on duty, or to be at a prescribed work site, and any time worked before or beyond the end of the normal shift to complete his or her work. An opinion letter of the Executive Office

of Labor and Workforce Development stated that an employee was not on duty during a five-hour period between shifts, applying federal standards in determining whether or not he or she was "on duty." See Op. Ltr. MW-2002-019 (June 28, 2002).

Determining the Compensability of Time Spent Changing Clothes in Massachusetts

Compensability of Time Spent Changing Clothes

Massachusetts law does not address the compensability of time spent changing clothes.

Determining When Travel Time Is Compensable in Massachusetts

Compensability of Travel Time

Rules on the compensability of travel time are provided in 455 Mass. Code Regs. § 2.03:

(a) Ordinary travel between home and work is not compensable working time. However, if an employee who regularly works at a fixed location is required, for the convenience of the employer, to report to a location other than his or her regular work site, the employee shall be compensated for all travel time in excess of his or her ordinary travel time between home and work with allowance for associated transportation expenses.

(b) An employee required or directed to travel from one place to another after the beginning of or before the close of a work day shall be compensated for all travel time and shall be reimbursed for all transportation expenses.

(c) Travel that keeps an employee away from home overnight shall be compensated for in a manner consistent with 29 C.F.R. § 785.39.

For additional information on travel time rules, see Op. Ltr. MW-2002-019 (June 28, 2002).

Determining When Training Time Is Compensable in Massachusetts

Compensability of Training Time

Massachusetts does not specify whether training time is compensable.

Instituting Jury Duty Policies in Massachusetts

Jury Duty Requirements

Crimes Against Public Justice – Discharging an Employee for Jury Service (Mass. Gen. Laws ch. 268, § 14A)

An employer is prohibited from terminating an employee because he or she was serving on a grand or traverse jury. Mass. Gen. Laws ch. 268, § 14A.

Office of Jury Commissioner – Regular Wages to Be Paid to Juror (Mass. Gen. Laws ch. 234A, §§ 48–49)

An employer must pay an employee who is serving on a trial or grand jury his or her regular wages for the first three days of jury service. Mass. Gen. Laws ch. 234A, § 48. The employer may be excused from compensating the employee upon a finding that it would cause the employer extreme financial hardship. Mass. Gen. Laws ch. 234A, § 49.

Office of Jury Commissioner – Deprivation of Employment (Mass. Gen. Laws ch. 234A, § 61)

An employer is prohibited from discharging or otherwise harassing, threatening or coercing an employee who has received a juror summons or who is obligated to perform jury service. The employer is also prohibited from imposing work assignments that would

interfere with the employee's availability, effectiveness, attentiveness, or peace of mind while the employee is serving as a juror. Mass. Gen. Laws ch. 234A, § 61.

Employee Eligibility

Office of Jury Commissioner – Regular Wages to Be Paid to Juror (Mass. Gen. Laws ch. 234A, §§ 48–49)

Employment for purposes of receiving wages for the first three days of jury service includes part-time, temporary, and casual employment as long as the hours of employment of the employee can reasonably be determined by a schedule or by custom or practice established by the employer for the three-month period preceding the employee's term of service as a juror. Mass. Gen. Laws ch. 234A, § 48.

Enforcement (Including Whether Private Right of Action Is Available)

Office of Jury Commissioner – Regular Wages to Be Paid to Juror (Mass. Gen. Laws ch. 234A, §§ 48–49)

An employee has a private right of action in tort for an employer's failure to compensate him or her for the first three days of jury service. Mass. Gen. Laws ch. 234A, §§ 60–61. The Office of the Jury Commissioner may seek the issuance of a criminal complaint against an employer who has failed to pay an employee wages for the first three days of jury service. Mass. Gen. Laws ch. 234A, § 61.

Office of Jury Commissioner – Deprivation of Employment (Mass. Gen. Laws ch. 234A, § 61)

An employee has a private right of action in tort against an employer who has discharged or otherwise discriminated against the employee for serving on a jury. Mass. Gen. Laws ch. 234A, § 61. The Office of the Jury Commissioner may seek the issuance of a criminal complaint against an employer who has discharged or otherwise discriminated against an employee for serving on a jury. Mass. Gen. Laws ch. 234A, § 61.

Agency Administration

The Office of the Jury Commissioner enforces Mass. Gen. Laws, ch. 234A, §§ 48, 60, and 61.

Statute of Limitations

Office of Jury Commissioner – Regular Wages to Be Paid to Juror (Mass. Gen. Laws ch. 234A, § 48)

An employee may commence a civil action if, within thirty days after the employee tendered the juror service certificate to the employer, the employer has failed to compensate him or her for the first three days of jury service. Mass. Gen. Laws ch. 234A, § 60.

Office of Jury Commissioner – Regular Wages to Be Paid to Juror (Mass. Gen. Laws ch. 234A, § 48)

As an employer is liable to an employee in tort for failure to pay the employee for the first three days of jury service, such an action must be commenced within three years of when the cause of action accrued. Mass. Gen. Laws ch. 260, § 2A.

Office of Jury Commissioner – Deprivation of Employment (Mass. Gen. Laws ch. 234A, § 61)

As an employer is liable to an employee in tort for discharging or otherwise discriminating against an employee for serving on a jury, such an action must be commenced within three years of when the cause of action accrues. Mass. Gen. Laws ch. 260, § 2A.

Potential Damages/Penalties

Office of Jury Commissioner – Regular Wages to Be Paid to Juror (Mass. Gen. Laws ch. 234A, § 48)

An employer who fails to compensate an employee for the first three days of jury service is liable to the employee in tort. If a court finds that an employer willfully failed to pay an employee for the first three days of jury service, it may award the employee treble damages and reasonable attorney's fees. Mass. Gen. Laws ch. 234A, §§ 60–61.

Office of Jury Commissioner – Deprivation of Employment (Mass. Gen. Laws ch. 234A, § 61)

An employer who discharges or otherwise discriminates against an employee for serving on a jury is liable in tort for damages and injunctive relief. If a court finds that an employer's violation was willful, it may award the employee treble damages and reasonable attorney's fees. Mass. Gen. Laws ch. 234A, § 61.

The employer may also be guilty of a crime and subject to a $5,000 fine upon conviction. Mass. Gen. Laws ch. 234A, § 61.

Crimes Against Public Justice – Discharging an Employee for Jury Service (Mass. Gen. Laws ch. 268, § 14A)

An employer who discharged an employee for serving on a grand or traverse jury may be prosecuted and punished for contempt of court. Mass. Gen. Laws ch. 268, § 14A.

Complying with Witness Duty Leave Requirements in Massachusetts

Witness Duty Leave Laws

An employer is prohibited from discharging or otherwise penalizing an employee who is a victim or a witness to a crime who has been subpoenaed to testify in a criminal proceeding. Mass. Gen. Laws ch. 268, § 14B; Mass. Gen. Laws ch. 258B, § 3(l).

Employee Notice Obligations

An employee must notify an employer of a subpoena prior to the day he or she is supposed to appear in court. Mass. Gen. Laws ch. 268, § 14B; Mass. Gen. Laws ch. 258B, § 3(l).

Potential Damages/Penalties

An employer who terminates or otherwise penalizes an employee for being absent from work to respond to a subpoena to testify in a criminal proceeding is liable for a fine of $200 or imprisonment for up to one month, or both. Mass. Gen. Laws ch. 268, § 14B; Mass. Gen. Laws ch. 258B, § 3(l).

Understanding Leave Laws for Crime Victims in Massachusetts

Leave Laws for Crime Victims

An employer may not terminate or otherwise penalize an employee who is a victim or a witness to a crime who has been subpoenaed to testify in a criminal proceeding. Mass. Gen. Laws ch. 268, § 14B; Mass. Gen. Laws ch. 258B, § 3(l).

Employee Notice Obligations

An employee must notify an employer of a subpoena prior to the day he or she is supposed to appear in court. Mass. Gen. Laws ch. 268, § 14B; Mass. Gen. Laws ch. 258B, § 3(l).

Potential Damages/Penalties

An employer who terminates or otherwise penalizes an employee for being absent from work to respond to a subpoena to testify in a criminal proceeding is liable for a fine of $200.00 or imprisonment for up to one month, or both. Mass. Gen. Laws ch. 268, § 14B; Mass. Gen. Laws ch. 258B, § 3(l).

Navigating Leave Laws for Victims of Domestic Violence in Massachusetts

Leave Laws for Victims of Domestic Violence

Under the Massachusetts Domestic Violence Act, employers with at least fifty employees must permit an employee who is a victim of domestic or sexual violence (or whose family member is such a victim) to take up to fifteen days of leave in a twelve-month period—provided the employee is not the person engaging in such violence. The term "family member" means spouse; parent, step-parent, child, step-child, sibling, grandparent or grandchild; persons in a substantive dating or engagement relationship and who reside together; persons having a child in common regardless of whether they ever have married or resided together; or persons in a guardianship relationship.

The employer has the right to decide whether domestic or sexual violence leave is paid or unpaid.

Employees are entitled to reinstatement to their original job, or to an equivalent position, when they return from domestic or sexual violence leave.

Mass. Gen. Laws ch. 149, § 52E(a); Mass. Gen. Laws ch. 149, § 52E(b); Mass. Gen. Laws ch. 149, § 52E(c); Mass. Gen. Laws ch. 149, § 52E(i).

Reasons for Leave

Domestic or sexual violence leave may be taken for medical attention, counseling, court appearances and proceedings, meetings with law enforcement officials, or to otherwise address domestic and/or sexual violence. Unless the employer waives the requirement, employees are required to exhaust personal leave or vacation balances prior to utilizing leave. Mass. Gen. Laws ch. 149, § 52E(b).

Exhaustion of Paid Time Off

Employees must exhaust all of their accrued annual or vacation leave, personal, and sick leave prior to requesting or taking domestic or sexual violence leave, unless the employer waives this requirement. Mass. Gen. Laws ch. 149, § 52E(g).

Employee Notice Requirements

Employees must give their employers adequate advance notice of the need for domestic or sexual violence leave. No advance notice of domestic or sexual violence leave is required if the employee—or his or her family member—faces a threat of imminent danger. In such cases, the employee—or his or her family member, advocate, or other professional assisting the employee—must notify the employer within three workdays that the domestic or sexual violence leave was or is taken as a result of domestic or sexual violence.

An employer cannot take any adverse action against employees for unscheduled domestic or sexual violence leaves of absence if the employee, within thirty days from the unauthorized absence—or within thirty days from the last unauthorized absence in the case of consecutive days of unauthorized absences—provides the applicable documentation to support the absence.

Mass. Gen. Laws ch. 149, § 52E(d).

Documentation Supporting Leave

Employers may require documentation that shows the employee or employee's family member has been a victim of domestic or sexual violence, and that domestic or sexual violence leave was related to it. However, employers may not require evidence of an arrest, conviction or other law enforcement documentation for such abusive behavior. Employees must provide such documentation within a reasonable time of the employer's request. Employees may provide any one of the following documents to satisfy an employer's request; the employer may maintain the documentation as part of the employee's employment record, but only for as long as the employer needs it to determine whether the employee is or was eligible for leave:

(1) A protective order, order of equitable relief or other document issued by a court as a result of domestic or sexual violence against the employee or employee's family member;

(2) A document on the letterhead of the court, provider or public agency, which the employee attended or utilized for assistance related to such violence;

(3) A police report, or victim or witness statement provided to police, including a police incident report, documenting the abusive behavior;

(4) Medical documentation showing the employee's or family member's treatment for the abusive behavior;

(5) A sworn statement—signed under the penalty of perjury—provided by a counselor, social worker, health care worker, member of the clergy, shelter worker, legal advocate or other professional who assisted the employee or employee's family member in addressing the effects of the abusive behavior;

(6) The employee's sworn statement—signed under penalty of perjury—that the employee has been the victim of such abusive behavior, or that his or her family member has been a victim.

Mass. Gen. Laws ch. 149, § 52E(e).

No Discrimination, Retaliation, or Interference

Employers may not discharge or otherwise discriminate against an employee for exercising the employee's rights under this section. Additionally, employees may not suffer any loss of employment benefits that accrued prior to domestic or sexual violence leave. Mass. Gen. Laws ch. 149, § 52E(i)

Employers shall not coerce, interfere with, restrain or deny the exercise of—or attempt to exercise—any rights to domestic or sexual violence leave, and may not make leave contingent upon whether or not the victim maintains contact with the alleged abuser. Mass. Gen. Laws ch. 149, § 52E(h).

Employer Notification Requirements

Employers must "notify each employee of the rights and responsibilities provided by the [domestic or sexual violence] law, including those related to notification requirements and confidentiality." Mass. Gen. Laws ch. 149, § 52E(k).

Instituting Voting Time Off Policies in Massachusetts

Voting Time Off Requirements

Any owner, superintendent, or overseer in a manufacturing, mechanical, or mercantile establishment is required to permit an employee to vote at an election during the first two hours after the polls are open if the employee requests such leave. Mass. Gen. Laws ch. 149, § 178.

Examining School-Related Leave Requirements in Massachusetts

School-Related Leave Policies Requirements

The Massachusetts Small Necessities Leave Act (SNLA), Mass. Gen. Laws ch. 149, § 52D(b), allows an eligible employee up to twenty-four hours of leave during any twelve-month period to

- participate in school activities of a child of the employee, such as parent-teacher conferences;
- accompany a child of the employee to routine medical or dental appointments; and
- accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the relative's care, including interviewing at a continuing care home.

The twenty-four hours of small necessities leave are in addition to the twelve weeks of leave allowed under the federal Family Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et seq.

An "elderly relative" under the SNLA is a person sixty years of age or older who is related by blood or marriage to the employee. Mass. Gen. Laws ch. 149, § 52D(a).

Under the SNLA, an employee may elect or an employer may require the employee to substitute any accrued paid vacation, personal, medical, or sick leave for the unpaid leave under the SNLA. Mass. Gen. Laws ch. 149, § 52D(c).

Employer Coverage

The term "employer" under the SNLA has the same definition as that under the FMLA. Thus, an employer is any person who employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. Mass. Gen. Laws ch. 149, § 52D(a).

Employee Eligibility

The term "employee" under the SNLA has the same definition as that under the FMLA. Thus, an employee is someone who has been employed for at least twelve months by his or her employer and who has worked for at least 1,250 hours in the previous twelve-month period. Mass. Gen. Laws ch. 149, § 52D(a).

Employee Notice Obligations

If an employee's need for leave under the SNLA is foreseeable, the employee is required to provide the employer with seven days' notice before the date his or her leave is to begin. If the need is not foreseeable, the employee must provide notice as soon as it is practicable. Mass. Gen. Laws ch. 149, § 52D(d).

The employer may require that the employee provide certification for a request for leave under the SNLA. Mass. Gen. Laws ch. 149, § 52D(e); 940 CMR 20.01. The request for certification may be made at the time the employee gives notice of the leave or within two business days after the employee has given such notice. 940 CMR 20.03. Certification is sufficient if it states in writing:

- The date the leave will be taken;
- The duration of the leave;
- The purpose for requesting the leave; and
- Includes the employee's signature.

940 CMR 20.02(1).

Enforcement (Including Whether Private Right of Action Is Available)

An employee aggrieved by a violation of the SNLA may file a complaint with the Massachusetts Attorney General. Within ninety days after the filing of a complaint with the Attorney General, the employee may file a civil action. Mass. Gen. Laws ch. 149, § 52D(f); Mass. Gen. Laws ch. 149, § 150.

Agency Administration

The Massachusetts Attorney General is charged with enforcing the SNLA. Mass. Gen. Laws ch. 149, § 52D(f).

Statute of Limitations

Within ninety days after the filing of a complaint with the Massachusetts Attorney General and within three years of the alleged violation, an employee may file a civil action. Mass. Gen. Laws ch. 149, § 52D(f); Mass. Gen. Laws ch. 149, § 150.

Potential Damages/Penalties

A court that finds an employer has violated the SNLA may:

- Order injunctive relief;
- Award damages incurred;
- Award up to treble lost wages and other benefits; and
- Award costs and reasonable attorney's fees.

Mass. Gen. Laws ch. 149, § 52D(f); Mass. Gen. Laws ch. 149, § 150.

The employer may also be punished by a fine of up to $500.00. Mass. Gen. Laws ch. 149, § 52D(f); Mass. Gen. Laws ch. 149, § 180.

Recordkeeping Requirements

If an employer has requested that an employee provide a certification under the SNLA, it is required to keep a copy of the certification for at least two years and to make such record available for inspection by the Massachusetts Attorney General's office. Mass. Gen. Laws ch. 149, § 52D(e); 940 CMR 20.05.

Addressing Bereavement Leave Requirements in Massachusetts

Bereavement Leave Requirements

There are no separate provisions for bereavement leave in Massachusetts.

Complying with Organ/Bone Marrow Donor Leave Obligations in Massachusetts

Organ/Bone Marrow Donor Leave Requirements

A public employee is entitled to take a thirty-day leave of absence during a calendar year to serve as an organ donor. Such leave is without:

- A loss or reduction in pay;
- A loss of leave to which the employee is otherwise entitled; and
- A loss of credit for time or service.

Mass. Gen. Laws ch. 149, § 33E(a).

Employer Coverage

The provision regarding organ donation leave applies to the Commonwealth or any county, city, or town that has accepted it. Mass. Gen. Laws ch. 149, § 33E(a).

Employee Eligibility

The provision regarding organ donation leave applies to an employee of the commonwealth or an employee of any county, city, or town that has accepted it. Mass. Gen. Laws ch. 149, § 33E(a).

Employee Notice Obligations

If the need for organ donation leave is foreseeable, a public employee should provide the employer with at least seven days' prior notice. Mass. Gen. Laws ch. 149, § 33E(c). The employer may require that the request for organ donation leave be supported by certification. Mass. Gen. Laws ch. 149, § 33E(d).

Enforcement (Including Whether Private Right of Action Is Available)

If a public employee is denied organ donation leave, he or she may file a complaint with the Massachusetts Attorney General. Within ninety days after the filing of a complaint with the Attorney General, the employee may file a civil action. Mass. Gen. Laws ch. 149, § 33E(d); Mass. Gen. Laws ch. 149, § 150.

Agency Administration

The Massachusetts Attorney General is charged with enforcing the provisions regarding organ donation leave for public employees and may obtain injunctive or declaratory relief. Mass. Gen. Laws ch. 149, § 33E(d).

Statute of Limitations

Within ninety days after the filing of a complaint with the Massachusetts Attorney General and within three years of the alleged violation of the provision granting organ donation leave for public employees, the employee may file a civil action against the employer. Mass. Gen. Laws ch. 149, § 33E(d); Mass. Gen. Laws ch. 149, § 150.

Potential Damages/Penalties

A court that finds an employer has violated the provisions regarding organ donation leave for public employees may

- order injunctive relief;
- award damages incurred;
- award up to treble lost wages and other benefits; and
- award costs and reasonable attorney's fees.

Mass. Gen. Laws ch. 149, § 33E(d); Mass. Gen. Laws ch. 149, § 150.

The employer may also be punished by a fine of up to $500.00. Mass. Gen. Laws ch. 149, § 33E(d); Mass. Gen. Laws ch. 149, § 180.

Navigating Blood Donation Leave Requirements in Massachusetts

Blood Donation Leave Requirements

An employee of the Commonwealth or an employee of a county, city, or town that accepts the provisions regarding blood donation leave is entitled to a paid leave of absence for up to eight hours each calendar year for the purpose of donating platelets, plasma white cells, or blood to any cancer research center. Mass. Gen. Laws ch. 149, § 33D.

Implementing Leave for Disaster Relief Volunteers in Massachusetts

Leave Requirements for Disaster Relief Volunteers

Discharge or Disciplinary Action Against Volunteer Firefighters (Mass. Gen. Laws ch. 149, § 177B)

Any employer is prohibited from discharging or taking other disciplinary action against an employee for failure to report to work when such failure is because the employee was responding to an emergency in his or her capacity as a volunteer member of a fire or ambulance department. Mass. Gen. Laws ch. 149, § 177B.

The employer may require the employee to submit a statement signed by the chief of the fire department or ambulance department that certifies the date and time the employee responded to the emergency. Mass. Gen. Laws ch. 149, § 177B.

"Responding to an emergency" is defined as working at the scene to prevent imminent loss of life or property from or returning from:

- A fire, rescue, or emergency medical service call;
- A hazardous materials incident; or
- A natural or man-made disaster.

Mass. Gen. Laws ch. 149, § 177B.

Leaves of Absence for Red Cross Emergency Volunteers (Mass. Gen. Laws ch. 30, § 9I)

An employee of the Commonwealth is entitled to a paid leave of absence if requested by the American Red Cross to serve as an American Red Cross volunteer in connection with a disaster. Leave is provided at the sole discretion of the employee's supervisor and is limited to a total of fifteen calendar days a year. Within thirty days after the American Red Cross has requested an employee's services, it shall submit written proof that the employee is certified as a disaster service volunteer. Mass. Gen. Laws ch. 30, § 9I(a).

The employee who is granted disaster service volunteer leave shall not lose any benefits, seniority, or previously accrued vacation time, sick time, personal days, compensation time, or earned overtime due to the leave of absence. Mass. Gen. Laws ch. 30, 9I(b).

Employer Coverage

Leaves of Absence for Red Cross Emergency Volunteers (Mass. Gen. Laws ch. 30, § 9I)

The Commonwealth is required to provide disaster service volunteer leave to its employees. Mass. Gen. Laws ch. 30, § 9I(a).

Employee Eligibility

Discharge or Disciplinary Action Against Volunteer Firefighters (Mass. Gen. Laws ch. 149, § 177B)

A "volunteer member" of a fire department or ambulance department is defined as:

- A volunteer, call, reserve, or permanent-intermittent firefighter; or
- An emergency medical technician.

The definition does not include any person who has received compensation for over 975 hours of services rendered in such a capacity in the last six months. Mass. Gen. Laws ch. 149, § 177B.

Leaves of Absence for Red Cross Emergency Volunteers (Mass. Gen. Laws ch. 30, § 9I)

To be entitled to disaster service volunteer leave, an employee must be employed by the Commonwealth and must be registered as a certified disaster services volunteer with the American Red Cross's human resources network. Mass. Gen. Laws ch. 30, § 9I.

Enforcement (Including Whether Private Right of Action Is Available)

Discharge or Disciplinary Action Against Volunteer Firefighters (Mass. Gen. Laws ch. 149, § 177B)

An employee who has been discharged or discriminated against because he or she was responding to an emergency call as a volunteer member of a fire or ambulance department has a private right of action. Mass. Gen. Laws ch. 149, § 177B.

Statute of Limitations

Discharge or Disciplinary Action Against Volunteer Firefighters (Mass. Gen. Laws ch. 149, § 177B)

An employee who has been discharged or discriminated against because he or she was responding to an emergency call as a volunteer member of a fire or ambulance department must bring a civil action within one year. Mass. Gen. Laws ch. 149, § 177B.

Potential Damages/Penalties

Discharge or Disciplinary Action Against Volunteer Firefighters (Mass. Gen. Laws ch. 149, § 177B)

In an action for a violation of Mass. Gen. Laws ch. 149, § 177B, an employee may be entitled to reinstatement to his or her former position without a reduction in pay, seniority and other benefits, and lost wages or benefits for the duration of the termination or other disciplinary action. Mass. Gen. Laws ch. 149, § 177B.

Other Leave Provisions in Massachusetts

Miscellaneous Leave Provisions

With the exception of employees whose services are essential and critical to public health or safety, any employee who is a veteran and who wants to participate in a Veterans Day or Memorial Day exercise, parade, or service is entitled to a leave of absence, with or without pay, for that purpose. However, if an employer has at least 50 employees, it must grant a leave of absence on Veteran's

Day with pay to any eligible employee if the employee provided reasonable notice for such leave. Mass. Gen. Laws ch. 149, § 52A1/2; Mass. Gen. Laws ch. 30, § 9H.

An employee of a city or town who is a delegate or alternate to a state or national convention of a veterans' organization chartered by the United States Congress may, if authorized by the board or officer having the power to remove him or her, attend the convention without a loss of pay or vacation leave. Mass. Gen. Laws ch. 41, § 111J.

An employee of the Commonwealth or its political subdivisions, who is a representative of an employee organization, may take a leave of absence without pay during his or her assignment as a representative. Mass. Gen. Laws ch. 32, § 28K.

An employee of a city or town that accepts the provisions of section 21 of Mass. Gen. Laws ch. 40 may be granted a leave of absence with pay to attend a convention of the employee's union as an officer, delegate, or alternate delegate. Mass. Gen. Laws ch. 40, § 21C.

A school superintendent is required to grant a public school teacher in good standing who has been accepted to serve in the United States Peace Corps a leave of absence without pay. Upon the completion of his or her service in the Peace Corps, the superintendent must restore the teacher to his or her previous or a similar position with the same status, pay, length of service credit, and seniority the teacher held when the leave of absence commenced. Mass. Gen. Laws ch. 71, § 41B.

A police officer or firefighter of a city, town, or fire or water district is entitled to a leave of absence with pay if he or she is incapacitated with injuries he or she received in the line of duty. Mass. Gen. Laws ch. 41, § 111F.

If a city or a town accepts the provisions of section 111M of Mass. Gen. Laws ch. 41, an employee of a city or town or fire or water district who is responsible for delivering emergency medical services is entitled to a leave of absence with pay if he or she is incapacitated by injuries he or she received in the line of duty. Mass. Gen. Laws ch. 41, § 111M.

Navigating Minimum Wage Requirements in Massachusetts

Minimum Wage Requirements

In no case shall Massachusetts's minimum wage rate be less than 50 cents higher than the effective federal minimum rate. Mass. Gen. Laws ch. 151, § 1. Effective January 1, 2017, the minimum wage rate is set at $11.00 per hour.

Mass. Gen. Laws ch. 151, § 1.

Effective January 1, 2017, the minimum wage rate for tipped employees in Massachusetts is $3.75 per hour.

Mass. Gen. Laws ch. 151 § 7. For more information on the minimum wage for Massachusetts tipped employees, see Navigating Tip Credit Requirements in Massachusetts.

For FLSA minimum wage requirements, see Navigating the FLSA's Minimum Wage Requirements.

Employer Coverage

For purposes of the Massachusetts minimum wage law, "employer" is defined as an individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation. 454 CMR 27.02. Exceptions to the minimum wage rate include wages paid to those in agriculture and farming, and wages paid to children under seventeen years of age, or a parent, spouse, child, or other member of the employer's immediate family. Mass. Gen. Laws ch. 151, § 2A. The Commissioner of the Department of Labor has authority under Mass. Gen. Laws ch. 151, §§ 7 and 9, and under 454 CMR 27.03 to set a minimum wage for an occupation in a given locality, and for learners and/or apprentices.

Enforcement (Including Whether Private Right of Action Is Available)

An employee may maintain a civil action for minimum wage law violations, or file an administrative claim with the Director of the Department of Labor Standards. Mass. Gen. Laws ch. 151, § 20.

Agency Administration

The Department of Labor Standards (DLS) and the Attorney General of the Commonwealth administers the Massachusetts Minimum Fair Wage Law. Mass. Gen. Laws ch. 151, § 3.

Statute of Limitations

The statute of limitations is three years for a minimum wage claim. Mass. Gen. Laws ch. 151, § 20a.

Potential Damages/Penalties

In an action for wages under Massachusetts' minimum wage law, an employee may seek injunctive relief, damages, and the full amount of unpaid minimum wages. An agreement between an employee and an employer for the employee to work for less than the minimum wage is not a defense to such action. An employee who prevails in such an action will be awarded treble damages, as liquidated damages, for any unpaid minimum wage and also will be awarded the costs of the litigation and reasonable attorney's fees. At the request of any employee asserting that he or she has been paid less than the minimum wage to which he or she is entitled the attorney general may take an assignment of such claim in trust for the assigning employee and may bring any legal action necessary to collect on such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The attorney general shall not be required to pay a filing fee in connection with any such action. Mass. Gen. Laws ch. 151, § 20.

Complying with Overtime Requirements in Massachusetts

Overtime Requirements

Generally, the overtime rate to be paid to employees is one and one-half times the employee's regular rate of pay for hours worked in excess of forty in a work week. Mass. Gen. Laws ch. 151, § 1A.

Definition of Workday and Workweek

The Minimum Fair Wage Law does not define the term "work week," but opinion letter MW-2008-005 indicates that the Executive Office of Labor and Workforce Development gives a reasonable interpretation to the law, and looks to the federal Fair Labor Standards Act for guidance. The term "workday" also is not defined.

Employer Coverage

All employers are covered by the overtime requirements of the Minimum Fair Wage Law, except as provided in Mass. Gen. Laws ch. 151, § 1A; those exceptions include an employee who is employed:

(1) As a janitor or caretaker of residential property, who when furnished with living quarters is paid a wage of not less than thirty dollars per week;

(2) As a golf caddy, newsboy or child actor or performer;

(3) As a bona fide executive, or administrative or professional person or qualified trainee for such position earning more than eighty dollars per week;

(4) As an outside salesperson or outside buyer;

(5) As a learner, apprentice, or handicapped person under a special license as provided in section nine;

(6) As a fisherman or as a person employed in the catching or taking of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life;

(7) As a switchboard operator in a public telephone exchange;

(8) As a driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the motor carrier act of 1935, or as employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act or subject to title II of the Railway Labor Act;

(9) In a business or specified operation of a business which is carried on during a period or accumulated periods not in excess of 120 days in any year, and determined by the Director of the Department of Labor Standards to be seasonal in nature;

(10) As a seaman;

(11) By an employer licensed and regulated pursuant to chapter 159A;

(12) In a hotel, motel, motor court, or like establishment;

(13) In a gasoline station;

(14) In a restaurant;

(15) As a garageman, which term shall not include a parking lot attendant;

(16) In a hospital, sanitorium, convalescent or nursing home, infirmary, rest home, or charitable home for the aged;

(17) In a non-profit school or college;

(18) In a summer camp operated by a non-profit charitable corporation;

(19) As a laborer engaged in agriculture and farming on a farm;

(20) In an amusement park containing a permanent aggregation of amusement devices, games, shows, and other attractions operated during a period or accumulated periods not in excess of 150 days in any one year.

Enforcement (Including Whether Private Right of Action Is Available)

The means of enforcing overtime requirements are provided by Mass. Gen. Laws ch. 151, § 1B. An employee may request that the attorney general take an assignment of the claim, or an employee may bring a civil action ninety days after filing a complaint with the attorney general.

Statute of Limitations

The statute of limitations is three years for a minimum wage claim. Mass. Gen. Laws ch. 151, § 20a.

Potential Damages/Penalties

An employee may seek in a civil action for unpaid wages injunctive relief, any damages incurred, and any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorney's fees. Mass. Gen. Laws ch. 149, § 150.

Navigating Tip Credit Requirements in Massachusetts

Tip Credit Requirements

Employers may pay service employees who regularly receive more than $20.00 per month in tips less than the state minimum wage, provided they make up any shortfall so that the employees ultimately make at least the applicable minimum wage. Mass. Gen. Laws ch. 151 § 7. See Navigating Minimum Wage Requirements in Massachusetts.

Because the amount of tip credit allowed depends on the minimum wage and Massachusetts has implemented a set statutory increase of the minimum wage, effective January 1, 2017, the minimum hourly cash wage for tipped employees is $3.75 per hour. Id.

An employer using a tip credit arrangement must inform the employee of the provisions of Mass. Gen. Laws ch. 151 § 7. Tips received by the employee must be retained by the employee, though tip pooling is permitted.

For FLSA tip credit requirements, see Navigating the FLSA's Minimum Wage Requirements.

Employer Coverage

"Employer" is defined as an individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation. 454 CMR 27.02. Exceptions to the minimum wage rate of Mass. Gen. Laws ch. 151, § 1 include wages paid to those in agriculture and farming, and wages paid to children under seventeen years of age engaged in agriculture and farming, or a parent, spouse, child, or other member of the employer's immediate family. Mass. Gen. Laws ch. 151, § 2A. The Commissioner of the Department of Labor has authority under Mass. Gen. Laws ch. 151, §§ 7 and 9, and 454 CMR 27.03 to set a minimum wage for an occupation in a given locality for learners and/or apprentices or for employees whose earning capacity is limited by age or physical deficiency or injury.

Enforcement (Including Whether Private Right of Action Is Available)

An employee may maintain a civil action for minimum wage law violations, and the attorney general or the Commissioner of Labor also may institute such a claim. Mass. Gen. Laws ch. 151, § 20.

Agency Administration

The Department of Labor Standards (DLS) administers the Massachusetts Minimum Fair Wage Law. Mass. Gen. Laws ch. 151, § 3.

Statute of Limitations

The statute of limitations is three years for an action arising out of a minimum wage claim. Mass. Gen. Laws ch. 151, § 20a.

Potential Damages/Penalties

In an action for wages under the minimum wage law, an employee may seek injunctive relief, damages incurred, and the full amount of the minimum wages less any amount actually paid to him or her by the employer. An agreement between the person and the employer to work for less than the minimum wage shall not be a defense to such action. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any loss of minimum wage and shall also be awarded the costs of the litigation and reasonable attorney's fees. At the request of any employee paid less than the minimum wage to which he or she is entitled the attorney general may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The attorney general shall not be required to pay a filing fee in connection with any such action. Mass. Gen. Laws ch. 151, § 20.

Understanding Written Commission Agreement Rules in Massachusetts

Requirements for Written Commission Agreements

Commission agreements between employers and employees do not have to be in writing.

Understanding Rules Regarding Interns and Volunteers in Massachusetts

Intern and Volunteer Requirements

Massachusetts does not have requirements regarding interns and volunteers.

Navigating the Executive Exemption in Massachusetts

Requirements for the Executive Exemption

The term "bona fide executive" in Mass. Gen. Laws ch. 151, §1A(3), shall have the same meaning as set forth under federal law in 29 C.F.R. § 541. See Understanding the Executive Employee Exemption.

Understanding the Administrative Exemption in Massachusetts

Requirements for the Administrative Exemption

The term "bona fide . . . administrative person" in Mass. Gen. Laws ch. 151, § 1A(3), shall have the same meaning as set forth under federal law in 29 C.F.R. § 541. See Navigating the Administrative Employee Exemption.

Applying the Professional Exemption in Massachusetts

Requirements for the Professional Exemption

The term "bona fide . . . professional person" in Mass. Gen. Laws ch. 151, § 1A(3), shall have the same meaning as set forth under federal law in 29 C.F.R. § 541. See Applying the Professional Employee Exemption.

Navigating the Outside Sales Exemption in Massachusetts

Requirements for the Outside Sales Exemption

Employees working in "outside sales work" are exempt from the Minimum Fair Wage Law, and employees working as outside salespersons or buyers are exempt from overtime requirements. Mass. Gen. Laws ch. 151, §§ 1A, 2. Mass. Gen. Laws ch. 151 § 2 provides in part: Occupations "shall also not include outside sales work regularly performed by outside salesmen who regularly sell a product or products away from their employer's place of business and who do not make daily reports or visits to the office or plant of their employer."

Applying the Computer Professional Exemption in Massachusetts

Requirements for the Computer Professional Exemption

Massachusetts does not define specific requirements for the computer professional exemption.

Navigating the Highly Compensated Employee Exemption in Massachusetts

Requirements for the Highly Compensated Employee Exemption

Massachusetts law does not specify requirements for the highly compensated employee exemption; however, the Executive Office of Labor and Workforce Development (EOLWD) indicated in a 2008 opinion letter that it would apply federal standards for the highly compensated employee exemption. See Op. Ltr. MW-2008-004.

Understanding the Combination Exemption in Massachusetts

Requirements for the Combination Exemption

Massachusetts does not provide for the combination exemption.

Understanding the Exemption for Commissioned Employees in Retail Service Establishments (Inside Salespeople) in Massachusetts

Requirements for the Retail Sales Exemption

Massachusetts does not recognize the retail sales exemption.

Understanding Meal Period Requirements in Massachusetts

Meal Period Requirements

No person shall be required to work for more than six hours during a calendar day without an interval of at least thirty minutes for a meal. Mass. Gen. Laws ch. 149, § 100. Employers do not have to provide employees with paid meal breaks unless an employee must perform job functions during a meal period.

Applying for Exceptions to Meal Period Requirements

The attorney general has authority under Mass. Gen. Laws ch. 149, § 101 to grant exemptions from meal break requirements for those employed in factory, workshop, or mechanical establishments if he or she deems it necessary and the exemption can be made without injury to persons affected thereby.

Do the Meal Period Requirements Apply to All Classes of Employees?

Mass. Gen. Laws ch. 149, § 101 provides exceptions to the meal break requirements of Mass. Gen. Laws ch. 149, § 100 for those employed in certain industries, including iron works, glass works, paper mills, letterpress establishments, print works, bleaching works, or dyeing works.

Enforcement (Including Whether Private Right of Action Is Available)

The attorney general is granted enforcement power under Mass. Gen. Laws ch. 149, § 2. Mass. Gen. Laws ch. 149, § 100 does not grant a private right of action.

Potential Damages/Penalties

Any employer, superintendent, overseer, or agent who violates Section 100 shall be punished by a fine of not less than $300 nor more than $600.

Determining Whether Break Periods Are Compensable in Massachusetts

Compensability of Rest Breaks

Massachusetts does not require paid rest breaks.

Understanding Lactation/Nursing Accommodation Requirements in Massachusetts

Lactation/Nursing Accommodation Requirements

Massachusetts does not have lactation/nursing accommodation requirements.

Determining When On-Call Time Is Compensable in Massachusetts

Compensability of On-Call Time

An on-call employee who is not required to be at the work site, and who is effectively free to use his or her time for his or her own purposes, is not considered an employee working while on call. 454 CMR 27.04.

Understanding Split Shift Payments in Massachusetts

Paying Split Shift Wages to Employees

Massachusetts law does not have split shift wage requirements. "Working time" is defined in 455 Mass. Code Regs. § 2.01 as all time during which an employee is required to be on the employer's premises or to be on duty, or to be at a prescribed work site, and any time worked before or beyond the end of the normal shift to complete his or her work. An opinion letter of the Executive Office of Labor and Workforce Development stated that an employee was not on duty during a five-hour period between shifts, applying federal standards in determining whether or not he or she was "on duty." See Op. Ltr. MW-2002-019 (June 28, 2002).

Determining the Compensability of Time Spent Changing Clothes in Massachusetts

Compensability of Time Spent Changing Clothes

Massachusetts law does not address the compensability of time spent changing clothes.

Determining When Travel Time Is Compensable in Massachusetts

Compensability of Travel Time

Rules on the compensability of travel time are provided in 455 Mass. Code Regs. § 2.03:

(a) Ordinary travel between home and work is not compensable working time. However, if an employee who regularly works at a fixed location is required, for the convenience of the employer, to report to a location other than his or her regular work site, the employee shall be compensated for all travel time in excess of his or her ordinary travel time between home and work with allowance for associated transportation expenses.

(b) An employee required or directed to travel from one place to another after the beginning of or before the close of a work day shall be compensated for all travel time and shall be reimbursed for all transportation expenses.

(c) Travel that keeps an employee away from home overnight shall be compensated for in a manner consistent with 29 C.F.R. § 785.39.

For additional information on travel time rules, see Op. Ltr. MW-2002-019 (June 28, 2002).

Determining When Training Time Is Compensable in Massachusetts

Compensability of Training Time

Massachusetts does not specify whether training time is compensable.

Understanding Timing, Frequency, and Method of Pay Laws in Massachusetts

Timing, Frequency, and Method of Pay Requirements

Timing and Frequency of Pay

Generally, nonexempt employees working on an hourly basis shall be paid weekly or bi-weekly. Mass. Gen. Laws ch. 149, § 148. Employees engaged in a bona fide executive, administrative, or professional capacity, as determined by the attorney general, and

employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly. Mass. Gen. Laws ch. 149, § 148. Exceptions to the above general rules of § 148 include those employed by governmental units, by railroads, and in agriculture. Mass. Gen. Laws ch. 149, § 148.

Timing of wage payments following a pay period varies:

- Employers must pay wages within six days of the end of a pay period during which the employee worked for five or six days in a calendar week.
- Employers must pay wages within seven days of the end of a pay period where the employee worked seven days in a calendar week.
- Employers must pay wages to "casual employees," meaning those who worked for fewer than five days in a calendar week, within seven days of the end of the pay period.

Wages include holiday or vacation payments due under an oral or written agreement, and commission payments when the amount of the commissions has been definitely determined and has become due and payable to the employee. Mass. Gen. Laws. Ch. 149, § 148.

For analysis of federal law on timing and frequency of pay, see Understanding Federal Law on Timing and Frequency of Pay.

Method of Pay

An employer may pay an employees' wages with a check provided that the employer provides the employee a check stub showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, hourly rate, and the amounts of deductions or increases made for the pay period. Mass. Gen. Laws. Ch. 149, § 148. An employer paying wages to an employee by check shall provide a facility for the cashing of such check at a bank, without charge by deduction from the face amount. Id.

We have not identified any Massachusetts authority addressing an employer's use of paycards or direct deposit to pay employees' wages.

Enforcement (Including Whether Private Right of Action Is Available)

Mass. Gen. Laws ch. 149, § 150 provides: an employee claiming to be aggrieved by a violation of section 148 may, ninety days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within three years after the violation, institute and prosecute in his or her own name and on his or her own behalf, or for himself or herself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits.

Agency Administration

The Office of the Attorney General has jurisdiction over the enforcement of wage payment claims. Mass. Gen. Laws ch. 149, § 2.

Statute of Limitations

Mass. Gen. Laws ch. 149, § 150 provides a three year statute of limitations.

Potential Damages/Penalties

Possible damages and penalties for violations of Mass. Gen. Laws ch. 149, § 148 include the following:

- Possible civil citations ranging from not more than $10,000 for a first offense to $25,000 for each subsequent violation, Mass. Gen. Laws ch. 149, § 27C
- Criminal penalties for willful violations ranging from $25,000 to $50,000, Mass. Gen. Laws ch. 149, § 27C
- In a civil action by the aggrieved employee, potential damages include treble damages, as liquidated damages, for any lost wages and other benefits, and the costs of the litigation and reasonable attorney's fees, Mass. Gen. Laws ch. 149, § 150

Understanding Wage Deductions in Massachusetts

Wage Deduction Requirements

No deduction, other than those required by law and those allowed for lodging and meals listed in 454 CMR 27.05(2) and (3), shall be made from the basic minimum wage. 454 CMR 27.05.

An employer shall furnish a suitable pay slip, check stub, or envelope notifying an employee of the amount of each deduction made from wages for items including social security, unemployment compensation benefits, pension, vacation or health and welfare funds, state taxes, federal taxes, dues check-off, and credit unions. Mass. Gen. Laws ch. 149, § 150A.

An employer may not make deductions from an employee's wages based on a unilateral decision that the employee damaged employer property. Camara v. AG, 458 Mass. 756, 757 (Mass. 2011).

Mass. Gen. Laws ch. 154, §§ 1–8 address assignment of wages, including union or craft dues.

Employer Coverage

Massachusetts wage deduction laws apply to all employers.

Understanding Paid Time Off and Vacation Pay Issues in Massachusetts

Permissibility of "Use It or Lose It" Vacation Policies

An Advisory from the Attorney General's Fair Labor Division on Vacation Policies addresses accrual caps and "use it or lose it" vacation policies. Employers who choose to provide paid vacation to employees must treat it as wages under Mass. Gen. Laws ch. 149, § 148. The advisory explains that policies for caps on accrued vacation are allowed, but employees must have notice and a reasonable opportunity to use vacation time within the time limits set by the employer. Otherwise, a cap on accrual or a "use it or lose it" policy may result in an illegal forfeiture of earned wages.

Paying Out Accrued but Unused Vacation Time at Termination

Mass. Gen. Laws ch. 149, § 148 provides that the word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

An employee leaving his or her employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday. Any employee discharged from employment shall be paid in full on the day of his or her discharge or in Boston as soon as the laws requiring pay rolls, bills, and accounts to be certified shall have been complied with. Mass. Gen. Laws ch. 149, § 148.

Navigating Termination Pay Issues in Massachusetts

Termination Pay Requirements

An employee leaving his or her employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; any employee discharged from such employment shall be paid in full on the day of his or her discharge or in Boston as soon as the laws requiring pay rolls, bills, and accounts to be certified shall have been complied with. Mass. Gen. Laws ch. 149, § 148.

Enforcement (Including Whether Private Right of Action Is Available)

Mass. Gen. Laws ch. 149, § 150 provides that an employee claiming to be aggrieved by a violation of section 148 may, ninety days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within three years after the violation, institute and prosecute in his or her own name and on his or her own behalf, or for himself or herself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits.

Agency Administration

The Office of the Attorney General has jurisdiction for enforcement of wage payment claims. Mass. Gen. Laws ch. 149, § 2.

Statute of Limitations

Mass. Gen. Laws ch. 149, § 150 provides a three year statute of limitations.

Potential Damages/Penalties

Possible damages and penalties for violations of Mass. Gen. Laws ch. 149, § 148 include the following:

- Possible civil citations ranging from not more than $10,000 for a first offense to $25,000 for each subsequent violation, Mass. Gen. Laws ch. 149, § 27C
- Criminal penalties for willful violations ranging from $25,000 to $50,000, Mass. Gen. Laws ch. 149, § 27C
- In a civil action by the aggrieved employee, potential damages include treble damages, as liquidated damages, for any lost wages and other benefits, and the costs of the litigation and reasonable attorney fees, Mass. Gen. Laws ch. 149, § 150

Paying Out Accrued but Unused Vacation Time at Termination

Mass. Gen. Laws ch. 149, § 148 provides that the word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

Potential Damages/Penalties for Failing to Pay Out Accrued but Unused Vacation Time at Termination

Mass. Gen. Laws ch. 149, § 27C provides for penalties ranging from $25,000 to $50,000 and one to two years in jail for violations of termination pay provisions.

Complying with Employer Wage and Hour Posting Requirements in Massachusetts

Required Wage and Hour Posters

The required wage and hour poster for all employers is available on the Massachusetts Attorney General's website.

Potential Damages/Penalties for Failing to Post Required Wage and Hour Posters

As of April 1, 2015, Mass. Gen. Laws ch. 151, § 19(3) provided that a violation of the posting requirement in the last sentence of Mass. Gen. Laws ch. 151, § 16, shall be punished or shall be subject to a civil citation or order as provided in section 27C of chapter 149.

Understanding Required Wage and Hour Notices at Hiring in Massachusetts

Required Content and Timing for Wage and Hour Notices at Hiring

Massachusetts does not require a wage and hour notice at hiring.

Understanding Required Annual Notices Regarding Compensation and Employment Status in Massachusetts

Required Content and Timing for Annual Notices Regarding Compensation and Employment Status

Massachusetts does not require an annual notice regarding compensation and employment status.

Understanding Required Notice of Compensation Changes in Massachusetts

Required Content and Timing for Notice Regarding Compensation Changes

Massachusetts does not require notice regarding compensation changes.

Navigating Pay Stub/Wage Statement Requirements in Massachusetts

Required Content and Timing for Pay Stubs/Wage Statements

An employer, when paying an employee his or her wage, shall furnish to such employee a suitable pay slip, check stub, or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period. Mass. Gen. Laws ch. 149, § 148. Mass. Gen. Laws ch. 149, § 150A addresses wage deduction information to be included with pay statements, and notices to employees regarding those deductions.

Enforcement (Including Whether Private Right of Action Is Available)

Mass. Gen. Laws ch. 149, § 150 provides that an employee claiming to be aggrieved by a violation of section 148 may, ninety days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within three years after the violation, institute and prosecute in his or her own name and on his or her own behalf, or for himself or herself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorney's fees.

Agency Administration

The Office of the Attorney General has jurisdiction over the enforcement of wage payment claims. Mass. Gen. Laws ch. 149, § 2.

Understanding Required Wage and Hour Notices at Termination in Massachusetts

Required Content and Timing for Wage and Hour Notices at Termination

Massachusetts does not require wage and hour notices at termination.

Understanding Key Facets of State Law Wage and Hour Retaliation Claims in Massachusetts

Prohibited Conduct

No employee shall be penalized by an employer in any way as a result of any action on the part of an employee to seek his or her rights under the wages and hours provisions of Chapter 149. Mass. Gen. Laws ch. 149, § 148A.

Any employer who discharges or in any other manner discriminates against any employee because such employee has made a complaint to the attorney general or any other person, or assists the attorney general in any investigation under Chapter 149, or has instituted, or caused to be instituted any proceeding under or related to Chapter 149, or has testified or is about to testify in any such proceedings, shall have violated Section 148A and shall be punished or shall be subject to a civil citation or order as provided in § 27C. Mass. Gen. Laws ch. 149, § 148A.

Under the Minimum Fair Wage Law, Mass. Gen. Laws ch. 151, § 19, employers are prohibited from discharging or discriminating against an employee for filing a complaint arising from a violation of the Minimum Fair Wage Law, testifying or agreeing to testify in a related investigation, or because the employer believes that the employee may make such a complaint. Employers in violation of § 19 are subject to the penalties provided under Mass. Gen. Laws ch. 149, § 27C.

Employer Coverage

All employers are subject to Mass. Gen. Laws ch. 151, § 19.

Enforcement (Including Whether Private Right of Action Is Available)

An employee has a private right of action to enforce Mass. Gen. Laws ch. 149, § 148A under Mass. Gen. Laws ch. 149, § 150. In addition, the Office of the Attorney General has jurisdiction to enforce chapter 149. Mass. Gen. Laws ch. 149, § 2.

Damages/Penalties

Employers in violation of Mass. Gen. Laws ch. 151, § 19 are subject to the penalties provided under Mass. Gen. Laws ch. 149, § 27C.

Complying with Massachusetts Equal Pay Laws

The Massachusetts Equal Pay Act, Mass. Gen. Laws ch. 149, § 105A through Mass. Gen. Laws ch. 149, § 105C, protects employees from wage discrimination on the basis of gender and prohibits retaliation.

Massachusetts enacted the Act to Establish Pay Equity, 2016 Mass. Acts 177, which amends the Massachusetts Equal Pay Act. The Act to Establish Pay Equity is effective July 1, 2018. 2016 Mass. Acts 177, Section 4. We discuss below the changes it makes to the Massachusetts Equal Pay Act.

Employer Coverage

"Employer" as used in the Massachusetts Equal Pay Act means any person acting directly or indirectly in the interest of the employer. Mass. Gen. Laws ch. 149, § 1.

Individual Liability

"Employer" as used in the Massachusetts Equal Pay Act means any person acting directly or indirectly in the interest of the employer. Mass. Gen. Laws ch. 149, § 1. Thus, there may be individual liability under the Massachusetts Equal Pay Act.

What Workers Are Covered?

Under the Massachusetts Equal Pay Act, an employee may bring a claim. "Employee" is defined as any person employed for hire by an employer, not including

- persons under the age of eighteen engaged in domestic service,
- persons engaged in agricultural service, or
- employees of any social club, fraternal, charitable, educational, religious, scientific, or literary association, no part of the net earnings of which enures to the benefit of any private individual.

Mass. Gen. Laws ch. 149, § 1.

Protected Classes and Characteristics

The Massachusetts Equal Pay Act prohibits wage discrimination on the basis of gender.

Prohibited Conduct

Under the Massachusetts Equal Pay Act, an employer may not discriminate in the payment of wages between genders for comparable work. Variations in rates of pay are permitted if the difference is based upon a system that rewards seniority, a merit system, a system that measures earnings by quantity or quality of production, sales, or revenue; the geographic location in which a job is performed; education, training, or experience to the extent such factors are reasonably related to the particular job in question; or travel, if travel is a regular and necessary condition of the particular job.

Retaliation Liability Standards and Defenses

The Massachusetts Equal Pay Act imposes a fine of $100.00 against any employer who, among other things, discharges an employee for making a complaint or for participating in a proceeding under the Act. Mass. Gen. Laws ch. 149, § 105B.

The Act to Establish Pay Equity

Effective July 1, 2018, Massachusetts amended its equal pay laws to define comparable work as work that is substantially similar in skill, effort, and responsibility that is performed under similar working conditions. Reliance upon job descriptions alone is not sufficient to determine if work is comparable. Mass. Gen. Laws ch. 149, § 105A(a). Variations in wages are permitted if they are based upon

- a system that rewards seniority, provided that leave due to pregnancy or pregnancy-related conditions or protected family and medical leave does not reduce seniority,
- a merit system,
- a system which measures earnings by quantity or quality of production, sales, or revenue,
- the geographic location in which a job is performed,
- education, training, or experience as they are reasonably related to the job in question, or
- travel if it is a regular and necessary condition of the job.

Employers in violation of these provisions cannot reduce the wages of any employee solely to be in compliance. Mass. Gen. Laws ch. 149, § 105A(b).

It is also an unlawful practice for an employer to

- require an employee to refrain from asking about, disclosing, or discussing information about the employee's wages or about any other employee's wages, although the employer is not required to disclose an employee's wages to another employee or a third party;
- seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or require that the prospective employee's prior wage or salary history meet certain criteria unless
    - the prospective employee voluntarily discloses such information and the employer is seeking confirmation, or
    - the employer is confirming the prospective employee's wage or salary history after compensation has been negotiated and an offer of employment has been made to the prospective employee;
- discharge or retaliate against any employee for
    - opposing a practice made unlawful by the Act,
    - making or indicating an intent to make a complaint or otherwise causing to be instituted any proceeding under the Act,
    - participating in an investigation or proceeding related to a possible violation of these provisions, or disclosing the employee's wages or inquiring about or discussing the wages of another employee.

Mass. Gen. Laws ch. 149, § 105A(c).

Affirmative Defense

The Act to Establish Pay Equity provides an employer against whom an action is brought with an affirmative defense to a claim of wage disparity if within the past three years the employer has completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work. The self-evaluation must have taken place within three years prior to the commencement of the action. The self-evaluation may be of the employer's own design, provided that it is reasonable in detail and scope. If the employer has completed a self-evaluation in good faith but it is not reasonable in detail or in scope, the employer is not entitled to the affirmative defense but will not be liable for liquidated damages. Mass. Gen. Laws ch. 149, 105A(d).

Enforcement

Enforcement Agency

The Massachusetts Attorney General has the authority to enforce the provisions of the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, § 105C.

Effective July 1, 2018, under the Act to Establish Pay Equity, the Massachusetts Attorney General may bring an action to collect unpaid wages and liquidated damages on behalf of one or more employees. The Attorney General also may collect costs and reasonable attorney's fees and has the authority to issue regulations interpreting and applying the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, 105A(b), (e).

Private Right of Action

An aggrieved employee may file an action alleging a violation of the Massachusetts Equal Pay Act in any court of competent jurisdiction. Mass. Gen. Laws ch. 149, § 105A.

Effective July 1, 2018, for violations of the Act to Establish Pay Equity, an employee can bring an action on his or her own behalf as well as on behalf of similarly situated employees in any court of competent jurisdiction. Mass. Gen. Laws ch. 149, 105A(b). If an action is based upon an employer seeking a wage or salary history from a prospective employee, it may be brought on behalf of one or more applicants for employment. Mass. Gen. Laws ch. 149, 105A(c).

Exhaustion Requirement

An employee does not have to submit an administrative claim under the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, § 105A.

Effective July 1, 2018, under the Act to Establish Pay Equity, an employee is not required to file a charge of discrimination with the Massachusetts commission against discrimination as a prerequisite to bringing an action under the Massachusetts Equal Pay Act. Mass. Gen. Laws ch. 149, 105A(b).

Statute of Limitations

An action based upon a violation of the Massachusetts Equal Pay Act must be instituted within one year from the date of the alleged violation. Mass. Gen. Laws ch. 149, § 105A.

Effective July 1, 2018, under the Act to Establish Pay Equity, an action based upon a violation of the Massachusetts Equal Pay Act must be brought within three years of the date of the alleged violation. For purposes of the statute of limitations, a violation occurs when a discriminatory decision or practice is adopted or when an employee becomes subject to or is affected by a discriminatory decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice. Mass. Gen. Laws ch. 149, 105A(b).

Damages and Penalties

Under the Massachusetts Equal Pay Act, an aggrieved employee may recover the amount of his or her unpaid wages plus an additional equal amount of liquidated damages. The employee may also recover reasonable attorney's fees and costs. Mass. Gen. Laws ch. 149, § 105A. An employer who violates the Act may be subject to a $100 fine. Mass. Gen. Laws ch. 149, § 105B.

Effective July 1, 2018, under the Act to Establish Pay Equity, an employee or applicant who is successful in an action under the Massachusetts Equal Pay Act shall recover the amount of any unpaid wages plus an equal amount of liquidated damages. The employee also shall recover reasonable attorney's fees and costs. Mass. Gen. Laws ch. 149, § 105A(b), (c).

Recognizing Exceptions to At-Will Employment in Massachusetts

This practice note addresses exceptions to at-will employment recognized in Massachusetts. For more information about implied contracts of employment, see Preventing Implied Contract Claims in Massachusetts.

Public Policy Exceptions to At-Will Employment

In Massachusetts, an at-will employee may file a claim for wrongful discharge against an employer if the employee can show that his or her discharge was in violation of a clearly defined public policy. Mello v. Stop & Shop Cos., 524 N.E.2d 105, 106 (Mass. 1988). Whether an employee's discharge falls within the public policy exception is a question of law for a judge to decide. Smith-Pfeffer v. Superintendent of Walter E. Fernald State Sch., 533 N.E.2d 1368, 1372 (Mass. 1989). Claims for wrongful discharge in violation of public policy have been recognized when:

- an employee is terminated for exercising a legally guaranteed right,
- an employee is terminated for refusing to commit an illegal act,
- an employee is terminated for doing what is required of him or her by law, and
- an employee is cooperating with a law enforcement investigation of an employer.

Mello v. Stop & Shop Cos., 524 N.E.2d 105, 106-107 (Mass. 1988); Hobson v. McLean Hospital Corp., 522 N.E.2d 975, 977-78 (Mass. 1988); Smith-Pfeffer v. Superintendent of Walter E. Fernald State Sch., 533 N.E.2d 1368, 1371 (Mass. 1989); Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1110-11 (Mass. 1991).

The Supreme Judicial Court of Massachusetts also has recognized a claim for wrongful discharge when an employer has fired an employee for performing an important public deed, even if the law did not require the performance of such a deed. Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1111 (Mass. 1991) (cooperating with law enforcement); Riley v. Green, 2002 Mass. Super. LEXIS 448, at *7-8 (Mass. Super. Ct. 2002) (engaging in whistleblowing activities). The Court has cautioned that the public policy exception must be narrowly construed to avoid converting the general rule of at-will employment into a rule that requires just cause to terminate an at-will employee. King v. Driscoll, 638 N.E.2d 488, 492 (Mass. 1994). To that end, Massachusetts courts have held that an employer's internal policies cannot be the basis of a wrongful discharge action based upon a violation of public policy, even if the employee's actions are appropriate and socially desirable. Smith-Pfeffer v. Superintendent of Walter E. Fernald State Sch., 533 N.E.2d 1368, 1371-72 (Mass. 1989). Public safety or an issue of public importance recognized by the Commonwealth or the federal government, if at stake, may satisfy the public policy exception to the at-will doctrine. Dineen v. Dorchester House Multi-Service Ctr., 2014 U.S. Dist. LEXIS 12929, at *10-11 (D. Mass. Jan. 31, 2014); Dolph v. Vitale, Caturano & Co., 2005 Mass. Super. LEXIS 342, at *9 (Mass. Super. Ct. 2005). However, a potential threat to public health or safety must not be too remote or speculative. The employee's general concerns that the employer's activities could result in harm to the public health or safety are not sufficient to support a claim for wrongful discharge. Nelson v. Anika Therapeutics, Inc., 2011 Mass. Super. LEXIS 168, at *20 (Mass. Super. Ct. 2011).

The Supreme Judicial Court distinguishes between an employee's discharge for an internal complaint about company policies or a violation of company rules and an employee's internal complaint about an alleged violation of criminal law. An employee does not have a cause of action for violation of public policy if the employee's termination was the result of making an internal complaint about company polices or a violation of company rules. An employee may state a claim for wrongful discharge in violation of public policy if the employee's termination was the result of making to his or her employer a good faith, internal report of perceived criminal wrongdoing. Shea v. Emmanuel College, 682 N.E.2d 1348, 1350 (Mass. 1997). An employee who told his employer of perceived criminal wrongdoing is entitled to recover for a wrongful discharge "even though before discharge he did not complain to public authorities." Shea v. Emmanuel College, 682 N.E.2d 1348, 1349-50 (Mass. 1997) (citation omitted).

Wrongful Constructive Discharge

Massachusetts recognizes a cause of action for wrongful constructive discharge where an employer terminated an employee in violation of a clearly established public policy. Spartaro v. Commonwealth, 2007 Mass. Super. LEXIS 2, at *7 (Mass. Super. Ct. 2007); Arnold v. Sodexho Marriot Mgmt., Inc., 2000 Mass. Super. LEXIS 652, at *8 (Mass. Super. Ct. Dec. 27, 2000).

A constructive discharge occurs when an employer's actions are such that they effectively force an employee to resign. To find a constructive discharge, the finder of fact must be satisfied that the working conditions have become so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. The employee's mere dissatisfaction with his or her assignments, compensation, or criticism of his or her performance are not sufficient to establish a constructive discharge, nor will a single isolated act by the employer generally be enough to support a constructive discharge claim. The adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be found intolerable. GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 169 (Mass. 1995).

Implied Covenant of Good Faith and Fair Dealing

Massachusetts courts recognize an implied covenant of good faith and fair dealing in an at-will employment contract when an employer would unjustly benefit financially at an employee's expense, such as firing an employee to deprive the employee of a commission.

Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977). Even if an employer did not terminate an employee to deny him or her compensation, if the employer terminated the employee without good cause, the obligation of fair dealing requires that the employer is liable for the loss of compensation that is clearly related to the employee's past service. Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21, 29 (Mass. 1981). In other words, to state a claim for breach of the implied covenant of good faith and fair dealing in the at-will employment context, the employee must show that he or she suffered a compensable loss as a result of the breach. The damages that the employee can recover are the compensation the employer owed him or her for past services that the employee did not receive as a result of his or her termination. The employer cannot be held liable for any impact on the employee's career or emotional distress. Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 686 (Mass. 2005).

Fraudulent Inducement

Fraudulent inducement of employment is not recognized in Massachusetts. Coyle v. Kittredge Ins. Agency, Inc., 2014 U.S. Dist. LEXIS 42067, at *17 (D. Mass. Mar. 28, 2014). However, an at-will employee who has been fraudulently induced into an employment relationship may have a cause of action for fraudulent misrepresentation. Whelan v. Intergraph Corp., 889 F. Supp. 15, 19 (D. Mass. 1995); Webber v. Frelonic Corp., 1994 Mass. Super. LEXIS 28, at *10-11 (Mass. Super. Ct. 1994). For the employee to state a claim for fraudulent misrepresentation, the employee must show all of the following:

- His or her employer made a false representation of material fact with knowledge of its falsity.
- The employer made the statement for the purposes of inducing the employee into an employment relationship.
- The employee relied upon the representation as true and then acted upon it to the employee's detriment.

Coyle v. Kittredge Ins. Agency, Inc., 2014 U.S. Dist. LEXIS 42067, at *17 (D. Mass. Mar. 28, 2014). An unfulfilled promise is not sufficient to permit recovery for fraudulent misrepresentation in the employment context. There must be some tangible evidence of the employer's present intent to deceive. Sargent v. Tenaska, Inc., 914 F. Supp. 722, 730-31 (D. Mass. 1996); Zhang v. Mass. Inst. of Tech., 708 N.E.2d 128, 134-35 (Mass. App. Ct. 1999).

Complying with Mass Layoff and Plant Closing Laws in Massachusetts

Basic Requirement

Massachusetts's mini–Worker Adjustment and Retraining Notification (mini–WARN) laws, Mass. Gen. Laws, ch. 151A, §§ 71A to 71H, require an employer to provide notice of a plant closing to the Director of the Department of Career Services ("Director").

In addition to the requirements of Mass. Gen. Laws, ch. 151A, §§ 71A to 71H, Massachusetts law contains a provision governing employer notice of a plant closing. An employer utilizing financing by a quasi-public agency of Massachusetts, or that is insured or subsidized by such an agency, must agree that in the event of a plant closing or partial closing as defined in Mass. Gen. Laws, ch. 151A, § 71A, the company will make a good faith effort to provide all affected employees with the longest practicable advance notice in cases where notice is possible and appropriate, and maintenance of income and health insurance benefits. The employer must also, if possible, help to reemploy affected employees. Mass. Gen. Laws, ch. 149, § 182.

Additionally, an owner of a factory, workshop, manufacturing, mechanical, mercantile, or other establishment or industry in which 12 or more persons are employed must notify the Director upon a change of location of its operations within the Commonwealth. An employer that knowingly violates this statute will be subject to a fine of not more than $100 or imprisonment for not more than two months, or both. Mass. Gen. Laws, ch. 149, § 179B.

Employer Coverage

Massachusetts's mini–WARN law, Mass. Gen. Laws, ch. 151A, § 71A, defines an employer as an individual, corporation, or other private business entity that owns or operates a facility for at least one year. A covered employer can be a for-profit or not-for-profit entity. An employer engaged in a seasonal enterprise as defined by the Director is not a covered employer.

Notice Triggers

An employer that is closing a facility must promptly notify the Commissioner. Mass. Gen. Laws, ch. 151A, § 71B(a). Mass. Gen. Laws, ch. 151A, § 71A defines a facility as a plant, factory, commercial business, hospital, institution, or other place of employment located in the Commonwealth that had 50 or more employees during any month in the six-month period prior to the certification date of the plant closing.

A "plant closing" is a permanent cessation or reduction of business at a facility that results or will result, as determined by the Director, in the permanent separation of at least 90% of the facility's employees within a period of six months prior to the actual or anticipated date of the plant closing as determined by the Director, or within such other period as the Director shall prescribe, provided that the period shall fall within the six-month period prior to the date of certification.

A "partial closing" is a permanent cessation of a major discrete portion of the business conducted at a facility that results in the termination of a significant number of the employees of the facility and that affects workers and communities in a manner similar to that of plant closings. The Director of Career Services of the Executive Office of Labor and Workforce Development may determine by regulation that some partial closings are treated as plant closings for purposes of Mass. Gen. Laws, ch. 151A, §§ 71A to 71H. Mass. Gen. Laws, ch. 151A, § 71C.

Timing of Notice

Massachusetts's mini–WARN law, Mass. Gen. Laws, ch. 151A, § 71B(a), requires an employer that is closing a facility "promptly" to notify the Director.

Individuals and Entities Entitled to Receive Notice

Massachusetts's mini–WARN law, Mass. Gen. Laws, ch. 151A, § 71B(a), requires an employer that is closing a facility to notify the Director.

Additionally, an employer may make a written, voluntary declaration to the affected employees or to their authorized collective bargaining representative. Mass. Gen. Laws, ch. 151A, § 71A. An employer that provides advance notice to an employee will reduce an employee's eligibility for reemployment assistance benefits. Mass. Gen. Laws, ch. 151A, § 71F(c).

Contents of the Notice

The report to the Director of Career Services must include the information needed to determine an employee's reemployment assistance benefits rights under Mass. Gen. Laws, ch. 151A, §§ 71A to 71H. Mass. Gen. Laws, ch. 151A, § 71B(a).

Method of Sending the Notice

Massachusetts's mini–WARN law, Mass. Gen. Laws, ch. 151A, § 71B(a), requires an employer to provide notice to the Director in the manner prescribed by the Director of Career Services.

Exceptions

Mass. Gen. Laws, ch. 151A, §§ 71A to 71H do not set forth any exceptions to the notice requirement.

Fulfilling Termination Notice Requirements in Massachusetts

Content and Timing of Information that Employers Must Provide to Employees at Termination

At the time of the employee's termination of employment, an employer must provide the employee with a separation notice to inform him or her about unemployment benefits. The Massachusetts Division of Unemployment Assistance of the Executive Office of Labor and Workforce Development prescribes and publishes a pamphlet for this purpose. If possible, an employer should hand-deliver the separation notice to the terminated employee on his or her last day of employment.

Within 10 business days, an employer must notify a terminated employee of the date upon which his or her coverage under the employer's group insurance policy will terminate. Mass. Gen. Laws, ch. 149, § 178O.

Before a tenured employee can be discharged for other than just cause, the appointing authority must give the employee written notice that states the action contemplated and the specific reason for the action, and includes a copy of Mass. Gen. Laws, ch. 31, §§ 41 to 45. Mass. Gen. Laws, ch. 31, § 41.

Waiving Employment Claims in Release Agreements in Massachusetts

This practice note answers key questions concerning agreements to release employment claims in Massachusetts. For more information about release agreements generally, see Understanding, Drafting, and Negotiating Settlement and Release Agreements on Behalf of Employers; and Understanding, Drafting, and Negotiating Separation Agreements on Behalf of Employers. For a sample Massachusetts release agreement, see Settlement Agreement and Release of Claims for Single-Plaintiff Employment Dispute (MA).

State-Specific Statutory and Common Law Claims Employers Must or Should Include in Release Agreements

In Massachusetts, a release agreement should contain a general release of "any and all claims" arising from or related to an employee's employment, including its termination. Massachusetts courts have upheld the validity of broadly-worded releases. See, e.g., Barton v. Brassring, Inc., 2006 Mass. Super. LEXIS 549 at *9-13 (Mass. Super. Ct. Oct. 24, 2006); Smith v. Fallon Clinic, Inc., 1998 Mass. Super. LEXIS 105, at *12 (June 3, 1998).

While not required, employers often cite the following examples of Massachusetts statutory and common law claims as included within the general release:

- Violation of the Massachusetts Fair Employment Practices Law, Mass. Gen. Laws ch. 151B, §§ 1 et seq. (see Duval v. Callaway Golf Ball Operations, Inc., 501 F. Supp. 2d 254, 263-64 (D. Mass. 2007))
- Violation of the Massachusetts Equal Pay Act, Mass. Gen. Laws ch. 149, § 105A
- Violation of the Massachusetts Equal Rights Act, Mass. Gen. Laws ch. 93, § 102
- Violation of the Massachusetts age discrimination law, Mass. Gen. Laws ch. 149, §§ 24A et seq.
- Violation of the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, §§ 148 et seq. (see MacLean v. TD Bank, N.A., 2014 U.S. Dist. LEXIS 95307, at *11-12 (D. Mass. July 14, 2014))
- Violation of the Massachusetts Civil Rights Act, Gen. Laws ch. 12, § 11
- Violation of the Massachusetts Small Necessities Act, Gen. Laws ch. 149 § 52D
- Violation of the Massachusetts Privacy Statute, Gen. Laws ch. 214, § 1B
- Violation of the Massachusetts Parental Leave Act, Gen. Laws ch. 149, § 105D
- Violation of the Massachusetts AIDS Testing Act, Gen. Laws ch. 111 § 70F
- Violation of the Massachusetts Consumer Protection Act, Gen. Laws ch. 93A
- Violation of the Massachusetts Equal Rights for the Elderly and Disabled Law, Gen. Laws ch. 93 § 103
- Violation of the Massachusetts Anti-Sexual Harassment Statute, Gen. Laws ch. 214, § 1C
- Violation of the Massachusetts Wage and Hour Laws, Gen. Laws ch. 151 §§ 1A et seq.
- Claims for wages and employee benefits
- Breach of contract
- Breach of the implied covenant of good faith and fair dealing
- Wrongful discharge
- Violation of public policy
- Retaliation
- Violation of privacy rights
- Fraud
- Defamation
- Negligent misrepresentation
- Tortious interference
- Intentional or negligent infliction of emotional distress
- Negligence
- Personal injury

Release of Massachusetts Wage Act Claims

Although the Massachusetts Wage Act (Wage Act) provides that an employee cannot, through a special contract, waive the protections of the Wage Act, Mass. Gen. Laws ch. 149, § 148, the Supreme Judicial Court of Massachusetts has held that an employee who has signed a document containing a general release of all claims against his or her employer can waive the employee's claims under the Wage Act provided that:

- The release is plainly worded and understandable to the average individual –and–
- The release specifically refers to the rights and claims the employee is waiving under the Wage Act

Crocker v. Townsend Oil Co., 979 N.E.2d 1077, 1087 (Mass. 2012). However, a United States district court has interpreted *Crocker* as not requiring that a general release contain an explicit citation to the Wage Act to be effective. MacLean v. TD Bank, N.A., 2014 U.S. Dist. LEXIS 95307, at *11-12 (D. Mass. July 14, 2014). That court held that as long as the general release makes it clear to the employee that the rights the employee is waiving are the rights to be paid any wages due under the Wage Act, the release is effective. Id. Given this conflicting authority, employers should be advised to reference a waiver of the Wage Act specifically in any general release to remove any doubt about the intentions of the parties.

Claims an Employee Cannot Waive

In Massachusetts, an employee cannot waive claims for:

- Workers' compensation (except as the following section provides) (Mass. Gen. Laws ch. 152, § 46)
- Unemployment compensation (Mass. Gen. Laws ch. 151A, § 35)

For non-waivable claims under federal law, see Understanding, Drafting, and Negotiating Settlement and Release Agreements on Behalf of Employers — Common Provisions in Settlement Agreements.

Claims an Employee Can Waive But Only with Court or Administrative Agency Approval

Workers' Compensation

In Massachusetts, an insurer and an employee may, with the written consent of the employer, settle the employee's workers' compensation claim with a lump sum payment. Mass. Ann. Laws ch. 152, § 48(1). The parties, however, must obtain approval of a lump sum agreement from an administrative judge (AJ) or administrative law judge (ALJ) if:

- The employee is unrepresented by counsel
- The parties seek a determination of the fair and reasonable amount to be paid out of the lump sum to discharge a lien cognizable under Mass. Ann. Laws ch. 152, § 46A –or–
- Any party to the agreement requests approval from an AJ or ALJ

Id. In such cases, the agreement will not be perfected until an AJ or ALJ has determined it is in the employee's best interests. Id.

In all other cases, the agreement must be reviewed and approved by a conciliator, AJ, or ALJ, as appropriate. Id. An ALJ is not authorized to impose a lump sum settlement upon on employee who indicates he or she does not wish to settle his or her workers' compensation claim on that basis. Opare's Case, 932 N.E.2d 863, 867-68 (2010).

A lump sum agreement made prior to the establishment of liability for workers' compensation does not prohibit an employee from subsequently filing a claim for medical benefits if the employee has suffered a substantial deterioration of his or her medical condition which:

- Could not have reasonably been foreseen at the time the agreement was entered into –and–
- Is the result of an injury the insurer would have been liable for under the workers' compensation law, absent the lump sum settlement

Mass. Ann. Laws ch. 152, § 48(2). The employee must bring such a claim within one year of the date he or she first became aware of the causal relationship between the substantial deterioration and his or her employment. Id.

A lump sum agreement may not contain a general or specific release provision that would bar:

- Employment with any employer
- The receipt by the employee of any pay or benefits due to him or her by the employer

- The bringing of any future workers' compensation claim –or–
- The bringing of any claims for wrongful discharge or breach of contract

Mass. Ann. Laws ch. 152, § 48(3). Any such releases are null and void. A party attempting to obtain such a release is subject to a $10,000 fine. Id.

A lump sum agreement only applies to the insurer and the employee who are parties to the agreement and does not affect any other action or proceeding arising out of a separate and distinct injury, whether that injury precedes or arises subsequent to the agreement. Mass. Ann. Laws ch. 152, § 48(4).

The Massachusetts Department of Industrial Accidents, which oversees and administers the workers' compensation system, provides many forms on its webpage, including: Request a Lump Sum Conference (Form 116), Lump Sum Agreement for Injuries On or After 11/1/1986 (Form 117), Lump Sum Agreement for Injuries before 11/1/1986 (Form 117A), and Consent of Employer to Lump Sum Settlement (Form 116A).

Other State-Specific Release Agreement Issues

In Massachusetts, an employee's release of claims is analyzed under the principles of contract law. Leblanc v. Friedman, 781 N.E.2d 1283, 1287 (Mass. 2003). A general release of all claims embraces everything included within its terms, unless otherwise prohibited by law. Crocker v. Townsend Oil Co., 979 N.E.2d 1077, 1086-87 (Mass. 2012). The mere fact that a release, as worded, extends to matters that the parties did not specifically have in mind at the time of the execution of the release does not exclude those matters from the scope of the release. Eck v. Godbout, 831 N.E.2d 296, 303 (Mass. 2005). If the parties intend anything to be excluded, it should be stated in the release. Schuster v. Baskin, 236 N.E.2d 205, 208 (Mass. 1968).

An unambiguous release of any and all claims will be enforced according to its terms. A party's subjective intent with respect to the scope of a release will not overcome its plain language. See Cormier v. Central Mass. Chapter of the Nat'l Safety Council, 620 N.E.2d 784, 787 (Mass. 1993). If the language of a release is clear and unambiguous, it is binding on the parties unless a party can show that the release was procured by:

- Fraud
- Duress
- Unconscionability –or–
- Mutual mistake

Id. at 786; Coveney v. President & Trustees of College of Holy Cross, 445 N.E.2d 136, 140 (Mass. 1983); Horner v. Boston Edison Co., 695 N.E.2d 1093, 1096 (Mass. App. Ct. 1998); Eck, 831 N.E.2d at 303.

In determining the validity of a release, courts look at the totality of the circumstances based on a set of six non-exclusive factors:

- The employee's education and business experience
- The roles of the employer and the employee in determining the provisions of the waiver
- The clarity of the language utilized
- The length of time the employee had to study the release
- Whether the employee sought independent advice, such as that of an attorney, prior to agreeing to the release –and–
- The consideration provided for the release

Barton v. Brassring, Inc., 2006 Mass. Super. LEXIS 549, at *9-10 (Mass. Super. Ct. Oct. 24, 2006). Not every factor listed above must be satisfied for a release to be valid. The question to be answered is, when looking at the totality of the circumstances, was the employee's waiver of rights knowing and voluntary? Id. (employee's consent to separation agreement was voluntary and knowing: she was educated, held a management position, and had several days to consider agreement).

Thus, employers are advised to give employees ample time to consider a release and consult an attorney to avoid the suggestion that the release was involuntary and is unenforceable.

Sample Release Language

The following release language may be inserted into a Massachusetts release agreement. For a sample comprehensive, Massachusetts release agreement, see Settlement Agreement and Release of Claims for Single-Plaintiff Employment Dispute (MA). For additional

information on effectively releasing age discrimination claims pursuant to the Older Workers Benefit Protection Act (OWBPA), see Complying with the Heightened Waiver Requirements Under the Older Workers Benefit Protection Act.

> Employee knowingly and voluntarily releases and forever discharges the Company, its affiliates and subsidiaries, and its and their predecessors- and successors-in-interest, insurers, and assigns ("The Corporate Releasees"), and each of the Corporate Releasees' current and former employees, attorneys, officers, directors, and agents, both individually and in their corporate capacities of and from any and all claims, known and unknown, asserted or unasserted, which Employee has or may have against them from the beginning of the world until the effective date of this Agreement, including, but not limited to, any alleged violation of: Title VII of the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Americans with Disabilities Act of 1990; and the federal Worker Adjustment and Retraining Notification, Fair Credit Reporting, Family and Medical Leave, and Equal Pay Acts; the Massachusetts Fair Employment Practices Law, Gen. Laws ch. 151B; the Massachusetts Civil Rights Act, Gen. Laws ch. 12, § 11; the Massachusetts Equal Rights Act, Gen. Laws ch. 93; the Massachusetts Small Necessities Act, Gen. Laws ch. 149 § 52D; the Massachusetts Privacy Statute, Gen. Laws ch. 214, § 1B; the Massachusetts Equal Pay Act, Gen. Laws ch. 149 § 105A-C; the Massachusetts Parental Leave Act, Gen. Laws ch. 149, § 105D; the Massachusetts AIDS Testing Act, Gen. Laws ch. 111 § 70F; the Massachusetts Consumer Protection Act, Gen. Laws ch. 93A; the Massachusetts Equal Rights for the Elderly and Disabled Law, Gen. Laws ch. 93 § 103; the Massachusetts Anti-Sexual Harassment Statute, Gen. Laws ch. 214, § 1C; the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, §§ 148 et seq.; the Massachusetts Wage and Hour Laws, Gen. Laws ch. 151 §§ 1A et seq.; the Massachusetts age discrimination law, Mass. Gen. Laws ch. 149, §§ 24A et seq.; and any other federal, state or local law, regulation or ordinance, all as amended; any public policy, contract, tort, or other common law; and any claim for fees or expenses, including without limitation, attorneys' fees and costs. This Release excludes any claims or rights that cannot be waived by law.