ASSOCIATED INDUSTRIES OF MASSACHUSETTS

EMPLOYER HOTLINE 800.470.6277

2020 Edition

State & Federal Employment Laws

EMPLOYMENT LAWS FOR MASSACHUSETTS COMPANIES

A Reference Guide

SPONSORED BY: McLane Middleton

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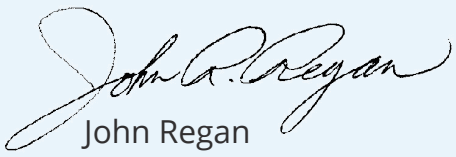
Thank you for your continued membership in AIM. As I write this, every employer in Massachusetts has been affected by Covid-19. AIM and AIM HR Solutions have been working to provide members with as much information as possible about how to manage their business during this difficult period. While the fluidity of the situation makes it impossible to update the reference guide regularly, we urge you to visit our website for updated information (aimnet.org/covid-19-resource-page-for-employers/), contact the AIM HR Hotline at 1-800-470-6277 with your Covid–19 HR questions, join us for our 30 on Thursday Covid–19 webinar series, and follow our regular publications for the latest information, including our weekly newsletters and the biweekly *HR Edge*.

These are unprecedented times for the economy in Massachusetts, the United States, and the world. AIM will continue to do its utmost to ensure you have the latest available information as it develops.

Sincerely,



John Regan
President & CEO
Associated Industries of Massachusetts

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ASSOCIATED INDUSTRIES OF MASSACHUSETTS
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ASSOCIATED INDUSTRIES OF MASSACHUSETTS

AIM engages in public policy work on behalf of thousands of Massachusetts employers who together employ one out of five residents of the commonwealth. We do so guided by the belief that only a vibrant, private-sector economy creates opportunity that binds the social, governmental, and economic foundations of our commonwealth. Our top-notch government affairs advocates work tirelessly on Beacon Hill and Capitol Hill in support of the issues that matter to employers: the cost of health care and energy; employment law; the legislative budget, taxes, and finance; and workforce development and regulations.

Any member interested in learning more about AIM's public policy work may contact Bradley A. MacDougall, Senior Vice President, Government Affairs, at 617-262-1180 or bmacdougall@aimnet.org. For more information, visit www.aimnet.org or follow us on Twitter @AIMBusinessNews.

AIM HUMAN RESOURCE HOTLINE: 800-470-6277

The AIM HR Hotline, a ready resource for AIM members, responds to hundreds of questions each month on topics such as employment law, employee relations, policies and procedures, compensation, employee benefits, performance management, discipline and discharge, and employment trends.

HR SOLUTIONS

AIM HR Solutions works with organizations to align their HR strategy to current business goals and objectives.

- Talent management, which focuses on workforce planning, recruitment, retention, employee training and development, and the full life cycle of the employee.
- HR strategies, which address a company's strategic direction in areas such as compensation, benefits, and the overall HR plan.
- Compliance to assist employers in understanding and complying with the ever-increasing number of regulatory issues that govern HR.

Our knowledgeable staff can assist directly with the implementation of programs and policies, and provide HR expertise on projects that arise in the day-to-day business of maintaining excellence in employer-employee relations. For more information, please visit AIMHRSolutions.com.

McLANE MIDDLETON

AIM is pleased to have the law firm of McLane Middleton as the exclusive sponsor or our 2020 *Employment Laws for Massachusetts Companies Reference Guide*. Our relationship with McLane Middleton extends back to 2011.

Founded in 1919, McLane Middleton, Professional Association has been committed to serving their clients, community and colleagues for over 100 years. They are one of New England's premier full-service law firms with offices in Woburn and Boston, Massachusetts, and Manchester, Concord and Portsmouth, New Hampshire. Driven by the firm's depth of sophisticated legal expertise and an unwavering commitment to client service, McLane Middleton has built collaborative and lasting relationships with a broad spectrum of domestic and international clients. The firm holds the respected honor of being listed as one of America's leading law firms in Chambers USA: America's Leading Business Lawyers as well as being included in The Best Lawyers in America publication, Martindale Hubbell and Super Lawyers.

McLane Middleton's Employment Law Practice Group is committed to meeting its clients' unique needs when it comes to employment law and managing their workplace. The group's risk management approach and client-focused responsiveness helps to ensure compliance with state and federal laws and prevent personnel problems before they arise. When lawsuits occur, the group's highly knowledgeable employment litigators work collaboratively with the firm's other practice groups to provide comprehensive representation in defending their clients' organizations. The group's primary goal is to help resolve disputes successfully and in a cost-efficient way for its clients. McLane.com

Attorneys from McLane Middleton have worked closely with our team at AIM to provide the most up-to-date information on federal and Massachusetts laws. AIM genuinely appreciates this partnership and thanks McLane Middleton for their long-standing support. Special thanks to employment counsel of McLane Middleton, P.A. for partnering with AIM on the 2020 edition of AIM's Employment Law Reference Guide: Charla Stevens, Adam Hamel, Laura Kahl and Andrew P. Botti.

ABOUT THIS GUIDE

This *Employment Laws Reference Guide* has been prepared by the staff of Associated Industries of Massachusetts (AIM) with the editorial assistance of members of the Employment Practice Group of the McLane Middleton Professional Association and is intended for use by AIM members as a quick reference for understanding state and federal laws, regulations, and policies affecting employers in Massachusetts. The laws and regulations listed reflect the most common areas of concern. Substantive, new, or updated information added for 2020 is presented in color. The reference guide, however, must always be used within the context of each individual company's human resources practices and policies, as well as within the context of any collective bargaining or other employment agreement. Please consult with your employment law attorney before taking any action based on this reference guide. The laws are current as of the time of this guide's printing. Significant changes will be reflected in subsequent annual updates. Members are encouraged to sign up to receive AIM's biweekly e-newsletter, the *HR Edge*. AIM regularly publishes articles in the *Edge* updating members on new employment-related developments based on statutory and regulatory changes as well as court decisions throughout the year. All citations for the statutes are to the Massachusetts General Laws (MGL) and to the Code of Massachusetts Regulations (CMR).

At the end of this guide is a list of websites where you can access required posters and other compliance-related information.

COMPLIANCE TIPS

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

AIM HR SERVICE

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

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

A NOTE ABOUT THE IMPACT OF DIFFERENCES IN FEDERAL AND STATE LAWS:

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

To cite an example, the federal minimum wage is $7.25 per hour, while the Massachusetts minimum wage is currently $12.75 (1-1-2020) per hour. Employers must follow the higher- or stricter-standard state law. Exceptions to this permissive doctrine do exist. For example, the federal Occupational Safety and Health Act (OSHA) generally preempts state health and safety laws, creating a uniform national standard. Likewise, the federal Employee Retirement Income Security Act (ERISA) generally preempts state laws relating to retirement or welfare benefit plans..

I. HIRING

BACKGROUND AND CREDIT CHECKS

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

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

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

Employers must take care to protect the confidentiality of the information obtained through background checks by properly storing it, limiting access to those who have a business need for it, and securely disposing of it when no longer needed.

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

CRIMINAL OFFENDER RECORD INFORMATION (MA ONLY)

The Massachusetts Criminal Offender Record Information (CORI) process allows employers to request CORI on an applicant to determine if the applicant has a criminal record in Massachusetts. The Department of Criminal Justice Information Services (DCJIS) issued new CORI regulations in 2017. Information from the 2017 regulations is presented below. The legislature amended the CORI law in 2018. Those changes are highlighted below as well.

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

The DCJIS is responsible for maintaining a CORI database and providing employers with access to it. The law establishes several additional changes to the CORI system:

- Private employers have access to CORI records through an online database accessible for a fee of $25 per record. Employers that were previously ineligible to access the CORI database now have the option of using the CORI system.

- The law limits the information that most employers may obtain through the CORI system to
  - felony records for seven years following the disposition of the felony;
  - misdemeanor records for three years following the disposition of the misdemeanor;
  - pending criminal charges.

Convictions for murder, voluntary manslaughter, involuntary manslaughter, and certain sexual offenses are available in the CORI database permanently. The law does not affect the scope of the information available to employers that are required by law to conduct criminal background searches on job applicants.

- Criminal justice agencies will continue to have virtually unlimited access to CORI, including sealed records. In addition, others submitting a request for CORI to the DCJIS will continue to have access to CORI to the extent authorized by law. These include individuals and agencies required by statute to have access to CORI (e.g., employers that provide services to vulnerable communities, such as children, the elderly, or individuals with disabilities) and those that request CORI to evaluate current and prospective employees, including full-time, part-time, and contract employees; interns; and volunteers.
- Employers must provide an applicant with a copy of his or her criminal record before questioning the applicant about the record or before making an adverse decision based on the record.
- Unless otherwise required by law or court order, an employer must properly discard CORI obtained from the DCJIS no later than 7 years from an individual's last date of employment or volunteer service or from the date of the final decision regarding the individual, whichever occurs later.
- Employers are required to limit and monitor the dissemination of CORI, which may be shared only with employees who "need to know" the information, and to maintain a "secondary dissemination log," which details when and to whom the CORI information was given beyond the requesting organization.
- Employers are protected from failure-to-hire claims based on erroneous information on a candidate's CORI and from negligent hiring claims if the employer relies on CORI when making its decision.

Amendments to the law in 2018 include the following:

- Prohibiting employers from asking applicants about sealed or expunged criminal records
- Requiring employers requesting criminal record information to *include the following language on any requests provided to applicants*:
  - An applicant for employment with a record expunged pursuant to law may answer "no record" with respect to an inquiry herein relative to prior arrests, criminal court appearances, or convictions.
- Enhanced legal protections for employers in cases of a negligent hiring claim. The law now presumes that an employer does not have notice of
  - records that have been sealed or expunged;
  - records about which employers may not inquire under Massachusetts anti-discrimination law; and
  - records concerning crimes that the DCJIS may not lawfully disclose to an employer.

Compliance Tip: *Employers who annually conduct five or more criminal background investigations must establish and maintain a written CORI policy that provides that they will, in addition to any obligations required by the commissioner by regulation, (1) notify the applicant of the potential of an adverse decision based on CORI, (2) provide a copy of the CORI and the policy to the applicant, and (3) provide information concerning the process for correcting a CORI.*

The 2017 regulations define CORI as records and data compiled by a Massachusetts criminal justice agency concerning an identifiable individual and relate to the nature or disposition of a criminal charge; an arrest; a pretrial proceeding; other judicial proceedings; or hearings in which the defendant was detained prior to trial or released with conditions, sentencing, incarceration, rehabilitation, or release.

- CORI now applies only to people 18 years of age or older, unless the person under 18 years of age was adjudicated as an adult. (CORI previously applied to people 17 years of age or older.) CORI does not include any offenses not punishable by incarceration.
- The 2017 regulations define employees as individuals currently employed by the requestor. These include volunteers; subcontractors; contractors; vendors; and special state, municipal, or county employees. This is a significant broadening of the term "employee" and is not consistent with many other state law definitions, such as that in the Massachusetts Independent Contractor Law.
- Any employer requesting CORI must enter into an iCORI Agency Agreement, which addresses the following issues:
  - Requestor agrees to comply with the CORI laws and regulations.
  - Requestor must maintain an up-to-date "need to know" list and provide all staff members who request, review, or receive CORI with the CORI training materials.
  - Requestor shall request only the level of CORI access authorized under statute or by the DCJIS.
  - Requestor is liable for any violations of the CORI laws or regulations; individual users of the requestor's account may also be liable for said violations.
- The DCJIS has developed model CORI Acknowledgment Forms, which are available from its website. The website is listed in the back of the guide.

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

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

AIM HR Service: AIM provides reference and background checking services and workplace incident investigations.

EMPLOYMENT APPLICATIONS

While no state law requires the use of employment applications, AIM strongly urges employers to adopt and use them for every hiring decision in order to follow consistent practices. It is also recommended that applicants be required to swear to or affirm the veracity of the information contained in the application. For employers that use employment applications as part of the hiring process, various Massachusetts employment laws require the following:

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

Under the law, questions may be asked about criminal history later in the employee selection process. The Massachusetts Commission Against Discrimination (MCAD) takes the position that the first time an employer can ask an applicant about his or her criminal history is during or after an in-person or telephone interview. Recent annual reports from MCAD now include cases that cite violations of the CORI law. In one case, a temporary-help agency that violated the ban-the-box provision of the law was required to pay $6,000 to the employee as part of a settlement agreement.

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

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

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

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

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

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

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

AIM HR Service: *AIM HR Solutions sells compliant job applications; these are downloadable from the AIM HR Solutions website at www.AIMHRSolutions.com.*

INDEPENDENT CONTRACTORS

Massachusetts law very narrowly defines who may be classified as an independent contractor. For an employer to demonstrate that someone is an independent contractor under Massachusetts law, the employer must be able to show that the worker meets all three of the following tests:

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

Failure to meet any one of the three tests means that the person is an employee. Pursuant to this law, the Office of the Attorney General published an advisory that is available on its website. The advisory discusses the law in detail and describes the imposition of civil and criminal penalties for violations of the law.

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

JOB DESCRIPTIONS

While there is no legal requirement that an employer have formal job descriptions, there are many benefits to having well-defined duties, responsibilities, and physical and mental skill/education requirements. In addition to being useful in the employee selection process and in setting clear performance expectations, the job description is essential:

- when sending an applicant for a post-offer, pre-employment medical examination;
- when determining if an employee is "fit for duty" to return to work following an injury or an illness;
- when determining how to accommodate an individual under the Americans with Disabilities Act;
- when classifying employees as exempt or non-exempt under the Fair Labor Standards Act.

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

NON-COMPETE AGREEMENTS

For the first time ever, Massachusetts in 2018 adopted a statutorily based non-compete agreement (NCA) law, superseding the long-standing common law–based NCA. The new law contains many provisions limiting the use of NCAs. The key ones include a definition of NCA, limits on duration and geography, a garden leave provision, and a limitation on the categories of employees subject to an NCA.

Under the new law, an NCA is defined as an agreement between an employer and an employee in which the employee or expected employee agrees that he or she will not engage in competitive activities with his or her employer after the employment relationship has ended. In return, the employer must provide consideration (defined below) to the employee.

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

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

7. **Consideration.** It must be supported by a garden leave clause or another mutually agreed upon consideration between the employer and the employee. The garden leave must provide for the payment of at least 50% of the employee's highest annualized base salary paid within the 2 years preceding the employee's termination and not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments unless the period has been increased beyond 12 months due to a breach (see number 4 above).
8. **The agreement must be consonant with public policy.**

On the other hand, the ban on NCAs does not include:

- covenants not to solicit or hire employees of the employer;
- covenants not to solicit or transact business with customers, clients, or vendors of the employer;
- NCAs made in connection with the sale of a business entity, or substantially all of the operating assets of a business entity or partnership, or the disposal of the ownership interest of a business entity or partnership (or division or subsidiary thereof) when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity that will receive significant consideration or benefit from the sale or disposal;
- noncompetition agreements outside an employment relationship;
- forfeiture agreements;
- nondisclosure or confidentiality agreements;
- invention assignment agreements;
- garden leave clauses;
- noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given 7 business days to rescind acceptance; or
- agreements by which an employee agrees to not reapply for employment to the same employer after termination.

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

NON-DISCLOSURE AGREEMENTS

Non-disclosure agreements require employees not to reveal any confidential information—such as trade secrets, recipes, or inventions—after they leave the company. The non-disclosure agreement should specifically discuss the types of information the employee will be exposed to and is prohibited from disclosing. A non-disclosure agreement typically does not cover information that could easily be obtained from other sources or that becomes public knowledge.

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

NON-PIRACY AGREEMENTS

A non-piracy, or anti-piracy, agreement is like non-compete and non-disclosure agreements. It prevents former employees from soliciting former customers and clients to leave the former employer and patronize the former employee in his or her new position. It can also seek to prevent former employees from soliciting their former colleagues at the old employer to leave and join the former employee at his or her new place of business. These agreements must be reasonable in the geographical area covered and in their duration, and will typically be

enforced only for customers with whom the former employee actually had a relationship. Courts are sensitive to protecting a customer's choice of vendor, so the free choice of a customer to leave and join with a former employee, without actual solicitation, cannot generally be prevented. As with all such clauses, employers should draft these as narrowly as possible to increase the likelihood of enforcement while protecting their important client and employee relationships.

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

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

POLYGRAPH TESTING

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

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

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

PRE-EMPLOYMENT PHYSICALS AND MEDICAL INQUIRIES

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

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

Compliance Tip: *Employers who require pre-employment physical examinations should take care to require them of all similarly situated employees in order to avoid claims of discrimination.*

RETENTION OF APPLICATIONS

In order to respond to a Title VII discrimination charge or an age discrimination charge under the federal Age Discrimination in Employment Act (ADEA), applications for candidates who were not hired must be retained for one year. In addition, under Title VII, application forms for persons applying for apprenticeship programs must be kept for two years following the date of the application.

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

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

II. DISCRIMINATION IN EMPLOYMENT

AFFIRMATIVE ACTION

Under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973, employers are required to establish written affirmative action plans (AAPs) documenting the employment of females, minorities, and individuals with disabilities for each of their establishments if they have a total of 50 or more employees and meet one of the following four criteria:

- have entered into at least one government contract as a contractor or subcontractor for $50,000 or more in any 12-month period
- have government bills of lading, which in any 12-month period total, or can reasonably be expected to total, $50,000 or more
- serve as a depository of government funds in any amount
- are a financial institution that is an issuing and payment agent for U.S. savings bonds and savings notes in any amount

AIM HR Solutions provides AAP-related services. For more information, please contact the AIM Hotline at 800-470-6277.

VIETNAM-ERA VETERANS

Contractors required by the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)(those with 50 or more employees and a contract of $150,000 or more) to develop a written AAP must also establish a hiring benchmark for protected veterans each year or adopt the national benchmark provided by the Office of Federal Contract Compliance Programs (OFCCP). Under either approach, contractors must compare the percentage of employees who are protected veterans in each of their establishments to the hiring benchmark set for that establishment.

AGE DISCRIMINATION

The federal Age Discrimination in Employment Act (ADEA) prohibits an employer with 20 or more employees from discriminating based on age against an employee 40 years of age or older in any employment actions. Massachusetts anti-discrimination law also prohibits discrimination on the basis of age beginning at age 40.

The Supreme Judicial Court of Massachusetts has ruled that a case alleging age discrimination must be based on a "substantial" difference in age, which it defined as no less than five years, unless there is other evidence to prove discriminatory intent by the employer.

REASONABLE FACTORS OTHER THAN AGE (RFOA)

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

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

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

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

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

EXAMPLE 1: LEGAL

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

EXAMPLE 2: ILLEGAL

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

FORCED RETIREMENT

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

ANTI-DISCRIMINATION

The federal Civil Rights Act of 1964 includes Title VII, which prohibits all forms of discrimination based on race, color, sex, religion, and national origin in all phases of the employment relationship. The federal law covers all employers of 15 or more employees and is enforced by the EEOC. Massachusetts anti-discrimination law covers employers of 6 or more and includes all the protected classes under federal civil rights law as well as ancestry, age, genetic information, disability, veteran status, military status, gender identity, and sexual orientation (MGL c. 151B § 4). The Massachusetts Commission Against Discrimination (MCAD) enforces Massachusetts anti-discrimination law. The Massachusetts Appeals Court has agreed with the MCAD position that an individual may be held personally liable for certain discriminatory actions under the state's anti-discrimination law. An individual alleging discrimination must file a complaint with the MCAD or the EEOC within 300 days of the alleged occurrence.

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

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

- **Bona fide occupational qualification (BFOQ) r**efers to a qualification for a position that is discriminatory but is permissible provided the employer can demonstrate that the qualification is reasonably necessary to the normal operation of the business. According to the law, in very limited situations, an employer may discriminate on the basis of age, sex, religion, or national origin. Examples include the following:
  - Age: when the federal government imposes a mandatory retirement age for safety reasons (e.g., pilots)
  - Sex: when a position is limited to a single sex based on privacy or safety (e.g., staff who bathe patients)
  - Religion: when an employer hires someone of a certain faith to perform certain faith-based activities (e.g., religious teacher)
  - National origin: when an employer has a federal contract stating that only U.S. citizens or U.S. persons (those born in the United States or naturalized citizens) may perform work on that contract
- **Disparate impact** exists when an employer has an apparently neutral policy that has an adverse impact on a member or members of a legally protected class. The burden of proof is on the employee, but if the employee proves disparate impact, the employer may be able to defend itself by showing that the policy is a BFOQ.
- **Disparate treatment** exists when an employer intentionally treats a member of a protected class less favorably than other employees in terms of employment. The burden is on the employee to prove the disparate treatment.

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

BURDEN OF PROOF

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

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

Most cases do not involve direct evidence of discrimination. To help bring the full story to light, the U.S. Supreme Court in its McDonnell Douglas decision established the three-step burden-shifting test to govern an employee's discrimination allegation. The three steps are as follows:

1. Plaintiff (employee) has to state a very simple case, one that does not require direct evidence.
2. Defendant (employer) must provide a legitimate reason for the challenged employment decision.
3. Plaintiff must prove that the reason offered by the defendant in step 2 is "a pretext for discrimination."

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

According to its FY 2019 annual report (the most recent available), the MCAD found LOPC in 86% of the claims it considered. Given an employer's responsibility to respond with a legitimate reason supporting the claim that its employment action was not discriminatory, the 86% success rate shows that clear and accurate documentation of a personnel action is essential when responding to any discrimination complaint.

ARMED SERVICES

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

DISABILITY: FEDERAL LAW

The Americans with Disabilities Act (ADA) applies to employers of 15 or more employees. It prohibits an employer from discriminating against a qualified individual who happens to have a disability.

A "qualified individual" is a person who meets bona fide skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position either with or without a "reasonable accommodation." The reasonable accommodation process requires the employer and employee/applicant to engage in an interactive dialogue to determine what if any accommodation may be needed. Examples of reasonable accommodation include adjustments to a employee's working conditions, work schedule, or possible reassignment to an open position.

As part of the interactive process, the employer has the right to request medical documentation to support the disability statement. This is where it's very useful for the employer to have the proper up-to-date job description for the medical provider to review considering the person's disability.

Disability is defined by the ADA as

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

The ADA Amendments Act (ADAAA) greatly expanded the definition of disability and, therefore, the statute's coverage. The ADAAA was passed in response to a number of Supreme Court decisions that limited the coverage of the law, often by narrowing the definition of what it meant to be disabled. In adopting the ADAAA, it appears

that Congress's intent was to shift the focus away from whether the plaintiff (applicant/employee) met the definition of what it means to be disabled to whether the employer complied with its obligations to engage in an interactive process to determine if the qualified individual can work, with or without a reasonable accommodation.

THE ADAAA

- reinforces the concept that an impairment must substantially limit a major life activity in order to be considered a disability;
- expands the list of major life activities to include but not be limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working;
- prohibits the consideration of mitigating measures—such as medication, prosthetics, and assistive technology—in determining whether an individual has a disability, with the exception of ordinary eyeglasses and contact lenses;
- provides coverage to people who experience discrimination based on a perception of impairment, regardless of whether the individual experiences a disability; this does not, however, apply to transitory and minor impairments for which the impairment is expected to last less than six months;
- makes clear that employers will not be required to provide a reasonable accommodation to individuals who are "regarded as" disabled;
- retains the requirement that the employee/applicant has the burden of proof in demonstrating that he or she is qualified and able to perform the job.

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

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

An applicant cannot legally be asked to provide medical information (or be asked about prior workers' compensation claims) before a bona fide offer of employment.

Compliance Tip: *Private litigants in U.S. courts and the EEOC continue to focus on how an employer may make a reasonable accommodation to an applicant with a disability via its web page as a way to investigate job opportunities or apply for a position. Any employer that relies on its web presence to invite applicants needs to review its site to make sure it is ADA compliant.*

DISABILITY: STATE LAW

Like the ADA, Massachusetts law provides protection against employment discrimination for "qualified" (able to perform the essential functions of the position either with or without a reasonable accommodation) individuals with disabilities. Employers of six or more employees must reasonably accommodate a qualified person unless to do so would cause undue hardship to the employer. In addition, an employer may not make any pre-employment inquiry as to whether the applicant has a disability or as to the nature or extent of the disability. A company may condition an offer of employment on the applicant successfully passing a medical examination conducted to ascertain whether the applicant can, with or without a reasonable accommodation, fulfill the essential functions of the position (MGL c. 151B §§ 3, 4). Once employed, the employee may be asked to submit to a medical examination only when it is job related and consistent with business necessity.

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

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

In 2017, the Massachusetts Supreme Judicial Court ruled that a qualified handicapped individual includes a disabled person that uses medical marijuana to treat the disability. This ruling means that an employer may need to make a reasonable accommodation for the applicant's or employee's disability. To determine the nature of the reasonable accommodation, if any, the employer must enter into an interactive dialogue with the disabled person. Please see the discussion on medical marijuana in Section IV below for more details.

ENGLISH-ONLY RULES

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

GENDER IDENTITY

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

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

GENDER DISCRIMINATION AND SOCIAL STEREOTYPING

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

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

GENETIC DISCRIMINATION

The federal Genetic Information Nondiscrimination Act (GINA)

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

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

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

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

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

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

INVESTIGATIONS

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

CONFIDENTIALITY

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

NATIONAL ORIGIN/ANCESTRY

It is illegal to discriminate against an applicant or an employee on the basis of characteristics associated with national origin or ancestry, such as being married to a person of a particular national origin, having participated in organizations identified with a particular national origin, or having a name associated with a particular national origin. Due to the significant increase in I-9 compliance audits by U.S. Citizenship and Immigration Services (USCIS), employers should be very alert to the fact that they will face increased scrutiny over possible disparate treatment of employees not born in the United States during the I-9 preparation process.

PREGNANCY

An employer subject to state and/or federal anti-discrimination laws may not deny a woman the right to work or restrict her job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. Any employer questioning a pregnant employee's ability to perform her job should seek a fitness-for-duty report on the employee before taking any action. The mere fact of pregnancy does not automatically establish a disqualifying disability. An employer may

not legally use a woman's pregnancy, childbirth, or potential or actual use of maternity leave as a reason for any adverse job action, such as refusing to hire or promote her, discharging her, laying her off, failing to reinstate her, or restricting her duties.

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

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

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

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

In a 2015 U.S. Supreme Court case, the employer claimed no need to provide modified duty to a pregnant employee, while the employee and the U.S. government argued that the EEOC's guidance required the employer to do so. The Supreme Court rejected both approaches, instead deciding that if an employee can show that the employer has a modified duty plan for others, such as injured employees, then the employer has the burden to prove why it cannot accommodate a pregnant employee. In addition, the employer cannot use reasons such as "too expensive" or "too inconvenient" as a valid justification for refusing the accommodation.

PREGNANT WORKERS FAIRNESS ACT

This law requires all Massachusetts employers with six or more employees to make a reasonable accommodation for an employee's pregnancy or pregnancy-related condition, such as to express milk for a nursing child.

Examples of accommodations include more frequent or longer paid or unpaid breaks; time off to attend to a pregnancy complication or to recover from childbirth, with or without pay; acquisition or modification of equipment or seating; temporary transfer to a less strenuous or less hazardous position; job restructuring; light duty; private non-bathroom space for expressing breast milk; assistance with manual labor; and a modified work schedule.

The law prohibits

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

An employer may claim an undue hardship if it can show the following: the nature and cost of the needed accommodation; the overall financial resources of the employer; the overall size of the business with respect to the number of employees and the number, type, and location of its facilities; and the effect of the accommodation on expenses and resources, or any other impact of the accommodation on the employer's business.

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

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

AIM has developed a model policy to assist employers in complying with the Pregnant Workers Fairness Act. Employers interested in obtaining a copy of the model policy may contact AIM HR Solutions: info@AIMHRSolutions.com.

RACE/SKIN COLOR

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

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

RELIGION

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

Under Massachusetts law, an employer may require any employee intending to be absent from work for religious reasons to notify it at least 10 days in advance. An employer may refuse to accommodate such a request if it can show that such an accommodation would be an undue hardship on the business. The employer always has the burden to demonstrate the hardship. The employer need not pay the employee for the day and can, whenever practicable in the judgment of the employer, arrange to have the employee work another day to make up the time. The employee has the burden of proof as to the required practice of his or her creed or religion.

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

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

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

On the other hand, in a 2004 federal court decision involving a dress code policy that would, among other things, ban facial piercings at Costco, an employee claimed that her faith (the Internet-based Church of Body Modification, which promotes piercings and tattoos) required her to wear her facial piercing at all times. Costco told the employee she could either cover it with a bandage or replace it with a clear space holder during the workday. She refused to comply, citing religious discrimination. In deciding the case, the U.S. Court of Appeals for the First Circuit ruled that the employee's claim of religious rights were not essential tenets of the church and that therefore the accommodations offered by Costco were reasonable and did not violate the anti-discrimination law.

Employers should proceed cautiously when implementing dress/grooming policies or when dealing with such issues as facial hair, body and facial piercings, and tattoos, since these can be based on religious practices (MGL c. 151B § 4).

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

RETALIATION

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

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

In its FY 2019 annual report (the most recent available), the MCAD reported that retaliation claims were the second most frequently (21%) cited claim. Slightly more than 51% of all claims filed with the EEOC in 2018 involved retaliation charges, usually coupled with another charge.

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

REVERSE DISCRIMINATION

The U.S. Supreme Court has ruled that the state of Connecticut discriminated against white firefighters when it discarded the results of a test for promotion because too few minority firefighters had passed. The court ruled that such an action discriminated against the white firefighters who had passed the test, since the failure to promote was solely race based. Mere fear of litigation from the minority firefighters was an insufficient reason to discriminate against the white group, particularly since the city had "no strong basis in evidence" to believe it might lose a disparate impact claim by the minority workers.

This decision makes it more difficult for employers to discard the results of hiring and preferment tests once they are administered, even if they have a disproportionately negative impact on members of a specific group. Such race-based actions are prohibited under Title VII unless the employer can show a "strong basis in evidence" that it would be liable for disparate impact discrimination had it not taken the action. This decision applies to all employers and all procedures used to assess, rank, and sort current and potential employees.

SAME-SEX HARASSMENT

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

SAME-SEX MARRIAGE

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

SEXUAL HARASSMENT

Sexual harassment is a form of illegal sex discrimination under both state and federal law. In Massachusetts, all employers of six or more employees must have a sexual harassment policy that is distributed to new employees when they are hired and to all employees annually. Volunteers may not sue under the Massachusetts sexual harassment law.

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

The Massachusetts Commission Against Discrimination has developed a model policy that employers may use. The commission has also issued sexual harassment prevention guidelines outlining employer responsibilities in

responding to a sexual harassment complaint, including the duty to investigate. The model policy and the guidelines are available at www.mass.gov/mcad. These guidelines indicate that training of managers and supervisors is strongly encouraged.

AIM HR Service: *For information on AIM's sexual harassment training programs, please call the AIM Hotline at 1-800-470-6277.*

SEXUAL ORIENTATION

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

VETERAN STATUS

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

The law also broadens the definition of "protected class" under the Massachusetts anti-discrimination law (MGL c. 151B) to include "status as a veteran." As a result, employers may want to consider including non-discrimination language regarding veterans' status in their recruiting materials, handbooks, employer websites, and employment applications.

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

III. NEW HIRE DOCUMENTATION

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

COBRA NOTIFICATION OF RIGHTS LETTER

The COBRA notification letter requires covered employers (i.e., employers of 20 or more employees that offer health insurance) to notify eligible employees about their rights under COBRA. The letter must be sent to employees and their spouses and dependents at the time they become eligible for coverage. Employers should make sure to document their compliance with the requirement by keeping a copy of the letter in an employee's personnel file or by sending it certified mail with a return receipt requested. A copy of this letter is available in the Department of Labor's COBRA website.

EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9)

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

U.S. Citizenship and Immigration Services (USCIS) released a new employment eligibility verification form (Form I-9) at the very end of January. The new form includes a 10-21-2019 effective date, but its use will not become mandatory until May 1, 2020. In the meantime, during the transition period prior to May 1, 2020, employers may use either the previous or the new version of the form. Please see Section IV, Employment, for more detailed information on the new Form I-9.

PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

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

The required information must be submitted to the Massachusetts DOR within 14 days of the employee's effective date of employment or effective date of reinstatement after a lapse in pay (a lapse in pay would be a period beyond 30 days). This report must contain the employer's identification number, name, and address, as well as the employee's name, address, social security number, and hire or reinstatement date.

PERSONNEL PRACTICE REMINDERS

Have employees receive and sign for their employee handbook, any specific policies (conflict of interest, sexual harassment, ethics, non-compete, non-disclosure, data security), and relevant company materials.

IV. EMPLOYMENT

DATA SECURITY

The primary existing Massachusetts data privacy and security laws are contained in Chapters 93H and 93I. Chapter 93H consists of two major requirements: (1) notification in the event of breach and (2) preventive measures to avoid breach. Chapter 93I defines how employers may properly dispose of documents or data containing personal information of any Massachusetts resident. Paper records containing personal information must be "redacted, burned, pulverized or shredded," and electronic data must be "destroyed or erased."

Chapter 93H mandates that any employer that knows or has reason to know of a breach concerning the personal information of any current or former Massachusetts resident (including employees, customers, potential customers, and vendors) must notify the individuals affected by the breach as well as the appropriate local, state, and federal regulatory authorities (including the Massachusetts Attorney General's Office). The law applies to all entities engaged in commerce that maintain electronic or paper files containing personal information about any residents of Massachusetts.

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

Breach of security is defined by statute as "the unauthorized acquisition of unencrypted data or encrypted electronic data along with the confidential process or key that may compromise the security, confidentiality, or integrity of personal information maintained by a person or agency that creates a material risk of identity theft." In addition, a breach of security includes any unauthorized acquisition or use that creates a substantial risk of identity theft or fraud. If a breach occurs, the employer must notify the affected individuals "as soon as practicable and without unreasonable delay." The notice must be in writing and include information on how the individuals can obtain a police report, how they can ask consumer reporting agencies to impose a security freeze, and any fees required for the freeze. The employer must also provide notice to the Massachusetts attorney general and the director of consumer affairs and business regulation.

In addition to requiring notification in the event of breach, Chapter 93H and its implementing regulations (201 CMR §§ 17.01–17.05) require all entities with personal information about any Massachusetts resident to "develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical and physical safeguards that are appropriate to … size, scope, and type of business …, the amount of resources available [to the business], … the amount of stored data, and the need for security and confidentiality" of such information. That security program must, at the least, assess and address the following matters:

- Identify and categorize reasonably foreseeable internal and external risks, and evaluate and improve the effectiveness of existing safeguards (i.e., conduct a comprehensive risk assessment).
- Develop written security policies and practices governing the acquisition, retention, access to, transmission, transportation, and disposal of personal information in both hard copy and electronic formats.
- Implement reasonable technological safeguards, including but not limited to appropriate user authentication; appropriate access controls; encryption of all personal information transported physically or transmitted in both hard copy and electronic formats; and appropriate firewalls, patching/updating, anti-virus/anti-malware/anti-ransomware, and intrusion detection.
- Implement reasonable safeguards for physical access to records and equipment that contain personal information in both hard copy and electronic formats.
- Designate an employee who is responsible for maintaining the information security program.
- Train employees on information security, discipline them for violations of the information security program rules, and cut off terminated employees' access to information.

- Take all reasonable steps to verify that third-party service providers with access to personal information are complying with Massachusetts law and regulations, and enter into appropriate confidentiality and information security agreements with such third-party service providers.
- Regularly test and monitor to determine if the information security program is effective and to detect and remedy any weaknesses.
- Investigate, respond to, and document any incident (including any breach and potential breach) involving protected information.
- Review and adjust the security program at least annually, or more frequently if there is a material change in business practices that may implement security.

DRUG TESTING

To date, Massachusetts has no statute governing employer drug testing of employees or applicants for employment. However, the Massachusetts Supreme Judicial Court has established principles for testing through case law, generally holding that random drug testing violates an employee's rights under the state privacy statute (see below) unless the job is safety sensitive, such as driving a vehicle or operating dangerous machinery. Under MCAD guidelines and the Americans with Disabilities Act (ADA), employers are advised to test only after a bona fide offer of employment has been made and to conduct all testing of prospective and current employees under a specific policy that has been made known to these individuals. According to the EEOC, it is permissible under the ADA if the employer tests applicants or employees for illegal drugs only and makes its employment decisions based on the results.

Massachusetts law recognizes four levels of employee drug testing:

1. **Post-offer pre-employment testing:** may be imposed on all applicants
2. **Post-accident:** limited to the testing of employees following workplace injuries (see the OSHA discussion in Section VIII, Safety, for more details)
3. **Reasonable suspicion:** testing applied on a case-by-case basis when the employer has a reasonable basis for doing so
4. **Random testing:** limited to the testing of employees in safety-sensitive occupations as defined by the employer

DRUG-FREE WORKPLACE ACT

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

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

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

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

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

FEDERAL CDL DRIVER DRUG TESTING

The federal government has a major new drug and alcohol initiative called the Commercial Driver's License (CDL) Drug and Alcohol Clearinghouse, which will take effect early next year. Established by the Federal Motor Carrier Safety Administration (FMCSA), the clearinghouse will contain information pertaining to violations of the DOT's controlled substances and alcohol testing program for CDL drivers.

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

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

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

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

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

EMPLOYER RESPONSIBILITIES

1. Register with the clearinghouse. A registration is valid for five years unless canceled or revoked.
2. Revise drug and alcohol testing policy. FMCSA regulations require employers to add language to their FMCSA drug and alcohol testing policies to notify drivers and driver-applicants that the following information will be reported to the clearinghouse:
    - a verified positive, adulterated, or substituted drug test result
    - an alcohol confirmation test with a concentration of 0.04 or higher
    - a refusal to submit to a drug or alcohol test
    - an employer's report of actual knowledge
    - on duty alcohol use
    - pre-duty alcohol use
    - alcohol use following an accident
    - drug use
    - a substance abuse professional's report of the successful completionof the return-to-duty process
    - a negative return-to-duty test
    - an employer's report of completion of follow-up testing
3. As of January 6, 2020, employers must seek information from the clearinghouse before allowing a newly hired CMV driver to begin operating a CMV. Drivers must sign a consent form allowing the employer to do so.

4. Employers must seek information from the clearinghouse at least once per year on each driver they currently employ. Drivers must sign a consent form allowing the employer to do so. The employer must maintain records of all requests and information obtained in response to the information request for a period of three years.
5. Employers must report drivers' drug and alcohol program violations, (see above) to the clearinghouse within three business days after the employer learns of the information.
6. Employers must prohibit drivers who have violated FMCSA's drug and alcohol program regulations from performing safety-sensitive duties unless the driver complies with the return-to-duty process, including requiring a substance abuse professional evaluation, possible treatment, return-to-duty testing, and follow-up testing.
7. Effective January 6, 2023:

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

PENALTIES

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

EMPLOYMENT AT WILL*

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

EMPLOYEE HANDBOOKS AND PERSONNEL POLICIES

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

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

or effect, and that the changes apply retroactively. Handbooks should not be given to applicants until they are hired.

Employers are not required by law to have written personnel policies except for those related to sexual harassment, the Pregnant Workers Fairness Act, earned sick time, the Family and Medical Leave Act, and, in some cases, Criminal Offender Record Information (for employers that request five or more per year). An employer of 20 or more employees that elects to have a written personnel policy must keep an updated copy of such policy on the employment premises.

AIM HR Service: AIM HR Solutions provides a variety of handbook-related services, including HR solutions on creating, reviewing, and editing handbooks, as well as model policies, a complete model handbook, and a handbook policy subscription service. Please contact the AIM Hotline at 800-470-6277 for more information.

EEO-1 REPORTS

All employers with at least 100 employees, and all employers with 50 or more employees and $50,000 or more in primary federal government contracts or first-tier contracts (subcontracts), must file an EEO-1 report annually (by March 31) with the EEOC. The filing date is a change from the long-standing September 30 date. All covered employers must use the EEO-1 form when filing the report. The revised form features changes to the racial and ethnic categories, as well as changes to the job categories. The form strongly endorses self-identification of race and ethnic categories by employees, as opposed to visual identification by employers. Given the possibility that the effective date and content requirements of the EEO-1 will change again in 2020, covered employers should be alert to information regarding possible changes prior to completing the form.

EMPLOYMENT ELIGIBILITY VERIFICATION/FORM I-9

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

Compliance Tip: *U.S. Citizenship and Immigration Services (USCIS) released a new employment eligibility verification form (Form I-9) at the very end of January. The new form includes a 10-21-2019 effective date, but its use will not become mandatory to use it until May 1, 2020. In the meantime, during the transition period prior to May 1, 2020, employers may use either the previous or the new version of the form.*

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

Section 1 of Form I-9 must be filled out by the employee by the first day of employment. The act also requires that employers complete Section 2 of Form I-9 by verifying the identity and work authorization of all employees within three business days of the employee's first day of employment and sets forth record-keeping requirements. To verify the identity and work authorization of an employee, the employer must view the actual identification document—not copies. This means that an employer may not rely on remote viewing technologies such as Skype to view the documents and verify them. If an employer is hiring a remote employee, the employer must use a local agent (local manager, notary public, etc.) to view and verify the documents. Employers must not specify which documents should be presented to demonstrate citizenship or work authorization. An employer may, but is not required to, make copies of an employee's documents. AIM recommends that employers make and retain copies on a consistent basis. Employers that choose to retain document copies must ensure that they make copies of all relevant documents, that their handling of Form I-9s is fully compliant with the statute, and that their practice of retaining copies is documented and followed consistently.

While I-9 forms may be filled out electronically, they must be printed out and manually signed. They may then be scanned and stored electronically if the specified electronic filing system standards are met. Otherwise, an employer may retain the I-9 in paper form. Though the law permits the comingling of personnel and I-9 files, AIM strongly recommends that employers maintain them separately to facilitate compliance with an I-9 audit. Employers must have an I-9 on file for every employee currently working unless the employee was hired prior to November 7, 1986. The immigration law further requires employers to retain a copy of the completed I-9 for three years from the date of hire or one year following the employee's termination, whichever is later. Failure to comply with the law may lead to significant monetary and criminal penalties.

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

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

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

E-VERIFY

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

Federal contractors must use the system for these employee categories:

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

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

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

EMPLOYMENT OF MINORS

For more information, please refer to AIM's Classification of Employees Reference Guide.

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

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

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

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

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

MARIJUANA

Massachusetts has two state laws governing the possession and use of marijuana. Both are briefly discussed below. Although state law permits the use of marijuana, it remains illegal under federal law, meaning certain employers that are subject to federal law will need to ignore state law in their policies and practices regarding marijuana.

Medical

In November 2012, Massachusetts voters passed by ballot referendum (popular vote) a law legalizing the use of marijuana for medical purposes (medical marijuana). This law is under the jurisdiction of the Massachusetts Department of Public Health (DPH), which promulgated implementation regulations in 2014. The commonwealth oversees the 35 authorized medical marijuana dispensaries.

The law does not require employers to tolerate any on-site use of medical marijuana in any place of employment. In most employment settings and situations, employers may treat marijuana use as one more item subject to its

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

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

Employers that have a zero-tolerance policy banning all drug use in the workplace should revise their policies to reflect the need to enter into a reasonable accommodation process based on an interactive dialogue when an applicant or employee seeks a reasonable accommodation under this ruling and presents a medical marijuana card to support the request. Even with the Barbuto ruling, a reasonable accommodation does not include the use of marijuana in the workplace or being under the influence of marijuana while at work.

Employers should also confirm that their employment application is consistent with their policies. Federal contractors remain subject to the federal Drug-Free Workplace Act, which does not recognize state medical marijuana laws.

Recreational

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

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

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

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

NATIONAL LABOR RELATIONS ACT (NLRA)/NATIONAL LABOR RELATIONS BOARD (NLRB)

Note: *The president has the authority to appoint or reappointment NLRB members as their staggered terms expire. The Republicans currently hold the majority and it is beginning to result in opinions and new regulations could overturn the previous administration's NLRB rulings. However, prior NLRB rulings will not change until a new decision has been issued on a particular topic. Until a new decision is issued, the current NLRB rulings will remain in effect.*

In carrying out its enforcement activities, the NLRB continues to be a significant force intent on reshaping the American workplace. The National Labor Relations Act (NLRA) was adopted in 1935 to encourage the growth of labor unions. Since 1954, the number of unionized employers in the private sector has steadily decreased, and the activities and reach of the NLRB has decreased as well. The areas in which the NLRB has been active include reviewing handbooks of non-unionized companies, requiring employers to make company email systems accessible to employees during nonwork time, implementing "quickie" elections, and narrowing the scope of what it means to be a bargaining unit within a company. This section highlights some of the recent developments.

Mutual Aid or Protection

Though little known, there is language in the NLRA protecting two or more employees acting in concert, whether or not those employees belong to a union. This provision allows the NLRB to respond to disputes that arise in non-unionized settings. An example of this would be a discussion between two or more workers about the terms and conditions of their employment (i.e., working conditions such as wages, salaries, overtime, or safety), which is discovered by their employer, who takes disciplinary action against the employees. Depending on the facts and circumstances, the mutual aid clause may justify the NLRB in ruling that the employees are engaged in protected concerted activity and overturn the employer's actions.

Social Media

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

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

Employee Handbooks and the At-Will Clause

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

Micro-Unions

In 2011, the NLRB issued the Specialty Healthcare ruling, recognizing the concept of micro-unions (i.e., subsets of employees defined by function or department within a bigger workplace). This decision upended a long-standing NLRB precedent that when a union attempted to organize a workplace, it did so on a "wall to wall" basis, meaning it had to win the support of a majority of all the eligible-to-vote employees rather than a subset of the employees

in a reduced-size unit. In permitting micro-union elections, the NLRB laid the foundation for numerous small-scale organizing drives across the economy.

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

Quickie Elections

The NLRB also issued so-called quickie election rules in April 2015, which limited the time in which an employer could respond to a union-organizing campaign by reducing the election cycle from approximately 42 days to approximately 21 days, and in some cases even less time. In December 2019, the board announced a rule change that overturned many of the prior administration's quickie election rules, restoring some of the pre-2014 timetables while also establishing new ones. The final rule was published on December 18, 2019, and became effective 120 days later, on April 16, 2020.

Company Email

In the late 2019 *Caesars Entertainment* decision, the NLRB ruled that employees do not have a statutory right to use employers' email systems and equipment for statutorily protected communications unless the employer's email system furnishes the only reasonable means for employees to communicate with one another. The decision overturned the late 2014 *Purple Communications* decision, in which the NLRB ruled that employee use of email for statutorily protected (in this case, union-related) communications on work time must presumptively be permitted by employers who have chosen to give employees access to their email systems.

Remedies

The NLRA provides that the NLRB may take a number of remedial steps to correct a violation. These steps include issuing cease-and-desist orders, ordering reinstatement and back pay, and requiring employers to post a notice explaining employees' rights under the NLRA. In extreme cases, the NLRB may grant a union the right to represent the employees *without* an election if the board views the employer's anti-union activities as malicious or creating a climate in which a fair election cannot be held regarding representation.

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

NEW HIRE REPORTING

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

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

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

PERFORMANCE EVALUATIONS

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

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

PERSONNEL RECORDS

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

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

The law also requires that if an employee requests it, an employer must provide the employee with a copy of his or her personnel record, or the opportunity to review his or her personnel record at the place of employment during normal business hours, within five business days of a written request. The law does add, however, that an employer does not have to allow an employee to review his or her personnel record on more than two separate occasions in a calendar year. It is important to note, however, that a review caused by notification that negative information has been placed in a personnel file will not count toward the two annually permitted reviews. Fines of up to $2,500 may be imposed on employers that do not allow appropriate employee access to these records.

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

PRIVACY

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

While employers may visually record employees except in circumstances where employees have a reasonable expectation of privacy, such as restrooms and changing rooms, it is a violation of the state's eavesdropping law to secretly record their voices.

RIGHT TO WORK

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

SMOKING

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

The law allows for limited exemptions in certain businesses, such as smoking bars and hotels and motels with designated smoking rooms. The law imposes fines of $100 to $300 per violation assessed against the employer, with harsher punishment possible for repeat offenders. The law also calls for fines of $100 to be levied against individual violators (i.e., employees). The law is enforced by the local board of health, the Massachusetts Department of Public Health (DPH), the local inspection department, the municipal government, and the Alcoholic Beverages Control Commission.

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

TEXTING/USING ELECTRONIC DEVICES WHILE DRIVING

Texting

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

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

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

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

It is important to remember that if it is an employer's actual practice, whether or not the practice agrees with the written policy, to expect employees to make/receive calls or read/respond to email while driving, it is the actual practice that will ultimately be examined, not the fact that an employee may have violated a written policy.

Electronic Devices

In late 2019, Massachusetts adopted An Act Requiring the Hands-Free Use of Mobile Telephones While Driving, which took effect in February 2020. The law covers the use of "electronic devices" while driving. While the statute does not define an electronic device, the presumption is that any iPhone, smartphone, tablet, GPS system, or other electronic gadget that someone might use in a vehicle will be subject to this law. Violators face new penalties that may include fines, remedial education, and insurance premium surcharges.

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

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

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

The law provides for limited exceptions, such as the use of a mobile electronic device in response to an emergency. The law defines an emergency as when the vehicle's operator needs to report that the vehicle is disabled; that medical attention or assistance is required; that police intervention, the fire department, or other emergency services are necessary for the personal safety of the operator or a passenger, or to otherwise ensure the safety of the public; or that a disabled vehicle or an accident is present on a roadway.

Penalties for violating the law include fines, remedial education, and insurance surcharges. The progressive fine structure is as follows:

- first offense: $100
- second offense: $250
- third and subsequent offenses: $500

An operator who commits a second or subsequent offense shall be required to complete a program selected by the registrar of motor vehicles that encourages a change in driver behavior and attitude about distracted driving. The law also provides that if a person commits a third or subsequent offense, it will be a surchargeable event against the driver's insurance. An operator found to be violating the law the first time will receive a warning up until March 31, 2020. After that, the law will be fully effective.

AIM HR Solutions has developed a model policy for member companies to use. It is available to all handbook subscription service members as part of their annual policy program. *AIM members with questions about this or any other HR-related issue may call the AIM Hotline at 1-800-470-6277.*

TRAINING

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

Massachusetts employers who participate in the Massachusetts Unemployment Insurance (UI) contribution system are eligible to apply for and receive grants. This includes all for-profit employers and some nonprofits. Nonprofit employers who pay UI benefits through the reimbursable system are ineligible to apply for grants.

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

For more information and to learn how to apply for a Certificate of Good Standing, go towww.mass.gov/service-details/certificate-of-good-standing-from-department-of-revenue-dor.

GENERAL PROGRAM TRAINING GRANTS

Businesses may apply for a grant of up to $250,000. Once awarded, they may use training providers of their choice. The grant funds most training programs, with the exception of those legally mandated (e.g., OSHA training). Examples of acceptable training topics include English for Speakers of Other Languages (ESOL), Customer Service, Sales, Supervisory Skills, Adult Basic Education, Train the Trainer, and Lean/Continuous Process Improvement. Grant value must be matched on a 50/50 basis between the grant and the employer's financial contribution. Employers typically meet their obligations by paying employees' wages while attending training. The grant must be completed within two years of receipt.

EXPRESS PROGRAM

This grant is available for businesses with 100 or fewer employees. Grant awards are limited to $30,000 per company per calendar year and $3,000 per employee per course. Approved businesses will be reimbursed up to 50% of the actual training cost. A Certificate of Good Standing is required.

DIRECT ACCESS PROGRAM

This grant is available for businesses with 100 or fewer employees. Created for smaller-scale training needs, this program offers free training slots to eligible businesses on a first-come, first-served basis in public training programs by approved providers.

AIM HR Service: AIM HR Solutions offers a variety of training programs supported by the range of workforce training fund grants. Please contact Kathleen Worthington 617-488-8303 or Kworthington@aimhrsolutions.org at AIM HR Solutions for additional information on how to apply for grants and other assistance related to the WTFP.

W-2S AND EMPLOYEE SOCIAL SECURITY STATEMENTS

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

V. PAYMENT OF WAGES

CLASSIFICATION OF EMPLOYEES (FLSA)

Note: *As of January 1, 2020, the threshold set by the U.S. Department of Labor (DOL) for an employee to be classified as exempt will be $684 a week, up from the previous amount of $455 a week.*

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

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

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

AIM HR Service: AIM HR staff can help employers with employee classification issues. For more information, please contact AIM's HR Hotline at 1-800-470-6277.

DIRECT DEPOSIT

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

EQUAL PAY

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

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

GARNISHMENT OF WAGES

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

Massachusetts Lesser Amount Standard

Massachusetts state law provides that an amount not exceeding the greater of 85% of the debtor's gross wages or 50 times the greater of the federal ($7.25 per hour) or Massachusetts ($12.75 per hour) minimum wage rate for each week or portion thereof shall be exempt from such attachment. For example, assume an employee earns gross wages of $1,000 per week. Relying on the method outlined above, the amount subject to garnishment is as follows: 15% (i.e., 100%–85%) of the gross wages equals $150, or disposable earnings less 50 times the Massachusetts minimum wage of $12.75 equals $637.50. Once these two amounts (i.e., $150 and $637.50) are determined, apply the two steps of the Massachusetts garnishment standard:

- Step 1: 50 x $12.75 = $637.50 (amount automatically exempt from any garnishment)
- Step 2: $1,000 – $637.50 = $362.50

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

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

Child Support

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

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

Student Loans in Default

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

Unpaid Taxes

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

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

HOLIDAY WORK

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

Manufacturers

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

Retail

Note: As part of a law adopted in 2018, changes were made to the blue laws regarding the elimination of premium pay over the next five years for employees who worked on some holidays. Premium pay was originally set at 1.5 times an employee's base pay for all hours worked on Sundays and certain holidays. The holidays subject to the declining premium pay rates include Memorial Day, Independence Day, and Labor Day. The law did not reduce premium pay for New Year's Day, Columbus Day, or Veteran's Day.

Effective in 2020, the premium pay rate decreased to 1.3 times and will decrease every year thereafter by .01 until it ceases to exist in 2023, when it will equal 1.0 (i.e., an employee's regular hourly wage). The premium rate will be 1.3 times an employee's base pay for 2020.

Retail stores may open at any time on New Year's Day, Martin Luther King Jr. Day, Presidents' Day, Patriots' Day, Memorial Day, Independence Day, and Labor Day. Retail stores may open on Columbus Day and Veterans Day after noon and 1:00 p.m., respectively. Retailers wishing to open before these times must obtain permission from the local chief of police. Retailers with seven or more employees cannot require work on New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, or Veterans Day, and if employees work voluntarily, they must receive premium pay. Retailers can require employees to work on Martin Luther King Jr. Day, Presidents' Day, and Patriots' Day, and there is no time-and-a-half requirement. Only retail stores exempted by statute may open on Christmas and Thanksgiving. Examples of stores exempt from the Blue Laws include convenience stores, pharmacies, bakeries, florists, cosmetology services, and banks (MGL c. 136 §§ 13, 16).

Non-manufacturers, Non-retail

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

MEAL BREAKS AND REST PERIODS

Meal Breaks

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

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

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

Rest Periods

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

MINIMUM WAGE

Effective January 1, 2020, the Massachusetts minimum wage is $12.75 per hour and is scheduled to increase incrementally to $15.00 per hour as of 2023. Under Massachusetts law, if the federal minimum wage (presently $7.25 per hour) increases, the Massachusetts minimum wage must exceed it by at least $0.50 per hour. Tipped employees are required to be paid $4.95 per hour in 2020, with annual increases resulting in a service rate of $6.75 in 2023. The service rate is premised on the expectation that tips from customers will increase it to the minimum wage. If the tipped employee does not receive at least minimum wage, the employer must make up the difference. Due to what is known as the Grand Bargain legislation, the employer's requirement to bring the tipped employee up to the minimum wage must now be done daily instead of weekly, as the law previously required. A poster stating the updated minimum wage must be posted on the company's bulletin board (MGL c. 151 § 1).

NURSING MOTHERS

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

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

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

Note: The Massachusetts Pregnant Workers Fairness Act expanded on the Nursing Mother law by requiring employers with six or more employees to provide breaks for mothers to express breast milk for a nursing child as well as other accommodations. For a more detailed discussion of the Pregnant Workers Fairness Act, see Section II, Discrimination in Employment.

ON-CALL PAY

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

PAY EQUITY

In 2016, the state amended the Massachusetts Equal Pay Act with the intent to create pay equity between the sexes. The statute changes the focus in gender pay comparison from the federal standard of equal pay for equal work to equal pay for comparable work. Comparable work is defined as work that is substantially similar in skill, effort, and responsibility and is performed under similar working conditions. Employers should not rely on job titles alone to identify employees performing comparable work. Instead, employers should develop robust job descriptions that clearly identify the skill, effort, responsibility, and working conditions required for each position, and then review pay by gender across positions identified as comparable. While not required, employers are encouraged to conduct regular self-evaluations of their pay practices to ensure equal pay for employees in comparable positions regardless of gender. Employers who conduct a self-evaluations in accordance with the law may use it as an affirmative defense to liability.

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

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

Employers are not able to ask for an applicant's pay history on an employment application or in an employment interview. However, the statute allows an employer, with the written permission of the applicant following any offer of employment with compensation, to confirm wages and benefits or other compensation and salary history from the applicant's prior employer. The new law also makes it clear that employers may not prohibit employees from voluntarily discussing their pay with coworkers. The law also prohibits an employer from reducing an employee's pay to create equity among employees of different sexes who perform comparable work.

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

AIM HR Service: AIM HR Solutions is available to assist employers with questions about compliance with the Equal Pay Act. Employers interested should contact the AIM Hotline at 1-800-470-6277.

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

PAYMENT OF OVERTIME

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

Note: *Some industries are exempt from the time-and-a-half requirement—for example, mechanics and truck drivers subject to the federal motor carrier act (MGL c. 151 § 1A). To see the full list, please view the statutory language in MGL c. 151 § 15A.*

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

Note: For many years, retail employers could offset Sunday premium pay against overtime pay when an employee worked on a Sunday that was also overtime. Due to the 2018 legislative amendments, which became effective in 2019, the Sunday premium pay rate is being reduced from 1.5 times an employee's regular wage by one-tenth every year until 2023, when it will become just the employee's regular rate of pay. Any employer subject to this law must remember that an employee may be eligible for overtime pay if Sunday hours lead to overtime.

There are also six holidays subject to the premium pay law: New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, and Veterans Day. As noted above in the Holiday Work section, the premium pay was phased out for only the three summer holidays.

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

PAYMENT OF WAGES

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

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

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

In all cases, employees must be paid within six days of the close of the pay period. Employers changing from weekly to biweekly pay for non-exempt hourly employees must provide each employee with written notice of the change at least 90 days in advance of the first biweekly period (MGL c. 149 § 148).

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

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

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

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

Compliance Tip: *An employee involuntarily discharged from a company for any reason must be paid his or her wages in full on the day of discharge. An employee voluntarily separating from employment may be paid full wages on the next regularly scheduled payday. The Massachusetts attorney general has stated that the word "wages" includes any vacation pay that is earned by an employee under an oral or a written company policy or union contract but is unused as of the date of discharge (MGL c. 149 § 148). On the other hand, it does not include any accrued but unused sick time. Employers who provide paid time off (PTO) instead of vacation leave should designate and track the number of hours or days of PTO that are considered vacation time in order to limit the amount owed to a separating employee. Absent a well-documented and consistently applied policy and practice, the entire PTO bank is likely to be deemed payable to the separating employee.*

Massachusetts courts place very strict limits on an employer's ability to offset any financial obligation to the company by withholding all or a portion of an employee's final wages. An example of a valid offset would be a company-issued loan or advance, provided there is written authorization of the employee acknowledging the debt and repayment terms and conditions. An example of an unauthorized offset would be unreturned company property provided to an employee, such as a uniform. Notwithstanding the legitimacy of the offset, the employee must receive the minimum wage for every hour worked in his or her final pay statement. For example, if an employee works 40 hours during his or her final week and earns $1,000 but owes the company $900, the employer may only set off $490 ($1,000 – $510 [min. wage] = $490). Any final amount before an offset may also be reduced by all required withholdings, including taxes and child support. If the remaining funds are insufficient to repay the debt, the employer may negotiate a repayment agreement with the former employee or sue the former employee in small-claims court for the difference.

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

REPORTING PAY

Massachusetts minimum wage regulations provide that a non-exempt employee who is scheduled to work three hours or more and reports for duty at the time set by the employer must be paid for at least three hours, even if the employee is sent home early due to lack of work, poor weather conditions, and so on. The employee must be paid at the employee's regular rate of pay for time actually worked and at the state minimum wage rate (at least) for the balance of the three hours if no work is performed. If the employee performs no work, the employee needs to be paid for only three hours at the minimum wage rate. Reporting pay also applies if a person shows up for work and has not been notified by the company that work is unavailable for that day or is sent home for lack of work. Union contracts or company policy may indicate a higher rate of pay and/or payment for more than three hours (454 CMR § 27.04).

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

SUNDAY WORK

Manufacturers

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

Retail Stores and Shops

Retail stores may open at any time on Sunday but cannot require that an employee work. If the store employs more than a total of seven persons—including the proprietor—on Sunday or any other day of the week, it must pay a non-exempt employee premium pay (1.3 times minimum wage in 2020) for all hours worked on Sunday (MGL c. 136 §§ 5, 6). See the Payment of Overtime section above for a discussion of retailers and overtime in more detail.

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

TRAINING PAY

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

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

TRAVEL PAY

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

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

TREBLE DAMAGES

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

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

VACATION

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

AIM HR Service: Please contact AIM for assistance in developing an effective vacation and/or paid-time-off policy.

WORK SCHEDULE/ONE DAY OF REST

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

An exemption to this provision may be obtained upon written request to the Massachusetts Attorney General's Fair Labor Division if it is proven to the division's satisfaction that special circumstances require it. Such an exemption will be granted for a 60-day period and can be renewed (MGL c. 149 § 51A).

VI. HEALTH INSURANCE

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

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

MASSACHUSETTS HEALTH-CARE REFORM

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

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

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

In 2013, most aspects of Massachusetts health-care reform were repealed as the commonwealth sought to integrate Massachusetts health-care reform with federal reforms under the Affordable Care Act (ACA). Below is an overview of the changes in Massachusetts health-care reform:

1. **Repeal of Requirement to Offer a Section 125 Premium Only Plan.** Employers are no longer required to set up and maintain an Internal Revenue Code Section 125 plan, which enables employees who purchase health insurance to pay the premium in pre-tax dollars. This includes employees who participate in an employer-sponsored health plan as well as certain non-benefits-eligible employees who may purchase insurance on their own. In addition, the free rider surcharge penalty has been repealed. The free rider surcharge was applied to employers failing to implement a compliant Section 125 plan if employees and their dependents made substantial use of the state's Health Care Safety Net (free care).
2. **Repeal of Fair Share Contribution.** Massachusetts employers are no longer subject to the fair share contribution. As a result, employers no longer face the possibility of a state-imposed penalty of $295 per employee per year for failing to make a "fair and reasonable" contribution toward the cost of health insurance for their employees. *AIM members are encouraged to call the AIM Hotline at 800-470-6277 for information and clarifications that complement the overview provided above.*
3. **Repeal of Health Insurance Responsibility and Disclosure (HIRD) Obligation.**Massachusetts employers are no longer required to obtain signed HIRD forms from any employee who declines participation in either an employer-sponsored healthinsurance plan or a Section 125 plan.

   Effective November 2018, employers with six or more employees must submit a new HIRD form detailing whether or not they are offering health insurance to their employees and the coverage details of the offered

options. The form is accessible online via the MassTaxConnect portal and is due annually on November 30. Although penalties have not yet been issued, the law authorizes a penalty of between $1,000 and $5,000 for any employer who provides false information or fails to file a HIRD form.

4. **Annual Health Insurance Coverage Statements: Form 1099-HC**. By January 31 of each year, Massachusetts employers must provide a written statement, a Form 1099-HC, to each employee who is/was a Massachusetts resident and to whom they provided group health insurance coverage during the prior calendar/tax year. They must also submit this information to the DOR in electronic format. Legislation passed during 2007 allows Massachusetts carriers to assume this responsibility on behalf of their group policyholders. Self-insured employers and those with group plans written outside Massachusetts must prepare the statements themselves or arrange to have them prepared. The 1099-HC contains information about the insurance provider, as well as the names of the subscriber/employee and covered dependents, along with their subscriber numbers and dates of coverage. Form 1099-HCs indicate whether or not coverage complies with Minimum Creditable Coverage standards. Individuals transfer information from the 1099-HC to Schedule-HC of their Massachusetts personal income tax return to verify compliance with the individual mandate.

The health-care reform law also made changes to the rules that govern the sale of group health insurance policies by carriers operating in Massachusetts. Ongoing changes are communicated through bulletins issued by the state's Division of Insurance. The rules affecting employers are described below, and they apply to every group policy sale regardless of employer size. Self-insured plans and employers with insured plans written in other states are not subject to these rules but may voluntarily choose to adopt them:

1. The Massachusetts health-care reform law required insured health plans to extend coverage to an employee's dependent child(ren) up to the time they turned 26 or two years following the loss of dependent status under the Internal Revenue Code, whichever occurred first. Due to a similar provision in the federal health-care reform law, which changed the IRS definition of "dependent" for purposes of receiving employer-sponsored health insurance on a tax-free basis, this requirement has been simplified.
2. The current state requirement mirrors the federal provision that became effective for all plan years beginning on or after September 23, 2010: dependent children must be eligible for coverage under group health plans up to their 26th birthday. (While Massachusetts insurance rules apply only to insured plans, it is important to note that the federal rule applies to all group plans—both insured and self-funded.)
3. The original state requirement created imputed income issues for some employees. This was rectified by the federal law and the IRS Code revisions mentioned above, which eliminated the imputed income issue for dependent children who are not yet 27 years of age at the end of a given tax year (IRS Code §§ 105[b] and 106). It is important to note that while the IRS Code allows tax-free coverage until the end of the year of the 26th birthday, both state and federal health-care reform laws require eligibility for coverage only to the date of the 26th birthday.
4. Massachusetts carriers are prohibited from selling a group policy unless coverage will be offered to all full-time employees, as defined in the rules, and unless the employer does not discriminate in favor of higher-paid employees in the percentage it contributes toward the cost of the premium. This means it is not acceptable to offer one plan to one classification of higher-paid employees, typically executives, and a different plan to others.
5. Contributions governed by a collective bargaining agreement are exempt from this rule.

Employers are encouraged to stay abreast of developments. AIM will use its blog and newsletters to communicate information about these issues and will also conduct educational sessions. As always, AIM members are urged to call the AIM Hotline 800-470-6277 with their questions.

FEDERAL HEALTH-CARE REFORM

Note: *Since its election, the current administration has taken a variety of steps to eliminate aspects of the Affordable Care Act. For example, in late 2017, the federal government reduced the assessment on individuals who fail to have complying health insurance (the so-called individual mandate) to $0. This change is effective for the tax year beginning in 2019. However, the employer mandate remains in effect until 2019. In November 2017, the IRS announced that it would start enforcing assessments against employers. Employers face an assessment of $250 per month for any full-time employee who received a premium tax credit for health insurance obtained through a state health-care exchange and did not receive an offer of affordable insurance from their employer.*

While it remains unclear as of this writing what sections of the law will be repealed, amended, or retained, and what actions federal agencies may take, all employers subject to the ACA should remain especially vigilant and monitor developments, especially changes to the scope and breadth of the law and effective dates to ensure compliance.

Since the passage of the Affordable Care Act, the law has continued to evolve. Below is an overview of key employer-related provisions presented in a timeline format:

Effective upon Enactment of the Law

- **Grandfathered Plans.** Both insured and self-insured plans in existence on March 23, 2010, the ACA's enactment date, could be "grandfathered" and therefore exempt from complying with certain of the law's requirements, provided they continue to meet the criteria for grandfathered status.
- **Small Business Health Care Tax Credit.** This credit was retroactive to the beginning of 2010 and available to employers of no more than 25 full-time equivalent employees and with average annual wages of no more than $50,000 among those employees.

Effective for Plan Years Beginning on or after September 23, 2010

- **Dependent Coverage to Age 26.** Plans that offer coverage to dependent children must make that coverage available until the dependents reach the age of 26, regardless of residency with the parent, student status, level of parental support, or marital status.
- **First-Dollar Coverage for Preventive Care.** Certain preventive services must be provided without any cost-sharing requirements, including co-payments or deductibles.
- **Limits on Benefits.** Lifetime limits are prohibited, and restrictions apply to annual limits on "essential health benefits."
- **Pre-existing Condition Limitations.** Such limitations are prohibited for employees or dependents under the age of 19.
- **Rescission of Coverage.** Retroactive rescission of coverage is prohibited except in very limited circumstances, such as acts of fraud.

Effective 2011

- **Over-the-Counter Medications.** Over-the-counter medications are no longer eligible for reimbursement through a flexible spending account (FSA), health reimbursement arrangement (HRA), health savings account (HSA), or Archer medical savings account (MSA) without a prescription with one exception: insulin. Medical supplies and equipment continue to be reimbursable.
- **Increased Withdrawal Penalties.** Penalties on non-medical distributions from an HSA or an Archer MSA increased from 10% to 20%.
- **Minimum Medical Loss Ratio Standards.** Policyholders may be reimbursed a portion of their premium when carriers spend less than an established percentage of premium dollars on actual claim expenses.

Effective 2012

- **Summary of Benefits and Coverage (SBC).** For all open enrollments, an SBC must be provided to each individual who is eligible to make an election during the open enrollment period and to each individual who becomes newly eligible or who enrolls due to a special enrollment period. For insured plans, the SBC will be prepared by the carrier.
- **W-2 Reporting of Benefit Value.** Employers that issued at least 250 Form W-2s in the prior tax year are required to report the aggregate value of each employee's health benefits in Box 12DD on Form W-2s issued for the current tax year. The exemption for employers issuing fewer than 250 W-2s will continue until the IRS issues information to the contrary, although smaller employers may certainly choose to report the information. The reporting is for informational purposes only and has no effect on employer or employee taxes. An IRS chart (www.irs.gov/uac/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage) is available to help employers determine exactly what must be included in the aggregated number, what is optional to include, and what should not be included.
- **Patient-Centered Outcomes Research Institute (PCORI) Trust Fund Fees.** For group plan years ending on or after October 1, 2012, and before October 1, 2019, a fee will be assessed based on the average number of lives, including all dependents, covered during that plan year.

Effective 2013

- **Flexible Spending Account (FSA) Limits.** Employee contributions to an FSA are limited to $2,500 per year per individual employee. Employers may choose to impose a lower limit but must not retain a higher limit. There continue to be no limits on employer contributions into these accounts. The written plan document required for FSAs must reflect accurate rules for the operation of the plan; thus, they must be reviewed and amended if changes are made due to this requirement.
- **Notice to Employees about Health Insurance Exchanges.** Employers are required to notify all current and future employees about the availability of coverage through health insurance exchanges and the potential for employees meeting certain criteria to receive premium tax credits and/or cost-sharing reductions.
- **Medicare Tax Increase for the Highly Compensated.** The additional Medicare tax is 0.9% and applies to compensation in excess of $200,000 for an individual tax filer and $250,000 for a couple filing jointly. Employers must withhold the additional amount from individual employees whose compensation exceeds $200,000 per year. There is no employer match on the additional amounts.

Effective 2014

- **Individual Mandate.** Individuals 18 years of age and older are required to have health insurance that meets ACA "minimum value" standards or pay an individual shared responsibility assessment.
- State health insurance exchanges are operational.
- Premium tax credits and/or cost-sharing reductions as well as plan enhancements are available to certain low-income individuals and families with household incomes between 138% and 400% of the federal poverty level who do not have access to affordable health insurance of minimum value through their employer or another source.
- **Expansion of Medicaid.** Residents with household incomes up to 138% of the federal poverty level are eligible for health insurance coverage through Medicaid. This marks an increase from the Medicaid threshold of 100% of the federal poverty level that existed in 2013.
- Pre-existing condition limitations are prohibited.
- There are no waiting periods longer than 90 days.
- **Flexible Spending Account (FSA) Carryover.** Employers may choose between two options for carrying over unused FSA funds at year end. Instead of the existing option of carrying over 100% of unused funds through March 15 of the following year, employers can allow a maximum of $500 of unused funds to be carried over through December 31 of the following year.
- **Incentives for Wellness Programs.** Employers can provide incentives to employees who participate in wellness programs. Incentives may take the form of increased or decreased employee share of health

insurance premiums; increased or decreased deductibles, co-pays, and other out-of-pocket expenses; increased or decreased employer contributions to HSAs and HRAs; and other financial incentives. Incentives associated with non-tobacco-related wellness are limited to 30% of the total individual premium. Incentives associated with tobacco-related wellness are limited to 50% of the total individual premium. The combination of tobacco-related and non-tobacco-related incentives is limited to 50% of the total individual premium.

Effective 2015

- **Employer Shared Responsibility Provisions.** Employers of a combination of 100 or more full-time and full-time equivalent (FTE) employees must offer health insurance that provides essential coverage of "minimum value" to 70% of its full-time employees or pay a shared responsibility penalty. A covered employer that does not offer insurance faces a penalty of $2,000 times the number of full-time (not FTE) employees minus 80. (The FTE number is used to determine coverage under the federal law but not to calculate any applicable penalty.) If a covered employer offers insurance but that insurance is not "affordable" or not of "minimum value," then the employer's shared responsibility penalty will be the lesser of the penalty described above or $3,000 per year per each full-time employee who obtains insurance through an exchange and receives a premium tax credit. In other words, in all cases, the maximum penalty will not exceed $2,000 times the number of full-time employees minus 80.
- **ERISA-Like Nondiscrimination Rules for Insured Plans.** This provision will impose rules on insured plans that would prevent them from operating in ways that favor highly compensated individuals. Implementation has been delayed due to many complex issues, including determining the definition of "ERISA-like." It will not take effect until after final regulations are issued by federal agencies.
- **Reporting.** Employers with 50 or more full-time and FTE employees must report information on all employees who are full time for one or more months. Information reported includes personal information, eligibility for health insurance, enrollment in health insurance, and employee cost of the lowest-cost self-coverage of minimum value for which the employee is eligible to enroll. Reports are due to employees by January 31 of the following year.

Effective 2016

- **Employer Shared Responsibility Provisions.** Employers of a combination of 50 or more full-time and FTE employees must offer health insurance that provides essential coverage of "minimum value" to 95% of its full-time employees or pay a shared responsibility penalty. A covered employer that does not offer insurance faces a penalty of $2,000 times the number of fulltime (not FTE) employees minus 30. (The FTE number is used to determine coverage under the federal law but not to calculate any applicable penalty.) If a covered employer offers insurance but that insurance is not "affordable" or not of "minimum value," then the employer's shared responsibility penalty will be the lesser of the penalty described above or $3,000 per year per each full-time employee who obtains insurance through an exchange and receives a premium tax credit. In other words, in all cases, the maximum penalty will not exceed $2,000 times the number of full-time employees minus 30.
- **Reporting.** Employers with 50 or more full-time plus FTE employees must provide each employee who worked full-time for one or more months with statements on health-care eligibility, enrollment, and cost for the prior calendar year by January 31. The same employers must also provide reports to the IRS by February 28 (March 28 if electronic) on all employees who worked at least one month per year in a full-time capacity. Employers with 200 or more employees must file electronically.

Effective 2020

The effective date of the so-called Cadillac tax has been delayed from 2020 to 2022.

- **Excise Tax on Cadillac Plans.** Plans considered to have excessively rich benefits, known as "Cadillac plans," will be subject to an excise tax. A Cadillac plan is defined as a plan with a total annual cost of more than $10,200 for individual coverage and $27,500 for family coverage. These cost levels will be indexed for inflation.

HEALTH INSURANCE COVERAGE IN MASSACHUSETTS

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

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

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

VII. LEAVES OF ABSENCE

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

Note: As part of legislation adopted in 2018, Massachusetts established a new leave of absence law called the Paid Family Medical Leave Act (PFMLA). While some provisions and definitions of the PFMLA are similar to or based on the Massachusetts unemployment insurance law and the federal FMLA, there are many significant differences. For example, while the FMLA allows employers to require employees to use existing paid time off (PTO) during the leave, the PFMLA explicitly prohibits employers from requiring the use of PTO. On the other hand, employers may run PFMLA concurrently with FMLA and the Massachusetts Parental Leave Act if applicable. Prior to the law taking effect, employers are urged to read the statute and regulations to become familiar with its provisions.

PAID FAMILY MEDICAL LEAVE ACT (PFMLA) (MASSACHUSETTS)

The PFMLA took effect on October 1, 2019, but will not be fully operational until 2021. Once fully operational, the PFMLA will provide eligible employees partial wage replacement of up to $850 (adjusted annually) per week for the following benefits:

- up to 12 weeks for family leave related to birth, adoption, or foster placement of a child (eff. 1-1-21)
- up to 12 weeks for a qualifying exigency arising out of a family member being on active duty or being called to active duty (eff. 1-1-21)
- up to 20 weeks for medical leave for covered individuals for a serious health condition that incapacitates them from work (eff. 1-1-21)
- up to 12 weeks of family leave to care for family members with a serious health condition (eff. 7-1-21)
- up to 26 weeks of combined leave for family leave and medical leave (eff. 1-1-21)

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

Key steps in the act's implementation include the following:

- **July 1, 2019:** Final regulations take effect.
- **October 1, 2019:** Employers begin contributing to the PFML trust fund. The total cost will be based on .75% of the employers wages up to the federal taxable wage base for Social Security. Although payments

come from the employer, the law provides that employers may require their employees to contribute up to 100% of the family leave cost and up to 40% of the medical leave cost. Contribution charges will be adjusted annually based on benefit payouts and solvency needs of the trust fund. The regulations will also explain how an employer may opt out of participating in the state plan by obtaining private insurance or by self-insuring.

- **January 1, 2021:** Trust fund will begin to pay partial wage replacement benefits to covered employees of up to $850 per week. Benefits will be adjusted annually based on the state's average weekly wage.

To help employers understand the significant details contained in the law, AIM will continue to provide information about the implementation of the law throughout the year through roundtables, seminars, webinars, and articles.

DOMESTIC VIOLENCE LEAVE (MASSACHUSETTS)

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

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

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

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

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

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

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

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

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

Prior to seeking any leave under this statute, an employee must exhaust all of his or her available annual or vacation leave, personal leave, and sick leave unless the employer waives this requirement.

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

EARNED SICK TIME (EST) LAW (MASSACHUSETTS)

The Massachusetts earned sick time (EST) law affects all Massachusetts employers. Businesses with 11 or more employees must offer up to 40 hours of paid sick time per benefit year. Businesses with fewer than 11 employees will be required to offer up to 40 hours of unpaid time to workers each benefit year. A benefit year is any consecutive 12 month period of time determined by the employer, including calendar year, fiscal year, tax year, or year based on date of hire. The regulations state what criteria an employer must use to determine whether or not it has 11 employees or more. To be eligible to use accrued earned sick time, an employee must have worked at least 90 days for the employer.

The law is enforced by the Office of the Attorney General, which has promulgated regulations to enforce the law. Employers are urged to visit and bookmark the website of the Office of the Attorney General for more information on earned sick time. The link is at the end of the guide.

The law applies to full-time, part-time, seasonal, and temporary employees.

The law requires employers to provide eligible employees one hour of sick time for every 30 hours worked up to a maximum of 40 hours per year, with a right to carry over up to 40 hours of unused sick time into the new year. The regulations broaden that provision to allow employers to award up to 40 hours at the start of the benefit year, without employees having to accrue time throughout the year. If the employer provides a lump sum of 40 hours of sick time at the beginning of each year, the employer is not obligated to allow employees to carry over unused sick time into the following year. The regulations address a number of the ambiguous details in the law, including how an employer may handle EST carryover, EST retention in the case of a break in service, how EST may be charged in initial increments of one hour, when an employer may refuse to pay sick leave in cases of suspected fraud, and how an employer may use its existing PTO policy to cover the 40 hours of EST.

Exempt employees earn paid sick time based on the assumption of a 40-hour workweek. If their normal workweek is less than 40 hours, paid sick time would accrue based on their normal workweek. Employees may begin to use earned sick time on the 90th day after hire.

Sick leave may be used by an employee to care for a physical or mental illness, an injury, or a medical condition, or to attend routine medical appointments for him- or herself or one of the following relations: child, spouse,

parent, or parent of a spouse. Earned sick time may also be taken to address the physical, psychological, or legal effects of domestic violence. It may also be used for trips to the doctor or pharmacy.

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

Compliance Tip: *AIM has a model EST policy and EST verification form available at the Online Resource Center. The Office of the Attorney General's website includes EST regulations, a regularly updated FAQ site, and an EST poster that employers should print out and display.*

FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA)

Employers of 50 or more employees (for at least 20 weeks per year) must provide eligible employees up to 12 workweeks of job-protected unpaid family and medical leave during a 12-month period.

To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months, which need not be consecutive, and must have worked at least 1,250 hours during the 12 months immediately preceding the leave. Leave may be requested for

- the birth of a child;
- placement of a child for adoption or foster care;
- the serious health condition of the employee;
- the serious health condition of the employee's immediate family member (defined as spouse, parent, or child);
- certain circumstances related to military service (see below).

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

Covered employers may select one of the following four options for establishing the 12-month period of time during which FMLA leave may be taken: the calendar year; any fixed 12 months; the 12-month period measured forward from the first date the employee takes FMLA leave; or a "rolling" 12-month period measured backward from the date the employee uses any FMLA leave.

It is the responsibility of the employer to notify the employee of his or her rights under the law. Covered employers must post a general FMLA notice even when they have no FMLA-eligible employees. If a covered employer has written policy documents or a written handbook informing employees about their employment rights and obligations, the employer must include an FMLA policy. If a significant portion (generally considered 20% or more) of an employer's workforce speaks another language, a poster must be displayed in that language as well. (It is the employer's responsibility to translate or have the poster translated into other languages. The DOL website includes a Spanish-language poster.) Covered employers that do not have written materials describing benefits and leave must provide the general FMLA notice to each employee upon hire.

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

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

Absences resulting from a workers' compensation injury or illness that meets the definition of a serious health condition under the FMLA may, at the employer's discretion, be designated as FMLA leave, to be counted against the employee's 12-week entitlement. The employer's policy must include this provision, and employees must be notified up front. (See the Workers' Compensation discussion in Section IX.) An employer may also elect to run the earned sick time benefit concurrently with the FMLA benefit.

Compliance Tip: *The Department of Labor updated the FMLA regulations and poster effective 2016. Both are available at www.dol.gov/whd/fmla by clicking on the appropriate links. [Note: separate links for regulations and posters]*

MILITARY FMLA LEAVE

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

1. Injured Service Member Family Leave

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

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

2. Family Member Military Duty Exigency Leave

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

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

JURY DUTY AND WITNESS LEAVE (MASSACHUSETTS)

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

Under Massachusetts law, jurors traditionally serve one day or serve on one trial, and employers are required to pay their employees in full for up to the first three days of service. After the third day, the court will pay the juror a daily stipend of $50. It is the employer's option to pay the difference between jury pay and regular pay, pay the employee's full regular pay, or pay nothing more (MGL c. 234A §§ 41, 48, 49).

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

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

MILITARY SERVICE LEAVE (FEDERAL AND MASSACHUSETTS)

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the rights of all those who serve in a branch of the military and reservists to return to their jobs after completing their time in voluntary or involuntary service. The act protects against discrimination and retaliation because of military service, prevents service members from suffering disadvantages due to performance of their military obligations, and affords them ample time to report back to jobs following completion of their service obligations. The protections of USERRA apply to employees who are absent from their jobs due to military service for up to five years. Employees who are called up for at least 31 days of active duty must be offered the right to the continuation of health-care benefits, similar to provisions under COBRA. USERRA does not limit the frequency of leaves unless they cause undue hardship to the company. In addition, employees have the right to the same or a similar position if they reapply within a certain period following their release from military service or training. The rules require that employers post a notice of USERRA rights where employee notices are customarily placed. Please see the end of this document for a link to the USERRA poster at the DOL website.

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

PARENTAL LEAVE ACT (MASSACHUSETTS)

The Massachusetts Parental Leave Act (MPLA) removes all terms referring to females ("maternity," "she," "her") and replaces them with "parental" or "employee," making it clear that male employees are entitled to leave under this law. The law still provides that employers of six or more employees are required to give eight weeks of unpaid (paid at employer's discretion) parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under 18 years of age (or under 23 if the child is mentally or physically disabled). To be eligible, an employee must have completed an initial probationary period set by the terms of employment but which is not greater than three months. The provisions about employment protection and benefit protection remain in effect. It is anticipated that the Massachusetts Commission Against Discrimination will issue updated guidance interpreting the MPLA. Among the expanded provisions of the law are the following:

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

In cases in which the FMLA also applies, employers may run the leaves concurrently.

PREGNANT WORKERS FAIRNESS ACT

Please see Section II above.

SMALL NECESSITIES LEAVE ACT (MASSACHUSETTS)

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

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

VOTING LEAVE (MASSACHUSETTS)

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

VIII. SAFETY

HOISTING

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

- Every employee who operates hoisting machinery must be individually licensed by the State of Massachusetts via the Office of Public Safety and Inspections (OPSI).
- If the company is an "Exempt Company" under 520 CMR 6.06, the company must submit an approved training plan to the OPSI and have at least one Massachusetts licensed employee named as the program administrator to manage and oversee the program.

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

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

Pursuant to MGLc. 146 § 53 and 520 CMR 6.06, the following types of companies may be exempt from the individual licensing and permitting requirements: (a) public utility companies, (b) other companies operating only upon public utility company property or equipment, and (c) other companies operating equipment exclusively on company property.

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

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

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

A copy of the regulations is available at www.mass.gov/regulations/520-CMR-6-hoisting-machinery. The administrative ruling can be found at www.mass.gov/eopss/docs/dps/engineering/inf-eng/s-dps-webwork-webload-engineering-inf-eng-interpretation-hoisting-2014-03.pdf.

Educational facilities or individuals seeking to offer continuing education courses for hoisting machinery operations must submit an application to the DPS for approval. The state regulations are in addition to any federal OSHA requirements that cover hoisting equipment. The rules also affect temporary permits that may be issued by a short-term rental entity for the operation of compact hoisting machinery.

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

LICENSES

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

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

AIM HR Solutions offers an OSHA training series. Anyone interested should contact the AIM Hotline at 800-470-6277 for more details about the series.

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

A company that had 10 or fewer employees at all times during the prior calendar year is not obligated to keep OSHA injury and illness records unless instructed to do so by OSHA.

Employers with 11 or more employees are required to maintain the required records at each establishment that is in operation for 12 or more months and to post them annually.

All employers covered by OSHA must report any workplace incident that results in a fatality within 8 hours, and any workplace incident that results in an amputation, a loss of an eye, or an inpatient hospitalization for treatment within 24 hours, using one of the following reporting methods: by telephone or in person to the OSHA Area Office nearest to the site of the incident; by telephone to the OSHA toll-free central telephone number, 1-800-321-OSHA); or by electronic submission using the reporting application located on OSHA's public website www.osha.gov.

Compliance Tip: *A recordable injury or illness must be reported on OSHA Form 300 as soon as possible but no later than six working days after the employer receives the information. Recordable injuries include fatalities, lost workday cases, nonfatal cases involving transfer of the employee to another job or termination of employment, medical treatment beyond first aid, and loss of consciousness or restriction of work or motion.*

Employers subject to the recording requirements must complete and post a summary of all work-related illnesses and injuries using Form 300A. Employers must post Form 300A no later than February 1 of the year following the year covered by the summary, and must keep the posting in place until April 30. Even if no recordable injuries or illnesses occurred, the employer must still complete and post Form 300A with zeros in each section of the log. A company executive must certify that he or she has examined the Form 300A log and that he or she reasonably believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete. Employers need to keep this form for five years.

ELECTRONIC SUBMISSION OF RECORDS TO OSHA (EFFECTIVE 2019)

As of January 25, 2019, establishments with 250 or more employees, which are otherwise required by OSHA to keep records, and establishments with between 20 and 249 employees in certain industries, must electronically submit summaries of illness and injury data from their forms 300A, together with the Employer Identification Number used by the establishment, to OSHA by March 2 of the year following the year covered by the report.

In 2016, OSHA adopted an electronic data submission rule that was to take effect January 1, 2017, which would have required certain employers to electronically submit injury and illness data from forms 300, 300A, and 301.

Then, beginning in early 2017, OSHA delayed enforcement of the 2016 electronic data submission rule. On July 30, 2018, OSHA issued a new proposed electronic data submission rule. Under the new rule, which went into effect on January 25, 2019, OSHA will provide a secure website that offers three options for data submission:

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

The OSHA link to the injury reporting application is available here: www.osha.gov/injuryreporting/index.html.

The list of industries covered by this rule can be found on the OSHA website. Any employer that believes it is exempt under the small employer rule should verify that by visiting OSHA's website and looking for the company NAICS code on the list. The list of high-risk industries is available on the OSHA website. New industries have recently been added to the record-keeping rule, so employers may need to check the list of those newly required to keep records.

OSHA NO RETALIATION RULE

In 2016, OSHA released the new electronic reporting rule. The rule included a section prohibiting any company policy or practice that discouraged workers from reporting an injury or an illness. The final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation, which can be satisfied by posting the already-required OSHA workplace poster.

A REASONABLE REPORTING POLICY

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

- **Reasonable**: to require employees to report a work-related injury or illness as soon as practicable after realizing they have the kind of injury or illness that they are required to report to the employer, such as the same or the next business day when possible, or to require employees to report to a supervisor through reasonable means, such as by phone, by email, or in person.
- **Unreasonable**: to discipline employees for failing to report before they realize they have a work-related injury that they are required to report or for failing to report right away when they are incapacitated because of the injury or illness; to require ill or injured employees to report in person if they are unable to do so; or to require employees to take unnecessarily cumbersome steps or an excessive number of steps to make a report.

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

NO RETALIATION

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

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

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

DRUG AND ALCOHOL TESTING

OSHA's New Standard Interpretation—Safety Incentive Programs

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

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

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

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

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

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

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

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

Thus, employers will want to make sure they state somewhere in their post-incident testing policy that the company "reserves the right to test all employees whose conduct may have contributed" to the incident.

Prior Interpretations Superseded; Enforcement Under New Standard Required

Other statements in OSHA's new Memorandum are also very helpful for employers, with respect to both incentive programs and post-incident drug/alcohol testing. These are as follows:

- "To the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them."
- "Regional Administrators shall enforce 29 C.F.R. § 1904.35(b)(1)(iv) in a manner consistent with this memorandum and shall consult DEP before issuing any citations under this provision related to workplace safety incentive programs or post-incident drug testing."
- "Agency commentary and guidance that severely limited both incentive programs and post-accident testing policies will therefore no longer be enforced under the injury reporting rule; rather, employers need only adhere to the more flexible approaches identified in the new Standard Interpretation Memorandum."

REVIEWING AND UPDATING POLICIES

Safety incentive programs that provide positive rewards to employees who report workplace injuries or illnesses are always lawful. Rate-based safety incentive programs that provide negative consequences for occurrences and/or reports of workplace injuries or illnesses are lawful only if the programs include adequate protective measures that ensure employees will not be discouraged from reporting illnesses and injuries, including (1) positive rewards for identifying unsafe conditions in the workplace, (2) training that reinforces reporting rights and responsibility and a company's anti-retaliation policy and (3) an accurate way to evaluate employee willingness to report injuries and illnesses.

Additionally, most forms of workplace drug/alcohol testing will survive OSHA scrutiny in retaliation-based injury reporting audits and complaint proceedings. Post-accident testing programs in particular—which OSHA acknowledges promote safety—need only specify that all employees whose acts may have contributed to a workplace accident will be subject to testing. An employer that conducts such tests should include any employees who may have caused or contributed to an accident, and not only those who report injuries. Broader testing without a "contributed to" standard continues to be allowed when no workplace injury occurs, such as situations in which an accident leads to property damage, but is subject to state law and any regulated testing requirements.

The rule permits employers to drug-test employees who report work-related injuries or illnesses if they have an objectively reasonable basis for testing. (The rule does not apply to drug-testing employees for reasons other than injury reporting.)

In determining if the testing is reasonable, OSHA's focus will be on whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness. Some of the factors OSHA may consider include

- whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (i.e., the test results could provide insight into why the injury or illness occurred);
- whether other employees involved in the incident that caused the injury or illness were also tested, or whether the employer tested only the employee who reported the injury or illness;
- whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardousness of the work being performed when the injury or illness occurred.

TESTING PRACTICES

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

INCENTIVES

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

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

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

State laws pertaining to employee safety and health are contained in numerous sections of MGL c. 149. In general, they are preempted by federal laws and regulations developed under OSHA, although they remain on the books.

WORKPLACE TEMPERATURE

Under Massachusetts law, adequate heat must be provided from October 15 through May 15. Although there are no regulations, the Massachusetts Department of Labor Standards has issued guidelines specifying the proper temperature that must be maintained at each type of workplace. The levels are specifically defined by type of facility: factories, 60°–68°; foundries, 50°; machine shops, 60°; offices, 66°–68°; restaurants, 62°; schools, 66°–68° in classrooms; stores, 66°–68°. The guidelines can be found online at www.mass.gov/info-details/massachusetts-law-about-winter-heating.

IX. WORKERS' COMPENSATION

Nearly all Massachusetts employers are required to obtain workers' compensation insurance. The insurance protects the employer from civil lawsuits from injured or ill employees while covering those employees for lost wages and medical expenses due to a work-related injury or illness. Any employer covered by the workers' compensation law must display a posting showing proof that it has insurance. Any employer without insurance may be issued a stop-work order and be subject to a fine of up to $250 per day until coverage is obtained. The law also allows corporate officers to elect not to have workers' compensation coverage and to allow sole proprietors and the partners of a partnership to elect to obtain coverage.

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

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

Compliance Tip: *If the insurer denies the claim, the employee may file a claim with the DIA to have it adjudicated. Employers should work with their insurer to defend against claims that they believe are not compensable. If it is determined that the employee has a compensable injury or illness, he or she may collect temporary total or partial disability benefits for a defined period of time. Alternatively, the insurer may offer to settle the claim by making a one-time payment (lump-sum settlement) in return for an agreement to release future claims arising from the same injury. For experience-rated insureds ($5,500 or more in annual workers' compensation premiums), the insurer must obtain the policyholder's consent before agreeing to a lump-sum settlement if the settlement will affect the employer's current experience rating (MGL c. 152 § 48).*

BENEFITS

Wage Replacement

All disability benefits are based on a percentage of the individual employee's pre-injury average weekly wage (AWW), up to the state's average weekly wage (SAWW) in effect on the date of the injury or illness. The SAWW is established and adjusted annually by statute in October (SAWW is $1,431.66 as of 10/01/19). All benefits to an injured employee are tax-free.

Temporary Total Benefits

Temporary total benefits normally provide an injured employee 60% of his or her pre-injury AWW, up to a maximum of 156 weeks. This benefit recognizes the employee's total inability to work.

Partial Disability Benefits

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

in which the injured employee is working part time while collecting partial benefits.

Taken together, temporary total and partial disability benefits may not exceed 364 weeks unless a judge finds that there is a permanent partial disability.

Permanent and Total Disability Benefits

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

Survivor Benefits

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

Cost-of-Living Adjustments (COLA)

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

Permanent Loss of Function and Disfigurement Benefits

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

EXPERIENCE RATING

An employer's workers' compensation premium is generally based on its experience rating. That is, each employer's cost is tied to the industry the employer operates in and the frequency and duration of the injuries the employer has. For example, companies are classified per a schedule approved by the state, assigning the company to a certain industry code. Then, within that code, employers either receive a financial benefit (reduced premium) or pay a cost (higher premium) based on the individual company's overall safety performance. In a nutshell, the more frequent and severe the injuries and illnesses are, the greater the premiums will be. The experience rating charge is calculated annually based on the employer's injury and illness data. The impact of the claim remains with the employer for the next three premium years.

Employers seeing their premiums rise should work with their workers' compensation carrier to implement more effective safety programs.

MODIFIED DUTY/RETURN TO WORK

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

Since workers' compensation incidents sometimes result in lengthy absences, it is important that employers carefully determine, document, and communicate their policies and practices related to job protection and continuation of benefits. AIM recommends that the policy be established in advance of the need to make a decision in

a specific case, since to do otherwise could create the perception that the policy was determined based on an individual situation rather than on more objective business criteria. It is further recommended that the policy be written to apply to all types of medical leave, instead of singling out workers' compensation cases.

SAFETY GRANT PROGRAM

Every fiscal year, the DIA awards numerous safety grants to Massachusetts employers. This grant program provides monies for workplace safety training aimed at making work safer for current and future workers in such organizations as service companies, manufacturing plants, and health-care and trade groups. To learn more about the program, please contact AIM or visit the DIA website at www.mass.gov/dia.

WC/FMLA/ADA

For employers with 50 or more employees, any lost-time workers' compensation claim involves both the Family and Medical Leave Act and the Americans with Disabilities Act. For example, an injured employee is likely to qualify for coverage under FMLA (serious medical injury) and have job-protected leave for up to 12 full weeks. Once FMLA leave is finished as part of the return-to-work effort, the employee may qualify for a reasonable accommodation provision under the ADA. One of the recognized accommodations is time off from work, meaning an employer should not unilaterally move to terminate an employee after the 12-week FMLA period has ended.

While some medical leave situations may not fall under the protection of the ADA, it is important that a careful review be made to make this determination. Consulting the AIM Hotline or legal counsel for guidance and current case law information is encouraged. ADA compliance requires careful case-by-case consideration.

It is illegal to retaliate against or terminate an employee for filing a workers' compensation claim.

X. EMPLOYMENT SEPARATION

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

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

DOCUMENT RETENTION

Under Massachusetts law, employers must retain a separated employee's personnel record for three years from the date of separation of employment. The employer must also retain Form I-9 for one year from the date of separation or three years from the date of hire, whichever is later.

HEALTH INSURANCE CONTINUATION: COBRA (FEDERAL LAW)

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

Due to the Supreme Court same-sex marriage decision referenced in Section II, the definition of spouse under COBRA now includes same-sex spouses.

MINI-COBRA (MASSACHUSETTS)

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

PAYMENT OF WAGES

In all cases, a terminated employee must be paid all outstanding wages, including commissions (when determined), plus any earned but unused vacation pay. In the case of a voluntary separation, the employee may be paid no later than the time of the next normal pay date. (A final commission payment may be made once it is determined.) In the case of an involuntary separation, the employee must be paid wages (including earned but unused vacation pay) on the day of termination. In either case, an exempt employee may be paid on a pro rata basis for the final week of work. Employers that provide paid time off (PTO) instead of specific vacation leave are encouraged to have a well-communicated policy that sets forth how earned vacation will be calculated and paid upon termination of employment. Absent a well-documented and consistently applied policy and practice, the entire PTO bank is likely to be deemed payable to the separating employee. Please see Section V for a more detailed discussion of payment of wages.

RELEASE OF CLAIMS, SEVERANCE PAY, AND TERMINATION AGREEMENTS

There are no laws requiring employers to pay severance benefits to a separating employee. An employer may elect to do so through a termination agreement known as a release of claims. To be valid, a release of claims requires payment from the employer to the employee in exchange for the employee forgoing a legal right to sue the employer over matters arising out of employment, such as discrimination. The payment must be above and beyond any payment of final wages owed. In the context of unemployment, a release of claims is treated separately from severance pay and does not delay a claimant's right to collect unemployment. Please see Section XI for a more detailed discussion of severance pay and termination agreements.

UNEMPLOYMENT INSURANCE

See the compliance tip in Section XI below.

XI. UNEMPLOYMENT INSURANCE

BENEFITS

An employee who loses a job through no fault of his or her own—including voluntarily leaving a job due to conditions caused by domestic violence; sexual harassment; or other urgent, compelling, or necessitous reasons—may be eligible for unemployment insurance (UI) benefits for a period of up to 30 weeks.

The administrating agency, the Department of Unemployment Assistance (DUA), determines benefit eligibility and duration. Claimants are subject to a one-week waiting period. The maximum UI benefit is 50% of an employee's average weekly wage, up to a ceiling of 57.5% of the state's average weekly wage (SAWW). The current SAWW was established on October 1, 2019, and is $1,431.66. The current maximum benefit is $823 per week. A claimant may also receive a dependency allowance of $25 per week per dependent, up to a maximum of one-half of the employee's weekly UI benefit. Employers have appeal rights to challenge a determination of eligibility. The DUA has an administrative process to determine a claimant's eligibility for benefits if it is in dispute.

Employers must file the Quarterly Contribution Report, Form 0001. An employer who has filed all required reports and has paid all contributions due may elect to make voluntary contributions. Upon timely payment of a voluntary contribution, the contribution is credited to the employer's account balance and the employer receives a re-computation of its contribution rate for that calendar year. Employers are also required to display the DUA's poster, "Information on Unemployment Insurance Benefits," informing workers about the filing requirements necessary to collect UI benefits. Failure to comply with this posting requirement may result in a warning for the first offense, fines of $100 and $250 for the second and third offenses, and a fine of $500 for more than three violations. Please visit the DUA website at www.mass.gov/orgs/department-of-unemployment-assistance, or contact the DUA at 617-626-5400 for posters and forms.

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

EXPERIENCE RATING

In most cases, charges for UI benefits are paid from the specific employer's UI trust fund account. Under Massachusetts law, employers pay the full cost of the UI charges. All employer charges are based on the UI tax rates contained within the statutorily established "Table of Contribution Rates and Schedules", ranging from A (lowest) to G (highest). Under current Massachusetts law, UI tax charges for 2020 are based on schedule E. The schedule is based on the overall UI trust fund balance – that is the greater the balance, the lower the schedule, and vice versa.

Each contributing employer is assigned a tax rate based on its UI experience rating (employer's trust fund balance, layoffs, benefits paid out from employer's account, contributions paid, etc.). The DUA projects that employers will pay an average of $584 per employee in 2020.

In order to determine the annual UI assessment for the following year, the DUA reviews

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

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

HEALTH INSURANCE FOR THE UNEMPLOYED/EMPLOYER MEDICAL ASSISTANCE CONTRIBUTION (EMAC)

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

Contributions

Employers must pay contributions on the first $15,000 of each employee's wages paid during the 2020 calendar year. The amount of contributions due (or liability) is derived by multiplying these wages by an assigned rate. The result is the amount that must be paid as an employer medical assistance contribution (EMAC). When a quarterly contribution report is not filed with the DUA through UI Online as required, the amount of liability cannot be established and will therefore be estimated.

Exemptions

Employers are exempt when they meet the definition of "newly subject." That is, an employer is not liable for payment of EMAC for up to three years after first becoming subject to the unemployment insurance law.

EMAC rates effective January 1, 2020:

Years 1, 2, and 3	New employers that become subject to EMAC previously will be exempt for the first three years.
Year 4	Employers in their fourth year of being subject to EMAC previously will an pay an EMAC rate of 0.12% (0.0012).
Year 5	Employers in their fifth year of being subject to EMAC previously will pay an EMAC rate of 0.24% (0.0024).
Year 6 and more	Employers in their sixth year or more of being subject to UHI previously will pay an EMAC rate of 0.34% (0.0034).

Employers that paid an EMAC rate of 0.51% in 2019 will pay a rate of 0.34% for calendar year 2020, except for those meeting exempt or reduced rate criteria. Employers operating within 3 years following the "newly subject" status as of MGL 151A, will pay at rates of 0.12% and 0.24%, respectively.

LOCKOUTS AND STRIKES

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

SEVERANCE PAY AND TERMINATION AGREEMENTS

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

Any employer considering offering an employee a release of claims should consult with legal counsel prior to making the decision to do so.

To be valid, a release of claims requires payment from the employer to the employee in exchange for the employee forgoing a legal right to sue the employer over matters arising out of employment, such as discrimination. In the context of unemployment, a release is treated separately from severance pay and does not delay a claimant's right to collect unemployment.

The Older Workers Benefit Protection Act of 1990 requires that releases of legal claims for workers 40 years old and older be knowing and voluntary; be part of a written, clearly understood agreement that specifically lists ADEA rights or claims; exclude a waiver of claims and rights arising after the date of the waiver; be for consideration (i.e., something of value, such as additional pay and/or benefits); advise the individual to consult an attorney; provide up to 21 days for the individual to consider the waiver (up to 45 days if part of a group [i.e., two or more employees] offer); and allow the individual up to 7 days to revoke the waiver. An employer should not make the final payment as provided for in the release until after the 7-day revocation period has expired. When group layoffs or exit incentive programs are involved, the employee must be given information on the class of employees covered, eligibility factors, applicable time limits, and the job titles and ages of individuals eligible or selected and the ages of individuals in the same job classification or unit not selected.

SOLVENCY ACCOUNT

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

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

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

WORK SHARING

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

XII. BENEFIT CONTINUATION

HEALTH INSURANCE

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

COBRA (FEDERAL LAW)

Under COBRA, employers of 20 or more employees must offer continuation of benefits to employees and covered dependents, called "qualified beneficiaries," who would otherwise lose coverage due to certain "qualifying events." As a result of the Supreme Court decision in the Defense of Marriage Act case, a qualified beneficiary now includes a spouse in a same-sex marriage.

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

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

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

MINI-COBRA (MASSACHUSETTS)

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

COVERAGE FOR DIVORCED OR LEGALLY SEPARATED SPOUSES (MASSACHUSETTS)

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

In cases in which an employer continues to cover an ex-spouse, it is very likely that the employee will have to pay

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

LIFE INSURANCE (MASSACHUSETTS)

If an employee has been insured under a life insurance policy for five years or more immediately preceding termination, the employee shall continue to be insured for a period of 31 days. Conversion rights are also available (MGL c. 175 § 134).

XIII. PLANT CLOSINGS

FEDERAL LAW

Employers of 100 or more are required to give a 60-day advance notice before closing a facility or "operating unit" where 50 or more employees would lose their jobs within a 30-day period or, in the case of a mass layoff, where 50 employees constituting 33% of the workforce would be laid off within a 30-day period. Failure to give these notices will result in monetary penalties and could result in mandatory payment of severance to affected workers under the Worker Adjustment and Retraining Notification (WARN) Act.

MASSACHUSETTS LAW

The Massachusetts plant-closing law contains a compulsory 90-day extension of health insurance benefits by the employer and certain unemployment benefits in the event of a plant closing, and encourages voluntary notice to employees of an impending plant closing. The Massachusetts law covers a company that employs over 50 employees and is triggered when 90% of its employees would be terminated over a six-month period due to the plant closing (MGL c. 151A § 71A).

RESOURCES: POSTERS | WEBSITES

Massachusetts and federal websites provide very useful compliance information for employers, including posters, regulations, opinion letters, guidance, advisories, and Frequently Asked Questions pages. This is only a partial listing and is not intended as a comprehensive list of all required workplace posters and notices. Materials may be updated at any time. You are encouraged to check with the issuing agencies for the most up-to-date information.

FEDERAL

- **Employee Polygraph Protection Act**: Prohibits most private sector employers from using a polygraph on an individual for pre-employment testing or duringthe course of employment www.dol.gov/agencies/whd/posters/employee-polygraph-protection-act (rev. 2016) (Note that Massachusetts law prohibits employers from using lie detector tests in connection with employment.)
- **Equal Employment Opportunity:** Poster covers Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Vietnam Era Veterans Readjustment Act, Executive Order 11246, and the Rehabilitation Act of 1973 (rev. 2009)
- **E-Verify:** E-Verify Participation posters must be displayed in English and Spanish by participating employers to inform their current and prospective employees of their legal rights and protections www.uscis.gov/e-verify/publications/participation-posters/e-verify-participation-posters (rev. 2017)
- **Family & Medical Leave Act:** Poster summarizes the major provisions of the law and informs employees how to file a complaint; poster must be displayed at all locations of a covered employer even if there are no eligible employees www.dol.gov/whd/regs/compliance/posters/fmla.htm (rev. 2016)
- **OSHA 300 Log:** Employer must post an annual summary of occupational illnesses and injuries (Form 300A) each year from February 1 to April 30 (retail, finance, insurance, and real estate are exempt from this requirement) www.osha.gov/recordkeeping/RKforms.html (rev. 2004)
- **Military Leave:** Uniformed Services Employment and Reemployment Rights Act www.dol.gov/vets/programs/userra (rev. 2017)
- **Wage and Hour Laws:** www.dol.gov/agencies/whd/flsa (2019)
- **Workplace Safety:** Occupational Safety and Health Act (OSHA) covers employers engaged in interstate commerce www.osha.gov/Publications/poster.html (rev. 2019)

MASSACHUSETTS

- **Child Labor:** www.mass.gov/doc/child-labor-laws-poster/download (rev. 2010)
- **Earned Sick Time Law:** www.mass.gov/doc/earned-sick-time-notice-of-employee-rights-english/download (pub. 2016)
- **Fair Employment Law:** Poster covers notification of protection for discrimination on the basis of race, color, religious creed, national origin, sex, sexual orientation, genetic information, military service, age, ancestry, disability and harassment. www.mass.gov/doc/fair-employment-poster/download (rev. 2015)
- **No Smoking signs:** Must be posted and visible in the workplace. Available from the Department of Public Health or through your local board of health www.mass.gov/files/documents/2016/07/tu/no-smoking-sign-8x11.pdf

- **Unemployment Insurance:** Information on Employees' Unemployment Insurance Coverage www.mass.gov/doc/information-on-employees-unemployment-insurance-coverage-form-2553a/download (rev. 2015) (documents available in many languages)
- **Wage and Hour Laws:** Covers MA Wage and Hour Laws, Hours Worked, Pay Deductions, Paystub Information, Child Labor, Overtime, Tips, Reporting Pay, Earned Sick Time, Domestic Violence Leave, and Meal Breaks www.mass.gov/doc/massachusetts-wage-hour-laws-poster/download (10-2018)
- **Workers' Compensation:** Notice to Employees of WC coverage www.mass.gov/service-details/notice-to-employees-poster (poster available in multiple languages)

AIM offers four monthly roundtables across the commonwealth designed to provide HR professionals an opportunity to meet and network about new developments in human resources and employment law in Massachusetts and the United States. The roundtables last two hours and occur in Woburn, Holyoke, Worcester, and Taunton. Anyone looking for more information about the roundtables and how to sign up should contact Wendy Dalwin at wdalwin@aimnet.org or Melissa Wotus at mwotus@aimnet.org.

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