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Overview of Developments In Employment Law 2008-2009

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Overview

I. Independent Contractors And Worker Classification

II. Health Care Reform

III. Selected Legislative Developments

IV. Regulatory Activity

V. Selected Cases

VI. Pending Or Proposed Legislation / Administration Priorities

I. INDEPENDENT CONTRACTORS AND WORKER CLASSIFICATION

Classification of Workers Matters Because….

- Laws governing the workplace generally apply only to employees, not independent contractors. For example, the following laws generally do not apply to independent contractors:
  - Workers' compensation.
  - Massachusetts or federal minimum wage and overtime provisions.
  - Tax withholding.

2004 Amendment to Independent Contractor Law

- In July of 2004, Massachusetts General Laws Chapter 149, Section 148B, was amended, changing the definition of an independent contractor.
- The law creates a presumption that workers are employees not independent contractors.
- It expands the presumption of employment to other wage and hour taxation, and workers compensation statutes.

2004 Amendment to Independent Contractor Law

- Workers may only be classified as independent contractors under Massachusetts law if they meet a three-factor test.
- All three factors must be met in order for the worker not to be considered an employee.
- This test is more difficult than the traditional common law test or the Internal Revenue Service's well-known 20 Factor Test.
- The burden of proof is on the employer.

Why the renewed focus on this 2004 amendment now?

- 2008 Attorney General Advisory.
- 2009 Department of Revenue Voluntary Compliance Program (TIR 09-2).
- Health Care Reform Audits.
- Joint Enforcement Task Force on the Underground Economy and Employee Misclassification.

2004 Amendment to Independent Contractor Law: The Three Factor Test

- The amended law provides that an individual performing any service is an employee unless:

  1. he is free from control and direction in connection with the performance of the service, both under his contract of the performance of service and in fact;

2004 Amendment to Independent Contractor Law: The Three Factor Test

2. the service is performed outside the usual course of the business of the employer; ***and***

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. [Emphasis supplied].

The First Factor: Freedom From Control and Direction

- The first part of the three part test is that the individual must be "free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact".
- The Attorney General's Advisory makes clear that an employment contract or job description is insufficient: the worker's activities and duties should actually be carried out with minimal instruction.

The First Factor: Freedom From Control and Direction

- The 2004 Advisory had been even more explicit: "[a]n employment contract or job description indicating that a worker is free from supervisory direction or control is a ***prerequisite***, but is insufficient by itself under the Independent Contractor Law" (Emphasis supplied).

The First Factor: Freedom From Control and Direction

Practice Note:

Companies should require service providers/workers they wish to classify as independent contractors to sign written contracts reflecting the three factors in the Independent Contract Law.

The First Factor: Freedom From Control and Direction

- To show freedom from control, a business must be able to demonstrate that the worker actually carries out his/her activities and duties with independence and autonomy.
- The AG's 2008 Advisory provides the example of an independent contractor who completes the job using his or her own approach with little direction and dictates the hours that he or she will work on the job.

The First Factor: Freedom From Control and Direction

"The burden is upon the employer to demonstrate that the services at issue are performed free from its control or direction. The test is not so narrow as to require that a worker be entirely free from direction or control from outside forces." *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod, 68 Mass. App. Ct. 426, 434 (2007), cited in the 2008 AG Advisory.*

The Second Factor: Service Outside Usual Course of Employer's Business

- The service must be performed outside the usual course of the business of the employer.
- The Attorney General states that a worker who performs "the same type of work that is part of the normal service" delivered by the company cannot be an independent contractor.

The Second Factor: Service Outside Usual Course of Employer's Business

- Under the prior law, the second factor could be satisfied if the worker performed services "***either*** outside the usual course of the business for which the service is performed ***or*** [performed the services] outside of all places of business of the enterprise". [Emphasis supplied]

The Second Factor: Service Outside Usual Course of Employer's Business

- Formerly, a worker could work within the usual course of the company's business and still properly be classified as an independent contractor so long as s/he worked outside the place of the company's business.
- *Now* it appears that a company may not hire a worker to perform service that it delivers as part of its business and classify that worker as an independent contractor.

The Second Factor: Service Outside Usual Course of Employer's Business

- This could require a change in common independent contractor arrangements such as:
  - between mental health providers and the social workers and psychologists providing treatment;
  - certified public accounting firms and accountants hired temporarily by such firms to work during tax season;

The Second Factor: Service Outside Usual Course of Employer's Business

- construction companies and plumbers, carpenters and other tradesmen;
- athletic clubs and personal trainers; and
- insurance agencies and insurance agents.

The Second Factor: Service Outside Usual Course of Employer's Business

The 2008 AG Advisory provides further guidance on the second factor. The Advisory favorably cites an Illinois case:

"The washing of windows or mowing of grass for a business is incidental. But when one is in the business of selling a product, sales calls made by sales representatives are in the usual course of business because sales calls are necessary. When one is in the business of dispatching limousines, the services of chauffeurs are provided in the usual course of business because the act of driving is necessary to the business."

The Second Factor in Action: Examples

1. A drywall company classifies an individual who is installing drywall as an independent contractor.

2. A company in the business of providing motor vehicle appraisals classifies an individual appraiser as an independent contractor.

3. An accounting firm hires an individual to move office furniture.

The Third Factor: Independent Trade, Occupation or Business

- The third factor is that the worker must be "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed".

The Third Factor: Independent Trade, Occupation or Business

Practice Tip:

It is unlikely that a worker with a long term relationship with a company who works exclusively for that company can properly be classified as an independent contractor under Massachusetts law.

Factors That Are Not Relevant to Determining Independent Contractor Status

- Failure to withhold taxes
- Failure to contribute to unemployment compensation
- Failure to provide workers' compensation for a worker
- A worker's decision to exercise his/her option to obtain workers' compensation insurance as a sole proprietor or partnership

Factors That Are Not Relevant to Determining Independent Contractor Status

- Company beliefs are also cited as irrelevant in the AG Advisory.
- Worker desires or beliefs are not mentioned in the AG Advisory.

The Effect of Violating the Massachusetts Independent Contractor Law

Penalties for Violation can include:

- Written warning or civil citation for each violation.

  Each failure to pay an employee appropriately for any pay period may be deemed a separate violation.

- Rectification of the infraction.

The Effect of Violating the Massachusetts Independent Contractor Law

- Restitution to the aggrieved party
- Civil penalties ($7,500-25,000/offense)
- Criminal penalties ($10,000-50,000/offense)
- Imprisonment
- Debarment from performing work on public projects

The Effect of Violating the Massachusetts Independent Contractor Law

- There is potential liability for both business entities and potential personal liability individuals, including corporate officers and those with management authority over affected workers
- Workers may also bring a private civil action seeking treble damages and attorneys fees

Other Potential Issues

- Retirement plan eligibility
- Health insurance eligibility
- Entitlement to back contributions under retirement plans
- Back overtime pay

Other Potential Issues

- Entitlement to back vacation pay
- Prospective entitlement to vacation, sick and holiday pay
- Coverage under applicable collective bargaining agreements

Current Developments Requiring Renewed Focus on This Issue Now:

- 2008 Attorney General Advisory
- Health Care Reform Audits
- Joint Enforcement Task Force on the Underground Economy and Employee Misclassification
- Department of Revenue Voluntary Compliance Initiative

Attorney General Enforcement

- The Attorney General issued a revised advisory 2008/1 superseding the 2004 advisory.
- Only where an individual is classified other than an employee will there be any determination of whether any of the factors are violated.
- The 2008 Advisory makes clear the AGO will enforce the law against entities that allow or contract with corporate entities such as LLC's or S Corporations that exist to avoid the law.

Attorney General Enforcement

- The AGO considers as strong evidence of misclassification:
  - Individuals providing services for an employer that are not reflected on the employer's business records;
  - Individuals providing services who are paid "off the books", "under the table", in cash or provided no documents reflecting payment;
  - Insufficient or no workers' compensation coverage exists;

Attorney General Enforcement

- Individuals providing services are not provided 1099s or W-2s by any entity;
- The contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity; and
- Alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance.

Department of Revenue Voluntary Compliance Initiative

- On February 9, 2009, the Commissioner of Revenue announced a new voluntary compliance and enforcement initiative for employers that either have
  - failed to file Massachusetts withholding or wage and information returns; or
  - have misclassified workers that should have been classified as employees on such returns for past taxable periods.

DOR Voluntary Disclosure Program

- This new Voluntary Disclosure Program is a time-limited program:
  - Initial contact must be by letter postmarked between February 17, and April 30, 2009.
  - Payment in full of amounts due on wage and information returns for tax periods beginning on or after January 1, 2008 plus applicable interest must be made no later than April 30, 2009.

DOR Voluntary Disclosure Program

- DOR uses the IRS 20 Factor Test in addition to the common law elements of direction and control to determine appropriate classification for wage withholding under M.G.L c.62B

DOR Voluntary Disclosure Program

- DOR may assess for any taxable period for which a return was due.
- The Statute does not limit the number of past due returns the Commissioner may assess.
- When an employer voluntarily complies with the terms of the VDP, the Department will apply a limited look-back period.

DOR Voluntary Disclosure Program

- If an employer does not come forward voluntarily and the Commissioner discovers from a source other than the employer's voluntary disclosure that an employer has misclassified its employees, the Department will apply a look-back period that is appropriate
  - will not be bound by the seven year look-back period.

DOR Voluntary Disclosure Program

- A taxpayer that has already been contacted by the Audit Division or is the subject of any other enforcement action is ineligible to participate in this initiative.

DOR Voluntary Disclosure Program

- The Commissioner may require additional returns to be filed, up to and including all past due returns. The Commissioner will consider pertinent facts and circumstances including:
  - Degree of flagrancy and history
  - Whether there was a basis for any reasonable doubt

DOR Voluntary Disclosure Program

- Failure to file returns of any type, such as 1099s
- Attempt in any manner to evade or defeat any tax
- Willful neglect to file
- Sporadic filing not justifiable by objective circumstances
- Special circumstances peculiar to the employer, its business or industry

DOR Voluntary Disclosure Program

- Penalties are generally imposed for late filing of a return or late payment of taxes.
- The Commissioner may waive late filing or payment penalties in some circumstances.
- The Commissioner will generally waive such penalties when an employer demonstrates that the failure to file or pay resulted from reasonable cause and not willful neglect.

DOR Voluntary Disclosure Program

- Participation in the DOR VDP has no effect on penalties imposed by other agencies, e.g., DUA.
- In order to take advantage of the VDP, the Employer must consent to the sharing of the information with other agencies including DUA and DIA.

DOR Voluntary Disclosure Program

- If DOR can verify that the employee paid income tax or made estimated personal income tax payments to the Commonwealth on or before April 15, 2009, the employer will receive credit for such payments (subject to offset for any other taxes due from the employer)

DOR Voluntary Disclosure Program

- To the extent DOR receives payments from an employer with respect to wages paid to an individual employee, DOR will not seek to collect unpaid tax from the employee, but will require the employee to file the appropriate returns.

Underground Economy and Employee Misclassification Task Force

- On March 12, 2008, Governor Deval Patrick signed Executive Order #499 establishing the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification.

Underground Economy and Employee Misclassification Task Force

What is the underground economy?

Individuals and businesses that

- Willfully avoid labor, licensing and tax laws
- Deal in cash and/or other "off the books" schemes
- Engage in misclassification of employees to conceal their activities and true tax liability from licensing, regulatory and tax agencies

Underground Economy and Employee Misclassification Task Force

- The Task Force is charged with coordinating the efforts of several state agencies to "stamp out" these "fraudulent employment activities."
- The Task Force has set up a tip line and is holding local meetings to encourage reporting of worker misclassification.

Underground Economy and Employee Misclassification Task Force

- The Task Force emphasizes that the underground economy affects:
  - Taxpayers
  - Workers who may otherwise be exploited
  - Responsible employers and their workers
  - Consumers of potentially unregulated and unsafe goods and services.

Underground Economy and Employee Misclassification Task Force

The objectives of the Task Force include:

- Eliminating unfair business competition/creating a level playing field
- Protecting workers by ensuring they receive benefits and protections due them under the law

Underground Economy and Employee Misclassification Task Force

- Protecting consumers by ensuring businesses are properly licensed and adhere to consumer protection regulations
- Increasing compliance with tax laws to maximize revenue.

Underground Economy and Employee Misclassification Task Force

Task Force Member Agencies

- Department of Labor (DOL)
- Department of Industrial Accidents (DIA)
- Department of Public Safety (DPS)
- Department of Revenue (DOR)
- Division of Apprenticeship Training (DAT)

Underground Economy and Employee Misclassification Task Force

- Division of Career Services (DCS)
- Division of Occupations Safety (DOS)
- Division of Professional Licensure (DPL)
- Division of Unemployment Assistance (DUA)
- Insurance Fraud Bureau (IFB)
- Massachusetts Office for Refugees and Immigrants (MORI)

Underground Economy and Employee Misclassification Task Force

Some statistics:

- The Task Force estimates that up to 14% of workers covered by audits in Massachusetts between 2002 and 2005 were misclassified.

Underground Economy and Employee Misclassification Task Force

- A 2004 Harvard study estimated that the state lost significant revenue between 2001 and 2003 due to the underground economy:
  - Nearly $100 million in unpaid income tax payments
  - another $100 million in unpaid workers compensation contributions.

Underground Economy and Employee Misclassification Task Force

In this economy, the possibility of significant revenue enhancement will continue to keep this on the government's front burner.

II. HEALTH CARE REFORM

Health Care Reform – First a quick recap

- Health Care Reform was signed into law on April 12, 2006.
- The Act required nearly all citizens of the Commonwealth to be covered by health insurance as of July 1, 2007.

Health Care Reform – First a quick recap

- The Act implemented a number of new obligations for employers of Massachusetts residents/including:
  - Fair Share Contribution
  - Free Rider Surcharge/Cafeteria Plans
  - HIRD Forms

Health Care Reform - FSC

The Employer Fair Share Contribution sections of the law provide that all employers of eleven or more FTE employees must either:

- Provide a "fair and reasonable" premium contribution or
- Pay a Fair Share Assessment of up to $295 per employee, per year

Health Care Reform - FSC

- The Primary Test requires that 25% or more of an employer's full time employees be enrolled in the employer's health insurance plan.
- The Secondary Test exempts an employer from paying a Fair Share Contribution if it has offered to pay at least 33% toward the cost of an individual health insurance plan to all full time employees no more than 90 days after the date of hire.

Health Care Reform - FSC

- For an employer not meeting either the Primary or Secondary test standards, the Fair Share Employer Contribution is up to $295 per employee per year.
- Beginning with the first quarter of 2009, employers with more than 50 FTE's must pass both tests to avoid paying the FSC contribution unless 75% or more of its full time employees are enrolled.

Health Care Reform - Free Rider Surcharge

- The free rider surcharge is a penalty levied on employers with more than 11 FTE's who have not established a cafeteria style plan allowing employees to buy insurance with pretax dollars.
- The surcharge is between 20% and 100% of the cost of state-funded care. The surcharge may be reduced by up to 75% based on the percentage of the employer's employees enrolled in the employer's health care plan.
- There may be renewed efforts to increase the Surcharge

Health Care Reform – HIRD forms

Employers with 11 or more FTE's must file an Employer Health Insurance Responsibility Disclosure (HIRD) Form and collect and maintain Employee HIRD forms.

The Employer HIRD form must be filed annually by November 15.

Health Care Reform – Field Audits

- DUA is currently doing field audits on selected employers and industries and imposing penalties.
- DUA is also sharing the information directly with the Underground Economy Task Force.
- Make sure to utilize qualified professional assistance before speaking to or meeting with the auditor.

Health Care Reform – Being Ready for the Audit

- Plan document(s) and any amendments.
- Summary plan descriptions.
- Cafeteria plan documents and SPD's.
- Eligibility rules for participation as distributed with documentation of distribution.

Health Care Reform – Being Ready for the Audit

- Documentation of who is eligible.
- Documentation of offer to each eligible employee.
- Proof of coverage / declination of coverage.

III. SELECTED LEGISLATIVE DEVELOPMENTS

A. Genetic Information Non-Discrimination Act of 2008

- GINA applies to employers and health plans.
- It becomes effective:
  - November 21, 2009, for employers, and
  - the first plan year beginning after May 21, 2009, for health plans.
- Over 30 states have laws prohibiting genetic discrimination.

A. Genetic Information Non-Discrimination Act of 2008

- Genetic Information is about:
  - an individual's genetic tests;
  - the genetic tests of family members of the individual; and
  - the manifestation of a disease or disorder of the individual's dependents, or first, second, third or fourth-degree relative.

A. Genetic Information Non-Discrimination Act of 2008

- Employers may not collect genetic information.
- Employers must keep genetic information confidential.
- Employers may not discriminate against applicants or employees on the basis of genetic information.

A. Genetic Information Non-Discrimination Act of 2008

- Employers may not collect genetic information except
  - Inadvertently,
  - If genetic services are offered by the employer (e.g., in a wellness program), with prior written authorization, and limited to health care professionals,
  - To comply with FMLA or similar state law,

A. Genetic Information Non-Discrimination Act of 2008

- By purchasing documents that are commercially and publicly available, or
- To undertake genetic monitoring of the biological effects of toxic substances in the workplace.

A. Genetic Information Non-Discrimination Act of 2008

- Employer must keep genetic information confidential
  - Separate forms and in separate medical files
  - Compliance with the requirements for maintaining confidential medical records under the ADA is considered compliance with GINA's maintenance requirements.

A. Genetic Information Non-Discrimination Act of 2008

- Disclosure is permitted under certain circumstances including:
  - in connection with the certification provisions of the FMLA or similar state law
  - to the employee, if requested in writing
  - if ordered by a court or certain other public researchers, officials or officers investigating compliance.

A. Genetic Information Non-Discrimination Act of 2008

- Employers, employment agencies and unions may not because genetic information about an employee:
  - Hire or fire or otherwise discriminate against an employee or applicant, or
  - Limit, segregate or classify employees in any way that would deprive them of employment opportunities or adversely affect them.

A. Genetic Information Non-Discrimination Act of 2008

- EEOC enforcement per Title VII powers.
- No cause of action for disparate impact until 6 year study completed
- Related issues include:
- EEOC enforcement per Title VII powers.
  - ADA-"regarded as"
  - ERISA Section 510

A. Genetic Information Non-Discrimination Act of 2008

- Health Plans and insurers must
  - treat genetic information as "protected health information" under HIPPA, and
  - use genetic information only for specified purposes
- There is no exception for small group health plans.

A. Genetic Information Non-Discrimination Act of 2008

- Health Plans and Insurers may not
  - adjust premiums or contribution amounts of the group based on genetic information;
  - request or require genetic testing;
  - request, require or purchase genetic information for underwriting purposes or in advance of an individual's enrollment;

A. Genetic Information Non-Discrimination Act of 2008

- establish rules for eligibility, or adjust premiums or contribution amounts, based on genetic information; or
- impose preexisting condition exclusions based on genetic information.

A. Genetic Information Non-Discrimination Act of 2008

Health Plan Enforcement:

- By the DOL
- $100 per day per violation penalty
- If uncorrected, penalty of at least $2,500 per participant or at least $15,000 per participant if not *de minimus*
- Penalty may be waived in certain situations

B. Lilly Ledbetter Fair Pay Act

- The LLFPA signed January 29, 2009 as the first legislative act of Obama's presidency.
- It expands time limits for employees challenging pay discrimination.
- It represents an attempt by Congress to repair a perceived errors by the Supreme Court and overturns Ledbetter v. Goodyear.

B. Lilly Ledbetter Fair Pay Act

- Ledbetter decision was found by Congress to have impaired "bedrock principles of American law" by unduly restricting the time period in which victims of discrimination can challenge discriminatory decisions and practices.

B. Lilly Ledbetter Fair Pay Act

- LLFPA makes clear that a discriminatory compensation decision or practice occurs each time compensation is paid pursuant to an illegal decision or practice under:
  - Title VII
  - ADA
  - ADEA

B. Lilly Ledbetter Fair Pay Act

- LLFPA does not limit a claimant's right to introduce evidence of an unlawful employment practice outside the time to file a charge of discrimination

B. Lilly Ledbetter Fair Pay Act

- Those responsible for discrimination may no longer be available as witnesses or their memories may have faded.
  - Practice Point – thus documentation is more critical than ever.
- Financial exposure can also increase exponentially because the time period for which damages may be owing can be many years

C: Stimulus Bill: COBRA Amendments

- The American Recovery and Reinvestment Act of 2009 (ARRA) included important changes to COBRA.
- The Act provides for a subsidy of 65% of the COBRA premium rate for certain individuals who were involuntarily terminated between September 1, 2008 and December 31, 2009.
- The subsidy lasts for up to 9 months.

C: Stimulus Bill: COBRA Amendments

- Employers will pay the 65% subsidy and be reimbursed for the cost through payroll tax deductions.
- If the cost of the subsidy exceeds the amount owed in payroll taxes, the employer will be entitled to receive payment for the balance.

C: Stimulus Bill: COBRA Amendments

- The subsidy requires new notice requirements that employers and COBRA administrators must follow.
- Those eligible for the subsidy who declined COBRA coverage or let it lapse between September 1, 2008 and February 16, 2009 will have another opportunity to elect COBRA with the Subsidy.

D: Stimulus Bill: HIPAA Amendments

- The ARRA included changes to HIPAA to apply security and privacy provisions directly to business associates of a covered entity.
- Business associate agreements will have to be modified based on the new rules.

D: Stimulus Bill: HIPAA Amendments

- The Act also imposed new notice requirements on covered entities and business associates in the event of a breach of private health information privacy. This provision will be effective 30 days after the Department of Health and Human Services issues regulations, which it must do with in 180 days of February 17, 2009.
- The other new rules will be effective February 17, 2010 or later and guidance is expected on the requirements in the next 6 months.

E. ADAAA

- ADA Amendments Act of 2008
  - Overturns four US Supreme Court cases of the last decade addressing the ADA and coverage of definition of "disabled."

E. ADAAA

- "It is the intent of Congress that the primary object of attention [in ADA cases] should be whether entities covered under the ADA have complied with their obligations… **the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."**

E. ADAAA

- Key Legislative Changes:
  - In determining disabled status, consider employee in "uncorrected state"
  - Employee may be "regarded as" disabled even where employer does not perceive impairment as limiting a major life activity

E. ADAAA

- EEOC directed to revise overly-restrictive definition of "substantially limited"
- A condition that substantially limits one major life activity need not limit any others
- Expansion of "major life activities" and addition of "major bodily functions" to definition of "disabled"

E. ADAAA

- How does this change the status quo?

    1. Is employee disabled?

    2. If so, employer is obligated to:

        a) Engage in interactive process; and

        b) Provide reasonable accommodation

- Congressional mandate for EEOC and courts to de-emphasize Step #1 and focus analysis in ADA cases on Step #2

IV. REGULATORY ACTIVITY

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- In September 2008, the EEOC issued guidance on applying performance and conduct standards to employees with disabilities.
  - The guidance is not a new law
  - Official interpretation by EEOC, the federal agency charged with enforcement of ADA

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Overview of "the Basics" (Client Alert Pg. 1-2).
  - Cannot discriminate against qualified individual with a disability.
    - Disability:
      - Physical or mental impairment that substantially limits major life activity
      - Record of such impairment
      - "Regarded as" having such impairment

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Overview of "the Basics" (continued)
  - "Qualified individual" must be able to perform essential functions with or without reasonable accommodation
  - Obligation to participate in interactive process to discuss possible accommodations
  - Must provide accommodation unless doing so would cause "undue hardship"

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Performance Standards (Client Alert pp. 2-3)
  - Can apply same quantitative/qualitative standards where job related and consistent with business necessity
  - Uniform application/enforcement is key
  - Need not remove essential functions from the job
  - But remember: still obligated to consider and provide accommodations where "reasonable" (e.g., schedule adjustment, time off, transfer, remove marginal duties)

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Conduct Standards (Client Alert pp. 3-5)
  - Need not tolerate/excuse misconduct caused by disability if:
    - Job-related and consistent with business necessity
    - Performance expectations uniformly applied

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Need not rescind discipline/termination where first learn of possible disability at the time/after the fact

- But, must still engage in interactive process and provide reasonable accommodations going forward – cannot retaliate for bad behavior

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Request for Medical Information (Client Alert pp. 5-6)
  - Reasonable belief
  - Objective evidence
  - Employee unable to perform essential function(s) OR
  - Poses a "direct threat"

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Attendance (Client Alert pp. 6-7)
  - Schedule modification and leave can be a reasonable accommodation
  - Generally need not tolerate frequent, unexcused, and/or unpredictable absences where impacts essential job function(s)
  - Need not grant leaves of indefinite duration

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Alcohol/ Drugs (Client Alert pp. 7-8)
  - Alcoholism = disability
  - (History of) drug addiction = disability
  - Must provide "reasonable accommodation" (e.g., leave for treatment, EAP)
  - (Current) use of illegal drugs - not protected

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Violation of drug/alcohol policy at work – not protected
- Misconduct/poor performance due to impairment – not protected
- Remember – must still engage in interactive process and provide reasonable accommodations going forward – cannot retaliate or discriminate

A. EEOC Guidance on Performance and Conduct Standards Under the ADA

- Employee Confidentiality (Client Alert pp. 8-9)
  - Should not tell co-workers of accommodation
  - "Out of respect for all our employees, we do not discuss one employee's situation with others"
  - Assure co-workers that employee is "meeting work requirements"

B. New FMLA Regulations

- Incorporates statutory changes to FMLA in 2008 relating to military families:
  - Up to 12 weeks of leave for spouse, parent, son or daughter of certain military personnel to address "qualifying exigencies"
  - Up to 26 weeks of leave for next of kin to care for covered service member with line of duty injury/illness

B. New FMLA Regulations

- Comprehensive overhaul of existing FMLA regulations
- Effective January 16, 2009

B. New FMLA Regulations

- Highlights
  - Enhanced notice requirements
  - Revised notices and medical certification forms

B. New FMLA Regulations

- Expanded ability for employers to obtain authentication and clarification of medical certifications
- Clarification of numerous other topics, including: employee eligibility, light duty, fitness for duty, waivers, substitution of paid leave…

C. Massachusetts Data Security Regulations

- Now effective January 1, 2010
- Applies to any business that maintains personal information about a resident of the Commonwealth
- Establishes minimum required standards to secure information in both paper and electronic form

C. Massachusetts Data Security Regulations

- Personal information = Name +
  - SSN;
  - Drivers License Number; or
  - Financial/Credit Account Number

C. Massachusetts Data Security Regulations

- Mandatory written program:
  - Designate responsible employees
  - Identify risks and effectiveness of current safeguards
  - Develop security policies for employees
  - Discipline employees for policy violations
  - Prevent former employees from accessing records

C. Massachusetts Data Security Regulations

- Verify compliance of third-party service providers
- "Reasonable" limitations on information collected and on retention period
- Identify documents with personal information (or treat all documents as such)
- Restrictions on physical access
- Mandatory annual and post-incident reviews with documentation

C. Massachusetts Data Security Regulations

- Electronic Records:
  - Limit access to those who need information for job duties
  - Unique IDs and passwords
  - Secure method to assign and select passwords
  - Restrict access to active users only

C. Massachusetts Data Security Regulations

- Block access after multiple login attempts
- Encryption of personal info on all laptops, portable devices and transmitted files
- Mandatory firewalls and anti-virus protection
- Education and training of employees

D. Immigration: New I-9 Form

- Employers must use new I-9 Employment Eligibility Verification Form for new hires and recertification's starting 4/3/2009.
- Expired documentation will no longer be accepted for I-9 verification. Currently, certain expired documents (e.g., U.S. Passport, driver's license) are acceptable for certain purposes.

D: Immigration: New I-9 Form (cont.)

- Updates to List A documents (establishing both identity and work authorization):
  - Removes several outdated immigration documents no longer in use
  - Adds Passports for citizens from Micronesia and Marshall Islands.
- In a separate announcement in August 2008, USCIS announced that the new U.S. "Passport Cards" are acceptable List A document.

D: Immigration: "No-Match" Safe Harbor Rule Still on Hold

- On October 28, 2008 DHS published supplemental final "No Match" rule in attempt to address concerns raised in pending lawsuit by AFL-CIO.
- Supplemental final rule addresses procedural rulemaking issues. Substance of rule itself is essentially unchanged.
- Court has refused to lift injunction (in effect since October 2007) or expedite processing of case.
- As in past years, SSA decided not to issue "No Match" letters for 2007 Tax Year. SSA has indicated it will not send 2008 Tax Year "No Match" letters until litigation is resolved.

D: Immigration:
E-Verify to be Required on Federal Contracts

- Effective May 21, 2009 - federal contractors/subs must verify status of current employees/new hires directly performing work on covered contracts (120 days and value of $100k / $3k subcontract).
- 90 days to comply
- Originally scheduled for January 15, 2009 but government voluntarily delayed implementation due to pending lawsuit by U.S. Chamber of Commerce. Obama administration to review the rule.
- Also – Rhode Island now requires state contractors to use E-Verify. Also subject of pending lawsuit, but courts have refused to delay implementation.

D: Immigration:
Employers Receiving Stimulus Payments Face Restrictions on Hiring H-1B Specialty Workers

- Effective February 17, 2009 employers receiving TARP stimulus money are automatically deemed "H-1B dependent employers."
- To obtain Labor Condition Application (LCA) from Dept. of Labor, employer must satisfy additional requirements:
  - No displacement or secondary displacement of U.S. workers for 90 days before or after placement of H-1B worker
  - Good faith recruitment of U.S. workers prior to filing petition; job offers to all U.S. workers with equal qualifications

D: Immigration: Extended Stay for Canadian & Mexican Professionals under NAFTA

- In October 2008, USCIS increased the maximum stay for Canadian & Mexican professionals on TN Visa from one year to three.
- Still no annual quota limit, and no limit on number of renewals.

V. SELECTED CASES

Selected Cases-Discrimination-Age

Meaham v. Knolls Atomic Power Laboratory, 554 U.S. ___, 128 S.Ct. 2395 (June 19, 2008). *In an ADEA suit for discrimination, an employer may raise the defense that although its employment policies led to seemingly discriminatory results, it relied on reasonable factors other than age to reach such results. The employer has the burden of persuading a court that the factors it relied on were reasonable.*

Selected Cases-Discrimination-Age (cont.)

Fischer v. Pres. & Fellows of Harvard College, 24 Mass. L. Rep. 224, 2008 WL 2745086 (Mass. Super. 2008). *In an age discrimination claim against an employer, a terminated employee's successor being given a higher salary despite being less experienced, together with multiple complaints filed against the employee by his/her supervisor could be potentially indicative of a "vendetta" and therefore were sufficient to support a claim.*

Selected Cases-Discrimination-Gender

King v. City of Boston, 883 N.E.2d 316, 71 Mass. App. Ct. 460 (2008). *Denial of rank-specific locker rooms to female officers and not male officers deprived them of a material feature of their employment, where the department had done so for decades, the locker rooms served an employment function and provided a buffer for patrol officers as a place to decompress without official scrutiny, as well as, providing a location for union organizing.*

Selected Cases-Discrimination-Gender (cont.)

Tuli v. Brigham and Women's Hospital, Inc., 566 F.Supp.2d 32 (D. Mass. 2008). *When a claimant challenges a decision by a committee which received its information from a variety of sources, some of which were tainted by bias, the claimant has to show that the discriminator significantly contributed to the decision, or the information provided was a "material and important ingredient" in the decision, or that the decision was significantly based on that information, and the plaintiff had no opportunity to present contrary information to the decision makers. Unlawful discrimination can factor into a decision where other legitimate reasons are also present.*

Selected Cases-Discrimination-Pregnancy

Thurdin v. SEI Boston, LLC, 895 N.E.2d 446, 452 Mass. 436 (2008). *Employees in Massachusetts who were unable to sue their employer for workplace discrimination under the state's anti-discrimination statute because the employer had fewer than six workers at the time of the alleged bias could sue under the Massachusetts Equal Rights Act. The MERA provides an alternative remedy for job bias for employees who are unprotected by MGL chapter 151B.*

Selected Cases-Discrimination-Sexual Harassment

Trinh v. Gentle Communications, LLC, 71 Mass.App.Ct. 368, 881 N.E.2d 1177 (2008). *An employer did not inadequately or inappropriately investigate an employee's sexual harassment claim. Although the employee's version of events was questioned and the supervisor was never disciplined, the employee did not complain to the officials identified in the Company's sexual harassment policy; the officials immediately investigated the claim upon becoming aware of it; the employer's inquiry into the employee's own behavior was relevant to the issue as to whether the advances were unwelcome; and the employee was kept informed of the investigation but refused to participate.*

Selected Cases-Discrimination-Equal Pay

Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008). *A female former state agency administrator who was paid significantly less than male predecessors, was demoted, and ultimately resigned after repeated conflicts with the governor could proceed with sex discrimination, equal pay, and retaliation claims under Title VII of the 1964 Civil Rights, the Equal Pay Act, and the Civil Rights Act of 1871 because she needed only to prove that sex bias was "a motivating factor" for the defendants' conduct.*

Selected Cases-Discrimination-Race

Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass.App.Ct. 549, 893 N.E.2d 80 (2008). *A general contractor who had notice of unlawful discriminatory acts by its supervisor, and failed to take reasonably adequate remedial action was directly liable to the employee of a subcontractor under G.L. c. 151B, § 4(4A).*

Selected Cases-Discrimination-National Origin

Esteños v. PAHO/WHO Federal Credit Union, 952 A.2d 878 (D.C. Cir. 2008). *A foreign immigrant who spoke only Spanish was permitted to move forward with his claim that a United Nations-affiliated credit union discriminated against him on the basis of national origin under local law when it discharged him for failing to meet an English-proficiency requirement.*

Selected Cases-Discrimination-Religious Discrimination

Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination, 450 Mass. 327, 879 N.E.2d 36 (2008). *An employer cannot argue that an employee's request for religious time off represents an undue hardship when it "fails to present evidence that it took any steps to accommodate, or even to investigate possible accommodations such as allowing other employees to voluntarily swap shifts.*

Selected Cases-Discrimination-Religious Discrimination (cont.)

Brown v. F.L. Roberts & Co., 452 Mass. 674, 896 N.E.2d 1279, (SJC 2008). *An employer of a Rastafarian worker whose religion does not permit him to shave or cut his hair, failed to show that allowing a religious exemption to a no-facial-hair grooming policy would create an undue hardship. The employer had the "burden to prove conclusively that no other conceivable accommodation was possible without imposing an undue hardship."*

Selected Cases-Discrimination-Disability/Handicap Discrimination

Tobin v. Liberty Mutual Insurance Company, 553 F.3d 121, 2009 WL 159414 (1st Cir. 2009).

An employee who repeatedly asked his employer to accommodate his bipolar disorder by providing staff support and assigning him to work on different accounts presented enough evidence to support a claim for disability discrimination.

Selected Cases-Discrimination-Disability/Handicap (cont.)

EEOC v. Agro Distribution, LLC, 555 F.3d 462, 2009 WL 95259 (5th Cir. 2009). *The ADA Amendments Act overturned the Supreme Court decisions that said "mitigating measures" must be considered in determining whether an individual is "substantially limited" in a "major life activity" and therefore disabled under the ADA. However, the Amendments do not apply retroactively to ADA claims based on workplace conduct prior to January 1, 2009 when the amendments took effect.*

Selected Cases-Discrimination-Disability/Handicap (cont.)

Gauthier v. Sunhealth Specialty Services, Inc., 555 F.Supp.2d 227 (D. Mass. 2008). *An employer's failure to engage in the "interactive process" can be a failure to provide a reasonable accommodation.*

Selected Cases-Discrimination-Disability/Handicap (cont.)

Santacrose v. CSX Transportation, Inc., 288 Fed.Appx. 655, 2008 WL 2973889 (11th Cir. 2008). *An employer does not fail to reasonably accommodate an employee for the purposes of the Americans with Disabilities Act by not granting the employee's exact request where the employer provides for an alternative accommodation.*

Selected Cases-Discrimination-Retaliation

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 555 U.S. ___, 129 S.Ct. 846, 2009 WL 160424 (2009).

An employee fired within a few months of disclosing a supervisor's alleged sexual harassment in response to her employer's questions during an investigation may pursue a retaliation claim under Title VII of the 1964 Civil Rights Act, even though she never filed a harassment charge or initiated the internal investigation.

Selected Cases-Discrimination Retaliation (cont.)

Dennis v. Osram Sylvania, Inc., 549 F.3d 851 (1st Cir. 2008). *A human resources employee failed to show he was fired in retaliation for his testimony in a co-worker's retaliation case against the employer because his employer had legitimate reasons for its actions, namely his misconduct and a reduction in force.*

Selected Cases-Discrimination Political Discrimination

Bergeron v. Cabral, 535 F.Supp.2d 204 (D. Mass. 2008). *Summary judgment was not appropriate in a political discrimination claim where there were still questions of fact remaining as to whether the Sheriff's decision to revoke corrections officers' commissions as deputy sheriffs was motivated by their dissemination of letters and a press release during the Sheriff's political campaign.*

Selected Cases-FMLA Intermittent Leave

Davis v. Michigan Bell Telephone Company, 543 F.3d 345 (6th Cir. 2008). *If an employee with a chronic health condition is approved for intermittent FMLA leave, the leave starts on the date of the first absence and covers all absences for the subsequent 12 month period. Once another 12 month period begins, any additional absences in that period constitute another period of intermittent FMLA leave.*

Selected Cases-FMLA Intermittent Leave (cont.)

Lewis v. School District #70, 523 F.3d 730 (7th Cir. 2008). *An employee who was demoted while taking intermittent leave to care for her ill mother produced sufficient evidence that her protected leave motivated the decision to raise a retaliation claim under the Family and Medical Leave Act.*

Selected Cases-
Wage and Hour (cont.)

Salvas v. Wal-Mart Stores, 452 Mass. 337, 893 N.E.2d 1187 (2008). *In a labor class action, a Company's nationwide practices are relevant to class action claims of local employees.*

Selected Cases- Employee Handbooks

Martin-Kirkland v. United Parcel Service, 71 Mass.App.Ct. 1123, 885 N.E.2d 175 (May 2008).
A Company's handbook was not an employment contract where it specifically stated the handbook was not a contract of employment, and adequately alerted the employee of its content.

Selected Cases-OSHA

Solis v. Summit Contractors, Inc., ___ F.3d ____, 2009 WL 465978 (8th Cir. 2009). *The Labor Department's "controlling employer" citation policy allows Occupational Safety and Health Administration inspectors to cite general contractors for hazardous work conditions faced by their subcontractors' employees at a construction site.*

Selected Cases-Defamation

Noonan v. Staples, Inc., 556 F.3d 20, 2009 WL 350895 (1st Cir. 2008). *In a defamation case, the "actual malice" standard does not require a finding that the Company had a dislike of or ill-will towards the employee, but rather whether the Company knew the statement at issue was false or entertained serious doubts about its truth.*

Selected Cases-Intentional Infliction of Emotional Distress/False Imprisonment

Gibney v. Dykes, 72 Mass.App.Ct. 1107, 889 N.E.2d 981 (2008). *The exclusivity clause of the Worker's Compensation Act bars claims by fellow workers for intentional torts as long as they occur during the course of the worker's employment. A false imprisonment claim not barred by exclusivity was not proven by the plaintiff.*

Selected Cases-Arbitration

St. Fleur v. WPI Cable Systems/Mutron, 450 Mass. 345, 879 N.E.2d 27 (2008). *Arbitration agreements that make arbitration the exclusive venue for any discrimination or related claims are valid.*

Selected Cases-Benefits

Metropolitan Life Insurance Co. v. Glenn, 554 U.S. ___, 128 S.Ct. 2343, 2008 WL 2444796 (June 19, 2008). *An ERISA plan administrator, whether it is an insurance company or a self-insured employer, has a conflict of interest if it both decides who receives benefits and makes benefits payments. That conflict of interest is one factor that should be taken into account in determining whether the administrator has abused its discretion in a case.*

VI. PENDING OR PROPOSED LEGISLATION/ ADMINISTRATION PRIORITIES

A. National Health Insurance

- Incremental universal?
- A Massachusetts model?

B. Employee Free Choice Act ("EFCA")

- On March 10, 2009 the EFCA was reintroduced in both Houses of Congress.
- Passage of the legislation in some form appears likely.

B. Employee Free Choice Act

- EFCA's most important changes would be:
  - card checks in lieu of secret ballot elections,
  - regulation of first contract negotiations,
  - enhanced enforcement powers for NLRB, including mandatory injunctions, treble damages and civil fines.

B. Employee Free Choice Act

- No secret ballot election required.
- Signed authorization cards from a majority of employees is sufficient.

B. Employee Free Choice Act - First Contract Negotiations

- EFCA sets up timelines for first contracts:
  - Contract to be reached within 90 days.
  - Mediation for another 30 days.
  - After that 120 days, negotiations go to an arbitration panel.
  - Panel's decision is binding for two years.

C. FMLA-Proposals Include…

- Reduce threshold for coverage from 50 to 25 employees.
- Addition of elder care and academic activities to permissible reasons for leaves.
- Large employers to provide 7 paid sick days annually.

D: Proposed Changes In Other Laws

- Expansion of Discrimination Laws
  - Sexual Orientation
  - Gender Identity
- Changes in Federal Labor Laws
  - Definition of supervisor
  - Changes in law allowing replacement of striking workers
- Proposal to mandate employers to permit IRA contributions by payroll deduction

E: Stepped Up Enforcement Activity at State and Federal Levels

Federal

- EEOC
- NLRB
- DOL

Massachusetts

- Underground Economy Taskforce
- DUA Audits/HCR

F. Non Compete Agreements

- "An Act to Prohibit Restrictive Employment Covenants" was filed on January 12,2009.
- The bill, prohibits all non-compete agreements in the employment context except those in the sale of business context.
- Any employer requiring an employee to sign a prohibited non-compete or attempting to enforce such an agreement, could be liable for the employee's attorneys' fees and treble damages

G. Economic Volatility Will Cause Its Own Changes and Increased Litigation

- Claims under ADEA and the Older Workers Benefit Protection Act
- Claims under COBRA
- Discrimination suits regarding layoffs or selective wage freezes

G. Economic Volatility Will Cause Its Own Changes and Increased Litigation

- ERISA fiduciary suits
- WARN Act notification compliance
- Increased ADA requests for accommodation regarding mental health issues such as depression or substance abuse

H. Job Bias Claims on the Rise

- Discrimination claims will continue to rise.
- Preliminary figures from the EEOC show a 15% jump in fiscal 2008 to 95,402, the highest level since the agency opened in 1965
- An EEOC spokesperson predicted that job bias cases will swell to more than 100,000 cases for the year commencing October 1, 2008 due to "ongoing mass layoffs and scant hiring, among other factors."
- Age and retaliation claims show the largest increase.

H. Job Bias Claims Filed 2007-2008

Source: Equal Employment Opportunity Commission

Category	FY 2007	FY 2008	Percent Change
Total Charges	82,792	95,402	15.2%
Race	30,510	33,937	11.2%
Retaliation	26,663	32,690	22.6%
Sex	24,826	28,372	14.3%
Age	19,103	24,582	28.7%
Disability	17,734	19,453	9.7%
National Origin	9,396	10,601	12.8%
Religion	2,880	3,273	13.6%
Equal Pay Act	818	954	16.6%

Conclusion

- Be Prepared
- Do your homework
- Don’t take shortcuts
- Prepare contingency plans
- Stay Flexible
- Hold tight - you are in for a ride!

Questions?

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