


# Overview of Notable Developments in Labor and Employment Law, 2007-2008

Presented by  
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- Wage & Hour
  - Leaves Of Absence / Non-Productive Time
  - Retirement Plans
  - OSHA
  - NLRB In Non-Unionized Settings
  - Immigration
  - Health Care Reform
  - Mass Security Breach Notice Law
  - Investigations
  - EEOC / MCAD

# *Wage & Hour*

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## Scrutiny Continues for Misclassified Workers:

- Independent Contractors vs. Employees.
- Exempt vs. Non-Exempt.
- “Salaried basis”.

# *Wage & Hour*

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## The Class Action Trend Continues

- It's not just California – The trend has moved east.
- May involve combination claims, e.g., wage and hour and equal pay claims.

# *Wage & Hour*

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**Skirchak v. Dynamics Research Corporation, 508 F.3d 49 (1st Cir. 2007).**

*A provision barring class claims in an employment arbitration program implemented by an employer is unconscionable under Massachusetts contract law.*

# *Wage & Hour*

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## What Can You Do Now?

- Re-examine all contract positions regularly.
- Perform exemption tests regularly.
- Watch out not to convert salaried workers into hourly workers.
- If you have a problem, fix it now – but get advice on how to roll it out.

# *Leaves of Absence / Non-Productive Time*

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The intersection of many different federal and state laws continues to pose issues.

- ADA
- FMLA
- Workers Compensation
- Massachusetts Handicap Disability Law
- SNLA
- USERRA
- Other - (e.g., duty to accommodate sincerely held religious beliefs)

# *Leaves of Absence / Non-Productive Time*

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**Downey v. Strain, 510 F.3d 534 (5th Cir. 2007).**

*The employer was penalized for failing to provide notice of designation of FMLA leave where such non compliance with applicable regulations interfered with Plaintiff's rights under the FMLA and caused her prejudice because she would have postponed her non-urgent surgery to another FMLA leave period had she been so notified.*



# *Leaves of Absence / Non-Productive Time*

**Caban-Hernandez v. Philip Morris USA Inc., 486 F.3d 1 (1st Cir. 2007)**

*Three employees who signed clearly worded releases of claims under federal and local law gave up their rights to sue Philip Morris USA Inc. for harassment and discrimination under Title VII of the 1964 Civil Rights Act and Puerto Rico's Law 100.*

# *Leaves of Absence / Non-Productive Time*

**Caban-Hernandez v. Philip Morris USA Inc., 486 F.3d 1 (1st Cir. 2007)**

*The employee waivers were valid and enforceable under standards developed by the Puerto Rico courts, and the workers were precluded from pursuing claims under the Commonwealth's equal employment law.*

# *Leaves of Absence / Non-Productive Time*

**Holloway v. Thompson Island Outward Bound Education Center, Inc., 492 F.Supp.2d 20 (D.Mass. 2007).**

*A former employee was barred from raising discrimination claims against his former employer based on events that occurred prior to the execution of a Settlement Agreement where the employee agreed to release all discrimination claims against the employer in exchange for a money settlement.*

# *Leaves of Absence / Non-Productive Time*

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**Taylor v. Progress Energy, Inc., \_\_F.3d\_\_, 2007 WL 1893362 (4th Cir. 2007) Page 112.**

*A Department of Labor (DOL) regulation precludes both the prospective and retrospective waiver of all Family Medical Leave Act (FMLA) rights, including the right to bring a claim for a past violation of the Act without prior court or DOL approval of the waiver.*

# *Leaves of Absence / Non-Productive Time*

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## What Can You Do Now?

- Have all policies reviewed for compliance.
- Check your processes for clarity and consistency of implementation.
- Make sure to take advantage of such proof as you are able to request.
- Make sure to inform employees when you are considering leave as FMLA leave.
- Understand the limitations of releases.

# *Retirement Plans*

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The move away from defined benefit plans continues.

Employers must select and monitor all vendors carefully.

The LaRue Decision: If you give a 401(k) participant choices, make sure the procedures are in place to monitor those choices.

# *Retirement Plans*

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**LaRue v. DeWolff, Boberg & Associates, Inc., 128 S.Ct. 1020 (2008).**

*Although ERISA does not provide a remedy for individual injuries distinct from plan injuries, it does allow recovery for fiduciary breaches that impair the value of plan assets in an individual's account.*

# *Retirement Plans*

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## What Can You Do Now?

- Review all plans for **Firestone** language.
- Maintain ERISA fiduciary coverage and fidelity bond.
- Select vendors carefully and document the process used (e.g., reference checks).



# *Retirement Plans*

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- Review written contracts with vendors for
  - Assumption of risk.
  - Proof of insurance.
  - Full fees disclosure (make sure no hidden fees).
  - Ability to terminate.

# *Retirement Plans*

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- Monitor your vendors.
- Make sure participant disclosures are clear and complete.
- Provide participant education, not advice.
- Remember: **PROCESS** is key.

# *OSHA / Workplace Safety*

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Many complaints come from disgruntled workers.

Remember OSHA isn't just about items like construction scaffolding.

- Violence, late night retail / homecare, e.g.,
- Bloodborne pathogens.

Note the intersection with ADA (e.g., allergens).

# *OSHA / Workplace Safety*

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**Trinity Marine Products, Inc. v. Chao**, 512 F.3d 198  
(5th Cir. 2007)

An employer has no constitutional right to a pre-execution contempt hearing prior to an OSHA search and it does not deprive the employer of its constitutional rights when the OSHA search of the workplace is done while accompanied by federal marshals.

# *OSHA / Workplace Safety*

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## What Can You Do Now?

- Inspect facilities, equipment and processes on a routine basis.
- Document efforts to abate problems.
- Prioritize worker training and education.
- Keep accurate records.

# *OSHA / Workplace Safety*

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## What To Do If The Government Comes Knocking?

- Call legal counsel immediately.
- Verify credentials.
- Ascertain purpose of inspection and source of complaint.
- Document names, get copies of warrant, if any.
- Train employees and supervisors for it in advance.

# *NLRB In Non-Unionized Settings*

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- Protected concerted activity.
- Right to have representation.
- Requirement of a quick election.
- Employee Free Choice Act:
  - Card check.
  - Binding Arbitration for first contract.

# *NLRB In Non-Unionized Settings*

## **Cintas Corporation v. National Labor Relations Board, 482 F.3d 463 (DC Cir. 2007).**

*An employer's handbook that contains a corporate policy that requires employees to maintain the confidentiality of information about the company and its workers interferes with the rights of employees under the National Labor Relations Act to discuss the terms and conditions of their employment.*



# *NLRB In Non-Unionized Settings*

## **Cintas Corporation v. National Labor Relations Board, 482 F.3d 463 (DC Cir. 2007).**

*The employer commits an unfair labor practice under the NLRA simply by publishing its policy even though a rule does not expressly forbid protected discussions, and even though there is no evidence that the rule was used to prohibit legally protected activity.*

# *NLRB In Non-Unionized Settings*

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## The Register-Guard e-mail case

*An employer does not violate federal labor law by maintaining a policy prohibiting employee use of the employer's e-mail system for non-job-related solicitations. The employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use.*

# ***NLRB In Non-Unionized Settings***

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## ***What Can You Do Now?***

- Review your no solicitation/distribution policies.
- Review trespass policies.
- Revise confidentiality policies.
  - If they are too broad (wages and benefits of individuals), they can violate the law.
- Train your Supervisors.

# *Immigration*

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- SSA “No Match” Letters and Safe-Harbor Regulation in Limbo
- New I-9 Form effective December 26, 2007.
- Employer Civil Penalties Relating to Unauthorized Employment, Unfair Immigration-Related Employment Practices Increased March 27, 2008.

# *Immigration*

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Use of the revised I-9 Form (which shows “Rev. 06/05/07” in the lower right-hand corner) became mandatory for all employers, effective **December 26, 2007**.

The changes in acceptable documentation were effective years ago.

# Documents *No Longer Acceptable* Are:

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- Certificate of U.S. Citizenship (Form N-560 or N-570)
- Certificate of Naturalization (Form N-550 or N-570);
- Alien Registration Receipt Card (Form I-151);
- Unexpired Reentry Permit (Form I-327); and
- Unexpired Refugee Travel Document (Form I-571).

# *Health Care Reform*

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See “The Massachusetts Health Care Reform Act:  
Coming to A State Near You?”

By Arthur P. Murphy, Esq.

Published in HR Advisor July/August 2007 issue

# *Health Care Reform*

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- Technical Corrections: Chapter 205 of the Acts of 2007 signed November 2007
  - Changes employers with “more than 10” to “11 or more” full-time equivalent employees for filing HIRD forms
  - Definition of employer expanded
  - Confirms that cafeteria plans should not be filed unless requested
  - Dependent status extended to the end of the calendar year



# *Health Care Reform*

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- Fair Share Contribution Changes
  - FSE data is to be filed electronically at the same time as employer HIRD data
  - Public employers who have adopted M.G.L. c. 32B, §16, not required to make FSC filing, but must still make the employer HIRD filing.

# *Health Care Reform*

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- Connector Bulletins
  - All health care policies legally sold in Massachusetts meet minimum creditability coverage for 2007 and 2008.
  - September 14, 2007 Administrative Bulletin (p. 35) re changes in the filing requirements for the Employer Fair Share Contribution
  - November 2007 Administrative Bulletin (p. 35) clarifying issues regarding the secondary test to determine employer liability for the Fair Share Contribution

# *Health Care Reform*

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The rising cost of health care reform remains the key issue regarding health care reform sustainability. If law is amended to increase employer cost, the likelihood of a preemption challenge increases.

# *Health Care Reform*

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## **Retail Industry Leaders Association v. Fielder, 475 F.3d 180 (4th Cir. 2007).**

*The Maryland Fair Share Health Care Fund Act which requires employers with more than 10,000 employees to spend at least 8% of their total payroll on employee health insurance or pay the difference to the State is preempted by ERISA because it conflicts directly with ERISA's purpose of providing for uniform nationwide plan administration.*

# *Health Care Reform*

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## **Retail Industry Leaders Association v. Fielder, 475 F.3d 180 (4th Cir. 2007).**

*An act like Maryland's denies employers uniform nationwide administration, one of ERISA's primary goals, by requiring them to keep an eye on conflicting state and local minimum spending requirements in order to adjust their healthcare spending and restructure their plans accordingly.*

# *Health Care Reform*

## What You Can Do Now?

- Determine if you are subject to the Mass. Health Care Reform law.
- Determine whether you meet the fair share contribution test:
  - Do you have 25% FTE enrollment MA employees in medical plan,
  - or
  - Do you contribute 30 % of premium costs for FT employees within 90 days of employment?

# *Health Care Reform*

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- Determine if you have a Section 125 cafeteria plan under which all MA employees (with limited exceptions) can make pretax premium contributions toward health care including Connector medical plans.
- Make sure any insurance contracts covered new class of eligible dependents effective January 1, 2007 and that parity requirements are met for policies entered into on or after July 1, 2007.

# *Health Care Reform*

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- Distribute employee HIRD form to employees who decline the employer's offer of health insurance or decline to participate in its Section 125.
- Collect employee HIRD forms within 30 days of the open enrollment period for the group health plan or the Section 125 plan.



# *Health Care Reform*

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- Determine whether medical plans meet final minimum creditable coverage.
- **Remember**: Individuals must have minimum creditable coverage by January 1, 2009.

# *Massachusetts Security Breach Notice Law*

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Governor Patrick signed comprehensive identity theft legislation into law in August 2007, making Massachusetts the 39<sup>th</sup> state to require notice to residents of unauthorized access or use of their personal information.

# *Massachusetts Security Breach Notice Law*

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- The new law covers individuals, business and government agencies that own, license, maintain or store personal information.

# *Massachusetts Security Breach Notice Law*

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- Personal information includes a person's first and last name (or first initial and last name) in combination with
  - Social security number
  - Driver's license number
  - State identification number
  - Financial account or debit or credit card number regardless of whether any security code, access code or password is disclosed.

# *Massachusetts Security Breach Notice Law*

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- Notice must be provided of a security breach or unauthorized access or use regardless of whether there is a likelihood of harm.
- Notice must be provided to the individual, the Attorney General and the Director of Consumer Affairs and Business Regulation.

# *Massachusetts Security Breach Notice Law*

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- Notice must be provided as soon as possible and without unreasonable delay.
- Content of the notice depends on the recipient.

# *Massachusetts Security Breach Notice Law*

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- Proposed regulations (pp. 55-59) have been issued relative to the standards to be met by persons who own, license, store or maintain personal information about a resident of the Commonwealth of Massachusetts.
- The Regulations establish minimum standards for safeguarding personal information in both paper and electronic form

# *Massachusetts Security Breach Notice Law*

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- The law's effective date was February 3, 2008.
- The Attorney General is charged with enforcement.
- Fines of \$100 per affected individual up to a maximum of \$50,000 per event.
- Civil suits will increase.



# *EEOC / MCAD*

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- Retaliation cases continue to rise.
- EEOC Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities:
  - The guidance does not create a new protected category of caregiver but is intended to provide guidance on how discrimination against caregivers may constitute unlawful disparate treatment. (pp. 40-54).
- Facially neutral policies inconsistently applied cause problems, see Trustees case.

# ***EEOC / MCAD***

**Trustees of Health and Hospitals of City of Boston, Inc. v. Massachusetts Commission Against Discrimination, 871 N.E.2d 444 (2007).**

*Five black female health care workers in Boston who were abruptly notified they were being laid off and then were monitored as they collected their belongings successfully showed that their employer illegally discriminated against them in violation of Massachusetts law.*

# *EEOC / MCAD*

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## What Can You Do Now?

- Review your policies procedures and handbook.
- Train your managers, supervisors and employees.
- Stress consistent enforcement among departments, locations, supervisors and employees.
- Consider alternative dispute resolution.
  - Mediation can be a successful tool if properly employed.

# *Investigations*

- Investigations are part of due diligence
- Process is key
  - When
  - By Whom
  - How
- Documentation

# *Investigations*

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- Will be discoverable unless protected by privilege.
- Consider whether to perform it “in-house” or seek outside assistance

# *Investigations*

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Factors to consider:

- Is there an incident? or a mere suggestion of a possible issue? How serious are the charges, if any?
- Who is the accused? sensitive position, high level position, sensitive accusation (misuse of funds).

# *Investigations*

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Factors to consider (Cont'd.):

- Is the “issue” likely to be the subject of or part of any litigation in the future.
- Is there someone internally who can conduct the investigation? – Here you are considering concerns such as confidentiality, knowledge, bias, seriousness of charge privacy/potential defamation claims.

# *Investigations*

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## General Principles :

- Don't reach conclusions, just state the facts.
- Be thorough and fair.
- Handle confidentiality as well as possible, but don't guarantee it.
- Should you always get signed statements?



# *Investigations, Part 2*

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What to do when the Government comes knocking at your door



# *Investigations*

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## EXAMPLES:

- OSHA
- EBSA
- IRS
- Criminal

# *Investigations*

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Anticipation is the name of the game:

- Conduct your own audits on a regular basis
- Correct any problems discovered
- Fine-tune processes to avoid future compliance issues
- Train personnel to those processes

# *Investigations*

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Anticipation is the name of the game:

- Evaluate personnel against those processes
- Appoint a central person to whom all inquiries should be directed
- Conduct dry runs

# *Investigations*

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Always notify legal counsel immediately

# *Investigations*

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## If an inspector shows up unexpectedly:

- Ask for inspector's credentials and make a copy
- Escort the investigator to a private room
- Ask the reason for the inspection
- Consider asking the inspector to return at another time

# *Investigations*

## If an inspector shows up unexpectedly:

- In appropriate circumstances, request a warrant, take a copy and review with counsel
- If confidential details sought, consult with counsel on what precautions to take
- If no written warrant take careful notes on precise scope of the inspection and review with counsel
- Designated person should accompany the inspector

# *General Consideration During an Investigation/Inspection*

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- Dignity                      Be courteous and professional.
- Discretion                      Do not volunteer information.  
Do not make admissions.  
Do not make commitments.
- Disclosure                      Make sure process is  
communicated.  
Make sure supervisors know and  
request company representative to  
be present.



# *General Considerations During an Investigation/Inspection*

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- Due Process      Follow your prearranged process.
- Due Diligence      Be prepared.
- Documentation      Take careful notes of everyone present, any statements made, any requests made.

# *General Considerations During an Investigation/Inspection*

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- Delay                      Seek as much time as reasonably possible but don't overreach.
  
- Discrimination            Be consistent.
  
- Deceit                      Avoid any false or misleading statements.  
Do not guess or speculate.



# Questions?



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