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ATTORNEYS AT LAW

MASSACHUSETTS AND FEDERAL

EMPLOYMENT LAW AND WORKPLACE REGULATIONS

A SYNOPSIS FOR EMPLOYERS

UNDERSTANDING YOUR COMPLIANCE OBLIGATIONS

2020 EDITION

CCHRA
Cape Cod Human Resources Association

An Employment Law Compliance Resource for CCHRA Members

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EDITOR'S NOTES

- *The information provided in this Synopsis was prepared by Foley & Foley, PC and is intended to assist the internal Human Resources function for employers with issue spotting and provide a basic understanding of the law. This Synopsis is by no means an exhaustive analysis of the issues an employer may face. Therefore this Synopsis is* ***not intended to be, nor should be,*** *a substitute for legal or professional advice and counsel. The issues we address in this Synopsis are often complicated and driven by specific facts.*

- *We can also prepare a state-specific Synopsis for any other state for what our clients describe as a reasonable fixed fee. Please contact Mike Foley at mike@foleylawpractice.com should you wish to have Foley & Foley, PC prepare the 2020 Synopsis for another state.*

- *Should you have questions about the laws and regulations that govern today's, workplace please contact us at questions@foleylawpractice.com. At least one of our firm's lawyers are admitted in: Connecticut, Massachusetts, New Hampshire, Vermont, Texas, Missouri, Kansas, Wisconsin, Minnesota, Oregon, North Carolina, Utah, New York, Georgia, Illinois, Maine, California and Pennsylvania.*

- *When your business has an issue involving its employees, we recommend that you consult with experienced labor and employment counsel.*

- ***This Synopsis may be considered an advertisement or a solicitation under pertinent rules and regulations.***

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INTRODUCTION

The regulations that govern today's workplace are extensive and expanding. HR-related risk has never been greater. Compliance obligations are burdensome and the liability and exposure created by state and federal laws and regulations are extraordinary. We all recognize that in some circumstances human resource professionals and C-suite executives have personal and vicarious liability which could include: back pay, front pay, emotional distress, attorney's fees, civil fines, and criminal sanctions.

Our mission is to help you navigate the twists and turns of vexing labor and employment laws. We recognize that employers must be well informed in order to operate their businesses within the boundaries of the law. It is with this in mind that we provide employers with this Synopsis. We are confident that the resources we offer: this Synopsis; employment law compliance resource material included in our Menu of Services, our HR-related risk management program (which includes the Employment Counsel On-Call Triage Service, Handbook preparation and updates and attorney-client privileged Diagnostic Audit of Personnel Practices), and our monthly e-newsletter will provide the necessary tools that your business needs to better manage risk.

If you have any questions or concerns that go beyond the information provided in this Synopsis, please do not hesitate to give us a call. Our dedicated toll free number is (844) 204-0505.

I. THE EMPLOYMENT RELATIONSHIP

Establishing the Employment Relationship

- **Recruiting**
  Ensure that all newspaper advertisements, brochures, job postings, interview queries and your employment application, if any, avoid wording that can be relied upon for employment litigation.

- **At-Will**
  The "at-will" status allows employers to terminate employees at any time, for any reason, with or without notice. Nevertheless, employers remain liable for any termination that violates the law, such as those resulting from discrimination in the workplace or an employee exercising his or her right to engage in protected, concerted activity under the National Labor Relations Act.

- **Independent Contractors**
  An employer is responsible for appropriately classifying a worker as an "employee" or an "independent contractor." Classification is crucial for determining the worker's right to unemployment compensation, workers' compensation, overtime and other benefits and protections. The misclassification of a worker as an independent contractor will expose an employer to significant liability under federal law.

  The independent contractor law in **Massachusetts** creates the presumption that a work arrangement is an employer/employee relationship, unless the party receiving the services can overcome the legal presumption by meeting each factor in a rigid three-part test:
  - The worker must be free from the presumptive employer's control and discretion in performing this service both under a contract and in fact;
  - The service provided by the worker must be outside the employer's usual course of business; and
  - The worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

Massachusetts recently fine-tuned the meaning of "individual" for the purpose of the independent contractor analysis. Massachusetts courts have held that, even where the "worker" is a separate legal entity rather than a person, the employer-employee relationship will be found if the entity acts in substance as an independent contractor. This is a fact-sensitive distinction that relies upon fulfilling the three-part test set out above.

Massachusetts imposes an additional burden on employers in conforming to the independent contractor classification. In 2013, the Supreme Judicial Court of Massachusetts held that the Commonwealth's independent contractor law also applies to employees working out of state, where the employee's employment law contract is governed by Massachusetts law.

- **Independent Contractor Assessment Under Federal Law**
  Both the United States Department of Labor (DOL) and the Internal Revenue Service (IRS) provide rules for determining whether a worker should be classified as an employee or independent contractor.

  The Fair Labor Standards Act's (FLSA) definition of employment is "to suffer or permit to work." This is one of the broadest definitions of employment under the law. When applying the FLSA's vague definition, workers who are economically dependent upon the business of the employer, regardless of skill level, are considered to be employees, as such most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves. There are a number of "economic realities" factors that guide the DOL's assessment of whether an individual should be appropriately classified as an independent contractor. While there is no one definitive set of factors, the following factors are generally considered when determining whether an employment relationship exists under the FSLA:
  - The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer.
  - Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skills may be indicated by the hiring and supervision of workers or by investment in equipment.
  - The relative investments in facilities and equipment by the worker and the employer. The worker must make some investment compared to the employer's investment (bear some risk for loss) in order for there to be an indication that she/he is an independent contractor in business for herself or himself.
  - The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment.
  - The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee.
  - The nature and degree of control by the employer. Who sets pay amounts and work hours and who determines how the work is performed? An independent contractor generally works free from control by the employer.

  The IRS looks at three general categories to determine whether the person performing services is an independent contractor:
  1. **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job?

2. **Financial**: Are the business aspects of the worker's job controlled by the payer? (These include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. **Type of Relationship**: Are there written contracts or employee type benefits (e.g., pension plan, insurance, vacation pay, etc.)? Will the relationship continue, and is the work performed a key aspect of the business?

When considering classification, it is important to weigh all of these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

- **Independent Contractor and Employee Misclassification Under Federal Law**
  The "Voluntary Classification Settlement Program" (VCSP) is a coordinated initiative by the IRS and DOL. It provides an opportunity for employers to reclassify independent contractors for federal employment tax purposes as employees with modified amnesty. To participate in this program, the business must meet specified eligibility requirements and apply to participate. Further information regarding the VCSP Program can be found here: https://www.irs.gov/businesses/small-businesses-self-employed/voluntary-classification-settlement-program.

- **EEOC Regulated Employment Tests and Selection Procedures**
  Employers often use tests and other selection procedures to screen applicants for hire or promotion. There are many different types of tests and selection procedures, for example: cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks. These tests are appropriate and comply with the law if used correctly.
  However, use of tests and other selection procedures can violate the federal anti-discrimination laws if they disproportionately exclude people in a particular protected class, unless the employer can justify the test or procedure under the law. For example, under the Americans with Disabilities Act, testing can only be administered after the extension of a conditional offer. Selections procedures that adversely impact protected classes must be both "job-related" and "consistent with business necessity."

- **Fair Credit Reporting Act Compliance**
  On January 1, 2013, the Consumer Financial Protection Bureau (CFPB) assumed responsibility for the enforcement of the Fair Credit Reporting Act (FCRA). The FCRA was enacted to regulate the consumer credit reporting industry. Employers that use and request consumer background checks from consumer reporting agencies are automatically subject to FCRA regulations. The FCRA requires employers to comply with the following restrictions:
  - **Acquire Written Consent**: Before an employer may seek to procure a consumer credit card report, a criminal background, or a background check from a credit reporting agency, applicants or employees subject to that screening must provide written consent.
  - **Provide Adequate Notice**: The CFPB issued new regulations modifying the forms that employers must use to notify employees and applicants of their rights.

- **Background Checks**
  Under federal law, employers are permitted to conduct background checks, which can include credit checks and criminal history. We strongly recommend that you do so. However, if conducted without appropriate planning and training, a pre-employment investigation can be a

potential source of liability. Pre-employment investigations should not be used as an off-the-record investigation into an applicant's background. Therefore, when conducting pre-employment investigations, employers should consider the following general guidelines:

- Employers should use pre-employment investigation tools that are reasonable, appropriate, and relevant to the position for which the applicant is applying.
- Pre-employment investigations should be consistently implemented with all candidates, regardless of class or position.
- Pre-employment investigations should be conducted by persons with special training, such as a reputable investigative service.
- All information must be evaluated in compliance with the Fair Credit Reporting Act (FCRA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and any other applicable state and federal law.

With these guidelines in mind, employers should consider which background checks are appropriate given the nature and scope of the position sought by the applicant.

In March 2014, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Federal Trade Commission (FTC) released two co-published technical assistance documents that explain how the agencies' respective laws apply to background checks performed for employment purposes. One document is for employers, and the other is for job applicants and employees. This is the first time that the two agencies have partnered to create resources addressing concerns in this key area. The documents are available on the EEOC's website: Background Checks: What Employers Need to Know and Background Checks: What Job Applicants and Employees Should Know.

The Massachusetts Consumer Credit Act is very similar to the FCRA, and requires that an organization must be able to prove that an applicant's financial condition is relevant to the job before conducting a credit check. Employers that are not able to prove relevance could face discrimination charges, since requiring a clean credit history may disproportionately screen out some job applicants.

- **Consumer Reports**

  Massachusetts and federal law also sets forth certain restrictions on the use of consumer reports for employment purposes. Consumer reports provide information about a person's creditworthiness, credit standing or capacity, work habits, and mode of living, as reported by consumer-reporting agencies. Consumer reports may also include personal interviews with a person's neighbors, friends, or associates to obtain information on the person's character, general reputation, and personal characteristics. Employers typically use the information obtained from a consumer reporting agency for verifying the following information:

  - Criminal history:
  - Driving records:
  - Employment history:
  - Education;
  - Social Security numbers; and
  - Professional licenses.

  Similar to credit checks, employers must be able to prove that the information gleaned from a consumer report is relevant to the job before the report can be conducted. If an applicant is denied employment for reasons relating to the credit report, the applicant must be informed of this fact and furnished with the name of the credit agency that issued the report.

Before an employer may obtain an investigative consumer report, the employer must:

- Receive written permission to obtain the report and
- Inform the individual in writing that the consumer report may contain information concerning his or her character, general reputation, personal characteristics, and mode of living.

The disclosure must also inform the individual about the precise nature and scope of any consumer report requested about the individual, and that the individual has a right to obtain a copy of the report. An employer can notify current employees that a credit report will be required simply by including such notice in an employee manual.

If the employer denies employment based on a consumer report, the employer must inform the individual within 10 business days from the date the decision was made.

- **Affirmative Action**

  An employer's Affirmative Action obligations should be a consideration when a recruitment process is initiated. Under federal law, certain contractors and subcontractors have Affirmative Action obligations under federal law. In general terms:

  - Each contractor or sub-contractor that has 50 or more employees and a contract with the Federal Government of $50,000 or more must develop a written Affirmative Action Plan (AAP) that covers minorities, women, the disabled, and veterans. The AAP is developed by the contractor to assist the contractor in a self-audit of its workplace. The AAP is kept on file and carried out by the contractor, and is submitted to the federal Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) only if the agency requests it for the purpose of conducting a compliance review. The AAP is intended to identify those areas, if any, in the contractor's work force that reflect under-utilization of women, minorities, veterans or individuals with disabilities. When determining availability or assessing underutilization, the contractor must consider, among other factors: the presence of minorities, women, veterans and individuals with disabilities having the requisite skills in an area in which the contractor can reasonably recruit. Based upon the utilization analysis and the availability of qualified individuals, the contractors then establish goals to reduce or overcome the under-utilization, if any.

    On August 27, 2013, the OFCCP released Final Rules that defined significant new requirements for contractors related to the employment of veterans under the Vietnam Era Veterans' Readjustment Assistance Act ("Veterans Rule") and the employment of individuals with disabilities under Section 503 of the Rehabilitation Act ("Disability Rule") (collectively known as the "Final Rules"). Attorney Timothy Kenneally manages our OFCCP AAP Compliance Program and we encourage you to contact him should you have any questions about these new obligations.

- **Federal Contractors**

  Federal contractors are subject to a number of specific laws and reporting requirements regarding wage and hour, discrimination, and equal pay and non-discriminatory hiring.

  - **Wage and Hour Requirements**: Can be found in the following:
    - Executive Order 13658, Establishing a Minimum Wage for Contractors (only contracts entered into on or after January 1, 2015): Provides that executive departments and agencies must, to the extent permitted by law, ensure that new covered contracts, contract-like instruments, and solicitations (collectively referred to as "contracts") include a clause, which the contractor and any subcontractors must incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers performing on or in connection with the contract or any subcontract

thereunder, must be at least: $10.60 per hour beginning January 1, 2019; and adjusted annually thereafter.

Coverage of EO 13658 and the Department's final rule generally extends to four major categories of contractual agreements:

a. Procurement contracts for construction covered by the DBA;
b. Service contracts covered by the SCA;
c. Concessions contracts, including any concessions contract excluded from the SCA by the Department's regulations at 29 C.F.R. 4.133(b); and
d. Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Executive Order only applies to prime contracts covered by the DBA that exceed $2,000 and prime contracts covered by the SCA that exceed $2,500. For procurement contracts where workers' wages are governed by the FLSA, the Order specifies that it applies only to contracts that exceed $3,000. There is no value threshold requirement for subcontracts awarded under such prime contracts. The Executive Order minimum wage generally applies to workers performing on or in connection with the above types of contracts if the wages of such workers are governed by the DBA, the SCA, or the FLSA (defined below).

- The Davis-Bacon and Related Acts, apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Davis-Bacon Act and Related Act contractors and subcontractors must pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area.
- Contract Work Hours and Safety Standards Act, as amended, prime contracts in excess of $100,000, contractors and subcontractors must also pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. The overtime provisions of the Fair Labor Standards Act may also apply to DBA-covered contracts.
- The McNamara-O'Hara Service Contract Act, requires contractors and subcontractors performing services on prime contracts in excess of $2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The Department of Labor issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies. These determinations are incorporated into the contract.
- Fair Labor Standards Act: For contracts equal to or less than $2,500, contractors are required to pay the federal minimum wage as provided in Section 6(a)(1) of the FLSA.
- For prime contracts in excess of $100,000, contractors and subcontractors must also, under the provisions of the Contract Work Hours and Safety Standards Act, as amended, pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. The overtime provisions of the Fair Labor Standards Act may also apply to SCA-covered contracts.
- The "Fair Pay and Safe Workplaces" Executive Order, requires bidders on federal procurement contracts for goods and services (including construction) in excess of $500,000 to disclose labor law violations that have occurred within the three-year period immediately preceding the bid. In addition, the Executive Order requires federal contractors to provide individuals who perform work under the federal contract with information regarding hours worked, overtime hours, pay, and any additions made to or

deductions made from pay. The Executive Order also prohibits federal contractors with contracts in excess of $1,000,000 from entering into mandatory pre-dispute arbitration agreements with their employees or independent contractors to resolve complaints under Title VII of the Civil Rights Act or tort claims arising out of alleged sexual assault or harassment.

- **Non-Discrimination and Affirmative Action:**
  - Executive Order 13672 prohibits federal contractors from discriminating on the basis of sexual orientation and gender. The Office of Federal Contract Compliance Programs ("OFCCP") recently published a list of resources to assist federal contractors in better understanding how to create an inclusive workplace for lesbian, gay, bisexual, or transgender ("LGBT") employees. These resources are intended to assist federal contractors in complying with Executive 13672 and can be found here: http://www.dol.gov/ofccp/LGBT/LGBT_resources.html.
  - Executive Order 11246, as amended. This law prohibits Federal contractors and subcontractors from discriminating in employment and requires affirmative action to ensure equal employment opportunity on the basis of race, color, religion, sex, or national origin. The Executive Order applies to all contractors, but construction contractors and companies participating in a construction project receiving Federal funds ("federally assisted construction contractor") have different affirmative action obligations than non-construction ("supply and service") contractors. The OFCCP regulations implementing the EO 11246 can be found at http://www.dol.gov/dol/cfr/Title_41/Chapter_60.htm. Contracts below a minimum threshold value and certain other contracts are exempt from coverage.
  - Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended. This law prohibits supply and service and construction contractors (and their subcontractors) from discriminating in employment against veterans. It also requires that these contractors take affirmative action to employ and advance veterans. Despite its name, this statute is no longer limited to veterans from the Vietnam Era. VEVRAA applies equally to: 1) disabled veterans; 2) Armed Forces service medal veterans; 3) recently separated veterans, and; 4) other protected veterans who served during a war or in a campaign or expedition for which a campaign badge has been authorized. Contracts below a minimum threshold value and certain other contracts are exempt.
  - Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended. This law prohibits supply and service and construction contractors (and their subcontractors) from discriminating in employment on the basis of disability. It also requires that these contractors take affirmative action to employ and advance in employment qualified individuals with disabilities. The OFCCP regulations implementing Section 503 can be found at 41 CFR Part 60-741 at http://www.dol.gov/cgi-bin/leave-dol.asp?exiturl=http://s.dol.gov/9S&exitTitle=www.ecfr.gov&fedpage=yes. Contracts below a minimum threshold value and certain other contracts are exempt from coverage.
  - In August 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs issued a Notice of Proposed Rulemaking requiring covered federal contractors and subcontractors with more than 100 employees to submit an annual Equal Pay Report on employee compensation. The proposed rule was published in the August 8, 2014 Federal Register. That proposed rule can be found at http://www.gpo.gov/fdsys/pkg/FR-2014-08-08/pdf/2014-18557.pdf.
- **EEO-1**

  Private employers with 100 or more employees (EXCLUDING state and local governments, public primary and secondary school systems, institutions of higher education, American Indian or Alaska Native tribes and tax-exempt private membership clubs other than labor organizations) and all federal contractors with 50 or more employees and a contract

amounting to $50,000 or more, and certain financial institutions must file a Standard Form 100 (EEO-1) each year. The EEO-1 is a compliance survey that collects employment data by race/ethnicity, gender and job category. As of 2019 the EEO-1 will also require employers to electronically submit pay data for each of these categories.

- **Arrest and Conviction Records**
  Employers should consider broadening their pre-offer investigations to include searches of public records on felony and misdemeanor convictions. If a search turns up a criminal conviction, employers must consider the relationship between the conviction and the applicant's fitness for a particular job before rejecting an applicant because of any particular conviction.

  Currently, 34 states have adopted what is widely known as "**ban the box**" initiatives that require employers to remove the conviction history question on the job application and delay the background check inquiry until later in the hiring process. Momentum for the policy has grown in recent years. The EEOC endorsed removing the conviction question from the job application as a best practice in its 2012 guidance making clear that federal civil rights laws also regulate employment decisions based on arrests and convictions. Specifically, the EEOC guidelines limit employers' consideration of criminal arrests and conviction records in making hiring or other employment decisions. The guidelines state, in part, that employers must limit their review to "convictions for which exclusion would be job related for the position in question and consistent with business necessity."

  On November 2, 2015, President Obama issued an Executive Order "banning the box" in federal recruitment. This has been viewed as the first step towards the introduction of a federal "ban-the-box" law, and though a bill was recently passed in the House of Representative, but is unlikely to pass in the Senate in 2019.

- **Criminal Background Checks in Massachusetts**
  The Commonwealth's Criminal Record Information (CORI) system allows employers to review the criminal record information for the state. **Under the CORI law, criminal record inquires must be eliminated from application forms but are still allowed within the recruitment process**. This means that under Massachusetts law, employers may inquire about criminal records after the initial applicant screening process, during a verbal interview. Employers also must provide employees with a copy of their CORI report before asking any questions about their criminal history, and before making employment decisions based upon the information contained in the CORI. Additionally, employers must also disclose the source of the specific information obtained, before taking any adverse action. Regulations also require background screening companies to identify their source of criminal history information. Employers should document all pre-adverse action measures when questioning a subject's criminal history and taking subsequent action, to demonstrate that all relevant steps were taken to comply with the law. The law also requires training for any employee who will be collecting CORI. The definition of employee for purposes of this law includes volunteers; subcontractors; contractors; vendors; and special state, municipal, or county employees. This broad inclusion differs from the definition of "employee" found in other state and federal laws.

  Massachusetts adopted ban-the-box legislation as part of the overhaul to the CORI system in 2010. That legislation barred employers from requiring applicants to check a box, if they had a criminal history.

On October 13, 2018, a reform bill (https://malegislature.gov/Bills/190/S2371) signed by Charlie Baker in April 2018 went into effect that altered the Ban the Box law in Massachusetts from 2010 in 4 significant ways:

- Employers are limited to asking about misdemeanors in which the conviction or completion of incarceration was more than 3 years prior to the date of the employment application. This is reduced from 5 years as in the original law.
- Employers are prohibited from asking applicants about a criminal record that has been sealed or expunged.
- When requesting criminal record information from an applicant, employers *must* include the following language regarding expunged records: "An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer 'no record' to an inquiry herein relative to prior arrests, criminal court appearances, juvenile court appearances, adjudications or convictions."
- Because of the above limitations, employers have greater protections from negligent hiring claims, because the employer is presumed not to have notice of (a) records that have been sealed or expunged; (b) records about which employers may not inquire under MA anti-discrimination laws, and (c) records containing crimes that the Department of Criminal Justice Information Services may not lawfully disclose to an employer.

- **Negligent Retention**
  The common law theories of negligent retention, negligent hiring and negligent supervision impose a duty on an employer to both select and retain employees who will not endanger their fellow employees. A claim of negligent retention will arise when an employer becomes aware of problems with a particular employee but fails to take further action such as investigating, disciplining, discharging, or reassigning the employee. In such cases, the employer has a duty to take appropriate action to protect other employees and the public.

- **Social Media**
  Ubiquitous social media use in today's workplace is a fact of life. More workers are using social networks while in the office, on the clock and at home. There is no one-size-fits-all solution on how a company can harness the benefits of employee participation while mitigating the risks. Your company should develop an effective policy for social media use. We can help.

  However, both state and federal laws have a number of restrictions and limitations when it comes to employers' ability to manage employee social media use. Did you know for example that the National Labor Relations Board and the Federal Trade Commission both govern your workplace? The NLRB is aggressively protecting employees' rights to engage in protected, concerted activity (whether those employees are represented by a union or not). The Federal Trade Commission is monitoring consumer-generated media and endorsements, including employee endorsements of employers. Handbook provisions related to social media, confidentiality, insubordination and electronic media are all targets and should be reviewed for compliance.

  Additionally, the EEOC is targeting the misuse of protected information gained by accessing a job applicant's social media information. Freely available information regarding race, marital status, and other protected class information may trigger anti-discrimination lawsuits. Job applicants may claim that the employer's use of this protected class information was the cause of their rejection from a prospective employment position.

Massachusetts law guarantees individuals the right to be secure from "unreasonable, substantial, or serious interference" with their privacy, and intrusions into areas in which the person has a legitimate expectation of privacy are prohibited. State law also prohibits the use of a person's "name, portrait, or picture" for purposes of trade without the person's written consent. Massachusetts employers must obtain employee written consent prior to use of photos, videos, and voice recordings of employees for commercial or advertising purposes.

- **Employment Eligibility—I-9 Documentation**
  Under state and federal immigration laws and regulations, employers may legally hire workers only if they are U. S. Citizens or aliens authorized to work in the United States.

  The Federal Immigration and Nationality Act requires all U. S. employers to verify that their employees are authorized to work in the United States. Verification is completed upon the submission of form I-9.

  The current version of the Form I-9 expired on 8/31/19, but currently there is no new form.

  All new hires must complete the Employment Eligibility Verification (Form I-9). Employers use the e-Verify to submit the information taken from Form I-9 to the Social Security Administration and the U. S. Citizenship and Immigration Services to determine whether the information matches government records.

  In addition, the Illegal Immigration and Reform Enforcement Act and federal law established procedures for hiring certain aliens, including skilled workers and professionals in occupations with shortages of qualified U. S. workers, on a temporary or permanent basis.

  The federal guest worker programs are:
  - H-1B Temporary Labor Certification (Specialty Occupations);
  - H-2A Temporary Labor Certification (Seasonal Agriculture);
  - H-2B Temporary Labor Certification (Non-Agricultural);
  - H-1C Nurses in Disadvantaged Areas;
  - D-1 Crew Members Certification; and
  - Permanent Labor Certification.

  More information regarding guest worker programs can be found at the U. S. Department of Labor website at http://www.doleta.gov/business/gw/guestwkr/.

- **Employment of Minors**
  Federal and state laws closely regulate the employment of minors, imposing special restrictions on the terms and conditions of their employment. These laws and regulations impose restrictions and compliance obligations on employers, subjecting employers to criminal penalties, civil liability, and other exposure.

  Federal labor laws prohibit children under the age of 18 from operating most work-assist vehicles and power-driven hoists. The laws also prohibit the use of chainsaws, wood chippers, reciprocating saws and performance of all forest-related services. There are some additional protections for 14 and 15 year olds: 15 years old is the minimum for lifeguarding at a traditional pool; and 14 and 15 year olds are prohibited from "youth peddling activities or non-charitable door-to-door sales."

All individuals between the ages of 14 and 17 must secure an employment permit and written permission from the child's parent or guardian prior to performing any work. The minor's weekly schedule or hours and breaks must be posted in a conspicuous area in the workplace and must comply with the maximum daily and weekly hour restrictions contained within the law. All minors must be under adult supervision during work hours and must avoid hazardous areas. No minor under the age of 16 may work in a manufacturing facility.

Massachusetts law allows minors aged 16 and 17 to work between 6:00 a.m. and 10:00 p.m. on school nights. In establishments that serve customers until 10:00 p.m., the new law allows them to work until 10:15 p.m. and on non-school nights until 11:30 p.m. If they are employed by a racetrack or restaurant, they may work until midnight. Minors in this age group may work a maximum of 48 hours a week, nine hours a day and six days a week.

During the summer season, 14 and 15 year olds may work only between 7:00 a.m. and 9:00 p.m., no more than eight hours a day, 40 hours per week and not more than six days a week. During the school year, 14 and 15 year olds may work a maximum of 18 hours a week, three hours a day on school days and up to eight hours a day on weekends and holidays.

Most teenagers under the age of 18 are not permitted to use most kinds of power tools and may not drive while at work. The law provides the Attorney General with the authority to immediately issue civil citations when investigators identify violations, which can include employers being personally liable for fines and penalties. The Attorney General also provides a "splash page" to give teenagers information regarding their job rights at www.laborlowdown.com.

- **Personnel Files**

  The contents of personnel files are heavily regulated by a variety of federal and state laws. When determining whether to place a document in the personnel file, a best practice is to consider whether the document contains sensitive information, such as date of birth, marital status, dependent information, Social Security numbers, medical information, immigration status, national origin, race, gender, religion, sexual orientation, criminal history, financial history, subjective statements or accusations. If it is does, the general personnel file is likely not the best place to store the document.

  Employers should also pay special consideration to where and how they maintain these files, limiting access to only those with a need to know and protecting applicants and employees from discrimination, identity theft, breach of privacy, GINA, FMLA, ADA and Health Insurance Portability and Accountability Act (HIPAA) violations.

  Our office can assist you with the creation of a personnel file classification system, document retention schedule, and record disposal system and log.

  Under the Commonwealth's Personnel Records Law, any employer who employs 20 or more employees must have a personnel record for each employee and retain a copy of the personnel record for at least three years after the employment relationship ends, or through the duration of any ongoing litigation, whichever is longer. Employers that employ fewer than 20 employees can, but do not have a legal obligation to, create personnel records for their employees. An employer who maintains a personnel record and receives a written request from an employee to inspect or obtain a copy of the record must comply with that request within five business days. Employees can request access to and/or a copy of his or her personnel file up to two separate occasions each calendar year.

Under Massachusetts law, an employer that maintains a personnel record must notify an employee within 10 days of the employer placing in the employee's personnel record any information that has been or may be used to negatively affect the employee's qualifications for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.

If there is a disagreement as to the accuracy of the information contained within an employee's personnel record, the removal of the information can be mutually agreed upon by the employee and the employer. If the employer refuses to remove the information, the employee may submit a written statement explaining his or her position, which then becomes part of the employee's personnel record. This statement must be:

- Maintained as part of the employee's personnel file;
- Included in any transmittal of the file to a third party; and
- Included in any disclosure of the contested information.

- **Reporting of New Hires**

  Federal law requires all employers to report the hiring, rehiring and return to work of all paid employees. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, directs all states to adopt laws requiring employers to report information on newly hired employees to the state child support agency.

  As a result of the pervasive use of independent contractors, the Massachusetts Department of Revenue is aggressively pursuing employers who fail to comply with these reporting requirements and imposing strict fines. If you believe you are not in compliance, please refer to our discussion of The "Voluntary Classification Settlement Program."

- **Smoking**

  Any Massachusetts employer with even one employee must ban smoking in their workplace. Employers may continue to designate a smoking area outside of the workplace, but the area must be of sufficient distance away from the building so that the smoke does not enter the workplace. It is important to note that smoking breaks aren't required, but if allowed, employees must be compensated for that time.

- **Written Information Security Plan (WISP)**

  Massachusetts law requires any business that collects personal information from a resident of Massachusetts to safeguard personal information contained in both paper and electronic records. In plain language, this means that all employers that employ residents of Massachusetts must have a Written Information Security Plan in place that:

  - Details measures adopted to safeguard personal information;
  - Designates at least one person to manage the security program;
  - Imposes disciplinary measures for violations of the program;
  - Limits access to personal information;
  - Monitors security to prevent unauthorized use; and
  - Documents all incidents involving breach and all corrective actions taken as a result.

  We have developed a comprehensive compliance program that includes a compliance audit and the preparation of a Written Information Security program. We also work in tandem with an IT specialist to ensure that our clients' systems comply with the law's encryption requirements. Please call us if you would like our assistance in achieving compliance with this workplace regulation.

- **Post-Offer Pre-Employment Physicals and Medical Inquires**
  Physical examinations and medical inquiries are permissible only after the offer of employment has been made. However, the Americans with Disabilities Act places three restrictions on post-offer inquiries:
  - All prospective employees in the same category must be subjected to the same inquiries;
  - The medical records must be retained separately from the personnel file to ensure confidentiality of the information contained therein; and
  - The examination or inquiry addresses only essential, job-related abilities.

- **Lie Detectors and Polygraph Testing**
  The federal Employee Polygraph Protection Act (EPPA) is administered by the Wage and Hour Division (WHD) of the United States Department of Labor. The EPPA prohibits most private employers from using lie detectors, either for pre-employment screening or during the course of employment.

  Additionally, employers are prohibited from taking retaliatory action against employees or prospective employees for refusing to submit to a lie detector test, and may not discriminate on the basis of test results. Every employer subject to EPPA must post and keep posted on its premises a notice explaining the Act.

Ending the Employment Relationship

- **Compensation**
  Employees whose employment has been involuntarily terminated must be paid their final paycheck and must receive payment for any and all accrued vacation time on their last day of work. Employees who voluntarily resign must be paid all wages, including accrued vacation time, by their next scheduled payday.

- **Group Health Insurance Continuation**
  Under federal law and many state laws, employees have the right to continue health insurance coverage for themselves and their covered dependents when they lose coverage due to certain "qualifying events."

- **COBRA**
  COBRA (the Consolidated Omnibus Reconciliation Act) is an acronym for the federal law that covers all employers with 20 or more employees. Under federal law, employers with 20 or more employees must offer health insurance continuation to employees and their covered dependents when they lose coverage due to certain "qualifying events." Continuation must be afforded for all coverage in effect at the time of the qualifying event, including medical, dental, and vision coverage.
  - **Notice**: The Employee Benefits Security Administration has issued an updated model election notice under COBRA to include additional information regarding healthcare coverage alternatives offered through the Marketplace. Please see: www.dol.gov/ebsa/healthreform.

  Qualifying events occur in three major categories under federal COBRA:
  - **Employee** – A qualifying event affecting an employee may be: voluntary or involuntary termination of employment for reasons other than gross misconduct; or a reduction in the number of hours of employment;
  - **Spouse** – A qualifying event affecting a spouse may be: a voluntary or involuntary termination of the covered employee's employment for any reason other than gross

misconduct; reduction in the hours worked by the covered employee; covered employee becoming entitled to Medicare; divorce or legal separation from the covered employee; or death of the covered employee;
- **Dependent Child** – A qualifying event affecting a dependent child may be: the same events listed for spouse, above, and loss of dependent child status under the plan rules.

In May 2014, the Employee Benefits Services Administration (EBSA) of the Department of Labor issued proposed rules regarding continuation coverage that employers must provide to their employees under the Consolidated Omnibus Reconciliation Act (COBRA) of 1985. The EBSA also released two model notice forms for employers to use for providing COBRA notices to their employees.

General and election model notices are currently located in the appendix to COBRA regulations. The proposed rule would eliminate the current model notices from the regulation and instead provide model notices through guidance to make it easier to update the model notices. The new model notices reflect that coverage is now available in the Marketplace and the updated model election notice provides information on special enrollment rights in the Marketplace.

- **Massachusetts Continued Coverage**
  Massachusetts has a "Mini-COBRA" law that applies to employers with between two and 19 employees. This law applies to medical coverage only but otherwise mirrors COBRA.

- **Do Plant Closing Laws Apply?**
  Employers having 100 or more employees are subject to the federal Worker Adjustment and Retraining Notification Act (WARN). WARN requires employers with 100 or more employees to give 60 days' notice prior to a "plant closing," a lay-off, or when terminating 50 or more employees. There are penalties and fines for failing to comply with WARN's requirements, including attorney's fees.

  Notice to the state? Except in the event of a mass layoff, no notice to the state is required for any kind of work separation, but if the employee was subject to a wage garnishment order for child support or alimony, the employer must notify the New Hire division of the Attorney General's office within seven days of the work separation. In the case of certain lump-sum payments of severance pay, bonuses, commissions, accrued leave, or similar post-termination payments, any child support or alimony amounts must be taken out of such payments.

- **Unpaid Intern or Employee**
  In 2018, the U.S. Department of Labor (DOL) issued a new test for determining whether interns must be paid or may be unpaid under the federal Fair Labor Standards Act (FLSA). The FLSA requires employers to pay at least minimum wage and overtime compensation to non-exempt employees. If an intern is considered an employee, then the intern is subject to the FLSA and must receive at least minimum wage and time and a half overtime compensation. If an intern is not considered an employee, the intern is not subject to the FLSA and does not have to be paid. The DOL uses the "primary beneficiary" test to determine whether the employer or intern is the primary beneficiary of the relationship. If the employer is the primary beneficiary, the intern should be paid. Seven factors are considered under the test:
  - The extent to which the intern and the employer clearly understand there is no expectation of compensation (any promise of compensation suggests the intern is an employee.);
  - The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;

- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
- The extent to which the intern and the employer understand the internship is conducted without entitlement to a paid job at the conclusion of the internship and is not entitled to minimum wage and overtime compensation.

There is no exception in the Massachusetts Minimum Fair Wage Law generally applicable to "interns." Rather, anyone performing services while undergoing "training" is considered to be an employee who is working and subject to the state's minimum wage guarantees, unless the work is under a training program in a charitable, educational or religious institution. Accordingly, interns and trainees performing services in Massachusetts workplaces must be paid minimum wage as a matter of state law unless they are under a training program in some type of charitable, educational or religious institution. Additionally, the Massachusetts standard for when interns must be paid minimum wages applies across the board, in both the for-profit and the non-profit sectors. Finally, it is also worth noting that the Massachusetts Department of Labor Standards has adopted the six-part test used by the DOL to determine whether a particular program in an educational or charitable institution qualifies as a "training program" within the meaning of the state statute. This means that, as a matter of Massachusetts state law, interns and trainees in Massachusetts workplaces generally must be paid state minimum wages unless the employer can satisfy the state's criteria as well as the six-part test used by the DOL for purposes of federal law.

II. WORKPLACE HARASSMENT AND DISCRIMINATION

Here is a brief summary of state and federal law:

- **Discrimination Charges with State and Federal Administrative Agencies**
  A combination of federal administrative agencies and courts enforce laws prohibiting employment discrimination. In general, a claim of discrimination typically begins with the filing of a discrimination charge with an administrative agency. The agency is then given an opportunity to investigate the charge and attempt to resolve the dispute between the employee and the employer. If the charge is not resolved, the employee may proceed with the administrative process through a decision or may sue the employer in civil court.

  The federal law covers employers who employ 15 or more employees, and prohibits all forms of discrimination based on race, color, sex, gender, sexual orientation, transgender, disability, genetic information, marital status, religion (both beliefs and practices), and national origin. Federal law does not directly prohibit the basing of employment decisions on an applicant's criminal history. However, employers must insure that such an inquiry is based upon a business necessity and does not have a direct impact on a protected group. In general terms, the Equal Employment Opportunities Commission (EEOC) enforces the federal law, known as Title VII.
  - **The Equal Employment Opportunity Commission (EEOC)** – The EEOC has primary responsibility for enforcing federal employment discrimination laws. All laws enforced by the EEOC, except the Equal Pay Act, require filing a charge with the EEOC or a state agency before a private lawsuit may be filed in court. The charging party must file a charge with the

EEOC within 180 days from the date the alleged violation occurred. The deadline is extended to 300 days if state or local anti-discrimination laws also cover the charge or if the charge is brought under the Age Discrimination in Employment Act (ADEA).

- **EEOC Procedures** – Within ten days after filing a charge, the EEOC will send a notice of such charge to the employer with the name and contact information for the investigator assigned to the case. The charge itself does not constitute a finding that the employer engaged in discrimination. The EEOC has responsibility to investigate and determine whether there is a reasonable cause to believe discrimination occurred. As part of the investigation, the EEOC will require the employer to respond to the employee's allegations by submitting a statement of position. Employers should fully investigate the allegations and charges before filing a position statement. Untrue or inaccurate statements in a position statement will be used against the employer as evidence that the employer is attempting to cover up the alleged discriminatory actions. For the purposes of investigation and resource allocation, the EEOC categorizes each claim as follows:
  - Category A – Further investigation is likely to result in a finding of discrimination. The charge will receive priority treatment and will be investigated further.
  - Category B – It is unclear whether discrimination has occurred and the charge requires further investigation.
  - Category C – It is unlikely that further investigation will disclose a violation because the claims include non-jurisdictional or unsupported charges. The charge will be dismissed without further investigation.

  A successful plaintiff may be entitled to back and front-pay, compensatory and punitive damages, reinstatement, and attorney's fees.

- **The Massachusetts Equal Rights Act (MERA)**
  The Massachusetts Anti-Discrimination Law (Chapter 151B) prohibits discrimination in the workplace, and includes more protected classes than those defined by federal law. Massachusetts employers are prohibited from discriminating against prospective employees based on race, color, religious creed, national origin, ancestry, sex, gender identity, age, criminal record, handicap (disability), mental illness, retaliation, sexual harassment, sexual orientation, active military personnel, veteran status, and genetics. In addition, employers have an affirmative responsibility to provide maternity leave to biological and adoptive parents. The Massachusetts Commission Against Discrimination (MCAD) enforces Chapter 151B.

- **Poster**
  The Massachusetts poster regarding Chapter 151B can be found at: http://www.mass.gov/mcad/documents/FairEmploymentLawPoster.pdf.

- **Reasonable Accommodation**
  Except when based upon a bona fide occupational qualification, employers must make reasonable accommodations for qualified disabled employees or job applicants, unless the employer can demonstrate that the accommodation would impose an undue hardship. The obligation to provide a reasonable accommodation applies to employers with 15 or more part-time or full-time employees.

- **Disability and the ADA**
  The Americans with Disabilities Act (ADA) is the federal law that prohibits discrimination against a qualified individual who is disabled. The ADA applies to employers with 15 or more employees. A "qualified individual" is a person who meets the legitimate skill, experience, education or other requirements of a position and who can perform the essential functions of that job, with or without accommodation.

In January 2014, the U.S. Department of Justice (DOJ) issued a Notice of Proposed Rulemaking (NPRM) to implement changes made by the ADA Amendments Act of 2008 (ADAAA) as they apply to Title II (nondiscrimination in state and local government services) and Title III (nondiscrimination by public accommodations and commercial facilities) of the Americans with Disabilities Act (ADA).

The ADAAA, which took effect on January 1, 2009, made important changes to the ADA's definition of the term "disability," making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. See 42 U.S.C. 12102(1)(A)-(C). The DOJ proposed several major revisions to the definition of "disability" contained in the Title II and Title III ADA regulations. All of these revisions are based on specific provisions in the ADAAA or on specific language in the legislative history.

These revisions state that the definition of disability "shall be interpreted broadly." The revisions also make it clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their statutory obligations and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. In addition, the revisions expand the definition of "major life activities" by providing a non-exhaustive list of major life activities, and specifically including the operation of major bodily functions.

The revisions also add rules of construction that should be applied when determining whether an impairment substantially limits a major life activity. The rules of construction state the following:

- That the term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;
- That an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;
- That the primary issue in a case brought under the ADA should be whether the covered entity has complied with its obligations and whether discrimination has occurred, not the extent to which the individual's impairment substantially limits a major life activity;
- That in making the individualized assessment required by the ADA, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA;
- That the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;
- That mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- That an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- That an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

The final rule also proposes language that states that the definition of "regarded as" does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity and provides that individuals covered only under the "regarded as" prong are not entitled to reasonable modifications.

- **Disability Under Massachusetts Law**
  In Massachusetts, employers with six or more employees must reasonably accommodate a qualified disabled person unless to do so would cause undue hardship to the employer. For example, the Massachusetts Commission Against Discrimination found that the employer had grounds for termination where an employee failed to monitor her diabetes, and frequently required her employer to assist her in seeking medical attention. These major disruptions to the workplace were found to impose an undue burden on the employer.

  In contrast, an employer was not found to be subject to an undue hardship where an employee was consistently absent for medical reasons and the employer had a rotating schedule of receptionists to conveniently fill her position.

- **Genetic Discrimination—Federal**
  The EEOC enforces Title II of GINA, which stands for the Genetic Information Nondiscrimination Act. GINA prohibits the use of genetic information in making employment decisions in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment. Genetic information is a written record or an explanation of a genetic test with regard to the presence, absence or variation of a gene.

  Under the GINA, family medical history is "genetic information," employers are not allowed to obtain, directly or indirectly from your employees. (There are a few exceptions, but this is the general rule.) This creates a risk for employers that request documentation for purposes of sick leave, or send an employee for a medical examination that fully complies with ADA and state law requirements, because if the doctor asks about the employee's family history (even if the employer does not know that the doctor is doing so), the company could be liable for a GINA violation. Fortunately, the GINA regulations also provide certain "safe harbor" language. An employer who provides this language to the healthcare provider will be protected, even if the healthcare provider asks questions that he or she should not.

- **Genetic Discrimination—Massachusetts**
  Massachusetts General Laws, Chapter 151B - prohibits employers from:
  - Terminating or refusing to hire individuals on the basis of genetic information;
  - Requesting genetic information concerning employees, applicants, or their family members;
  - Attempting to induce individuals to undergo genetic tests or otherwise disclose genetic information;
  - Using genetic information in any way that effects the terms and conditions of an individual's employment; or
  - Seeking, receiving or maintaining genetic information for any non-medical purpose.

  Genetic information is a written record or an explanation of a genetic test with regard to the presence, absence or variation of a gene.

- **Caregiver Discrimination**
  As the number of employees with child and elder care responsibilities continues to grow, more workers are filing lawsuits claiming discrimination on the job as a result of their caregiver duties. Claims of "family responsibilities discrimination" have seen a 400% rise in the last decade.

- **Age Discrimination—ADEA**
  All employees who are 40 years old or older are in a protected class and therefore cannot be discriminated against based upon their age. The Age Discrimination in Employment Act of 1967

(ADEA) applies to employers with 20 or more employees, including state and local governments, and protects individuals from adverse employment decisions relating to hiring, firing, promotion, layoff, compensation, benefits, job assignments and training, based in whole or in part upon the employee's age.

The Massachusetts Commission Against Discrimination is the state agency that enforces this state's prohibition against discrimination based upon an employee's age. Employers of six or more individuals are covered by the Massachusetts law.

- **Military Service Discrimination**
  The current law in Massachusetts prohibits employers from denying employment, re-employment, and retention of employment, promotion or any benefit of employment to any person because of their membership in the armed services or obligations to any military service. In 2016, the HOME Act extended this protection to veterans. A veteran is any person with an honorable discharge who served in any branch of the U.S. military or who served full time in the National Guard under certain conditions. Any person who served in wartime and was awarded a service-connected disability or Purple Heart is also a qualifying veteran. Refusal to comply with these obligations constitutes discrimination based upon military service. Massachusetts law does not impose any greater obligations than those defined within the Federal Uniformed Employment and Re-Employment Rights Act (USERRA). We address military leave under Section VII, Leave from Work, in this Overview.

- **Volunteer Firefighters**
  Volunteer Firefighters are protected from termination by their employers for responding to an emergency related to a fire, rescue, emergency medical service call, hazardous materials incident, or a disaster.

- **Transgender Equal Rights Act**
  In July 2012, Massachusetts joined 16 states and the District of Columbia in providing legal protection against discrimination based on gender identity or expression in employment, housing, education, credit and hate crimes.

- **Drug Testing and Alcohol**
  According to the National Survey on Drug Use and Health, most illicit drug users are employed. Not surprisingly, the U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration has reported that, compared with non-substance abusers, substance abusing employees are more likely to: change jobs frequently, be late to or absent from work, be less productive employees, be involved in a workplace accident or file a workers' compensation claim. Many employers who have implemented drug and alcohol workplace programs or testing programs have experienced positive results: improvements in morale and productivity with decreases in absenteeism, accidents, down time, turn over, theft; better health status among employees; decreased use of medical benefits and decreased cost for workers' compensation.

  Surprisingly, the issue of drug testing has not been addressed on a broad level by either federal or state legislators. The Drug Free Workplace Act of 1988 requires federal government contractors and employers receiving contracts to ensure a drug-free workplace, but curiously does not require testing to achieve compliance. Employers who employ drivers who are required to possess a commercial driver's license (CDL) are governed by the Department of Transportation (DOT) regulations requiring testing for alcohol and controlled substances.

It is important to remember that illegal use of drugs, controlled substances, or prescription drugs, is not protected by the ADA regardless of whether the employee is considered an addict or an occasional user. Current alcohol use, in contrast, may be protected by the ADA if the employee is diagnosed as an alcoholic by his or her treating physician.

Upon the implementation of a drug-free workplace program, in accordance with the specified legal requirements, employers will qualify for a premium discount certified under the employer's workers' compensation insurance policy.

The following elements must be included in an employer's drug-free workplace program in order to qualify for the workers' compensation premium discount:

- A written policy statement;
- Substance abuse testing;
- Resources of employee assistance providers;
- Employee education;
- Supervisor training; and
- Confidentiality standards.

- **Marijuana**

  Under the Federal Controlled Substances Act ("CSA") (21 U.S.C. § 811), marijuana is classified as a Schedule I drug, which means the federal government views marijuana as highly addictive and having no medical value. Doctors may not prescribe marijuana for medical use under federal law, but they may recommend its use under the First Amendment.

  However, while marijuana remains illegal under the CSA, which does not recognize a difference between medical and recreational use of marijuana, the number of states passing laws to legalize marijuana in some form has grown in recent years and several more states are expected to vote on further legalization before the end of next year. Twenty-three states have legalized medical marijuana, and 10 states including Massachusetts have legalized the use of recreational marijuana as well. While it is still a best practice to follow a zero tolerance policy for drug and alcohol use at work, many employers are choosing to carve out exceptions for medicinal marijuana use outside of the workplace rather than a blanket prohibition on drug use outside of work.

  In 2016, recreational marijuana possession and use was decriminalized in Massachusetts. In 2018 retailers will be able to begin selling marijuana. This change in the law requires employers to revisit their policies related to drug and alcohol use at work. Massachusetts law does not yet provide anti-discrimination protections for medicinal or recreational marijuana users. However, the first Massachusetts workplace medical marijuana lawsuit was filed in September of 2015 by an employee alleging she was improperly fired from her job for using marijuana legally obtained for medical reasons.

- **Pregnancy**

  Employers are prohibited from using a woman's pregnancy, childbirth or potential use of maternity leave as a reason for any adverse employment action. Adverse employment actions include refusing to hire or promote, lay-off, failure to reinstate, or restricting duties. Pregnancy-related complications qualify as a bona fide disability under the ADA, and obligate the employer to consider reasonable accommodations.

  In July 2014, the U.S. Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance on Pregnancy Discrimination and Related Issues, along with a question and answer document about the guidance and a Fact Sheet for Small Business. In light of the U.S. Supreme

Court decision in *Young v. UPS*, which sets forth the test for determining when to accommodate a pregnant employee, the EEOC updated the guidance in June of 2015. The updated enforcement documents can be found at: http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm.

- **Massachusetts Pregnant Workers Fairness Act**
  Massachusetts law requires employers with six or more employees to provide reasonable accommodation to pregnant employees. The act has three notice requirements. First, employers must provide employees with written notice of their rights under the act via a "handbook, pamphlet or other means." Second, employers must provide notice to newly-hired employees at the time of hire. Third, employers must provide notice to any employee who notifies the employer of her pregnancy. Such notice must be provided within 10 days of such notification. The act also requires employers to reasonably accommodate all pregnant employees, just as they are required to reasonably accommodate employees with disabilities. This means that an employer must engage in the interactive process with the employee or prospective employee to try to identify a reasonable accommodation that enables the employee or prospective employee to perform the essential functions of the position.

  In addition, the act specifically references an employer's obligation to accommodate employees with a need to express breastmilk for a nursing child.

  The act provides the following examples of accommodations that may be required:
  - 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;
  - Seating;
  - Temporary transfer to a less strenuous or hazardous position;
  - Job restructuring;
  - Light duty;
  - Private non-bathroom space for expressing breastmilk;
  - Assistance with manual labor; and
  - Modified work schedules.

  Although an employer may request documentation to support the need for an accommodation, the act specifically prohibits an employer from requesting documentation for the following accommodations:
  - More frequent restroom, food or water breaks;
  - Seating;
  - Limitation on lifting objects over 20 pounds; and
  - Private non-bathroom space for expressing breastmilk.

- **Religious Freedom**
  Both federal and state statutes protect workers from discrimination in the workplace based upon their sincerely held religious beliefs.

  Religious discrimination charges relating to a wide range of issues have steadily increased. In fiscal year 2013, the EEOC received 3,721 charges alleging religious discrimination, more than double the 1,709 charges received in fiscal year 1997.

  In March 2014, the EEOC issued two new technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming under Title VII of the

Civil Rights Act of 1964. The question-and-answer guide, entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," and an accompanying fact sheet, provide a user-friendly discussion of the applicable law, practical advice for employers and employees, and numerous case examples based on the EEOC's litigation.

In June of 2015, in a case against retailer Abercrombie & Fitch, the U.S. Supreme Court held that "[t]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." The court found that Abercrombie's decision not to hire a Muslim applicant because she wore a hijab that did not meet the company's dress code amounted to discrimination even though the applicant did not specifically request religious accommodation. The Court also clarified that even if an employer has a neutral dress policy (e.g. Abercrombie's policy of "no headwear") and applies it to everyone, regardless of religion, the employer can still be liable for discrimination.

In **Massachusetts**, an employer may refuse to accommodate an employee's request to be absent from work due to a religious reason if the employer can show that such accommodation would be an undue hardship on the business.

- **Race**
  Employers are prohibited from engaging in conduct that would discriminate on the basis of race and color.

- **Sexual Harassment**
  Sexual harassment is considered a form of gender discrimination under state and federal law. In Massachusetts, employers with six or more employees must have a written policy that addresses the prohibition against sexual harassment. Employees must also distribute the policy to all new hires and to all existing employees annually. We have developed a model sexual harassment prevention policy and training program. Please contact us for more information about these resources.

- **Sexual Orientation and Gender Identity as Protected Classes**
  On December 3, 2014, the, U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced a Final Rule that will prohibit federal contractors from discriminating in employment on the basis of sexual orientation or gender identity. Although this protection has not been explicitly extended to all private employers, the EEOC has interpreted Sex Discrimination to include discrimination on the basis of sexual orientation and gender identity and filed sex discrimination suits throughout the country against employers who allegedly discriminated on the basis of sexual orientation or gender identity. At present, the Circuit Courts are split as to whether Title VII prohibits sexual orientation discrimination, and the U.S. Supreme Court is expected to take up the issue at some point.

  Massachusetts law specifically prohibits discrimination on the basis of sexual orientation and/or gender identity.

- **The Ledbetter Fair Pay Act**
  As we know, it is unlawful for employers to discriminate against an employee based on an employee's gender with respect to hiring, firing, promotion, job training, compensation, or any other term, condition, or privilege of employment. The right of employees to be free from discrimination in compensation is protected under several federal and state laws. Under the Ledbetter rules, the date of the initial offense is no longer relevant for purposes of a limitations

defense if there is a continuing violation. In fact, the continuing violation keeps the discriminatory claim alive indefinitely.

- **Massachusetts Pay Equity Act**
  The Massachusetts Pay Equity Act makes it generally illegal for an employer to pay employees compensation at a lower rate than the rate paid to employees of a different gender for comparable work. The law eliminates the requirement that "comparable work" involve similar duties. Instead, under the new law, comparable work is "work that is substantially similar in that it requires substantially similar skill, effort, and responsibility and is performed under similar working conditions." The law also provides that "a job title or job description alone shall not determine comparability."

  Although the Act's prohibition on unequal compensation is broadly worded, it also contains important new defenses for employers that were not available under the old law. Under the new law, an employer is not liable if it can demonstrate that a pay difference for comparable work is based on one or more of the following factors:
  - A bona fide seniority system; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority;
  - A bona fide merit system;
  - A bona fide system that measures earnings by quantity or quality of production or sales;
  - The geographic location in which a job is performed;
  - Education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or
  - Travel, if the travel is a regular and necessary condition of the particular job.

  Notably, the Act also establishes an affirmative defense for employers who have audited their pay practices within the prior three years. Specifically, employers who voluntarily review their pay practices and "demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work," have an affirmative defense to pay discrimination claims. Foley & Foley can conduct Pay Equity Audits that will assist employers with utilizing the affirmative defense in the event of an Equal Pay Act claim.

  In addition to the equal pay requirements, the Pay Equity Act also makes it illegal for an employer to: (1) require that an employee refrain from inquiring about, discussing or disclosing information about the employee's own wages, or any other employee's wages; (2) screen job applicants based on their wages; (3) request or require an applicant to disclose prior wages or salary history; or (4) seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment, including proposed compensation, has been made.

  An employer may, however, prohibit human resources employees, or any other employee whose job responsibilities require access to other employees' compensation information, from disclosing such information. The new law also contains anti-retaliation provisions for any employee who opposes an action or practice made illegal under this section.

  Prior to 2018, employers must remove salary history questions from applications, and understand that they can no longer seek this information prior to making an offer of employment.

III. WAGE AND HOUR OBLIGATIONS

- **Massachusetts Fair Wage Act (MFWA)**
  Massachusetts law and regulations also address minimum wage, overtime eligibility and several issues not addressed by the FLSA such as: meal periods, vacation pay, and reporting time pay. Massachusetts was the first state to enact what many consider to be an anti-business wage law in 2008. The law, "*An Act to Clarify the Law Protecting Employee Compensation*," makes practically any violation of Massachusetts wage and hour laws subject to mandatory treble damages, and leaves the courts with virtually no discretion to limit the employee's recovery to single damages. The First Circuit expanded on the Act in 2013, finding that employees may collect damages arising from common law causes of action (such as breach of contract), as long as the common law remedy was not in direct conflict with the FLSA. The ramifications of this decision are significant. The statute of limitations for violations of the Massachusetts Wage Act has been extended to three years, up from two years, as of the fall of 2014. Additionally, the time for filing is put on hold (tolled) from the time an employee files a complaint with the AG's office to when the AG issues a right to sue letter or its enforcement action becomes final. Employees are now empowered to collect damages arising from common law claims as well as from violations of the FLSA, the Massachusetts Fair Wage Act (MFWA), and other applicable statutes.

- **Overtime Eligibility**
  The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping, and child labor requirements for full-time and part-time employees in the private sector and in federal, state and local governments. For the purposes of determining overtime eligibility, the law defines two categories of employees, non-exempt and exempt:
  - **Non-exempt** employees may be paid on an hourly basis or salaried basis and must receive time-and-a-half for all hours worked in excess of 40 hours in a workweek.
  - **Exempt** employees must be paid on a salaried basis and must meet the salary and duty tests for administrative, professional, or executive employee as defined under the Fair Labor Standards Act (FLSA). Exempt employees are not entitled to overtime, regardless of the number of hours worked in a workweek.

- **Updated Proposed Rules on Overtime Eligibility**
  In July 2015 the Department of Labor released a proposed update to the regulations governing which executive, administrative and professional employees (white-collar workers) are entitled to the Fair Labor Standards Act's minimum wage and overtime pay protections. The Department last updated these regulations in 2019, and the salary threshold for exemption in 2019 is $455 per week ($23,660 per year) and beginning January 1, 2020, the salary threshold for exemption is $679 per week ($35,308 per year).

  In 2019, the DOL issued a new proposed rule that would increase the standard salary level to $679 per week ($35,308.00 per year) and raising the annual compensation requirement for highly compensated employees from to $147,414.

  The DOL issued the final overtime rule effective January 1, 2020. Employers with salaried employees under $35,308 annually should be prepared to adjust their pay practices.

EXEMPT CATEGORIES UNDER FEDERAL LAW

1. **Executive Exemption** – To qualify for the executive employee exemption, *all* of the following tests must be met:

   Compensation Test:
   - ☐ The employee must be compensated on a salary basis at a rate not less than $684.00 per week (equivalent to $35,568 per year for a full-time worker).

   Duties Test:
   - ☐ The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise – these duties must consume close to 50% of the time the employee works on a regular workday;

   - ☐ The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

   - ☐ The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

2. **Administrative Exemption** – To qualify for the administrative employee exemption, *all* of the following tests must be met:

   Compensation Test:
   - ☐ The employee must be compensated on a salary or fee basis at a rate not less than $684.00 per week (equivalent to $35,568 per year for a full-time worker).

   Duties Test:
   - ☐ The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operation of the employer or the employer's customers; and

   - ☐ The employee's primary duties include the exercise of discretion and independent judgment with respect to matters of significance.

3. **Professional Exemption –** To qualify for the learned professional employee exemption, *all* of the following tests must be met:

   Compensation Test:
   - ☐ The employee must be compensated on a salary or fee basis at a rate not less than $684.00 per week (equivalent to $35,568 per year for a full-time worker).

   Duties Test:
   - ☐ The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominately intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

   - ☐ The advanced knowledge must be in a field of science or learning; and

- ☐ The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

4. **Creative Professional Exemption** – To qualify for the creative professional employee exemption, *all* of the following tests must be met:

   Compensation Test:
   - ☐ The employee must be compensated on a salary or fee basis at a rate not less than $684.00 per week (equivalent to $35,568 per year for a full-time worker).

   Duties Test:
   - ☐ The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

5. **Computer Employee Exemption** – To qualify for the computer employee exemption, *all* of the following tests must be met:

   Compensation Test:
   - ☐ The employee must be compensated either on a salary or fee basis at a rate not less than $685.00 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour.

   Duties Test:
   - ☐ The employee must be employed as a computer system analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

   - ☐ The employee's primary duty must consist of: 1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; 3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4. Combination of the aforementioned duties, the performance of which requires the same level of skills.

6. **Outside Sales Exemption**– To qualify for the outside sales employee exemption, only the following duties test must be met:

   Duties Test:
   - ☐ The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

   - ☐ The employee must be customarily and regularly engaged away from the employer's place or places of business.

7. **Highly Compensated Employees Exemption** – Highly compensated employees perform office or non-manual work and are paid total annual compensation of $107,432.00 or more are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard test for exemption.

Compensation Test:

- ☐ The employee must be compensated on a salary basis at a rate not less than $107,432.00 or more annually.

Duties Test:

- ☐ Customarily and regularly performs at least one of the duties of an exempt executive, administrative or professional employee.

We can help you audit and classify your employees to attain compliance with applicable state and federal wage and hour laws. Please contact us to discuss options and request assistance.

Under Massachusetts law, <u>all employees</u> must be paid overtime with the exception of the following limited categories of employees:

- Janitor or caretaker of residential property, who when furnished with living quarters is paid a wage of not less than $30 per week;
- Golf caddy, newsboy or child actor or performer;
- Bona fide executive, or administrative or professional person or qualified trainee for such position earning more than $80 per week;
- Outside salesman or outside buyer;
- Learner, apprentice or handicapped person under a special license as provided in Section 9;
- Fisherman or as a person employed in the catching or taking of any kind of fish, shellfish or other aquatic forms of animal and vegetable life;
- Switchboard operator in a public telephone exchange;
- Driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935, or as employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act or subject to Title II of the Railway Labor Act;
- In a business or specified operation of a business which is carried on during a period or accumulated periods not in excess of 120 days in any year, and determined by the commissioner to be seasonal in nature;
- Seaman;
- An employee of an employer licensed and regulated pursuant to chapter 159A;
- An employee employed in a hotel, motel, motor court or like establishment;
- An employee employed in a gasoline station;
- An employee employed in a restaurant;
- An employee employed as a garageman, which term shall not include a parking lot attendant;
- An employee employed in a hospital, sanatorium, convalescent or nursing home, infirmary, rest home or charitable home for the aged;
- An employee employed in a non-profit school or college;
- An employee employed in a summer camp operated by a non-profit charitable corporation;
- An employee employed as a laborer engaged in agriculture and farming on a farm; and
- An employee employed in an amusement park containing a permanent aggregation of amusement devices, games, shows, and other attractions operated during a period or accumulated periods not in excess of 150 days in any one year.

Massachusetts employers should take note that unless an employee is exempt from both FLSA and Massachusetts overtime law, he or she must be paid overtime.

We can help you audit and classify your employees to attain compliance with applicable state and federal wage and hour laws. Please contact us to discuss options and request assistance.

- **Training Time**
  Attendance at courses, lectures, meetings, training programs, and similar activities generally do not constitute hours worked under the following conditions:
  - The attendance is outside normal working hours;
  - The attendance is voluntary;
  - The course, lecture, meeting, or training is not directly related to the employee's current job assignment; and
  - No work of value is performed for the employer.

- **Travel Time**
  An employer does not have to pay an employee for the time the employee spends commuting to and from work. However, an employer is obligated to compensate an employee for travel during the workday if that travel benefits the employer. If an employee who regularly works at a fixed location is required to report to a location other than the regular worksite, the employee must be compensated for the travel time in excess of the employee's ordinary travel time between home and work.

  The IRS publishes special per diem rates for taxpayers to use to substantiate ordinary and necessary business expenses incurred while traveling away from home, specifically:
  1. The special transportation industry meal and incidental expenses rates (M&IE);
  2. The rate for the incidental expenses only deduction; and
  3. The rates and list of high-cost localities for purposes of the high-low substantiation method. Taxpayers using the rates and list of high-cost localities provided must comply with Rev. Proc. 2011-47, I.R.B. 2011-42, 520.

  The 2018-2019 Special Per Diem Rates notice can be found at https://www.irs.gov/pub/irs-drop/n-18-77.pdf.

- **Sleep Periods**
  An employee required to be on duty at the worksite for less than 24 hours is considered to be working, regardless of whether the employee is permitted to sleep or engage in any other personal activities when not busy. Employees that are required to be on duty at the worksite for 24 hours or more may establish an agreement with their employer, prior to performing work, to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period, of no more than eight hours. However, this agreement will be valid only if the employer provides adequate sleeping quarters where employees may enjoy an uninterrupted sleep.

- **Reporting Time Pay**
  Employees who are scheduled to work two or more hours and to report for duty on time must be paid for at least two hours of work, at no less than the employee's rate of pay, when the employee is not provided with the expected hours of work.

- **Minimum Wage**
  As of January 1, 2019, the current Massachusetts minimum wage is $12.75 per hour. For tipped employees, the minimum wage is $4.95 per hour. The federal minimum wage is $7.25 per hour.

- **Nursing Mothers**
  The Patient Protection and Affordable Care Act (ACA) amended Section VII of the FLSA to require employers to provide reasonable break time for an employee to express breastmilk for her nursing child for one year after the child's birth each time such an employee has a need to express breastmilk. Employers are also required by the ACA to provide a place for employees to express breastmilk other than a bathroom that is shielded from view and free from intrusion from co-workers and the public.

  Massachusetts provides additional protections and accommodation requirements under the Pregnant Worker Fairness Act.

- **Meal Periods**
  Employers may not require employees to work more than six consecutive hours without a 30-minute meal period. If the employee is relieved of all tasks and responsibilities during the meal period, the employee is not entitled to compensation for that time; however, if the employee is required to eat while working (such as eating at a desk), the employer must provide compensation for that time.

- **Payroll Cards**
  Employers may not require employees to receive wages on a payroll card. This prohibition arises from the impact of the Electronic Fund Transfer Act (EFTA) and the consumer protections that apply to payroll cards, including limited liability for unauthorized transfers and error resolution rights. Employers wishing to implement payment of wages by payroll card must take the following steps. Provide current employees with a written explanation of any fees associated with the payroll card:
  - Such fees can include "withdrawal" or "usage" fees, as well as fees to replace a lost payroll card;
  - Provide employees with a form that allows employees to opt out of the payroll card payment and request either a paper check or direct deposit; and
  - Both of these documents must be provided to current employees at least 30 days before an employer implements a payroll card account system. For new employees, the documents must be provided at the time of hire.

- **Home Care Workers**
  Federal minimum wage and overtime protections under the Fair Labor Standards Act (FLSA) apply to homecare workers. Third party employers, such as homecare staffing agencies, are not entitled to claim either the FLSA's companionship services or live-in domestic service employee exemptions.

- **Reducing an Employee's Wage Rate**
  Employers are permitted to reduce an employee's rate of pay, provided the employee received 30 days prior notice. This rule does not apply to situations in which the employer reduces an employee's hours or transfers the employee to a different position with different duties.

- **Payment of Wages**
  Compliance with Massachusetts wage and hour obligations is a tedious responsibility for all employers. The Department of Labor does conduct audits, and here are some of the more common areas that are examined for compliance:
  - All non-exempt employees must be paid weekly or bi-weekly;
  - All non-exempt employees must be paid within six days from the end of their pay period;

- Employers can change from a weekly to a bi-weekly pay period for non-exempt employees but must provide each employee with written notice at least 90 days in advance of the first bi-weekly pay;
- Exempt employees can be paid weekly, bi-weekly, semi-monthly and, with their consent, monthly;
- Employers are required to withhold various state and federal taxes from employee's paychecks and must maintain records of these withholdings;
- Employers must provide each employee with written notification of such deductions; and
- Employers must pay an employee who is discharged (for any reason) their final check for hours worked on the day of the actual discharge. There are a number of other obligations, which must also be satisfied on an employee's last day of work.

- **Tips on the Massachusetts Tip Statute**
  The minimum wage for tipped employees (employees who receive more than $20.00 a month in tips) is $4.95 per hour. This minimum wage can be paid only if the tipped employees are informed of the law, receive at least minimum wage when tips and wages are combined (the minimum wage in Massachusetts is currently $12.75 per hour), and all tips must be retained by the employee or distributed through a valid tip pooling arrangement. Tip pooling arrangements are also governed by Massachusetts General Laws and are permissible within specific parameters. The law requires that all proceeds from tips, gratuities and service charges that are added to bills after customers are served must be distributed only to wait staff. The term wait staff includes waiters, waitresses, bus people, counter staff, bartenders and employees who customarily receive tips and provide services directly to customers. The law prohibits restaurant and bar owners from distributing the money to any other employee, including managers or themselves, even if they also serve food and beverages. The tip statute is enforced by the Attorney General's office and protects complaining workers under the anti-retaliation provisions of the Massachusetts General Laws.

- **Boston Living Wage Ordinance**
  Boston Jobs and Living Wage Ordinance requires that any for profit or not for profit employer that employs at least 25 full-time equivalents and has been awarded a city of Boston service contract of $25,000 or more is required to pay employees a wage equal to the poverty level for a family of four indexed annually on July 1, to whichever is higher of the adjusted poverty guidelines or 100% of the state minimum wage. All subcontractors with the city of Boston service contracts of at least $25,000 or more are also required to pay the living wage. http://www.cityofboston.gov/jcs/Liv_wage_ord.asp.

- **Mandatory Overtime for Nurses**
  Hospitals are prohibited from requiring mandatory overtime except in the case of an emergency, or where the safety of the patient requires its use, and there is no reasonable alternative. The Health Policy Commission's Guidelines for the law may be found at: http://www.mass.gov/anf/docs/hpc/regs-and-notices/hpc-mno-guidelines.pdf.

RETIREMENT PLANS DESIGN AND COMPLIANCE

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

Paying Attention to Details

Many employers sponsor tax-qualified 401(k), 403(b) and traditional pension plans. These plans are subject to federal tax, labor and age discrimination laws. An employer maintaining one of

these plans needs to be aware of the special requirements that govern these plans. Failure to comply can result in significant tax penalties and fiduciary liability.

On June 5, 2013, the U. S. Department of Labor's Employee Benefits Security Administration announced the launch of an online toolkit to help workers identify key issues related to retirement planning. The toolkit was prepared in cooperation with the Social Security Administration and the Centers for Medicare and Medicaid Services to help workers understand important decisions related to employment-based plans, social security and Medicare. The toolkit includes a timeline illustrating key decisions to be made about retirement benefits, social security and Medicare; general guidance; a list of publications; and interactive tools to assist with planning.

- **Retirement Plan Tax Exclusions**
  The 2020 maximum contribution limit for employees contributing to a 401(k), 403(b) or 457 plans has been adjusted to $19,500, an increase of $500 from the 2019 limit.

IV. INSURANCE

- **Patient Protection and Affordable Care Act (PPACA)**
  The Patient Protection and Affordable Care Act (PPACA), commonly called the Affordable Care Act (ACA) was enacted in 2010 to increase the quality and affordability of health insurance, lower the uninsured rate by expanding public and private insurance coverage, and reduce the costs of healthcare for individuals and the government. It introduced mechanisms like mandates, subsidies, and insurance exchanges. The law requires insurance companies to cover all applicants within new minimum standards and offer the same rates regardless of pre-existing conditions or sex. A timeline of the key features of the Affordable Care Act by year may be found here: http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca-by-year/index.html#.

  The implementation of the ACA has redefined the landscape of the Massachusetts Health Care Reform Law. Employers must be diligent in achieving compliance with the ACA, as it reshapes health plan obligations. However, if the ACA is repealed or "gutted" as has been promised by a number of lawmakers, employers in Massachusetts may see a return to reporting obligations under the Massachusetts Health Care Reform Law that are currently preempted by the ACA.

- **Health Insurance Exchange**
  The federal Affordable Care Act (ACA) allows each state the opportunity to establish a health insurance exchange to facilitate the purchase of health insurance by small employers and individuals. The Massachusetts Health Connector is the health insurance exchange.

- **Resources Regarding Federal Health Care Reform**
  - FAQs about the Patient Protection and Affordability Care Act implementation can be found at http://www.dol.gov/ebsa/.
  - A Summary of DOL regulations and guidance related to the Affordable Care Act including links, compliance workshops, marketplace information and related resources may be found at http://www.dol.gov/ebsa/healthreform/.
  - A summary of Affordable Care Act Tax Provisions can be found at https://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions.

- **Employer Shared Responsibility Provisions**
  Employers with 50 or more full-time (or full-time equivalent) employees that do not offer health insurance to their full-time employees (those working 30+ hours/week) and their dependents, or

that offer coverage that is not affordable or that does not provide minimum value, may be required to pay an assessment if at least one of their full-time employees receives a premium tax credit to purchase coverage in the new individual Marketplace. Refer to the IRS's ALE Information Center for the latest information on the Employer Shared Responsibility rules.

Fewer than 50 employees? Firms of this size are generally not affected by the Employer Shared Responsibility rules and do not have to pay an assessment if their full-time employees receive premium tax credits in the Marketplace.

- **Information Reporting on Health Coverage by Employers**
  Beginning in 2015, the Affordable Care Act provides for information reporting by employers with 50 or more full-time employees (including full-time equivalent employees regarding the health coverage they offer to their full-time employees (known as Section 6056 rules). New information reporting by issues, self-insuring employers and other parties that provide healthcare coverage also take effect in 2015 (Section 6055 rules). The first of these reports must be filed in early 2016. The IRS' Information Center contains updated information concerning new reporting requirements.

- **QSEHRA**
  The maximum reimbursement for a Qualified Small Employer Healthcare Reimbursement arrangement (QSEHRA) for 2020 has been set to $5,250 for individual and $10,600 for family coverage. QSEHRA limits for 2019 were $5,150 for individual coverage and $10,450 for family coverage.

- **Summary of Benefits and Coverage (SBCs) Disclosure Rules**
  Employers are required to provide employees with a standard "Summary of Benefits and Coverage" form explaining what their plan covers and what it costs. The purpose of the SBC form is to help employees better understand and evaluate their health insurance options. Penalties may be imposed for non-compliance. For more information, visit https://www.federalregister.gov/articles/2013/09/09/2013-21791/information-reporting-by-applicable-large-employers-on-health-insurance-coverage-offered-under.

- **Medical Loss Ratio Rebates**
  Under ACA, insurance companies must spend at least 80% of premium dollars on medical care rather than administrative costs. Insurers who do not meet this ratio are required to provide rebates to their policyholders, which is typically an employer who provides a group health plan. Employers who receive these premium rebates must determine whether the rebates constitute plan assets. If treated as a plan asset, employers have discretion to determine a reasonable and fair allocation of the rebate. For more information on the federal tax treatment of Medical Loss Ratio rebates, refer to IRS's FAQs.

- **W-2 Reporting of Aggregate Healthcare Costs**
  Most employers must report the aggregate annual cost of employer-provided coverage for each employee on the Form W-2. The new W-2 reporting requirement is informational only and it does not require taxation on any health plan coverage. Reporting is required for most employer-sponsored health coverage, including group medical coverage.

  Small Employer Exception: The W-2 reporting requirement does not apply to employers required to file fewer than 250 Form W-2s in the prior calendar year. To learn more about the requirements, as well as exclusions, visit this page at IRS.gov.

- **Limits on Flexible Spending Account Contributions**
  The maximum amount an employee may elect to contribute to healthcare flexible spending arrangements (FSAs) for any year is capped at $2,600, subject to cost-of-living adjustments. Note that the limit only applies to elective employee contributions and does not extend to employer contributions.

- **Social Security and Medicare Withholding Rates**
  The current tax rate for social security is 6.2% for the employer and 6.2% for the employee, or 12.4% total The Medicare is 1.45% for the employer and 1.45% for the employee, or 2.9% total.

- **Transit and Parking Employee Benefits**
  Monthly limit on fringe benefit exclusion for transit and parking for 2020 was increased to $270 from the 2019 limit of $265.

- **Adoption Assistance Programs**
  The maximum yearly exclusion for qualified adoption expenses in taxable year 2020 will be $14,300, up from $14,080 for 2019.

- **Medicare Assessment on Net Investment Income**
  A 3.8% tax is assessed on net investment income such as taxable capital gains, dividends, rents, royalties and interest for taxpayers with Modified Adjusted Gross Income (MAGI) over $200,000 for single filers and $250,000 for married joint filers. Common types of income that are not investment income are wages, unemployment compensation, operating income from a non-passive business, social security benefits, alimony, tax-exempt interest and self-employment income.

- **Workplace Wellness Programs**
  The ACA creates new incentives to promote employer wellness programs and encourage employers to take more opportunities to support healthier workplaces. Health-contingent wellness programs generally require individuals to meet a specific standard related to their health to obtain a reward, such as programs that provide a reward to employees who don't use, or decrease their use of, tobacco, and programs that reward employees who achieve a specified level or lower cholesterol. Under final rules that took effect on January 1, 2014, the maximum reward to employers using a health-contingent wellness program increased from 20% to 30% of the cost of healthcare coverage. Additionally, the maximum reward for programs designed to prevent or reduce tobacco use is as much as 50%. In 2019, the EEOC vacated the rules related to the 30% incentive with regard to plans that collect protected health data. Employers should review wellness plans that contain an incentive that is tied to biometric screening or collection of employee private health data or genetic information of the employee or the employee's spouse.

- **State of the Affordable Care Act Under the Trump Administration**
  Although the Affordable Care Act remains the law, the current administration has taken a number of steps that will continue to cause premiums to rise, including ending reimbursements to insurers for low-income deductible and co-pay waiver, and repealing the ACA tax on individuals who do not obtain insurance. For now, at least, large employers remain responsible for furnishing their employees with Form 1095s.

- **Medicaid Coverage**
  The ACA provides additional opportunities for Medicaid coverage for adults who earn up to 133% of the poverty level ($16,146.20 for an individual and $33,383 for a family of four). The

proposed rules will help develop systems that will make it easier for consumers to determine if they are eligible for Medicaid or tax credits through the exchanges.

- **Mental Health Parity Act Addiction Equity Act**
  Implemented in November 2013, the Mental Health Parity and Addiction Equity Act requires the provision of mental health or substance disorder benefits to match that of medical and surgical benefits with regard to financial requirements and treatment limitations under group health plans and group and individual health insurance coverage.

- **Group Health Plan Waiting Periods**
  Group health plans and health insurers offering group health insurance coverage are prohibited from imposing waiting periods longer than 90 days. HHS, IRS, and the Department of Labor have issued final rules on how employers should apply the 90-day rule.

- **Multi-Employer Welfare Arrangements (MEWA)**
  A MEWA is an arrangement where a group of employers pool their contributions in a self-contributing benefits plan for their employees. The ACA has placed additional restrictions on the use of MEWA. In response to the high frequency of fraudulent MEWA plans, the final rules authorize the following restrictions:
  - **Cease and Desist Orders**: The Secretary of Labor is authorized to immediately issue a cease and desist order, without notice and a hearing, when it is apparent that fraud is taking place within a MEWA.
  - **Summary Seizure Orders**: The Secretary of Labor can also seize assets from a MEWA to preserve the plan's funding when there is a probable cause that the plan is in a financially hazardous condition.
  - **MEWA Reporting/Registration**: The ACA requires all non-plan MEWA to register with the Department of Labor before operating in the State.

- **Employer Mandate**
  Referred to as the "employer mandate," employers with 50 or more full-time employees or full-time equivalent employees must provide affordable health coverage to at least 95% of their eligible full-time employees or face a penalty.
  - **Reporting**: IRC § 6056 requires large employers (50 or more full-time employees including full-time equivalent employees) to file annual reports detailing the health coverage they offer to full-time employees. Information will include employee names and SSNs, along with indicators (codes) about the type of health coverage offered. Large employers will give a Form 1095-C to each employee, and file these forms with the IRS using transmittal Form 1094-C.
  - IRC § 6055 requires insurers and self-funded plan sponsors to file annual reports detailing the health coverage provided to each individual. This includes any employer, large or small, that sponsors a self-funded health plan. For this purpose, employers will provide Form 1095-B to plan enrollees and members, and file these forms with the IRS using transmittal Form 1094-B. Large employers that also sponsor a self-funded health plan can use Form 1095-C to satisfy both the § 6056 and 6055 reporting requirements.

V. SAME SEX MARRIAGE: FEDERAL AND STATE

Massachusetts – Pursuant to the Massachusetts Constitution, the same laws and procedures that govern traditional marriage also apply to same-sex marriages. There are no special procedures for a same-sex marriage. Moreover, pursuant to St.2008, c.216 which was enacted on July 31, 2008 (repealing the so-

called “1913 laws” which prohibited most same-sex couples from other states from marrying in Massachusetts), residents of other states may now follow the same procedures as Massachusetts residents for marrying. The following laws provide additional guidance regarding same sex marriage in Massachusetts:

- A child born of a same-sex marriage is the legitimate child of both people. As a result, when there is a marriage between same-sex couples, there is no need for second-parent adoption to at the very least confer legal parentage on the non-biological parent when the child is born of the marriage.
- A Vermont civil union is the functional equivalent of a marriage. Therefore, a Vermont civil union must be dissolved prior to either party entering into marriage with a third person in the Commonwealth

Federal – On June 26, 2013, the Supreme Court of the United States ruled that the Defense of Marriage Act (DOMA) was unconstitutional on the grounds that it violated the due process and equal protection principals of the Fifth Amendment. DOMA, which was enacted under the Clinton administration in 1996, restricted same-sex couples from being recognized as married spouses under federal law. DOMA’s repeal requires employers to ensure the same extension of privileges and protections to same-sex spouses as to all other married spouses.

On June 25, 2015, the Supreme Court ruled that the Fourteenth Amendment requires states to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Prior to the ruling, many states had already legalized same-sex marriage. However, there were several that had not. As a result, benefits administration, especially among national companies, suffered from uneven policies, procedures, and enforcement. Different states defined spouse differently, meaning two gay employees who worked for the same company, in the same state, but who live in different states, could have different rights. That problem no longer exists.

For ERISA (Employee Retirement Income Security Act of 1974) purposes, the Employee Benefits Security Administration had previously determined that the term “spouse” refers to any individuals who are lawfully married under any state law. Thus, all spouses in same-sex marriages across the country are now covered.

Other laws should not change a great deal. While the Supreme Court’s decision may be a springboard to pass legislation, like the Employment Non-Discrimination Act (ENDA) that is currently before the U.S. House of Representatives and makes sexual orientation a protected class, for now, sexual orientation is not a protected class under Title VII of the Civil Rights Act. However, sex is; and a number of courts have found sex discrimination in cases of LGBT discrimination. Moreover, in Massachusetts sexual orientation and gender identity are both protected classes. Therefore, if your company makes it more difficult for gay or lesbian employees to enjoy rights and benefits, there is real exposure for a sex discrimination lawsuit. Contact Mike Foley at our office with questions regarding potential liability.

- **FMLA Benefits**
  The U.S. Department of Labor notes that FMLA spousal leave entitlements extend to same-sex spouses in states that recognize same-sex marriage.

  On February 23, 2015, the U.S. Department of Labor released a Final Rule that updates the definition of spouse under the Family and Medical Leave Act (FMLA). The Final Rule updates the FMLA regulatory definition of “spouse” so that an eligible employee in a legal same-sex marriage will be able to take FMLA leave for his or her spouse regardless of the state in which the employee resides.

- **Federal Taxation**
  The U.S. Department of Treasury and the Internal Revenue Service require that same-sex spouses, married in jurisdictions that recognize their marriage, must be treated as married for all federal tax purposes, including income, gift, and estate taxes. It is important to note that this requirement applies regardless of whether the spouses are currently living in a jurisdiction that recognizes same-sex marriage. However, this requirement does not extend to domestic partnerships, civil unions, or any other similar formal relationship under state laws.

- **ERISA (Employee Retirement Income Security Act of 1974)**
  For the purpose of interpreting ERISA provisions, the terms "spouse" and "marriage" in Title I of ERISA and in related department regulations should be read to include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live.

- **Retirement Plans for Same-Sex Married Couples**
  In April 2014, the IRS issued guidance, found at http://www.irs.gov/pub/irs-drop/n-14-19.pdf, stating that sponsors of qualified retirement plans must recognize same-sex spouses of legally married participants retroactively to the U.S. Supreme Court decision regarding Section 3 of the Defense of Marriage Act (DOMA) on June 26, 2013.

  Employers sponsoring retirement plans qualified for tax-deferred benefits must recognize legally married same-sex couples as of June 26, 2013, the date of the Supreme Court's ruling in *United States v. Windsor*. This recognition requires extending to same-sex married couples the same rights and benefits afforded to opposite-sex married couples.

  The Windsor decision invalidated Section 3 of the 1996 Defense of Marriage Act (DOMA) that barred married same-sex couples from being treated as married under federal law. Subsequently, the IRS issued Revenue Ruling 2013-17, found at http://www.irs.gov/irb/2013-38_IRB/ar07.html, clarifying that a same-sex couple is treated as lawfully married for federal tax purposes if the jurisdiction in which they were married recognizes same-sex marriage, without regard for the fact that they may now live in a state that fails to recognize same-sex marriage.

  Plans should enlist the advice of legal counsel to review any terms referring to Section 3 of DOMA, or if spouse is only defined as a person of the opposite sex. Not all plans will need to be amended to be in compliance. An amendment is only required if the plan's terms are inconsistent with the Windsor decision or with IRS Revenue Ruling 2013-17. Any required amendments must be adopted by the later of December 31, 2014, or the applicable date under Revenue Procedure 2007-44, found at http://www.irs.gov/irb/2007-28_IRB/ar12.html.

  It is important for plan administration to comply in both policy and practice. For example, IRC Section 417(A)(4) requires certain plans to obtain the consent of the spouse of a married participant before making a loan to the participant. Compliance requires plan administration to treat all legally married spouses in a consistent manner.

  Plan sponsors may, but are not required to, reflect the outcome of Windsor for periods prior to the date Windsor was decided (June 26, 2013). However, IRS guidance cautions employers that retroactively recognizing same-sex spouses for all purposes under a qualified retirement plan could have "unintended consequences," such as triggering ownership attribution requirements and other rules that are "difficult to implement retroactively."

For more information, visit the IRS website with the press release and frequently asked questions at http://www.irs.gov/Retirement-Plans/Treatment-of-Marriages-of-Same-Sex-Couples-for-Retirement-Plan-Purposes.

VI. LEAVE FROM WORK

- **Massachusetts Earned Sick Leave Law**
  The Massachusetts Earned Sick Leave Law provides that all employees whose primary place of employment is Massachusetts shall be eligible to accrue and use paid (or unpaid, for employers with fewer than 11 employees) sick time. Sick time accrues at the rate of one hour for every 30 hours worked per benefit year, which is defined as 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. Employers may cap sick leave accruals at 40 hours per benefit year. The law also provides for two alternative schedules for awarding sick leave for employers who do not wish to track accruals: a lump sum award of at least 40 hours at the start of the benefit year; or an accrual schedule that provides full-time employee with eight hours of sick leave per month for at least five months.
  - **Use of Sick Time**: Employees may use up to 40 hours of accrued sick time per benefit year. Accrual of sick time begins on the employee's first date of actual work, but employees may not use such earned sick time until 90 calendar days after their start date. Sick time is provided to allow employees to:
    - Care for the employee's own physical or mental illness, injury, or other medical condition that requires home, preventative, or professional care;
    - Care for a child, parent, spouse, or parent of a spouse who is suffering from a physical or mental illness, injury, or other medical condition that requires home, preventative or professional care;
    - Attend routine medical and dental appointments for themselves or for their child, parent, spouse, or parent of a spouse;
    - Address the psychological, physical, or legal effects of domestic violence; or
    - Travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

    Earned sick time may be used for full or partial day absences. The smallest amount of sick time that an employee can take is one hour. For uses beyond one hour, employees can use sick time in the smallest increment used in the employer's payroll system. If an employee's absence from work requires the Company to call in a replacement worker to cover the absent employee's job functions, the Company may require the absent employee to use an equal number of hours of sick time as were worked by the replacement. If the employee lacks sufficient accrued sick time to cover all such time worked by the replacement, the employer must provide sufficient job-protected unpaid leave to make up the difference in that shift. Up to 40 hours of unused sick time may be carried over into the following benefit year.
  - **Notice**: Employers may require employees to give advance notice of the need for sick leave, except in an emergency. If the absence is foreseeable (for example, if the employee will be absent to attend a previously scheduled appointment), the employer may require the employee to provide up to seven days' advance notice, unless the employee learns of the need to use earned sick time within a shorter period of time.
  - **Documentation of Use of Sick Time**: Employers may require an employee to submit a doctor's note or other documentation to support the use of sick time if the absence:
    - Exceeds 24 consecutively scheduled work hours or three consecutive days on which the employee is scheduled to work;

- Occurs within two weeks prior to an employee's final scheduled day of work (except in the case of temporary employees); or
- Occurs after four unforeseeable and undocumented absences within a 3-month period (or three unforeseeable and undocumented absences if the employee is age 17 or under).

Required documentation must be submitted within seven days of the absence. If an employee fails to timely comply with the sick time law's documentation requirements, the employer may recoup the sick time paid from future wages. If the employer provides unpaid sick time and the employee fails to timely comply with the company's documentation requirements for use of unpaid sick time, the employer may deny future use of an equivalent number of hours of accrued sick time until the documentation is provided, but may not otherwise take any adverse action.

- **Discipline for Abuse**: Employers may discipline employees for misuse of earned sick time in the event that an employee shows a pattern of use that indicates fraud including a pattern of calling out on Friday and Monday or on days where duties are perceived to be undesirable.
- **Payout of Sick Time**: Sick time is not payable on termination of employment. Employers that choose to pay out sick leave balances at the end of the year, must provide employees with 16 hours of unpaid leave to start the new benefit year.
- **Interaction with Other Types of Leave**: Massachusetts Earned Sick Leave law runs concurrently with any leave that is also covered under the FMLA, Massachusetts Parental Leave law, Massachusetts Domestic Violence Leave law, or Massachusetts Small Necessities Leave law, or other leave of absence law, shall run concurrently with such leave.
- **Violations**: There are no criminal sanctions attached to the new law. The Attorney General may issue a civil citation to an employer for a violation. The new law also allows an aggrieved employee to file a private civil action against an employer. If the employee prevails, he or she is entitled to mandatory treble damages, costs and reasonable attorney's fees.
  - Employers are not allowed to utilize any adverse employment action against an employee for using earned sick time or for asserting his rights under the new law.
- **Record Keeping**: Employers must keep records of sick leave used and accrued for three years and must provide such records to employees upon request.
- **Notice Requirements**: Employers must post the following notice in a conspicuous location accessible to employees and provide all employees with a copy: http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-notice-to-post-black-white.pdf.
- **Additional Information**: The Attorney General's Office is regularly updating an Earned Sick Time FAQ: http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf. Sick Leave for Federal Contractors is addressed in the Federal Contractor section of this Synopsis.

- **Vacation**

  Employers do not have to provide vacation benefits to employees. However, once an employer establishes a vacation policy, an employee must be paid for earned vacation either when the vacation is taken, at year-end, or at the time employment terminates (even if the termination is for cause and/or misconduct).

- **Massachusetts Parental Leave Act (formerly Massachusetts Maternity Leave Act or MMLA)**

  Employers with six or more employees are required to provide eight weeks of unpaid parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under age 18. Employees may choose to use vacation or PTO benefits concurrently with Parental Leave under the law, but cannot be required to do so by the employer. The right to leave applies to

employees who have completed an initial probationary period set by the terms of employment, but which is not greater than three months. Parental leave is also available for the adoption of a child.

Under the law, employers must keep a posting in a conspicuous place describing the law's requirements and the employer's policies as to parental leave. Employers may provide parental leave that exceeds eight weeks, but if the employer agrees to provide parental leave for longer than eight weeks, the employer must reinstate the employee at the end of the extended leave unless it clearly informs the employee in writing before the leave and before any extension of that leave, that taking longer than eight weeks of leave shall result in the denial of reinstatement or the loss of other rights and benefits.

Employees seeking leave must provide at least two weeks' notice of the anticipated date of departure and the employee's intention to return, or as soon as practicable if the delay is for reasons beyond the employee's control. If two employees of the same employer give birth to or adopts the same child, the two employees are entitled to an aggregate of eight weeks of leave.

- **Military Service Leave**
  State and federal law grant benefits for military leave and this leave time continues to be an issue in today's workplace.

  Under **Massachusetts** law, an employee may receive up to 17 days in a calendar year for military leave.

  Additionally, in July 2016, Governor Baker signed the HOME Act requiring employers to provide paid leave to qualified veterans on Veterans Day under certain conditions. The act also adds "veteran status" as a protected class under the Massachusetts Fair Employment Practices Act. Before the enactment of the HOME Act, Massachusetts law required employers to grant a paid or unpaid leave of absence to qualifying veterans who wished to participate in a Veterans Day or Memorial Day exercise, parade, or service. M.G.L. 149 § 52A 1/2. The HOME Act amends the law to require employers with 50 or more employees to grant said leave of absence on Veterans Day with pay, provided that the employee provides "reasonable notice" for such leave. As written, the HOME Act does not require employers to grant paid leave on Memorial Day.
  - **The Federal Uniform Services Employment and Re-Employment Act (USERRA)** provides the following protections:
    - Employees have re-employment rights following military service for up to five years;
    - Employees who are called up for 31 days or more of active duty must be offered the right to continue their healthcare benefits, similar to the provisions under the Consolidated Omnibus Budget Reconciliation Act (COBRA).
  - **The National Defense Authorization Act (NDAA)** is an expansion of the Family and Medical Leave Act (FMLA). Under the law, FMLA-eligible employees are entitled to the following benefits:
    - Twelve weeks of FMLA leave due to a spouse, son, daughter or parent being on active duty or having been notified of an impending call or order to active duty in the armed services;
    - Twenty-six weeks of FMLA leave during a single 12-month period for a spouse, son, daughter, and parent or nearest blood relative caring for a recovering servicemember. A recovering servicemember is defined as a member of the armed forces who suffered an injury or illness while on active duty that may render the person unable to perform the duties of the member's office, grade, rank or rating.

- The U. S. Department of Labor issued a final rule in 2013, amending FMLA regulations relating to military leave and flight crew eligibility. The FMLA's military leave provision has been amended to:
  - Expand the definition of serious injury or illness to include pre-existing injuries or illnesses of current servicemembers that were aggravated in the line of duty;
  - Expand military caregiver leave to care for covered veterans;
  - Permit eligible employees to obtain certification of a servicemember's serious injury or illness from any healthcare provider as defined in the FMLA regulations, not only those affiliated with the Department of Defense;
  - Increase the amount of time an employee may take for qualifying exigency leave related to the military member's "rest and recuperation" leave from five days to up to 15 days; and
  - Create an additional qualifying exigency leave category for parental care leave to provide care necessitated by the covered active duty of the military member for the military member's parent who is incapable of self-care.

- **Jury Duty**
  Massachusetts law requires employers to grant employees time off from work to serve on a jury. Employers must pay their employees regular wages for the first three days of jury service. After the third day, the court will pay the juror a daily stipend of $50. The employer has the option to pay the difference between the jury stipend and regular pay. Any employer who fails to compensate an employee who has not been excused from jury service can be held liable for treble damages.

- **Massachusetts Small Necessities Leave Act (SNLA)**
  Employers with 50 or more employees must provide eligible employees with 24 hours of unpaid leave per year to allow the employee to accompany a child to routine medical or dental appointments or participate in school or educational activities. These 24 hours are in addition to the 12 weeks provided by the Federal Family and Medical Leave Act (FMLA). To be eligible, employees must have worked for the employer for 12 months and have worked 1,250 hours in the year immediately preceding the leave. Employers may require an employee to use accrued time (vacation, personal, medical or sick) during this leave.

- **Federal Family and Medical Leave Act (FMLA)**
  Employers with 50 or more employees must provide up to 12 weeks of unpaid leave to eligible employees each year. To qualify, the employee must have worked for the employer for at least 12 months and at least 1,250 hours in the year immediately preceding the leave. The leave may be requested for any of the following reasons:
  - Birth of a child;
  - Placement of a child for adoption or foster care;
  - A "serious health condition" of the employee or a serious health condition of the employee's immediate family member (spouse, parent or child); or
  - A "qualifying exigency" that arises out of the fact that the employee's spouse, child or parent is on active duty or has been called to active duty for the National Guard or Reserve in support of a contingency operation.

  The FMLA also grants eligible employees up to 26 weeks of leave in a single 12-month period to care for a covered servicemember recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.

- **New FMLA Forms**
  In 2015, the U.S. Department of Labor (DOL) issued new versions of the agency's template Family and Medical Leave Act (FMLA) notices and certification forms, which have been approved for use for the next three years. The new forms, some of which the DOL has substantively revised, include the following:
  - WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition;
  - WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition;
  - WH-381 Notice of Eligibility and Rights & Responsibilities;
  - WH-382 Designation Notice;
  - WH-384 Certification of Qualifying Exigency for Military Family Leave;
  - WH-385 Certification for Serious Injury or Illness of Current Servicemember for a Military Family Leave; and
  - WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

  The forms, which are now approved through August 31, 2021, are available through the DOL's webpage.

- **The FMLA, Childcare, and Adult Childcare**
  The Department of Labor's Wage and Hour Division issued additional guidance regarding the definition of "son or daughter" for employees seeking leave under the Family and Medical Leave Act in order to care for adult children age 18 or older. In order to take leave under the FMLA to care for a child under age 18, an employee must only show a need to care for the child due to a serious health condition. However, if an employee needs to take care of an adult child aged 18 or older, the child must have a mental or physical disability and be incapable of self-care because of that disability.

  Four requirements must be met for an employee to be entitled to take FMLA leave in order to care for an adult child. The son or daughter must:
  - Have a disability as defined by the ADA, which would mean that he or she has an impairment that substantially limits one or more major life activities (or has a record of such impairment or is regarded as having such an impairment);
  - Be incapable of self-care due to that disability;
  - Have a serious health condition; and
  - Be in need of care due to the serious health condition.

  This clarification also has significant ramifications for the interpretation of impairments under the ADA. Now, impairment is a disability, even if in remission or if merely episodic, if it would substantially limit a major life activity when active, and there is no minimum duration for an impairment to be a disability. Therefore, cancer that is in remission or illnesses like asthma, multiple sclerosis, lupus, or post-traumatic stress disorder could be considered disabilities even during symptom-free periods.

- **FMLA and the ADA**
  The amendments to the Americans with Disabilities Act (ADA) have drastically expanded the definition of "disability" for purposes of the law. Where many serious health conditions that are covered by the FMLA will also be considered disabilities under the ADA, employers must often consider the two laws in tandem. If you are faced with an employee who is unable to return from FMLA due to his or her own serious health condition, it is very likely that he or she may be

entitled to additional leave under the ADA. The intersection of these leaves is complex. Please call our office for additional guidance on this difficult topic.

- **Massachusetts Paid Family Medical Leave**
  Beginning in 2021, employers will be required to provide paid family medical leave to Massachusetts employees. Under the Paid Family Medical Leave law, Massachusetts employees, and in some cases, non-employees and former employees will be entitled to receive, on an annual basis:
  - Medical leave of up to 20 weeks for the covered individual's own health condition;
  - Family leave of generally up to 12 weeks to care for family members; and
  - Combined medical and family leave of up to 26 weeks.

  Although the implementation of the paid leave provisions is delayed until 2021, employers will be required to start making financial contributions to support the paid leave program starting on July 1, 2019. The law allows employers to deduct part of the required contributions from each employee's wages. Employers with fewer than 25 employees do not have to pay the employer share of the cost. The initial contributions are set at 0.63 % of each employee's wages.

- **Massachusetts Voting Leave**
  Under Massachusetts law, employers in the manufacturing, mechanical, and mercantile sectors must grant an employee unpaid leave to vote during the period that is two hours after the opening of the polls. Violation of the Massachusetts Voting Leave law is punishable by a fine of up to $500.

- **Massachusetts Disaster Services Leave**
  Under Massachusetts law, an employer may not discharge or take any other disciplinary action against any employee when the employee failed to report for work at the beginning of a regular shift/working hours because they were responding to an emergency as a volunteer member of a fire department or ambulance department. Employers are not required to compensate employees when they are responding to an emergency and are not at work.

- **Red Cross Volunteer Leave**
  Any state employee who is a certified disaster relief service volunteer of the American Red Cross may, with the authorization of the employee's supervisor, be granted leave not to exceed 15 working days in any fiscal year to participate in specialized disaster relief service work if:
  - The request for service is made by the American Red Cross; or
  - The disaster is designated as level III or above according to the American National Red Cross regulations and procedures.

  An employee granted disaster relief services leave may not lose seniority, accumulated vacation leave, sick leave, or earned overtime. In addition, the employee must be paid his or her regular pay based on regular work hours during the leave.

- **Leave Authorized in a State of Emergency**
  A member of a fire department, rescue squad, or emergency medical services agency who is called upon to respond to a state of emergency has the right to take leave without pay to respond to the emergency. Employers may not require an employee to use his or her vacation or other accrued leave for the period of emergency service.

- **Massachusetts Domestic Violence Leave**
  As of 2014, employers with at least 50 employees must permit their workers to take up to 15 days of leave, which can be unpaid, in a 12 month period, when requested to deal with domestic violence or other abusive behavior or its effects, whether for themselves or a family member. This can include seeking medical attention, obtaining counseling, dealing with the court system, among other reasons. Employers must not retaliate against employees seeking the leave.

- **Firefighter Services Leave**
  Any state employee who is a certified volunteer wild land firefighter may be granted a leave of absence with pay to participate in wild land fire emergencies to include non-wild land fire emergencies in another state or province pursuant to an agreement with The Northeastern Interstate Forest Fire Protection Compact and the U.S. federal government.

VII. WORKPLACE SAFETY

- **Occupational Safety and Health Administration Act (OSHA)**

  All employers in the United States must comply with the "general duty clause" of the Occupational Safety and Health Act. The clause reads:

  > Each employer 1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees and 2) shall comply with the Occupational Safety and Health standards promulgated under the Act.

  Given the frequency of work-related accidents and the ancillary cost to employers, we recommend that every business implement a **Health and Safety Protection Plan**. Of note, this is a best practice recommended by the U. S. Department of Labor's OSHA Health and Safety Administration.

  The OSHA Top Ten: OSHA released the top ten most frequent citations of 2019:
  1. Fall Protection;
  2. Hazard Communication;
  3. Scaffolding;
  4. Lockout/Tagout;
  5. Respiratory Protection;
  6. Ladders;
  7. Powered Industrial Trucks;
  8. Fall Protection – Training Requirements;
  9. Machine Guarding; and
  10. Personal Protective and Lifesaving Equipment – Eye and Face Protection.

- **OSHA Recordkeeping Rules**
  Many employers with more than 10 employees are required to keep a record of serious work-related injuries and illnesses. (Certain low-risk industries are exempted.) Minor injuries requiring first aid only do not need to be recorded. The records must be maintained at the worksite for at least five years. Each February through April, employers must post a summary of the injuries and illnesses recorded the previous year. Also, if requested, copies of the records must be provided to

current and former employees or their representatives. The record keeping forms are the OSHA 300, 300A and 301.

In 2019, OSHA amended its final rules, ruling that there is no longer a requirement for employers with 250 or more employees to electronically submit information from OSHA Forms 300 and 301.

- **Healthcare and Service Workers**
  In April 2015, OSHA released guidelines for preventing workplace violence for healthcare and social service workers. This comprehensive document assesses the risks present within these industries and offers strategies for preventing violence: https://www.osha.gov/Publications/osha3148.pdf.

- **Restroom Access for Transgender Workers**
  In September of 2015, OSHA released a guidance document related to Restroom Access for Transgender Workers. The document sets forth what OSHA considers to be best practices related to this timely issue. In short, OSHA's core principal is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity. The documents are located here: https://www.osha.gov/Publications/OSHA3795.pdf.

- **OSHA Anti-Retaliation Rules**
  Under OSHA rules, employers may not discharge or in any manner discriminate against an employee for reporting a work-related injury or illness. In the preamble to the final regulation, OSHA stated that safety incentive programs and post-accident drug testing would potentially violate the anti-retaliation rules. Regarding incentive programs, OSHA stated that programs that denied benefits to employees who reported injuries could violate the anti-retaliation provision. To cite an example used by OSHA, a program that allowed employees who reported no injuries to participate in a raffle for cash but excluded employees who reported injuries was not compliant. OSHA also stated that mandating a post-accident drug test in a scenario in which drug use likely did not cause or contribute would also violate the anti-retaliation rules. In late 2018, OSHA issued new guidance indicating that most instances of workplace drug testing are permissible, but that employers should be sure to test all employees whose conduct could have led to the incident, not just the employee who reported the injury.

  Massachusetts is not a "state plan" state and does not have a federally approved occupational safety and health regulatory program. Therefore, OSHA administers and enforces occupational safety and health requirements in private sector workplaces in Massachusetts. Additional Massachusetts workplace safety and health statutes and regulations may be found at: http://www.mass.gov/lwd/labor-standards/massachusetts-workplace-safety-and-health-program/statutes/.

VIII. VIOLENCE IN THE WORKPLACE

The FBI reports that anecdotal evidence shows that "many active shooters have a real or perceived deeply held personal grievance, and the only remedy that they can perceive for that grievance is an act of catastrophic violence against a person or an institution." In 2016, 17% of workplace deaths were the result of violence.

Mass shootings have been occurring more frequently in recent years. In 2017 there were 346 mass shootings compared to 270 in 2014. Seventy percent of the incidents "occurred in either a commerce/business or educational environment. Workplace violence frequently results in:

- Physical and psychological harm;
- Losses to property and productivity;
- Workers' compensation claims;
- Increased litigation;
- Temporarily or perhaps permanently losing a good employee; and
- Increased security costs.

We recommend that employers train staff, particularly supervisory and HR personnel, to recognize the following potential risk factors:

- **Actions and emotions**: If a person appears increasingly belligerent, hypersensitive, extremely disorganized or generally has changed his or her behavior noticeably.
- **Personality conflicts**: Is someone angry at a coworker or boss? If so, how is he or she dealing with it? Conversely, one should also be mindful if a person seems to have become obsessed with a supervisor or co-worker, for better or worse.
- **On-the-job disputes**: Is he or she upset about something that happened at work, including how he or she might have been disciplined?
- **Off-the-job issues**: Is the employee having a tough time outside of work, like going through a divorce or dealing with money problems?
- **Talk of weapons/violence**: Has an employee expressed a fascination with weapons, "violent themes" or recent high-profile killings? Does the employee discuss having a weapon or make veiled or explicit threats of violence?
- **Domestic Violence**: Has an employee appeared battered, frequently missed work, or have a spouse or significant other that frequently calls or shows up at the workplace? The Department of Labor notes that 27% of all violent events in a workplace are tied to domestic violence. Employers must be mindful not to retaliate against victims of stalking, sexual assault, or domestic violence particularly where the employees need time off work to take legal action or because they are victim of a crime as these actions could lead to a wrongful termination cause of action against the employer.

We can help you identify the risk of violence in your workplace and develop effective programs and policies to address the issue.

HR and Management Personnel Can Take the Following Specific Steps:

- **Open your door to employees**: Make sure all employees understand the importance of telling a supervisor, internal security or law enforcement if they have concerns about employee violence.

- **Take stock of the following**:
  - Are employees overloaded or mistreated?
  - Can management be improved?
  - Is counseling available?
- **Is there a reorganization or lay-off imminent?** If so, police may be called in before and as someone learns they are losing a job, which is exactly the kind of thing that could set off a volatile person.

- **Firearms**
  To minimize their legal risk and promote a safe work environment, employers often implement workplace violence policies that include a ban on weapons at the workplace. Currently, there is no federal law that regulates weapons at private workplaces.

- **Addressing the Impact of Domestic Violence in the Workplace**
  - Laws to be aware of: Occupational Health and Safety Act of 1970 ("OSHA")—"General Duty" Clause; the Violence Against Women Act (VAWA) of 1994, amended.

  In Massachusetts, both the Domestic Violence Victims Leave and Earned Sick Leave law mandate leave for purposes of addressing the effects of domestic violence.
  - Domestic violence has made homicide the leading cause of death for women at work.
  - Employees miss 175,000 days per year of paid work due to domestic violence.
  - Forty percent of women personally affected by domestic violence report that the abuse has impacted their work performance in the form of tardiness, missed work, missed career promotions or loss of employment.
  - One-third of employers believe that domestic violence affects their balance sheets.

  We can help you identify the domestic victim in your workplace and develop effective programs and policies to address the issue.

IX. WORKERS' COMPENSATION

All employers in Massachusetts are required to carry Workers' Compensation insurance covering their employees, including themselves, if they are an employee of their company. This requirement applies regardless of the number of hours worked in any given week. If you know of an injury to one of your employees, or if an employee alleges an injury that has resulted in five calendar days of disability, the employer must file an "Employer's First Report of Injury" form (Form 101). Employers are required to file this form with the Department of Industrial Accidents within seven calendar days. Employers operating without Workers' Compensation Insurance are subject to civil fines and/or criminal penalties, including imprisonment or stop work orders. Employers do not have to hold injured worker's jobs open while the worker is unable to work due to an occupational accident. However, the law does require employers to give preferential treatment in the re-hiring of injured workers when they are ready to return to work.

Workers' Compensation Benefits are a creature of state law and are an employer-financed, no-fault insurance program. The program compensates employees who have become ill or injured as a result of a work-related injury or accident. Every state has enacted some form of workers' compensation laws to protect employees against loss of income and burdensome medical payments resulting from a work-related injury, illness, accident or disease.

The vast majority of states throughout the country have made workers' compensation coverage mandatory and require most employers to carry workers' compensation coverage.

- **Reducing Workers' Compensation Costs**
  Many employers have developed several approaches to control the cost of their workers' compensation benefits, including the following:
  - Provision of education and safety programs including comprehensive OSHA health and safety protection plan.

- Thorough investigation of all claims to safeguard against fraudulent claims. In addition, one of the most effective ways to control costs is to maintain regular communication with the injured or ill employee after the claim is filed and benefits have begun. Such regular contact, among other things, gives the employer the chance to insure that the worker is at home recuperating and not working elsewhere or participating in activities that might inhibit recovery.
- An effective return-to-work program can also help control costs. These programs often include temporary, modified duty assignments.
- It is also important for an employer to understand how workers' compensation leaves and benefits interact with state and federal disability discrimination laws, including the Americans with Disabilities Act. It is important for all employers to understand that just because an individual is receiving workers' compensation benefits does not mean the individual has a disability as defined by the ADA.

X. UNEMPLOYMENT COMPENSATION

Unemployment compensation throughout our country is designed to temporarily compensate workers who lose their jobs or income through no fault of their own (as determined or defined by applicable law). In order to be eligible for benefits, a worker must be capable and available to accept work opportunities. The general rule is that employers who pay unemployment compensation taxes to a state with unemployment laws that are in compliance with federal requirements are usually offered tax credits against federal taxes. If a state law meets minimum federal requirements under the Federal Unemployment Tax Act (FUTA) and Title III of the Social Security Act of 1935, then the employer will receive up to 5.4% basic and additional tax credit against the 6.2% federal unemployment tax. The FUTA imposes a payroll tax on employers based on the wages paid to their employees. All states finance unemployment compensation primarily through contributions from covered employers on the wages of covered workers.

Experience rating is the system under which the employers are assigned tax rates in accordance with their individual experience with unemployment and subject to the needs of their particular state program. Experience is measured by the variable relative incidents of unemployment among workers of different employers. Differences in such experience represent the major justification for differences in tax rates, either to provide incentives for stabilization of employment or to allocate the cost of unemployment. Experience rating calculations are the state's method of measuring each employer's unemployment experience.

Massachusetts laws govern the unemployment insurance program which provides temporary income for eligible workers who become unemployed through no fault of their own and who are seeking new employment.

The Massachusetts agency responsible for administering the unemployment insurance program is the Division of Unemployment Assistance (DUA).

The money for unemployment insurance benefits comes from revenues paid by employers. However, workers may be deemed "ineligible" and have their claims indefinitely disqualified if they become unemployed for the following reasons: voluntarily quitting a job without "good cause" attributable to the employer, quitting a job to join one's spouse or any other person at a new location, being discharged by the employer for deliberate misconduct on the job, willful disregard of the employing unit's interests or a knowing violation of a reasonable and uniformly enforced rule; and job loss due to conviction of a felony or misdemeanor.

- **Massachusetts Unemployment Insurance Law**
  Effective March 24, 2015, the Unemployment Insurance law creates a rebuttable presumption of retaliation against an employee who is terminated or experiences a substantial alteration of the terms of employment within six months of providing evidence or testifying at an unemployment hearing. Employers who violate these prohibitions or threaten or coerce employees in connection with an unemployment claim may be required to reinstate the employee and pay costs of suit and attorneys' fees. It is vital that employers keep consistent records regarding employee performance and conduct—contemporaneous records are the best (and sometimes the only effective) defense against a claim of retaliation.

XI. HIPAA PRIVACY RULES AND THE HITECH ACT

- **HIPAA**
  A major goal of this privacy rule is to ensure that an individual's health information is properly protected, while allowing the flow of health information needed to provide high quality healthcare and to protect the public's health and wellbeing.

  Beginning in 2016, The Department of Health and Human Service's Office for Civil Rights (OCR) will begin conducting HIPAA compliance audits. The OCR will target specific common areas of noncompliance identified in pilot audits and enforcement actions, and the audits will consist of a combination of review of policies and onsite reviews.

  The most common deficiency found by OCR in the pilot audits was organizational failure to conduct security assessments to identify and mitigate risks to Patient Health Information (PHI) (e.g., PHI on exposed servers, unencrypted laptops, unchanged default passwords, outdated security software and inadequate training).

  Preparation for an audit begins with a thorough review of the compliance requirements found in the HIPAA Audit Program Protocol. The audit compliance requirements are divided into three categories: security, privacy and breach notification.

  A common deficiency identified among organizations is a failure to conduct a security risk assessment. A risk assessment identifies and assesses risks to the security of PHI, evaluates security controls put in place to mitigate those risks and monitors the effectiveness of those controls on an ongoing basis. An adequate control environment contains many elements, including policies, procedures, systems, audits, people and training. The risk assessment focuses on evaluating and prioritizing security risks. Risk activities should be prioritized based upon the likelihood of occurrence of a security breach and the likely severity of such a breach. Organizations should consider conducting their risk self-assessment under attorney-client privilege to encourage maximum disclosure without fear of exposure. Attorneys at our offices are available to assist organizations with this process.

  In addition to conducting a risk assessment, adequate audit preparation requires a review of HIPAA policy requirements relating to, for example, privacy practices; uses and disclosures of PHI; training; complaint handling; discipline; administrative, technical and physical security safeguards; and security incident management. These policies will likely be requested and examined by OCR in a desk audit prior to an onsite visit.

- **HITECH Act**
  The Health Information Technology for Economic and Clinical Health Act (HITECH Act) orchestrates a significant makeover to the regulation of the privacy and security of patient health information. Many of the HIPAA standards will now apply directly to business associates, and business associates will be subject to the same civil and criminal penalties as covered entities.

  Business associates must implement reasonable and appropriate policies and procedures to incorporate administrative, physical and technical safeguards.

XII. BEST PRACTICES

While this section of our Synopsis falls outside of the domain of legal mandates, each subject addressed below is an important best practice for preventing workplace disturbances:

- **Restrictive Employment Covenants**
  - As addressed in more detail in Section XVIII of this Synopsis, to be enforceable, covenants not-to-compete must be narrowly tailored as to their duration, geographic jurisdiction, and definition of prohibited activity. Recently, drafting considerations for such covenants have become more complicated as a result of the global economy. In the past, a non-compete duration of one or even two years was generally considered conservative and reasonable. Clauses which previously were viewed as valid may now be unenforceable. The market moves too quickly. Likewise, geographical restrictions, measured in counties within the state or miles from the old workplace, may have little meaning in an economy that is without defined borders. Instead, restrictions may be defined in geographical terms as to where the company's products or services are sold. Accurately defining the activity which is prohibited is also crucial to a valid non-compete agreement.
  - In 2018, Massachusetts significantly amended its non-compete law:
    - The law applies to post-employment non-competes entered into on or after October 1, 2018, by Massachusetts workers and residents.
    - The law does not apply to other kinds of restrictions, including non-solicitation agreements. It also does not apply to non-compete restrictions that apply during employment.
    - Non-competes cannot be imposed on non-exempt (overtime eligible) employees.
    - Non-competes will not be enforceable where the employee is laid off or terminated without cause.
    - Non-competes cannot extend beyond one year unless the employee has taken the employer's information or violated his or her fiduciary duty, in which case the restriction can extend to two years after termination.
    - Non-competes must be presented to new employees with the formal offer or 10 business days before the start date, whichever is earlier.
    - The non-compete must be signed by both parties and must recite that the employee is advised to consult a lawyer.
    - The non-compete must contain a "garden leave" clause or provide for "other mutually-agreed upon consideration." "Garden leave" is defined as payment during the restricted period of 50% of the employee's highest recent salary. "Other mutually-agreed upon consideration" is not defined in the law. We await clarification (from the legislature or, ultimately, court decisions) as to what will suffice under that prong of the law.
    - A provision choosing another state's law will not overcome application of the law for Massachusetts workers and residents.

- Separation agreements containing a non-compete are not subject to the new law's requirements, except that the agreement must recite that the employee has seven business days after signing to rescind acceptance.

- **Trade Secrets**
  The Uniform Trade Secrets Act is a model law drafted by the National Conference of Commissioners on uniform state laws to better define rights and remedies of common law trade secrets. Only New York has not adopted the UTSA.

  Under Massachusetts law, the relevant factors in determining whether information is secret are as follows: "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information can be properly acquired or duplicated by others." *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972).

  We recommend that our clients conduct a trade secrets audit on a regular basis to identify company information that may be a protectable trade secret. The process is designed to clarify what information is currently subject to trade secret protection (as some previously protectable information may have become obsolete while other vital information has emerged) and what steps the employer can take to protect that valuable information.

- **Non-Compete and Non-Disclosure Agreements**
  Non-Compete Agreements and Non-Disclosure Agreements are two of the more heavily litigated employment subjects and therefore should be prepared in consultation with legal counsel; particularly since the National Labor Relations Board has brought new life into employees' right to engage in "protected and concerted activity." Covenants not to compete cannot be unduly burdensome on an employee's freedom of trade. States generally read covenants not to compete "narrowly" by reading the contract in the light most favorable to the employee. For example, courts do not uphold "overbroad" covenants not to compete that prevent a former employee from working in a vast geographic area, for a long period of time, and in a broadly-defined field, profession, or industry.

- **Good Supervisors Are Essential**
  They play a critical role in minimizing the risk of harassment complaints, litigation, and high turnover, all of which cost employers money and lost productivity. Here are 16 keys to being a good supervisor:
  1. Know your employees as individuals;
  2. Be approachable and a good listener;
  3. Be responsive to questions and concerns;
  4. Always follow-up with your employees;
  5. Apply policies and practices consistently and uniformly;
  6. Keep your employees informed about the business;
  7. Document employee discipline;
  8. Communicate employee concerns up the line;
  9. Recognize employee efforts;
  10. Train your employees in all aspects of their jobs;
  11. Be open on how to do things better;
  12. Develop your own technical job skills;

13. Expect, believe in, and encourage good work;
14. Constructively counsel your employees;
15. Use your authority with reason and restraint and do not play favorites; and
16. Admit your mistakes and correct them.

- **Job Descriptions**
  Well worded job descriptions are an invaluable resource and tool. Job descriptions should:
  - Define duties and responsibilities;
  - Allow for the monitoring and objective evaluation of performance;
  - Facilitate the proper classification of positions as exempt or non-exempt under wage and hour laws; and
  - Define essential and non-essential functions for purposes of accommodations under disability laws.

- **Performance Reviews**
  Reviews: To begin with, a good performance review process analyzes individual performance and sets individual employee goals in the context of organizational goals and objectives. A performance review policy should clearly state standards for a particular job and an accurate statement of job objectives by:
  - Identifying job responsibilities;
  - Providing measures of each job component; and
  - Providing examples of satisfactory and unsatisfactory performance for each component.

  The review rating system should be uniform, objective, and useful, in addition to accounting for situational factors affecting job performance. A performance review goes hand in glove with a current, accurate job description. Use this time to update job descriptions if necessary. The review time period should be identified in each review as well.

  Evaluators: Although it sounds obvious, every evaluator must guard against bias. For example, it should be clear that the evaluator's standing is not dependent on the outcome of subordinate's ratings.

- **Tips for Evaluators**
  - Grade the overall performance of an employee during the review period, not just single incidents.
  - Tell the truth. The legal and economic benefits of performance reviews are lost if a review is dishonest, even it if is to the employee's benefit. Moreover, even a single favorable performance review that is undeserving may come back to haunt the employer if the employee is discharged for cause and files a claim.
  - Cite specific facts and examples to support conclusions.
  - Rate employee performance, not personality, except to the extent those personal characteristics embody bona fide job qualifications.
  - Undertake reviews in confidence and limit access to the information collected to a need-to-know basis. Careless disclosure and breach of confidentiality may result in liability for defamation, invasion of privacy, intentional infliction of emotional distress, public policy violations, negligent maintenance of records, or breach of contract, despite qualified privilege protecting employee appraisals.
  - Administer reviews regularly, consistently, and on-time.
  - Gather information from a variety of sources. This will ensure:
    - Objectivity;
    - That no review will be distorted based on a single incident;

        - That consistent standards will be applied to similarly employed individuals;
        - That relevant external factors will be identified, such as the diversion of an employee's time and effort to support other personnel.
    - Compare current reviews among supervisors to prior reviews and to relevant statistical data (e.g., attendance records and performance test results) to resolve any questions or inconsistencies.
    - Provide the employee with the results.
    - Provide a mechanism for the employee to appeal a negative review or provide feedback.
    - Develop a performance improvement plan as needed.

- **Final Thought**
  Think of employee reviews as the foundation for good management. Well-written performance reviews can assist the workforce in performing the duties they were hired to perform. If there are performance issues, the review is the time to document them to safeguard against liability in the future.

- **Employee Handbooks**
    - There is no state or federal law that requires employers to establish a handbook or written personnel policies, although many states will enforce handbook policies. Thus, well-written and up-to-date handbooks and corresponding personnel policies are not only a very effective method for employers to communicate terms and conditions of employment in a consistent manner, they also significantly reduce exposure to claims of disparate treatment. Such handbooks and policies must be carefully drafted so as not to convert the at-will employment relationship to a contractual obligation. We recommend that employers work with legal counsel when drafting such documents and also recommend that handbooks be reviewed annually and conspicuously state its effective date. The handbooks that we prepare for our clients consist of a blend of compliance obligations and best employment practices and are one of the building blocks for our clients' HR-related risk management program.
    - On March 18, 2015, the National Labor Relations Board's (NLRB) Office of General Counsel released a report that provides new guidance on employee handbooks. Most employers will need to review and update the following sections of their handbooks to comply with the National Labor Relations Act (NLRA):
        - Confidentiality rules;
        - Professionalism rules;
        - Anti-harassment rules;
        - Trademark rules;
        - Photography/recording rules; and
        - Media contact rules.

- **The Electronic Workplace**
  Email, mobile devices, and the internet have revolutionized the way most businesses communicate, making communication more efficient and economical. Monitoring employees' use of these technologies can take many forms, and employer surveillance of employees is increasing. Employers have a legitimate business interest in monitoring their employees' work to ensure efficiency and productivity. Workplace electronic monitoring policies that clearly define an employer's expectations and an employee's lack of rights to an employer's electronic communications equipment are absolutely necessary to clarify an employee's privacy expectations. Moreover, companies have recognized the need to implement policies out of concern for electronic evidence and governmental investigations, not to mention matters of efficiency and productivity.

- **Effectively Managing Employee Blogging**
  The "blog" has come to epitomize free speech on the web in an era where internet access is universal. What does this mean for employers when an employee posts information about company products or internal affairs in a public forum? The issue is whether an employee has the right to post his or her opinions about the company publicly without the risk of being fired.
  - **Employer's Liability**: Not only can a blog tarnish the reputation of a company, but it can also raise issues of liability for employers who may be answerable for the comments posted by their employees, which could lead to defamation and harassment complaints.
  - **Solutions**: A well written Electronic Communications policy. Employers must clearly define their expectations. By creating clear policies regarding permissible and prohibited internet use, companies can avoid costly and potentially embarrassing termination proceedings. Employees will understand exactly what is considered acceptable to publish on the internet. Making matters more complicated, the National Labor Relations Board (NLRB) recently issued an opinion memo related to a complaint against a national restaurant chain, citing its social media policy (and many other portions of its handbook) as overly-broad and chilling protected activity. These policies must be carefully constructed. For more information, contact Mike Foley.

- **Employment References**
  The EEOC has viewed negative employment references as retaliation, which puts an employer in an awkward position. How can an employer safely respond to an employment reference check without legal exposure for defamation or retaliation? The EEOC views "the truthfulness of the information in the reference" as a defense unless there is proof of pretext. Employers must be able to weigh the risk of either a possible defamation allegation or civil claim. For instance, a propensity to physically harm a third person may create a duty to disclose information in spite of the risk of a defamation claim.

- **Successful Reductions in Force**
  As outlined earlier, it is possible to completely avoid exposure by obtaining a binding release and waiver of claims when an employee is laid off. Please contact us.

XIII. LABOR UNIONS

While there is a wide range of strategies that can be adopted to achieve strategic results in response to union campaigns, this overview is intended to help you better prepare if you have a visit from organized labor.

- **The Early Signs of Union Organizing Activity**
  It is extremely important that a company's managerial and supervisory personnel react in a quick, positive and aggressive manner following the first signs of union organization. A delayed reaction is almost always damaging and often fatal to later efforts to remain union-free. The key is for the company's managers and supervisors to be attuned to early warning signs of union activity, including the following:
  - The nature of employee complaints differs and/or the frequency increases;
  - Employees form in groups that include individuals who do not normally associate with each other;
  - New leadership emerges among the employees and complaints are raised by a delegation, not a single employee;
  - Inquiries increase, particularly about pay, benefits and disciplinary matters;
  - The employees go to work areas they do not normally visit;

- The employees avoid supervisors and employees communicate less with management;
- The employees ask argumentative questions in meetings;
- News clippings appear on bulletin boards about union settlements in local companies or other industries;
- Cartoons or graffiti appear directing humorous hostility toward the organization, management or supervision;
- Some vendors and subcontractors show an unusual interest in communicating with employees;
- Strangers appear and linger upon the company premises or in work areas;
- Employees adopt a new, technical vocabulary, which includes such phrases as protected activity, unfair labor practices, just cause and seniority; and
- Any behavior or activity that appears to be out of the ordinary and seems to be separating management from the workforce.

In our roles as both in-house counsel and special outside counsel we have developed positive employee relations programs that produce more effective supervision and allow you to be well prepared to control your destiny if and when a union knocks at the door.

If your workplace is already organized, we direct you to our Client Advisory titled *Overview of the Collective Bargaining Process*. That Advisory consists of the following categories: subjects of bargaining, mandatory subjects of bargaining, the obligation to bargain in good faith, permissive subjects of bargaining, illegal subjects of bargaining and the relevance of past practice and management rights. Our overview also includes a pop quiz to help you assess your understanding of the federal and state labor laws.

One of the unique services that we provide for our clients is a Labor Relations Diagnostic Audit. This audit will be one of the most effective methods for your company to determine if you are well prepared to commence negotiations and/or manage your current collective bargaining agreement and labor relations. Please contact us if you have any questions or would like us to work with you to conduct that audit.

XIV. COLLECTIVE BARGAINING

- **Overview of the Collective Bargaining Process**

The collective bargaining process and collective bargaining rights and obligations are very similar in the public, private and not-for-profit sectors under state and federal law. Collective bargaining, to a large extent, is the same for all and consists of the mutual obligation of employers' and employees' representatives (union) to meet at reasonable times and confer in good faith with respect to the wages, hours and other terms and conditions of employment.

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

Mandatory Subjects of Bargaining: While the state and federal laws provide some guidance on the issues over which the parties are required to bargain, none of the laws provide a specific laundry list of issues that must be bargained. Therefore, the state and national boards have assumed the responsibility of defining the topics that are mandatory subjects of bargaining. The state and national boards have interpreted the phrase "wage, hours and other terms and conditions

of employment" (i.e., mandatory subjects of bargaining) to encompass dozens of specific issues, including: Christmas bonuses, work schedules, rest periods, subcontracting, supervisors performing bargaining unit work, change in shift hours, transfer of employees, accumulation of seniority, work rules, employee safety, installation of new machinery, healthcare coverage, benefit contributions, vacation policy, absenteeism policy, implementation of light duty, and implementation of physical examinations, among several other issues. This is by no means an exhaustive list.

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

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

- **Interest-Based Employee and Labor Relations**
  We are frequently asked how interest-based bargaining differs from traditional negotiations. The fundamental goal of the interest-based approach to interactions in the workplace is to develop new skills and strategies that will build effective communication, good relationships and better results. Those who have adopted the interest-based approach have acknowledged that there is power in: understanding interests, defining creative options, adopting objective criteria or standards, drafting well-crafted commitments, committing to effective communication and being tenacious in pursuing good working relationships. The ultimate goal is to create the power to craft wise, workable, stable solutions at the collective bargaining table and beyond. Please contact Mike Foley for further information on interest-based bargaining to ascertain how the process works and whether it is suited to your bargaining scenario.

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

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

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

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

XV. EMPLOYEE WELLNESS AND ASSISTANCE PROGRAMS

- **Employee Wellness Programs**
  The recent national and state focus on healthcare reform has compelled many employers to re-evaluate their healthcare policies and strategies and seek ways to reduce expenses through the implementation of employee wellness programs. While employee wellness programs may appear to offer significant benefits, and many do, there are some potential liabilities for employers to consider. The patchwork of statutes that may potentially impact wellness programs requires special attention, and employers should be aware that a program that complies with one statute may be prohibited under another.

  Did you know that HIPAA prohibits ERISA group health plans from using a health factor as a basis for discrimination with regard to either eligibility to enroll or premium contributions? The enumerated list of "health factors" includes health status, medical conditions, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability and disability. If a wellness program does not condition a reward on an individual satisfying a standard that is related to a health factor, the wellness program does not violate HIPAA, so long as the participation in the program is made available to all similarly situated individuals.

  In addition, employers should take into account two provisions of the ADA when implementing wellness programs: 1) The reasonable accommodation requirement and 2) the prohibition on disability related inquiries. If a health factor on which a bona fide wellness program conditions a reward constitutes a disability as defined by the ADA, the program must comply with the ADA's reasonable accommodation requirement, and the employer must engage in an interactive process with the disabled employee to develop a reasonable alternative that satisfies the goals of the wellness program. Additionally, the ADA prohibits all disability-related inquires and medical examinations prior to an offer of employment, and after a conditional offer is made, allows disability related inquiries and medical examinations only if they are job related and consistent with business necessity.

  The EEOC enforcement guidance on disability-related inquiries and medical examinations of employees under the ADA states that disability-related inquiries and medical examinations are permitted as part of a voluntary wellness program. Below are key takeaways for employers:
  - **Do not discriminate**. Specifically, employers may not interfere with an employee's ADA rights, or threaten, intimidate, or coerce an employee into participating in a wellness program, or retaliate against an employee for refusing to participate in a wellness program or for failing to achieve certain health outcomes.
  - **Make it voluntary**. Employers cannot require employees to participate in wellness programs or discipline or deny health coverage to employees who do not participate.
  - **Reasonable accommodation rules apply**. Employers must provide reasonable accommodation to individuals with disabilities to allow them to participate in wellness programs and to earn the same incentives as non-disabled employees.
  - **Confidentiality**. An employee wellness program may include medical examinations or questions about employees' health. However, if this or other medical information is collected, the employee wellness program must promote health or prevent disease. Further, employers may only view medical information in aggregate form, and it must be kept confidential.
  - **Incentive limits**. Employers may offer incentives of up to 30% of the total cost of employee-only coverage in connection with wellness programs.

The principle concern of the law in this area is to prevent discrimination by and through these programs. As a general rule, wellness programs will be enforceable if: 1) the program is available to all similarly-situated employees and 2) provided that any rewards/penalties resulting from the program are not conditioned on a "health factor." Health factors under these laws include prior medical care, current medical conditions, medical claim history, health status, prior use of healthcare, genetics, insurability (risky behavior/abuse) and disability. Therefore, if a program were to afford all employees who successfully completed the program with a paid day off and the criteria for completion was to quit smoking, such a program would discriminate against people who could not quit smoking. However, if the program provided two paid hours off to everyone who participated in an anti-smoking education program, regardless of whether or not anyone quit smoking, then such a program would not violate the law. There are various exceptions that are too complex to outline here. Please contact us.

Group health plans must be tailored to the specific needs of the business. Therefore, employers must generally assess their plan's compliance with the law on a case-by-case basis. However, there is one rule that we think applies to all plans: avoid penalizing employees for non-compliance and instead reward employees for good faith participation. Also, develop a well drafted written operating plan that explains the program to your employees. Encourage your employees to voice their questions, comments and concerns. These "best practices" will help to diminish your exposure to discrimination claims.

- **Massachusetts Wellness Tax Credit Incentive**
  This incentive gives small businesses in Massachusetts a state tax credit for having an employee wellness program. Massachusetts businesses that employ 200 or fewer workers may qualify for the tax credit for up to 25% of the cost of implementing a certified wellness program for their employees. Employers must meet eligibility requirements in addition to wellness program criteria. These requirements include offering health benefits, having a majority of employees working in Massachusetts, not having willful or repeat OSHA violations in the past five years, and meeting all other requirements as set forth in the final regulations. Additional information may be found at: http://www.mass.gov/eohhs/consumer/wellness/health-promotion/massachusetts-wellness-tax-credit.html.

- **Employee Assistance Programs (EAP)**
  Employee productivity is a vital aspect of any business's success but often employees are too overwhelmed by personal or behavioral problems to perform at their highest level. An employee assistance program is an employer sponsored program that offers services or referrals to help employees deal with personal challenges. Depending on how an EAP is structured, it could offer employee education, evaluation, hotlines, counseling and/or referrals. It could be an in-house program, outsourced through an independent EAP provider or a combination of the two.

  Not surprisingly, the U.S. Department of Labor is a proponent of employee assistance programs as a means of dealing with a multitude of issues that affect job performance. EAPs have been shown to contribute to:
  - Decreased absenteeism;
  - Reduced accidents and fewer workers compensation claims;
  - Greater employee retention;
  - Fewer labor disputes; and
  - Significantly reduced medical costs arising from early identification and treatment of individual mental health and substance abuse issues.

Many employers today are actively integrating services and resources to support overall employee physical and mental health expanding EAP services to include wellness programs, disease management and preventive health.

Legal Considerations: If an EAP is considered a welfare benefit plan, it must comply with ERISA's reporting and disclosure requirements. The key distinction, typically, is whether the EAP offers direct counseling or simply referrals. Because employee welfare plans are defined as providing medical benefits, an EAP that provides counseling would generally fit that description and would be subject to ERISA standards. Similarly, the COBRA implications are a bit unclear regarding EAPs. Generally, if an EAP is a welfare benefit plan and provides medical care, it is subject to COBRA.

Offering an EAP could open an employer to certain legal liability situations for actions taken by EAP counselors or outside vendors. We encourage our clients to ensure that their liability insurance covers all aspects of their EAP program. In addition, confidentiality is essential for an EAP.

An effective EAP can help employers attract and retain employees, lower health care and disability claims costs, increase productivity and moral, and lower absenteeism.

XVI. FEDERAL AND STATE WORKPLACE POSTING REQUIREMENTS

- **Federal Posting Requirements:**
  Private employers, state and local governments, and educational institutions are required to post notices in compliance with the following acts:
  - Rights Under the Fair Labor Standards Act Poster (FLSA/Minimum Wage);
  - Job Safety and Health: It's the Law Poster (Occupational Safety and Health Act/OSHA);
  - Employee Rights and Responsibilities Under the Family and Medical Leave Act (FMLA);
  - Equal Employment Opportunity is the Law Poster (EEO);
  - Pay Transparency Nondiscrimination Provision (41 CFR Part 60-1.35);
  - Migrant and Seasonal Agricultural Worker Protection Act Notice (MSPA);
  - Employee Rights for Workers with Disabilities Paid at Special Minimum Wages Poster (FLSA Section 14[c]);
  - Employee Polygraph Protection Act Notice (EPPA);
  - Your Rights Under USERRA Notice/Poster; and
  - Employee Rights Under the H-2A Program.

  Workplace Posters of special interest to federal contractors:
  - Notice to All Employees Working on Federal or Federally Financed Construction Projects (Davis-Bacon Act);
  - Equal Opportunity is the Law Poster (EEO);
  - Pay Transparency Nondiscrimination Provision (41 CFR Part 60-1.35);
  - Employee Rights on Government Contracts Poster (SCA, CWHSSA, Walsh-Healey); and
  - Notification of Employee Rights under Federal Labor Laws Poster.

  Federal Contractors may have additional notice requirements under the following laws:
  - Drug-Free Workplace Act;

- Executive Order 11246 – prohibiting federal contractors and subcontractors and federally-assisted construction contractors and subcontractors that have contracts exceeding $10,000 from discriminating on the basis of race, color, religion, sex, or national origin;
- Executive Order 13496 – federal contractors and subcontractors must post employee notices conspicuously in so that the content is prominent and readily seen by employees. http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm;
- National Labor Relations Act;
- Section 503 of the Rehabilitation Act of 1973;
- Vietnam Era Veterans' Readjustment Assistance Act;
- Walsh-Healy Public Contracts Act; and
- McNamara-O'Hara Service Contract Act.

In addition to the required posters, the federal government also recommends that employers post notices on the following acts:

- Civil Rights Act of 1991;
- Consolidated Omnibus Budget Reconciliation Act (COBRA);
- Consumer Credit Protections Act, Title III;
- Employee Retirement Income Security Act of 1974 (ERISA);
- Fair Credit Reporting Act (FCRA);
- Federal Military Selective Service Act;
- Immigration Reform and Control Act;
- Jury Service and Selection Act of 1968; and
- Worker Adjustment and Retraining Notification Act (WARN).

We recommend checking the Department of Labor's web page www.dol.gov to keep posters current.

- **Massachusetts Posting Requirements:**
  - Child Labor – Employers are required to conspicuously post information regarding permits, time and hour restrictions, and supervision;
  - Earned Sick Time;
  - Fair Employment Practices: Massachusetts employers with six or more employees must conspicuously post a notice outlining their employees' rights and obligations when apposing unlawful discrimination;
  - Prohibition Against Sexual Harassment in the Workplace;
  - Parental Leave Act;
  - Meal Periods;
  - Notice to Employees – Department of Industrial Accidents;
  - Safety and Health – "Right to Know" workplace notice;
  - Smoking in the Workplace is Prohibited;
  - Temporary Worker Right to Know;
  - Unemployment Insurance;
  - Wages and Hours;
  - Whistle Blowing;
  - Domestic Workers Rights; and
  - Workers Compensation.

We recommend checking the state's web page www.mass.gov/lwd/labor-standards/dls/massachusetts-workplace-poster-requirements to keep posters current.

XVII. LEGAL TRIAGE RISK MANAGEMENT AND COMPLIANCE ASSISTANCE PROGRAM

We know that the first decision made when an employment-related issue arises will make a difference between a desirable result and a disastrous one. We all confront the reality that our workplace is heavily regulated by state and federal law. Our compliance obligations are onerous; and our liability and exposure is extraordinary. Workplace law continues to be fluid.

We have a solution that will help you manage your risk exposure to employment-related claims. Our solution includes the following services each of which are performed for a fixed fee that is well below what our competitors charge:

- **The Employment Counsel On-Call Risk Triage Service**: This service provides covered clients with unlimited telephone and email access to our seasoned employment lawyers so that the best possible decisions can be made when issues present;
- **The preparation and updating of Employee Handbooks**: A well written and updated Employee Handbook is the most effective way for an employer to communicate the terms and conditions of employment in a consistent manner thus having a positive impact on morale and significantly reducing HR-related risk; and
- **An Attorney/Client Privileged Diagnostic Audit of Personnel Policies and Practices**: In our experience the Diagnostic Audit is the most effective way for employers to identify issues before they become time consuming and expensive distractions in their workplace.

Please call Mike Foley at (844) 204-0505 to discuss this risk management program.

XVIII. RESTRICTIVE EMPLOYMENT COVENANTS

Most states recognize, through common law, that current employees owe their employer a "duty of loyalty." While the state specific definitions of that duty differ, in general terms, an individual while employed is not permitted to induce current customers, suppliers or other employees to leave the organization nor are they allowed to set up or operate a competing business. When that duty is breached most states permit the employer to collect lost profits, punitive damages and out of pocket costs incurred. This duty is a creature of common law and employees need not sign any agreement or other document to trigger that duty. That duty of loyalty ends when the employee's employment relationship terminates; and therefore require their employees sign agreements containing a "loyalty provision." That is a clause that requires the employee to devote all or most of his or her working time to the employer's endeavors, while the employee remains employed by the employer.

Restrictive covenants, also known as non-competition, non-compete agreements, non-solicitation agreements or confidentiality agreements, are written documents that create binding commitments restricting employees' rights while employed and for a period of time following the termination of the employment relationship.

As a general rule, courts will consider the following factors in determining whether to enforce restrictive covenants:

- Does the employer have a legitimate interest in being protected from the employee's competitive activity? A court may refuse to enforce a restrictive covenant that is too broadly drafted even though the employer may be able to demonstrate a legitimate business interest worth of protection.

- Is the restriction reasonable in light of all the circumstances? By "reasonable," the courts mean that the Agreement is no more restrictive upon an employee than necessary to protect the employer's legitimate business interests.
- Is the restriction reasonably limited in time and geography? The Agreement must contain a reasonable time restriction. Such a time restriction would be based on such factors as the time it would take to train a new employee or for customers to become familiar with the new employee and eliminate the identification between the employer's business and the former employee. Most states recognize 12 months beyond the employment relationship as a reasonable temporal restriction. The geographical scope of the restriction must be limited to areas necessary to protect the employer's interests.

XIX. CONCLUSION

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