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Labor and Employment Law Update

MASSACHUSETTS ENACTS SECURITY BREACH NOTICE LAW

On August 2, 2007, Governor Patrick signed the Massachusetts Security Breach Notice Law. It covers all “persons,” which encompasses all employers (including out-of-state employers) that maintain records of a Massachusetts resident’s first and last name in combination with the resident’s Social Security number, or driver’s license number, or financial account number or credit card number, with or without any code that would permit access to the resident’s financial accounts. An employer holding such information must provide notice “as soon as practicable and without additional delay” when it knows or has reason to know that there has been an unauthorized acquisition of such information “that creates a substantial risk of identity theft or fraud against a resident of the Commonwealth.” Notice must also be provided to the Attorney General, the Director of Consumer Affairs, and to consumer reporting agencies. The notice to be provided to the individual resident must include a statement of the resident’s right to obtain a police report and how the consumer can request a security freeze from credit reporting agencies. The notice may be delayed at the request of law enforcement agencies under certain circumstances. The statute becomes effective October 31, 2007.¹

The same Act also requires that employers disposing of records containing personal information either redact, burn, pulverize, or shred paper records so that the personal information cannot be reconstructed, and either destroy or erase electronic media so that personal information cannot be reconstructed. Third parties can be hired to do this work. The record destruction law becomes effective February 3, 2008.²

The Act is extraterritorial. That is, if a company keeps records of Massachusetts residents outside the Commonwealth, the Massachusetts law applies if those records are improperly accessed.

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EEOC Issues Guidance on Unlawful Treatment of Workers with Caregiving Responsibilities

In May, 2007, the Equal Employment Opportunity Commission issued an Enforcement Guidance on Unlawful Disparate Treatment of Workers with Care Giving Responsibilities. The EEOC observes that most family caregivers are women and that, with the increase of women in the work force, there is more conflict between job duties and care giving. While “caregiver” is not a protected category, the status of caregiver will always intersect with the protected categories of gender and race. The EEOC offers the following examples of improper discrimination against caregivers based upon those protected categories:

- Treating male caregivers more favorably than female caregivers: Denying women with young children an employment opportunity that is available to men with young children.
- Sex-based stereotyping of working women:

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- ◆ Reassigning a woman to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job.
- ◆ Reducing a female employee's work load after she assumes full-time care of her niece and nephew based on the assumption that, as a female caregiver, she will not want to work overtime.
- Subjective decision making: Lowering subjective evaluations of a female employee's performance after she becomes the primary caregiver of her grandchildren, despite the absence of an actual decline in performance.
- Assumptions about pregnant workers: Limiting a pregnant worker's job duties based on pregnancy-related stereotypes.
- Discrimination against working fathers: Denying a male caregiver leave to care for an infant under circumstances where such leave would be granted to a female caregiver.
- Discrimination against women of color: Reassigning a Latina worker to a lower-paying position after she becomes pregnant.
- Stereotyping based on association with an individual with a disability: Refusing to hire a worker who is a single parent of a child with a disability based on the assumption that care giving responsibilities will make the worker unreliable. This claim arises under the Federal Americans with Disabilities Act.
- Hostile work environment affecting caregivers: Subjecting a female worker to severe or pervasive harassment because she is a mother with young children, because she is pregnant or has taken maternity leave, or because she has a spouse or family member with a disability.

The Federal Family and Medical Leave Act gives caregivers, under certain circumstances, the right to twelve weeks of leave to care for a child after birth or adoption, or to care for a spouse, child, or parent of the employee who has a serious health condition.

The thrust of the EEOC's guidance is that employers should not make assumptions about how employees "should" structure their lives or about their unexpressed desires. Employment decisions must be based upon actual qualifications and performance, not upon assumptions about whether men who seek time off to care for children are serious about their job, whether women with small children will not travel with their work or accept transfers, or whether employees who care for an elderly relative are reliable workers. That said, "Employment decisions that are based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to care giving responsibilities."³

Courts Continue to Deal With Claims for Unpaid Wages and the Distinction Between Employees and Independent Contractors

The U.S. Department of Labor and the Massachusetts Attorney General continue their aggressive enforcement of wage payment and overtime laws. Large retail employers have been an irresistible target. Wal-Mart, in particular, is under siege in many states, and voluntarily paid over \$33 million in back overtime based on its own internal audit.

Litigated overtime cases can be a threat, since Massachusetts and Federal statutes permit awards of multiple damages and attorneys' fees. There is also exposure to personal liability. Under Federal law "any person acting directly or indirectly in the interest of an employer in relation to an employee" is liable for unpaid wages. Under Massachusetts law the president, treasurer, and "any officers or agents having the management of" the corporation are personally liable for unpaid wages. There are also criminal penalties under both statutes. In most situations, though, the risk of personal civil liability is removed by corporate laws or by-laws that indemnify employees against liability incurred in the ordinary course of performing their duties.

Many employers fail to pay overtime by improperly categorizing workers as independent contractors, rather than as employees. Massachusetts law creates a presumption that workers are employees for the purpose of the minimum wage and overtime laws. The status issue most commonly arises when a discharged worker applies for unemployment compensation. If he or she was an employee, then unemployment compensation is payable; if an independent contractor, then unemployment compensation is not payable. Two recent cases have wrestled with these classifications.

In Coverall North America, Inc. v. Commissioner of DUA,⁴ Coverall appealed from an award of unemployment compensation to a person who cleaned a single Arlington nursing home pursuant to a "franchise" agreement with Coverall. Coverall claimed that the person was free to seek other customers, so was, in effect, an entrepreneur and not an employee. The DUA and the Massachusetts Supreme Judicial Court found that Coverall failed to meet its burden of proving the three elements of independent contractor status under the unemployment compensation law ("the ABC test"):

- A. the person has been and will continue to be free from control and direction in connection with the performance of services;
- B. the service is performed either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- C. the individual is customarily engaged in an independently established trade, occupation,

profession, or business of the same nature as that involved in the service performed.

Coverall failed to prove all of these elements, because the worker was assigned to only one business, where hours and duties were directly controlled by Coverall.

The later case of Commissioner of DUA v. Town Taxi of Cape Cod, Inc.,⁵ also applied the ABC test, and reached the opposite result for independent taxi drivers. "Upon obtaining a hackney license, the drivers could open their own taxi service or drive for another service. They were free to find customers on their own and reject prospective customers referred from the dispatcher. Town Taxi permitted them to engage in other employment or generate their own businesses while using the leased taxi, and many did so."

As these cases show, the determination of whether a worker is an employee or an independent contractor is fact specific, and requires a careful review of the Massachusetts wage laws, the Unemployment Compensation Act, and the decisions interpreting those statutes.

New Law Permits Unions to Organize Massachusetts Government Employees Without a Secret Ballot

It has long been the law that union representation elections were conducted by secret ballot. Unions have become dissatisfied with that procedure because they lose 69% of the time. Unions claim that this is the result of employer intimidation. The response has been to seek legislation compelling employers to recognize a union if a majority of the employees sign a card or petition seeking union representation. Unions call this "free choice," and deny that employees approached by union organizers or fellow employees on an individual basis will be intimidated. If organization in this way is permitted, an employer could find itself unionized without realizing that an organizing campaign was under way.

The Democratic majority in Congress sought, but failed, to amend the National Labor Relations Act to bypass secret ballot elections if a majority of the members of the bargaining unit sign authorizations. Consequently, employees covered by the National Labor Relations Act are still "entitled by federal law to vote your free choice in a fair, honest, secret-ballot election to determine whether employees want union representation," in the words of an NLRB publication. The same is no longer true for Massachusetts public employees.

On September 27, 2007, Governor Patrick signed legislation that permits public employees to organize through card check drives, rather than secret ballots. The legislation also applies to those few private employers not covered by the NLRA. Nursing home owners objected to the law, so it explicitly excludes "a health care facility, a non-profit institution or a vendor who contracts with or receives funds from the Commonwealth or a political subdivision thereof to provide social, protective, legal, medical, custodial, rehabilitative, respite, nutritional, employment, educational, training or other similar ser-

vices to the Commonwealth or a political subdivision thereof." The statute becomes effective on December 26, 2007.⁶

In New Hampshire, Democratic Governor John Lynch signed similar legislation in June.

If the next President is a Democrat, and if the Democrats retain control of both houses of Congress, and win a 60 seat majority in the Senate, the National Labor Relation Act will undoubtedly be amended in the same way.

Recent Decisions of Interest from the NLRB: "Salts"; Replacement of Strikers; Union Decertification.

The National Labor Relations Board has recently issued a number of decisions modifying existing law.

Oil Capital Sheet Metal, Inc.,⁷ dealt with the right of union "salts" to receive back pay if they were not hired or were terminated. A "salt" is a person sent by an union to seek employment at a non-union shop with the intent of organizing the employees. Under federal law, it is unlawful to discharge or refuse to hire a salt because of his or her union activity or affiliation. The former rule was that back pay was awarded to salts from the date of the unlawful act until the employer made a valid offer of reinstatement or reinstatement. The NLRB presumed that, if hired, the salt would have stayed on the job for an indefinite period. Oil Capital Sheet Metal, Inc., changed that presumption, reasoning that it was "inconsistent with the reality of salting. The reality is that salts, when hired, stay on the job until they succeed in their organizational effort or reach the point where such efforts are unsuccessful. In either situation, the union typically then sends the salt to seek to organize the employees of another non-union employer," in the words of an NLRB press release. The majority also ruled that the employer would not be compelled to hire the salt where he or she would have left the job before a hiring order was made.

The Board again dealt with salts in Toering Electric Co.,⁸ where the majority ruled that a salt who applies for employment must be genuinely interested in seeking to establish an employment relationship in order to be protected against discrimination based upon union affiliation or activity. According to the Board, "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. Indeed, such conduct manifests a fundamental conflict of interest ab initio between the employer's interest in doing business and the applicant's interest in disrupting or eliminating this business," and collides with the employer's right to insist on employee loyalty and on a cooperative employer-employee relationship.

In Jones Plastic & Engineering,⁹ the NLRB clarified the reinstatement rights of striking employees. Under existing law, an economic striker who unconditionally offers to return to work is entitled to immediate reinstatement unless the employer has hired a permanent replacement for the striker in order to continue its business operations during the strike. Thus, at the conclusion of a strike, an employer is not bound to discharge

those hired permanently to fill the places of economic strikers. The question presented was whether at-will employees are “permanent” replacements of strikers? In a 3-2 decision, the Board held that they are, pointing to the fact that the strikers themselves were hired at-will.

For many years the law has been that an employer’s voluntary recognition of a union, based on a showing of the union’s majority status, barred a decertification petition filed by employees or a rival union’s petition for a reasonable period of time. The Board changed that rule in Dana Corp.,¹⁰ ruling that an employer’s voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition. A decertification petition requires signatures of only 30% of the employees in the bargaining unit. The two members of the Board who voted against the change argued that it disrupts the bargaining process just as it is getting started.

¹ Chapter 82 of the Acts of 2007, adding Chapter 93H to the General Laws.

² Chapter 82 of the Acts of 2007, adding Chapter 93I to the General Laws.

³ www.eeoc.gov/policy/doc/qanda_caregiving.html and www.eeoc.gov/policy/docs/caregiving.html. Title VII, the primary federal anti-discrimination law, applies to employers of fifteen or more, as does the Americans with Disabilities Act. The Federal Age Discrimination in Employment Act applies to employers of twenty or more. The Family and Medical Leave Act of 1993 applies to employers of fifty or more within a 75 mile radius. (Sen. Clinton has proposed that the coverage threshold be reduced to 25 employees.) The Massachusetts anti-discrimination law applies to employers of six or more.

⁴ 447 Mass. 852 (2006).

⁵ 68 Mass.App.Ct. 426 (2007).

⁶ The Massachusetts Statute is Chapter 120 of the Acts of 2007, amending portions of G.L. c.150A and c.150E.

⁷ 349 NLRB No. 118 (June 5, 2007).

⁸ 351 NLRB No. 18 (October 3, 2007).

⁹ 351 NLRB No. 11 (October 3, 2007).

¹⁰ 351 NLRB No. 28 (September 29, 2007).

RUBIN AND RUDMAN LLP PRACTICE AREAS:

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