50 Rowes Wharf
Boston, MA 02110
July, 2008

Labor and Employment Law Update

MASSACHUSETTS NOW IMPOSES MANDATORY TRIPLE DAMAGES FOR WAGE AND HOUR VIOLATIONS

On April 14, 2008, the Massachusetts Legislature passed Senate Bill No. 1059, without the signature of Gov. Patrick. The bill amends the Massachusetts Wage Act to impose *mandatory* triple damages on all employers found in violation of the state wage and hour requirements. Previously, Gov. Patrick had returned the bill to the Legislature with recommended amendments addressing his concern that "mandating treble damages in all cases without any exception for employers who act in good faith is unfairly punitive." Only a few years ago, the Supreme Judicial Court ("SJC") expressly held that trial judges were not required to make triple damages awards. The Legislature rejected Gov. Patrick's proposed amendments, as well as the SJC precedent, and passed the bill in its original form.

When this new law became effective on July 13, 2008, Massachusetts became the only state in the nation to automatically triple damages for wage and hour violations. Unlike damage assessments under the federal Fair Labor Standards Act ("FLSA"), the Massachusetts requirement that damage awards be tripled applies whether the employer's failure to pay the required wages was intentional or inadvertent. In *all* cases, the damage award must be tripled. Massachusetts judges no longer have discretion to award less than triple damages to prevailing plaintiffs in cases alleging non-payment of overtime, minimum wage violations, untimely payment of wages, Sunday and holiday pay violations, improper calculation of commissions, errors in calculating travel time, independent contractor misclassifications, unlawful tip retentions and other wage and hour violations.

Furthermore, employers generally will not be able to avoid triple damages by paying the amount owed to the employee before trial. For many wage and hour claims under Massachusetts law, once the employee has filed suit, the unpaid wages must be tripled. The triple damages can also be assessed personally against certain high-level executives of the employer. In addition to the triple damages, employers remain liable for 12% interest per year on the damages award as well as for attorney's fees. The retroactive application of this new law is uncertain.

This new law not only significantly raises the stakes for employers in terms of monetary damages, but it is sure to spur an increase in the number of workers claiming wage and hour violations. Employers should make every effort to ensure that their wage and hour policies and procedures are in full compliance with the law. As good faith efforts for wage and hour compliance will not shield employers from the imposition of triple damages, the time for employers to address compliance issues is right now.

Rubin and Rudman LLP provides counseling and representation in all areas of labor and employment law. The members of the Labor and Employment Group are:

Michael R. Coppock *617-330-7049*
James B. Cox *617-330-7089*
Karla J. Doukas *617-330-7125*
Paul G. Gitlin *617-330-7002*
Paul J. Hodnett *617-330-7134*
Paul J. Kingston *617-330-7133*
Diedre T. Lawrence *617-330-7056*
Alison J. Little *617-330-7094*
Julie M. Marcal *617-330-7009*
Denise I. Murphy *617-330-7123*
Mark Peters *617-330-7151*

This update was written by Alison J. Little.

Copyright © 2008, Rubin and Rudman LLP

This is an occasional informational service provided by Rubin and Rudman LLP. As such, it is required to be labeled "advertising" by Rule 3:07 of the Supreme Judicial Court of MA

NEW ADVISORY ON MASSACHUSETTS INDEPENDENT CONTRACTOR LAW

In May of 2008, on the heels of the passage of the new wage and hour triple damages law, the Massachusetts Attorney General's Office ("AGO") issued an Advisory that provides guidance on how the AGO will interpret and enforce the state's Independent Contractor Law ("ICL"). Amended in 2004, the ICL presumes that an individual is an employee, and an employer must satisfy each part of a stringent three part test to establish that the worker is not an employee, but rather an independent contractor: (1) the individual must be free from the employer's control; (2) the individual must perform work outside of the usual course of business of the employer; and (3) the individual must be engaged in an independently established trade, occupation, profession or business.

To satisfy the first prong, the Advisory explains that an employer cannot rely upon a contract or job description. Instead, it must prove that the individual is *in fact* free from the employer's actual control, which means that the individual should perform tasks with minimal instruction. As to the second prong, the Advisory states that the services performed by the individual must be merely incidental to the employer's business. Lastly, the Advisory explains that the third prong of the test looks at whether the individual provides the services in question to others. If the individual is dependent upon a single employer, the third prong cannot be met.

The Advisory emphasizes the AGO's authority to investigate violations of the ICL. It also cautions that the AGO intends to enforce the ICL not only against entities that misclassify individuals as independent contractors, but also against those that allow, request or contract with corporate entities that exist for the purpose of avoiding the ICL.

The Advisory acknowledges that the ICL and other federal and state laws use different tests for determining whether an individual is an employee versus an independent contractor. This means that a worker may be an employee for some purposes, but not for others. For example, a worker may be an employee under the ICL for purposes of the Massachusetts wage and hour laws, but an independent contractor under the federal tax code. Given the new mandatory triple damages provision for state misclassification violations, employers must be all the more diligent to reconcile the differences in the various independent contractor tests in order to be in compliance.

The Advisory can be accessed at the AGO's website at http://www.mass.gov/ago.

PROPOSED EMPLOYEE MISCLASSIFICATION PREVENTION ACT OF 2008

Congress is now considering a similar crackdown on independent contractor misclassification at the federal level. In May of 2008, Rep. Andrews (D-NJ), chairman of the Subcommittee on Health, Employment, Labor and Pensions, introduced H.R. 6111, the Employee Misclassification Prevention Act, which would amend the FLSA to penalize employers who misclassify workers as independent contractors.

In its current form, the bill would impose a maximum fine of $10,000 per violation for an employer who "repeatedly or willfully" failed to accurately classify a worker. Additionally, if an employer's misclassification accompanied violations of the FLSA's maximum hours or minimum wage provisions, a worker could recover double his or her liquidated damages. The bill would also require employers of individuals classified as "non-employees" to notify them in writing of: (1) their classification; (2) that their rights to "wage, hour, and other labor protections" depend upon proper classification; and (3) directing them to the Department of Labor ("DOL") if they suspect they have been misclassified or need further information.

Further, the bill would strengthen classification monitoring by requiring state unemployment insurance agencies to conduct audits and establish penalties for employers who misclassify employees, or who fail to properly report or record their compensation for unemployment compensation purposes. Finally, the bill would permit the DOL and the IRS to share information on cases where employers misclassify workers, and would mandate that the DOL perform targeted audits focusing on employers in industries that frequently misclassify employees. While this bill has just been introduced, its potentially significant impact on employers merits close monitoring of its progress.

GENETIC INFORMATION NONDISCRIMINATION ACT

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act ("GINA") into law. Passed almost unanimously by Congress, GINA effects changes in the laws governing employment, health insurance and child labor. While several states, including Massachusetts, have laws addressing the use of genetic

information, Congress determined that GINA was necessary to "establish[ ] a national and uniform basic standard ... to fully protect the public from discrimination and allay their concerns about the potential for discrimination, thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies." Although the major provisions of GINA do not become effective until November 21, 2009, employers should begin taking steps to ensure compliance.

GINA's Employment Discrimination Provisions

GINA provides broad protections against the improper collection, use or disclosure of employees' genetic information. Under GINA, "genetic information" is broadly defined to include information about: (1) an individual's genetic tests; (2) the genetic tests of the individual's family members; and (3) the manifestation of a disease or disorder in a family member. While this definition is intended to prevent an employer from inferring that an employee is predisposed to the same disease or disorder as a family member, including a spouse or dependent child by birth or adoption, and certain other relatives of such individual, individual's spouse or dependent child, from the first to the fourth degree. For example, information about the manifested diseases or disorders of an employee's mother, grandmother, great grandmother, and great great grandmother would constitute "genetic information" under GINA. While the term "genetic information" does not include information about the sex or age of any individual, genetic information concerning an individual or family member of an individual does include: (a) for a pregnant woman, the genetic information of any fetus carried by such pregnant woman; and (b) for an individual or family member utilizing an assisted reproductive technology, the genetic information of any embryo legally held by the individual or family member.

GINA prohibits employers with 15 or more employees from discriminating against employees on the basis of genetic information in hiring, firing, and other terms and conditions of employment through its own substantive provisions as well as through the amendment of other statutes, including Title VII of the Civil Rights Act of 1964. GINA bars discrimination in employment based not only on an individual's own genetic information, but on a family member's genetic information or the potential that a latent family genetic disorder may manifest. Likewise, employers are prohibited from retaliating against an employee who opposes genetic discrimination. GINA also makes it unlawful for an employer to "limit, segregate, or classify [employees, individuals, or members]… in any way that would deprive or tend to deprive [them] of employment opportunities or otherwise adversely affect the status of the [employee, individual, or member] as an employee because of genetic information…."

GINA also prohibits employers and others from requesting, requiring or purchasing genetic information. Certain limited exceptions, however, are included in the law: (1) inadvertently requesting or requiring family medical history; (2) requesting or requiring family medical history for purposes of complying with certification requirements of the Family and Medical Leave Act ("FMLA") or state family and medical leave laws; and (3) genetic monitoring of the biological effects of toxic substances in the workplace, when required to do so by law and under specific conditions.

Employers are also required to apply the same confidentiality protections for genetic information that are applicable to other types of medical information protected under the Americans with Disabilities Act ("ADA"). In other words, genetic information must be treated as confidential, maintained on separate forms and in separate medical files, and internal access must be strictly limited to those with a need to know.

Although GINA generally prohibits employers from disclosing genetic information to third parties, the statute provides a few exceptions. Disclosures are permitted: (1) when necessary for the employee to comply with federal or state medical leave laws; (2) to government agencies investigating compliance with GINA; and (3) in response to a court order provided that the employer notifies the employee of the disclosure if the court order was issued without the employee's knowledge. Employers are also permitted to disclose to public health agencies that an employee's family member has manifested a contagious disease, provided that the disease presents an imminent hazard of death or life-threatening illness and the employee is notified of the disclosure.

An individual's rights and remedies under GINA include compensatory and punitive damages and attorneys' fees, tracking those available under Title VII. As under Title VII, employees must first exhaust their administrative remedies before initiating a lawsuit, and, like Title VII, GINA does not preempt more stringent state laws. Currently, GINA does not permit claims based on a disparate impact theory, but Congress has authorized the EEOC to make recommendations as to whether such claims should be permitted.

GINA's Insurance Provisions

GINA amends a number of federal laws, including the nondiscrimination and privacy provisions of the Health Insurance Portability and Accountability Act

("HIPAA"), the Employee Retirement Income Security Act ("ERISA"), and the Internal Revenue Code ("IRC"). For health plans and health insurance issuers, GINA becomes effective for plan years that begin on and after May 21, 2009.

Generally, GINA is intended to encourage individuals who might otherwise fear genetic discrimination to seek potentially beneficial genetic testing. To that end, the law prohibits group, state-regulated and individual health insurers from discriminating against individuals on the basis of genetic information. For example, employer-sponsored group health plans may not adjust premium or contribution amounts on the basis of genetic information. GINA also prohibits health plans from requesting, requiring or purchasing genetic information for underwriting or enrollment purposes. GINA specifically prohibits a group plan from requesting, requiring or purchasing genetic information with respect to any individual prior to his or her enrollment.

To enforce these provisions with respect to group health plans, GINA amends section 502 of ERISA to provide the Secretary of Labor with the authority to seek monetary penalties against plan sponsors and health insurance issuers. GINA also amends section 4980D of the IRC to assess an excise tax for compliance failures.

GINA's Child Labor Provisions

Effective as of May 21, 2008, GINA also made changes to the Fair Labor Standards Act ("FLSA") concerning child labor. Among its provisions, GINA increases the penalty for child labor violations by $1,000 per violation. The new law also raises potential employer liability to $50,000 where a violation causes the death or serious injury of a minor. This amount can be doubled for repeat or willful violations.

Overall Implications For Employers

As GINA's employment law provisions do not become effective until November 21, 2009, it is premature to predict GINA's practical effects. Employers can, however, take the following steps toward GINA compliance now: (1) include non-discrimination on the basis of genetic information to employee handbooks, equal employment opportunity statements/policies and affirmative action plans (if not already done in the wake of the amendment of Mass. Gen. Laws c. 151B to include genetic testing); (2) refrain from requesting family medical histories from applicants and employees; (3) limit requests for information about the manifested disorders or diseases of an employee's family members to FMLA or state leave analogues; (4) review confidentiality policies and procedures and institute necessary changes to take genetic information into account; (5) implement policies and procedures to address the disclosure of genetic information; and (6) examine current health benefit administration to determine if changes are necessary. Given the sufficient time for employers to institute compliance measures, GINA's effective date should not prompt a new flood of litigation based on genetic information discrimination.

PROPOSED ADA RESTORATION ACT OF 2008

On June 25, 2008, the House passed H.R. 3195, the ADA Restoration Act of 2008 ("ADARA"). In its present form, the bill purports to significantly and extensively alter the scheme of disability law as we now know it under the ADA.

The ADARA would redefine "disability" simply as "a physical or mental impairment." Individuals would no longer need to prove that impairments "substantially limit" one or more "major life activities" as required under the ADA. While the House version of the bill retains these terms in form, it redefines them so broadly as to turn a "major life activity" into virtually anything and everything that a person might do in any given day, such as sleeping, standing, concentrating, thinking, communicating and working. It also includes in the redefinition "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The bill would also forbid employers from considering the effects of mitigating measures that an individual uses to manage an impairment, such as eyeglasses or medications.

Additionally, and significantly for employers, the ADARA purports to shift the burden of proof in determining job qualification in disability discrimination cases from the employee to the employer. Under the ADA, an employee currently must show that s/he is qualified to perform a job with or without a reasonable accommodation. Under the ADARA, an employer would have to prove the employee is not qualified. Finally, the ADARA would also explicitly require that the ADA's provisions be broadly construed, and that federal regulations and guidance be given deference by courts and administrative bodies.

The ADARA is now pending in the Senate. While the current version has been touted by supporters as a moderate compromise over earlier drafts, the bill would greatly expand the class of persons who are

considered disabled and therefore legally entitled to workplace accommodations. If passed in its current form, the ADARA will undoubtedly increase an employer's responsibilities to provide reasonable accommodations as well as spark a significant increase in disability discrimination litigation.

NEW FMLA POSTER AVAILABLE FROM DOL

As discussed in the April 2008 Labor and Employment Law Update, the enactment of the National Defense Authorization Act earlier this year included two important amendments to the FMLA: (1) employees can take up to 26 work weeks of protected leave to care for a seriously injured or ill family member serving in the military; and (2) employees can take up to 12 work weeks of protected leave to deal with emergencies or necessities arising out of a family member's active duty in the military.

The DOL recently issued a temporary, mandatory poster addressing these FMLA amendments that must be posted next to your current FMLA poster. The DOL poster is available on its website at http://www.dol.gov/esa/regs/compliance/posters/fmla.htm.

FEDERAL CONTRACTORS MUST NOW USE E-VERIFY

On June 6, 2008, President Bush signed an amendment to Executive Order 12989 that requires all federal contractors to use E-Verify, the Department of Homeland Security's ("DHS") employment eligibility online verification system. The amendment requires federal departments and agencies that enter into contracts to include, as a condition of each contract, a provision that the contractor agree to use E-Verify to verify the employment eligibility of: (1) all persons hired during the contract term by the contractor to perform employment duties within the U.S.; and (2) all persons assigned by the contractor to perform work within the U.S. on the federal contract.

The amended Executive Order does not provide specifics regarding these requirements, but rather authorizes the Attorney General and DHS to issue implementing regulations. The regulations are expected to clarify whether the amended provisions apply to new and/or existing contracts and whether employers are required to use E-Verify for employees under existing contracts or only for new hires.

Until the regulations are published, the E-Verify requirements are not effective. Until then, employers with federal contracts should evaluate their current contracts to determine which employees will or might be affected by the rule. All employers who enroll in E-Verify must sign an agreement that gives the government broad access to the company's records, including I-9 records. Consequently, employers should examine their current I-9's for accuracy.

FEDERAL LILLY LEDBETTER FAIR PAY ACT DOES NOT PASS

On April 25, 2008, the Senate narrowly failed to pass a vote to move forward with the Lilly Ledbetter Fair Pay Act. The bill, which passed the House, attempted to reverse the Supreme Court's 2007 decision in Ledbetter v. Goodyear Tire & Rubber Co., which held that Lilly Ledbetter's claim of pay discrimination on the basis of her gender was untimely except as to those pay decisions made within the 180 days before she filed her claim with the EEOC. In Ledbetter, the Court held that the 180 day time frame is necessary to prevent employers from having to defend stale claims, and therefore Ledbetter could not challenge any of the paychecks she had received in her 19 years of employment with Goodyear with the exception of those that she had received in the 180 days before she filed with the EEOC.

The Lilly Ledbetter Fair Pay Act purported to amend Title VII, the ADEA and the ADA to clarify that an unlawful act occurs each time that compensation is paid pursuant to a discriminatory decision or practice. Sen. Edward Kennedy (D-MA), sponsor of the bill, vowed to fight on and Majority Leader Reid (D-NV) agreed to bring the bill up again. While the April 25th Senate vote had been delayed to allow the presidential contenders to return to vote, Sen. John McCain (R-AZ), who opposed the bill, did not return. President Bush stated that he would veto the bill if passed.

MCAD COMMISSIONER ANNOUNCES THAT AGENCY WILL INTERPRET THE MASSACHUSETTS MATERNITY LEAVE ACT AS APPLYING TO FATHERS

Martin Ebel, a Commissioner of the Massachusetts Commission Against Discrimination ("MCAD"), recently announced that the MCAD views the Massachusetts Maternity Leave Act ("MMLA") as gender neutral and will apply it equally to male employees. The MMLA requires employers with 6 or

more employees to provide female employees with 8 weeks of leave relating to the birth or adoption of a child. Commissioner Ebel explained that the decision to reinterpret the law as gender neutral was made after the MCAD permitted a man to pursue an MMLA claim against his employer late last year.

Commissioner Ebel explained that reading the statute as written (applying only to women) would raise constitutional concerns, particularly in light of the SJC's decision regarding same-sex marriage in Goodridge v. Dept. of Public Health. For example, according to Commissioner Ebel, if a female same-sex couple adopted a child, both would be entitled to leave under the MMLA. If, however, the couple were male, neither would be entitled to leave. To avoid this anomalous result, Commissioner Ebel stated that the law should apply to men, as well as women, and that the MCAD intends to proceed on claims that employers failed to provided MMLA leave to male employees.

Commissioner Ebel's announcement is not only contrary to the plain language of the MMLA, but it is also a departure from the MCAD's prior practice and its own MMLA guidelines. The MCAD's current guidelines provide:

> The MMLA, by its terms, provides maternity leave to female employees only. This means that the MCAD is unable to take jurisdiction over claims in which male employees are seeking eight weeks of unpaid paternity leave.

MCAD Guidelines and Policies, Guidelines on the Massachusetts Maternity Leave Act, Mass. Gen. Laws c. 149, §150D, III (April 10, 2000). Similarly, no Massachusetts court has concluded that the MMLA should be interpreted as applying to men.

Without addressing the rationality or propriety of the basis for the MCAD's opinion, we are skeptical of the MCAD's authority to determine that the MMLA applies to men when the language of the statute explicitly provides otherwise. We doubt that the MCAD has the power to disregard the MMLA's statutory limitation and believe that such a blatant rejection of the provision of the law will be subject to judicial review. If the MCAD takes the position that the MMLA is unlawful in its current form, we believe that the MCAD should allow the Legislature to correct it.

As the MCAD has yet to update its own Guidelines on this point (see www.mass.gov/mcad/maternity1.html#3), there is some chance that the MCAD will not follow through on Commissioner Ebel's announcement. Nonetheless, given the severity of the MCAD's departure from the language of the MMLA, employers must proceed cautiously on issues of paternity leave. If the MCAD proceeds and its interpretation of the MMLA survives judicial scrutiny, employers with more than 6 employees must provide male employees with 8 weeks of leave for the birth or adoption of a child.

As a practical matter for many employers, however, the issue of providing MMLA leave to men is not likely to arise very often. Regardless of how the MMLA is interpreted, male employees are entitled to up to 12 weeks of FMLA leave provided that they have worked for an employer with 50 or more employees for at least 12 months and 1,250 hours. Consequently, Commissioner Ebel's announcement will not impact the manner in which FMLA-compliant employers provide leave to FMLA-eligible male employees, because such employers already are providing up to 12 weeks of paternity leave.

For small employers (fewer than 6 employees) and employers with male employees not otherwise eligible for FMLA leave, Commissioner Ebel's announcement may indeed impact their leave rights and obligations. Until either the MCAD abandons this position, or the courts and/or the Legislature address it, these employers should consider revising their leave policies and practices in accordance with the MCAD's new position, i.e., to provide similar MMLA leave rights to men and women. More importantly, such employers should immediately contact their counsel in the event that a male employee seeks leave for the birth or adoption of a child.

RUBIN AND RUDMAN LLP PRACTICE AREAS:

LABOR AND EMPLOYMENT COUNSELING AND REPRESENTATION:
GRIEVANCES · ARBITRATION · CERTIFICATION ELECTIONS COLLECTIVE BARGAINING · UNFAIR LABOR PRACTICES AT THE NLRB · · WAGE AND HOUR CLAIMS · PREVAILING WAGE CLAIMS · DISCRIMINATION CLAIMS BEFORE THE EEOC AND MCAD · · WRONGFUL DISCHARGE CLAIMS · REPRESENTATION IN STATE AND FEDERAL COURTS · PERSONNEL POLICIES AND STATUTORY COMPLIANCE ·

· REAL ESTATE DEVELOPMENT AND LEASING · ENVIRONMENTAL, LAND USE, PERMITTING, ZONING · POWER PLANT SITING, LICENSING, AND RATE SETTING · ESTATE PLANNING; ESTATE AND TRUST ADMINISTRATION · PUBLIC AND PRIVATE CONSTRUCTION CONTRACTING AND CLAIMS · CORPORATE, BUSINESS, AND TAX · BANKRUPTCY · SECURITIES REGULATION AND ARBITRATION · REPRESENTATION BEFORE STATE AND FEDERAL ADMINISTRATIVE BOARDS · REPRESENTATION BEFORE MEDICAL AND OTHER STATE LICENSING BOARDS · ALCOHOLIC BEVERAGES LICENSING ISSUES · LEGISLATIVE REPRESENTATION · COMPLEX COMMERCIAL LITIGATION · INSURED DEFENSE · CRIMINAL DEFENSE · DOMESTIC RELATIONS ·