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EMPLOYMENT LAWS FOR MASSACHUSETTS COMPANIES
A Reference Guide

About this Guide
This Employment Laws Reference Guide has been prepared by the staff of Associated Industries of Massachusetts (AIM) and is intended as a quick reference for use by AIM members in understanding state and federal laws, regulations, and policies affecting employers in Massachusetts. The laws and regulations listed reflect the most common areas of concern. Substantive information added for 2016 is presented in color. The Reference Guide, however, must always be used within the context of each individual company’s human resources practices and policies, as well as within the context of any union or other employment agreement. Please consult with your employment law attorney before taking any action based on this Reference Guide. The laws are current as of the time of this Guide’s printing. Significant changes will be reflected in subsequent annual updates. Members are encouraged to sign up to receive AIM’s HR Edge bi-weekly e-newsletter. AIM regularly publishes articles in the Edge updating members on new employment related developments based on statutory and regulatory changes as well as court decisions throughout the year. All citations for the statutes are to the Massachusetts General Laws (M.G.L.) and to the Code of Massachusetts Regulations (CMR).

AIM Member HR Hotline 800-470-6277
A ready resource for AIM members, the Hotline fields hundreds of questions each month on topics such as employment law, employee relations, policies and procedures, compensation, employee benefits, performance management, discipline and discharge, and employment trends. We are also available to further explain the information contained in this Guide, to assist directly with the implementation of programs and policies, and to answer any questions that arise in the day-to-day business of maintaining excellence in employer/employee relations.

AIM membership also includes access to the AIM Online Resource Center, where members can search and download hundreds of HR documents, ranging from sample forms and policies to required posters and articles on HR topics. For more information on using the Online Resource Center, visit www.aimnet.org. At the end of this Guide is a list of Websites where you may access required posters and other compliance-related informations.
About Foley Hoag LLP

AIM is again pleased to have the law firm of Foley Hoag as the exclusive sponsor for our 2016 Employment Laws for Massachusetts Companies Reference Guide. Our partnership with Foley Hoag extends back to 2011. Attorneys from Foley Hoag have worked closely with our members to inform and educate them about interesting and challenging developments in U.S. and Massachusetts employment law. AIM looks forward to working with them again this coming year.

Note: The impact of differences in Federal and State law

The conflict between state and federal rules occurs throughout employment law. Generally, federal law is seen as being “permissive,” that is, it establishes a minimum threshold that all parties must adhere to but “permits” states to adopt and enforce other standards more favorable to employees. To cite an example, the federal minimum wage is $7.25 per hour while the Massachusetts minimum wage is currently $10.00 per hour. Employers must follow the higher, stricter standard, whether it is federal or state law. Exceptions to this rule do exist. For example, the federal Occupational Safety and Health Act (OSHA) generally preempts state health and safety laws, creating a uniform national standard. Likewise, the federal Employee Retirement Income Security Act (ERISA) generally preempts state laws relating to retirement or welfare benefit plans.
I. HIRING

Background and Credit Checks

It is lawful for employers to conduct background and credit checks on applicants for employment. In fact, it is highly recommended that employers perform very thorough background checks. Employers that use a third party to carry out investigations should be aware of certain compliance issues.

The federal Fair Credit and Reporting Act (FCRA) typically requires an employer to get an applicant's written consent prior to initiating third-party background or credit checks or obtaining reports. Employers who rely on such reports to take an adverse employment action (e.g., denying an applicant a job, reassigning or terminating an employee, or denying an employee a promotion) must give the affected individual a pre-adverse-action disclosure and a reasonable period of time to correct any misinformation in the report. After the adverse action has been taken, the employer must give the affected individual notice of the action and provide him or her with additional disclosures, including: the name, address, and toll-free telephone number of the agency that made the report; a statement noting that the report-supplying agency did not make the decision to take the adverse action and cannot give specific reasons for it; and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished.

The FCRA exempts certain third-party investigations, including those related to employee misconduct such as sexual harassment and violations of state and federal law, from the prior approval requirement discussed in the paragraph above.

The Federal Trade Commission (FTC) rule on the disposal of consumer report information states that employers may dispose of the information by contracting with a third party to properly dispose of the information. The employer must monitor the third party's performance to ensure compliance. An employer may also create its own policies and procedures to shred or use other forms of document destruction. In 2007, Massachusetts enacted a law relating to the disposal of records containing certain information on Massachusetts residents. That law is discussed in detail in this Guide's section on Employment (Data Security). More detailed information is available in AIM's Massachusetts Data Security Laws, A Reference Guide.

Criminal Offender Record Information (MA only)

The Massachusetts Criminal Offender Record Information (CORI) process allows employers to request CORI on an applicant to determine if the applicant has a criminal record in Massachusetts. In 2010, Massachusetts made significant legislative reforms to employer's access to, use of, and inquiry into an applicant's criminal history.

The law prohibits employers from asking questions on an “Initial written application form” about an applicant’s “criminal offender record information”. This includes information about criminal
charges, arrests, convictions and incarceration. Employers, therefore, are urged to remove all inquiries concerning criminal history from their employment applications. The only exceptions expressly provided in the CORI reform law are for (1) positions for which a federal or state law or regulation disqualifies an applicant based on a conviction; or (2) employers who are subject to an obligation under a federal or state law, regulation, or accreditation not to employ persons who have a conviction.

The Department of Criminal Justice Information Systems (DCJIS) is responsible for maintaining a CORI database and providing employers with access to it.

The law imposes several additional changes to the CORI system:

• Private employers have access to CORI records through an online database accessible for a fee of $25 per record. Employers that were previously ineligible to access the CORI database now have the option of using the CORI system.

• The law limits the information that most employers may obtain through the CORI system to: (1) felony records for 10 years following the disposition of the felony; (2) misdemeanor records for 5 years following the disposition of the misdemeanor; and (3) pending criminal charges. Convictions for murder, voluntary manslaughter, involuntary manslaughter, and certain sexual offenses are available in the CORI database permanently. The law does not affect the scope of the information available to employers that are required by law to conduct criminal background searches on job applicants.

• Criminal justice agencies will continue to have virtually unlimited access to CORI, including sealed records. In addition, others submitting a request for CORI to the DCJIS will continue to have access to CORI to the extent authorized by law. These include individuals and agencies required by statute to have access to CORI (e.g. employers that provide services to vulnerable communities such as care or services to children, elderly or disabled individuals); and those who request CORI for the purpose of evaluating current and prospective employees including full-time, part-time, contract, interns or volunteers.

• Employers must provide an applicant with a copy of the applicant's criminal record before questioning the applicant about the record or before making an adverse decision based on the record.

• Unless otherwise required by law or court order, an employer must properly discard CORI obtained from the DCJIS no later than 7 years from an individual's last date of employment or volunteer service, or from the date of the final decision regarding the individual, whichever occurs later.

• Employers are required to limit and monitor the dissemination of CORI, which may only be shared with employees who “need to know” the information, and to maintain a “secondary dissemination log” that details when and to whom the CORI information was given beyond the requesting organization.
Employers are protected from failure-to-hire claims based on erroneous information on a candidate’s CORI, and from negligent hiring claims if the employer relies on CORI when making its decision.

Employers who annually conduct 5 or more criminal background investigations are required to maintain a written policy that provides that, in addition to any obligations required by the Commissioner by regulation, the employer will: (1) notify the applicant of the potential of an adverse decision based on criminal offender record information; (2) provide a copy of the criminal offender record information and the policy to the applicant; and (3) provide information concerning the process for correcting a criminal record. The model CORI policy is available to members from AIM’s online resource center.

The CORI reform law creates many additional questions for employers regarding the hiring process. AIM will continue to monitor and communicate regarding legislative and regulatory developments. AIM members are encouraged to call the HR Hotline with questions related to criminal background checks.

**Note:** Employers are advised to consult legal counsel to determine if they are legally obligated to conduct CORI checks. CORI only covers Massachusetts criminal records. An employer seeking criminal background information from other jurisdictions will need to use other background checking services to conduct a broader search.

**AIM provides reference and background checking workplace incident investigations services.**

**Employment Applications**

For more detailed information, please refer to AIM’s Employment Applications & Interviews and the Data Security Laws Reference Guides.

The following are mandatory regarding Massachusetts employment applications:

1. **No Pre-employment Medical Inquiries** – Any question designed to ascertain the current or past health status of an applicant is illegal. Omit any reference to disabilities or impairments, excessive absences due to illness, prior workers compensation claims, injuries, etc. It is permitted to ask about disabilities as part of a voluntary affirmative action data-collecting section of the form that is not seen by the person conducting the interview(s).

2. **Lie Detector Language** – All employment application forms in Massachusetts must contain the following specific language regarding the use of lie detector tests before or during employment: “It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.”

3. **Verifiable Volunteer Work** – When employers ask for employment history, they must include language that invites applicants to list any verifiable volunteer work, but explains
that the applicant need not include organizational names that would indicate possible membership in a protected class such as race, color, religion, sex, or national origin.

4. No Criminal Record Inquiries – It is illegal for an employer to ask about a job applicant's criminal history on a job application. The law prohibits employers from asking questions on an "initial written application form" about an applicant's "criminal offender record information," which includes information about criminal charges, arrests, convictions and incarceration. Employers, therefore, are urged to remove all inquiries concerning criminal history from their employment applications. The only exceptions expressly provided in the CORI reform law are for (1) positions for which a federal or state law or regulation disqualifies an applicant based on a conviction; or (2) employers who are subject to an obligation under a federal or state law, regulation, or accreditation not to employ persons who have been convicted. See discussion on the CORI law above.

Under the law, questions may be asked about criminal history later in the employee selection process. The Massachusetts Commission Against Discrimination (MCAD) takes the position that the first time an employer can ask an applicant about his or her criminal history is during or after an in-person or telephone interview. Recent annual reports from MCAD now include cases that cite violations of the CORI law. In one case a temporary help agency that violated the "ban the box" provision of the law was required to pay $6,000 to the employee as part of a settlement agreement.

Note: Equal Employment Opportunity Commission (EEOC) Pre-Employment Inquiries and Arrest & Conviction. Federal law does not prohibit employers from asking about criminal history. But, Title VII of the Civil Rights Act prohibits employers from discriminating when they use criminal history information to make employment decisions.

Title VII also prohibits employers from treating people with similar criminal records differently because of their race, national origin, or other Title VII-protected characteristic. Title VII prohibits employers from using policies or practices that screen individuals based on criminal history information if:

- they significantly disadvantage Title VII-protected individuals; AND
- they do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

5. Age/Date of Birth may only be asked to confirm that an applicant is at least 18 years old.

Note: An employer may not legally take action against an applicant or employee for answering an unlawful question untruthfully. On the other hand, if an applicant answers an illegal question truthfully, any adverse action taken based on the answer may be grounds for a discrimination claim against the employer.
Employers should also consider the following with respect to employment applications:

1. Social Security Numbers – In light of the Massachusetts Data Security Law, AIM recommends that employers do not require or request an applicant’s social security number on an employment application. Under the Massachusetts Data Security Law, these numbers, when combined with the individual’s last name plus either first name or first initial, are considered to be “personal information” and any “breach of security” must be reported to the affected individual(s) and potentially to the state government. This is true for both paper and electronic information. If these numbers are needed, for a background check for example, they can be requested separately and made available on a need-to-know basis.

2. Company EEO Statement – Including an Equal Employment Opportunity (EEO) statement on an employment application is optional. If an employer chooses to do so, however, the statement must include “sexual orientation” and should be similar to the following: “Our company is committed to a policy of nondiscrimination and equal opportunity for all employees and qualified applicants without regard to race, color, religious creed, protected genetic information, national origin, ancestry, sex, age, disability, veteran’s status, or sexual orientation.”

3. Genetic Discrimination – Although not required by law, AIM recommends that employers include on their application the following statement to the effect that Massachusetts Anti-Discrimination law (MGL 151B) prohibits employers from (1) terminating or refusing to hire individuals on the basis of genetic information; (2) requesting genetic information concerning employees, applicants, or their family members; (3) attempting to induce individuals to undergo genetic tests or otherwise disclose genetic information; (4) using genetic information in any way that affects the terms and conditions of an individual’s employment; or (5) seeking, receiving or maintaining genetic information for any non-medical purpose.

Independent Contractors
For more detailed information, please refer to AIM’s Reference Guide Classification of Employees.

Massachusetts law very narrowly defines who may be classified as an independent contractor. For an employer to demonstrate that someone is an independent contractor under Massachusetts law, the employer must be able to show that the worker meets all three of the following tests:

1) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

2) The service is performed outside the usual course of the business of the employer; and
3) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Failure to meet any one of the three tests means the person is an employee. Pursuant to this law, the Attorney General published an Advisory on the Independent Contractor law that is available on its office Website at www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf.

The Advisory discusses the law in detail and describes the imposition of civil and criminal penalties for violations of the law.

For purposes of unemployment compensation laws, the test for independent contractors is very similar to the test above, except that the second element may be satisfied if the worker performs service “outside the usual course of business OR outside the physical premises of the employer”.

The IRS, the U.S. Department of Labor, and the Massachusetts Department of Revenue use different tests to determine independent contractor status. The Massachusetts three-factor test above, however, is the most restrictive definition, and should be followed by Massachusetts employers seeking to minimize their legal risk.

Job Descriptions

Please see AIM’s Reference Guide to Job Descriptions for more detailed information, or contact AIM for assistance with writing or reviewing job descriptions.

While there is no legal requirement that an employer have formal job descriptions, there are many benefits to having well-defined duties, responsibilities, physical and skill/education requirements. The job description is essential when sending an applicant for a post-offer, pre-employment medical examination; to determine if an employee is “fit for duty” following an injury or illness; or to determine how to accommodate a disabled individual under the Americans with Disabilities Act. Job descriptions also facilitate the proper classification of positions as exempt or nonexempt under the Fair Labor Standards Act. They are also very useful in the employee selection process and in managing employee performance. Job descriptions must also be carefully drafted in order to avoid weakening the “at will” status of the employment relationship by inadvertently assuring long-term or permanent employment if the terms of the job description are met.

Non-Compete Agreements

Note: Employers who require non-compete, non-disclosure or non-piracy agreements should regularly update them to ensure that they cover any new duties, responsibilities, titles and knowledge the employee may acquire over the life of his/her employment with the company. Failure to do so may result in the agreement being voided by a court.

A non-compete agreement is typically a document or a clause included within another employment document, designed to protect an employer's commercial goodwill, and/or its confidential proprietary information. Such information can
include customer lists and other sensitive confidential business information. An employer may require some or all employees to sign a non-compete agreement to prevent them from competing directly with the employer at another company or establishing their own competing business. To be enforceable, such an agreement must be reasonable in the geographical area covered and in its duration. A non-compete agreement may be signed at the time of hire, during the period of an employee's employment, or at the time of separation. To be enforcable, a non-compete agreement must include consideration (something of value) in exchange for the employee signing the agreement.

Depending on the circumstances surrounding the signing of the non-compete agreement, it may be difficult to enforce in Massachusetts courts. Employers should consider drafting them as narrowly as possible or using non-disclosure or non-piracy agreements. Any employer considering requiring a non-compete should contact its legal counsel for assistance in preparing the document.

Non-Disclosure Agreements
Non-disclosure agreements require employees not to reveal any confidential information such as trade secrets, recipes or inventions after they leave the company. The non-disclosure agreement should specifically discuss the types of information the employee is to be exposed to and is prohibited from disclosing. A non-disclosure agreement typically does not cover information that could easily be obtained from other sources or that becomes public knowledge. See the National Labor Relations Act (NLRA) section below for a more detailed discussion on the impact of the National Labor Relations Board (NLRB) view on employer's limiting employee conversations on terms and conditions of employment, including topics such as wages and benefits. While the NLRB is generally concerned with such limiting language in an employee handbook, such a provision in a nondisclosure agreement would also violate public policy in that it would chill employees' rights to communicate with each other and/or a union regarding terms and conditions of employment.

Because non-disclosure agreements do not seek to prevent former employees from working, they are often more easily enforced in the courts than non-compete agreements. Any employer considering requiring a non-disclosure agreement should contact its legal counsel for assistance in preparing the document.

Non-Piracy Agreements
A non-piracy, or anti-piracy, agreement is similar to a non-compete and non-disclosure agreement. It prevents former employees from soliciting former customers and clients to leave the former employer and patronize the former employee in his or her new position. It can also seek to prevent former employees from soliciting their former colleagues at the old employer to leave and join the former employee at his or her new employer or business. These agreements must also be reasonable in the geographical area covered and in their duration, and will typically be enforced only for customers with whom the former employee

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actually had a relationship. Courts are sensitive to protecting a customer's choice of vendor, so the free choice of a customer to leave and join with a former employee, without actual solicitation, cannot generally be prevented. As with all such clauses, employers should draft these as narrowly as possible to increase the likelihood of enforcement while protecting their important client and employee relationships.

Any employer considering requiring a non-piracy agreement should contact its legal counsel for assistance in preparing the document.

Pre-Employment Physicals and Medical Inquiries
An employer may legally inquire about an applicant's present or past health only after it has made a bona fide offer of employment. If a company requires or requests a physical examination following the offer of employment and designates the physician for prospective employees, or for current employees, the company must pay for the examination (M.G.L.c.149§159B). A more detailed discussion of drug testing appears later in this publication.

If a company requires a physical examination of an employee, the employer must pay for the employee's time spent obtaining the physical. Additionally, a copy of the examination must be furnished to that individual upon request (M.G.L.c.149§19A).

Retention of Applications
For more information, please refer to AIM's Personnel Records and Federal & State Recordkeeping Requirements or the Affirmative Action Obligations Reference Guides.

In order to respond to a Title VII discrimination charge or an age discrimination charge under the Age Discrimination in Employment Act (ADEA), applications must be retained for one year. In addition, under Title VII, application forms for persons applying for apprenticeship programs must be kept for two years following the date of the application.

For employers that must have an Affirmative Action Plan (AAP), applications should be kept for the current and past AAP years. The employer subject to the AAP is responsible for designating an AAP year. Examples of AAP years include calendar year, fiscal year or year beginning with the date of the commencement of coverage. Employers subject to an AAP for the first time need only retain applications for that year and going forward. Employers interested in learning more about AIM's AAP related services, please call the AIM Hotline at 800-470-6277.

It is recommended that an employer not keep applications any longer than required to do so by law.
II. DISCRIMINATION IN EMPLOYMENT

Anti-Discrimination

The federal Civil Rights Act of 1964 includes Title VII, which prohibits all forms of discrimination based on race, color, sex, religion, and national origin in all phases of the employment relationship. The federal law covers all employers of 15 or more employees and is enforced by the Equal Employment Opportunity Commission (EEOC). Massachusetts anti-discrimination law covers employers of six or more and includes all of the protected classes under federal civil rights law as well as ancestry, age, genetic information, disability, marital status, military service, gender identity and sexual orientation (M.G.L.c.151B§4). The Massachusetts Commission Against Discrimination (MCAD) enforces the Massachusetts anti-discrimination laws. The Massachusetts Appeals Court has agreed with the MCAD position that an individual may be held personally liable for certain discriminatory actions under the state's anti-discrimination laws. An individual alleging discrimination must file a complaint with the MCAD or the EEOC within 300 days of the alleged occurrence.

The Massachusetts Supreme Judicial Court held that employees may sue employers of less than 6 employees for employment discrimination under the Massachusetts Equal Rights Act (MERA). The Supreme Judicial Court ruled that although Chapter 151B excludes small employers of 5 or fewer from its coverage, the Legislature intended to create an alternative avenue for relief under MERA.

Massachusetts and federal anti-discrimination law include frequently used key terms that Human Resource professionals should be aware of. They include bona fide occupational qualification, disparate impact and disparate treatment. These terms are briefly discussed below.

• **Bona Fide Occupational Qualification (BFOQ)** is a qualification for a position that is discriminatory but is permissible provided the employer can demonstrate that the qualification is reasonably necessary to the normal operation of the business. An example would be discriminating on the basis of sex when the job requires the employee to bathe patients. The employer bears the burden of proof to show that the BFOQ is a business necessity.

• **Disparate Impact** exists when an employer has an apparently neutral policy that has an adverse impact on a member or members of a legally protected class. The burden of proof is on the employee but if the employee proves disparate impact, the employer may be able to defend itself by showing the policy is a BFOQ.

• **Disparate Treatment** exists when an employer intentionally treats a member of a protected class less favorably than other employees in terms of employment. The burden is on the employee to prove the disparate treatment.

In order to help employers understand their responsibilities in responding to a discrimination claim, it is helpful to be familiar with the McDonnell Douglas burden shifting test.
Burden of Proof

In employment discrimination cases the plaintiff (employee) must prove that he or she is the victim of unlawful discrimination. In making a charge of discrimination an employee must prove that:

1. he or she is a member of a protected class;
2. possessed the necessary qualifications and adequately performed his or her job;
3. was nevertheless dismissed or otherwise suffered an adverse employment action at the hands of his or her employer; and
4. his or her employer sought someone of roughly equivalent qualifications to perform substantially the same work.

Since most cases do not involve direct evidence of discrimination, and to help bring the full story to light, the U.S. Supreme Court established the three step burden shifting test in 1973 to govern an employee’s discrimination allegation.

The three steps are:

1. Plaintiff has to state a very simple case, one that does not require direct evidence.
2. Defendant (employer) must provide a legitimate reason for the challenged employment decision.
3. Plaintiff must prove that the reason offered by the defendant in step two is “a pretext for discrimination.”

The legal process at the Massachusetts Commission Against Discrimination (MCAD) illustrates the burden shifting test. An employee (or former employee) files a formal written complaint alleging one or more types of discrimination. The complaint is then sent to the employer who outlines its response to the complaint. The MCAD then convenes a meeting to gather further information about the complaint.

Based on the results of that process the MCAD issues either a Probable Cause (PC) or Lack of Probable Cause (LOPC) finding. A PC determination means the case moves forward in the MCAD process. An LOPC determination means that pending the outcome of an appeal, the claim is dismissed and closed as far as MCAD is concerned. According to the MCAD 2014 Annual Report, the MCAD found LOPC in 83% of the claims it considered. Given an employer’s responsibility to respond with a legitimate reason supporting its particular employment action, clear and accurate documentation of the action is essential.

Same-Sex Marriage

For more detailed information, please refer to AIM’s Human Resource Issues Regarding Same-Sex Marriage in Massachusetts Reference Guide.

Effective May 17, 2004, the Massachusetts Supreme Judicial Court declared that under Massachusetts law, the phrases “spouse” and “marriage” must include same-sex couples. The ruling extended the coverage of Massachusetts based employment law benefits to same sex couples, including Mini-COBRA, the Small Necessities Leave Act (SNLA), the Massachusetts Parental Leave Act (MPLA), Sick Leave, Domestic Violence Leave and the Massachusetts state tax code.
In June 2013, the U. S. Supreme Court overruled section 3 of the Defense of Marriage Act (DOMA), the federal law passed in 1996 to deny legal rights to same sex couples regarding federal laws. As a result federal law now recognizes that married same sex couples must be treated the same as opposite sex married couples regarding all federal laws including FMLA, COBRA, and the U.S. tax code.

In 2015 the U.S. Supreme Court ruled that there is no constitutional prohibition against same sex marriage, thus making it legal throughout the Unites States. The Obama administration is currently amending and revising various federal regulations such as FMLA and COBRA to bring them into compliance with the Supreme Court’s ruling.

Age Discrimination
The federal Age Discrimination in Employment Act (ADEA) prohibits an employer from discriminating based on age against an employee 40 years old or older in any employment actions. Massachusetts anti-discrimination law also prohibits discrimination on the basis of age beginning at age 40.

The Supreme Judicial Court of Massachusetts has ruled that a case alleging age discrimination must be based on a “substantial” difference in age, which it defined as no less than five years, unless there is other evidence to prove discriminatory intent by the employer.

Reasonable Factors Other than Age (RFOA)
The ADEA provides employers with an affirmative defense against a limited range of age discrimination claims. The defense is based on a standard called reasonable factors other than age (RFOA). The EEOC issued rules a few years ago clarifying when an employer may use this defense, limiting its application to only a few kinds of employment practices. Specifically, it applies to practices that:

- are neutral on their face,
- might harm older workers more than younger workers, and
- apply to groups of people.

For instance, RFOA may apply to tests used to screen employees or to some procedures used to identify persons to be laid off in a broad reduction-in-force (“RIF”).

An employer would be required to prove the defense only after an employee has identified a specific employment policy or practice, and established that the practice harmed older workers substantially more than younger workers. To show an employment practice is an RFOA, the employer must prove that an employment practice was reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers.

The extent to which the employer defined and applied the factor fairly and accurately refers to the steps the employer took to make sure that the practice was designed and applied to achieve the employer’s intended goal while taking into account potential harm to older workers. The EEOC offers a couple of examples that we have included below to illustrate the point:
Example 1
A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

Example 2
The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer’s stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in the example above.

Forced Retirement
In general, forcing employees to retire is prohibited. There are, however, exemptions for bona fide high-level executives and bona fide seniority or benefit plans (M.G.L.c.149§24A-K; c.151B). There is no upper age limit on this protected class.

Armed Services
Massachusetts law prohibits employment discrimination against members of the armed services. The law specifically bans 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. The law covers discrimination against any person who “applies to perform” military service as well. The law does not impose any greater compliance burdens than the ones already imposed by the federal Uniformed Services Employment and Re-employment Rights Act (USERRA) of 1994. (See military leaves below for a more detailed discussion of USERRA.)

Disability – Federal Law
For more specific information on the ADA, ADAAA and MA disability law, please see refer to AIM’s Reference Guide to Disability Laws.

The Americans with Disabilities Act (ADA) applies to employers of 15 or more employees. It prohibits an employer from discriminating against a “qualified individual” who happens to have a disability.

A “qualified individual” is a person who meets bona fide skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform
the "essential functions" of the position either with or without "reasonable accommodation." "Disability" is defined by the ADA as: (1) having a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) having a record of such impairment; and/or (3) being regarded as having such impairment.

The ADA Amendments Act of 2008 (ADAAA), which took effect on January 1, 2009 greatly expanded the definition of disability and, therefore, the statute's coverage. The ADAAA was passed in response to a number of Supreme Court decisions that limited the coverage of the law, often by narrowing the definition of what it means to be disabled. In adopting the ADAAA, it appears that the intent of Congress was to shift the focus away from whether the plaintiff (applicant/employee) meets the definition of what it means to be disabled to whether the employer complied with its obligations to engage in an interactive process to determine if the qualified individual is able to work, with or without a reasonable accommodation.

The 2008 ADAAA Amendments:

• Reinforces concept that an impairment must substantially limit a major life activity in order to be considered a disability.

• Includes specific examples of major life activities, including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

• Prohibits the consideration of mitigating measures such as medication, prosthetics, and assistive technology, in determining whether an individual has a disability, with the exception of ordinary eyeglasses and contact lenses.

• Provides coverage to people who experience discrimination based on a perception of impairment, regardless of whether the individual actually experiences a disability. However, this does not apply to transitory and minor impairments where the impairment is expected to last less than six months.

• Makes clear that employers will not be required to provide a reasonable accommodation to individuals who are "regarded as" disabled.

• Retains the requirement that the employee has the burden of proof in demonstrating that he or she is qualified and able to perform the job.

EEOC guidance makes clear that the ADA also protects qualified applicants and employees from employment discrimination based on their relationship or association with an individual who has a disability. The ADA prohibits discrimination based on relationship or association in order to protect individuals from employer actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person with a disabled spouse from being denied employment because of an employer's unfounded assumption
that the applicant would use excessive leave to care for the spouse.

The key to determining if discrimination has occurred is whether the employer’s actions are motivated by an individual’s own disability or by the individual’s relationship or association with a person who has a disability. The employer is required to provide a reasonable accommodation only to a person who has a disability.

An applicant cannot legally be asked to provide medical information (or be asked about prior workers compensation claims) prior to a bona fide offer of employment.

Disability – State Law

Like the ADA, Massachusetts law provides protection against employment discrimination for “qualified” (able to perform the essential functions of the position either with or without reasonable accommodation) disabled individuals. Employers of six or more employees must reasonably accommodate a qualified disabled person unless to do so would cause undue hardship to the employer. In addition, an employer may not make any pre-employment inquiry as to whether the applicant is disabled or as to the nature or extent of the disability. A company may condition an offer of employment on the applicant successfully passing a medical examination conducted to ascertain whether the applicant can, with or without a reasonable accommodation, fulfill the essential functions of the position (M.G.L. c.151B§3,4).

Once employed, the employee may be asked to submit to a medical examination only when job-related and consistent with business necessity.

The Massachusetts Appeals Court has ruled that allowing an employee to work from home might be considered a reasonable accommodation for an employee’s disability. Whether or not the employer must make such an accommodation depends on a number of factors, including whether the essential functions of the job can be performed at home, whether the employer allows other employees to telecommute, whether the employee can perform the job without direct supervision, and the amount of equipment the employee may need at home to perform the job.

The Massachusetts Supreme Judicial Court now recognizes that state anti-discrimination law extends to prohibiting employers from discriminating against employees based on their association with a disabled person. This means an employer may not make an employment decision based on its concern that continuing to employ someone will increase the employer’s health insurance expenses or otherwise adversely affect the company, even if those expenses flow from the physical or mental impairment of someone who is associated with that employee and covered under the employer’s health insurance plan.

Gender Identity

Protected classes under Massachusetts anti-discrimination law includes gender identity. This law extends the state’s equal rights provisions to transgendered individuals by prohibiting discrimination on the basis of gender identity in employment, housing, credit and education. Under this law, employers will be
prohibited from refusing to hire, discharging or discriminating against any individual in compensation or in terms, conditions or privileges of employment, because of an individual's gender identity.

The law defines gender identity as “a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth.” While the law lists medical history and care or treatment as possible evidence that an individual belongs to this protected class, evidence that the gender-related identity is a sincerely held belief will also be sufficient.

Genetic Discrimination
The federal Genetic Information Nondiscrimination Act (GINA):

1. Prohibits employers from discriminating against an employee or job applicant based upon genetic information;
2. Places broad restrictions on an employer’s deliberate acquisition of genetic information;
3. Mandates confidentiality for genetic information that employers lawfully collect;
4. Strictly limits disclosure of such information; and
5. Prohibits retaliation against employees or job applicants who complain about genetic discrimination.

Following the adoption of the law, the U.S. Equal Employment Opportunity Commission (EEOC) issued final regulations implementing GINA. The final regulations provide examples of genetic tests; more fully explain GINA's prohibition against requesting, requiring, or purchasing genetic information; provide model language employers can use when requesting medical information from employees to avoid acquiring genetic information; and describe how GINA applies to genetic information obtained via electronic media, including Websites and social networking sites.

The regulations also provide guidance regarding GINA's impact on requests for health-related information (e.g., to support an employee's request for reasonable accommodation under the ADA or a request for sick leave). When making such requests, the employer should warn the employee and/or health care provider not to provide genetic information. The warning may be in writing or verbal (if the employer typically does not make such requests in writing).

As previously discussed, Massachusetts state law already prohibited employers from requiring or requesting genetic test results, as well as from discriminating in terms and conditions of employment on the basis of genetic information. Massachusetts General Laws, c.151B, defines “genetic information” as any written record or explanation of a genetic test of a person’s family history with regard to the presence, absence, or variation of a gene. A genetic test is broadly defined as “any test of DNA, RNA, mitochondrial DNA, chromosome, or proteins for the purpose of identifying genes or genetic abnormalities.” The law expressly excludes drug and alcohol tests from this definition,
meaning that employers may continue to conduct those tests in accordance with existing legal requirements.

Massachusetts employers should take the following measures to comply with state and federal law:

1. Confirm that any required physical examinations do not require the disclosure of genetic information.
2. Ensure that genetic information is not inadvertently provided to them, and that no employee's file includes genetic information of any kind. Wellness plans should be reviewed to ensure GINA compliance.
3. Train human resources personnel, managers and recruiters about compliance with GINA, especially the provisions generally prohibiting deliberate acquisition of genetic information.
5. Ensure that EEO policies include prohibitions against discrimination based on genetic information and associated retaliation.

Investigations
For a more thorough discussion of the investigation process, please see the AIM Reference Guide on Sexual Harassment.

Whenever an employer receives a complaint of discrimination from an employee, the employer must respond immediately by conducting an investigation. An employer's failure to investigate may form an independent basis for liability, only if the underlying claim for discrimination succeeds. MCAD's guidance also states that employers should make every effort to keep its investigation as confidential as possible. Although Massachusetts law makes it clear that investigating and addressing a claim of discrimination is not decisive in enabling an employer to overcome a discrimination complaint, it is clear that a failure to investigate and resolve a complaint will likely allow the employee to prevail.

Confidentiality
Supervisors and managers should make it absolutely clear to any employee alleging discrimination that they will make every effort to maintain confidentiality, but that the employer will have to confront the employee(s) accused of discrimination and may have to speak with witnesses.

Note: A recent National Labor Relations Board (NLRB)* ruling suggests that employers cannot insist on blanket confidentiality by employees related to an investigation except under specific circumstances. While the NLRB case may be appealed, employers need to be aware of this general prohibition and the exceptions as they handle investigations. The four bases on which an employer can insist on employee confidentiality related to an investigation include:

- to protect a witness,
- to stop evidence from being destroyed,
- to avert fabricated testimony, or
- to prevent a cover-up.
This conflict over confidentiality may raise a question over which standard (MCAD or NLRB) an employer should follow when conducting an investigation. AIM generally recommends following the MCAD standard as most claims are likely to be adjudicated under Massachusetts state law but employers with a question about the best course of action should contact the AIM Hotline or outside legal counsel.

*Many recent decisions and actions by the NLRB that impact non-union employers are subject to an ongoing political debate and legal challenges which may limit the authority of the NLRB and lead to the above provision being changed during 2016. AIM will continue to monitor this issue and inform members of changes as they occur.

National Origin/Ancestry
It is illegal to discriminate against an applicant and/or an employee on the basis of characteristics associated with national origin or ancestry, such as marriage to a person of a particular national origin, participation in organizations identified with a particular national origin, or having a name associated with a particular national origin. Due to the significant increase in I-9 compliance audits by the U.S. Citizenship & Immigration Services (USIS) agency, employers should be very alert to the fact that they face increased scrutiny over possible disparate treatment of employees not born in the U.S. during the I-9 preparation process.

For more information about this and other I-9 related matters, please see AIM's Reference Guide to Form I-9 (Employment Eligibility Verification Form), E-Verify & H1-B visas.

English-Only Rules
English-only rules are presumed by the EEOC to violate anti-discrimination laws when they require that English be spoken at all times (e.g., even during breaks) in the workplace. The federal court for Massachusetts ruled that an employer may require employees to speak English during work time if the policy is based on a legitimate business necessity such as communication with customers, workplace safety or cooperative work assignments. Any employer considering adopting an English-only policy should carefully consider what situations the policy is intended to address and explore if there is another way to resolve the matter.

Pregnancy
An employer subject to state and/or federal anti-discrimination laws may not deny a woman the right to work or restrict her job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. Any employer questioning a pregnant employee’s ability to perform her job should seek a fitness for duty report on the employee prior to taking any action. The mere fact of pregnancy does not automatically establish a disqualifying disability. An employer may not legally use a woman’s pregnancy, childbirth, or potential or actual use of maternity leave as a reason for any adverse job action, such as refusing to hire or promote her or for discharging her, laying her off, failing to reinstate her, or restricting her duties.
The federal Pregnancy Discrimination Act (PDA) also states that the employer must treat pregnancy-related disabilities in the same manner as any other disability. In 2014, the EEOC issued a new guidance informing employers that they must provide pregnant workers with light-duty positions if they provide light duty for other workers. Although the guidance does not require employers to create a light duty policy where none exists, employers that only offer light duty for work related injuries and not for other situations such as post a short term disability absence face two options:

- Open up light duty to include pregnancy, or
- Revise their light duty policy in general to include all return to work situations, including post work injury, pregnancy and non-work injury.

While the EEOC guidance does not require employers to provide a “reasonable accommodation” as does the Americas with Disabilities Act (ADA) for all pregnant employees, it instead reiterated its position that the ADA and PDA only require accommodations beyond light duty for pregnancy-related impairments that substantially limit a major life activity.

All health insurance and disability plans must provide benefits and consideration for pregnancy-related conditions on the same basis that they are provided for other medical conditions.

In 2015, the U. S. Supreme Court considered a case about pregnancy and modified duty under the PDA. In that case, the employer claimed no need to provide modified duty to a pregnant employee while the employee and the US government argued that the EEOC's guidance mentioned above required the employer to provide modified duty. The Supreme Court rejected both approaches, instead deciding that if an employee can show that the employer has a modified duty plan for others such as injured employees, then the employer has the burden to prove why it could not accommodate the pregnant employee. And the employer cannot use reasons such as “more expensive or less convenient” to add pregnant women to the categories of those whom the employer accommodates. Employers facing this issue should contact the AIM Hotline or legal counsel.

Race/Skin Color
The EEOC Compliance Manual provides guidance on analyzing charges of race and skin color discrimination in violation of Title VII. Title VII does not define race or skin color nor has the EEOC adopted its own definitions.

The Compliance Manual states that Title VII prohibits racial discrimination based on ancestry, physical characteristics, race-linked illness, culture, perception, association, racial subgroup characteristics or reverse race discrimination. It also prohibits skin color discrimination on the basis of pigmentation, complexion or skin shade or tone. The manual is available on the EEOC Website.

Religion
Federal and state anti-discrimination statutes protect individuals from discrimination in the workplace based on their sincerely held religious beliefs, without regard to whether such beliefs are
approved, espoused, prescribed, or required by an established church or other religious institution or organization. In 2008, the EEOC issued an update to its Compliance Manual on religious discrimination, along with a fact sheet of questions and answers and a best practices guide. These documents were issued partly in response to a significant rise in charges of religious discrimination. The update contains information on religious discrimination in employment, including materials on avoiding religious discrimination in hiring, promotion and other employment decisions; employer liability for religious harassment; accommodating employees' religious beliefs and practices in the workplace; retaliation; and exemptions for religious-based institutions. The compliance manual also contains a number of employee best practices intended to instruct employees on the best ways to advise employers of their religious practices, how to resolve conflicts between those practices and work rules, and how to handle discussions about religious faith and proselytizing in the workplace. The manual is available on the EEOC Website.

Under Massachusetts law, any employee intending to be absent from work for religious reasons may be required to notify the employer at least 10 days in advance. An employer may refuse to accommodate such a request if it can show that such an accommodation would be an undue hardship on the business. The employer always has the burden to demonstrate the hardship. The employer need not pay the employee for the day and may, whenever practicable in the judgment of the employer, arrange to have the employee work another day to make up the time. Caution is recommended before refusing to grant days off for religious observances since even significant inconvenience may not meet the "undue hardship" standard.

Employers should also proceed cautiously when implementing dress/grooming policies or when dealing with such issues as facial hair, body and facial piercings and tattoos since these can arise from religious practices (M.G.L. c.151B§4).

In Brown v. F.L. Roberts & Co. [so-called Jiffy Lube case] (2008), the Massachusetts Supreme Judicial Court ruled that a Rastafarian man was entitled to a trial on possible religious discrimination for refusing to cut his hair or beard to comply with his employer's policy on grooming. Although the Court recognized the employer's right to institute a grooming policy, it disagreed that providing an exemption from a grooming policy constitutes an undue hardship as a matter of law. The Court ruled that blanket assertions of "public image" are not sufficient to determine which employees deal with customers because they could lead to a slippery slope that favors members of so-called majority religions. The Court found that, because the employer never discussed possible alternatives with the employee, it could not show conclusively that a total exemption from the grooming policy was the only accommodation. Therefore, because it could not show that it could not provide a reasonable accommodation, the company would not be able to assert the defense of undue hardship.
On the other hand, in an early 2000’s U.S. Appeals Court decision involving a dress code policy that would among other things ban facial piercings at Costco, an employee claimed that her faith (the internet based Church of Body Modification which promoted piercings and tattoos) required her to wear her facial piercings at all times. Costco told the employee she could either cover it with a band-aid or replace it with a clear space holder during the work day. She refused to comply, citing religious discrimination. In considering whether or not it was permissible for Costco to promote its dress code the First Circuit U.S. Court of Appeals ruled that the employee’s claim of religious rights were not essential tenets of the Church and that therefore the accommodations offered by Costco were reasonable and did not violate the anti-discrimination law.

Employers must tread very carefully when an employee seeks an exemption from a grooming policy on religious grounds. Employers must, at a minimum, engage in a meaningful discussion about a possible accommodation and document the discussion.

Retaliation
In addition to prohibiting employment discrimination generally, Title VII as well as the employee protection laws of Massachusetts protect employees who complain of discrimination through employer-initiated retaliation. In 2006 the U.S. Supreme Court clarified that Title VII’s anti-retaliation provision should be interpreted broadly in order to allow employees to complain of discrimination or participate as a witness in an investigation without fear of reprisal. In defining what “interpreted broadly” means, the Court held that employer conduct that would dissuade a reasonable employee from making or supporting a charge of discrimination would violate the law. Thus, even if the action or harm does not affect the employee’s compensation, terms, conditions or privileges of employment, the employer’s conduct may open the employer to a retaliation lawsuit. While the Court did stress that the context within which the alleged behavior occurred is important, it is clear that employers should be very careful in making personnel decisions following the filing of a discrimination complaint.

Under Massachusetts law, even if the underlying actions are not ultimately found to be discriminatory, an employer may still be liable for retaliating against an employee engaged in protected activity such as reporting or seeking redress for that non-discriminatory action. Additionally, the Massachusetts Supreme Judicial Court has recognized that an employer may be liable for retaliation even when the employee has only made an internal complaint and never files a complaint with a governmental agency. For example, the MCAD reported that retaliation claims were the third most frequently (17%) cited claim in its FY 2014 annual report. In FY 2015, Forty-five percent of all claims filed with the EEOC involved retaliation charges.

Given the increase in successful retaliation claims and the breadth of the Court rulings, employers should take extra care to train supervisors and managers on how to manage current employees who have filed a complaint or have been called as a
witness on any employment matter ranging from discrimination and harassment to non-payment of wages to FMLA – whether such a complaint has been filed internally or with a government agency.

**Sexual Harassment**

*For more detailed information, please see AIM's Reference Guide to Sexual Harassment. Contact AIM for sample policies, training services, and for investigation of complaints.*

Sexual harassment is a form of illegal sex discrimination under both state and federal law. In Massachusetts, all employers of six or more employees must have a sexual harassment policy that is distributed to new employees when they are hired and to all employees annually. Volunteers may not sue under the Massachusetts sexual harassment law.

The Supreme Judicial Court has ruled that Massachusetts recognizes third-party liability if an employer is unable to protect one of its own employees from harassment by third parties such as a subcontractor. The employer can protect itself from liability by showing it took reasonable steps to address the harassment in a timely manner. An employee will not be disqualified from receiving unemployment benefits if the reason he or she left work was due to sexual harassment.

The Massachusetts Commission Against Discrimination (MCAD) has developed a model policy that employers may use. The MCAD has also issued sexual harassment prevention guidelines outlining responsibilities and investigations of complaints. The model policy and the guidelines are available at www.mass.gov/mcad. These guidelines indicate that training of managers and supervisors is strongly encouraged. *For information on AIM's sexual harassment training programs, please call the AIM Hotline.*

**Same-Sex Harassment**

The U.S. Supreme Court has held that same-sex harassment claims, in which an employee claims harassment by another employee of the same sex, are actionable under Title VII, the federal anti-discrimination law. The harassing conduct need not be motivated by sexual desire, but must nonetheless be severe, pervasive, and offensive to a reasonable person.

**Sexual Orientation**

A Massachusetts employer may not discriminate against an individual in compensation or in terms, conditions, or privileges of employment due to that person's sexual orientation.

**Reverse Discrimination**

In 2009, the United States Supreme Court ruled that New Haven Connecticut discriminated against white firefighters when it discarded the results of a test for promotion because too few minority firefighters had passed. The court ruled that such an action discriminated against the white firefighters who had passed the test, since the failure to promote was solely race-based. Mere fear of litigation by the city from the minority firefighters was insufficient reason to discriminate against the white group, particularly where the city had “no strong basis in
evidence" to believe it might lose a disparate impact claim by the minority workers.

This decision makes it more difficult for employers to discard the results of hiring and promotional tests once they are administered, even if they have a disproportionately negative impact on members of a specific group. Such race-based actions are prohibited under Title VII unless the employer can show a "strong basis in evidence" that it would be liable for disparate impact discrimination had it not taken the action. This decision applies to all employers and all procedures used to assess, rank and sort current and potential employees.

**Gender Discrimination and Social Stereotyping**

In a 2009 federal case, Chadwick v WellPoint, Inc. the mother of four young children brought a claim of gender discrimination against her employer after she was denied a promotion. At the time of her application for promotion, the employee had worked for the employer for seven years, and had received excellent performance reviews. When she questioned why she was not promoted, the decision-maker stated, "It wasn't anything you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now."

The U.S. First Circuit Court of Appeals found that a jury could infer from the above statements that she was denied the promotion due to the assumption that a woman with four young children might not "give her all" to the job. The opinion makes the point that employers should not assume that a woman, because she is a woman, will be a less productive employee due to family responsibilities. Additionally, employers may not take an adverse job action based on the assumption that a woman will neglect her job responsibilities in favor of her presumed childcare responsibilities.

### III. NEW HIRE REMINDERS

The hiring of an employee requires employers to take a number of steps to ensure compliance with the relevant laws. This section consolidates hiring related topics, including some that are addressed in other sections of this guide.

**COBRA Notification of Rights Letter**

The COBRA Notification letter requires subject employers (i.e. employers 20 or more employees that offer health insurance) notify eligible employees about their rights under COBRA. The letter must be sent to employees and their spouses and dependents at the time they become eligible for coverage. Make sure to document your compliance with the requirement by keeping a copy of the letter in the personnel file or by sending it certified mail with a return receipt requested.

**Employment Eligibility Verification Form (I-9 Form)**

An employer must have a completed I-9 on file for every employee hired on or after November 7, 1986. Section 1 of the Form I-9 must be filled out by the employee by the first day of employment. The Act also requires that employers complete Section 2 of the Form I-9 by verifying the identity and work authorization of all employees within three business days of hire,
and also sets forth recordkeeping requirements. Please see the document retention provision of the Section X, Termination.

Personal Responsibility and Work Opportunity Reconciliation Act
This law requires every employer to report all new hires and independent contractors who will be paid over $600 in a calendar year to the Massachusetts Department of Revenue (DOR), which will then transmit the information to the National Directory of New Hires.

The required information must be submitted to the Massachusetts DOR within 14 days of the employee's effective date of employment or effective date of reinstatement after a lapse in pay (a lapse in pay would be a period of time beyond 30 days). This report must contain the employer's identification number, name, and address as well as the employee's name, address, Social Security number and hire or reinstatement date.

Reminders
Have employees receive and sign for employer handbook, any specific policies (i.e. conflict of interest, sexual harassment, ethics, non-competes, non-disclosures, data security, etc.) and relevant company materials.

IV. EMPLOYMENT

Employment-At-Will*
In general, the employer's decision to hire an employee does not represent a commitment to employ that person for any definite period of time unless the employer and employee have an employment contract defining the terms of employment. The employee may quit at any time and for any reason, and the employer may terminate the employee at any time and for any reason except for reasons that are against public policy or are specifically forbidden by state and federal law, including anti-discrimination laws. Public policy exceptions include being a whistleblower, participating in jury duty, being subpoenaed as a witness in a criminal prosecution and filing a workers compensation claim. The National Labor Relations Board has recently begun to review employer's employment-at-will statements to determine whether or not the at-will statement demonstrates anti-union animus on the part of the employer. The NLRB appears to be concerned that a rigid or inflexible at-will statement may be construed by employees as denying their rights to engage in concerted or protected activity under the NLRA.

*Many recent decisions and actions by the NLRB that impact non-union employers are subject to an ongoing political debate and legal challenges which may limit the authority of the NLRB and lead to the above provision being changed during 2016. AIM will continue to monitor this issue and inform members of changes as they occur.

Employee Handbooks and Personnel Policies
Employers are not required by any law to have employee handbooks. Many employers choose to create such documents
in order to establish in writing the policies and practices, and benefits of employment. It is important that handbook language be carefully drafted and that it contain sufficient disclaimers to avoid creating unintended contractual obligations. All employee handbooks should adopt clear and prominent language stating that no policy represents an enforceable promise, that employees gain no rights from the policies expressed, that the employer has complete discretion to interpret policies and to unilaterally alter any policies at any time, and that the handbook is an informational guide only. While employers may include a reference to policies such as non-compete, non-disclosure or non-piracy, employers are strongly recommended to adopt stand-alone policies that employees must sign on a regular basis. Employers should also regularly review and update their employee handbooks to ensure they remain consistent with any new developments in company policy and with changes in regulations and/or laws.

In 2007, the Massachusetts Appeals Court found that the Massachusetts Turnpike Authority had formed an implied contract with a long-time employee, due in large part to the language of the employee handbook. In 2008, the Massachusetts Supreme Judicial Court affirmed that decision. In light of that case, to avoid the employee having a reasonable belief that past policies will not be changed retroactively, handbooks should also separately provide that any change to policies may apply retroactively. Any updates of handbooks or policies should specifically state that they supersede and replace the old policies, that the old policies are of no continuing force or effect, and that the changes apply retroactively. Handbooks should not be given to applicants until they are hired.

Employers are not required by law to have written personnel policies, except for sexual harassment policies (six employees or more) and in some cases a Family and Medical Leave Policy (50 employees or more). An employer of 20 or more employees that elects to have a written personnel policy must keep an updated copy of such policy on the employment premises.

Please contact AIM for more information. AIM provides a variety of handbook-related services including creating, reviewing and editing handbooks, as well as model policies, a complete model handbook, and a handbook policy subscription service.

Employment of Minors
For more information, please refer to AIM’s Reference Guide to Classification of Employees.

In 2010 the federal Department of Labor’s Wage and Hour Division (WHD) published a Final Rule governing the employment of children in non-agricultural jobs. It contains the most far-reaching revisions to the federal child labor regulations in the last thirty years. According to the WHD, the purpose of the Final Rule is to foster permissible and appropriate job opportunities for working youth that are healthy, safe, and not detrimental to their education. Employers must comply with the stricter of either the federal or state laws while employing minors in Massachusetts. Please visit the Department of Public Health Website for a

Prior to working, all minors from 14 to 17 years of age must secure an employment permit from their school superintendent’s office as well as written permission from a parent or guardian. Employers may include a question on its employment application such as “Are you at least 18 years of age old?” to confirm that the child labor laws do or do not apply to a particular applicant. Certain maximum daily and weekly work restrictions apply during school and non-school hours depending on age (14 and 15, 16 and 17). The minor’s weekly schedule of hours and breaks must be posted in a conspicuous area. There are a number of categories of hazardous areas in which minors under the age of 18 may not work at all. For example, no minor under 16 may work in a manufacturing facility. Certain exemptions from these provisions are available for agriculture, for theaters and restaurants, or for minors in vocational education programs (M.G.L. c.149§60-98).

Under the Massachusetts and federal child labor laws, 14 and 15 year olds are not allowed to work prior to 7:00 a.m. on any day, regardless of whether or not school is in session. During the school year, they are allowed to work as late as 7:00 p.m., but they cannot work during the school hours of the local public school where they reside. The law extends the work hours of 14 and 15 year olds to 9:00 p.m. during the summer, which is defined as July 1 through Labor Day.

Massachusetts law restricts the work hours of 16 and 17 year olds to between 6:00 a.m. and 10:00 p.m. on school days and 6:00 a.m. and 11:30 p.m. on any night that does not precede a regularly scheduled school day. Exceptions to these restrictions are as follows: they may continue to work until 10:15 p.m. on a school night if they work at an establishment that stops serving clients or customers at 10:00 p.m.; and they may continue to work until midnight on a non-school night if they work at a racetrack or restaurant.

In addition to the restrictions stated above, children under the age of 18 may not work after 8:00 p.m. unless they are under the direct and immediate supervision of an adult, acting in a supervisory capacity, who is situated in the workplace and who is reasonably accessible to the minor. The sole exception to this requirement is minors who are employed at a kiosk, cart, or stand located within the common areas of an enclosed shopping mall that employs security personnel, a private security company, or a public police detail every night from 8:00 p.m. until the mall is closed to the public.

**EEO-1 Reports**

All employers with at least 100 employees, and all employers with 50 or more employees and $50,000 or more in primary federal government contracts or first tier contracts (sub-contracts), must file an EEO-1 report annually (by September 30) with the EEOC. The most recent (2007) EEO-1 form must be used by all covered employers when filing the report. The revised form introduced
changes to the racial and ethnic categories, as well as changes to the job categories. The form strongly endorses self-identification of race and ethnic categories by employees, as opposed to visual identification by employers.

*The EEO-1 reporting deadline was extended in 2015 until October 30, 2015. Any EEO-1 subject employer should check to confirm the due date in 2016.

Immigration

Note: The current I-9 is due to expire on March 31, 2016. In late 2015, the United States Citizenship and Immigration Service (USCIS) issued a draft of a new Form I-9 for a 60 day comment period. It is anticipated that following the comment period, the USCIS will issue a Final I-9 sometime in the late winter or early spring 2016.

The federal Immigration Reform and Control Act of 1986 prohibits the hiring of undocumented immigrants and also prohibits discrimination against individuals who are legally authorized to work in this county. The United States Citizenship and Immigration Services (USCIS) has significantly increased its compliance enforcement efforts around the proper preparation of Form I-9’s. Employers are required to maintain strict compliance with I-9 completion deadlines and to ensure that the form is properly and thoroughly filled out by the employee and the employer.

Section 1 of the Form I-9 must be filled out by the employee by the first day of employment. The Act also requires that employers complete Section 2 of the Form I-9 by verifying the identity and work authorization of all employees within three business days of hire, and also sets forth recordkeeping requirements. In order to verify the identity and work authorization of an employee, the employer must view the actual identification documents and not a copy. That means that an employer may not rely on remote viewing technologies such as skype to view the document and verify it. If an employer is hiring a remote employee, the employer must use a local agent (local manager, notary public, etc.) to view and verify the document(s). Employers must not specify which documents should be presented to demonstrate citizenship or work authorization. An employer may, but is not required to, make copies of an employee's documents. Employers that choose to retain document copies must ensure that they make copies of all the relevant documents, their handling of Form I-9s is fully compliant with the statute, that their practice of retaining copies is documented and that it is followed consistently.

In 2013, the USCIS issued a new Form I-9, which changed and reduced the number of documents employers can accept to satisfy the Form's requirements. Employers may not accept expired credentials to establish the identity or work eligibility of new hires. The most recently issued Form I-9 has a revision date of March 8, 2013 and a stated expiration date of March 31, 2016. This is the only I-9 permitted to be used.

Form I-9s may be electronically signed and retained, and paper forms may be scanned and stored electronically, as long as the specified electronic filing system standards are met.
the law permits the commingling of personnel and I-9 files, AIM strongly recommends that employers maintain them separately in order to facilitate compliance with an I-9 audit. Employers must have a Form I-9 on file for every employee currently working, unless the employee was hired prior to November 7, 1986. The immigration law further requires employers to retain a copy of the completed I-9 for three years from the date of hire or one year following the employee's termination, whichever is later. Failure to comply with the law may lead to significant monetary and criminal penalties.

All employers should have a system in place to remind them that they may need to reverify an employee's I-9 documentation. U.S. citizens and noncitizen nationals never need reverification. Do not reverify the following documents: An expired U.S. passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card (Form I-551), or a List B document that has expired.

Employees whose immigration status, employment authorization, or employment authorization documents expire should file the necessary application or petition sufficiently in advance to ensure that they maintain continuous employment authorization or valid employment authorization documents. If the employee is authorized to work for a specific employer, such as an H-1B or L-1 nonimmigrant, and has filed an application for an extension of stay, he or she may continue employment with the same employer for up to 240 days from the date the authorized period of stay expires. An employer must reverify an employee's employment authorization on the I-9 no later than the date that the employee's employment authorization or employment authorization document expires, whichever is sooner.

**E-Verify**

Federal contractors and their subcontractors that meet certain criteria are required to electronically verify the employment eligibility of their employees through a free electronic system known as E-Verify. Federal contractors who are awarded a new contract that includes the Federal Acquisition Regulation E-Verify clause must use the E-Verify system.

Federal contractors must use the system for:

- All new employees, following completion of the Employment Eligibility Verification (Form I-9), within three business days of their start date. The system may only be used after an employment offer has been accepted.
- All existing employees who are classified as “employees assigned to the contract.” Employees who have already been verified through E-Verify should not be re-verified by the same federal contractor.

Employers participating in E-Verify must post a notice indicating participation in the program. The notice must be posted in a location clearly visible to job applicants.

Non-governmental contractors may also elect to participate in the E-Verify system. For more information about the program, please visit www.uscis.gov/everify.

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New Hire Reporting
The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires every employer to report all new hires and independent contractors who will be paid over $600 in a calendar year to the Massachusetts Department of Revenue (DOR), which will then transmit the information to the National Directory of New Hires.

The required information must be submitted to the Massachusetts DOR within 14 days of the employee’s effective date of employment or effective date of reinstatement after a lapse in pay (a lapse in pay would be a period of time beyond 30 days) (M.G.L.c.62E §2). This report must contain the employer’s identification number, name, and address as well as the employee’s name, address, Social Security number and hire or reinstatement date.

Any employer with 25 or more employees is required to report new hires electronically, which may be done through the Department of Revenue’s Website at www.mass.gov/dor. (Click on the “For Businesses” tab and then on the “New Hire Reporting” link.)

Performance Evaluations
There is no law requiring that employees be appraised on their performance. However, an accurate and well-written performance evaluation can provide justification for, and potentially defense of, adverse employment actions such as corrective action or discharge.

Performance appraisals should highlight areas of excellence, opportunity and needed training and development. It is also a good management practice to offer feedback and coaching to all employees. Except in certain jobs that, by law, require ongoing training, training in general is not mandated. Certain types of training, however, have been proven to assist greatly in the defense of employment decisions and, perhaps most importantly, to potentially prevent claims and lawsuits. These include training on supervisory and management skills, as well as harassment and discrimination prevention.

Training
The WTPF provides for two principal types of grants: (1) the Express Grant program through which employers of 100 or fewer employees may be reimbursed for 50% of the cost of employee training up to a maximum of $3,000 per course and $30,000 in a 12 month period; and (2) the General Grant, which is available to companies of any size and designed to support more comprehensive training plans. The waiting period between general grants has been reduced from two years to one. The General Grant allows companies to request up to $250,000 in training funds.

A third lesser known grant is the technical assistance grants which provides funding from between $5,000 to $10,000 to help consortia of employers determine a set of training needs. Eligible applicants include individual employers serving as the lead applicant on behalf of a consortium of businesses that hire the
services of a technical assistance provider, community colleges, labor organizations, industry associations, and administrative entities for local workforce investment areas. Technical Assistance grants must be completed within six months.

The Hiring Incentive Training Grant (HITG) program was suspended in 2014 and there is no scheduled date to begin operating again.

The WTFP is funded by Massachusetts employers through an annual per employee unemployment insurance surcharge. Please contact AIM for additional information on how to apply for grants and/or other assistance related to the WTFP.

Personnel Records
Certain records kept by an employer relating to an employee's qualifications, compensation, disciplinary action, promotion, and transfer are considered to be personnel records in Massachusetts and are subject to state regulation.

Employers that maintain personnel files must notify employees within ten days of adding any information to their personnel files that “has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.”

The law also requires that, if an employee requests it, an employer must provide an employee with a copy of his or her personnel record, or the opportunity to review his or her personnel record at the place of employment during normal business hours, within five business days of a written request. The Act does add, however, that an employer does not have to allow an employee to review his or her personnel record on more than two separate occasions in a calendar year. It is important to note that a review caused by notification that negative information has been placed in a personnel file will not count toward the two annually permitted reviews. Fines of up to $2,500 may be imposed on employers that do not allow appropriate employee access to these records.

If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position, which must become part of the employee's personnel file. Employers of 20 or more employees must retain a copy of the personnel record for at least 3 years after the employment relationship ends or throughout the duration of any ongoing litigation, whichever is longer.

Data Security
For more detailed information, please see AIM's Reference Guide to Massachusetts Data Security Laws. Visit AIM's Online Resource Center, www.aimnet.org, for worksheets to assist your company in developing a written information security program and determining compliance with the regulations.
The Massachusetts data security law consists of two major sections. The first one, Chapter 93H, mandates that any employer that knows or has reason to know of a “breach of security” concerning the “personal information” of any current or former employee or applicant, (or any other Massachusetts resident), must notify that individual. The law applies to all entities engaged in commerce that maintain electronic or paper files containing personal information about employees and/or clients who are residents of Massachusetts.

Personal information consists of an individual's last name plus either first name or first initial, combined with one or more of the following: Social Security number; driver's license or state-issued identification number; biometric identifiers; financial account numbers; or credit or debit card numbers, whether in paper or electronic form.

"Breach of security" is defined by statute as “the unauthorized acquisition of unencrypted data or encrypted electronic data along with the confidential process or key that may compromise the security, confidentiality, or integrity of personal information maintained by a person or agency that creates a material risk of identity theft.” In addition, a breach of security includes any unauthorized acquisition or use that creates a substantial risk of identity theft or fraud. If a breach occurs, the employer must notify the affected individuals “as soon as practicable and without unreasonable delay.” The notice must be in writing, and include information on how the individuals can obtain a police report, how they can ask consumer reporting agencies to impose a security freeze and any fees required for the freeze. The employer must also provide notice to the Massachusetts Attorney General and the Director of Consumer Affairs and Business Regulation.

The second part of the law, Chapter 93I, defines how employers may properly dispose of documents or data containing personal information of any Massachusetts residents who are current or former employees, job applicants or customers/clients. Paper records containing personal information must be “redacted, burned, pulverized or shredded” and electronic data must be “destroyed or erased.”

The Massachusetts Office of Consumer Affairs and Business Regulation issued the final version of the "Standards for the Protection of Personal Information" (201 CMR 17.00), implementing the provisions of M.G.L. c. 93H. Under 201 CMR 17.00 employers are required to develop and implement a comprehensive written security program that is consistent with industry standards, and is based on a technical feasibility and reasonableness standard. Employers are allowed greater flexibility based on risk, size of company, and resources available. The employer must also designate an employee who is responsible for maintaining the information security program. Employers are required to train employees on information security, and to discipline them for violations of the information security program rules.

Massachusetts employers now must have written security programs in place and ensured that their data-security
technology complies with the law. They must also take all reasonable steps to verify that third-party service providers with access to personal information have the capacity to protect the personal information, and that such third-party service providers are applying protective security measures at least as stringent as those required under the regulations.

All organizations and individuals in commerce who deal with “personal information” of Massachusetts residents must comply with these new data management requirements or face monetary penalties and potential suit brought by the Massachusetts Attorney General.

National Labor Relations Act (NLRA)/National Labor Relations Board (NLRB)

In carrying out its enforcement activities, the NLRB continues to be a significant force intent on re-shaping the American workplace. The NLRA was adopted in 1935 to encourage the growth of labor unions. Since 1954 the number of unionized employers in the private sector has steadily decreased and the activities and reach of the NLRB decreased as well. In recent years the NLRB has taken a number of high profile steps that are likely to impact the operation of nearly every employer in the country. The areas where the NLRB has been active include reviewing non-unionized companies handbooks, requiring employers to make company email systems accessible to employees during non-work time, implementing “quickie” elections and narrowing the scope of what it means to be a bargaining unit within a company. This section highlights some of the recent developments.

Mutual aid or protection

Though little known, there is language in the NLRA protecting two or more employees acting in concert whether or not those employees belong to a union. The “other mutual aid or protection” provision allows the NLRB to respond to disputes that arise in non-unionized settings. An example of this would be two or more workers discussing the terms and conditions of their employment (i.e. working conditions such as wages, salaries, overtime or safety) in which an employer discovers and takes disciplinary action against the employees. Depending on the facts and circumstances, the mutual aid clause may justify the NLRB in ruling that the employees are engaged in protected concerted activity and overturn the employer’s actions.

Social Media

Employers must be careful when adopting and enforcing any social media policy that may be viewed as limiting an employee’s ability to discuss the terms and conditions of employment. For example, in a 2011 case, the NLRB held that employee confidentiality agreements limiting an employee’s ability to discuss terms and conditions of employment including wages violated the NLRA.

To help employers that wish to establish a social media policy, the NLRB issued a model social media policy in 2012. Any employer that has or is considering adopting its own social media policy should review the NLRB model policy and strongly
consider using it as the basis for its policy. It is available from the NLRB Website www.nlrb.gov* and the AIM on-line resource center at www.aimnet.org.

Employee Handbooks and the At-Will clause
In recent years the NLRB raised questions about what criteria must be met for an employer to use the term “at-will” in employee handbooks or other documents. The NLRB focus is on whether or not the at-will language presents a chilling effect on employees’ ability to organize (so-called section 7 rights) into a union. The NLRB has stated that as long as the at-will statement includes language along the lines of “Only the Company President is authorized to modify the Company’s at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employee and the President.” it will not violate the NLRA.

Confidentiality of investigations
Another NLRB decision holds that unless certain criteria are met, an employer may not be able to keep its internal investigations confidential. Under the NLRA, the initial burden is on the employer to establish “a legitimate and substantial confidentiality interest” with respect to the witness statements by showing that the:

• witness[es] need protection,
• evidence is in danger of being destroyed,
• testimony is in danger of being fabricated, or
• there is need to prevent a cover up.

If the employer is able to make such a showing, “the Board then weighs the [employer’s] interest in confidentiality against the [union’s] need for the information in deciding what happens to the information contained in the investigation. See the discussion above on investigations for more information on this topic.

Micro-unions
In 2011, the NLRB issued the Specialty Health Care ruling in which it recognized the concept of micro-unions (i.e. subsets of employees within a bigger workplace) making it potentially easier for unions to organize subsets of employees where previously the unions had to organize the entire workplace. This decision upended long-standing precedent that held that when a union attempted to organize a workplace, it did so on a “wall to wall” basis, meaning it sought to win the support of a majority of all the eligible-to-vote employees, rather than a subset of the employees. In permitting elections governing only a sub-set of employees within a company, the NLRB has laid the foundation for numerous small scale organizing drives across the economy.

Quickie Elections
The NLRB also issued so-called “Quickie Elections” rules in April 2015 that limit the time for an employer to respond to a union organizing campaign by reducing the election cycle from approximately 42 days to approximately 21 days, and in some cases even less time.

Company E-Mail
In the late 2014 Purple Communications decision, the NLRB ruled that employee use of email for statutorily protected (in this
case, union-related) communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. The decision does not require employers to give email access to employees that currently do not have it but does make it clear that if the employer does allow access, it must allow these types of communications. This ruling means that any company policy intended to limit the use of the company email system to “business purposes only" is likely to run afoul of this ruling.

Remedies
The NLRA provides that the Board may take a number of remedial steps to correct a violation. The steps include issuing cease and desist orders, ordering reinstatement and back pay, and requiring employers to post a notice explaining employees' rights under the NLRA.

Privacy
Employees are protected against unreasonable, substantial, or serious interference with their privacy (M.G.L.c.214 §1B). Unlike many of the commonwealth's employment laws, the privacy law is enforced by individuals via lawsuits. Massachusetts courts have held that this law must balance the employer's legitimate business concerns versus the employee's reasonable expectation of privacy in the workplace. This balancing test has been applied in such areas as drug testing, changing clothing, release of medical or personal information, use of electronic communications, searching of desks and lockers, and employee surveillance. In the cases of drug testing, searches and surveillance, the expectation of privacy may be eliminated through well communicated policies explaining that the employer will, or reserves the right to, conduct these actions. Particular care should be exercised regarding the release of personal or medical information since there could be ADA and HIPAA issues as well as those related to privacy. Employers should carefully document situations and their resulting decision making processes.

Texting While Driving
Among other things, the Massachusetts Safe Driving Law bans text messaging while driving. The law does the following:

• Bans all operators of motor vehicles, including law enforcement officers, from text messaging. Drivers caught texting will be assessed fines of $100 for a first offense, $250 for a second offense, and $500 for a third offense.

• Prohibits drivers less than 18 years of age from using any type of cell phone or mobile electronic device, whether hand-held or hands-free. Those found to be in violation of the law will be punished with a 60-day license/learner's permit suspension, a $100 fine, and the completion of an “attitudinal" course for a
first offense. The punishment for a second offense will be a 180-day license/learner’s permit suspension and a $250 fine. Subsequent offenses will result in a 1-year license/learner’s permit suspension and a $500 fine.

• Requires drivers age 75 and older to renew their license in-person at a Registry of Motor Vehicles (RMV) and to undergo a vision test every 5 years.

• If physicians or law enforcement officers have cause to believe an operator is not physically or medically capable of driving safely, they may report their opinion to the RMV for a medical evaluation.

• Prohibits operators of public transportation vehicles from using any type of cell phone or mobile electronic device, whether hand-held or hands-free.

• Makes drivers who have three or more surchargeable incidents within a 24-month period subject to an examination to determine their capacity for driving safely.

In light of Massachusetts’s safe driving law, employers should adopt and consistently enforce a written policy prohibiting texting while driving. Such a policy will put employees on notice that the company takes the new law seriously and requires compliance.

AIM recommends that employers have a clearly written policy regarding cell phone use by employees who drive on company business, and that they carefully consider its provisions. This is especially important if cell phones are provided by the employer. While the law described above prohibits only texting while driving, employers should carefully consider their expectation of employees who might make/receive business related calls and/or send/receive e-mails on their mobile devices while driving for either business or personal reasons. In the case of a business driver, or an employer-provided mobile device, it also increases the potential for employer liability.

It is important to remember that if it is an employer’s actual practice, whether or not the practice agrees with the written policy, to expect employees to make/receive calls or read/respond to e-mail while driving, it is the actual practice that will ultimately be examined, not the fact that an employee may have violated a written policy.

Smoking
Massachusetts law requires all employers of one or more employees to provide smoke-free workplaces. Employers may designate a smoking area outside of the workplace but it must be far enough away from the building that the smoke cannot enter the workplace. An employer may treat e-cigarettes the same as regular cigarettes. Employers bear primary responsibility and liability for enforcement. “No smoking” signs must be conspicuously posted so they are clearly visible to all employees, customers or visitors while in the workplace. The law allows for limited exemptions in certain businesses such as smoking bars, and hotels and motels with designated smoking rooms. The law imposes fines of $100 to $300 per violation assessed against the employer, with harsher punishment possible for repeat
offenders. The law also calls for fines of $100 to be levied against individual violators. The law is enforced by the local board of health, the state Department of Public Health (DPH), the local inspection department, municipal government, and the Alcoholic Beverage Control Commission.

With respect to smoking in company vehicles, the DPH guidance documents state that company vehicles must be smoke-free if more than one employee may use a vehicle or if more than one person occupies it at any given time.

Drug Testing
To date, Massachusetts has no statutory restrictions on drug testing of employees or applicants for employment. However, the Massachusetts Supreme Judicial Court has established principles for such testing through case law, generally holding that random drug testing violates an employee's rights under the state privacy statute unless the job is safety sensitive, e.g., requires driving a vehicle or operating dangerous machinery. Under MCAD guidelines and the ADA, employers are advised to test only after a bona fide offer of employment has been made and to conduct all testing of prospective and current employees under a specific policy that has been made known to these individuals. According to the EEOC, it is permissible under the ADA if the employer tests applicants or employees for illegal drugs only and makes its employment decisions based on the results.

Massachusetts law recognizes four levels of employee drug testing:

1. **Post-offer pre-employment testing**—may be imposed on all applicants
2. **Post-accident**—limited to testing employees following workplace injuries
3. **Reasonable suspicion**—testing applied on a case-by-case basis when the employer has a reasonable basis for doing so
4. **Random testing**—limited to the testing of employees in safety-sensitive occupations as defined by the employer.

The federal Drug Free Workplace Act of 1988 requires federal government contractors and employers receiving contracts or grants of $25,000 or more to take specific steps to ensure a drug-free workplace. The Act does not require testing for illegal drugs. However, testing of certain employees is required if the company must comply with Department of Transportation (DOT) commercial driver's license regulations or has contract work with the DOT. For more information, call the DOT: (202-366-4000) or visit their Website at www.dot.gov.

The U.S. Department of Transportation Office of Drug & Alcohol Policy & Compliance (ODAPC) published a Final Rule in the Federal Register that restored mandatory direct observation collections for all return-to-duty and follow-up drug testing. The rule is applicable to return-to-duty, safety-sensitive transportation industry employees who have already failed or refused to take a prior drug test.

All employees subject to the rule who go for return-to-duty and follow-up tests must have their collections observed by someone.
of the same gender. The employee must show the collector that he or she is not wearing a prosthetic device designed to carry clean urine and urine substitutes. If an employee refuses to permit any part of the direct observation procedure, this is considered a refusal to submit to a test and may lead to termination of employment.

Although some employers and labor organizations may have entered into collective bargaining agreements that prohibit or limit the use of direct observation collections in return-to-duty and follow-up testing situations, it is now a requirement of federal law and supersedes any such contractual agreements. Additionally, employers covered by DOT drug and alcohol testing rules must ensure that labs properly conduct collections to comply with direct observation procedures.

Medical Marijuana

In November 2012, Massachusetts voters passed by ballot referendum (popular vote) a law entitled “An Act for the Humanitarian Use of Marijuana” providing for the use of marijuana for medical purposes (medical marijuana). The law took effect in 2013. The law is under the jurisdiction of the Massachusetts Department of Public Health (DPH), which promulgated regulations in 2014. The Commonwealth is currently determining who will operate and where the law’s 35 authorized medical marijuana dispensaries will be located. As of this writing, the DPH is beginning to license medical marijuana dispensaries across the state.

Nothing in the medical marijuana law requires the accommodation of any on-site use of medical marijuana in any place of employment. In most employment settings and situations, employers may treat marijuana use as one more item subject to its drug testing policy, relying on the testing to determine whether or not an employee is impaired in their ability to perform their job due to the use of marijuana. In light of the new law, employers should review their existing drug testing and drug use policy to state that medical marijuana will not be permitted in the workplace. Employers should also confirm that their employment application is consistent with its policies. Federal contractors remain subject to the federal Drug Free Workplace law, which does not recognize state medical marijuana laws.

Note: The first lawsuit alleging medical marijuana use discrimination was filed by an employee in 2015. AIM will monitor the case as it moves through the courts and report updates through the HR Edge as they occur.

Nothing in the medical marijuana law requires the accommodation of any on-site use of medical marijuana in any place of employment. In most employment settings and situations, employers may treat marijuana use as one more item subject to its drug testing policy, relying on the testing to determine whether or not an employee is impaired in their ability to perform their job due to the use of marijuana. In light of the new law, employers should review their existing drug testing and drug use policy to state that medical marijuana
will not be permitted in the workplace. Employers should also confirm that their employment application is consistent with its policies. Federal contractors remain subject to the federal Drug Free Workplace law, which does not recognize state medical marijuana laws.

Unionized Employers
Massachusetts does not have a “right to work” statute. Therefore, if an employer or unit of an employer is unionized, an employee may, after a stated period of time, be required to join a union or pay union dues as a condition of employment. Employees have the right to bargain collectively (with or without a union) and to engage in other concerted activities with respect to their employment. For more information about this topic, please see the NLRA/NLRB section above.

Tax Withholding Information and Employee Social Security Statements
The year-by-year display of earnings listed in the Social Security Statement is a compilation of information reported on: (1) paper Form W-2; (2) electronic/magnetic media equivalents that employers send to the Social Security Administration (SSA) each year; or (3) self-employment income reported to the Internal Revenue Service (IRS). The earnings record has a direct bearing on the eligibility for, and amount of, Social Security benefits payable to eligible individuals and their families. Therefore, it is essential that timely and accurate Form W-2 information be submitted to the SSA. For more information, call the SSA’s Employer Hotline at (800)-772-6270 or visit their Website at www.ssa.gov/employer.

V. PAYMENT OF WAGES
Classification of Employees
For more detailed information on the classification of employees, refer to AIM’s Reference Guide, Classification of Employees.

The federal Fair Labor Standards Act (FLSA) establishes two classifications of employees: nonexempt and exempt. Nonexempt employees may be paid on an hourly or salary basis of at least the minimum wage and must receive payment of time-and-one-half for all hours worked in excess of 40 in each workweek. Exempt employees must be paid on a salary basis and must meet the salary and duty test for administrative, professional, executive, computer-related, or outside salespersons as stated by the FLSA. Exempt employees are not entitled to overtime pay or a guaranteed minimum wage regardless of the number of hours worked in a workweek. Employees earning less than $455 per week or $23,660 per year are automatically classified as nonexempt, regardless of the duties the employee performs.

Misclassification of employees as being exempt from overtime pay is one of the most frequent mistakes made by employers, especially for positions such as customer service, inside sales and administrative assistant. This failure to pay overtime appropriately creates the potential for significant legal and financial liability under both federal and state law. AIM encourages all employers
to review their job descriptions and employment classifications to correctly determine which employees are exempt and which ones are nonexempt and to take corrective action to properly classify employees as soon as it is determined that one or more of them are misclassified.

Note: The U.S. Department of Labor has announced that it will issue revisions to the FLSA white collar regulations tentatively scheduled for the middle of 2016. For more assistance on this issue, please contact AIM's HR Hotline at 1-800-470-6277.

Direct Deposit
According to the Massachusetts Fair Labor Division, the wage and hour enforcement division of the state Attorney General's office, an opinion letter from the Commissioner of Banks concludes that the electronic funds transfer law does not prevent an employer from requiring its employees to participate in the company's direct deposit program. However, the employee must be allowed to choose the bank and participation in the program must not cost the employee anything. Therefore, an employer may not require participation in a direct deposit program if the employee is forced to open a bank account that he or she does not want and to incur fees associated with that account, unless the employer is prepared to pay for the establishment and maintaining the account.

Garnishment of Wages
Under federal law, garnishments are limited to the lesser of 25 percent of disposable earnings or the difference between disposable earnings (earnings after taxes and the employee's share of social security payments) and 30 times the current minimum wage rate (currently $7.25 per hour). An employer is prohibited from firing an employee whose earnings are subject to garnishment for any one single garnishment. However, the law does not prohibit discharge because an employee's earnings are separately garnished for two or more debts. The U.S. Department of Labor enforces this law against any violations.

Massachusetts state law provides that a garnishment may not exceed the greater of 85% of the debtor's gross wages or 50 times the greater of the federal ($7.25 per hour) or Massachusetts hourly minimum wage (currently $10.00 per hour) for each week or portion thereof shall be exempt from such attachment. For example, an employee earns gross wages of $1,000 per week. Fifteen percent (i.e. 100% - 85%) of the gross wages is $150 and disposable earnings less 50 times the Massachusetts minimum wage of $10.00 are equal to $500 (i.e. 50 x $10 = 500, $1,000 - $500 = $500). Due to the lesser amount provision in the law, a creditor may only garnish up to $150 of the employee's wages per week. (M.G.L.c.246 §28).

The limits explained above do not apply to child support, student loans, and unpaid taxes. If an employee owes child support, student loans, or unpaid taxes, the government or creditor can garnish wages without getting a court judgment. The amount that can be garnished is different as well.
Child Support
The amount that may be garnished for child support varies depending on the employee's circumstances as highlighted below:

• Up to 50% of an employee's disposable earnings may be garnished to pay child support if the employee is currently supporting a spouse or a child not the subject of the order.

• Up to 60% of an employee's disposable earnings may be garnished if the employee is not supporting a spouse or child.

• An additional 5% may be garnished for support payments over 12 weeks in arrears.

Student Loans in Default
In this case the U.S. Department of Education (DOE) or any entity collecting on its behalf can garnish an employee's wages through an administrative garnishment without first getting a court judgment. The most that the DOE can garnish is capped at 15% of an employee's disposable income, but not more than 30 times the state minimum wage.

Unpaid Taxes
The federal government can garnish wages if an employee owes back taxes, even without a court judgment. The amount of the garnishment depends on the number of dependents an employee has and the employee's deduction rate.

States and local governments may also be able to garnish wages to collect unpaid state and local taxes.

If a judge orders an employee to obtain health care coverage for his/her child, the employee must do so if such coverage is available through the employer. Employers are obligated to cover a child subject to such an order and may be liable for the full amount of the assigned income or the full amount of medical costs incurred if they fail to comply with an order of income assignment or a health care order (M.G.L. c. 119A §12,14,16).

Holiday Work
Public employers must close on all Massachusetts legal holidays while private employers have the option, with some exceptions, of remaining open. An employer cannot require an employee to work more hours on other days or in any one day in order to make up time lost by reason of a legal holiday (M.G.L. c. 149 §46). A calendar of the 11 legal holidays and related requirements is available through AIM's Online Resource Center at www.aimnet.org.

Some special rules apply as follows:

Manufacturers
Overtime pay is not required for work performed on any of the legal holidays unless established by company policy, time worked on the holiday results in the employee exceeding 40 hours per week, or pursuant to a union contract. However, on those days designated as “Sunday Law” holidays - to which blue laws apply - manufacturers, unless they are a continuous operation, must secure a permit from the local chief of police
to open, and work must be voluntary on the part of employees (M.G.L.c.149§45;c.136§15). The continuous operation exception is a very limited one requiring the employer to show that the work is absolutely necessary and for technical reasons the company must operate continuously. Examples include military and pharmaceutical emergencies.

Retail
Retail stores may open at any time on New Year's Day, Martin Luther King Day, Presidents' Day, Patriots' Day, Memorial Day, Independence Day, and Labor Day. Retail stores may open on Columbus Day and Veterans Day after noon and 1:00 p.m., respectively. Retailers wishing to open before these times must obtain permission from the local chief of police. Retailers with seven or more employees cannot require work on New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, or Veterans Day; and if employees work voluntarily, they must be paid time-and-one-half. Only retail stores exempted by statute may open on Christmas and Thanksgiving. Examples of stores exempt from the blue laws include convenience stores, pharmacies, bakeries, florists, and video rental stores (M.G.L.c.136§13&§16).

Non-manufacturers, Non-retail
Establishments that are neither manufacturing nor retail must obtain a permit from the local chief of police to operate on the restricted holidays of Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, on Columbus Day before noon and on Veterans Day before 1:00 p.m. If the permit is obtained, employees may be required to work. Pay would be at the employee's regular rate of pay unless otherwise required by union contract or by the employer's policies and practices.

Breaks
Meal Breaks
An unpaid meal break of 30 minutes must be given each nonexempt employee required to work more than six hours. The employer may choose to provide pay for the meal break (M.G.L.c.149§100). Any employee working during a meal break must be paid for that time. An employee may waive a meal break if the employee voluntarily states this choice in writing. The employee, however, may revoke the waiver at any time. For a sample waiver form visit AIM's Online Resource Center www.aimnet.org.

The Fair Labor Division of the Massachusetts Attorney General's Office may also grant an exemption from the meal break law if it can be made without injury to the persons affected and for the following reasons:

- By nature of certain industry—glassworks, paper mills, ironworks, etc.
- The continuous nature of the process
- Collective bargaining agreements (M.G.L.c.149§101)

Rest Periods—There is no requirement for an employer to provide employees with rest periods (e.g., coffee breaks) under
either federal or Massachusetts law. The Fair Labor Standards Act (FLSA) requires that if a break is given, and it is for 20 minutes or less, it must be paid. Breaks are part of a company's voluntary benefits practice.

Breaks for Nursing Mothers
As part of the Affordable Care Act of 2010 employers are now required to provide “reasonable” unpaid breaks for nursing mothers. The health care law amends the FLSA, requiring employers to provide:

1. A reasonable unpaid break every time an employee needs to express breast milk for her nursing child for up to one year after the child’s birth; and
2. A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which the employee may use to express breast milk.

Employers of fewer than 50 employees are exempt from this requirement if it would “impose an undue hardship by causing the employer significant difficulty or expense.” The burden is on the employer to demonstrate the undue hardship.

Minimum Wage
Effective January 1, 2016, the Massachusetts minimum wage is $10.00 per hour. The law further provides for a $1.00 increase on January 1, 2017 to $11.00. Under Massachusetts law, if the federal minimum wage increases, the Massachusetts minimum wage must exceed it by at least $0.50 per hour. Tipped employees are only required to be paid $3.35 per hour with the expectation that tips from customers will increase the hourly rate to the minimum wage. If the tipped employee does not receive at least minimum wage during a pay period, the employer must make up the difference. A poster stating the updated minimum wage must be posted on the company bulletin board (M.G.L.c.151§1).

On-Call Pay
Whether or not an employee’s time must be paid as “on-call” time depends on whether that time predominantly benefits the employer and whether employees are able to use the time for their own purposes. For example, on-call time is generally not compensated for an employee who is required to wear a pager and answer emergency calls but who can travel within a reasonable distance and can otherwise use the time as he/she chooses. Employees may be compensated at less than their regular rate of pay for their on-call time. However, if the employee is called in to work, the employee must be paid his/her regular rate, or overtime, if appropriate.

Payment of Overtime
State and federal law requires employers to pay time-and-one-half for all work actually performed in excess of 40 hours in a given workweek by all nonexempt employees. The FLSA does not consider holiday pay, sick pay, or vacation pay as hours worked for purposes of calculating overtime. An employer may, however, choose to adopt a policy to include time paid but not worked in the calculation of overtime. Note: some industries are exempt from the time-and-one-half requirement, e.g.,
mechanics, truck drivers subject to the federal motor carrier act (M.G.L. c. 151 §1A).

The Massachusetts Supreme Judicial Court decided that retail employers subject to payment of overtime under the Sunday Opening law and the FLSA may offset the overtime paid for working Sunday against the FLSA-based overtime on an hour-for-hour basis up to the number of hours worked on Sunday. An employer may elect to pay exempt employees overtime if it so chooses. For more information regarding rules governing retail employers and Sunday work, please see the Sunday work section below.

Employers may require overtime as a condition of employment or continued employment. (See restriction for Sunday work for retail stores and shops.) If an employee works overtime that was not authorized, that employee may be subject to disciplinary action, but must be paid for all time worked.

The FLSA and the Massachusetts Minimum Wage law do not impose any limitation on the number of hours that an employee may work. Instead, they require that employers pay nonexempt employees additional wages (e.g., overtime pay at one-and-one-half times the employee’s regular wage) for hours worked in excess of 40 hours in a workweek. In addition, Massachusetts requires that employers must have one day of rest in seven (see below) and that the employer shall post in a conspicuous place on the premises a schedule containing a list of employees who are required or allowed to work on Sunday, and designating the day of rest for each.

**Payment of Wages**

Under Massachusetts law, employers may elect to pay all employees on a weekly or bi-weekly basis. In addition, employers may pay certain employees semi-monthly or, with the employees’ consent, on a monthly basis. Those employees include:

1. Executive, administrative or professional (exempt) employees; and
2. Nonexempt employees who are paid on a salary basis for a workweek of substantially the same number of hours from week to week.

This means that nonexempt employees whose hours are subject to fluctuation for any reason, including overtime, should be paid either weekly or biweekly.

In all cases, employees must be paid within six days of the end of their pay period.

Employers changing from weekly to biweekly pay for nonexempt hourly employees must provide each employee with written notice of such change at least 90 days in advance of the first biweekly period (M.G.L.c.149§148).

Employers are required to withhold various state and federal taxes from employees’ paychecks for remittance to governmental agencies and must maintain forms (such as Form W-4) and records of these withholdings.
Employers must furnish each employee with a written indication (e.g., a pay statement) containing certain specific information, including notification of deductions or contributions from such employee's pay at the time such deductions or contributions are made. Employers are also required to provide new employees with written notification concerning the nature of deductions and contributions (M.G.L.c.148§150A).

Any employer paying wages by check must ensure that facilities are available for cashing the check (at a bank or elsewhere) without any fee to the employee (M.G.L.c.149§148).


An employee involuntarily discharged from a company for any reason must be paid his or her wages in full on the day of discharge. An employee voluntarily separating from employment may be paid full wages on the next regularly scheduled work day. The Massachusetts Attorney General has taken the position that the word "wages" includes any vacation pay that is earned, but unused by an employee under an oral or written company policy or union contract, but is unused as of the date of discharge (M.G.L.c.149§148). On the other hand, it does not include any accrued but unused sick time. Employers who provide paid time off instead of vacation leave should designate the amount of hours or days of PTO which are considered vacation time in order to limit the amount owed to a separating employee. Absent a well-documented and consistently applied policy and practice, the entire PTO bank is likely to be deemed payable to the separating employee.

Massachusetts courts place very strict limits on an employer's ability to "offset" any obligation to the company by withholding all or a portion of an employee's final wages. An example of a valid offset would be a company issued loan or advance provided there is a written authorization of the employee acknowledging the debt and repayment terms and conditions. An example of an unauthorized offset would be unreturned company property provided to an employee such as uniforms. Notwithstanding the legitimacy of the offset, the employee must receive the minimum wage for every hour worked in the final pay statement. For example, if an employee works 40 hours during his final week and earns $1,000 but owes the company $900, the employer may only offset $600 ($1,000-$400(min. wage) = $600. The employer may sue the former employee in small claims court for the difference.

The word "wages" also includes commissions when the commissions are definitely determined and there is no good faith dispute regarding how to calculate the amount due.

Equal Pay

Federal and state Equal Pay Acts require that men and women be paid the same for performing essentially the same work for
the same employer. Consideration is allowed for factors such as bona fide seniority systems. The Massachusetts Equal Pay Act contains a one-year statute of limitations. The statute of limitations begins on the date that the employee receives the unequal paycheck or the date on which the employee discovers the unequal pay violation, whichever is later.

The Lilly Ledbetter Fair Pay Act redefined the federal equal pay act 180 day statute of limitations so that it now restarts each time the employer issues an unequal paycheck. Additionally, the law allows not only an employee, but also other individuals who were affected by pay discrimination, to file a claim. This means that family members, including spouses, children, and others, might become plaintiffs in discrimination suits over an employee’s pay, even after the employee is no longer living. The Act overturned a U.S. Supreme Court decision that had limited the application of the law.

Reporting Pay
Massachusetts minimum wage laws provide that a nonexempt employee who is scheduled to work at least three hours or more and reports for duty at the time set by the employer must be paid for at least three hours. The employee must be paid at the employee’s regular rate of pay for time actually worked and at least the state minimum wage ($10.00) for the balance of the three hours if work is not performed for at least three hours. Reporting pay also applies if a person shows up for work and has not been notified by the company that work is unavailable for that day or is sent home for lack of work. Union contracts or company policy may indicate a higher rate of pay and/or payment for more than three hours (455CMR§2§3).

An employer may schedule an employee to work for less than three hours as part of a regularly scheduled work shift. Since the regulation only covers workers who are scheduled for three hours or more, the reporting pay provision appears not to require employers to pay reporting pay when a worker is scheduled to work less than three hours and is prevented from finishing the shift.

Sunday Work
Please see AIM’s Legal Holidays Calendar for further information on Sunday and Holiday work.

Manufacturers
All manufacturers, except continuous operations, need to secure a permit from the local chief of police to perform necessary work on Sunday. Even where a permit is secured, non-continuous operations manufacturers cannot require employees to work on Sunday. When employees do agree to work on Sunday, they may be paid at their regular rate unless such work constitutes overtime under the provisions of the FLSA or unless more generous payment is provided by company policy or union contract. Continuous operations companies can require employees to work on Sunday, and are not required to pay overtime or premium pay unless the Sunday work constitutes overtime under the provisions of the FLSA or unless such pay is provided by company
policy or union contract. Any manufacturing, mechanical, or mercantile employer must post the names of those employees working on a Sunday along with their designated days of rest (M.G.L.c.149§51). Please see the discussion below regarding the work schedule/one day of rest law.

Retail Stores and Shops
Retail stores may open at any time on Sundays but cannot require that an employee work. If the store employs more than a total of seven persons, including the proprietor, on Sunday or any other day of the week, it must pay time-and-one-half to all nonexempt employees for all hours worked on Sunday. (M.G.L.c.136§5,6). See the payment of overtime section above for a discussion of retailers and overtime in more detail.

There are no restrictions on Sunday work for employers that are non-manufacturing and non-retail.

Training Pay
Training required by an employer is considered “hours worked” and nonexempt employees must be paid at their regular rate of pay. Generally, attendance at training programs does not constitute “hours worked” only if all four of the following factors are met if:

- attendance is outside normal working hours,
- attendance is completely voluntary,
- attendance is not directly related to the employee's current job assignment, and
- no work of value to the employer is performed by the employee during the training.

Travel Pay
The general rule is that commuting time is not paid work time. However, the FLSA covers three different forms of travel time that may constitute paid work time for nonexempt employees. They are travel during the workday, out-of-town travel and overnight travel.

Travel during the workday that occurs after the employee has reported for work and that is for the benefit of the employer is usually compensated. Commuting time to the place of departure (e.g., airport, train station) is excluded from paid work time. However, employees who travel out of town must be compensated for the time spent travelling during normal work hours. Trips that take employees away for overnight are also compensable when the travel time occurs during the employee's regular work hours even if the employee is traveling on non-regularly scheduled workdays (e.g., Saturday or Sunday). Employers may always choose to be more generous than the law requires when compensating nonexempt employees for travel.

Vacation
Employers are not required to offer paid vacation. However, once an employer establishes a vacation policy, the employee must be paid for earned vacation either when the vacation is taken, at year-end (unless it is stated that vacation may be carried forward
into the next year, or there is a “use it or lose it” provision); or at the time employment terminates. At the time of termination, the employee must be paid all vacation time that is due but unused. It is important that an employer’s policy is very specific as to how vacation is accrued and under what circumstances it is deemed to be “due” the employee. This is because the Massachusetts Attorney General’s Vacation Advisory www.mass.gov/ago/docs/workplace/vacation-advisory.pdf states that paid vacation is to be regarded as wages. Thus, a company may want to issue a written statement or policy that clearly separates paid vacations from any paid personal time. If this is not done, all paid personal time will be considered as vacation. Please contact AIM for assistance in developing an effective vacation and/or paid time off policy.

Work Schedule/One Day of Rest
Employers are generally free to set whatever hours of work they wish for employees. However, every employee in manufacturing, mechanical, or mercantile establishments must be given an unbroken 24-hour period of rest in every consecutive seven days of work, which effectively means after six days (M.G.L.c.149§48). There are certain statutory exemptions from the day of rest requirement, including specific types of establishments and certain types of work (M.G.L.c.149§49, §50). For more information on these exemptions, please call the AIM Hotline.

An exemption to this provision may be obtained upon written request to the Massachusetts Attorney General’s Fair Labor Division if it is proven to the Division’s satisfaction that special circumstances require it. Such an exemption will be granted for a 60-day period and can be renewed (M.G.L.c.149551A).

Mandatory Treble Damages
Massachusetts employers are automatically liable for mandatory treble damages (three times the actual damages awarded) plus attorney’s fees for any violation of the Massachusetts Wage Act, regardless of the employer’s good-faith efforts to comply with the law. This means that treble damages will be awarded once a violation is demonstrated, even in cases where the employer made an unintentional mistake.

Given the increased exposure to employers under the treble damages law, it is important for employers to pay close attention to the various technical requirements of the Wage Act and employee classification under the FLSA to ensure that they are in full compliance.
VI. HEALTH INSURANCE

Massachusetts Health Care Reform
In April of 2006, Massachusetts enacted a comprehensive Health Care Reform law. As a result all residents of Massachusetts age 18 or older are required to have health insurance unless they are granted a waiver based on affordability, sincerely held religious beliefs, or a personal hardship situation. This obligation is commonly called the Individual Mandate. Each individual's coverage must meet certain standards called “Minimum Creditable Coverage.” The underlying concept of the law is that of shared responsibility—with individuals, the government, and employers having significant roles and obligations.

The Massachusetts Department of Revenue (DOR) is responsible for enforcement of the individual mandate and penalties for noncompliance are meted through the individual income tax system. The maximum penalty for noncompliance, absent an approved waiver, is 50% of the cost of the lowest cost policy available through the Commonwealth Health Insurance Connector (“the Connector”). The Connector is a quasi-public agency created by the law to facilitate the purchase of health insurance by individuals and by businesses with 50 or fewer employees.

Penalty amounts may differ for young adults under age 27 and for individuals with incomes between 150.1% and 300% of the federal poverty level (FPL). There is no penalty for individuals with incomes up to 150% of the FPL. Penalties apply for any break in coverage in excess of 63 days.

Effective July 1, 2013, most aspects of Massachusetts Health Care reform were repealed as the Commonwealth sought to integrate Massachusetts Health Care reform with federal reforms under the Affordable Care Act. Below is an overview of the changes in Massachusetts Health Care Reform:

1. Repeal of Requirement to Offer a Section 125 Premium Only Plan

Employers are no longer required to set up and maintain an Internal Revenue Service (IRS) Code Section 125 plan that enables employees who purchase health insurance to pay the premium in pre-tax dollars. This includes employees who participate in an employer-sponsored health plan as well as certain non-benefits-eligible employees who may purchase insurance on their own. In addition, the “Free Rider Surcharge” penalty has been repealed. The “Free Rider Surcharge” applied to employers failing to implement a compliant Section 125 plan places if employees and their dependents make substantial use of the state's Health Care Safety Net (free care).

Repeal of Fair Share Contribution
Massachusetts employers are no longer subject to the Fair Share Contribution. As a result, employers no longer face the possibility of a state imposed penalty of $295 per employee per year for failing to make a “fair and reasonable” contribution toward the cost of health insurance for their employees.
AIM members are encouraged to call our Hotline for information and clarifications that complement the overview provided above.

Repeal of Health Insurance Responsibility and Disclosure (HIRD) Obligation
Effective July 1, 2013, Massachusetts employers are no longer required to obtain signed Employee HIRD forms from any employee who declines participation in either an employer-sponsored health insurance plan or Section 125 plan. The employer must keep forms completed prior to July 1, 2013 on file for three years. The HIRD form may be properly disposed of after three years.

2. Annual Health Insurance Coverage Statements – Form 1099-HC
By January 31 of each year, Massachusetts employers must provide a written statement, a Form 1099-HC, to each employee who is/was a Massachusetts resident and to whom they provided group health insurance coverage during the prior calendar/tax year. They must also submit this information to the DOR in electronic format. Legislation passed during 2007 allows Massachusetts carriers to assume this responsibility on behalf of their group policyholders. Self-insured employers and those with group plans written outside of Massachusetts must prepare the statements themselves, or arrange to have them prepared. The 1099-HC contains information about the insurance provider, as well as the names of the subscriber/employee and covered dependents with their subscriber numbers and dates of coverage. Form 1099-HCs indicate whether or not coverage complied with Minimum Creditable Coverage standards. Individuals transfer information from the 1099-HC to Schedule-HC of the Massachusetts personal income tax return to verify compliance with the individual mandate.

The Health Care Reform Law also made changes to the rules that govern the sale of group health insurance policies by carriers operating in Massachusetts. Ongoing changes are communicated through Bulletins issued by the state’s Division of Insurance. The two primary rules affecting employers are described below and they apply to every group policy sale regardless of employer size. Self-insured plans and employers with insured plans written in other states are not subject to these rules but may voluntarily choose to adopt them:

1. The Massachusetts Health Care Reform Law required insured health plans to extend coverage to an employee’s dependent child(ren) up to age 26 or two years following the loss of dependent status under the Internal Revenue Code, whichever occurred first. As a result of a similar provision in the federal Health Care Reform law, which changed the IRS definition of “dependent” for purposes of receiving employer-sponsored health insurance on a tax-free basis, this requirement has been simplified. The current state requirement mirrors the federal provision that became effective for all plan years beginning
on or after September 23, 2010 – dependent children must be eligible for coverage under group health plans up to their 26th birthday. (While Massachusetts insurance rules apply only to insured plans, it is important to note that the federal rule applies to all group plans – both insured and self-funded.)

The original state requirement created imputed income issues for some employees. This was rectified by the federal law and the IRS Code revisions mentioned above, which eliminated the imputed income issue for dependent children who are not yet 27 years of age at the end of a given tax year. (IRS Code Sections 105(b) and 106). It is important to note that, while the IRS Code allows tax-free coverage until the end of the year of the 26th birthday, both state and federal health reform laws require eligibility for coverage only to the date of the 26th birthday.

2. Massachusetts carriers are prohibited from selling a group policy unless coverage will be offered to all “full-time employees,” as defined in the rules, and unless the employer does not discriminate in favor of higher-paid employees in the percentage it contributes toward the cost of the premium. This means it is not acceptable to offer one plan to one classification of higher-paid employees, typically executives, and a different plan to others.

Employers are encouraged to stay abreast of developments. AIM will utilize its blog and newsletters to communicate about these issues and will also conduct educational sessions. As always, AIM members are urged to call the Hotline with their questions.

Contributions governed by a collective bargaining agreement are exempt from this rule.

Employers are encouraged to stay abreast of developments. AIM will utilize its blog and newsletters to communicate about these issues and will also conduct educational sessions. As always, AIM members are urged to call the Hotline with their questions.

Federal Health Care Reform

Since the passage of the Patient Protection and Affordable Care Act (PPACA), the law has continued to evolve. Below is an overview of key employer-related provisions presented in a timeline format:

Effective upon enactment of the law

• Grandfathered Plans - Both insured and self-insured plans in existence on March 23, 2010, PPACA’s enactment date, could be “grandfathered” and therefore exempt from complying with certain of the law’s requirements, provided they continue to meet the criteria for grandfathered status.

• Small Business Health Care Tax Credit – Retroactive to the beginning of 2010 and available to employers of no more than 25 full-time equivalent employees and with average annual wages of no more than $50,000 among those employees.

• Breaks for Nursing Mothers - The Fair Labor Standards Act was amended to provide (1) a “reasonable” unpaid break every time
an employee needs to express breast milk for her nursing child for up to one year after the child's birth; and (2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which the employee may use to express breast milk.

Effective for Plan Years
Beginning On or After September 23, 2010

• **Dependent Coverage to Age 26** – Plans that offer coverage to dependent children must make that coverage available until the dependents reach the age of 26, regardless of residency with the parent, student status, level of parental support, or marital status.

• **First-dollar Coverage for Preventive Care** – Certain preventive services must be provided without any cost-sharing requirements, including copayments or deductibles.

• **Limits on Benefits** – Lifetime limits are prohibited and restrictions apply to annual limits applied to "essential health benefits."

• **Pre-existing Condition Limitations** – Such limitations are prohibited for employees or dependents under the age of 19.

• **Rescission of Coverage** – Retroactive rescission of coverage is prohibited except in very limited circumstances such as acts of fraud.

Effective in 2011

• **Over-the-counter Medications** – Over-the-counter medications are no longer eligible for reimbursement through a flexible spending account (FSA), health reimbursement arrangement (HRA), health savings account (HSA) or Archer medical savings account (MSA) without a prescription with one exception – insulin. Medical supplies and equipment continue to be reimbursable.

• **Increased Withdrawal Penalties** – Penalties on non-medical distributions from an HSA or Archer MSA increased from 10% to 20%.

• **Minimum Medical Loss Ratio Standards** – Policyholders may be reimbursed a portion of their premium when carriers spend less than an established percentage of premium dollars on actual claim expenses.

Effective in 2012

• **Summary of Benefits and Coverage (SBC)** – For all open enrollments beginning on or after September 23, 2012, and for all plan years beginning on or after January 1, 2013, an SBC must be provided to each individual who is eligible to make an election during the open enrollment period, and to each individual who becomes newly eligible or who enrolls due to a special enrollment period. For insured plans, the SBC will be prepared by the carrier.

• **W-2 Reporting of Benefit Value** – Employers that issued at least 250 Form W-2s in the prior tax year are required to report the aggregate value of each employee’s health benefits in Box 12DD on Form W-2s issued for the current tax year.
The exemption for employers issuing fewer than 250 W-2s will continue until the IRS issues information to the contrary, although smaller employers may certainly choose to report the information. The reporting is for informational purposes only and has no effect on employer or employee taxes. An IRS chart (www.irs.gov/uac/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage) is available to help employers determine exactly what must be included in the aggregated number, what is optional to include, and what should not be included.

• **Patient-Centered Outcomes Research Institute (PCORI) Trust Fund Fees** – For group plan years ending on or after October 1, 2012 and before October 1, 2019, a fee will be assessed based on the average number of lives, including all dependents, covered during that plan year. The fee for the first year will be $1.00 times the average covered lives. In subsequent years the fee is increased to $2.00. Carriers will pay the fee on behalf of insured plans. Self-insured plans will pay via the IRS Form 720 federal Excise Tax Return. Fees must be paid by July 31 of the calendar year following the end of the each plan year. Collected fees go into a trust fund for operation of the Patient-Centered Outcomes Research Institute established by PPACA. This is one of many fees and taxes created by PPACA that will have a direct or indirect effect on the cost of operating a group health plan.

**Effective in 2013**

• **Flexible Spending Account (FSA) Limits** – For plan years beginning on or after January 1, 2013, employee contributions to an FSA are limited to $2,500 per year per individual employee. Employers may choose to impose a lower limit, but must not retain a higher limit. There continue to be no limits on employer contributions into these accounts. The written plan document required for FSAs must reflect accurate rules for the operation of the plan so they must be reviewed and amended if changes are made as a result of this new requirement.

• **Notice to Employees about Health Insurance Exchanges** – Effective October 1, 2013, employers are required to notify all current and future employees about the availability of coverage through Exchanges and the potential for employees meeting certain criteria to receive premium tax credits and/or cost sharing reductions.

• **Medicare Tax Increase for Highly Compensated** – Beginning with tax year 2013, the Additional Medicare tax is 0.9% and applies to compensation in excess of $200,000 for an individual tax filer and $250,000 for a couple filing jointly. Employers must withhold the additional amount from individual employees whose compensation exceeds $200,000 per year. There is no employer match on the additional amounts.

**Effective in 2014**

• **Individual Mandate** – Individuals 18 an older are required to have health insurance that meets PPACA “minimum value” standards or pay an Individual Shared responsibility assessment.
• State health insurance exchanges operational.
• Premium tax credits and/or cost sharing reductions as well as plan enhancements available to certain low-income individuals and families with household incomes between 138% and 400% of the federal poverty level who do not have access to affordable health insurance of minimum value through their employer or another source.
• Expansion of Medicaid – residents with household incomes up to 138% of the federal poverty level are eligible for health insurance coverage through Medicaid. This marks an increase from the Medicaid threshold of 100% of the federal poverty level that existed in 2013.
• Pre-existing condition limitations are prohibited.
• No waiting periods longer than 90 days.
• **Flexible Spending Accounts (FSA) Carryover** - Employers may choose between two options for carrying over unused FSA funds at year end. Instead of the existing option of carrying over 100% of unused funds through March 15 of the following year, employers can instead allow a maxim of $500 of unused funds to be carried over through December 31 of the following year.
• **Incentives for Wellness Programs** - Employers can provide incentives to employees who participate in wellness programs. Incentives may take the form of increased or decreased employee share of health insurance premiums; increased or decreased deductibles, co-pays and other out of pocket expenses; increased or decreased employer contributions to Health Savings Accounts and Health Reimbursement Accounts; and other financial incentives. Incentives associated with non-tobacco related wellness are limited to 30% of the total individual premium. Incentives associated with tobacco related wellness are limited to 50% of the total individual premium. The combination of tobacco related and non-tobacco related incentives is limited to 50% of the total individual premium.

**Effective 2015**
• **Employer “Shared Responsibility” Provisions** – Employers of a combination of 100 or more full-time and full-time equivalent employees (FTEs) must offer health insurance that provides minimum essential coverage of “minimum value” to 70% of its full time employees or pay a “shared responsibility” penalty. A covered employer that does not offer insurance faces a penalty of $2,000 times the number of full-time (not Full Time Equivalent Employees) employees minus 80. (The FTE number is used to determine coverage under the federal law but not to calculate any applicable penalty.) If a covered employer offers insurance but that insurance is not “affordable” or not of “minimum value,” then the employer’s “shared responsibility” penalty will be the lesser of the penalty described above or $3,000 per year per each full-time employee who obtains insurance through an Exchange and receives a premium tax credit. In other words, in all cases, the maximum penalty will
not exceed $2,000 times the number of full-time employees minus 80. Employers face Employer Shared Responsibility assessments effective January 1, 2015. However, if an employer offers health insurance that provides minimum essential coverage of “minimum value” to 95% of its full time employees on the first day of its plan year can delay Employer Shared Responsibility assessments until the start of its plan year.

**Employer “Shared Responsibility” Provisions** – Employers of a combination of 50-99 full-time and full-time equivalent employees (FTEs) may postpone Employer Shared Responsibility assessments until 2016 if the employer can certify that

- The monthly average number of employees for all months in 2014 is between 50 – 99 full-time plus full-time equivalent employees
- There were no workforce reductions between 2/9/14 – 12/31/14 for other than bona fide business reasons
- Maintain the employer contribution to “self-only” coverage at either
  - 95% of the 2014 dollar amount or
  - Equal to or greater than the 2014 employer’s contribution
- Certify all of the above in a manner provided by the IRS

**ERISA-like Nondiscrimination Rules for Insured Plans** – This provision will impose rules on insured plans that would prevent them from operating in ways that favor highly compensated individuals. Implementation has been delayed due to many complex issues, including determining the definition of “ERISA-like.” It will not take effect until after final regulations are issued by federal agencies, currently projected for 2015.

**Reporting** – Employers with 50 or more full time and full time equivalent employees must report information on all employees who are full time for one or more months. Information reported includes personal information, eligibility for health insurance, enrollment in health insurance and the employee cost of the lowest cost self-only coverage of minimum value for which the employee is eligible to enroll. Reports are due to employees by January 31 of the following year.

**Effective 2016**

**Employer “Shared Responsibility” Provisions** – Employers of a combination of 50 or more full-time equivalent employees (FTEs) must offer health insurance that provides minimum essential coverage of “minimum value” to 95% of its full time employees or pay a “shared responsibility” penalty. A covered employer that does not offer insurance faces a penalty of $2,000 times the number of full-time (not FTE) employees minus 30. (The FTE number is used to determine coverage under the federal law but not to calculate any applicable penalty.) If a covered employer offers insurance but that insurance is not “affordable” or not of “minimum value,” then the employer’s “shared responsibility” penalty will be the lesser of the penalty described above or $3,000 per year per each full-time employee who obtains insurance through an
Exchange and receives a premium tax credit. In other words, in all cases, the maximum penalty will not exceed $2,000 times the number of full-time employees minus 30.

- **Reporting** – Employers with 50 or more full-time plus full-time equivalent employees must provide each employee who worked full-time for one or more months with statements on health care eligibility, enrollment and cost for the prior calendar year by January 31. The same employers must also provide reports to the IRS by February 28 (March 28 if electronic) on all employees who work at least one month per year in a full-time capacity. Employers with 200 or more employees must file electronically. In late 2015, the IRS announced the following delays in the reporting requirement for 2016 only.

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**Effective 2020**

Excise Tax on "Cadillac" Plans – Beginning in 2018 plans considered to have excessively rich benefits, i.e., "Cadillac" plans, will be subject to an excise tax. A "Cadillac" plan is defined as one with a total annual cost of more than $10,200 for individual coverage and/or $27,500 for family coverage. These cost levels will be indexed for inflation.

The federal health care reform law is extremely complex and myriad regulations and other guidance are expected to be released during 2016. AIM strongly recommends, however, that employers look beyond mere compliance and strategically examine the various provisions and their practical impact on both the employer and its employees. In many cases, we believe employers may want/need to make important plan management decisions regarding what they offer, when they offer it, to whom they offer it, and how they structure premium cost-sharing.

AIM has educated thousands of employers throughout the state on both Massachusetts and federal health care reform and continues to be the preeminent source for the most up-to-date technical and practical information. Please contact the AIM Hotline with specific questions or for information on upcoming educational programs and other services and assistance designed to help employers in their compliance and plan management efforts.

**Health Insurance Coverage in Massachusetts**

Massachusetts requires that health insurance policies written in the state cover biologically based mental illnesses in the same manner as physical illnesses with respect to diagnosis, treatment, and capitation. Any insured plan regulated by the state Division of Insurance must also extend coverage to spouses in same-sex
marriages. In the case of a plan termination, a company must comply with appropriate state and federal law regarding plan participants’ rights for coverage continuation.

Effective January 1, 2014, the expansion of Medicaid under the PPACA has eliminated the Massachusetts Insurance Partnership.

If a judge orders an employee to obtain health care coverage for his/her child, the employee must do so if such coverage is available through the employer. Employers are obligated to cover a child subject to such an order and may be liable for the full amount of the assigned income or the full amount of medical costs incurred if they fail to comply with an order of income assignment or a health care order (M.G.L. c. 119A §12,14,16).

Employee Retirement Income Security Act (ERISA)
The federal Employee Retirement Income Security Act (ERISA) was passed in 1974 to govern how some benefit plans must operate in the areas of documentation, recordkeeping, and fiduciary obligations and to ensure that such plans are not operated in ways that discriminate in favor of highly compensated employees. These include both employee health and welfare plans and pension plans, which are commonly known as defined benefit and defined contribution plans. An example of a defined benefit plan is a pension plan that includes future retirement benefits based on criteria such as years of service and/or income level. An example of a defined contribution plan is a deferred compensation program such as a 401(k) retirement plan where participants can invest pre-tax dollars toward retirement and defer the taxes until the dollars are withdrawn. Unlike other situations related to the interaction of state and federal law, ERISA will generally preempt any state law related to employee benefits for those plans subject to ERISA, even when the state law would be more favorable to employees.

VII. LEAVES OF ABSENCE

For more detailed information on the various types of leave discussed in this section, please see AIM’s Legally Required Leaves, A Reference Guide.

Federal Family and Medical Leave Act (FMLA)
Employers of 50 or more employees must provide eligible employees up to 12 workweeks of job-protected unpaid family and medical leave during a 12-month period.

To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months which need not be consecutive and must have worked at least 1,250 hours during the 12 months immediately preceding the leave. Leave may be requested for:

1. Birth of a child;
2. Placement of a child for adoption or foster care;
3. The “serious health condition” of the employee;
4. The “serious health condition” of the employee’s immediate family member (defined as spouse, parent or child); or
5. Certain circumstances related to military service (see below).
As a result of the 2015 Supreme Court decision discussed above, the definition of spouse under the FMLA now includes same sex spouses. The FMLA regulations are being changed to reflect the decision.

The FMLA definitions of a “serious health condition” are varied and often complex though the regulations do provide some clarification. For example, one of the definitions requires more than three consecutive days of incapacity plus at least two visits to a healthcare provider for treatment. The two visits to a healthcare provider must occur within 30 days of the start of the period of incapacity, and the first visit must occur within seven days of the first day of incapacity. Additionally, the regulations provide a list of common ailments, such as colds and flu, which the DOL believes will be helpful in identifying ailments that ordinarily will not qualify for FMLA leave. Employers are encouraged to call AIM or other professional counsel for clarification regarding specific situations.

It is the responsibility of the employer to notify the employee of his/her rights under the law. Covered employers must post a general FMLA notice even when they have no FMLA-eligible employees. If an employer has written policy documents or a written handbook informing employees about their employment rights and obligations, the employer must include an FMLA policy. If a significant portion (generally considered 20% or more) of an employer's workforce speaks another language, a poster must be displayed in that language as well. Employers that do not have written materials describing benefits and leave must provide the general FMLA notice to each employee upon hire.

An eligible employee may elect, or the employer may require, the substitution of the employee's accrued vacation, personal leave or sick leave for any of the leave period. Under the regulations, when an employee substitutes accrued paid leave for unpaid FMLA leave, the employee must follow the terms and conditions of the applicable leave policy. The employer may voluntarily waive any such requirements in order to permit employees to substitute paid leave more liberally.

An employee on FMLA leave is entitled to have health insurance benefits maintained at the same employee contribution percentage rate as if the employee were not on leave. Employees on FMLA must be reinstated to the same or equivalent position and must not be penalized in any way for taking protected leave. If an employee is on FMLA based leave and is laid off from employment pursuant to a reduction in force, the employee's right to FMLA leave ends when the layoff becomes effective. The employer should be able to demonstrate that the employee's layoff was not, in any way, related to the use of FMLA leave.

Absences resulting from a workers compensation injury or illness that meets the definition of a “serious health condition” under the FMLA may, at the employer's discretion, be designated as FMLA leave to be counted against the employee's 12-week entitlement. The employer's policy must include this provision, and employees must be notified up front. An employer may also elect to run the earned sick time benefit concurrently with the FMLA benefit.
The Department of Labor updated the FMLA regulations and poster effective February 2013. The regulations are available at http://www.dol.gov/whd/fmla by clicking on the regulations at the bottom of the page. See the end page of this guide for a link to the poster.

Military FMLA Leave

As of 2009, the FMLA statute includes leave for military families in certain circumstances. There are two forms of protected leave:

1. Injured Service Member Family Leave
   Under this type of leave, the FMLA permits an employee who is the spouse, son, daughter, parent, or next of kin of a member of the Armed Forces, to take up to 26 workweeks of leave. This leave is provided to care for a “member of the Armed Forces, including a member of the National Guard or Reserves” who is "undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” This includes veterans who are undergoing treatment for a serious illness or injury incurred in the line of active duty and who were members of the Armed Forces, including the National Guard or Reserves, within the five years preceding the treatment. A covered condition is any injury or illness incurred in the line of duty while on active duty “that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.”

   This is a one-time-only entitlement as the law states that the combined total amount of Family Member Military Duty Exigency Leave and Injured Service member Leave that may be taken is twenty-six (26) weeks during a “single twelve (12)-month period.” The regulations clarify that the “single 12-month period” for military caregiver leave begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons. The regulations further provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a “single 12-month period,” provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason.

2. Family Member Military Duty Exigency Leave
   Under this type of military leave, employees may use FMLA leave for (1) a qualifying exigency arising out of a covered family member's active duty or call to active duty in the Armed Forces in support of a contingency plan or operation; or (2) a qualifying exigency arising out of a covered family member's active duty in the regular Armed Forces when that family member is deployed to a foreign country. "Qualifying exigencies" include:
   - Short-notice deployment
   - Military events and related activities
   - Child care and school activities
• Financial and legal arrangements
• Counseling
• Rest and recuperation
• Post-deployment activities
• Additional activities where the employer and employee agree to the leave.

### Jury Duty and Witness Leave

Massachusetts law requires that employees called for jury duty be given time off from work to serve as a juror. A person cannot be disciplined or discharged for serving as a juror.

Under Massachusetts law, jurors traditionally serve one day or one trial, and employers are required to pay their employees in full for the first three days of service. After the third day, the court will pay the juror a daily stipend of $50. It is the employer's option to pay the difference between jury pay and regular pay or pay the employee's full regular pay or pay nothing extra (M.G.L.c.234A §41, §48, §49).

Persons who are subpoenaed to appear in criminal cases because they are victims of or witnesses to a crime may not be discharged from employment on that basis. Although no law directly addresses whether or not they should be paid for this time, other state statutes provide guidance by saying that individuals should not be penalized for missing work in order to serve as a witness, meaning they should not be docked in pay or otherwise disciplined (M.G.L. c. 268 §14A, §14B).

On the other hand, employees are sometimes subpoenaed to testify at hearings, trials, or other civil proceedings. If the legal issue has no relation to the employee's job, employers may require those employees to take personal or vacation time or may grant unpaid time off.

### Massachusetts Parental Leave Act (MPLA)

Massachusetts adopted a law making significant changes to the long established maternity leave law that took effect on April 7, 2015. The most obvious is the renaming of the law to be the Massachusetts parental leave act. The new law also removes all terms referring to female, maternity, she or her replacing them with parental or employee. This means that male employees will be entitled to leave under this law. The law still provides that employers of six or more employees are required to give eight weeks of unpaid (paid at employer's discretion) parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under 18 years of age (or under 23 if the child is mentally or physically disabled). To be eligible, an employee must have completed an initial probationary period set by the terms of employment, but which is not greater than 3 months. The provisions about employment protection and benefit protection remain in effect. It is anticipated that the MCAD will issue an updated guidance interpreting the new law as it did the current law.

Some of the new provisions include:

- Allows an employer to agree that the employee may take more than 8 weeks of leave. However, if the employer does so, the
Employer must inform the employee in writing prior to the start of the leave that the extended leave will not result in extended job and benefits protection. Otherwise all reinstatement rights will continue beyond 8 weeks.

- Provides that two parents with same employer get an aggregate of 8 weeks, not 8 weeks each.
- Changes the notification provision to state “two weeks or “notice as soon as practicable” if the delay is for reasons beyond the individual’s control.
- Massachusetts law requires that this law be posted in the workplace (M.G.L.c.149§105D). In cases where the FMLA also applies, FMLA and MPLA leaves may run concurrently

**Massachusetts Domestic Violence Leave**

Massachusetts adopted a new law in 2014 providing protections for victims of domestic violence. The law applies to employers of 50 or more employees. It requires up to 15 days of job protected leave during a 12 month period. This leave is in addition to all other forms of leave available to employees. The leave must be directly related to the abusive behavior such as medical attention, counseling, victim services or legal assistance; secure housing; obtain a protective order from a court; appear in court or before a grand jury; meet with a district attorney or other law enforcement official; or attend child custody proceedings or address other issues directly related to the abusive behavior against the employee or family member of the employee.

According to the law, the employer has sole discretion on whether any leave taken under this section shall be paid or unpaid. The law also requires employees to give appropriate advance notice consistent with the employer’s leave policy unless the employee faces imminent danger to his/her health or safety.

There is no notice required if there is a threat of imminent danger to the health or safety of an employee or the employee’s family member but the employee must notify the employer within 3 workdays that the leave was taken or is being taken due to domestic violence. Any one of the following people notifying the employer is sufficient:

- the employee,
- family member of the employee or
- employee's counselor, social worker, health care worker,
- member of the clergy, shelter worker,
- legal advocate or other professional who has assisted the employee

Employers cannot take an adverse action against any employee using this leave for any unauthorized absence within 30 days from the unauthorized absence or last day of unauthorized absence as long as the employee provides the necessary documentation to support the absence. Examples of necessary documentation covering either the employee or the employee’s family member include:

1. A Court issued protective order
2. An official document from a court, provider or public agency
3. A police report or statement of a victim or witness provided to police
4. Documentation attesting to perpetrator’s guilt
5. Medical documentation of treatment for the abusive behavior
6. A sworn statement, provided by a professional who has assisted the employee
7. A sworn statement, from the employee attesting to being a victim of abusive behavior

Any of the documents provided by the employee to support time off for domestic violence may only be maintained in the employee’s employment record for as long as needed for the employer to make a determination as to whether the employee is eligible for leave under this section.

All information related to the employee’s leave under this section must be kept confidential by the employer and not disclosed unless:

1. requested or consented to, in writing, by the employee;
2. ordered to be released by a court of competent jurisdiction;
3. otherwise required by applicable federal or state law;
4. required in the course of an investigation authorized by law enforcement, including, but not limited to, an investigation by the attorney general; or
5. necessary to protect the safety of the employee or others employed at the workplace.

Prior to seeking any leave under this statute, an employee must exhaust all his or her available annual or vacation leave, personal leave and sick leave unless the employer waives this requirement.

The law also makes it clear that an employer cannot coerce, interfere with, restrain or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether or not the victim maintains contact with the alleged abuser.

The law is enforced by the attorney general. The new law also requires employers with 50 or more employees to notify each employee of the rights and responsibilities provided by this law including those related to notification requirements and confidentiality.

Massachusetts Earned Sick Time (EST) Law
The new Massachusetts earned sick time law impacts all Massachusetts employers. The law is enforced by the Attorney General’s office which has promulgated regulations to enforce the law. Employers are urged to visit and bookmark the Attorney General’s earned sick time Website at mass.gov/ago and click on the earned sick time link.

Note: While the Attorney General has issued its regulations, some of the regulations may be challenged in court in the future. This section will draw from both the law and the regulations in explaining what employers may or must do to comply with the law.

The law took effect on July 1, 2015, though employers had the option to delay compliance until January 1, 2016 by adopting a safe harbor policy, meaning continuing their current paid time off policy provided it met certain criteria. No matter what decision employers made in 2015, as of January 1, 2016, all employers
must comply with the EST law. Businesses with 11 or more employees must offer up to 40 hours of paid sick time per benefit year. Businesses with fewer than 11 employees will be required to offer up to 40 hours of unpaid time to workers each calendar year. The regulations state what criteria an employer must use to determine whether or not it has 11 employees or more.

The law applies to full-time, part-time, seasonal and temporary employees.

The law requires employers to provide eligible employees one hour of sick time for every 30 hours worked up to a maximum of 40 hours per year with a right to carry over up to 40 hours of unused sick time into the new year. The regulations broaden that provision to allow employers to award up to 40 hours at the start of the benefit year without having to accrue time throughout the year. The regulations address a number of the ambiguous details in the law including topics such as how an employer may handle EST carryover, EST retention in the case of a break in service, EST may be charged in initial increments of one hour, when an employer may refuse to pay sick leave in cases of suspected fraud, and how an employer may use its existing PTO policy to cover the 40 hours of EST.

Exempt employees earn paid sick time based upon the assumption of a 40-hour work week, unless their normal work week is less than 40 hours, and in that case their paid time would accrue based upon their normal work week. Employees may begin to use earned sick time on the 90th day after hire.

Sick leave may be used to care for a physical or mental illness, injury or medical condition, or to attend routine medical appointments for him/herself or one of the following relations: child, spouse, parent, or parent of a spouse. Earned sick time may also be taken to address the physical, psychological or legal effects of domestic violence. It may also be used for trips to an appointment, a pharmacy, or other sick leave-related location.

Employers may require certification of the need for sick time when more than 24 consecutive hours of earned sick time are taken. Employers may not delay the taking of, or payment for, earned sick time because they haven’t received the certification. The employee does not need to provide documentation for absences of fewer than 24 consecutive hours. An employer may require an employee to notify it every day for an absence being taken under the sick leave law and may also require employees to verify in writing that they have taken sick time when they return to work.

The law also allows employees to file a lawsuit in court to enforce their earned sick time rights. AIM has a model EST policy and EST verification form available via its Website. The Massachusetts Attorney General’s Website includes EST regulations, a regularly updated FAQ site, and an EST poster, that employers should print out and display. Employers should check the FAQ site as the AG’s office will be updating it with new information regularly.
Massachusetts Small Necessities Leave Act (SNLA)
Employers of 50 or more employees must provide eligible employees with 24 hours of unpaid leave per year to participate in school activities directly related to the educational advancement of the employee's child or to accompany the employee's child to routine medical or dental appointments. The law also covers employees who need to accompany an elderly relative to routine medical, dental, or other appointments related to professional care of the relative. An “elderly relative” is defined as an individual 60 years of age or older who is related to the employee by blood or marriage. This leave is in addition to any leave the employee may have under the FMLA (M.G.L.c.149 § 52D).

To be eligible, employees must have worked for the employer for 12 months and must have worked 1,250 hours in the year immediately preceding the leave. Employees may be required to give 7 days' notice of the leave if the need is foreseeable. Notice “as soon as practicable” is to be provided in all other cases. Employers may require an employee to substitute any accrued paid vacation, personal, medical, or sick leave for leave under this law.

Military Service Leave
The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the rights of all those who serve in a branch of the military and reservists to return to their jobs after completing their time in voluntary or involuntary service. The Act protects against discrimination and retaliation because of military service, prevents service members from suffering disadvantages due to performance of their military obligations, and affords them ample time to report back to jobs following completion of their service obligations. The protections of USERRA apply to employees who are absent from their jobs due to military service for up to five years. Employees who are called up for at least 31 days of active duty must be offered the right to the continuation of health care benefits similar to provisions under COBRA. USERRA does not limit the frequency of leaves unless they cause undue hardship to the company. In addition, employees have the right to the same or similar position if they reapply within certain time periods following their release from military service or training. The rules require that employers post a notice of USERRA rights where employee notices customarily are placed. Please see the end page for a link to the USERRA poster at the DOL Website.

Voting Leave
Employees are entitled to vote in any federal, state, or municipal election. All polling places in Massachusetts must be open a minimum of 13 hours - 7:00 a.m. to 8:00 p.m. - which eliminates most requests for leave to vote (M.G.L. c.149 § 178; c.53 § 43). However, Massachusetts law requires that employees who apply be granted a leave of absence to vote during the two hours after the polls open. There is no requirement that the employee be paid for this leave. Employers may request proof that the employee voted.
VIII. SAFETY

Licenses

Many operations commonly performed in facilities require state licensing of individual operators. For instance, employees engaged in driving forklifts or operating other hoisting equipment, supervising or operating wastewater treatment plants, or operating steam boiler equipment may need to be individually licensed by the Department of Environmental Protection or the Department of Public Safety. Employers should research these and other laws and regulations to make sure their operations are in compliance with all permitting requirements.

Hoisting

State law requires individual licenses for every operator of hoisting equipment commonly used in many companies, including manufacturing facilities, retail outlets, warehouses and warehouse-type stores and even commercial buildings.

In late 2013, the Massachusetts Department of Public Safety (DPS) amended its long-standing hoisting regulations to include those companies that operate forklifts, overhead cranes and other hoisting equipment used exclusively on company property.

The regulations contained an exemption for companies provided the company met certain conditions. Among the important conditions to be met are the following:

- A company must maintain an employee training program approved by the DPS and
- Designate a responsible person or persons (licensed by the DPS) who will be at the site at all times to manage the hoisting operators.

Companies unable to take advantage of the expanded licensing exemption must continue to operate under the existing individual license program, a requirement that has been in place for many years.

Then, in November 2014, the DPS released a new Administrative Ruling (2014-04) which clarifies the responsibility of the company exemption with regards to OSHA regulated industrial forklifts and the overlapping jurisdiction of the two agencies. In this Administrative Ruling, the DPS determined that any company normally required to have licensed operators for industrial forklifts and lifts trucks used on company property may be exempt from the requirements of state licensing if the general public does not have access to any area where industrial lift trucks and forklifts are operated.

Other Hoisting equipment, even if used in areas where the public is not allowed is not covered by this Administrative ruling and still must be operated by licensed personnel.

Educational facilities or individuals seeking to offer continuing education courses for hoisting machinery operations must submit an application to the DPS for approval.

The state regulations are in addition to any federal OSHA requirements that cover hoisting equipment. The rules also impact temporary permits that may be issued by a short-term rental entity for the operation of compact hoisting machinery.

Employers need to pay attention to these new rules and carefully understand their applicability. Because state officials have rarely enforced the hoisting rules over the years, many companies will find themselves confronting the regulations for the first time. Also, recent agreements between the state DPS and federal OSHA allow for exchanges of enforcement information.

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

Employers have a general duty to provide a place of employment that is free from recognized health and safety hazards. The federal Occupational Safety and Health Administration (OSHA) conducts random inspections, investigates complaints, and issues fines and citations for violations of its laws. OSHA has specific recordkeeping requirements that employers must adhere to including Form 300, Log of Work Related Injuries and Illnesses; Form 300A, Summary of Work-Related Injuries and Illnesses; and Form 301, Injuries and Illnesses Incident Report.

A company that had 10 or fewer employees at all times during the prior calendar year is not obligated to keep OSHA injury and illness records unless instructed to do so by OSHA. Employers with 11 or more employees are required to maintain the required records at each establishment, and to post them annually. All employers covered by OSHA must report any workplace incident that results in a fatality or in the hospitalization of three or more employees.

A recordable injury or illness must be reported on OSHA Form 300 as soon as possible but no later than six working days after the employer receives the information. Recordable injuries include fatalities, lost workday cases, nonfatal cases involving transfer of the employee to another job or termination of employment, medical treatment beyond mere first aid, and loss of consciousness or restriction of work or motion.

Even if no reportable injuries or illnesses occurred, the employer must still complete and post the 300A form from February 1 through April 30 of each year.

All employers must have an OSHA poster displayed in the workplace. Please visit the OSHA Website at www.osha.gov for a copy of this poster.

State laws pertaining to employee safety and health are contained in numerous sections of M.G.L. c.149. Many of them are preempted by federal laws and regulations developed under OSHA, although they still remain on the books.
Workplace Temperature
Under Massachusetts law, adequate heat must be provided from October 15 through May 15. Although there are no regulations, the state has issued guidelines specifying the proper temperature that must be maintained at each type of workplace. The levels are specifically defined by type of facility. They include: Factories 60 - 62°; Foundries 50 - 60°; Machine Shops 60 - 62°; Offices 66 - 68°; Public Buildings 60 - 68°; Restaurants 62 - 66°; Schools 66 - 68°; Stores 65°; Theaters 62 - 65°.

IX. WORKERS COMPENSATION
For more information, please refer to AIM’s three Reference Guides, Leaves of Absence, Disability Laws and Workers Compensation.

Nearly all Massachusetts employers are required to obtain workers compensation insurance. The insurance protects the employer from civil lawsuits from injured or ill employees while covering those employees for lost wages and medical expenses due to a work-related injury or illness. Any employer covered by the workers compensation law must display a posting showing proof that they have insurance. Any employer without insurance may be issued a stop-work order shutting down the business and be subject to a fine of up to $250 per day until coverage is obtained. The law also allows corporate officers to elect not to have workers compensation coverage and to allow sole proprietors and the partners of a partnership to elect to obtain coverage.

When an employee’s injury or illness “arises out of or in the course of employment,” and the employee is disabled for more than 5 calendar days the employer must file a First Report of Injury (Form 101) with the insurer, injured employee, and Department of Industrial Accidents (DIA). The employer may file the Form 101 online by accessing the DIA Website at www.mass.gov/dia. The employer should always work closely with its workers compensation insurer before sending the form to the DIA as most insurers will file the 101 on their behalf to verify the accuracy of the information contained in the form. The insurer must then investigate the report to determine if it is a work-related injury. If so, the insurer is obligated by statute to pay benefits.

In response to an injury claim, the insurer can pay a claim for up to the first 180 days without accepting liability for the claim. During this 180 day pay-without-prejudice period, the insurer may stop or modify the payments after giving a seven-calendar-day notice to the injured worker and the DIA. The period can be extended with the agreement of the parties.

If the insurer denies the claim, the employee may file a claim with the DIA to have it adjudicated. Employers should work with their insurer to defend against claims which they believe are not compensable. If it is determined the employee has a compensable injury or illness, he or she may collect temporary total and/or partial benefits for a defined period of time. Alternatively, the insurer may offer to settle the claim by making a one-time payment (lump sum settlement) in return

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for an agreement to release future claims arising from the same injury. For experience-rated insureds ($5,500 or more in annual workers compensation premiums), the insurer must obtain the policyholder’s consent before agreeing to a lump sum settlement if the settlement will affect the employers current experience rating (M.G.L. c. 152).

Since workers compensation incidents sometimes result in lengthy absences, it is important that employers carefully determine, document and communicate their policies and practices related to job protection, continuation of benefits, and at what point employment will be terminated. AIM recommends that the policy be established in advance of the need to make a decision in a specific case since to do otherwise can create the perception that the policy was determined based on an individual situation instead of more objective business criteria. It is further recommended that the policy be written to apply to all types of medical leave rather than singling out workers compensation cases. Keep in mind that making exceptions to existing policies and practices is generally considered to be a “reasonable accommodation” under the ADA. While many medical leave situations may not fall under the protection of the ADA, it is important that a careful review be made to make this determination. Consulting legal counsel for guidance and current case law information is encouraged. ADA compliance requires careful case-by-case consideration.

It is illegal to retaliate against or terminate an employee for filing a workers compensation claim. If the employee receives workers compensation benefits, he or she may also have rights and benefits under the FMLA (job protected leave of up to 12 weeks), ADA (return to work, reasonable accommodation efforts), and/or COBRA (health care continuation).

Safety Grant Program
Every fiscal year, the Department of Industrial Accidents (DIA) awards numerous safety grants to Massachusetts employers. This grant program provides monies for workplace safety training aimed at making work safer for current and future workers in organizations such as service companies, manufacturing, and health care and trade groups. To learn more about the program, please contact AIM or visit the DIA Website: www.mass.gov/dia.

X. TERMINATION

Please see AIM’s Personnel Records and Federal and State Recordkeeping requirements, A Reference Guide for more detailed information about record retention

An employee separation immediately raises a number of HR issues for an employer. This section consolidates separation related topics, including some that are addressed in other sections of this guide.

A voluntary separation occurs when the employee resigns, fails to appear at work without an authorized justification for the absence (no call, no show), fails to return from an authorized leave, or retires. An involuntary separation occurs when the
employer terminates the employee's employment by layoff, reduction in force or discharge.

**Payment of Wages**

In all cases, a terminated employee must be paid all outstanding wages plus any earned but unused vacation pay. In the case of a voluntary separation, the employee may be paid no later than the time of the normal pay date. In the case of an involuntary separation, the employee must be paid wages (including earned but unused vacation pay) on the day of termination. In either case an exempt employee may be paid on a pro rate basis for the final week of work. Employers that provide paid time off (PTO) instead of specific vacation leave are encouraged to have a well communicated policy that sets forth how earned vacation will be calculated and paid upon termination of employment. Absent a well documented and consistently applied policy and practice, the entire PTO bank is likely to be deemed payable to the separating employee. Please see Section IV above for a more detailed discussion of Payment of Wages.

**Unemployment Insurance**

The employer must distribute to any separating employee DUA Form 590-A, “How To File For Unemployment Insurance Benefits,” as soon as practicable, but within a period not to exceed 30 days from the last day compensable work was performed. According to the DUA, separated employees include those employees who have been fired for cause, voluntary quits and layoffs due to lack of work. The information may be delivered in person or mailed to the employee's last known address. Employees who do not receive the information and who are otherwise eligible to receive unemployment insurance benefits will have their claims backdated to the time of initial eligibility. Please see Section X below for a more detailed discussion of Unemployment.

**Severance Pay and Termination Agreements**

There are no laws requiring employers pay severance benefits to a separating employee. An employer may elect to do so through a termination agreement known as a release of claims. To be valid a release of claims requires payment from the employer to the employee in exchange for the employee foregoing a legal right to sue the employer over matters arising out of employment such as discrimination. The payment must be above and beyond any payment of final wages owed. In the context of unemployment, a release is treated separately from severance pay and does not delay a claimant's right to collect unemployment. Please see Section X below for a more detailed discussion of Severance Pay and Termination Agreements.

**Federal Law – COBRA**

COBRA requires covered employers (20 or more employees) that offer group health coverage to offer a covered employee and/or dependents the right to elect to continue that coverage at their own expense for 18 to 36 months, depending on their eligibility. Termination of employment is among these qualifying events and results in eligibility to continue coverage for up to 18 months. Please see Section XI below for a more detailed discussion of COBRA.
As a result of the Supreme Court decision in the DOMA case referenced above in the same sex discussion on page 13, the definition of spouse under COBRA now includes same sex spouses.

State Law – “Mini-COBRA”
The Massachusetts “Mini-COBRA” law applies to employers of between 2 and 19 employees. Please see Section XI below for a more detailed discussion of mini-COBRA.

Document Retention
Under Massachusetts law, employers must retain a separated employee's personnel record for 3 years from the date of separation of employment. The employer also must retain the Form I-9 for one year from the date of separation or three years from the date of hire, whichever is later.

XI. UNEMPLOYMENT INSURANCE

Unemployment Insurance Benefits
An employee who loses a job through no fault of his/her own, including leaving a job due to conditions caused by domestic violence, sexual harassment or other urgent compelling or necessitous reasons, may be eligible for unemployment insurance benefits for a period of up to 30 weeks. The administering agency, the Department of Unemployment Assistance (DUA), determines benefit eligibility and duration. Claimants are subject to a one-week waiting period. The current maximum benefit is $722 per/week. The maximum UI benefit is 50% of an employee's previous earnings up to a ceiling of 57.5% of the state average weekly wage (SAWW). The current SAWW is $1,256.47. A claimant may also receive a dependency allowance of $25 per week per dependent, up to a maximum of one-half of the employee's weekly U.I. benefit. Employers have appeal rights to challenge a determination of eligibility. The DUA has an administrative process to determine a claimant's eligibility for benefits if it is in dispute.

Employers must file the Quarterly Contribution Report, Form 0001. An employer who has filed all required reports and has paid all contributions due may elect to make voluntary contributions. Upon timely payment of a voluntary contribution, the contribution is credited to the employer's account balance and the employer receives a recomputation of its contribution rate for that calendar year. Employers are also required to display a poster, “Information on Unemployment Insurance Benefits,” prepared by the DUA, informing workers about the filing requirements necessary to collect Unemployment Insurance benefits. Failure to comply with this posting requirement may result in a warning for the first offense, fines of $100 and $250 for the second and third offenses, and $500 for more than three violations. Please visit the DUA Website at www.detma.org or contact the DUA at 617-626-5400 for posters and forms.

Employers are required to distribute DUA Form 590-A, “How To File For Unemployment Insurance Benefits,” to all separated employees as soon as practicable, but within a period not
to exceed 30 days from the last day compensable work was performed. According to the DUA, separated employees include those employees who have been fired for cause, voluntary quits and layoffs due to lack of work. The information may be delivered in person or mailed to the employee's last known address. Employees who do not receive the information and who are otherwise eligible to receive unemployment insurance benefits will have their claims backdated to the time of initial eligibility.

**Experience Rating**

In most cases, charges for UI benefits are paid from the specific employer's UI trust fund account. In order to determine the annual UI assessment for the following year, the DUA reviews the following:

- the employer's wages subject to contribution, (taxable wage base, $15,000)
- the contributions actually paid to by the employer,
- the amount of benefits charged to the employer, and
- any account balance adjustments.

Once a final annual balance is determined, it is divided by that company's average annual payroll which is then represented as a percent. That percent is plotted on the UI rate Schedule to determine the legally required rate. Once established, employers receive a UI assessment that may be paid in total or on a quarterly basis throughout the year.

**Solvency Account**

DUA maintains a general solvency account to pay benefits that are not assigned to an individual employer. The solvency account is only available to UI contributory employers and not to reimbursable employers. Reimbursable employers include public sector and some non-profits.

Permissible charges to this account include:

- Employers that have ceased operation with insufficient funds in their account to pay claims
- Dependency allowance,
- State funded extended benefits,
- Benefits for domestic violence,
- Benefits not otherwise chargeable to a specific employer and
- Benefits paid when claimants are in DUA-approved training programs.

The solvency assessment is established annually the DUA through the following process. It multiplies wages subject to contribution by a DUA determined solvency adjustment factor for all subject employers in Massachusetts. The result is an actual dollar amount which represents an employer's share for the computation period. This factor changes from year to year, depending on the charges made to the solvency account during that period and DUA's projections of solvency needs for the upcoming year.
Medical Security Program/Employer Medical Assistance Contribution

As of January 1, 2014, the Medical Security Program within the Unemployment system no longer exists. Unemployed workers now wishing to obtain health insurance coverage must use the Massachusetts Health Care Connector.

All employers of six or more employees are now required to pay a statutorily set assessment with a current maximum cap of $50.40 per year per employee to offset the newly named Employer Medical Assistance Contribution (EMAC), a reduction from the previous rate of $67 per annum. Any future increases in the charge would have to be approved by the Legislature, a further improvement over prior law. Proceeds from the EMAC assessment support the provision of subsidized health care services funded by the Commonwealth Care Trust Fund and the Health Safety Net Trust Fund.

Lockouts and Strikes

Unemployment benefits may be available to employees involved in lockout situations. The law does not deny benefits to any employee unless the employer can prove that the lockout is in response to acts of repeated and substantial damage or repeated threats of damage with the express or implied approval of the officers of the bargaining unit. Strikers can receive unemployment insurance benefits only if it can be shown to the DUA's satisfaction that it was an economic strike or resulted from an unfair labor practice (M.G.L.c.151A §25).

Severance Pay and Termination Agreements

There are no laws requiring payment of severance benefits. However, severance benefits granted for past service generally count as earnings for purposes of unemployment benefits unless the employer receives something of value in exchange for the pay, such as the employee's signature on a waiver and release of legal claims agreement (M.G.L.c.151A§1(r)(3)). Any employer considering offering an employee a release of claims should consult with legal counsel prior to making the decision to do so.

To be valid a release of claims requires payment from the employer to the employee in exchange for the employee foregoing a legal right to sue the employer over matters arising out of employment such as discrimination. In the context of unemployment, a release is treated separately from severance pay and does not delay a claimant's right to collect unemployment. The Older Workers Benefit Protection Act of 1990 requires that releases of legal claims for workers 40 years old and older be knowing and voluntary; be part of a written, clearly understood agreement that specifically lists ADEA rights or claims; exclude a waiver of claims and rights arising after the date of the waiver; be for consideration such as additional pay and/or benefits; advise the individual to consult an attorney; provide 21 days for the individual to consider the waiver (45 days if part of a group offer); and allow the individual 7 days to revoke the waiver. An employer should not make the final payment as provided for in the Release until after the 7 day revocation period has expired.
When group layoffs or exit incentive programs are involved, the employee must be given information on the class of employees covered; eligibility factors; applicable time limits; information as to job titles and ages of individuals eligible or selected; and ages of individuals in the same job classification or unit not selected.

Worksharing
The Division of Career Services Worksharing Program provides an alternative to layoffs. To participate an employer must apply to and be approved by the Department of Unemployment Assistance (DUA). Once the employer is certified to participate, the workshare program allows employees of an entire company, a complete department, or even a small unit within the company, to share reduced work hours while also collecting unemployment insurance benefits to supplement their reduced wages. The decrease in the normal weekly hours must be shared equally by all workers in the participating unit(s) as defined by the employer. The reduction in hours may range from 10 to 60 percent. To be eligible, an employer must have a positive Unemployment Insurance Trust Fund balance at the time the Worksharing application is approved; or if an employer has a negative balance, the employer must reimburse the trust fund on a dollar for dollar basis (M.G.L. c. 151A §29D).

XII. BENEFIT CONTINUATION
For more detailed information, please refer to AIM's Reference Guide to COBRA: Federal and State Requirements for Group Health Insurance Continuation.

Health Insurance
Virtually every Massachusetts employer that offers its employees health insurance is required, under either federal or state law, to offer health insurance continuation rights to eligible employees and dependents, at group rates, but at the employee's and/or dependent's expense. Federal COBRA covers all employers with 20 or more employees. Massachusetts "Mini-COBRA" applies to all employers with 2 to 19 employees.

Federal Law – COBRA
Under COBRA, employers of 20 or more employees must offer continuation of benefits to employees and covered dependents, called “qualified beneficiaries,” who would otherwise lose coverage due to certain “qualifying events.” As a result of the Supreme Court decision in the DOMA case referenced above up in the same sex discussion on page 13, a qualified beneficiary now includes a spouse in a same sex marriage.

Qualifying events for employees and dependents include the termination of employment or a reduction in the employee’s hours below the eligibility threshold for health insurance, resulting in continuation eligibility for up to 18 months. Additional qualifying events for dependents also include death of the employee, divorce or legal separation of the employee, or a loss of dependent status as defined by the plan, and allow benefits continuation of up to 36 months. An 18-month period may be extended up to an additional 11 months in certain cases.
of disability, or up to an additional 18 months in cases of multiple qualifying events. If an employee is on active military duty, he/she may be eligible for up to 24 months of continuation coverage under USERRA requirements.

Continuation must be offered for all coverage in effect at the time of the qualifying event, including medical, dental, vision, Flexible Spending Accounts (health care reimbursement only), etc. Each qualified beneficiary has individual election rights and COBRA participants have exactly the same rights as active employees to add or drop dependents, switch plans, etc.

COBRA places stringent timetables, notice requirements and other obligations on both employers and employees. Employers are required to give their employees COBRA-related notices:
1. when the employee (and spouse, if applicable) becomes covered under the health insurance plan;
2. when a qualifying event occurs;
3. when COBRA coverage terminates; and
4. for unavailability of coverage.

State Law – “Mini-COBRA”
The Massachusetts "Mini-COBRA" law applies to employers of between 2 and 19 employees. It differs from COBRA in that it does not apply to fully self-insured plans; it applies to medical coverage only – not dental, vision, etc.; its extension of the continuation of coverage for disability applies only to the employee. Otherwise, the law generally mirrors COBRA provisions (M.G.L.c.176J§9).

State Law – Coverage for Divorced or Legally Separated Spouses
Plans subject to Massachusetts Insurance Law, including Blue Cross/Blue Shield, Health Maintenance Organizations and Preferred Provider Organizations must continue health and dental insurance benefits for legally separated spouses and ex-spouses of employees under an employer’s group plan(s). This is true even if the divorce or legal separation decree is silent on the issue. On the other hand, if the decree specifies that the spouse has no right to continuation, the decree will supersede the law. It is very important that employers understand this law since it is often much more generous than COBRA. The employee and/or spouse can be required to pay the cost of coverage and eligibility generally ends on the date specified in a decree or upon the remarriage of the former spouse.

Where an employer continues to cover an ex-spouse, it is very likely that the employee will have to pay income tax on the “fair market value” of the coverage as imputed income. These amounts would also be subject to Social Security and Medicare taxes – employee and employer portions. All employer-provided fringe benefits are taxable income unless they are explicitly exempted by IRS rules. Coverage for an ex-spouse will only be exempted if he or she meets the IRS Code Section 152 definition of a “qualifying relative.” The definition includes “other individuals” who are not related to the employee, but who live in the employee’s household for the entire tax year, and who were not the spouse of the employee at any time during the tax year. An ex-spouse may qualify under the “other individuals” definition, but it would be rare for an ex-spouse to live in the

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same household as the employee for an entire tax year. As a result, where the employer continues to cover the ex-spouse following a divorce, it is more likely than not that the income will be imputed to the employee.

State Law – Life Insurance
If an employee has been insured under a life insurance policy for five years or more immediately preceding termination, the employee shall continue to be insured for a period of 31 days. Conversion rights are also available (M.G.L. c. 175 §134).

XIII. PLANT CLOSINGS

For information on additional provisions, please refer to AIM’s Reference Guide to Plant Closings and Mass Layoffs.

Federal Law
Employers of 100 or more are required to give a 60-day advance notice before closing a facility or “operating unit” where 50 or more employees would lose their jobs or, in the case of a mass layoff, where 50 employees within a 30-day period constituting 33 percent of the workforce would be laid off. Failure to give these notices will result in monetary penalties and could result in mandatory payment of severance to affected workers under the Worker Adjustment & Retraining Notification (WARN) Act.

State Law
The Massachusetts Plant Closing Law contains a compulsory 90-day extension of health insurance benefits by the employer and certain unemployment benefits in the event of the plant closing and encourages voluntary notice to employees of an impending plant closing. This Massachusetts law covers a company that employs over 50 employees and is triggered when 90 percent of its employees, over a six-month period, would be terminated due to the plant closing (M.G.L. c. 151A §71A).
RESOURCES - POSTERS / WEBSITE
A number of agencies have updated their required posters. Posters referenced below are available for free the listed Website.

MASSACHUSETTS
- Workers Compensation: Notice to Employees of WC Coverage - www.mass.gov/dia (poster is available in many languages)
- Wage and Hour Laws: covers MA Wage and Hour laws, Child Labor, Overtime, Tips, Show up Pay and Meal Break. www.mass.gov/ago (rev. 2014)
- No Smoking signs: Must be posted and visible in the workplace www.mass.gov/dph or through your local board of health.
- Massachusetts Fair Employment Law: poster covers notification of protection for discrimination on the basis of race, color, religious creed, national origin, sex, sexual orientation, genetic information, military service, age, ancestry, disability and harassment. www.mass.gov/mcad (rev.2013 )
- No Federal poster required at this employment threshold

FEDERAL
• OSHA 300 log: Employer must post an annual summary of occupational injuries and illness (Form 300A) each year from February 1 to April 30. (Retail trade, finance, insurance and real estate services are exempt from this requirement.) www.bls.gov/respondents/iif/forms/oshaforms.pdf (rev. 2004)

• Family & Medical Leave Act: poster summarizes the major provisions of the law and informs employees how to file a complaint. Revised version reflects military leave information. Poster must be displayed at all locations even if there are no eligible employees. www.dol.gov/esa/regs/compliance/posters/pdf/fmlaen.pdf (rev. 2013)

OTHER AIM REFERENCE GUIDES
Affirmative Action Obligations
Classification of Employees
Continuation of Benefit Coverage Laws (COBRA)
Disability Laws
Employment Applications and Interviews
Federal and State Personnel Records/Recordkeeping Requirements
Form I-9, E-Verify and H1-B
HR Issues Regarding Same-Sex Marriage in Massachusetts
Job Description Guide
Legally Required Leaves
Plant Closings and Mass Layoffs
Sexual Harassment
Small Business Compliance
Workers Compensation
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