

## MAINE

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### I. AT-WILL EMPLOYMENT

#### A. Statute

The Maine legislature has not enacted an at-will employment statute. Employment is at will in forty-nine (49) states (Montana is the exception).

#### B. Case Law

In Maine, it has long been the rule that a contract of employment for an indefinite length of time is terminable at the will of either party. *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, ¶ 9, 705 A.2d 696. Where a contract for a definite term exists, the at-will employment doctrine has no applicability. *Madore v. Kennebec Heights Country Club*, 2007 ME 92, ¶¶ 6-9, 926 1180.

Enforcement of an oral promise to an employee that she could retain her employment position until she retired at the age of 65 is barred by Maine's statute of frauds. *See* 33 M.R.S. § 51(5); *Popanz v. Peregrine Corp.*, 1998 ME 95, ¶ 5, 710 A.2d 250.

An employee cannot avoid the statute of frauds based solely upon detrimental reliance on an employer's oral promise of continued employment. *Popanz*, 1998 ME 95, ¶ 6, 710 A.2d 250.

Moreover, written language within a personnel policy distributed to an employee that implies restrictions on the employer's rights to terminate an employee's employment is insufficient to bind the employer. *Popanz*, 1998 ME 95, ¶ 8, 710 A.2d at 252. But a municipal employee whose non-union city contract stated removal from employment would be based solely on "merit, ability, and justice" amounted to a restriction on the employer's ability to terminate him at-will. *Cummings v. South Portland Housing Authority*, 985 F.2d 1, 3 (1st Cir. 1993) (applying Maine law). Likewise, the Law Court, Maine's highest court, has upheld the finding of an enforceable oral contract of employment between a town and a town manager when the town's charter explicitly provided that the town manager could only be removed for "just cause." *Mercier v. Town of Fairfield*, 628 A.2d 1053, 1055 n. 3 (Me. 1993).

Notwithstanding, it remains an open question whether an employee may succeed in arguing fraudulent misrepresentation due to reliance (justifiable or otherwise) on false representations of specific promises made by an employer of long-term work and employment “for years to come.” *Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 11, 832 A.2d 771.

## II. EXCEPTIONS TO AT-WILL EMPLOYMENT

### A. Implied Contracts

#### 1. Employee Handbooks/Personnel Materials

In *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97 (Me. 1984), the employees’ complaint alleged that they were terminated for misconduct after each had worked for Penobscot for approximately one and one-half years. *Id.* at 98. They claimed, among other things, that they were discharged in violation of certain writings promulgated by the employer entitled “General Policy” and “Work Rules.” *Id.* The Law Court held that the employees stated sufficient allegations to withstand a motion to dismiss:

[P]arties may enter into an employment contract terminable only pursuant to its express terms—as “for cause”—by clearly stating their intention to do so, even though no consideration other than services to be performed or promised is expected by the employer or is performed or promised by the employee.

*Id.* at 99-100. Accordingly, it was error for the trial court to dismiss the employees’ complaint for failure to state a claim upon which relief can be granted. *Id.* at 100.

#### 2. Provisions Regarding Fair Treatment

Maine has never recognized the tort of wrongful discharge. *Maine Bonding & Cas. Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079, 1080 (Me. 1991); *Bard v. Barth Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991).

#### 3. Disclaimers

The Law Court has suggested in a dissenting opinion that it would give effect to language in a personnel policy disclaiming an intent to create a contract. *Taliento*, 1997 ME 194, ¶ 24, 705 A.2d at 705 (citing *Libby v. Calais Reg’l Hosp.*, 554 A.2d 1181, 1183 (Me. 1989)).

As explained hereinabove, you generally can terminate someone in Maine at any time for any legal reason. Problems can arise, however, if an employee handbook seems to establish a contract and makes certain promises that employment will be guaranteed unless, for example, every step of a disciplinary procedure is followed. As such, an at-will disclaimer can help avoid future problems.

Likewise, another important disclaimer to include in a handbook is that its contents are not intended to restrict the National Labor Relations Act (NLRA). Section 7 of the NLRA applies to all private workplaces and provides employees with the right to engage in “concerted activities” to advance their interests as employees. These activities include discussing pay, workplace conditions, and discipline with others. An NLRA disclaimer can help clarify an otherwise vague policy found in a handbook: “Nothing contained in this policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms or conditions of employment. Company employees have the right to engage in and refrain from such activities.”

#### 4. Implied Covenants of Good Faith and Fair Dealing

The Law Court has not adopted an implied covenant of good faith and fair dealing in the employment context. *But see Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993) (discussing duty of good faith and fair dealing with respect to insurance contracts).

In a somewhat related context, to recover damages for negligent misrepresentation with regard to the duration of employment, an employee must prove that (1) the employer supplied false information for the guidance of the employee, (2) the employee justifiably relied upon the information, and (3) the employer failed to exercise reasonable care in obtaining or communicating the information. The fact-finder’s primary task is to ascertain whether the employer’s conduct was reasonable. *Rand*, 2003 ME 122, ¶ 13, 832 A.2d 771. Unlike fraud or deceit, the employer’s “knowledge is largely immaterial for negligent misrepresentation, and the fact-finder’s primary task is to ascertain whether the [employer’s] conduct was reasonable.” *Id.*

#### B. Public Policy Exceptions

##### 1. General

No general public policy exception to at-will employment has been adopted by the Law Court or enacted by the Maine legislature.

##### 2. Exercising a Legal Right

The following Maine statutes prohibit discharge of an employee for exercising the employment rights granted therein.

- a. Maine Human Rights Act, 5 M.R.S. § 4633.
- b. Maine Smoking Act, 22 M.R.S. § 1544.
- c. Maine Whistleblower's Protection Act, 26 M.R.S. § 833.
- d. Maine Family Medical Leave Requirements, 26 M.R.S. § 847.
- e. Maine Workers’ Compensation Act of 1992, 39-A M.R.S. § 353.

- f. Protection of Jurors' Employment and Health Insurance, 14 M.R.S. § 1218.

3. Refusing to Violate the Law

The Maine Whistleblower's Protection Act, 26 M.R.S. § 833, prohibits discrimination against an employee who engages in any of the following:

- Reports to the employer or appropriate government agency a condition or practice which the employee reasonably believes violates a state or federal law or regulation;
- Reports a condition or practice that would put at risk the health or safety of the employee or any other individual (this portion of the Act specifically protects school employees who report safety concerns related to a student);
- Participates in an investigation, hearing, or inquiry held by a public body or a court;
- Refuses to carry out a directive to engage in activity that would be a violation of a law or rule, or that would expose the employee or any individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the illegal activity or dangerous condition from the employer; or
- Reports to a patient, the employer, or a regulating authority, a deviation from the applicable standard of care for a patient by an employer charged with the care of that patient (applicable to an employee of a health care provider).

4. Exposing Illegal Activity (Whistleblowers)

See discussion above on "Refusing to Violate the Law."

To bring a Whistleblower's Protection Act claim, the plaintiff must have been an employee or applicant at the time of the protected activity. *Costain v. Sunbury Primary Care. PA*, 2008 ME 142, ¶ 8 n. 3, 954 A.2d 1051. Moreover, the Act does not apply to an employee who has reported or caused to be reported a violation, or unsafe condition or practice to a public body, unless the employee has first brought the alleged violation, condition, or practice to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition or practice. 26 M.R.S. § 833(2). Despite this requirement, however, prior notice to an employer is not required if the employee has specific reason to believe that reports to the employer will not result in promptly correcting the violation, condition or practice. *Id.*

Likewise, the federal Whistleblower Protection Act protects federal employees and

applicants for employment who lawfully disclose information they reasonably believe evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety. Under the WPA, certain Federal employees may not take or fail to take, or threaten to take or fail to take, any personnel action against an employee or applicant for employment because of the employee or applicant's protected whistleblowing. *See* 5 U.S.C. § 2302(b)(8).

### **III. CONSTRUCTIVE DISCHARGE**

Assuming, without deciding, that a hostile work environment could constitute an adverse employment action within the meaning of the Maine Whistleblower's Protection Act, an employee's evidence that her supervisor glared at her, confronted her over performance issues, and transferred clients to other employees did not constitute a hostile work environment. *See Blake v. Maine*, 2005 ME 32, 868 A.2d 234.

The relationship between a supervisor and an employee by its very nature involves a certain amount of tension, and at times, may even generate some hostility. A supervisor must be able to exert authority when interacting with a subordinate. In order to demonstrate a hostile work environment in the case of a supervisor-subordinate, the subordinate must show that the hostility was severe or pervasive, and that it extended beyond the normal tension that exists in many supervisor-supervisee relationships.

*Id.* ¶ 10 (citation omitted).

An employee's allegation that she was forced to resign in order to follow her husband (who alleged that he was unlawfully discharged) does not satisfy the elements of a claim of constructive discharge under the Maine Human Rights Act ("MHRA"), 5 M.R.S. § 4633. *See Andrews v. Am. Red Cross Blood Servs., New England Region*, 251 F.Supp.2d 976, 979 (D. Me. 2003).

To establish a hostile environment motivated by retaliation under the MHRA, the employee must generate evidence of repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment. A single comment that is offensive or in poor taste is not sufficiently severe or pervasive to constitute a hostile work environment. *Doyle v. Dep't Of Human Servs.*, 2003 ME 61, ¶ 25, 824 A.2d 48.

### **IV. WRITTEN AGREEMENTS**

#### **A. Standard "For Cause" Termination**

Execution of a collective bargaining agreement after an employee's separate, individual employment contract discharges the prior agreement to the extent it is inconsistent. *Walton v. Me. Sch. Admin. Dist.* 52, 2008 ME 61, ¶ 7, 945 A.2d 1242.

"Whether a[n] [employment contract] is ambiguous is a question of law." *Lee v. Scotia*

*Prince Cruises Ltd.*, 2003 ME 78, ¶ 9, 828 A.2d 210. If ambiguous, the interpretation of the contract is a question of fact for the fact-finder. *Id.*, citing *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 98. An employment contract is ambiguous when it is reasonably susceptible to different interpretations. *Id.*

#### B. Status of Arbitration Clauses

Maine has a strong policy favoring the enforcement of arbitration clauses. *Barrett v. McDonald Investments, Inc.*, 2005 ME 43, ¶ 16, 870 A.2d 146. Maine law determines whether a contract to arbitrate exists. *Foss v. Circuit City Stores, Inc.*, 477 F. Supp. 2d 230 (D. Me. 2007). A dispute is subject to arbitration if (1) the parties have generally agreed to arbitrate disputes, and (2) the party seeking arbitration presents a claim that, on its face, is governed by the arbitration agreement. *Baker v. Securitas Sec. Services USA, Inc.*, 432 F. Supp. 2d 120, 124 (D. Me. 2006), citing *V.I.P., Inc. v. First Tree Dev. Ltd. Liab. Co.*, 2001 ME 73, ¶ 4, 770 A.2d 95 (citations and quotation marks omitted). An employer does not waive its right to arbitration by failing to initiate arbitration during administrative proceedings before the Maine Human Rights Commission or the EEOC. *Baker*, 432 F. Supp. 2d at 125.

Under Maine law, however, an arbitration clause may be waived if the party seeking to compel arbitration has “demonstrated a ‘preference for litigation’ over arbitration.” *Saga Communications of New England, Inc. v. Voornas*, 2000 ME 156, ¶ 12, 756 A.2d 954. In that case, the Law Court, applying the Federal Arbitration Act – and noting its similar policy favoring arbitration – because the defendant’s employment as a radio announcer involved interstate commerce, held that the plaintiff waived the right to compel arbitration pursuant to the employment and non-compete agreement. The plaintiff’s substantial litigation of issues going to the merits, including its filing of two motions for injunctive relief and opposing the defendant’s motion for summary judgment without raising the arbitration issue, constituted a course of action inconsistent with its subsequent insistence upon its contractual right to arbitration. *Id.* ¶¶ 14-15.

Because Maine law permits an action on a contract made by a minor only if the minor ratified the contract in writing after reaching the age of 18, or the contract was ratified by a person lawfully authorized to do so, 33 M.R.S. § 52, an arbitration agreement is unenforceable where the employee signed the agreement when he was 17 years old, and there is no evidence that his parent consented to the agreement, *Foss*, 477 F. Supp. 2d at 235-37 (applying Maine law).

### V. ORAL AGREEMENTS

#### A. Promissory Estoppel

The Law Court has held that promissory estoppel cannot be applied to avoid the statute of frauds in the context of employment contracts. *Stearns v. Emery-Waterhouse Co.*, 596 A.2d 72, 74 (Me. 1991); *see also Popanz*, 1998 ME 95, ¶ 6, 710 A.2d 252.

#### B. Fraud

To prove that an employer made a false representation regarding the duration of employment, an employee must establish by clear and convincing evidence the elements of fraud: (1) that the employer made a false representation, (2) of a material fact, (3) with knowledge of its falsity or with reckless disregard of its falsity, (4) for the purpose of inducing the employee to act in reliance upon it, and, (5) the employee justifiably relied upon the representation as true and acted upon it to his or her damage. *Rand*, 2003 ME 122, ¶ 13, 832 A.2d 771, 773.

C. Statute of Frauds

An oral agreement between employer and employee regarding salary level, promotion, and transfer of company stock, was not enforceable under the statute of frauds, where both employer and employee understood that the transfer of stock could not be accomplished within one year. *Ingram v. Rencor Controls, Inc.*, 256 F. Supp. 2d 12, 21-22 (D. Me. 2003).

VI. DEFAMATION

A. General Rule

The elements of defamation are as follows:

[A] false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher; and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

*Morgan v. Kooistra*, 2008 ME 26, ¶ 26, 941 A.2d 447.

1. Libel

In *Cole v. Chandler*, 2000 ME 104, 752 A.2d 1189, a former employee brought libel and slander claims arising out of a co-worker's statements made in the course of the employer's investigation of a sexual harassment complaint. The former employee also alleged forced publication of libel and slander, asserting that the employer should have known that he would be forced to reveal the reasons for his termination in a search for new employment, and that he was forced to republish the libelous and slanderous statements. The court determined that the employer could not be liable for defamation, as the alleged defamatory statements were privileged because "an important interest of the [employer—the prevention of sexual harassment] will be advanced by frank communication" in these circumstances. *Id.* ¶ 16.

2. Slander

Recovery for slander *per se* requires no showing of special harm beyond the publication itself. *Rippett v. Bemis*, 672 A.2d 82, 86 (Me. 1996).

B. References

Maine's Employment Reference Immunity Act, 26 M.R.S. § 598, creates a statutory presumption that an employer disclosing information about a former employee's job performance acts in good faith, but also states that the statute is not in derogation of common law remedies available to employees.

C. Privileges

A conditional privilege shields a supervisor or co-worker from liability arising out of an alleged defamatory statement if (1) the statement is made through "normal channels" to further an important public interest; (2) the third party's knowledge of the information will serve the lawful protection of that interest; and (3) the publisher of the statement does not act with malice or a reckless disregard for the truth or falsity of the statement. *Morgan v. Kooistra*, 2008 ME 26, ¶ 31, 941 A.2d 447

D. Other Defenses

1. Truth

Truth is an affirmative defense to common law defamation. *Ramirez v. Rogers*, 540 A.2d 475, 477 (Me. 1988).

2. No Publication

Communication by an employee, within the scope of employment, to another employee or agent of the employer is a publication not only by the first employee but also by the employer, regardless of whether the employer is an individual, a partnership, or a corporation. *Staples v. Bangor Hydro-Elec. Co.*, 629 A.2d 601, 604 (Me. 1993).

3. Self-Publication

The Law Court has not specifically addressed the issue of defamation by compelled self-publication. *Cole v. Chandler*, 2000 ME 104, ¶ 5, 752 A.2d 1189; *but see Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 11 (D. Me. 1995) (predicting Maine law).

4. Invited Libel

The Law Court has not addressed this issue in the employment context.

5. Opinion

A defamation claim must be based upon an assertion of fact, either explicit or implied, and not merely an opinion. A statement is an opinion if it does not imply the existence of undisclosed defamatory facts, but makes a personal observation on the facts. For instance, a student's letter to a university tenure committee did not make statements of fact, but expressed

opinions. It conveyed the student's subjective evaluation that a teacher was homophobic, and that his manner was offensive, insensitive, and occasionally intimidating. "The letter itself makes it clear that [the declarant] was conveying her subjective impressions; it states at the outset that it expresses 'my strong opinions on this matter.'" *Lester v. Powers*, 596 A.2d 65, 71 (Me. 1991).

Statements made by a defendant, commenting on the merits of the defense and expressing opposition to the settlement authorized by the municipal risk pool, constitute statements of opinion that cannot support a claim for defamation or false light invasion of privacy. *Halco v. Davey*, 2007 ME 48, ¶¶ 3, 14, 919 A.2d 626.

Additionally, pursuant to Maine's anti-SLAPP statute (Strategic Lawsuit Against Public Participation), 14 M.R.S. § 556, is designed to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of a defendant's First Amendment right to petition the government by threatening would-be activists with litigation costs. *Desjardins v. Reynolds*, 2017 ME 99, ¶ 6, 162 A.2d 228. The anti-SLAPP statute provides defendants who are the targets of such suits with a "special motion to dismiss," a statutory motion designed to minimize the litigation costs associated with the defense of such meritless suits. *Id.* ¶ 7.

#### E. Job References and Blacklisting Statutes

In Maine, blacklisting is a Class D crime. 17 M.R.S. § 401. *See, also*, discussion on "References" in Section VI(B) above.

#### F. Non-Disparagement Clauses

The Law Court has not addressed this issue in the employment context.

A defendant's public comments regarding a settlement agreement, to the effect that the settlement was a "payoff" that "only promotes more lawsuits" and that the defendants "had beaten this guy the whole way through" the litigation, support a claim for violation of the non-disparagement clause in a settlement agreement, because the statements can be understood to suggest that the plaintiff's claim was frivolous. *Halco*, 2007 ME 48, ¶ 12, 919 A.2d at 630.

### VII. EMOTIONAL DISTRESS CLAIMS

#### A. Intentional Infliction of Emotional Distress

An employee pursuing an intentional infliction of emotional distress claim must prove that the employer (1) inflicted severe emotional distress or was certain or substantially certain that such distress would result from the conduct of its employees; (2) the employer's conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community; (3) the conduct caused the employee's emotional distress; and (4) the employee's emotional distress was so severe that no reasonable person could be expected to endure it. *Argereow v. Wisberg*, 2018 ME 140, ¶ 27, 195 A.3d 1210. Courts determine, in the first instance, whether the conduct of the employer or its employees was

so extreme and outrageous as to permit recovery. Conduct that frustrates and humiliates an employee does not rise beyond the usual emotional traumas of daily life in modern society. *Leavitt v. Wal-Mart Stores, Inc.*, 238 F. Supp. 2d 313, 316-317 (D. Me. 2003).

#### B. Negligent Infliction of Emotional Distress

In Maine, it is no longer required that a plaintiff prove the existence of a separate tort in order to recover for negligent infliction of emotional distress. *Bryan R. v. Watchtower Bible & Tract Soc. of N.Y., Inc.*, 1999 ME 144, ¶ 30, 738 A.2d 839. “The removal of the necessity for a plaintiff to allege an underlying tort or physical impact did not create a new cause of action, but simply removed the barriers that prevented plaintiffs from proceeding with claims already recognized in Maine, when the only damage suffered was to the psyche.” *Id.* Recovery is allowed only “where a particular duty based upon the unique relationship of the parties has been established.” *Id.* ¶ 31.

To recover for mental or emotional distress suffered as a result of a breach of contract, including an employment contract, the plaintiff must suffer some accompanying physical injury, or the contract must be such that a breach of it will result in a serious emotional disturbance, such as contracts between carriers and innkeepers, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death.

*Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 622 (Me. 1996).

Many negligent infliction of emotional distress claims arising in the workplace are barred by the exclusivity and immunity provisions of the Maine Workers’ Compensation Act. *See* 39-A M.R.S. §§ 104, 408.

### **VIII. PRIVACY RIGHTS**

#### A. Generally

Public employees have a right to confidentiality in discussion of employment matters, including assignment, duties, promotion, demotion, compensation, evaluation, discipline, resignation, and dismissal, if public discussion could be reasonably expected to cause damage to the reputation or the employee’s right to privacy would be violated. The public employee also has a right to be present at an executive session convened to charges or an investigation of the employee. 1 M.R.S. § 405(6)(A)(2).

With certain defined exceptions, personnel records of state, county and municipal employees are confidential and not open to public inspection. 5 M.R.S. §§ 7070, 7070-A; 30-A M.R.S. §§ 503, 2702. A final written decision of employee discipline is public information. However, complaints against the employee or investigations that do not end in discipline are confidential. Payroll information is public; citizens have the right to know what their government pays its employees. Even though the public has an interest in learning whether public employees are physically fit to perform their job duties, especially in the public safety

area, all medical records are confidential. An application for employment and any letters of recommendation are public only if the applicant is hired. However, if a letter of recommendation is “expressly submitted in confidence,” it is deemed confidential. Public records must be redacted of all personal information, such as the employee’s address, phone number, and social security number.

The Maine legislature has not enacted a statute generally addressing the privacy rights of non-public employees.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Maine has not enacted statutes governing the use by employers of the federal e-verification process. Maine’s former governor, Paul R. LePage, signed an executive order on January 6, 2011, which allows employers to question the immigration status of employees. By statute, an employer also shall not knowingly employ an alien. 26 M.R.S. § 871. An employer is not deemed to have violated this limitation if it makes a bona fide inquiry regarding the alien’s status. *Id.*; An Order to Enhance Cooperation Between State and Federal Law Enforcement Officials January 6, 2011, [http://www.maine.gov/tools/whatsnew/index.php?topic=Gov\\_Executive\\_Orders&id=181046&v=article2011](http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=181046&v=article2011)

2. Background checks

In Maine, conviction data may be disseminated to any person for any purpose. 16 M.R.S. §§ 703(8), 704(1). Other criminal history record information is non-public and may only be disclosed if permitted by statute. *Id.* § 705. A consumer reporting agency may furnish an investigative consumer report to an employer for use in determining eligibility or suitability for employment, promotion, reassignment, or retention as an employee, but only if the employer gives notice to the individual who is the subject of the report. A person subject to Maine’s Fair Credit Reporting Act shall comply with the federal Fair Credit Reporting Act and the provisions of 12 Code of Federal Regulations § 1022.1. *See* 10 M.R.S. § 1309.

Unless the record is based on a bona fide occupational qualification, an employer may not make or keep a record of an applicant’s race, color, sex, sexual orientation, physical or mental disability, religion, age, ancestry, or national origin. After a person has been employed, however, information concerning the person’s features can be recorded for use in identifying the employee, and data required by state or federal agencies may be recorded, provided that the record is intended and used for those agencies and not for discriminatory purposes. 5 M.R.S. §§ 4572(1)(D)(2), 4573(2), (3).

An employer may not ask an applicant for employment to provide a maiden or former name except when based on a bona fide occupational qualification. 94-348 CMR Ch. 3, § 4(1)(A)(1).

## C. Other Specific Issues

### 1. Workplace Searches

No legal standard or law regarding searches of an employee's desk, locker, or general workplace has been adopted by the Law Court, Maine's highest court, or enacted by the Maine legislature.

### 2. Electronic Monitoring

Maine's Interception of Wire and Oral Communications Act prohibits the interception of wire and oral communications. The criminal and civil penalties are applicable in the employment context. 15 M.R.S. §§ 709, 710.

### 3. Social Media

Section 7 of the National Labor Relations Act limits an employer's ability to restrict its employee's use of social media. 29 U.S.C.A. § 157. The National Labor Relations Act preempts any Maine law(s), which would be in conflict with the NLRA, if such Maine law existed, which it does not. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144-147 (1971).

The Maine Legislature recently enacted an employee social media privacy statute, which prohibits an employer from requesting or requiring (1) the disclosure of passwords to an employee's or applicant's personal social media accounts, (2) that an employee or applicant access such accounts in the employer's presence, (3) that an employee or applicant disclose account information, (4) that an employee or applicant add the employer to her list of contacts, and (5) that an employee or applicant alter settings that affect a third party's ability to view an account. 26 M.R.S. § 616. Additionally, an employer may not discharge, discipline, or penalize an employee or threaten to do so for the employee's refusal to agree to any of the prohibited employer requests. *Id.* An employer may not fail or refuse to hire an applicant for the applicant's refusal to agree to any of the prohibited employer requests. *Id.* The law does not apply to publicly available information and when such personal social media account information is reasonably believed to be relevant to an investigation of employee misconduct or a violation of workplace-related laws, rules, or regulations. *Id.* § 617. Additionally, an employer may adopt workplace policies governing the use of the employer's electronic equipment, which can include a requirement that an employee disclose her user name, password, or other information necessary to access employer-issued electronic devices or employer-provided software or e-mail accounts. *Id.* § 618. Violations of the statute are punishable by fines beginning at \$100 for the first violation, a fine of not less than \$250 for the second violation, and fines of not less than \$500 for each subsequent violation. *Id.* § 619.

Service of process may be effectuated by using an individual's usual place of "virtual abode," which might include Internet web sites with means of contact, email access, social networking sites, or any other alternative avenues where it is reasonably certain to provide a person with actual notice of the suit. M.R. Civ. P. 4 (Advisory Comments 2010).

#### 4. Taping of Employees

See discussion above on “Electronic Monitoring.”

#### 5. Release of Personal Information on Employees

Maine law requires an employer to allow an employee, former employee, or his duly authorized representative to review and copy the employee’s personnel file within ten days of receipt of a written request by the employee or former employee. 26 M.R.S. § 631.

On written request by an affected employee, an employer must give that employee the written reasons for the termination of employment. Failure to satisfy this requirement within 15 days of receipt of the request may subject the employer to a fine of \$50 to \$500. 26 M.R.S. § 630.

#### 6. Medical Information

Every individual's health care information is confidential pursuant to Maine law. Health care information may not be disclosed other than to the individual, except pursuant to a written authorization signed by an individual for the specific purpose stated in the authorization. 22 M.R.S. § 1711-C.

A state employee’s health care information, in the possession of the employer, is confidential. 5 M.R.S. § 7070. A county or municipal employee’s health care information, in the possession of the employer, is confidential. 30-A M.R.S. § 2702. The Maine Human Rights Act establishes the confidentiality of any health care information in the possession of an employer. 5 M.R.S. § 4572.

#### 7. Restrictions on Requesting Salary History

There is currently no law addressing the ability to request salary history.

### **IX. WORKPLACE SAFETY**

#### A. Negligent Hiring

Maine has adopted Restatement (Second) of Torts § 411 “as setting forth a valid claim pursuant to Maine tort law for the negligent selection of a contractor.” *Dexter v. Town of Norway*, 1998 ME 195, ¶ 10, 715 A.2d 169. Accordingly, an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor:

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons.

Negligent hiring is a claim of direct, not vicarious liability. *Brennan v. Stone Coast Brewing Co.*, 2003 WL 1618509 (Me. Super. Jan. 21, 2003).

B. Negligent Hiring/Supervision

Maine recognized the tort of negligent supervision in *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, 871 A.2d 1208. The Law Court determined that the allegations underlying the Plaintiff's claim, his prolonged and extensive involvement with the church as a student and altar boy, were sufficient to establish a fiduciary relationship with the church for purposes of surviving a Motion to Dismiss. "A child who is both a student and an altar boy is subject to the supervision, control, and authority of the Diocese on a daily basis. At its very core, this is a relationship marked by the 'great disparity of position and influence between the parties' that is a hallmark of a fiduciary relationship." The existence of the fiduciary relationship, coupled with the assertion that the Diocese knew or should have known of the substantial risk of harm posed by the priest who abused Fortin, gave rise to a duty to protect on the part of the Diocese.

The court limited negligent supervision claims to the specific relationships addressed by § 315(b) of the Restatement (Second) of Torts, and the rule established by § 317 of the Restatement. Judicial imposition of a duty of care based on the existence of a special relationship does not violate the First Amendment because it (1) is facially neutral and does not overtly or covertly target religious beliefs or practices, and (2) satisfies the requirement of general applicability because it applies to all individuals and organizations, not just religious organizations. Courts do not inhibit the free exercise of religion by applying neutral principles of law to a civil dispute involving members of the clergy. *See* RESTATEMENT (2D) OF TORTS §§ 315(b) and 317. *See, also, Fortin*, 2005 ME 57, ¶ 49, 871 A.2d 1208.

An employer is not vicariously liable for actions on the part of an employee that are done with a private, rather than a work-related, purpose to commit wrongdoing. Even when an employee acts during work hours and while working, the motivation of the employee in performing the act at issue is a crucial, immunity-related fact. *Mahar v. StoneWood Transport*, 2003 ME 63, ¶ 14, 823 A.2d 540 (quoting *Nichols v. Land Transp. Corp.*, 103 F.Supp.2d 25, 27 (D. Me. 1999)).

In *Napieralski v. Unity Church of Greater Portland*, 2002 ME 108, 802 A.2d 391, the Law Court declined to consider imposing liability on a church for negligent supervision of its employee where the claim arose out of a private business transaction rather than the defendant's employment relationship with the church.

The facts here involve contact between adults for the purpose of addressing a private, personal matter unrelated to the business or function of the Unity Church. The contact occurred at the residence of the individual who was allegedly negligently supervised. Recognizing a cause of action for negligent supervision, and extending it to such facts, would go far beyond the scope of any

traditional negligent supervision action. Such an interpretation would suggest that employers should become the guarantors of their employee's good conduct in private matters merely because the initial contact with the employee occurred in the regular course of business.

*Id.* ¶ 8.

C. Interplay with Workers' Comp. Bar

The Maine Workers' Compensation Act provides that an employer is liable for personal injury caused to an employee when workplace safety violations negligently are left undiscovered or not remedied. 39-A M.R.S. § 901.

D. Firearms in the Workplace

An employer may not prohibit an employee who has a valid permit to carry a concealed firearm under 25 M.R.S. § 252 from keeping a firearm in the employee's vehicle as long as the vehicle is locked and the firearm is not visible. The statute does not authorize employees to carry firearms in places where carrying a firearm is prohibited by law. 26 M.R.S. § 600.

E. Use of Mobile Devices

Maine law does not address the limitation by employers of the use of personal mobile devices in the workplace. It is a crime in Maine to intercept the use of personal mobile devices without the consent of the person entitled to privacy or without a warrant. 17-A M.R.S. § 511. Government entities must obtain a warrant for real time cellphone tracking of an individual's movement, as well as to access data on the individual's historical location. 16 M.R.S. §§ 641-645.

Public employees must comply with the "Mobile Device Policy" issued by the State of Maine on July 31, 2013 and last revised on October 3, 2017.  
<https://www.maine.gov/oit/policies/MobileDevicePolicy.pdf>

**X. Tort Liability**

A. Respondeat Superior Liability

"Maine applies the RESTATEMENT (SECOND) OF AGENCY to determine the limits of imposing vicarious liability on an employer." *Mahar*, 2003 ME 63, ¶ 13, 823 A.2d 540.

Specifically, an employer may be liable for the actions of its employee if the actions taken were in the "scope of employment." *Id.* The Restatement (Second) of Agency § 228 provides:

- (1) Conduct of a servant is within the scope of employment if, but only if:
  - (a) it is of the kind he is employed to perform;
  - (b) it occurs substantially within the authorized time and space limits;

- (c) it is actuated, at least in part, by a purpose to serve the master, and
  - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

*Dragomir v. Spring Harbor Hosp.*, 2009 ME 51, ¶ 12, 970 A.2d 310.

An employer may be held vicariously liable for the harassment of an employee only if the harassing employee meets the United States Supreme Court’s new articulated definition of supervisor: an employee “empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013)

#### B. Tortious Interference with Business/Contractual Relations

Tortious interference with a prospective economic advantage requires a plaintiff to prove: (1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages. *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶31, 915 A.2d 400. “Intimidation is not restricted to frightening a person for coercive purposes, but rather exists wherever a defendant has procured a breach of contract by ‘making it clear’ to the party with which the plaintiff had contracted that the only manner in which that party could avail itself of a particular benefit of working with defendant, would be to breach its contract with plaintiff.” *Id.* The “arrangement need not be overtly expressed to be ‘made clear’”; tacit suggestions, mere inferences, and recommendations may constitute intimidation. *Id.* ¶ 33.

### XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

#### A. General Rule

Restrictive covenants are enforceable under Maine law. “[A]n employer, under a proper restrictive agreement, can prevent a former employee from using his trade or business secrets and other confidential knowledge gained in the course of employment, and from enticing away old customers.” *Bernier v. Merrill Air Engineers*, 2001 ME 17, ¶ 15, 770 A.2d 97. Restrictive covenants are enforceable if reasonable in scope and duration and the interests to be protected. *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995). The reasonableness of a non-compete or nondisclosure agreement is a question of law for the court. *Id.* The reasonableness of the agreement depends on the circumstances of each case and should be “assess[ed] only as [the defendant] has sought to apply it and not as it might have been enforced on its terms.” *Id.*

#### B. Blue Penciling/Severability

It is well established in Maine that “the severability or entirety of a contract depends upon the intent of the contracting parties, and that intent is question of fact.” *Belanger v. Haverlock*, 537 A.2d 604, 606 (Me. 1988). “The true test is whether the parties assented to all

the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out.” *Dehahn v. Innes*, 356 A.2d 711, 716 (Me. 1976).

### C. Confidentiality Agreements

A nondisclosure clause which protects the use of information that does not rise to the level of a trade secret but involves more than general skill or knowledge, and does not prohibit the employee from using the general skill and knowledge acquired during employment, is enforceable. A nondisclosure agreement need not have durational or geographic limits because “confidentiality knows no temporal or geographical boundaries.” *Bernier*, 2001 ME 17, ¶ 18, 770 A.2d 97.

### D. Trade Secrets Statute

Maine has enacted the Uniform Trade Secrets Act. 10 M.R.S. §§ 1541-1548. The Act creates a cause of action for injunctive relief, damages, punitive damages, and attorneys’ fees.

### E. Fiduciary Duty and their Considerations

A fiduciary relationship exists where “the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.” *DeCambra v. Carson*, 2008 ME 127, ¶ 13, 953 A.2d 1163. But not all fiduciary relationships are special relationships; only those where there is a “great disparity of position and influence between the parties” will suffice. *Dragomir*, 2009 ME 51, ¶ 19, 970 A.2d 310.. This determination is to be made on a case-by-case basis, “unless the nature of a given relationship is such that there is always certain to be a great disparity of position and influence.” *Id.*

In two instances, the Law Court has found that, in light of the circumstances, a plaintiff’s relationship to the defendant was marked by a “great disparity of position and influence between the parties.” *See id.*; *see also Fortin*, 2005 ME 57, ¶ 34, 871 A.2d 1208.. In *Fortin*, the plaintiff, who had been sexually assaulted by his childhood priest, alleged that the Diocese was liable for negligent supervision. 2005 ME 57, ¶¶ 3, 16, 31, 871 A.2d 1208. When the abuse began, Fortin was a parochial school student and altar boy under the daily supervision, control, and authority of the Diocese. *Id.* ¶ 34. The court distinguished Fortin’s relationship with the Diocese from that of an individual who could assert only a “general membership” in an organization and concluded that the established and close connection between Fortin and the organization signaled a special relationship. *Id.* ¶¶ 32, 34, 37.

Similarly, a patient with a serious mental condition and the hospital providing him with treatment may have a fiduciary relationship marked by a “great disparity of position and influence.” *Dragomir*, 2009 ME 51, ¶ 21, 970 A.2d 310.. In *Dragomir*, while the plaintiff was receiving treatment from a hospital for schizophrenia and substance abuse, he and his social worker began a sexual relationship. *Id.* ¶¶ 2, 3, 21. As a vulnerable and impaired patient receiving intensive treatment from the hospital, Dragomir was able to allege facts sufficient to establish a special relationship. *Id.* ¶ 21.

On the other hand, in *Gniadek v. Camp Sunshine*, the Law Court found that no fiduciary relationship existed between the plaintiff and defendant. 2011 ME 11, ¶ 22, 11 A.3d 308. Gniadek spent one week each year at Camp Sunshine. *Id.* Outside of this contact, she elected to participate in, at most, three fundraising events to benefit the Camp. Gniadek also maintained a social relationship with some campers, volunteers, and staff. Ultimately, her relationship with the Camp was indistinguishable from that of other campers. *Id.*

An employer may attempt to protect these same interests by asserting an unjust enrichment claim against a former employee. *Maine Eye Care Associates P.A. v. Gorman*, 2008 ME 36, 942 A.2d 707. To recover, the employer must prove: (1) it conferred a benefit on the employee; (2) the employee had appreciation or knowledge of the benefit; and, (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for the employee to retain the benefit without payment of its value. *Id.* ¶ 17. In that case, the employer brought an unjust enrichment claim against one of its ophthalmologists, who set up a new practice, serving the employer's patients. The employer's claim foundered on the "retention" element, because the employer had not established "the monetary value of the files or goodwill of the practice." *Id.* ¶ 18. This legal theory could allow an employer to restrict a former employee's competition for business under circumstances where the goodwill or other benefit used by the former employee can be valued.

## **XII. DRUG TESTING LAWS**

### **A. Public Employers**

Maine has comprehensive drug testing laws. 26 M.R.S. §§ 681-690. The substance abuse testing law seeks to protect employees' privacy rights and allow employers to test for substance abuse when there is a compelling reason for it, ensure reliable and accurate results when tests are used, eliminate drug use in the workplace, and provide an opportunity for each employee with a substance abuse problem to obtain rehabilitation and treatment services so as to return quickly to work. 26 M.R.S. §§ 681(1), 683. The law prohibits any substance abuse test that is required, requested, or suggested by an employer, unless it complies with both the law's standards and procedures and the employer's written and approved policy. An employer may use such tests only for the purpose of discovering the use of any substance of abuse likely to cause impairment of the user or the use of any scheduled drug. Tests may not be used to discover any other information. Before establishing any substance abuse testing program, an employer, among other things, must develop a written policy that: explains the consequences of an employee's voluntary admission of a substance abuse problem, including the availability and procedure of the employer's employee assistance program; states when substance abuse testing may occur for particular positions and the procedures to be followed in selecting employees to be tested on a random or arbitrary basis, although the policy may designate all positions as subject to testing in regard to applicant and probable cause testing; and provides for the collection of testing samples under the supervision of a licensed physician or nurse in a medical facility, which may include a first-aid station at the worksite.

Each employee must receive a copy of the approved substance abuse testing policy at

least 30 days before any portion of it applicable to employees takes effect. 26 M.R.S. § 683(3)-(4). Also, each employee must receive a copy of any change in the policy concerning employees at least 60 days before it takes effect. Further, the employer must give any applicant who is subject to testing a copy of the policy before testing the applicant. An employer may not require, request, or suggest that any employee or applicant sign or otherwise give assent to any agreement that attempts to either absolve the employer of any potential liability arising from substance abuse testing or waive the test subject's rights under the substance abuse testing statute.

Within limits set by the Maine Human Rights Act and other state and federal employment laws, an employer may use a confirmed positive result on a substance abuse test or an employee's refusal to submit to such a test as a factor in its decision to reject an applicant for employment, or to discharge, discipline, or change the work assignment of an employee. 26 M.R.S. § 685. Before acting on a confirmed positive result the employer must give the employee an opportunity to participate for up to six months in a rehabilitation program designed to avoid future substance use or abuse. The employer may take an adverse action if the employer receives notice from the rehabilitation or treatment provider before the end of the six-month period that the employee has failed to comply with the provider's prescribed program or if the employee receives a subsequent confirmed positive result from any test lawfully administered under the testing statute. If the employee chooses not to participate in a rehabilitation program, the employer may take an adverse action.

#### B. Private Employers

See discussion above regarding Public Employees. The relevant statutes apply equally to public and private employees.

### **XIII. STATE ANTI-DISCRIMINATION STATUTE(S)**

#### A. Employers/Employees Covered

The Maine Human Rights Act covers all employers, employment agencies, labor organizations and joint labor-management committees in Maine, regardless of size. 5 M.R.S. § 4553. Additional anti-discrimination statutes are discussed below under Section XII.B.

However, individual supervisors are not liable for employment discrimination under the Maine Human Rights Act (MHRA) and the Whistleblowers' Protection Act (WPA). *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 35, 58 A.3d 108; see also *Roy v. Correct Care Solutions, LLC*, 914 F.3d 52 (1st. Cir. 2019) (declining to extend *Fuhrmann's* holding to third-parties and concluding that any "person", including non-employer third-party entities and third-party individuals may be liable for employment related discrimination under § 4633 of the MHRA).

#### B. Types of Conduct Prohibited

The Maine Human Rights Act, 5 M.R.S. §§ 4551-4634, provides that no employee may be discriminated against or discharged on the basis of race or color, sexual orientation, sex,

physical or mental disability, religion, age, ancestry or nationality. The Act also prohibits retaliation against an employee who participates in proceedings or opposes unlawful practices under the Act. An employee alleging Title VII retaliation must prove that his employer's retaliatory motive was the "but-for" cause of the negative employment action, instead of just a motivating factor under the lessened causation test. *Univ. Tex. Sw. Med. Ctr. V. Nassar*, 570 U.S. 338 (2013).

The Act's definition of a "physical or mental disability" is much broader than the definition under the federal Americans with Disabilities Act. The Act defines disability as a physical or mental impairment that substantially limits one or more of a person's major life activities, significantly impairs physical or mental health, or requires special education, vocational rehabilitation, or related services. In addition, certain medical conditions qualify as a disability without regard to the severity of the condition. These conditions include absent, artificial or replacement limbs, hands, feet, or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury. 5 M.R.S. § 4553-A.

Maine's public health laws prohibit discrimination against an employee or applicant on the basis of genetic information concerning that individual or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test. 5 M.R.S. § 19302.

Maine's Family Medical Leave Requirements, 26 M.R.S. §§ 843-848, provides that no employer may discriminate against an employee for taking family or medical leave and is enforced through a civil action. Remedies include lost pay damages, liquidated damages and attorney fees. Entitlement to leave extends beyond the scope of the federal Family Medical Leave Act, to domestic partners, as defined by the statute. 26 M.R.S. § 843(7).

Maine's Volunteer Firefighters' Employment Act, 26 M.R.S. § 809, provides that no employer may discriminate against an employee who fails to report to work at the beginning of the workday due to responding to an emergency and is enforced through equitable remedies.

No employee may be discriminated against for refusing to perform an abortion. 22 M.R.S. § 1592.

No employee may be discriminated against for taking action in compliance with state occupational safety and health laws and regulations. 26 M.R.S. § 570.

Maine's Whistleblowers' Protection Act, 26 M.R.S. §§ 831-840, provides that (1) no employee may be discriminated against for reporting in good faith a suspected violation of any federal, state or municipal law or rule; (2) no employee may be discriminated against for reporting in good faith a condition or practice that endangers the employee or other individuals; (3) discharging an employee for participating in an investigation is prohibited; (4) discharging an

employee who refuses to comply with an employer's order when doing so would expose the employee or another individual to a condition that would result in serious injury or death, after attempting to get the employer to correct the condition is prohibited; and (5) no employee of a health care provider may be discriminated against for reporting medical care that deviates from acceptable standards.

Maine's Workers' Compensation Act, 39-A M.R.S. § 353, prohibits an employer from discriminating or retaliating against an employee for filing a workers' compensation claim.

No employee may be discharged because the employer was served with a child support withholding order. 19-A M.R.S. § 2367.

C. Administrative Requirements

Under the Maine Human Rights Act, an aggrieved party must file a charge of discrimination with the Maine Human Rights Commission within 300 days of the alleged discriminatory act. 5 M.R.S. § 4611.

D. Remedies Available

Under the Maine Human Rights Act, an aggrieved party who complies with the administrative requirements may recover back pay, front pay, costs and attorney's fees, and compensatory and punitive damages subject to damage caps. Caps for compensatory and punitive damages, where available, apply as follows:

- 1-14 employees--\$10,000;
- 15-100 employees--\$50,000;
- 101-200 employees--\$100,000;
- 201-500--\$300,000;
- >500--\$500,000.

5 M.R.S. § 4613.

The standard of proof for recovering punitive damages under the Maine Human Rights Act is clear and convincing evidence. *Batchelder v. Realty Resources Hospitality, LLC*, 2007 ME 17, ¶ 22, 914 A.2d 1116.

In *Ginn v Kelley Pontiac-Mazda, Inc.*, 2004 ME 1, ¶¶ 12-13, 841 A.2d 785, the Law Court held that a former employee seeking to recover, as an element of back pay, the value of fringe benefits must prove that he or she incurred out-of-pocket expenses for the same or equivalent benefits following unlawful termination of employment.

#### **XIV. STATE LEAVE LAWS**

A. Jury/Witness Duty

No employee may be deprived of employment or health insurance coverage because the employee receives or responds to a summons for jury service, serves as a juror, or attends court for prospective jury service. Violation of this statute is a Class E crime. 14 M.R.S. § 1218.

B. Voting

The Maine legislature has not enacted a voting leave law.

C. Family/Medical Leave

Maine's Family Medical Leave Requirements provide that employees who have been employed for 12 consecutive months with the same employer are entitled to up to 10 consecutive work weeks of family medical leave in any two-year period, at any work site with 15 or more employees. 26 M.R.S. §§ 843-848. Entitlement to leave extends beyond the scope of the federal Family Medical Leave Act, to domestic partners, as defined by the statute. 26 M.R.S. § 843(7).

Maine's Family Sick Leave Act requires employers to permit employees who have accrued paid sick, personal, or vacation time, to use up to 40 hours of that compensated time off to care for a sick child, spouse or parent. 26 M.R.S. § 636.

D. Pregnancy/Maternity/Paternity Leave

The Human Rights Act specifically prohibits employers from treating employees disabled by pregnancy, or medical conditions resulting from pregnancy, differently from the employees who are similarly able or unable to work as a result of other disabilities, except where the differentiation is based on a bona fide occupational qualification. Thus, employers are not obligated to give to employees disabled by pregnancy or other related medical conditions additional benefits that are not given to other employees. 5 M.R.S. § 4572-A(3)-(4), 94-348 CMR ch. 3, § 11(2)(C).

Maine law protects mothers who must breastfeed during working hours. 5 M.R.S. § 4634; 26 M.R.S. § 604. Employers must provide adequate unpaid break time or permit an employee to use paid break time or meal time each day to express breast milk for her nursing child for up to three years following childbirth. Also, employers must make reasonable efforts to provide a clean room, other than a bathroom, where an employee may express breast milk in privacy.

E. Day of Rest Statutes

Days of rest are: Sunday (except from noon to 5 p.m. between Thanksgiving and Christmas), Memorial Day, July 4th, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day. 17 M.R.S. § 3204. There are several exceptions to the law. *Id.*

F. Military Leave

Any member of the National Guard or the Reserves of the United States Armed Forces is entitled to a military leave of absence from a position with any public or private employer, when absence from work is in response to state or federal military orders. 26 M.R.S. § 811.

A family member of a Maine resident who is deployed for military service longer than 180 days, if employed by an employer of 15 or more employees, is entitled to 15 days of unpaid leave during the deployment. 26 M.R.S. § 814.

G. Sick Leave

There is currently no law in Maine requiring private employers to provide sick leave to its employees, whether paid or unpaid.

H. Domestic Violence Leave

The Employment Leave for Victims of Violence Act, 26 M.R.S. § 850, requires an employer to grant reasonable and necessary leave from work, with or without pay, for an employee who has been a victim of violence, assault, sexual assault, stalking, or any act that would support an order for protection from abuse, to prepare for and attend court proceedings, receive medical treatment, or obtain necessary services to remedy a crisis caused by domestic violence, sexual assault or stalking. The employer may deny leave if the leave would create an undue hardship, if the request is not communicated to the employer within a reasonable time, or if the leave is impractical, unreasonable or unnecessary based upon the facts known to the employer.

**XV. STATE WAGE AND HOUR LAWS**

A. Current Minimum Wage in State

As of January 1, 2019, the minimum wage is \$11.00 per hour. Starting January 1, 2020, the minimum wage is \$12.00 per hour. On January 1, 2021 and each January 1<sup>st</sup> thereafter, the minimum wage “then in effect must be increased by the increase, if any, in the cost of living” as measured by the percentage increase in the Consumer Price Index as of the previous August. 26 M.R.S. § 664(1).

B. Deductions from Pay

Maine generally requires that the employee be provided a paystub that must include the: (1) pay period date; (2) hours; (3) total earnings; and (4) total itemized deductions. 26 M.R.S. §665.

Employees must receive at least the minimum wage free and clear of any deductions, except (1) those required by law; or (2) payments to a third-party that are directed by the employee. The following deductions generally cannot be made from an employee’s pay: (1) cost of uniforms required by the employer or the nature of the job; (2) cash register or inventory

shortages and damages to employer provided equipment; (3) costs of licenses; (4) any portion of tips received by employees other than through a tip-pooling plan; (5) tools or equipment necessary to perform the job; (6) employer-required medical examinations; (7) cost of tuition for employer-required training; and (8) disciplinary deductions (employees must be paid on a salary basis may not be docked pay if they work any part of the week, but exempt employees may be docked for “major safety infractions.”). 26 M.R.S. §§ 629, 664, 672.

Examples of deductions that can be made: (1) Tax or tax liens; (2) employee portions of health insurance premiums; (3) employer’s actual cost of meals or housing furnished to the employee; (4) loan payments to third parties that are directed by the employee; (5) employee payments to savings plans such as 401(k)s, U.S. savings bonds, or IRAs; and (6) court-ordered child support or other garnishments, provided they comply with the Consumer Credit Protection Act. *Id.*

An employer may not deduct items incurred by the employee in the course of the employee’s work or in dealing with the customers on the employer’s behalf, such as cash shortages, inventory shortages, dishonored checks, dishonored credit cards, damages to the employer’s property in any form, or any merchandise purchased by a customer. 26 M.R.S. § 629.

An employer may not make deductions from an employee’s wages for any reason other than: (1) repayment of a loan, debt, or advance made to the employee; (2) payment of any merchandise purchased from the employer; (3) sick or accident benefits, or life or group insurance premiums, excluding compensation insurance, which an employee has agreed to pay; and (4) rent, light, or water expense of a company-owned house or building. 26 M.R.S. § 629. Any agreement should be reduced to writing and signed by the employee.

### C. Overtime Rules

Maine employees must be paid one and one-half (1.5) times their regular rate for all hours worked over 40 in a week. 26 M.R.S. § 664. The regular rate includes all earnings, bonuses, commissions and other compensation that is paid or due based on actual work performed but does not include any sums excluded from the definition of regular rate under federal law. *Id.*

Maine contains no daily overtime limitation.

An employee is exempt from minimum wage and overtime requirements if he or she is: (1) an executive, administrative, or professional employee; and (2) is paid a fixed salary that, when converted to an annual rate, exceeds 3000 times the State’s minimum hourly wage or the annualized rate established by the United States Department of Labor under the federal Fair Labor Standards Act, whichever is higher. 26 M.R.S. § 663(3)(K).

The overtime pay provisions of Maine’s wage and hour laws do not apply to interstate motor carriers. *Thompson v. Shaw’s Supermarkets, Inc.*, 2004 ME 63, ¶¶ 8-9, 847 A.2d 406.

D. Time for payment upon termination

An employer is required to pay any employee leaving employment in full by the next regular pay period; no pay may be withheld unless loan or advance is evidenced by a statement in writing signed by the employee; civil penalties, including attorney's fees, and twice the wages owed as liquidated damages, apply to failure to pay within a reasonable time. 26 M.R.S. § 626.

Maine's unpaid wages statute, which entitles a former employee to treble damages and attorney fees expended to recover unpaid wages, does not impose a requirement that the employer withheld wages in bad faith. *Bisbing v. Maine Med. Ctr.*, 2003 ME 49, ¶ 5, 820 A.2d 582.

An employer of an industrial or commercial facility that has employed 100 or more persons in the preceding 12-month period must provide severance pay at the rate of one week per year of employment to eligible employees upon relocation or termination of a business, unless employees have been paid equal or greater benefits under an express contract. 26 M.R.S. § 625-B.

E. Breaks and Meal Periods

Maine law provides that in the absence of a collective bargaining agreement or other written agreement between an employer and employee providing otherwise "an employee . . . may be employed or permitted to work for no more than 6 consecutive hours at one time unless the employee is given the opportunity to take at least 30 consecutive minutes of rest time . . . . This rest time may be used by the employee as unpaid mealtime, but only if the employee is completely relieved of duty." *See* 26 M.R.S. § 601. This statute does not apply to any place of employment in which fewer than three employees are on duty at one time and the nature of the work done allows the employee frequent paid breaks for shorter duration during the work day. *Id.*

F. Employee Scheduling Laws

An employer is prohibited from requiring an employee to work more than 80 hours of overtime in any consecutive 2-week period. 26 M.R.S. § 603. There are certain exceptions to this prohibition, however. *Id.* §603(3).

**XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

A. Smoking in the Workplace

Employers are required to establish a written policy on smoking in the workplace, post the policy, and make copies available on request to employees. The policy must prohibit smoking indoors and everywhere except in designated smoking areas, which must be outdoors and 20 feet or more from any entranceways, vents, or doorways, and the policy may prohibit smoking throughout the business facility. 22 M.R.S. § 1580-A. Discrimination against

employees who assist in the supervision or enforcement of the statute is prohibited. *Id.*

B. Health Benefit Mandates for Employers

An employer may not discriminate with respect to “compensation, terms, conditions or privileges of employment,” such as the provision of insurance benefits, because of an employee’s sexual orientation. 5 M.R.S. § 4572(1)(A). Same-sex marriage is permitted under Maine law. 5 M.R.S. § 4572(1)(A); 19-A M.R.S. § 701 (repealed); 24-A M.R.S. §§ 2832-A, 2741-A, 4249; 24 M.R.S. § 2319-A. If health insurance benefits are extended to spouses of employees, an employer must make available to employees the option to purchase additional benefits for domestic partners, however, they are not obligated to offer domestic partner benefits. Domestic partners are defined for health insurance purposes under the health insurance statute; however, Maine also has a domestic partnership registry.

C. Immigration Laws

Maine has not enacted statutes governing the use by employers of the federal e-verification process. Maine’s former governor, Paul R. LePage, signed an executive order on January 6, 2011, which allows employers to question the immigration status of employees. By statute, an employer also shall not knowingly employ an alien. 26 M.R.S. § 871. An employer is not deemed to have violated this limitation if it makes a bona fide inquiry regarding the alien’s status. *Id.*; An Order to Enhance Cooperation Between State and Federal Law Enforcement Officials January 6, 2011, [http://www.maine.gov/tools/whatsnew/index.php?topic=Gov\\_Executive\\_Orders&id=181046&v=article2011](http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=181046&v=article2011)

D. Right to Work Laws

Maine has not enacted a right to work law. It has no statute prohibiting union security clauses in collective bargaining agreements.

E. Lawful Off-Duty Conduct (Including Lawful Marijuana Use)

Maine's Medical Use of Marijuana Act (“MUMA”), 22 M.R.S. §§ 2421-2430-B, decriminalizes the use of marijuana for certain medical purposes. Under the MUMA, qualifying patients may use, and their caregivers may cultivate, medical marijuana in conformity with state requirements. 22 M.R.S. § 2423-A. A qualifying patient is one who has been diagnosed with a debilitating medical condition, such as cancer or glaucoma, or an otherwise chronic or debilitating medical condition that produces long-term pain, severe nausea, or other similar symptoms. MUMA provides certain express employment protections for qualifying patients and caregivers, while also supporting an employer's right to a drug-free workplace. 22 M.R.S. § 2423-E.

Specifically, the MUMA statute provisions and the Maine Department of Health and Human Services Division of Licensing and Regulatory Services’ “Rules Governing the Maine Medical Use of Marijuana Program,” provide, among other things, that:

(1) Employers cannot terminate or take adverse action against employees simply because of their status as qualifying patients or caregivers. However, employers operating under federal contracts, grants, or certain regulatory requirements may discriminate on the basis of status if employing such persons would put the employer in violation of federal law;

(2) Employers do not have to accommodate the ingestion of marijuana in the workplace. Employers should continue to enforce their drug-free workplace policies, even with respect to qualifying patients. They can also refuse a disability accommodation request if the employee is asking to ingest marijuana during working time;

(3) Employers do not have to tolerate an employee working while under “the influence of marijuana.” Further, the statute does not protect anyone who undertakes a task under the influence of marijuana in a way that constitutes professional malpractice or otherwise violates a professional standard. Employers, therefore, can terminate employees who show up for work under the influence, whether those employees used marijuana off site in compliance with MUMA.

Employers should be cautious when using drug test results to prove an employee is under the influence. A positive drug test does not necessarily show an employee is under the influence of marijuana. Marijuana remains in a person’s system long after any “high” has worn off. In addition, the phrase “under the influence” is not defined in the statute. The appropriate response to a positive drug test will depend on many factors, and the facts of each case must be analyzed carefully.

<http://www.maine.gov/dhhs/dlrs/mmm/documents/MMMP-Rules-144c122.pdf>

By a November 2016 statewide public referendum, Maine legalized the use of recreational marijuana *See* 28-B M.R.S. § 101 *et seq.* Adults over the age of 21 are permitted to possess, use, and transport marijuana and marijuana products of certain enumerated quantities in certain approved locations. *See* 28-B M.R.S. § 1501. Section 112 of the Marijuana Legalization Act addresses the scope of restricting marijuana use by employers. The Act provides that an employer is not required to “permit or accommodate the use, consumption, possession, trade, display, transportation, sale or cultivation of marijuana or marijuana products in the work place.” *Id.* The Act further provides that an employer “[m]ay enact and enforce workplace policies restricting the use of marijuana and marijuana products by employees in the workplace or while otherwise engaged in activities within the course and scope of employment” and “[m]ay discipline employees who are under the influence of marijuana in the workplace or while otherwise engaged in the activities within the course and scope of employment in accordance with the employer’s workplace policies regarding the use of marijuana and marijuana products.” *Id.* There is currently no case law interpreting the Act, but given the language contained therein, it does not appear an employer can restrict an employee’s legal recreational use of marijuana or consumption thereof when the employee is not on the employer’s premises or acting within the employee’s scope of employment.

#### F. Gender/Transgender Expression

The Maine Human Rights Act protects transgender individuals from discrimination in housing, credit, employment, education, and public accommodations. *See*, 5 M.R.S. § 4571. The

Law Court addressed gender/transgender expression in *Doe v. Reg'l Sch. Unit 26*, 2014 ME 11, 86 A.3d 600. *Doe* involved a transgender girl, who was born male, but began to express female gender identity as early as age two. In elementary school, the child used the girls' bathroom with the support and encouragement of school staff, without complaints. In fifth grade, the child continued to use the girls' bathroom "with no complaints from other students' parents, until a male student followed her into the restroom on two separate occasions, claiming that he, too, was entitled to use the girls' bathroom. The student was acting on instructions from his grandfather, who was his guardian and was strongly opposed to the school's decision to allow Susan to use the girls' bathroom. The controversy generated significant media coverage. As a result of the two incidents, the school, over the child's parents' objections, terminated the child's use of the girls' bathroom, requiring her instead to use the single-stall, unisex staff bathroom. That year, the child was the only student instructed to use the staff bathroom."

The Law Court vacated a summary judgment in favor of the school:

In vacating this judgment, we emphasize that in this case the school had a program carefully developed over several years and supported by an educational plan designed to sensitively address Susan's gender identity issues. The determination that discrimination is demonstrated in this case rests heavily on Susan's gender identity and gender dysphoria diagnosis, both of which were acknowledged and accepted by the school. The school, her parents, her counselors, and her friends all accepted that Susan is a girl.

Thus, we do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are present in this case. Our opinion must not be read to require schools to permit students casual access to any bathroom of their choice. Decisions about how to address students' legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA.

*Id.* ¶¶ 23-24.

#### G. Other Key Statutes

All employers must display a poster regarding the illegality of sexual harassment, and shall annually notify all employees that sexual harassment is illegal. Employers with 15 or more employees must provide training regarding the illegality of sexual harassment to all employees within one year of hire, and to all supervisors within one year of assumption of supervisory responsibility. Notification and training must include information about the employer's internal complaint process. 26 M.R.S. § 807.

Under the Maine Tort Claims Act, employees of governmental entities are absolutely immune from personal civil liability for defined categories of conduct. 14 M.R.S. § 8111.

An employer must provide education and training, orally and in writing, to any employee whose primary task is to operate a video display terminal (such as a computer screen). The program must include, at a minimum, written notice of rights and duties under the training law; an explanation or description of the proper use of terminals and the protective measures that the operator may take to avoid or minimize symptoms or conditions that may result from extended or improper use of terminals and instruction related to maintaining proper posture during terminal operation. The training must occur within the first month of employment, and annually thereafter. 26 M.R.S. § 252.

An employer is required, upon written request from an employee or former employee, to provide an employee with a copy of the employee's personnel file. Civil penalties apply if the personnel file is not produced within 10 days of receipt of a written request. 26 M.R.S. § 631.

The statute giving an employee the right to review his personnel records, defined as all documents "relating to the employee's character . . . [or] work habits," encompasses an employer's investigation of employee misconduct. *Harding v. Wal-Mart Stores, Inc.*, 2001 ME 13, ¶ 13, 765 A.2d 73.

An employer is required, upon written request of employee, to give a written statement of reason for termination of employment. Civil penalties apply to failure to provide a written reason within 15 days of the request. 26 M.R.S. § 630.

No employer may request or suggest that an employee submit to a polygraph examination as a condition of employment, or use such as examination for employment purposes. 32 M.R.S. § 7364.

Long-term and personal care agencies must obtain criminal history record information about applicants, and are restricted from hiring an applicant with a history of specific types of complaints and criminal convictions. 22 M.R.S. § 1724.