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I. AT-WILL EMPLOYMENT

A. Statute

There is no applicable Massachusetts statute.

B. Case law

The termination of an "at-will" employee without cause is generally not, in and of itself, a sufficient basis for a cause of action against an employer. John A. Doran and David L. Abne, *An Overview of Massachusetts Law on Wrongful Termination of At-Will Employment*, 77 Mass. L. Rev. 83, 84 (June 1992). Appellate courts in Massachusetts have repeatedly stated that an at-will employee may be terminated at any time for almost any reason or for no reason at all, in the absence of express or implied commitments to the contrary. See *Parker v. Town of North Brookfield*, 68 Mass. App. Ct. 235, 240 (2007); *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388 (1994); *Jackson v. Action for Boston Cmty. Dev., Inc.*, 403 Mass. 8 (1988).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

Under Massachusetts law, employee handbooks and/or personnel manual may form the basis of an implied contract. *Jackson v. Action for Boston Cmty. Dev., Inc.*, 403 Mass. 8, 14 (1988). The Supreme Judicial Court in *Jackson* set forth a list of factors to examine when determining whether an employee handbook is part of the employment contract, including:

- a. Where parties agree in advance of employment that a personnel manual will set forth relative rights and obligations of the employment relationship, the manual becomes a part of the employment contract.
- b. If during the course of "at-will" employment, the parties agree orally or in writing that thereafter their rights and obligations would include the provisions of an employee manual (i.e., an employee remaining with the employer after receiving a manual provides the consideration necessary to support the contract).
- c. The circumstances of a particular employment relationship could warrant a finding of an implied contract that includes the terms of a personnel manual.
- d. An employee continuing to work after receipt of an employment manual may constitute an acceptance of an offer under a unilateral contract if the employee reasonably believes that the employer was offering to continue the employee's employment on the terms stated in said manual.

Id.; See also *O'Brien v. New England Tel. and Tel. Co.*, 422 Mass. 686 (1996); *O'Brien v. Analog Devices*,

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Inc., 34 Mass. App. Ct. 905 (1993) (finding that manual played no part in an employment agreement because employee did not read manual until after she began her employment); *Mullen v. Ludlow Hosp. Soc.*, 32 Mass. App. Ct. 968 (1992) (no contract was found to have existed because terms of the manual were not negotiated, manual was received after employee began working, employer could change manual unilaterally, and manual stated it was not a contract).

An employer generally cannot be held liable for breach of contract based on a company policy if the employee does not exhaust all the remedies provided by the company policy. *Martin-Kirkland v. UPS*, 21 Mass. L. Rep. 66 (2006).

In 2010, the Massachusetts legislature amended the Massachusetts personnel records statute, Mass. Gen. Laws ch. 149, § 52C, to alter how employers must handle employee personnel files. Specifically, the amendment requires an employer to notify employees within ten (10) days of “placing in the employee’s personnel record any information to the extent that the information is, 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.” Under the amendment, employees can request to review their records only twice a year, except where the employee requests a copy of the file as a result of being notified of the placement of negative information in the file. Notably, however, employees cannot sue employers who violate the notification requirement. Rather, enforcement of the law falls within the purview of the Attorney General’s Office, which can impose sanctions of \$500 to \$2,500, though simply requesting compliance is also an enforcement option.

The Massachusetts legislature also enacted a comprehensive reform to the Criminal Offender Records Information (“CORI”) statute, Mass. Gen. Laws. ch. 151B, § 4(9^{1/2}). The most important provision for employers is the “Ban the Box” provision, which prohibits employers in Massachusetts from requesting “criminal offender record information” on an initial written application form. However, there are two exceptions to the general prohibition; specifically, an employer may inquire about an applicant’s criminal record on the written application (1) where state or federal law creates a disqualification for the position based on a criminal conviction; and (2) where state or federal law prohibits an employer from employing individuals convicted of certain criminal violations. Moreover, employers are still permitted to ask questions about certain prior convictions during employment interviews as the premise behind the law appears to be to provide the potential employee with an opportunity to explain the circumstances of a prior conviction. Employers that do not comply with the requirements are deemed to be in violation of the Massachusetts anti-discrimination statute and are subject to compensatory damages, punitive damages, attorneys’ fees and equitable relief.

2. Provisions Regarding Fair Treatment

In *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256 (2001), non-minority police officers who were bypassed for promotions in favor of minority police officers with lower test scores appealed the city police department’s promotion decisions. The civil service commission held that the police department had improperly promoted minority officers. The commission’s decision was affirmed at the Superior Court level, and by the Supreme Judicial Court, where they found that the fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. *Id.* at 260, citing to *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304 (1997). The commission is charged with ensuring that the system operates on “[b]asic merit principles,” as defined in G.L. c. 31, § 1:

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Basic merit principles shall mean ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens....

This statutory and common law authority is consistent with the inherent principles of the Massachusetts Declaration of Rights.

3. Disclaimers

A personnel manual may give rise to an employer's contractual obligations despite a specific disclaimer of contractual intent. *Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp 49, 54 (D. Mass. 1996); See also *Ferguson v. Host Int'l Inc.*, 53 Mass. App. Ct. 96, 103 (2001). In *Ferguson*, the Massachusetts Appeals Court held that two disclaimers hidden in the manual's introduction were the "functional equivalent of fine print." *Ferguson*, 53 Mass. App. Ct. at 103. The *Ferguson* court instructed that disclaimers in employment manuals must be placed in a "very prominent position" to be effective. *Id.*

Ferguson has been distinguished "where the disclaimer is set forth in its own separate paragraph surrounded by little else." *Englund v. Big Y Foods, Inc.*, 98 Mass. App. Ct. 1102 (2020) (manual found not to be legally enforceable where disclaimer was set forth in its own separate paragraph in capital letters).

4. Implied Covenants of Good Faith and Fair Dealing

Massachusetts courts recognize the doctrine of an implied covenant of good faith and fair dealing in employment contracts that are terminable at will. *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96 (1977). The breach of such a covenant occurs when the employer terminates an at-will employee in "bad faith" to avoid payment to the employee of compensation he has earned or "almost earned" through services rendered to the employer. *Id.* at 105; see also *King v. Driscoll*, 424 Mass. 1 (1996) (employee must show he was denied compensation for work performed in order to prevail). However, "termination in the absence of good cause does not establish bad faith. . . ." *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 668 (1981).

To recover under this theory, an employee must demonstrate that she was deprived of identifiable compensation or benefits due for past services, or that of a future benefit, such as pension rights, reflective of past services to the employer. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659 (1981); see also *Maddaloni v. W. Mass. Bus. Lines Inc.*, 386 Mass. 877 (1982) (discharge of employee to avoid payment of commission was in bad faith, but lost wages and fringe benefits unrelated to past services were not recoverable). Prospective benefits that are contingent upon an employee providing future services are not recoverable. *Harrison v. NetCentric Corp.*, 433 Mass. 465, (2001). In addition, any recovery under this cause of action is limited to contract damages. Emotional distress damages or other tort damages are not available. See *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 388 (2005); See also *McCone v New England Tel. & Tel. Co.*, 393 Mass. 231, 234, n.8 (1984).

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B. Public Policy Exceptions

1. General

Liability may be imposed on an employer who terminates an "at-will" employee for a reason that violates a clearly established public policy. See *Parker v. Town of North Brookfield*, 68 Mass. App. Ct. 235, 240 (2007); *King v. Driscoll*, 418 Mass. 576 (1994); *Wright v. Shriners Hosp. For Crippled Children*, 412 Mass. 469 (1992). The public policy exception makes redress "available to employees who are terminated for asserting a legal right (e.g., filing a workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to disobey the law (e.g., refusing to commit perjury)." *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch.*, 404 Mass. 145, 149-50 (1989).

Massachusetts courts have determined that an at-will employee can seek recovery when discharged for:

- a. Refusing the employer's demand to testify falsely in a criminal proceeding. *DeRose v. Putnam Mgmt. Co.*, 398 Mass. 205 (1986);
- b. Cooperating with a law enforcement agency investigation of his employer. *Flesner v. Technical Communications Corp.*, 410 Mass. 805 (1991); and
- c. Consulting with an attorney regarding employment issues. *Sellig v. Visiting Nurse & Cmty. Health. Inc.*, 10 Mass. L. Rptr. 231 (Mass. Super. Ct. June 10, 1999).

However, the Massachusetts Supreme Judicial Court has narrowly interpreted the public policy exception. See *King v. Driscoll*, 418 Mass. 576, 583 (1994). The court in *King* explained that the internal administration, policy, functioning and other matters of an employer's organization cannot be the basis for a public policy exception to the general rule that at-will employees are terminable at any time with or without cause. *Id.* at 583 (employer's termination of an employee who participates in a shareholder derivative suit did not violate any public policy); See also *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388, 394-95 (1994) (employee discharged for failure to comply with employer's internal policy of mandatory drug testing could not recover against employer under public policy exception); *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 475-76 (1992) (nurse's discharge as a result of unfavorable comments made during survey conducted by hospital's national headquarters did not violate public policy); *Korb v. Raytheon Corp.*, 410 Mass. 581, 584 (1991) (employee hired as corporation's spokesperson discharged for publicly expressing views which conflicted with corporation's economic interests could not seek redress under public policy exception); *Mello v. Stop & Shop Cos.*, 402 Mass. 555, 560-61 (1988) (employee discharged for reporting co-employee's false damage claims did not violate any public policy). In addition, the U.S. District Court of Massachusetts has held that the public policy exception does not protect socially desirable duties. *Masso v. U.P.S.*, 884 F. Supp. 610, 614 (1995).

In the specific context of a physician-hospital employment relationship, a physician whose staff privileges have been terminated by a hospital may assert a claim of breach of the implied covenant of good faith and fair dealing against the hospital based on its alleged bad faith failure to follow its own bylaws. *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 386 (2005).

The right to rebut information placed in one's personnel file falls within the public policy exception. *Meehan v. Medical Information Technology, Inc.*, 488 Mass. 730 (2021).

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2. Exercising a Legal Right

Under Mass. Gen. Laws ch. 111F, § 13, no employee may be discharged for exercising rights or participating in proceedings under the hazardous substances disclosure laws. *See also* discussion in Section II.B.1. above.

3. Refusing to Violate the Law

A public policy exception exists for enforcing safety laws which were the employee's responsibility to enforce. *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413 (1988).

4. Exposing Illegal Activity (Whistleblowers)

Mass. Gen. Laws ch. 149, § 185 reads in pertinent part:

(b) An employer shall not take any retaliatory action against an employee because the employee does any of the following:

* * * *

(3) Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes is in violation of a law, or rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment.

Liability may not be imposed for an internal complaint about violations of company policies. *See Shea v. Emmanuel College*, 425 Mass. 761 (1997). An employee is protected for reporting violations or suspected violations of criminal law regardless of whether the employee reports the violations to a public authority or within the company. *Id. See also Service v. Newburyport Housing Authority*, 63 Mass. App. Ct. 278 (2005).

III. CONSTRUCTIVE DISCHARGE

Massachusetts courts recognize the doctrine of constructive discharge when an employer's conduct effectively forces an employee to resign against the employee's will. *Gates v. Flood*, 57 Mass. App. Ct. 739 (2003); *GTE Prod. Corp. v. Stewart*, 421 Mass. 22 (1995). As a result, a constructive discharge is legally regarded as a firing, rather than a resignation. *GTE*, 421 Mass. at 22. An employee does not have a right not to be "constructively" discharged. *Kelleher v. Lowell General Hospital*, 98 Mass. App. Ct. 49, 51 (2020). Rather, the employee must first have a right not to be discharged. *Id.* The date of a constructive discharge is the date that the employee gave notice of resignation. *Green v. Brennan*, 578 U.S. 547 (2016).

In order to prevail on a claim for constructive discharge, an employee must demonstrate that "the working conditions [were or] would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *GTE*, 421 Mass. at 34; *Rubin v. Household Commercial Fin. Serv.*, 51 Mass. App. Ct. 432, 439 (2001). A single isolated act of an employer, such as one unfavorable performance review or even a demotion, generally will not be sufficient to support a

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claim for constructive discharge. *GTE*, 421 Mass. at 34 (employee's single, distressing interview with supervisor insufficient to support a claim of constructive discharge). In order to amount to a constructive discharge under Massachusetts law, the adverse working conditions complained of must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable. *Id.* at 34-35.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

An employee with a contract for a term certain may only be terminated prior to the expiration of that term for justifiable cause. *Mahoney v. Hildreth & Rogers Co.*, 332 Mass. 496, 499 (1955). An employment contract may define the length of employment and the circumstances under which an employer can terminate such a contract, including defining the term "just cause." In this instance, the issue of whether the discharge was proper is a matter of contract interpretation.

However, if "just cause" is not defined within the employment contract, the Supreme Judicial Court in *G&M Employment Serv., Inc. v. Commonwealth*, 358 Mass. 430, 435 (1970), has defined just cause to mean:

There existed (1) a reasonable basis for employer dissatisfaction with a[n] . . . employee, entertained in good faith for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct or other culpable or inappropriate behavior or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business. Discharge for "just cause" is to be contrasted with discharge on unreasonable grounds or arbitrarily, capriciously or in bad faith.

Id.

B. Status of Arbitration Clauses

Under both Federal and Massachusetts arbitration statutes, it is clear that parties can agree to arbitrate claims of employment discrimination. *Joule v. Simmons*, 459 Mass. 88 (2011), quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–27, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Warfield*, 454 Mass. at 395–396, 910 N.E.2d 317; *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17–21 (1st Cir.1999).

The Massachusetts Arbitration Act ("MAA"), Mass. Gen. Laws ch. 251, §§ 1-19, governs arbitration clauses in Massachusetts. Section one states that written agreements to submit any existing controversy to arbitration "shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Mass. Gen. Laws ch. 251, § 1. Section two permits a party aggrieved by the failure or refusal of another to proceed to arbitration under an agreement described in section one to apply to the Massachusetts Superior Court for an order directing the parties to proceed to arbitration. Mass. Gen. Laws ch. 251, § 2.

In *Joule*, 459 Mass. at 94-96, the Massachusetts Supreme Judicial Court acknowledged that "for agreements covered by the Federal Arbitration Act ("FAA"), means that 'in applying general state-law principles of contract interpretation of an arbitration agreement within the scope of the [FAA] ... due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the

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arbitration clause itself resolved in favor of arbitration,” (citation omitted). *Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475–476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The court in *Joule* also acknowledged the holding in *Warfield*, supra at 398, 910 N.E.2d 317, that “in view of the strong public policy against discrimination in employment, any agreement to arbitrate claims of discrimination must be stated clearly and unmistakably.” *Id.* Ultimately, the court in *Joule* held that “the FAA directs courts to place arbitration agreements on equal footing with other contracts, but it does not require the parties to arbitrate when they have not agreed to do so’...’ Arbitration under the FAA is a matter of consent not coercion.” *Id.* at 95. quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (*Waffle House*), quoting *Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Jr. Univ.*, 489 U.S. at 478, 479, 109 S.Ct. 1248. In contrast, pursuant to Policy 96-1(l)(d), the Massachusetts Commission against Discrimination refuses to honor mandatory pre-dispute arbitration agreements, because such mandatory and prospective waivers of statutory rights run directly counter to Mass. Gen. Laws, ch. 151B, the statute it is charged with enforcing. *Zabrowski v. John Foundry*, MCAD Docket No. 96-SEM-0750, slip op. (June 19, 1997).

V. ORAL AGREEMENTS

A. Promissory Estoppel

Massachusetts courts recognize a claim for promissory estoppel. In the employment context, a Massachusetts federal court judge held that an employee’s breach of contract complaint, alleging that he relied on representations made by his corporate employer and its major stockholder to resign from his prior employment, was sufficient to show detrimental reliance on plaintiff’s part and avoid employer’s statute of frauds defense. See *Hoffman v. Optima Systems, Inc.*, 683 F. Supp. 865, 869-70 (D. Mass 1988).

B. Fraud

There is no case law specific to fraud with regard to oral employment agreements.

C. Statute of Frauds

Oral employment contracts have been held enforceable in Massachusetts in some circumstances. *Boothby v. Texon, Inc.*, 414 Mass. 468 (1993). Generally speaking, Massachusetts courts will enforce an oral employment agreement where the promise of employment is explicit, and it does not violate the Statute of Frauds or some other standard contract principle.

However, statements that amount to mere speculation or hope will not be enforced as an oral employment contract. In *Whelan v. Intergraph Corp.*, 889 F. Supp. 15, 18 (D. Mass. 1995), the U.S. District Court for the District of Massachusetts held that an employer’s statements that a prospective employee would be a “key employee” and that accepting the position would be a “career move” were expressions of opinion, and, therefore, did not create an oral agreement for permanent employment. See also *Treadwell v. John Hancock Mut. Life Ins. Co.*, 666 F. Supp. 278, 286 (D. Mass. 1987) (employer’s promise of “secure and continuing employment” did not amount to a permanent employment contract).

VI. DEFAMATION

A. General Rule

To prove a claim of defamation, an employee must establish that the employer published false

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statements of fact that exposed the employee to public hatred, ridicule or contempt in a considerable and respectable class in the community. *McAvoy v. Shufrin*, 401 Mass. 593, 597-98 (1988).

The seminal case governing claims for defamation in Massachusetts is *McCone v. New England Tel. and Tel. Co.*, 393 Mass. 231 (1984). In *McCone*, certain employees sued the employer for defamation based upon poor evaluations of their performance which they had received from their managers. *Id.* at 233. The Supreme Judicial Court of Massachusetts held that because the evaluations were prepared in accordance with the company's stated policy of conducting employee evaluations and the communication clearly served the employer's legitimate interest, the communication was "conditionally privileged." *Id.* at 235-36.

1. Libel

For an employer to lose its privilege and the employee to successfully prove a libel case, the employee must prove that the employer published the defamatory information recklessly. *Bratt v. IBM Corp.*, 392 Mass. 508, 509 (1984).

2. Slander

See above discussion in Section VI.A.

B. References

There is no case law specific to the issue of references in the context of defamation actions.

C. Privileges

Massachusetts employers possess a conditional privilege to disclose defamatory information concerning employees when such publication is reasonably necessary to serve the employer's legitimate interests. *McCone*, 393 Mass. at 235; *Bratt v. Int'l Bus. Machs. Corp.*, 392 Mass. 508, 512-13 (1984). However, an employer can lose a conditional privilege if the disclosure of defamatory information (1) was unnecessary, unreasonable or excessively published; (2) was made with a reckless disregard for the truth or with the knowledge that statements were false, or (3) was made primarily out of spite or ill will. *Bratt*, 392 Mass. at 515-16. In addition, this privilege may also be lost if the defendant publishes defamatory materials to others outside of a group, which is narrowly defined by their legitimate interest in the publication. *Draghetti v. Chimielewski*, 416 Mass. 808, 813-814 (1994). The burden is on the employee to prove that the employer abused its conditional privilege. *Foley v. Polaroid Corp.*, 400 Mass. 82 (1987). An employer also loses its conditional privilege if the employee proves that the employer acted with actual malice. *Dexter's Hearthside Restaurant, Inc. v. Whitehall Co.*, 24 Mass. App. Ct. 217 (1987). Malice occurs when the "defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege but were spoken out of some base ulterior motive." *Id.* at 223. See also *Blackstone v. Cashman*, 448 Mass. 255, 261 (2007).

Where an employer began an investigation into whether an employee was attempting to hide significant accounting discrepancies from his supervisors and where, during the course of the day that the investigation was held, the employee was not allowed to leave the building, was accompanied at all times by a security guard, and was not allowed to use the telephone, the court held that the employer's conduct was ambiguous, open to various interpretations and not defamatory. *Phelan v. May Dep't*

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Stores Co., 443 Mass. 52 (2004).

D. Other Defenses

1. Truth

"The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved." Mass. Gen. Laws ch. 231, § 92. In support of the defense of truth to an action for libel, it is sufficient for the defendant to show that the statements in the alleged libel were true in substance. *Conner v. Standard Pub. Co.*, 183 Mass 474 (1903). "The lodestar of Massachusetts defamation law is the axiom that the truth is an absolute defense to defamation." *Taylor v. Swartwout*, 445 F. Supp. 2d 98, 102 (D. Mass. 2006) (Gorton, D.J.) (citing *Massachusetts Sch. of Law at Andover, Inc.*, 142 F.3d at 42). Thus, if a statement is "substantially true," it cannot be defamatory. *Reilly v. Assoc. Press*, 59 Mass. App. Ct. 764, 770, 797 N.E.2d 1204 (2003). "[W]hen a statement is substantially true, a minor inaccuracy will not support a defamation claim." *Noonan v. Staples, Inc.*, 707 F. Supp. 2d 85, 90 (D. Mass. 2010).

2. No publication

Publication is the essential element of a claim for defamation in Massachusetts. See *McAvoy v. Schufrin*, 401 Mass. 593 (1988).

3. Self-Publication

The Supreme Judicial Court declines to adopt the doctrine of compelled self-publication, holding that any harm arising from an employee's discharge is more appropriately dealt with under principles of employment law, and not under the law of libel and slander, and if defamation law is to provide a remedy, the person to be charged with culpability must be the originator of the defamatory statement who communicated the statement to a third-party, and not someone who self-publishes a defamatory statement about themselves. See *White v. Blue Cross and Blue Shield of Massachusetts, Inc.* 442 Mass. 64 (2004).

4. Invited Libel

There is no specific case law on this topic.

5. Opinion

Under most circumstances, a defendant is not liable for an opinion because under the First Amendment to the United States Constitution, there is no such thing as a false idea. *Myers v. Boston Magazine Co.*, 380 Mass. 336, 338-39 (1980). However, a statement in the form of an opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *National Assn. of Govt. Employees, Inc. v. Central Bdcst. Corp.*, 379 Mass. 220, 227-28 (1979). Factors considered in determining whether a statement is fact or opinion are:

(1) how is the allegedly offensive statement commonly understood; (2) is the statement capable of being characterized as true or false; (3) what will the reader infer from the statement objected to in light of statements not objected to, i.e., how does the statement

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sit in the context of the material in which the statement appeared; and (4) what is the broader context or setting in which the statement appears?

Yovino v. Fish, 27 Mass. App. Ct. 442, 447-48 (1989).

E. Job References and Blacklisting Statutes

Mass. Gen. Laws ch. 149, § 19, states that “[n]o person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of any person.”

F. Non-Disparagement Clauses

Massachusetts recognizes a cause of action for breach of non-disparagement clauses. See *Caputo v. City of Haverhill*, 82 Mass. App. Ct. 1109 (2012). Factual inquiry is required in order to determine whether or not plaintiff can succeed on such a claim.

In *Ryan v. Board of Trustees of Westfield State College*, 2010 WL 3327864, 1 (Mass. Super. 2010), Plaintiff sought to discover records in the custody of his former employer in order to support his claim for breach of a non-disparagement agreement. Plaintiff was the former Chief of the Millville Police Department. His employment was terminated in 2006, and he entered into a settlement agreement which provided that the Police Department would not make any oral or written communication to any person or entity which would damage his reputation. Plaintiff alleged that the town violated the agreement when its agents and employees made disparaging remarks to a State Police Trooper conducting a background check as part of Plaintiff’s employment application process. Plaintiff’s motion to compel discovery was allowed.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In Massachusetts, an employee’s claim for intentional infliction of emotional distress against an employer is barred by the exclusivity provision of the Workers’ Compensation Act. See Mass. Gen. Laws. ch. 152, § 24. The Massachusetts Workers’ Compensation Act provides the exclusive remedy by which an employee can recover damages for personal injuries sustained in the course of and arising out of his employment. See, e.g., *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 558 (1996); *Doe v. Purity Supreme, Inc.*, 422 Mass. 563, 565 (1996). However, an employee may bring this cause of action against a co-worker when the alleged conduct was not in the course of the co-worker’s employment, or against third parties such as independent contractors, vendors or customers.

To prevail on a claim for intentional infliction of emotional distress, the employee must establish that:

- a. The defendant intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from misconduct;
- b. The defendant’s conduct was extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community;
- c. The defendant’s actions were the cause of the plaintiff’s distress; and,

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- d. The emotional distress suffered by plaintiff was severe and of such a nature that no reasonable person could be expected to endure it.

Tetrault v. Mahoney, Hawkes and Goldings, 425 Mass. 456 (1997); see also *Payton v. Abbott Labs*, 386 Mass. 540 (1982).

B. Negligent Infliction of Emotional Distress

An employee's claim of negligent infliction of emotional distress against an employer is precluded by the Massachusetts Workers' Compensation Act. *Catalano v. First Essex Savings Bank*, 37 Mass. App. Ct. 377 (1994); See also *Hamilton v. Baystate Med. Educ. & Research Found., Inc.*, 866 F. Supp. 51, 56-57 (D. Mass. 1994), *aff'd*, 66 F.3d 306 (1st Cir. 1995).

To prevail on a claim for negligent infliction of emotional distress in a non-employment context, a plaintiff must prove that:

- a. The acts of the defendant were negligent;
- b. The defendant's negligence caused emotional distress;
- c. The emotional distress either caused or was caused by physical harm;
- d. The physical harm was manifested by objective symptomatology; and
- e. A reasonable person would have suffered emotional distress under similar circumstances.

Payton v. Abbott Labs, 386 Mass. 540 (1982). Furthermore, the plaintiff may need to offer expert medical testimony to demonstrate the objective evidence of harm necessary to corroborate the emotional distress alleged. *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 138 (1993).

Emotional distress damages should not be improperly considered, or awarded as a substitute for punitive damages. Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered. Each award should be case specific and should not be determined by formula or by precise reference points. While evidence in the form of some physical manifestation of the emotional distress, or evidence in the form of expert testimony, is not necessary to obtain an award, such evidence certainly would be beneficial. An award must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (*e.g.*, by counseling or by taking medication). In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. *Stonehill Coll. v. MCAD*, 441 Mass. 549 (2004).

VIII. PRIVACY RIGHTS

A. Generally

Massachusetts has a specific statute governing the right to privacy which can be found in

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Massachusetts General Laws, ch. 214 § 1B. The statute states in relevant part, "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy. The Superior Court shall have jurisdiction and equity to enforce such a right and in connection therewith award damages." *Id.* See also Article 14 of *The Massachusetts Declarations of Rights* specifically recognizing one's right to be free from unreasonable searches and seizures.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

It is unlawful for an employer to inquire as to the wage and salary history of a prospective employee from the prospective employee or a current or former employer or to require that a prospective employee's prior wage or salary history meet certain criteria. M.G.L. c. 149 § 105A(c)(2). This prohibition does not apply if a prospective employee voluntarily discloses such information.

2. Background Checks

Pursuant to Mass. Gen. Laws ch. 151B, § 4 (9 1/2) it is unlawful "[f]or an employer to request on its initial written application form criminal offender record information." However, an employer may inquire about any criminal convictions on an applicant's application form if:

(i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or

(ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

Id. This prohibition does not bar employers from obtaining this information from other sources. See *Ryan v. Chief Administrative Justice of Trial Court*, 56 Mass.App.Ct. 1115 (2002) (unpublished decision).

C. Other Specific Issues

1. Workplace Searches

In *Garrity v. John Hancock Mutual Life Insurance Co.*, 2002 WL 974676, 1 (D. Mass. May 7, 2002), the U.S. District Court for the District of Massachusetts held that Massachusetts employees have no reasonable expectation of privacy in e-mail where their employer provides notice that it may access e-mail stored on, or transmitted from, its computer systems. The *Garrity* court explained that an employee has no reasonable expectation of privacy in e-mail messages transmitted over the network that are at some point accessible by a third-party. The court further reasoned that even if the plaintiffs had a legitimate privacy interest in their e-mail correspondence, the employer's legitimate business interest in protecting and preventing workplace harassment "would likely trump that privacy interest."

2. Electronic Monitoring

Employers have a right to collect information relevant and necessary to the safe and efficient operation of their business. See *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 101, 102 (1977). Absent

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an express statutory restraint on the means of surveillance used, "the employer's legitimate interest in determining the employees' effectiveness in their jobs should be balanced against the seriousness of the intrusion on the employees' privacy." *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388, 392 (1994), citing *Bratt v. IBM Corp.*, 392 Mass. 508, 520 (1984) and *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 308 (1982); *Dasey v. Anderson*, 304 F.3d 148 (1st Cir. 2002). See also *Nelson v. Salem State College*, 446 Mass. 525, 534-36 (2006) (holding that an employee does not have a reasonable expectation to privacy in a public work area that is open and under silent video surveillance).

3. Social Media

There is no specific case law on this topic.

4. Taping of Employees

The taping of employees without their knowledge is all but off-limits. See Mass. Gen. Laws ch. 272 § 99. Massachusetts prohibits almost all forms of warrantless electronic interceptions of oral or wire communications and disclosures or use of any communication obtained in violation of statute. *Id.*; See also *Commonwealth v. Look*, 379 Mass. 893 (1982). A Massachusetts trial court judge has ruled that even an out-of-state individual, whose state law permits one party to record a telephone conversation without the other party's knowledge, is prohibited from recording a conversation of an individual in Massachusetts. See *Heffernan v. Hashampour*, 26 Mass. L. Rptr. 541 (Mass. Super. 2009) (unpublished).

M.G.L. c. 272 § 99 has been held unconstitutional on First Amendment grounds as applied to the nonconsensual audio recording of police officers' discharging their official duties in public spaces. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817 (2020). Yet, the First Circuit has declined to extend that holding to school officials in an IEP meeting with parents. *Pitta v. Medeiros*, 90 F.4th 11 (1st Cir. 2024).

5. Release of Personal Information on Employees

Under Mass. Gen. Laws ch. 214 § 1B, "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy. The Superior Court shall have jurisdiction and equity to enforce such a right and in connection therewith award damages." The Massachusetts privacy cases have emphasized the need for a careful balancing of an employer's legitimate business interest in obtaining an employee's private information and the employee's interest in keeping private information private. See *Webster v. Motorola, Inc.*, 418 Mass. 425, 637 N.E.2d 203, 207 (1994); *Folmsbee v. Tech Tool Grinding & Supply Inc.*, 417 Mass. 388, 630 N.E.2d 586, 588 (1994).

6. Medical Information

Whether a particular disclosure of medical information about an employee is proper is subject to the same balancing test as other information, despite the traditional importance of physician-patient confidentiality and the historical protection of medical information. *Bratt v. IBM Corp.*, 392 Mass. 508 (1984). However, the employer may violate the employee's privacy if it violates physician-patient confidentiality in obtaining the information. *Bratt v. IBM Corp.*, 785 F.2d 352, 361-62 (1st Cir. 1986). A private physician's disclosure of private medical information without the patient's consent is sufficient to establish an invasion of privacy. *Tower v. Hirschhorn*, 397 Mass. 581, 588 (1986); See also *Bailey v. Harrington*, 13 Mass. L. Rptr. 509, 2001 WL 1029643 (Mass. Super. July 19, 2001) (non-employment context). One who induces a physician wrongfully to disclose information about a patient may be held

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liable to the patient for damages that flow from the disclosure. *Alberts v. Devine*, 395 Mass. 59, 70 (1985).

IX. WORKPLACE SAFETY

A. Negligent Hiring

Massachusetts recognizes the tort of negligent hiring. See *Ellingsgard v. Silver*, 352 Mass. 34 (1967); *Carson v. Canning*, 180 Mass. 461 (1902); *Foster v. The Loft, Inc.*, 26 Mass. App. Ct. 289 (1988); *Bonnie W. v. Commonwealth*, 419 Mass. 122 (1994) (a sexual assault victim's claim against the Commonwealth for "negligent referral" by a parole officer survived summary judgment where parolee assaulted victim in the trailer park where the parolee was employed.) In Massachusetts "[a]n employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result." *Foster v. Loft, Inc.*, 26 Mass. App. Ct. 289, 290-91 (1988). In *Bonnie W.*, the parole officer allegedly contributed to the plaintiff's injuries by negligently recommending the parolee's continued employment at the trailer park and misrepresenting the parolee's criminal record, which included rape convictions, in response to queries from trailer park management before the alleged assault took place. 419 Mass. at 123. However, there are limits to the foreseeability of an employee's bad acts. For instance, in *Coughlin v. Titus & Bean Graphics, Inc.*, 54 Mass. App. Ct. 633 (2002), the court held that it was not reasonably foreseeable that an employee would have attacked a member of the public, despite the fact that the employer knew that the employee had spent fourteen years in prison for violent crimes that included rape. 54 Mass. App. Ct. at 639-40.

B. Negligent Supervision/Retention

Massachusetts also recognizes the torts of negligent supervision and retention. See *Foley v. Boston Hous. Auth.*, 407 Mass. 640 (1990) (negligent supervision and training); *Doe v. Town of Blandford*, 402 Mass. 831 (1988) (negligent hiring, supervision and retention); *Copithorne v. Framingham Union Hosp.*, 401 Mass. 860 (1988) (negligent supervision and retention); *Doyle v. Hasbro, Inc.*, 884 F. Supp. 35, 42 (D. Mass. 1995), *aff'd* 103 F.3d 186 (1st Cir. 1996) (acknowledging that the Supreme Judicial Court may recognize the tort of negligent supervision in some circumstances, but dismissing claim for negligent supervision where there is no basis for extending tort to apply to claim that manufacturer and its employees extorted kickbacks from plaintiff trucking company). "Negligent retention ... occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment." *Foster v. Loft, Inc.*, 26 Mass. App. Ct. 289, 291 (1988). "The scope of the [prudent] investigation is directly related to the severity of risk third parties are subjected to by an incompetent employee." *Or v. Edwards*, 62 Mass. App. Ct. 475, 488 (2004).

C. Interplay with Worker's Comp. Bar

In Massachusetts, the Department of Industrial Accidents oversees the Worker's Compensation System, codified at Mass. Gen. Laws ch. 152, §§ 1 et seq., and 452 C.M.R. 1.00 to 8.00. Under the

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Workers' Compensation Act (WCA), employees injured in the course of their employment, and their dependents, may receive predictable compensation at a time of hardship while employers have the benefit of relative cost certainty. *Saab v. Massachusetts CVS Pharmacy, LLC*, 452 Mass. 564 (2008). For an employer who fails to provide payment to his employees of the compensation provided for by the chapter, a stop work order shall be served on said employer, requiring the cessation of all business operations at the place of employment or job site. Mass. Gen Laws ch. 152, § 25C.

The Division of Occupational Safety investigates workplace conditions to discover and prevent health hazards. Mass. Gen. Laws. ch. 23, § 11A. Both entities work together to promote workplace safety.

D. Firearms in the Workplace

Pursuant to Mass. Gen. Laws ch. 269, § 10, an individual may knowingly possess a firearm when in or on his or her residence or place of business, as long as they have been issued a firearm identification card or are otherwise licensed or exempted from the firearm identification requirement.

E. Use of Mobile Devices

Pursuant to Mass. Gen. Laws ch. 90, § 13B, it is illegal to text while operating a motor vehicle in Massachusetts. There are no statutes that specifically address the use of mobile devices in the workplace.

X. TORT LIABILITY

A. Respondeat Superior Liability

"[R]espondeat superior is the proposition that an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment." *Dias v. Brigham Med. Assocs., Inc.*, 438 Mass. 317, 319–20 (2002). In determining whether an employer-employee relationship exists, various factors are to be considered, including the method of payment (e.g., whether the employee receives a W-2 form from the employer), and whether the parties themselves believe they have created an employer-employee relationship. See *Kavanagh v. Trustees of Boston University*, 440 Mass. 195, 198 (2003). "The 'conduct of an agent is within the scope of employment if it is of the kind he is employed to perform, ... if it occurs substantially within the authorized time and space limits, ... and if it is motivated, at least in part, by a purpose to serve the employer.'" *Lev v. Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234, 238 (2010) (citations omitted).

B. Tortious Interference with Business/Contractual Relations

For a successful claim for intentional interference with advantageous relations, a plaintiff must prove that (1) he had an advantageous relationship with a third party; (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions. *Weber v. Community Teamwork, Inc.*, 434 Mass. 761 (2001).

If the supervisor's actions in bringing about the discharge are within the scope of employment and in furtherance of the employer's interests, the supervisor is merely the agent of the employer, and should share the employer's immunity from suit. See *Wright v. Shriners Hosp. for Crippled Children*, 412

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Mass. 469, 476 (1992); *Appley v. Locke*, 396 Mass. 540, 543 (1986). Moreover, an accused corporate officer may be so closely identified with the corporation itself, and with its policies, that he should not be treated as a third person in relation to corporate contracts, susceptible to charges of tortious interference. *Schinkel v. Maxi-Holding Inc.*, 30 Mass. App. Ct. 41, 50 (1991). Conversely, if the supervisor's tortious conduct is purely personally motivated and outside the scope of his employment, the supervisor may be liable, while the employer should not be vicariously liable for the supervisor's actions. *Mailhiot v. Liberty Bank & Trust Co.*, 24 Mass. App. Ct. 525 (1987).

The Massachusetts Supreme Judicial Court determined that any corporate officer sued for tortious interference with business/contractual relations is entitled to actual malice jury instructions. *Blackstone v. Cashman*, 448 Mass. 255 (2007).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

In Massachusetts, absent an agreement, an at-will employee "may properly plan to go into competition with his employer and may take active steps to do so while still employed . . . Such an employee has no general duty to disclose his plans to his employer, and generally he may secretly join other employees in the endeavor without violating any duty to his employer." *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172 (1991). However, Massachusetts courts have limited an employee's right to compete with his employer in the following manner:

He may not appropriate his employer's trade secrets. *See E. Marble Prod. Corp. v. Roman Marble, Inc.*, 372 Mass. 835, 838-842 (1977). He may not solicit his employer's customers while still working for his employer. *See Chelsea Indus., Inc. v. Gaffney*, supra, 389 Mass. at 11-12, (as to executive employees), and he may not carry away certain information, such as lists of customers. *New England Overall Co., Inc. v. Woltmann*, 343 Mass. 69, 77 (1961). Of course, such a person may not act for his future interests at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer.

Augat, 409 Mass. at 172-73.

An employer who wishes to further restrict the post-employment competitive activities of a key employee may seek that objective through a non-competition agreement. *All Stainless, Inc. v. Colby*, 364 Mass. 773 (1974). However, "Massachusetts courts have not hesitated to limit their enforcement of non-competition agreements in duration, geographic area or scope to that which they deem reasonable." *Id.* at 779-80.

Courts should consider four factors in deciding whether to enforce a non-compete agreement:

- a. Is the agreement necessary to protect the legitimate business interests of the employer;
- b. Is the agreement supported by consideration;
- c. Is the agreement reasonably limited in all circumstances, including time and space; and
- d. Is the agreement otherwise consonant with public policy.

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See *Bowne of Boston, Inc., v. Levine*, 97-5987A, 1997 WL 781444, at *2 (Mass. Super. Nov. 25, 1997).

B. Blue Penciling

Massachusetts courts have previously held that blue penciling is permissible within reason. *Kroeger v. Stop & Shop Companies, Inc.*, 13 Mass. App. Ct. 310, 312 (1982). In *Cheney v. Automatic Sprinkler Corp. of America*, 377 Mass. 141 (1979), the court reconsidered whether forfeiture for competition clauses in deferred compensation agreements should receive unconditional enforcement. *Cheney* held that the enforcement of forfeiture for competition provisions should be subject to the same tests of reasonableness as apply to the enforcement of covenants not to engage in competition with a former employer, whether independently or by working for a competitor. *Id.* at 147-49. Rather than declining entirely to give effect to an unreasonable non-competition clause, a court may modify its terms so as to make it reasonable; i.e., onerous terms may be cut back. *Id.* at 147.

C. Confidentiality Agreements

Courts will not enforce restrictive covenants or non-competition agreements meant solely to protect employers from run-of-the-mill business competition. *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. 280 (1974). However, the protection of "trade secrets, other confidential information, [and] ... the good will the employer has acquired through dealings with his customers" constitute legitimate business interests." *Lombard Medical Technologies, Inc. v. Johannessen*, 729 F. Supp. 2d 432, 439 (D. Mass. 2010).

D. Trade Secrets Statute

Mass. Gen. Laws ch. 266, § 30(4), defines a trade secret as "anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement." The Massachusetts Supreme Judicial Court has held that the central issue surrounding trade secret status is whether the information sought to be protected is, in fact and in law, confidential. *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972). The court has set forth the following criteria to be considered in determining whether the information sought should qualify as confidential: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.* Therefore, to prove that the information sought to be protected is, in fact, a "trade secret" a company must take affirmative steps to maintain the secrecy of the information. *Id.*

E. Fiduciary Duty and their Considerations

"Employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer." *Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 11 (1983). Such an employee "is bound to act solely for his employer's benefit in all matters within the scope of his employment, and an executive employee is barred from actively competing with his employer during the tenure of his employment, even in the absence of an express covenant so providing." *Id.* at 11-12 (internal quotations omitted). "Fiduciaries may plan to compete with the entity to which they owe

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allegiance, provided that in the course of such arrangements they [do] not otherwise act in violation of their fiduciary duties.” *Meehan v. Shaughnessy*, 404 Mass. 419, 435 (1989). “There are, however, certain limitations on the conduct of an employee who plans to compete with his employer: He may not appropriate his employer's trade secrets; [h]e may not solicit his employer's customers while still working for his employer; and he may not carry away certain information, such as lists of customers.” (citations omitted). *Id.* at 172-73.

XI. DRUG TESTING LAWS

A. Public Employers

Massachusetts courts perceive public employers as identical to private employers in relation to drug testing. *O'Connor v. Police Comm'n of Boston*, 408 Mass. 324, 330 (1990).

B. Private Employers

Massachusetts courts have recognized that drug testing can involve a significant invasion of privacy, and generally interpret the soundness of an employer's drug testing procedures in light of Mass. Gen. Laws ch. 214, § 1B. See *Folmsbee v. Tech Tool Grinding and Supply, Inc.*, 417 Mass. 388 (1994).

In making this determination, courts will generally look to balance the employer's legitimate interest in determining the employee's effectiveness in their jobs against the seriousness of the intrusion on the employee's privacy. *Bratt v. IBM Corp.*, 392 Mass. 508, 520 (1984); *Cort v. Bristol-Meyers Co.*, 385 Mass. 300, 302-03 (1982). The decision of whether an employer's drug testing is an unreasonable invasion of an employee's privacy is determined on a case-by-case basis. *O'Connor v. Police Comm'n of Boston*, 408 Mass. 324 (1990) (employer's interest in determining whether police cadets were using drugs outweighed employee's interest in privacy); *Horsemen's Benevolent and Protective Ass'n. Inc. v. State Racing Comm'n*, 403 Mass. 692 (1989) (Commission's random drug testing by urinalysis found to be violation of Art. 14 of the Massachusetts Declaration of Rights); *Webster v. Motorola. Inc.*, 418 Mass. 425 (1994) (recognizing the reasonableness of some of an employer's drug testing program in light of the nature of the defendant employer's businesses and the duties and responsibilities of employees).

XII. STATE ANTI-DISCRIMINATION STATUTE(S)

The Massachusetts Fair Employment Practices Act (“MFEPA”), Mass. Gen. Laws ch. 151B, §§ 1-10, prohibits discharging employees on the basis of various characteristics or traits. The Act also requires that covered employers have a sexual harassment policy.

A. Employers/Employees Covered

The MFEPA excludes clubs which are deemed "exclusively social" and employers with less than six employees. Mass. Gen. Laws ch. 151B, § 1.

B. Types of Conduct Prohibited

The MFEPA makes it illegal for an employer, by himself or his agent, to discriminate on the basis of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, ancestry, or status as a veteran. Mass. Gen. Laws ch. 151B, § 4.

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The Supreme Judicial Court of Massachusetts has ruled that an employer may be held liable for “associational discrimination.” *Flagg v. Alimed, Inc.*, 466 Mass. 23 (2013) (employer could be liable for claim of associational discrimination under MFEPA for allegedly firing employee in order to avoid paying medical plan costs incurred by employee’s wife).

An employer may not discriminate against a “qualified handicapped person”. An employer must grant a request for a reasonable accommodation, provided that it does not cause an “undue hardship” on the employer. Mass. Gen. Laws ch. 151B, § 4. See *Menninger v. PPD Development, L.P.* No. 1-19-cv-11441-LTS (D.Mass. 2023) (\$27 million verdict in favor of employee who claimed that after disclosing her mental health disability to her employer and requesting an accommodation for it, the employer discriminated against her, retaliated against her, and overall failed to provide any sort of reasonable accommodation for her disability).

C. Administrative Requirements

An aggrieved person under the MFEPA must file an administrative complaint with the Massachusetts Commission Against Discrimination (“MCAD”) within 300 days of the alleged unlawful employment practice. Mass. Gen. Laws ch. 151B, § 5.

The MCAD issued a standing order, effective July 1, 2004, regarding the pre-determination case process. The investigating commissioner will no longer allow parties to conduct pre-determination discovery. All fact gathering at the pre-determination stage will be conducted by the Commission.

After investigation, the investigating commissioner is responsible for deciding if there is “probable cause” to credit the allegations in the complaint. A finding of Probable Cause shall be made when, after appropriate investigation, the Investigating Commissioner concludes that there is sufficient evidence upon which a fact finder could form a reasonable belief that it is more probable than not that the respondent committed an unlawful practice. 804 C.M.R. § 1:02). A charge of discrimination may be dismissed by the investigating commissioner for a number of reasons such as “lack of probable cause” and lack of jurisdiction.

If the MCAD finds probable cause, the MCAD is required to attempt to conciliate the case. Mass. Gen. Laws ch. 151B, § 5; 804 C.M.R. § 1.09. If conciliation efforts are unsuccessful, the investigating commissioner issues a Post-Determination Discovery Order. 804 C.M.R. § 1.20. Once post-determination discovery is complete, the Commissioner schedules a certification conference to determine the issues that will be certified to public hearing. 804 C.M.R. § 1.11.

After a complaint has been pending before the Commission for at least 90 days, the complainant, only, has the right to remove the matter from the MCAD to the Superior Court (trial court). Mass. Gen. Laws ch. 151B, § 9; 804 C.M.R. 1.04(12). The complainant must waive the right to remove the complaint prior to the commencement of the public hearing. 804 CMR 1:12(3).

D. Remedies Available

In *Stonehill College v. MCAD*, 441 Mass. 549 (2004), the Massachusetts Supreme Judicial Court held that respondents who receive an unfavorable administrative ruling at the MCAD can no longer obtain a de novo jury trial in the Superior Court. Respondents are limited to an administrative review of the decision under Mass. Gen. Law ch. 30A.

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The Massachusetts Supreme Judicial Court in *Stonehill College* also addressed the issue of awarding emotional distress damages at the administrative level. 441 Mass. 549 (2004). The court emphasized that:

[E]motional distress damages should not be improperly considered, or awarded, as a substitute for punitive damages Each award should be case specific and should not be determined by formula or by precise reference points. While evidence in the form of some physical manifestation of the emotional distress, or evidence in the form of expert testimony, is not necessary to obtain an award, such evidence certainly would be beneficial.

Id. at 575-76.

Chapter 151B, § 5 of the Massachusetts General Laws, authorizes the MCAD to impose civil administrative penalties, ranging from \$10,000 to \$50,000.

The Supreme Judicial Court of Massachusetts has concluded that an employee's claim for violation of the MFEPA survives death, including the employee's claim for punitive damages. *Gasior v. Mass. General Hospital*, 446 Mass. 645 (2006).

In addition, the Supreme Judicial Court re-visited the issue of punitive damages in discrimination cases and explained that punitive damages may only be awarded where the defendant's conduct involved is outrageous and or egregious and so offensive that it justifies punishment and not merely compensation. *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91 (2009). The Court explained that an award of punitive damages requires "a heightened finding beyond mere liability and also beyond a knowing violation of the statute." *Id.* at 111. Specifically, the fact finder should determine that the award is needed to "deter such behavior toward the class of which plaintiff is a member, or that the defendant's behavior is so egregious that it warrants public condemnation and punishment." *Id.*

XIII. STATE PREGNANT WORKERS FAIRNESS ACTS

The Massachusetts Pregnancy Fairness Act ("MPFA"), is an update to Mass. Gen. Laws ch. 151B § 1, which makes it unlawful for an employer to deny a reasonable accommodation for an employee's pregnancy or any condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child if the employee requests such an accommodation; provided, however, that an employer may deny such an accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer's program, enterprise or business.

A. Employers/Employees Covered

The MPFA applies to employers with six or more employees.

B. Types of Conduct Prohibited

It is unlawful to:

(i) take adverse action against an employee who requests or uses a reasonable accommodation in terms, conditions or privileges of employment including, but not limited to, failing to reinstate

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the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other applicable service credits when the need for a reasonable accommodation ceases;

(ii) deny an employment opportunity to an employee if the denial is based on the need of the employer to make a reasonable accommodation to the known conditions related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child;

(iii) require an employee affected by pregnancy, or require said employee affected by a condition related to the pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, to accept an accommodation that the employee chooses not to accept, if that accommodation is unnecessary to enable the employee to perform the essential functions of the job;

(iv) require an employee to take a leave if another reasonable accommodation may be provided for the known conditions related to the employee's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, without undue hardship on the employer's program, enterprise or business;

(v) refuse to hire a person who is pregnant because of the pregnancy or because of a condition related to the person's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child; provided, however, that the person is capable of performing the essential functions of the position with a reasonable accommodation and that reasonable accommodation would not impose an undue hardship, demonstrated by the employer, on the employer's program, enterprise or business.

Mass. Gen. Laws ch. 151B § 1.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No Massachusetts employee may be discharged for serving on jury duty. Mass. Gen. Laws ch. 268, § 14A.

B. Voting

No Massachusetts employee may be discharged for taking time off to vote. Mass. Gen. Laws ch. 149 § 178.

C. Family/Medical Leave

Pursuant to M.G.L. c. 149 § 148C, which became effective in July of 2015, all Massachusetts employers are required to provide sick time to their employees. For employers with eleven or more employees, the time off must be paid. For smaller employers, it may be unpaid. Employees accrue one hour of sick time for every thirty hours worked, and can earn and use up to forty hours of sick time a year.

An employee can use earned sick time if required to miss work in order to: (1) care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness,

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injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care; (2) care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care; (3) attend the employee's routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse; or (4) address the psychological, physical or legal effects of domestic violence.

Employers may require certification of the need for sick time if an employee uses sick time for more than 24 consecutively scheduled work hours. Employers cannot delay the taking of or payment for earned sick time because they have not received the certification. Employees must make a good faith effort to notify an employer in advance if the need for earned sick time is foreseeable.

Employers are prohibited from interfering with, or retaliating based on, an employee's exercise of earned sick time rights, and from retaliating based on an employee's support of another employee's exercise of such rights.

The law does not override employers' obligations under any contract or benefit plan with more generous provisions than those in the law. Employers that have their own policies providing as much paid time off, usable for the same purposes and under the same conditions as the law, are not required to provide additional paid sick time.

The law is enforced by the Attorney General and by private lawsuit.

Pursuant to M.G.L. c. 149, § 52E, which became effective August 8, 2014, Massachusetts employers with fifty or more employees must permit employees to take up to fifteen days of unpaid leave per year, if they or their family members are the victims of "abusive behavior," which includes domestic violence, stalking, sexual assault and kidnapping. Employees must exhaust all available vacation, sick and personal time before requesting or taking leave under this statute. Employees must provide advance notice in accordance with the employer's leave policy.

D. Pregnancy/Maternity/Paternity Leave

Massachusetts provides job-protected leave and partial wage replacement to eligible employees for the birth, adoption, or foster care placement of a child under certain circumstances. *Paid Family & Medical Leave Law (PFML)* Mass. Gen. Laws. ch. 175M. *See also* Mass. Gen. Laws ch. 149, § 105D (parental leave rights and benefits).

Pursuant to M.G.L. 175M §2, which became effective in July of 2021, family leave shall be available to any covered individual for any of the following reasons: (i) to bond with the covered individual's child during the first 12 months after the child's birth or the first 12 months after the placement of the child for adoption or foster care with the covered individual; (ii) because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or (iii) in order to care for a family member who is a covered servicemember.

Pursuant to M.G.L. c. 175M §3, *Determination of weekly benefit amount*, which became effective in October of 2023, the following is provided:

Section 3. (a) No family or medical leave benefits shall be payable during the first 7 calendar days

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of such leave; provided, however, that an employee may utilize accrued sick or vacation pay or other paid leave provided under an employer policy during the first 7 calendar days of such leave. Employees taking family or medical leave for which benefits are not payable under this subsection shall be entitled to the protections of subsections (e) and (f) of section 2 and section 9.

(b)(1) The weekly benefit amount for a covered individual on family or medical leave shall be determined as follows: (i) the portion of the covered individual's average weekly wage that is equal to or less than 50 per cent of the state average weekly wage shall be replaced at a rate of 80 per cent; and (ii) the portion of the covered individual's average weekly wage that is more than 50 per cent of the state average weekly wage shall be replaced at a rate of 50 per cent. For purposes of the calculation specified in this paragraph, a covered individual's average weekly wage shall include only those wages or payments subject to the contribution requirements of section 6.

(2) The maximum weekly benefit amount calculated pursuant to paragraph (1) shall be not more than \$850 per week; provided, however, that annually, not later than October 1 of each year thereafter, the department shall adjust the maximum weekly benefit amount to be 64 per cent of the state average weekly wage and the adjusted maximum weekly benefit amount shall take effect on January 1 of the year following such adjustment.

(3) For a covered individual who takes leave on an intermittent or reduced leave schedule, the weekly benefit amount shall be prorated as determined by the department.

(c) The weekly benefit amount shall be reduced by the amount of wages or wage replacement that a covered individual receives for that period under any of the following while on family or medical leave: (i) any government program or law, including but not limited to workers' compensation under chapter 152, other than for permanent partial disability incurred prior to the family or medical leave claim, or under other state or federal temporary or permanent disability benefits law, or (ii) a permanent disability policy or program of an employer.

The weekly benefit amount shall not be reduced by the amount of wage replacement that an employee receives while on family or medical leave under any of the following conditions, unless the aggregate amount an employee would receive would exceed the employee's average weekly wage: (i) a temporary disability policy or program of an employer; or (ii) a paid family, or medical leave policy of an employer. If an employer makes payments to an employee during any period of family or medical leave that are equal to or more than the amount required under this section, the employer shall be reimbursed out of any benefits due or to become due from the trust fund for family or medical leave benefits for that employee covering the same period of time as the payments made by the employer.

Top Off Benefits

For applications filed on or after November 1, 2023, employees receiving PFML benefits may supplement (or "top off") their PFML benefits with any available accrued paid leave (sick time, vacation, PTO, personal time, etc.). For employees who choose to supplement their PFML benefits in this way, the combined weekly sum of PFML benefits and employer-provided paid leave benefits cannot exceed the employee's Individual Average Weekly Wage (IAWW). Employers will be responsible for monitoring and ensuring that the combined weekly sum of employer-provided paid leave benefits and PFML benefits does not exceed an employee's IAWW. If the application is filed on or after November 1, 2023,

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applications filed retroactively for a leave that began before November 1, 2023, are eligible for topping off.

See supra, Mass. Gen. Laws ch. 149, § 105D.

E. Day of Rest Statutes

Mass. Gen. Laws ch. 149 § 48 provides for a weekly day of rest. Most employees must be given one day of rest in seven, although certain establishments and employees are excepted. Violations are punishable by fines of up to \$300.00.

F. Military Leave

There is no state law supplement to the federal military leave statute, 38 U.S.C. § 4301.

G. Sick Leave

See supra, Mass. Gen. Laws c. 149, § 105D.

H. Domestic Violence Leave

Massachusetts provides for leave from work when an employee or family member of an employee has been a victim of abusive behavior. M.G.L. c. 149 §52E.

Pursuant to M.G.L. c. 149 §52E (b), an employer may permit an employee to take up to 15 days of leave from work in any 12-month period if:

- (i) the employee, or a family member of the employee is a victim of abusive behavior;
- (ii) the employee is using the leave from work to: seek or obtain 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; and
- (iii) the employee is not the perpetrator of the abusive behavior against such employee's family member.

The employer shall have the sole discretion to determine whether any leave taken under this section shall be paid or unpaid, and this section applies specifically to employers who employ 50 or more employees. M.G.L. c. 149 §52E (c).

Unless it is a case of imminent danger to the health and safety of an employee or to the employee's family member, the employee seeking leave from work under this section shall provide appropriate advance notice of the leave to the employer as required by the employer's leave policy. M.G.L. c. 149 §52E (d).

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The employer may require an employee to provide documentation evidencing that the employee or employee's family member has been a victim of abusive behavior. M.G.L. c. 149 §52E (e).

Additionally, all information related to the employee's leave shall be kept confidential by the employer and shall not be disclosed, except to the extent that disclosure is:

- (i) Given by the employee through written consent;
- (ii) Ordered to be released by a court of competent jurisdiction;
- (iii) Otherwise required by applicable federal or state law;
- (iv) Required in the course of an investigation authorized by law enforcement, including, but not limited to, an investigation by the attorney general; or
- (v) Necessary to protect the safety of the employee or others employed at the workplace. M.G.L. c. 149 §52E (f).

An employee seeking leave under this section shall exhaust all annual or vacation leave, personal leave and sick leave available to the employee, prior to requesting or taking leave under this section, unless the employer waives this requirement. M.G.L. c. 149 §52E (g).

The employer may not interfere with nor restrain the rights of an employee under this section, and the employer is not allowed to discriminate against an employee for exercising his or her rights under this section. M.G.L. c. 149 §52E (h) (i).

The attorney general will enforce this section and may seek injunctive relief or other equitable relief to enforce this section. M.G.L. c. 149 §52E (j).

Employers with 50 or more employees shall notify each employee of the rights and responsibilities provided by this section including those related to notification requirements and confidentiality. M.G.L. ch. 149 §52E (k)

I. Other Leave Laws

There are currently no other particularized leave laws warranting discussion.

XV. STATE WAGE AND HOUR LAWS

Massachusetts law requires minimum wages and overtime to be paid to all covered employees. Massachusetts law covers all employees in Massachusetts. See Mass. Gen. Law ch. 151. Further, the Wage Act provides protection to an out-of-state employee of a Massachusetts company if the employee has sufficient contacts with the Commonwealth. *Dow v. Casale*, Dckt. No. 10-1343-BLS1 (Mass. Super. Ct. 2011), *aff'd* 83 Mass. App. Ct. 751 (2013) (finding non-resident employee had sufficient contacts for protection under the law where his business address was in Massachusetts, his contact information was a Massachusetts telephone number and fax number, many of his customers were in Massachusetts, he visited the state regularly and paperwork regarding his sales was sent from and returned to Massachusetts). If either federal or state law provides a greater degree of protection for employees, that law will apply. See 29 U.S.C. § 218.

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A. Current Minimum Wage in State

Effective January 1, 2023, the minimum wage in Massachusetts is \$15.00 per hour. Certain occupations are exempt, primarily in service ("tipped") industries. Minimum wage for tipped employees is \$6.75 per hour. While the minimum wage in Massachusetts is significantly higher than the federal minimum wage, Mass. Gen. Laws. ch. 151, § 1 states "in no case shall the minimum wage rate be less than fifty cents higher than the effective federal minimum rate." Effective July 24, 2009, the Fair Labor Standards Act minimum wage is \$7.25.

B. Deductions from Pay

No deductions from wages, other than those required by law, may be made without the employee's written consent. 454 C.M.R. § 27.05. Required deductions include:

- a. Social Security and Medicare contributions;
- b. federal and state income tax withholdings;
- c. alimony, spousal support, and child support orders (Mass. Gen. Laws ch. 119A, § 12);
- d. garnishments; and
- e. court order under Chapter 13 of the Bankruptcy Act.

The Attorney General must consent if deductions would bring an employee's wages below the minimum wage. 454 C.M.R. § 27.05. Deductions which are permitted, if authorized by the employee in writing and otherwise complying with applicable law, include:

- a. amounts for union dues or obligations;
- b. deposits in, or loan payments to, federal or state credit unions;
- c. amounts for medical service subscriptions;
- d. contributions to insurance or annuity plans; and
- e. contributions to cafeteria plans, including flexible spending accounts.

C. Overtime Rules

An employer is required to pay an employee at the rate of time and one-half the regular hourly rate for overtime work unless the employee is "exempt." Definitions of "exempt" and "non-exempt" status vary under state and federal law and turn on close analysis of the employee's actual job duties. See *Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165 (2000).

The Massachusetts statute governing exemptions from the overtime pay requirement includes an exemption for "a bona fide executive, administrative or professional person" but does not provide any further definitions like those found in the federal regulations. Mass. Gen. Laws ch. 151, § 1A(3).

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However, the statute specifically exempts certain other jobs, including outside salespersons, janitors or caretakers of residential property, golf caddies, news deliverers, child performers, amusement park employees, and persons engaged in fishing, agriculture, farming, and restaurant work. Mass. Gen. Laws ch. 151, §1A.

Whether an individual worker is classified as an employee or an independent contractor will have a significant impact on virtually all aspects of the legal relationship between the worker and the employer, including whether the minimum wage and overtime requirements of federal and state law apply. Misclassification of a statutory or common law employee as an independent contractor may expose the employer to significant criminal and civil liability under a host of laws. Therefore, it is important that employers not casually categorize persons as independent contractors who regularly perform tasks related to the employer's usual business. An individual is classified as an independent contractor when: (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; (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.

Mass. Gen. Law ch. 149, § 148B creates a rebuttable presumption that anyone customarily performing services at the employer's place of business is an employee subject to all the protections of Mass. Gen. Law ch. 149 (relating to Labor and Industries) and creates criminal penalties and civil liability for failure to accord the individual employee status. No person may by a special contract with an employee or by any other means be exempt from the provisions of the Wage Act. Mass. Gen. Law ch. 149, § 148.

In addition to criminal penalties, under the state wage and hour law affected employees may sue for three times the unpaid overtime compensation and attorneys' fees. *See* Mass. Gen. Laws ch. 151, § 1B.

State enforcement is also vigorous, and the Office of the Attorney General has a record of successfully seeking substantial civil penalties as well as back pay for violations of chapters 149 and 151. In addition to civil or criminal penalties, the Supreme Judicial Court has explained that the proper measure of damages for a misclassified employee is not “measured by subtracting the compensation the plaintiff obtained as an independent contractor from the compensation the plaintiff would have received had he been hired as an employee.” *Somers v. Converged Access, Inc.*, 454 Mass. 582 (2009). Rather, an employee misclassified as an independent contractor, as a matter of law, is an employee and his contract rate is his wage rate such that his “damages incurred” equal the value of wages and benefits he or she should have received as an employee but did not. *Id.* Finally, private enforcement actions have gained significant momentum, with a number of reported class action cases being brought under state law the hurdles to achieving class relief are lower than under federal law.

D. Time for payment upon termination

Mass. Gen. Laws c. 149, § 148 requires employers to pay discharged employees their wages in full on the date of discharge. Under the statute, “wages” includes any payment for vacation or holidays that is due an employee under a written or oral employment agreement. Employees who voluntarily depart may be paid on the next regular payday. An employer who fails to pay an employee involuntarily

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terminated on the day of discharge shall be liable for the amount of wages owed, trebled. *Reuter v. City of Methuen*, 489 Mass. 465 (2022).

E. Breaks and Meal Periods

No employee shall be required to work for more than six hours per day without an interval of at least 30 minutes for a meal. Any employer who violates this section shall be punished by a fine. M.G.L. c. 149 §100. This statute does not apply to certain professions such as iron works, glass works, paper mills, letterpress establishments, print works, bleaching works, or dyeing works. M.G.L. ch. 149 §101.

An employer who employs a domestic worker for 40 hours a week or more shall provide a period of rest of at least 24 consecutive hours in each calendar week and at least 48 consecutive hours during each calendar month, and, where possible, this time shall allow time for religious worship. The employee can voluntarily agree to work on a rest day provided that the agreement is in writing and the employee is compensated at the overtime rate for all hours worked on that day. M.G.L. c. 149 §190.

F. Employee Scheduling Laws

Under M.G.L. ch. 151B §4 (1A), it is an unlawful and discriminatory practice for an employer to impose conditions upon an employee that would require the employee to violate or forego the practice of the employee's religion. Under this statute, an employer must make reasonable accommodations to the religious needs of an employee. No employee who has given notice to their employer will be required to stay at work during any days in which, as a requirement of the employee's religion, that employee observes a Sabbath or other holy day. An employee who intends to be absent from work due to religious observance shall notify their employer no less than 10 days in advance of said absence.

Under M.G.L. ch. 151B §4 (1E), an employer may not deny reasonable accommodations, including modification of work schedule, for an employee's pregnancy or any condition related to the employee's pregnancy, including the need to nurse, if the employee requests such an accommodation. The employer, however, may deny this accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer's program, enterprise, or business.

Additionally, under 454 C.M.R. 27:04 (1), when an employee who is scheduled to work three or more hours reports for duty at the time set by the employer, and that employee is not provided with the expected hours of work, the employee shall be paid for at least three hours on such day at no less than basic minimum wage. This section does not apply to organizations that are granted status as charitable organizations under the Internal Revenue Code.

G. Commissions Protected under the Wage Statute

For purposes of the Massachusetts Wage Act, commissions are contingent compensation; thus, the prophylaxis of the Wage Act applies to commissions only when two conditions have been met: (1) the amount of the commission has been definitely determined, and (2) the commission has become due and payable. Mass. Gen. Laws Ann. ch. 149, § 148. *Klauber v. VMware, Inc.*, 80 F.4th 1 (1st Cir. 2023).

In *Klauber*, commissions sought by sales representative were not due and payable under employer's commission plans and, thus, were not protected wages owed to representative under the Massachusetts Wage Act. The terms and conditions to which representative and employer mutually

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agreed provided that, if an event sales transaction was determined to be an “exception transaction,” i.e., one that was unusually large, commissions would not be deemed earned until a plan reconciliation had taken place to determine the extent of the commission. There were no limits on the extent of the adjustments that could be made to commission calculation for exception transactions, and representative did not dispute that sales at issue were properly characterized as exception transactions. Mass. Gen. Laws Ann. ch. 149, § 148.

A commission is definitely determined when it is arithmetically determinable, taking into account the applicable formulas and deductions and the total from which deductions would be taken. If a commission is susceptible to definite determination, it is not due and payable until all dependent contingencies have been met. Mass. Gen. Laws Ann. ch. 149, § 148. The default rule is that commission becomes due and payable when employee closes a sale, even if there is delay in actual payment on sale. Mass. Gen. Laws Ann. Ch. 149, § 148. However, this is not a fixed part of the “due and payable” calculus: an employer and an employee may agree to different terms, thus modifying or eliminating the default rule. If those mutually agreed upon contingencies are not met, the commissions do not become wages protected by the Massachusetts Wage Act. Mass. Gen. Laws Ann. Ch. 149, § 148. Where a commission plan specifically sets out contingencies, courts apply the terms of the plan. Mass. Gen. Laws Ann. Ch. 149, § 148. The contractually agreed upon “plan reconciliation” requirement in *Klauber* overrode the default rule, thus preventing the employee’s commission from being due and payable at the time of the sales were closed.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

Mass. Gen. Laws ch. 272, §§ 92A, 98, and 98A constitute the state's public accommodations civil rights law.

Under Mass. Gen. Laws ch. 12, §§ 11H & 11I, no employer may require an employee to take a lie detector examination.

Under Mass. Gen. Laws ch. 152, § 75B, no employer may retaliate against an employee who files for workers' compensation benefits.

M.G.L. c. 151A, § 47, which became effective March 24, 2015, creates a rebuttable presumption of retaliation against any employee who is terminated or experiences a substantial alteration of the terms of employment within six months of providing evidence or testifying at an unemployment hearing. To rebut the presumption, the employer must show clear and convincing evidence that the employer’s actions were not retaliatory, and that there is sufficient justification for the action. Employers who violate these prohibitions or threaten or coerce employees in connection with an unemployment claim may be required to reinstate the employee and pay costs of suit and attorneys’ fees.

A. Smoking in Workplace

Under Mass. Gen. Law ch. 270, § 22, smoking is prohibited in the workplace. It is the employer’s responsibility to provide a smoke free environment for all employees working in an enclosed workplace.

B. Health Benefit Mandates for Employers

Under the Massachusetts Health Care Reform Law, ch. 58 of the Acts of 2006, employers with eleven or more employees are subject to employer responsibility requirements. Employers in this

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category who do not offer health insurance that meets minimum standards are subject to a tax penalty. Because the Federal Patient Protection and Affordable Care Act does not preempt the current state law, some businesses may face a state and federal tax penalty for not offering coverage.

C. Immigration Laws

Under Mass. Gen. Laws ch. 149 § 19C it is unlawful for any employer knowingly to employ any alien in the Commonwealth, except those who are admitted under a work permit, or unless the employment of such alien is authorized by the Attorney General of the United States. An employer shall not be deemed to have violated this section if it has made a bona fide inquiry into whether a person hereafter employed or referred by it is a citizen or an alien, and if an alien, whether he is lawfully admitted to the United States for permanent residence, or admitted under a work permit, or is authorized by the Attorney General of the United States to accept employment.

D. Right to Work laws

Mass. Gen. Laws ch. 149 § 19 provides that “no person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of any person.” Similarly, Mass. Gen. Laws ch. 149 § 20 provides that “[n]o person shall, himself or by his agent, coerce or compel a person into a written or oral agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person.

E. Lawful Off-duty Conduct (including lawful marijuana use)

In December of 2016, the Regulation and Taxation of Marijuana Act was enacted in Massachusetts. The purpose of the Act is to control the production and distribution of marijuana under a system that licenses, regulates, and taxes the businesses involved in a manner similar to alcohol and to make marijuana legal for adults 21 years of age or older. The intent behind the Act is to remove the production and distribution of marijuana from the illicit market and to prevent the sale of marijuana to persons under 21 years of age by providing for a regulated and taxed distribution system. M.G.L. c. 334, § 1.

F. Gender/Transgender Expression

Pursuant to M.G.L. c. 151B, § 4, it is an unlawful practice for an employer to refuse to hire or employ, or to bar, or to discharge from employment, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of gender identity.

G. Other Key State Statutes

An Act to Establish Pay Equity went into effect on July 1, 2018, for all employers and employees in the Commonwealth. The Act makes it illegal for employers to discriminate in any way in the payment of wages between the sexes, including paying any person salary or wage rates less than the rates paid to employees of the opposite sex for work of like or comparable character or work on like or comparable operations. The Act makes clear that variations in pay rates as to different seniority levels are not prohibited. Employers are permitted to take certain attributes of an employee or applicant into account when determining variation in pay such as work experience, education, job training, and measurements of production, sales, or revenue. The Act also makes it illegal for an employer to require a prospective employee to provide his or her salary history before receiving a formal job offer. Any employer who

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violates the Act shall be liable to the employee or employees affected in the amount of their unpaid wages, and in an additional equal amount of liquidated damages. The Act further allows for the recovery of reasonable attorney's fees. M.G.L. ch. 149 § 105A.

XVII. MISCELLANEOUS CASELAW REGULATING EMPLOYMENT PRACTICES

A. Religious Exemptions to Vaccine Mandates

In the wake of the COVID-19 era, *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023) holds that a plaintiff asserting religious discrimination claim under Title VII must make *prima facie* case that a bona fide religious practice conflicts with employment requirement and was reason for adverse employment action, and if the employee does so, burden then shifts to employer to show that it offered reasonable accommodation or, if it did not offer accommodation, that doing so would have resulted in undue hardship. *Civil Rights Act of 1964* §§ 701(j), 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a).

The case held that accommodating healthcare workers' requests for religious exemptions from the Commonwealth's COVID-19 vaccine mandate would have worked undue hardship on their employers, and thus employers' failure to provide religious exemptions did not violate Title VII's prohibition against religious discrimination; employers would have risked onerous penalties, including license suspension, if they had provided workers' requested accommodation. *Civil Rights Act of 1964* §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a); 22 Me. Rev. Stat. §§ 802(4-B), 804(2), 804(3).

B. Age Discrimination and the Innocent Pawn Theory of Liability

Under *Adams v. Schneider Electric USA*, 210 N.E.3d 917 (Mass. 2023) the Supreme Judicial Court held that it is possible, and consistent with liability under the employment discrimination statute, for a mid-level manager directed to lay off employees in his or her division to be found to further a discriminatory corporate policy without knowingly doing so; this is an example of the so-called cat's paw or innocent pawn theory of liability. Mass. Gen. Laws Ann. Ch. 151B, § 4.

C. Anti-Discrimination Laws in Public Accommodation

In the Supreme Court case *303 Creative LLC v. Elenis*, the Court looked at the intersection of anti-discrimination law in public accommodations with the Free Speech Clause of the First Amendment. The Court held that the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages in which the designer disagrees. The implication for private businesses is that The First Amendment protects an individual's right to speak their mind regardless of whether the government considers their speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

D. Equal Rights Under the Law and Organizations

The Supreme Court has held that Section 1981 Equal Rights Under the Law "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976). In *Am. All. for Equal Rights v. Fearless Fund Mgt., LLC*, No. 23-13138, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023) the Court states "we find no support in our caselaw to limit the standing of a membership organization to file a Section 1981 claim because it has members of many different races." Further, they state "[a]lthough the

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First Amendment protects the defendants' right to promote beliefs about race, it does not give the defendants the right to exclude persons from a contractual regime based on their race."