EMPLOYMENT LAW GUIDE:
A Practical Guide to Understanding Massachusetts Employment Law

Authors:
Justine H. Brousseau
Mark H. Burak
Anthony J. Cichello
David C. Henderson
Jody L. Newman
Andrew C. Pickett
Valerie Samuels

Reviewer and Editor:
Nina Joan Kimball

Layout and Assistant Editor:
Elizabeth E. Hennessy

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For inquries about this guide, Please contact:

Boston Bar Association
Membership Department
16 Beacon Street
Boston, MA 02108
617-778-2040

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Introduction

The Labor and Employment Section of the Boston Bar Association, working in a bipartisan group of lawyers representing both management and employees, has prepared this Guide to assist employers and employees in understanding their rights and obligations in the workplace. It is an overview of the most common issues that arise – it does not address every issue. Part I sets out laws that affect the workplace, which establish legal rights and obligations. Part II provides guidance through the complex world of the employment relationship from hiring through termination and beyond. **THIS GUIDE IS NOT INTENDED TO BE, NOR IS IT A SUBSTITUTE FOR, LEGAL ADVICE FROM COMPETENT EMPLOYMENT COUNSEL.** It cannot address the myriad details involved in most employment matters. These details should be addressed with employment counsel.

Part I: Laws Affecting the Workplace

To manage effectively and in compliance with the law, employers and managers need to understand the legal landscape in which they operate. In Massachusetts (and in most other states), the general rule is that employment is "at will." This means that either the employer or the employee can terminate the employment relationship at any time, without notice or cause. It also means that the employer generally can modify the terms and conditions of the employment at any time, without notice or cause. However, this "at-will" rule is subject to exceptions that may result from statutes, by contract, or by common law (*i.e.*, laws developed in the courts). This Guide briefly discusses these laws. Our intention is to provide

employers and employees with an ability to identify and address employment issues before they develop into legal problems.

1. STATUTORY RIGHTS

Most employers, depending on their size, are regulated by federal and state statutes. While there are many statutes governing employment, this section provides an overview of the most common statutory rights and obligations, including those that impose obligations relating to non-discrimination, payment of wages, including overtime pay, leave, and various benefits.

1.1 Non-discrimination: General Rules

Ordinarily employers enjoy very broad discretion in making employment decisions. However, this discretion is limited by state and federal statutes that prohibit employers from discriminating against their employees and applicants on the basis of certain protected characteristics. Specifically, employers cannot make employment decisions on the basis of race, color, national origin and ancestry; age; sex (including pregnancy); sexual orientation; religion; disability; military status; or genetic information. The general rule, therefore, is that employers must treat similarly situated employees the same way. As a result, consistency in treatment of employees is critical.

Two types of discrimination are recognized by the non-discrimination laws: disparate treatment" and "disparate impact." Disparate treatment occurs when an employer intentionally (whether consciously or subconsciously) treats an employee differently on the basis of illegal considerations. For example, disparate treatment discrimination exists if an employer rejects female applicants on the basis of a stereotype that "women don't make good

construction workers" or if an employer assigns heavy cleaning work only to African-American workers but not to Caucasian employees.

Disparate impact discrimination occurs when employment practices are "fair in form, but discriminatory in operation." Disparate impact discrimination thus creates built-in barriers for protected groups that are unrelated to actual job requirements and not consistent with "business necessity." Examples may involve physical testing, minimum height and weight standards, or educational credentials.

Discrimination can conceivably infect any decision an employer makes that affects an employee's job. Some of the more common decisions in which discrimination might occur include hiring, firing, transfers, promotions, evaluations, assignments, compensation, raises, benefits, or reductions-in-force and other reorganizations. It is therefore critical that employers' decisions be job-related and consistent.

FIVE MAJOR CONCEPTS OF EQUAL EMPLOYMENT OPPORTUNITY

1. **Applicants and employees having equal qualifications, abilities, and performance must be treated equally.**
2. **Managers and supervisors must be able to provide legitimate, job-related reasons for adverse actions against individuals in protected groups.**
3. **Hiring, promotion and other employment standards that are neutral on their face may be unlawfully discriminatory if they impact protected groups more heavily.**
4. **Employment decisions based on stereotypes may be unlawful.**
5. **Merit based decisions and uniformity usually result in compliance with laws that prohibit discrimination, but "reasonable accommodation" may be required for disabled individuals.**

1.2 Statutory Coverage/Protected Categories

In Massachusetts, employers of six or more employees are covered by the state's general anti-discrimination statute, Mass. Gen. L. c. 151B (Chapter 151B). Smaller employers are governed by other state statutes protecting employees from certain forms of discrimination. Federal laws governing workplace discrimination apply to employers with 15 or more employees (or in the case of age discrimination, 20 or more employees). Substantive differences between state and federal laws exist, but are beyond the scope of this Guide.

The major "protected categories" covered by state and/or federal law are:

- Race, color, national origin and ancestry
- Age (age 40 and above)
- Sex/Gender
- Sex/Gender – Pregnancy
- Sex/Sexual Harassment
- Sexual Orientation
- Religion
- Disability
- Military/Veteran/National Guard or Reserve Status
- Genetic Information
- Criminal Record

Although most of the "protected categories" are self-explanatory, the following summarizes the statutory coverage and discusses certain special issues.

A. Race, Color, National Origin and Ancestry

Chapter 151B and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. (Title VII), prohibit discrimination on the basis of race, color, national origin and ancestry. These statutes prohibit discrimination based on one's race or color, such as African-American, Asian or Hispanic. "National origin" and ancestry are references to the country where a person was born or the country from which her ancestors came. Thus, for

example, the phrase "Irish need not apply" is unlawful today. All individuals are protected from race discrimination, not just "minorities." Thus, Caucasians are protected under these same standards from "reverse" discrimination. Contrary to some misperceptions, these prohibitions make discrimination by one minority against another minority unlawful as well (for example, discrimination by African-Americans against Asians, or by Hispanics against African-Americans or against someone in the same protected class).

B. Age

Chapter 151B and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq*., prohibit age discrimination against individuals age 40 or over. The prohibition against age discrimination covers all terms, conditions and privileges of employment, including hiring or firing, promotion, layoffs, compensation, benefits, job assignments and training. An employer generally cannot operate a seniority system or employee benefit plan that requires or permits involuntary retirement. Layoffs and other apparently neutral employment practices often have a greater impact on older workers who tend to be more expensive. There are some exceptions to the age discrimination statutes that are beyond the scope of this Guide.

C. Sex/Gender - Generally

Statutory prohibitions against sex discrimination are wide-ranging. Chapter 151B and Title VII prohibit sex discrimination, which protects both males and females, and also outlaws differential treatment on the basis of pregnancy. Of particular concern is discrimination based on gender stereotyping, which is gender based misconceptions such as "women cannot be leaders." In Massachusetts, marital status is not itself a protected category, but employers should avoid making decisions based on an employee's marital status, as that could be a form of gender stereotyping. Such discrimination could occur, for

example, if an employer terminates a female employee rather than a male because the female is married and therefore can rely on her husband as the "breadwinner," or the employer considers the marital status of a female employee because of concern that she may have children.

D. **Sex/Gender – Pregnancy**

Pregnancy and childbirth are sex-linked characteristics. Thus if an employer takes an adverse action against an employee because of pregnancy, child birth or maternity leave, that can be a form of sex discrimination. Employers cannot treat employees and applicants for employment who are pregnant less favorably than they treat other employees, including other employees who are affected by other conditions but who are similarly able or unable to work. Such disparate treatment may constitute sex discrimination.

E. **Sex/Gender – Wage Discrimination**

A number of statutes, including Chapter 151B and Title VII, prohibit an employer from paying men and women differently because of their gender. The Federal Equal Pay Act, 29 U.S.C. § 206(d), also prohibits gender-based pay discrimination. A violation of the statute is established if a female employee performs work that is "substantially" equal to the work of a male employee, but is paid at a lower rate, *unless* the employer can show that the pay differential is a result of: (1) a seniority system, (2) a merit system, (3) a system that measures quantity or quality of production, or (4) any other factor other than sex. Under the analogous Massachusetts statute, the Massachusetts Equal Pay Act, Mass. Gen. L. c. 149, § 105A, gender based pay discrimination is established if a female employee performs work that is "comparable" to the work of a male, but is paid at a lower rate. Under Massachusetts law, the only exception is for seniority-based differences.

F. Sex - Sexual Harassment

Sexual harassment is a form of gender discrimination. Men as well as women can be victims of sexual harassment, and persons of the same gender can be victims. There are two forms of sexual harassment, commonly known as "*quid pro quo*" and "hostile work environment." *Quid pro quo* sexual harassment occurs when unwelcome requests for sexual favors or acquiescence in sexual advances or conduct are made a condition of employment or a basis of employment decisions. In order to establish a claim, the victim must show that (i) the harasser made sexual advances or sexual requests, or engaged in conduct of a sexual nature; (ii) the sexual conduct was unwelcome; and (iii) the victim rejected the advances and suffered an adverse employment action, or submitted to the advances in reasonable fear of an adverse employment action.

To establish hostile work environment sexual harassment, the victim must establish (i) she (or he) was subjected to conduct of a sexual nature; (ii) the conduct was unwelcome; (iii) the conduct had the purpose or effect of creating an intimidating, hostile, humiliating or sexually offensive work environment; and (iv) the conduct interfered with work performance or altered terms and conditions of employment.

"Conduct of a sexual nature" is wide-ranging and can include inappropriate touching, sexual epithets, jokes, gossip, comments, displaying sexually suggestive pictures and objects and leering, whistling or sexual gestures. Although such conduct must be "unwelcome" to be unlawful, the victim need not communicate an objection to the harasser to demonstrate that the conduct is unwelcome.

To be unlawful, the conduct must be "objectively" offensive - that is, it must be of a nature that a reasonable person would find it offensive. The conduct also must be "severe" or "pervasive" to be unlawful. This means that a single serious incident (such as a sexual

assault) may suffice. Alternatively, a steady barrage of sexual comments or treatment may be "pervasive" enough to create a hostile working environment even though individual comments or treatment may seem relatively innocuous when viewed in isolation.

Finally, to be unlawful, the conduct at issue must "interfere" with the job or alter its conditions. Such interference could be an adverse job action (such as a termination, suspension or demotion), but that is not required to establish a claim. Further, unlawful harassment need not be intentional. "Innocent" conduct such as jokes may constitute sexual harassment.

G. Sexual Orientation

In Massachusetts, Chapter 151B prohibits employment discrimination on the basis of sexual orientation. Sexual orientation means "having an orientation for, or being identified as having an orientation for heterosexuality, bisexuality or homosexuality." Thus, in most sexual orientation cases, the primary inquiry is whether the employer identified or perceived the employee (or applicant) as gay, lesbian, or bisexual, and treated the employee (or applicant) differently. However, discrimination on the basis of an employee's *heterosexuality* also is unlawful.

H. Religion

The prohibition against religious discrimination includes established and organized faiths such as Catholicism, Judaism, Islam and Buddhism, as well as "any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization." Also, an issue that frequently arises in this area is the obligation to provide "reasonable accommodations" to the employee's religion (such as a modified schedule) that do not cause more than a minimal hardship or inconvenience to the employer.

I. **Disability/Handicap**[*]

State and federal disability discrimination laws (Chapter 151B and the Americans With Disabilities Act (ADA), 42 U.S.C. § 12111, *et seq*.) generally preclude an employer from discriminating against a "qualified" but "disabled" applicant or employee who can perform the "essential functions" of the job with or without "reasonable accommodation." As is explained below, the terms appearing in quotation marks have very specific legal meaning. As a result, obtaining legal counsel in this area may be particularly useful to determine the appropriate response to individual situations.

1. "Disabled" Employee Defined

A "disabled" individual is a person who: (i) has a physical or mental "impairment" that "substantially limits" one or more "major life activities"; (ii) has a "record" of such impairment; or (iii) is "regarded" as having such an impairment. Effectively, this means that an employee (or applicant) who has an impairment that substantially impacts day to day activities such as caring for one's self, performing manual tasks, walking, hearing, seeing, speaking, breathing, learning or working may be protected by these statutes. Further, individuals that have a "record" of such impairment (*i.e.*, individuals who were disabled in the past) or are regarded, incorrectly, as having such an impairment (for example, if an employer has an erroneous belief that an employee with a heart condition can no longer perform manual labor), may be protected as well.

In order to be protected, the individual must be "qualified" that is, the individual must be able, with or without reasonable accommodation, to perform the essential functions of the

[*] The term "disability" as used in the federal ADA and the term "handicap" as used in Chapter 151B are synonymous. We use the term "disability" here to refer to standards under both the federal and state statutes, which are very similar.

job at issue. The essential functions of a job are the fundamental job duties of the position the individual holds or desires. The term "essential functions" does not include the marginal functions of the position. A job function may be considered essential if:

a. the reason the position exists is to perform that function;

b. there are a limited number of employees available among whom the performance of that job function can be distributed; and/or

c. due to the function being so highly specialized, the incumbent in the position was hired for her expertise or ability to perform the function.

2. Employer's Obligation to Reasonably Accommodate

Employers are obligated to make "reasonable accommodations" to allow qualified individuals with a disability to work. Reasonable accommodations commonly include: (i) making existing facilities readily accessible to and usable by persons with disabilities; (ii) restructuring the job, modifying work schedules, reassigning the employee to a vacant position; or (iii) acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

The obligation to make reasonable accommodations, however, does not include lowering quality or production standards or providing personal use items (*i.e.*, glasses or hearing aids). Further, employers need not make an accommodation that imposes an "undue hardship" on the employer. An undue hardship involves significant difficulty or expense. Whether a "hardship" is "undue" may depend on the employer's size, financial resources and the nature/structure of operations.

J. Retaliation

Many employment statutes contain anti-retaliation provisions, which prohibit an employer from punishing an employee for having complained of unlawful conduct or participating in an investigation of unlawful conduct. In order to prove a retaliation claim, the employee need only show (i) the employee engaged in legally protected conduct (such as opposing sexual harassment, filing a complaint, assisting in an investigation of another's complaint); (ii) she suffered an "adverse employment action" (such as a demotion, cut in pay or termination or any action against the employee that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination"); and (iii) a causal connection exists between the protected conduct and the adverse action.

Retaliation claims are among the fastest growing claims and are often easier to prove than the underlying discrimination claim. Therefore, employers must be mindful of how they treat employees who complain or file discrimination claims, even if the initial complaint is without merit. There are many forms of protected conduct. Employers generally cannot punish employees for (i) complaining of or opposing unlawful practices (such as discriminatory conduct, harassment, or unsafe working conditions); (ii) testifying or cooperating in any governmental investigation into potentially unlawful conduct; and (iii) aiding another in complaining about potentially unlawful conduct. Employers also need to respond promptly and objectively whenever retaliation claims are raised.

K. Military and Other Uniformed Services

Discrimination is prohibited against persons who perform or apply for voluntary or involuntary duty in a uniformed service under competent government authority. Both state and federal law prohibit denying employment, reemployment, promotion, or any benefit because of military service or an application for military service. Retaliation because of the

assertion of these statutory protections is also prohibited. The federal law extends protection not merely to members of, and applicants for, the armed services but also to persons who serve or train as intermittent disaster-response appointees upon activation of the National Disaster Medical System. While the state law applies to employers with six or more employees, the federal law applies to all employers regardless of the number of persons they employ.

L. Genetic Information

Massachusetts and a majority of other states prohibit employers from using genetic information about employees or prospective employees in any way, such as hiring, firing, or to affect the terms, conditions, compensation, or privileges of employment. Although Congress has not yet enacted federal legislation to address specifically the use of genetic information in employment decisions, the EEOC has interpreted "disability" in the ADA to include genetic predisposition to disease.

M. Criminal Record

Chapter 151B prohibits employers from asking job applicants or employees about certain criminal record information, specifically the following:

1. an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or

2. a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or

3. any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

Mass. Gen. L. c. 151B, § 4(9).

1.3 Discrimination Resources

The Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission have information on their websites that cover the protected categories discussed in Section 1.2 above. The MCAD Facts Sheets are included in the Appendix below that contain information discussing the various protected categories.

SEE APPENDIX

Exhibit A	**MCAD Fact Sheet: Discrimination in the Workplace Based on Race, Color, National Origin or Ancestry**
Exhibit B	**MCAD Fact Sheet: Age Discrimination**
Exhibit C	**MCAD Fact Sheet: Parental Leave**
Exhibit D	**MCAD Fact Sheet: Sexual Harassment in Employment**
Exhibit E	**MCAD Model Sexual Harassment Policy**
Exhibit F	**MCAD Fact Sheet: Employment Discrimination on the Basis of Disability**
Exhibit G	**MCAD Fact Sheet: Genetic Testing**
Exhibit H	**MCAD Fact Sheet: Employment Discrimination on the Basis of Criminal Record**

CHECK THE INTERNET

Equal Employment Opportunity Commission (EEOC):
www.eeoc.gov/types/index.html

Massachusetts Commission Against Discrimination (MCAD):
www.mass.gov/mcad/forms.html

1.4 Other Statutory Rights

A. **Family and Medical Leave Act**

The federal Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq*., covers employers of 50 or more employees. Employees are eligible for FMLA leave if they have worked for at least 12 months, and for at least 1,250 hours over the previous 12 months. Eligible employees can take up to 12 weeks of unpaid leave during a 12-month period for:

- the birth and care of a newborn child of the employee;
- the placement of a son or daughter for adoption or foster care;
- the care for an immediate family member (spouse, child, or parent) with a "serious health condition";
- medical leave when the employee is unable to work because of a "serious health condition"; or
- due to a "qualifying exigency" related to a family member's deployment in the Armed Services.

In addition, an employee can take up to 26 weeks in a single 12-month period to care for a family member who has a serious illness or injury received in the line of duty in the Armed Services. FMLA leave can be taken all at once or on a reduced or intermittent basis. The employer must keep health benefits in place while the employee is on FMLA leave. Ordinarily, the employee is entitled to be returned to her same or an equivalent position at the end of the leave.

Although FMLA rules are complicated and beyond the scope of this Guide, there are some significant traps that employers should understand. In particular, employers should be aware that an employee need *not* make a specific request for "FMLA" leave to be entitled to it. The employee need only give the employer enough information to inform the employer that the employee may be entitled to such leave. In some circumstances FMLA leave may run concurrently with leave an employee takes under other statutes or policies such as workers' compensation leave, or disability leave under a Short Term Disability policy, or maternity leave under the Massachusetts Maternity Leave Act. The Department of Labor

(DOL) has issued extensive regulations applying the FMLA, which (at the time of publication) are undergoing revision, and which can be found on the DOL's website. Guidelines for establishing FMLA policies can be found in Part II, Section 2.4 below.

B. Massachusetts Maternity Leave Act

The Massachusetts Maternity Leave Act (MMLA), Mass. Gen. L. c. 149, § 105D, applies to employers of six employees or more, and requires the employer to provide an unpaid maternity leave of eight weeks to female employees who have completed a probation period or have been employed for three months. At the end of MMLA leave, the employee is entitled to be restored to her same or a similar position.

C. Small Necessities Leave Act

The state Small Necessities Leave Act, Mass. Gen. L. c. 149, § 52D, requires employers of 50 or more employees to provide up to 24 hours of unpaid leave for certain family-related issues, such as taking family members to doctors' appointments and attending parent-teacher conferences.

D. Uniformed Services Employment and Reemployment Rights Act

Chapter 151B prohibits discrimination and retaliation against military personnel. The federal statute, the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, *et seq*., also prohibits employers from discriminating against members of, or applicants to, a uniformed service with regard to initial employment, reemployment, retention, promotion, or benefits. Employers may not retaliate because of an exercise of a USERRA right.

USERRA provides special protections to those who must leave their civilian jobs to perform uniformed service. Members of a uniformed service who satisfy certain eligibility requirements must be reemployed at the civilian positions they would have held, and with the

pay, seniority, and benefits they would have enjoyed if continuously employed as a civilian. The basic conditions of eligibility are that (1) the employee gave advance notice to the employer of the uniformed service requirement, (2) the employee has five or less years of total uniformed service while with this particular employer, (3) the employee made a timely return to work or application for reemployment, and (4) the employee was not separated from uniformed service with a disqualifying discharge or under other than honorable conditions.

USERRA rights can change employment at-will status. If the civilian employee's uniformed service was for more than 30 but less than 181 days, then she cannot be discharged from her civilian job within 180 days of reemployment unless the discharge is for "cause." If the uniformed service was for more than 180 days, then the returning employee cannot be discharged within a year of reemployment unless the discharge is for "cause." USERRA contains obligations relating to health insurance, pension plans and other benefits as well as notice requirements.

CHECK THE INTERNET

- **Additional information on USERRA is available at the U. S. Department of Labor: www.dol.gov.vets**
- **The Department of Labor's interactive online USERRA advisor can be viewed at: www.dol.gov/elaws/userra.htm**
- **The USERRA Notification of Rights poster is available at: www.dol.gov/vets/programs/poster.htm**

- **An additional source of comprehensive USERRA information is available at the National Committee for Employer Support of the Guard and the Reserve's (ESGR) website: www.esgr.org**

E. Workers' Compensation

In Massachusetts, all employers must provide workers' compensation insurance under the workers' compensation statute, Mass. Gen. L. c. 152, to each employee. Such coverage is normally the exclusive remedy for an employee who suffers a personal injury arising out of her employment.

The statute prohibits any pre-employment inquiry regarding whether an applicant has sought or received workers' compensation benefits. It also is unlawful for employers to retaliate against an employee for having sought workers' compensation benefits. Moreover, an employee with an approved claim for benefits and who is able to perform the essential functions of the job with or without reasonable accommodation is automatically considered "handicapped" under Massachusetts law, thereby providing rights to reasonable accommodations under Chapter 151B. Furthermore, terminated employees who leave due to a workers' compensation covered injury have certain rehire preferences, although such individuals are not guaranteed reemployment or job restoration.

F. Privacy Rights

Under Massachusetts law (Mass. Gen. L. c. 214 § 1B), employees are protected against unreasonable, substantial or serious interference into their private lives. Although employers can have legitimate interests in employee private information, those interests are balanced against the employee's reasonable expectation of privacy. As a result, employees sometimes bring claims against employers for invasion of privacy, usually for such conduct

as questioning about purely private matters, or conducting physical searches, drug testing, or surveillance and monitoring of employees. Employers can guard against such claims by carefully considering their conduct and by publishing policies that reasonably serve to diminish expectations of privacy in certain areas, *e.g*., an electronic communications and an internet use policy. Employers should be aware that there are other sources of privacy rights under state and federal law.

G. The Worker Adjustment and Retraining Notification Act

Under federal and state laws, advance notice and reporting requirements may apply before an employer can close a plant or conduct a significant layoff. Under the federal Worker Adjustment and Retraining Notification Act, known as the WARN Act, 29 U.S.C. § 210l, *et seq*., employers that plan to close a facility of 100 or more employees or lay off at least one-third of employees at a facility which number at least 50 or more employees must provide a minimum of 60 days advance, written notice of the layoff to affected employees. An analogous state law, Mass. Gen. L. c. 151A, §§ 71A - 71G, may also impose certain obligations. Notice and reporting requirements are strict. An employer also may have obligations concerning employee benefits that are triggered by a plant closing. Employers facing a plant closing or significant layoff are encouraged to consult experienced employment counsel.

H. Consolidated Omnibus Budget Reconciliation Act

A federal statute, the Consolidated Omnibus Budget Reconciliation Act, known as COBRA, 29 U.S.C. § 1161, *et seq.*, gives employees and other insurance beneficiaries the option to continue group health insurance benefits following termination. COBRA applies to both medical and dental insurance coverage. This means that generally former employees,

retirees, spouses, former spouses and dependent children may elect temporary continuation of their health insurance coverage at the employer's group rate. Individuals who qualify under COBRA are required to pay the entire premium for coverage and may be charged a 2% administrative fee each month. Group health plans for employers with 20 or more employees are subject to COBRA. Employers of less than 20 employees are covered by the state "mini" COBRA statute, the Small Group Health Insurance Act, Mass. Gen. L. c. 176J, § 9, which is very similar to the federal COBRA law.

The typical COBRA beneficiary is usually eligible for group coverage during a maximum of 18 months for qualifying events such as employment termination or reduction in hours. Other qualifying events, or a second qualifying event during the initial coverage period, may permit the beneficiary to receive coverage for a maximum of 36 months.

When a qualifying event occurs, the health plan administrator must provide a COBRA notice to the employee and any covered beneficiaries regarding their rights to elect COBRA coverage. Employers are required to notify their plan administrators within 30 days after an employee's termination or reduction in hours that causes the employee to lose health benefits. Thereafter, the plan administrator is required to provide notice to individual employees of their right to elect COBRA within 14 days after the plan administrator receives notice from the employer of the qualifying event.

The Department of Labor has issued regulations that provide detailed information regarding COBRA's notice and election requirements, as well as a model election form that may be sent to employees. The form may be found on the Department of Labor website: www.dol.gov. The employer may choose to use its own form; however, the form must

contain detailed information regarding the employee and/or beneficiary's right to elect COBRA continuation.

I. The Health Insurance Portability and Accountability Act

The federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1301, *et seq.*, mandates continuity of health insurance coverage, including coverage under group health plans offered by employers. HIPAA applies to group health plans with two or more current employees as participants. It applies to self-insured plans as well as insurance and health maintenance organizations.

HIPAA limits exclusions for pre-existing conditions and prohibits discrimination against employees and beneficiaries because of their health history. Under certain circumstances, HIPAA affords an opportunity for individuals to enroll in a new health insurance plan.

HIPAA limits the effect of pre-existing condition exclusions by implementing a procedure for crediting previous health coverage. This is called "creditable coverage." HIPAA also requires the issuance of a certificate that shows creditable coverage. A certificate of creditable coverage must be provided whenever an eligible individual loses coverage under an insurance plan, is entitled to elect COBRA continuation coverage or exhausts COBRA continuation coverage. Certificates are to be provided automatically and free of charge.

J. Wage & Hour Laws

In Massachusetts, wage payments, overtime, and vacation pay are governed by Mass. Gen. L. chs. 149 and 151, and most employers also are covered by the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq*. These statutes and their implementing

regulations require payment of minimum wages, timely payment of wages and payment of overtime pay where required. Among other things, these statutes require that:

- an employee who reports for duty by request or with permission be paid for at least 3 hours at no less than minimum wage, even if work is not available;
- if an employee works more than 6 hours a day, the employee must have 30 minutes unpaid time for a meal (the employee can waive this right, but can only do so voluntarily);
- an employee terminated involuntarily must be paid in full as of the date of termination, including payment for accrued vacation and commissions owed;
- employees who resign need be paid only at the next regular pay period;
- employers must pay overtime at one and one half the employee's regular hourly rate for all work in excess of forty hours in a week unless the employee is "exempt" from the overtime requirement.

There are several classifications of salaried employment that are "exempt" from the requirement to pay overtime. The most common exemptions include: (i) executive; (ii) administrative; (iii) learned professional; (iv) creative professional; (v) computer professional; (vi) outside sales; and (vii) highly compensated positions.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to an exception, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, *i.e.*, because of the operating requirements of the business, that employee is not paid

on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

The most common exemptions to the payment of overtime include:

Executive Exemption	Administrative Exemption
To qualify for the executive employee exemption, all of these tests must be met: 1. the employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week; 2. the employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; 3. the employee must customarily & regularly direct the work of at least two or more other full-time employees or their equivalent; and 4. the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.	To qualify for the administrative employee exemption, all of these tests must be met: 1. the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week; 2. the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and 3. the employee's primary duty includes the exercise of discretion & independent judgment with respect to matters of significance.
Learned Professional Exemption	**Creative Professional Exemption**
To qualify for the learned professional employee exemption, all of these tests must be met: 1. the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week; 2. the employee's primary duty must be the performance of work requiring advanced knowledge, defined as predominantly intellectual in character & which	To qualify for the creative professional employee exemption, all of these tests must be met: 1. the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week; and 2. the employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or

includes work requiring the consistent exercise of discretion & judgment; 3. the advanced knowledge must be in a field of science or learning; and 4. the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.	creative endeavor.
Computer Professional Exemption	**Outside Sales Exemption**
To qualify for the computer professional employee exemption, all of these tests must be met: 1. the employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour; and 2. the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; The employee's primary duty must consist of: 1. the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2. the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; 3. the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4. a combination of the aforementioned duties, the performance of which requires	To qualify for the outside sales employee exemption, all of the following tests must be met: 1. the employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and 2. the employee must be customarily and regularly engaged away from the employer's place or places of business.

the same level of skills.	
Highly Compensated Employees	
Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) can more easily meet the white collar exemptions and are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.	

The exemptions discussed above apply only to "white collar" employees who meet the salary and duties tests set forth above. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt no matter how highly paid they might be.

Given that an employer may be subject to civil, as well as criminal, penalties for failure to comply with these statutes, employers are well advised to seek the advice of competent employment counsel to ensure proper compliance.

K. Unionization and Concerted Protected Activity[*]

All employers, even those whose employees are *not* unionized, are governed by certain rules contained in the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. The NLRA guarantees employees the right to organize and bargain collectively with their employers or to refrain from all such activity. Although sometimes misconstrued as applying

[*] The authors wish to thank Andrew J. Orsmond of Foley Hoag and Michael J. Doheny of Segal, Roitman & Coleman for their contribution to this section.

only to unionized employers, in fact the NLRA protects all employees who engage in "concerted activities" for "mutual aid or protection."

For employee conduct in a non-unionized workplace to be protected, it must be both "concerted" and "for mutual aid or protection." "Concerted activity" is conduct engaged in by an employee with, or on the authority of, other employees. Similarly, such concerted activity is for "mutual aid or protection" if it is intended to further the employees' collective employment-related interests. The NLRA does not shelter concerted activity that is violent, unlawful, in breach of contract, or "indefensibly disloyal." Nor does the NLRA protect activity by a single employee for that individual's personal or individual benefit.

The determination of whether certain conduct is "concerted" or "for mutual aid or protection" is highly fact-specific, and frequently requires review by experienced counsel. Indeed, the National Labor Relations Board's determination as to what constitutes protected "concerted activity" has varied over the years. However, protected "concerted activity" generally includes:

- employee petitions and letters to an employer regarding the terms or conditions of employment;
- employee discussions regarding their terms or conditions of employment;
- employee complaints to management regarding the terms or conditions of employment;
- employee complaints to management regarding actions taken against co-employees;
- employee complaints to federal or state agencies regarding the terms or conditions of employment;
- employee refusals to accept job assignments claimed to be unsafe;
- employee protests against alleged unlawful employment discrimination; and
- employee refusals to cross a picket line at another employer's place of business.

Employers are prohibited not only from punishing employees for engaging in protected activities, but from instituting policies designed to prevent them from doing so. The National

Labor Relations Board, with court approval, has held that employer policies intended to prevent employees from engaging in such activities violate the NLRA.

Employees do not have free reign in the manner in which they engage in concerted activity, and not all concerted conduct may be deemed to be for "mutual aid or protection." Examples of such unprotected conduct include:

- any conduct that involves violence or the threat of violence;
- conduct aimed at non-employment related grievances;
- sit down, partial, or intermittent strikes;
- disclosure of an employer's confidential business information to individuals or entities not authorized to receive the information; and
- certain forms of conduct disparaging management or an employer's business.

Again, the determination of whether activity will be deemed for "mutual aid or protection" is highly fact-specific.

The NLRA also places restrictions upon what a non-unionized employer may and may not do when faced with a union organizing effort. Most notably, an employer may not:

- threaten reprisal if employees decide to join a union;
- promise a benefit to not join a union;
- spy on union activities;
- question employees about union activity; or
- make implied threats or promises of benefit.

However, an employer is permitted to:

- offer opinions about union policies and union leaders;
- offer facts known about the union or its officers;
- inform employees about prior experience with unions;
- inform employees that there is no guarantee that union representation will result in better wages or benefits; or
- inform employees of perceived disadvantages of unionization.

The full measure of specialized protections provided to both labor unions and management in the context of an organizing campaign, election, and collective bargaining

agreement negotiation are beyond the scope of this publication. Employers concerned about or facing organizing campaigns are encouraged to consult experienced labor counsel.

CHECK THE INTERNET

Additional information on the NLRA is available at the National Labor Relations Board: www.nlrb.gov

The National Labor Relations Board's "Basic Guide to the National Labor Relations Act" can be viewed at: www.nlrb.gov/nlrb/shared_files/brochures/basicguide.pdf

1.5 Common Law Rights and Duties

In addition to rights and obligations that are created by statute (Sections 1.2 and 1.4 above) and created by contract (Section 1.6 below), the law developed through court decisions (referred to as the "common law") has provided employers and employees with many different types of common law rights and duties. The claims that most commonly arise are discussed briefly below.

A. Common Law Duty of Loyalty

Under Massachusetts law, employees owe their employers a "duty of loyalty." In essence, the employee's duty is that she will not misuse or appropriate to herself the employer's confidential, proprietary or trade secret information that is entrusted to her or otherwise act against the employer's interests. For example, the duty of loyalty prohibits an employee from using the employer's confidential, proprietary or trade secret information to engage in competition with the employer and, to some degree, this duty continues even after termination of employment.

Although an employee may not compete with an employer while employed, the employee may plan to go into competition with her employer and may take certain active

steps to do so while still employed without violating her duty of loyalty. However, there are certain limitations on the conduct of an employee who plans to compete with her employer. While still employed, an employee may not: (1) solicit her employer's customers, (2) engage in any activity for her future interests at the expense of her employer by using the employer's resources or employees for personal gain, or (3) engage in conduct designed to hurt the employer.

In Massachusetts, if an employee uses her employer's trade secrets for her own personal gain, the employer may also have a claim of misappropriation of trade secrets under the state statute, Mass. Gen. L. c. 93, §§42 and 42A, which prohibits an employee from disclosing or using without permission trade secrets of the employer. The employer must show that the employee both misappropriated and wrongfully used the employer's trade secret.

B. Wrongful Termination

1. Wrongful Termination: Breach of Covenant of Good Faith & Fair Dealing

Under Massachusetts law, all contracts contain an implied covenant of good faith and fair dealing. In the employment context, this covenant is violated when an employer terminates an at-will employee in order to avoid payment to the employee of compensation earned or almost earned. These cases typically arise when an employee is terminated just before receipt of earned payments, such as for commissions or bonuses.

2. Wrongful Termination in Violation of Public Policy

Under the "public policy" doctrine, at-will employees can file claims when terminated contrary to a well-defined public policy. Public policy employment claims usually arise in one of three situations: (i) the employee is fired for asserting a legally

guaranteed right (*e.g.*, filing a workers' compensation claim); (ii) the termination is a result of the employee doing what the law requires (*e.g.*, serving on a jury); or (iii) the employee is let go for refusing to do that which the law forbids (*e.g.*, committing perjury).

C. <u>Intentional Interference With Contractual or Advantageous Relations</u>

Employees also have rights against supervisors, co-workers or other third-parties based on allegations that the individual wrongfully procured the employee's discharge or otherwise interfered with the employee's employment. In order to bring such a claim, the employee must show that the individual was motivated by malice, which means a "spiteful, malignant purpose, unrelated to the legitimate corporate interest." Consequently, employers should instruct their managers that personal feelings towards employees should never intrude into employment decisions.

D. <u>Defamation</u>

A claim for defamation can arise when an employer communicates a false statement of fact to a third person (not to the employee himself) that damages the employee's reputation. In the employment context, defamation claims may arise when employers make statements regarding employee misconduct, job performance and character traits. Although employers have a qualified privilege to communicate such information when it serves a legitimate business interest, it is generally advisable that information concerning employee conduct (or misconduct) be kept on a "need to know" basis. The other area where defamation claims may occur concerns references. Former employees have filed claims based on poor references on the theory that the reference was materially false and damaging. In order to avoid this type of litigation, many employers will not give references, positive or negative, beyond confirming dates of employment and positions held.

E. **Fraud/Misrepresentation**

An employee may have a claim for fraud or misrepresentation if her employer makes a false statement for the purpose of inducing the employee to rely on that statement in order to take a particular action, the statement turns out to be false, and the employee is harmed by relying on the false representation. A typical claim involves misrepresentations in the hiring process concerning length and terms of employment, such as a promise of a minimum term of employment, job security or bonus compensation, in order to induce a job applicant to take a job.

F. **Negligent Hiring/Retention**

Employers must exercise reasonable care in the selection and retention of employees. This is particularly true if their employees come into contact with members of the public as part of their jobs. An employer breaches its duty if it knows, or should have known, of problems that indicate unfitness and fails to investigate, discharge, or reassign the employee. As a result, employers are well advised to conduct background checks of applicants, particularly if the employee will deal with customers, cash or other sensitive matters. See Part II, Section 2.1(B)(2) below.

1.6 Contracts

Employers and employees can modify the at-will employment relationship by contract. The formation of a contract can be intentional or unintentional. Contractual obligations can arise from written employment agreements and offer letters as well as pre-hire oral statements or promises. In addition, implied contracts may be formed by promises or statements made in handbooks, employment policies and practices and the employer's conduct. The most common contract claims will be discussed briefly below.

A. Employment Agreements and Offer Letters

Some employees have written employment agreements, which are contracts that set out terms and conditions of employment and can modify the nature of "at-will" employment depending on the language in the agreement. It is important to understand that offer letters (if accepted) also create employment contracts. A well written offer letter will define the basic terms of the employment relationship, and can be drafted to preserve at-will employment. For tips on drafting offer letters and employment agreements see Part II, Section 2.1(C) below.

B. Non-Compete Agreements and Confidentiality Agreements

Non-compete agreements and confidentiality agreements, also referred to as non-disclosure agreements or "NDAs," are types of employment agreements that employers use in order to protect their confidential, proprietary and trade secret information and to prevent departing employees from stealing their employees and customers. A discussion of these agreements can be found in Part II, Sections 2.1(D) and (E) below.

C. Oral Contracts

Contracts may also be formed by pre-hire statements and promises, and occasionally, by post-hire promises. For example, typical statements that may support a claim for the existence of an oral contract include promises made in an interview concerning length of employment, job security, disciplinary processes, income levels and future promotions. Training interviewers and managers to be careful about making unintended promises regarding terms and conditions of employment during the hiring process can go a long way to avoid these issues. Further, because it is often difficult to establish what was said or not said during an interview, as noted above, a well drafted offer letter setting out the terms of employment is usually advisable.

D. Employee Handbooks/policies/practices

Under Massachusetts law, statements in employee handbooks and policies can create "implied contracts," meaning that such statements imply contractual promises. Disclaimer of contractual commitments – including statements that the employer retains the right to modify a handbook unilaterally, that the handbook is for general guidance only, or statements that reiterate at-will status – may or may not be effective to negate a contractual obligation depending on the circumstances. See Part II, Section 2.2(A) below.

E. Independent Contractors

Employers sometimes engage independent contractors to perform specific tasks. The Massachusetts Independent Contractor Law, Mass. Gen. L. c. 149, § 148B, which went into effect in July 2004, significantly limits the kinds of workers who can be properly classified, and thus hired, as independent contractors. Under the new law, there is a presumption that a work arrangement is employer/employee unless the party receiving the services can overcome this presumption. In order to overcome the presumption, each of the following three factors must be established: (1) the worker must be free from the presumed employer's control and direction in performing the service, both under a contract and in fact; (2) the service provided by the worker must be outside the employer's usual course of business; and (3) the worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

According to an advisory issued by the Attorney General, an employer violates the statute when two acts occur. First, the employer classifies or treats a worker as an independent contractor although the worker does not meet each of the three criteria listed above. Second, in receiving services from the worker, the employer violates one or more of

the state's wage and hour, taxation and/or workers' compensation statutes. Failure to meet these requirements will deem the worker to be an employee for purposes of the Massachusetts wage and hour, taxation and/or workers' compensation laws. For practical purposes this means employers can no longer engage independent contractors to perform tasks that are a normal course of their business. In addition, there are strict tests in the workers' compensation, unemployment insurance and other laws that limit when a worker can be lawfully classified as an independent contractor.

**INDEPENDENT CONTRACTOR OR EMPLOYEE:
WHICH ARE YOU?**

The first factor of the new test – that the independent contractor must be free from the employer's control and direction – can be determined from standards that have been developed over the years, and still apply under federal law and in other states. Over the years, the courts have considered many facts in deciding whether a worker is controlled by the employer. These relevant facts fall into three main categories: *behavioral control, financial control,* and *relationship of the parties*. In each case, it is very important to consider all the facts – no single fact provides the answer.

BEHAVIORAL CONTROL

These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work. For example:

- **Instructions – if you receive extensive instructions on how work is to be done, this suggests that you are an employee. Instructions can cover a wide range of topics, for example:**

  -- how, when, or where to do the work
  -- what tools or equipment to use
  -- what assistants to hire to help with the work
  -- where to purchase supplies and services

If you receive less extensive instructions about what should be done, but not how it should be done, that is evidence of being an independent

contractor. For instance, instructions about time and place may be less important than directions on how the work is performed.

- **Training – if the business provides you with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that you may be an employee.**

FINANCIAL CONTROL

These facts show whether there is a right to direct or control the business part of the work. For example:

- **Significant Investment – if you have a significant investment in your work, you may be an independent contractor. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an independent contractor.**

- **Expenses – if you are not reimbursed for some or all business expenses, then you may be an independent contractor, especially if your unreimbursed business expenses are high.**

- **Opportunity for Profit or Loss – if you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an independent contractor.**

RELATIONSHIP OF THE PARTIES

These are facts that illustrate how the business and the worker perceive their relationship. For example:

- **Employee Benefits – if you receive benefits, such as insurance, pension, or paid leave, this is an indication that you may be an employee. If you do not receive benefits, however, you could be either an employee or an independent contractor.**

- **Written Contracts – a written contract may show what both you and the business intend. This may be very significant if it is difficult, if not impossible, to determine status based on other facts.**

CHECK THE INTERNET FOR THE FEDERAL LAW STANDARD

Internal Revenue Service:
www.irs.gov/pub/irs-pdf/p1779.pdf

PART II: NAVIGATING THE LIFE CYCLE OF THE EMPLOYMENT RELATIONSHIP

2.1 Hiring Considerations and Practices

A. Pre-Hiring Considerations

Before hiring occurs may be the employer's *last* practical opportunity to think fully through the process it is setting in motion. That is the time to ensure that the overall hiring result best reflects both the employer's business interests and the applicant/employee's legitimate concerns. Accordingly, before initiating the hiring process, an employer should carefully consider the objectives that will inform the hiring decision.

QUESTIONS AN EMPLOYER SHOULD CAREFULLY CONSIDER PRIOR TO HIRING

- **What exactly is the business need the employer is trying to address with this particular employee?**
- **How does that business need translate into a clear job description for the employee?**
- **Given the job description, what education and experience should a successful applicant possess?**
- **Will this employment be for a distinct period of time, or should it be indefinite, terminable at will by either the employee or the employer?**
- **How will this new employee fit into the workplace hierarchy and be properly classified in terms of compensation?**
- **How can the employer ensure that candidate advertising, interviewing, and evaluating remain focused on legitimate business considerations, such as those listed above (and are not led off track by extraneous factors)?**
- **What must be done, or avoided, for the employer to prevent a miscommunication of intentions or the creation of false expectations?**
- **How can the employer ensure that hiring and employment occur within an overall environment of fairness and equal opportunity?**

- **What degree of diligence is appropriate with regard to testing or investigating an applicant's background and credentials?**
- **What documentation of the hiring decision and/or employment relationship is required or may be useful later?**
- **Are there particular legal pitfalls that must be avoided?**

B. Evaluating Candidates

When hiring, it is important to select the best qualified candidate. Proper screening can assist with the determination of which applicant is the best qualified. Permissible screening of candidates, with some specific and appropriate limitations depending on the position being filled, may include a medical examination, drug testing, and background and credit checks.

1. Applications and Interviewing

In Massachusetts, all applications for employment must contain a statement that it is illegal to administer a lie detector test. Mass. Gen. L. c. 149, §19B(2)(b). If an application has a section to record the applicant's work history, then it must also notify the applicant that verifiable work performed on a volunteer basis may be recorded. In Massachusetts, employers are limited in the information regarding criminal records that may be requested from an applicant. Mass. Gen. L. c. 151B, §4(9). See Part I, Section 1.2(L) above.

Before an applicant is granted an interview, the employer should determine that the applicant, on the face of her application, meets the minimum requirements established for the position. If the information given by the applicant on the face of the application does not meet the advertised/posted minimum requirements the employer need not interview the applicant. Once an interview is granted, then the interviewer should interview the candidate for the position being filled.

a. Improper Inquiries

It is unlawful for an employer to inquire about certain areas during the application process. Generally, any inquiries that directly or indirectly elicit information about an applicant's protected status is inappropriate. An area that is frequently difficult for employers are inquiries that relate to disabilities. Employers may not ask disability questions during the pre-employment process, whether on a job application form, in a job interview, or in the employer's background or reference checks. The purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of her medical or disability-related condition. Questions about any of the following subjects are off limits during the pre-employment part of the hiring process because they are likely to elicit information related to a handicap or disability:

- treatment for medical conditions or diseases;
- hospitalizations;
- treatment by a psychologist or a psychiatrist for a mental condition;
- major illnesses;
- absences from work due to illness; and
- physical conditions.

Questions about an applicant's workers' compensation or health insurance history are also prohibited because they are often related to an individual's impairment and are likely to elicit information about a disability. It is discriminatory for an employer to reject an applicant because of a fear that she may increase workers' compensation or health insurance costs. An employer cannot ask how often an applicant was absent from a former job due to illness.

Similarly, it is inappropriate to ask applicants about religious practices, plans to marry or have children, pregnancy, race or national origin, or any other protected status. An employer may not ask an applicant certain questions related to criminal history. See Part I,

Section 1.2(L) above. Moreover, an employer may not ask former supervisors or references anything that it is not permitted to ask the applicant.

b. Permissible Inquiries

An employer may always ask a job applicant about her ability to perform specific job functions. An employer can also ask about the applicant's qualifications and skills, such as education, work history or required licenses. In general, all pre-employment questions should focus on an applicant's ability to do the job.

An employer can ask applicants to describe or demonstrate how they would perform specific tasks, with or without an accommodation, provided that all applicants in the same job category are asked to do this. For example, if the job requires heavy lifting, the employer can ask all applicants to demonstrate or describe how they would lift the weight. If the applicant needs a reasonable accommodation to do the demonstration, the employer can either provide the accommodation or ask the applicant to describe how she would perform the task.

It is permissible for employers to ask whether an applicant can meet the attendance requirements for the job and to inquire about the applicant's attendance record at a former job. Employers may ask an applicant if she is authorized to work in the United States. See Part II, Section 2.1(B)(4) below.

EXAMPLES OF QUESTIONS YOU CAN ASK AN APPLICANT (provided they are job related)

- **Are you able to perform the essential functions of the job, with or without reasonable accommodation, for which you are applying? If so, describe how you would perform these job-related functions. (Note: If there is no written job description available, describe the job and its essential functions.)**
- **Can you move 50 pounds from point A to point B?**

- **Do you have a driver's license?**
- **Can you sit for two hours at a time?**
- **Can you read a video display terminal?**
- **Can you reach the top of a six-foot-high filing cabinet?**
- **Are you capable of standing for three hours at a time?**
- **Would you be able to arrive to work by 8:00 A.M. every day?**
- **What was your attendance record at your prior place of employment?**
- **Do you currently engage in the illegal use of drugs?**
- **An employer may invite applicants to voluntarily disclose their handicap or disability or other protected status for purposes of assisting the employer in its affirmative action efforts. An employer should make it clear that the information will be used solely in connection with its affirmative action efforts, will be kept confidential, and that nondisclosure will not subject the applicant to adverse treatment.**

The MCAD has developed a Fact Sheet which can serve as a quick reference guide to determine what are and are not appropriate questions to ask on an application or during an interview.

SEE APPENDIX

Exhibit I MCAD Fact Sheet: Pre-Employment Inquiries

CHECK THE INTERNET

Massachusetts Commission Against Discrimination:
www.mass.gov/mcad/preemployfactsht.html

c. Questions About Drug Use

Questions about the use of legal and illegal drugs are complicated. For example, asking an applicant to list all currently prescribed drugs may reveal that she is using AZT or insulin, indicating that the applicant may be disabled. An exception would exist if the employer has administered a test for the current use of illegal drugs and an applicant tests positive. In that case, the employer may ask about the use of legal drugs in order to seek an explanation for the positive test result.

An employer may inquire about the current illegal use of drugs, provided that the questions are not likely to elicit information about past drug addiction which is a covered disability. For example, it is permissible to ask whether the applicant has ever engaged in the use of illegal drugs and when was the last time. However, it is prohibited to ask if the applicant has ever been addicted to illegal drugs or treated for drug abuse. Additional and broader questions may be permitted depending on the circumstances and occupation.

2. Reference, Background and Credit Checks

a. Reference Checks

In conducting reference checks with former employers, there are two responses an interviewer might encounter. First, many former employers will only verify that the individual worked for them and provide dates of employment. In general, these former employers will not provide any information related to the reason for separation of the employee, and many will require that the request for reference be made in writing. The second response is not so limited and allows former employers to provide truthful details about the employee's performance and separation. In many instances, former employers can require that former employees sign releases authorizing the release of information to

prospective employers. For an employer seeking a reference check, obtaining such a release from an applicant is likely to increase the chance it obtains a substantive response from the former employer. In general, the employer should document the response so a record exists regarding the reference, although circumstances could arise that may result in such a record being problematic.

b. Background Checks

The extent of an employer's duty to make an independent inquiry into an applicant's background depends largely on the type of work to be done by the applicant. Because an employer is more prone to liability where the employee's position requires, for example, working with children, entering people's homes or protecting the safety of property of third parties, a more intensive investigation is appropriate. Prospective employers should:

- have applicants sign a consent to background checks;
- make hiring contingent on satisfactory completion of a background check; and
- consider drug testing of applicants.

Pursuant to the Criminal Offender Record Information Act (CORI), it is unlawful to require a person to provide a copy of his criminal record (Mass. Gen. L. c. 6, § 172). CORI provides only limited access to criminal records. However, employers, agencies and individuals may apply to the Criminal History Systems Board for access to more extensive information, if they are required by statute to have access to such information, or if obtaining the information is in the public interest, such as information on employees who interact with children or other particularly vulnerable populations. Employers need to develop and apply a consistent policy regarding background checks of the criminal history of applicants for employment.

SEE APPENDIX

Exhibit J Request For Publicly Accessible Massachusetts CORI

Another tool available to employers for gathering background information on a prospective employee is an "investigative consumer report." An investigative consumer report is a consumer report in which information on a person's character, personal reputation, personal characteristics or mode of living is obtained through personal interviews with neighbors, friends, associates or others with whom the person is acquainted. Employers must notify applicants that an investigative consumer report, including information as to character, general reputation, personal characteristics, and mode of living, is going to be requested, and must obtain the employee's written consent before requesting the report. Specific steps are required under the Massachusetts Consumer Credit Reporting Act and the federal Fair Credit Reporting Act (see below).

An employer may want to verify academic records, to confirm any degrees attained, schools attended, and dates attended as stated by an applicant on an employment application or resume.

c. Credit Checks

An employer who plans to use consumer credit reports in the process of evaluating applicants must meet certain disclosure requirements. A "consumer report" is any oral or written report by a consumer reporting agency on a person's "credit worthiness, credit standing, or credit capacity" that is used or expected to be used as a factor in establishing eligibility for employment, promotion, reassignment or retention as an employee.

Employers must inform an applicant of the use of an ordinary consumer credit report if the applicant is rejected for employment on the basis of the report.

In Massachusetts, employers who use consumer reporting agencies to perform credit checks on job applicants must comply with the requirements of the Massachusetts Consumer Credit Reporting law (Mass. Gen. L. c. 93, §§ 50-68) and in some cases the Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681t).

3. Medical Examinations and Testing

Medical examinations and testing are permissible in limited circumstances. An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information. Once a conditional job offer is made, the employer may conduct a medical examination (and/or inquiry) and may condition a job offer on the satisfactory result of a post-offer medical examination (and/or inquiry), to the extent it is limited to determining whether the prospective employee, with or without reasonable accommodation, is capable of performing the essential job functions of the position and further provided that all applicants extended such a conditional offer are required to undergo such examination or inquiry.

Massachusetts employers are not allowed to require HIV testing as a condition of employment. Physical and mental ability tests are only permitted to the extent such tests measure only those abilities that are necessary to perform the essential functions of the position, or that are job related and consistent with business necessity.

The use of tests to measure the qualifications of applicants is, generally speaking, a valid employment practice. Employers who utilize tests, however, should be aware of the potential legal ramifications of such use. Drug tests are not considered medical exams. Under appropriate circumstances, drug tests can be used during the hiring process. Tests to measure or define an applicant's personality traits, including honesty and motivation, generally are not medical exams. However, certain other psychological testing may reveal mental disabilities and can be considered medical exams.

4. Employment Eligibility Verification

The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(b), requires that employers verify the identity and employment eligibility of anyone hired after November 6, 1986 to perform labor or services in return for wages, by completing and retaining a Form I-9 regarding each such person.

An employee must provide the information required on the Form I-9 and sign and date the Form I-9 at the actual commencement of employment. Employers are responsible for reviewing and ensuring that employees fully and properly complete Section I. Proper completion of Section I is imperative because even if a person is legally authorized to be employed in the United States, an employer may still be charged with a paperwork violation if the Form I-9 is either not completed or completed incorrectly. Due to the penalties imposed for employing a person who is not authorized to work in the United States, it is important for an employer to establish a tickler system to monitor the expirations of employment authorizations. An employer must retain the Form I-9 throughout the period of employment plus one year, or for three years after the date on which employment begins, whichever is longer.

C. **Offer Letters and Employment Agreements**

The "offer letter" is a crucial document that needs careful attention. When thought through and well-crafted, an offer letter can communicate important information and make the prospective employee feel good about joining the company, while still protecting the employer. Assume that whatever is offered to an employee upon joining the company, an employee will demand upon leaving the company.

Here are some tips to handle the more important issues in an offer letter.

1. At-Will Disclaimers

The offer letter should state that employment is not for a definite duration, and is terminable by either the employer or the employee at any time, with or without notice, and for any reason. See Part I, Section 1.6(A) above.

2. Expression of Compensation

To avoid the inference that the employer guarantees employment for at least one year, the offer letter should not reference a prospective employee's annual salary. Rather, the reference to compensation should reflect the amount of compensation based on the employer's payroll schedule (e.g., weekly or bi-weekly). Massachusetts law generally requires that employees be paid no less often than bi-weekly or, in the case of bona fide executive, administrative or professional salaried employees, semi-monthly.

3. Bonuses

If a prospective employee will be eligible for a bonus, the offer letter should clearly state the amount and date of payment of the bonus. If the bonus is discretionary, the offer letter should state that in no uncertain terms. In addition, if the bonus is contingent upon

certain performance criteria such as achieving a sales quota, or the company earning certain revenues, the offer letter should explicitly define the metrics for such performance targets.

4. Stock Options

The terms under which stock options (or other types of ownership such as restricted stock, phantom stock, stock appreciation rights) are granted to employees can be complicated (*e.g.*, vesting timetables, performance measures, buy-back provisions) and are best stated in a formal agreement between the company and the recipient. The offer letter merely should state the basics, such as the number of option shares. It should further state that receipt of stock options is dependent upon the employee's signing an option agreement and, if appropriate, contingent upon approval by the Board of Directors or Compensation Committee.

5. Benefits

Employee benefits, such as health insurance, retirement plans and tuition reimbursement should not be described in detail in an offer letter. Rather, advise new hires that eligibility for such benefits is subject to the conditions of the particular benefit plan or contract.

6. Conditions of Employment

Employers should include all conditions of employment (*e.g.*, reference checks, post-offer medical examinations, proof of eligibility to be employed in the United States (the Form I-9) in the offer letter. If the employer requires a prospective employee to sign a confidentiality or non-competition agreement, enclose the agreement and refer to it in the offer letter.

7. Prior Employment

Prospective employees should represent that they are not bound by a contract that would prohibit or restrict their employment with the company and they should agree not to disclose to the company any confidential or proprietary information obtained from a prior employer.

8. Duration of the Offer and Start Date

Offer letters should inform prospective employees that the offer will expire on a certain date, and also of the expected start date.

9. Integration Clause

Offer letters should include an "integration clause" stating that the offer letter and the documents referenced therein contain all the terms and conditions of employment and that they supersede any other written documents or conversations about such terms.

10. Acceptance/Expiration

The offer letter should require the prospective employee to sign and further should state that if acceptance is not transmitted to the employer by a certain date the offer expires.

SEE APPENDIX

Exhibit K **Sample Offer Letter for Executive Position**

Exhibit L **Sample Offer Letter for Non-Executive Position**

D. Non-Disclosure and Inventions Agreements

Companies that have confidential, proprietary and trade secret information that they want to keep confidential need to take steps to protect the confidential nature of such information. One way to do so is to have their employees sign non-disclosure and inventions

agreements. These agreements define the company's confidential information that cannot be disclosed or misused, and provide that all inventions made during the course of employment belong to the employer. Be aware that confidential information cannot extend to information that is in the public domain and thus the agreement should have an exception for information that is publicly available. See Part I, Sections 1.5(A) and 1.6(B) above.

E. <u>Contractual Non-Compete and Non-Solicitation Provisions</u>

In the absence of a written agreement, a Massachusetts employee is generally free to compete with her former employer. Many employers want non-compete and non-solicitation agreements, particularly for technical, sales and management staff, to protect trade secrets, confidential business information and goodwill, and to protect their customer base and employees. Such agreements prohibit an employee while employed and after leaving the company from competing with the employer for a specific period of time within a specified geographical area, and also frequently restrict the employee from soliciting staff and some or all customers for a specific period of time. When asked by an employer to enforce a particular agreement, Massachusetts judges carefully scrutinize the terms of the restrictive covenants to determine if they protect the legitimate business interests of the employer and are reasonable in time and geographical scope. Employers with overbroad non-compete agreements risk that a court will refuse to enforce the terms of the agreement or redefine them. To lessen these risks, it is critical that restrictive covenants be drafted with care by lawyers familiar with both the specific needs of the particular business and the parameters of Massachusetts non-compete law. See Part I, Sections 1.5(A) and 1.6(B) above.

F. Hiring Checklist

Having hired the new employee, make sure all the appropriate documents are signed and returned.

SAMPLE HIRING CHECKLIST

- ____ **Signed Application**
- ____ **Signed Release to contact references**
- ____ **IRCA Documents**
- ____ **FCRA Disclosures/Consent**
- ____ **Signed Offer Letter**
- ____ **Signed Non-Disclosure, Inventions and Non-Compete Agreement**
- ____ **Signed Receipt of Sexual Harassment Policy**
- ____ **Signed Receipt of Handbook**
- ____ **Any other Key Policies**
- ____ **Benefits Forms**

2.2 Managing the Employment Relationship

A. Policies

Employment policies serve to establish rules of conduct, set expectations, and ensure that employees are treated consistently. A few policies (*i.e.*, a sexual harassment policy and an FMLA policy) are required by law. However, in some instances broad written policies may not serve an employer's interest and may even expose the employer to liability if its policies are not consistently applied and enforced. As such, before establishing written policies an employer should ensure that its managers are sufficiently capable and trained to

implement and apply its policies on a consistent basis. If employers decide to have employment policies, they should establish and maintain such policies in accordance with the guidelines below.

1. Establish Policies and Procedures That Are Appropriate

An employer should have employment policies and procedures in place that are appropriate for the employer's particular workplace, given the size of the company, the make up of the workforce, and the company's mission and goals.

2. Communicate Policies

Once the employer has the employment policies and procedures established, it should make sure that it communicates these policies to the employees clearly and on a regular basis. This can be done through handbooks, training sessions, company web pages, posters, memos, e-mail notices, and postings.

3. Enforce Policies Consistently

It is important to enforce policies consistently so that the employer is not vulnerable to claims of discriminatory or unfair treatment.

4. Review and Revise Policies as Needed on a Regular Basis

If an employer has employment policies and procedures in place, it should have them reviewed and updated on a regular basis to make sure that they comply with current laws and that they reflect changes in the company's operations or workforce.

EXAMPLES OF EMPLOYMENT POLICIES FOR EMPLOYERS

- **Electronic Communications Policy**
- **Leave Policies, including FMLA, Worker's Compensation, and Maternity/ Paternity Leave and other types of Family Leave**
- **Sexual Harassment Policy**

- **Short and Long term Disability Policies**
- **Vacation Policy**
- **Code of Conduct**
- **Bereavement Leave**
- **Jury Duty**

B. Required Workplace Posters

Both state and federal law require employers to post in the workplace employment and labor law posters to notify employees of employment and labor law rights. Most employers, depending on their size, are required to post a variety of employment and labor law posters. Some of the required posters are: Equal Employment Opportunity is the Law, OSHA, Minimum Wage, FMLA, FLSA, Employee Polygraph Protection Act, and the Massachusetts Model Sexual Harassment Policy, to name a few. Note, there is a combined Massachusetts state and federal labor law poster requirement listing available in the "Businesses" section of the Commonwealth of Massachusetts website at www.mass.gov.

CHECK THE INTERNET

U.S. Department of Labor:
www.dol.gov/compliance

Equal Employment Opportunity Commission (EEOC):
www.eeoc.gov/types/index.html

Commonwealth of Massachusetts:
www.mass.gov

Massachusetts Commission Against Discrimination (MCAD):
www.mass.gov/mcad/forms.html

C. **Writing Effective Performance Evaluations**

The two primary purposes of written performance evaluations are to provide a record of performance and to provide guidance to the employee for improving performance. Here are some general guidelines for writing effective performance evaluations.

1. Preparing for the Evaluation

Evaluations should be done by immediate supervisors. The evaluator should gather input from all supervisors with whom the employee interacts and review the employee's personnel records. Past evaluations can provide a basis for comparing current performance, but the evaluation should focus on the period being evaluated. Employee self-evaluations provide useful information about the employee's perspective.

2. Writing the Evaluation

Whether on a standard form or narrative format, a performance evaluation should analyze all relevant employee skills separately and use objective factors (*i.e.*, sales records, attendance records) when available. The employee's performance should be considered in relation to the job that she is doing and not to the employee's peers. Evaluators should be clear and candid in assessing past performance and provide specific examples when noting exceptional or below-standard performance. Ignoring or underplaying performance problems defeats the primary purposes for doing performance evaluations. Effective performance evaluations not only record current performance, but also define future expectations and goals.

3. The Evaluation Meeting

The evaluation should be provided to the employee in adequate time in advance of the evaluation meeting for review. The employee should always be allowed the opportunity to

respond both at the evaluation meeting and in writing, if desired. The final written evaluation should be treated with confidentiality and placed in the employee's personnel file.

2.3 Investigations Into Complaints of Harassment and Other Inappropriate Conduct

In general, the objectives of an investigation into a complaint of harassment or other inappropriate conduct are: to determine if the allegations have merit; to decide whether the conduct violates the employer's policies regarding workplace conduct; to eliminate any ongoing unacceptable conduct; to take any other appropriate remedial measures (including possible disciplinary action); to keep the allegations as confidential as possible; to ensure that no retaliation occurs against the individual who makes the complaint or those who cooperate with the investigation into the complaint; and to promote an atmosphere in which employees feel comfortable reporting unwelcome or inappropriate conduct before either the conduct or the discomfort it engenders escalates.

It is critical that the employer respond to employee complaints of harassment or other inappropriate conduct as swiftly as possible. The response must include an appropriate investigation into the allegations. Note that the law also requires the employer to respond if he or she learns, through an indirect source, that inappropriate conduct has or is occurring in the workplace, even if no one has come forward with a complaint. An employer who fails to investigate such a complaint promptly and thoroughly risks an imposition of liability for that failure, regardless of the merits of the underlying complaint.

Upon receipt of a complaint from an employee about harassment of any kind (particularly harassment based on the individual's membership in a protected category, such

as sexual or racial harassment) the employer should make several preliminary determinations.

First, the employer should decide which individuals should be informed about the complaint (or the conduct, if no complaint has been made). This group should always include either in-house or outside legal counsel, because there are many traps for the unwary in this area. Legal advice is required in order to ensure that the investigation is performed and documented in a way that protects the employee's rights while shielding the employer from unnecessary potential liability.

The second issue generally addressed is who should conduct the investigation (which is in part dependent on the answer to the question above). Sometimes it is advisable that two investigators work together, preferably a male and female. Possibilities are a Human Resources department member, with some seniority, and a senior manager in a department separate from the alleged harasser, and/or in-house counsel. Note, however, if in-house counsel is used, special care must be taken to maintain the attorney-client and work product privilege.

Here are some general guidelines for conducting an effective investigation:

- Make a detailed list of questions to ask during the interviews, to make sure to elicit specific, detailed facts and other information. In other words, ask for as much specific information as possible (*e.g.*, Who? What? Where? When? How? Who else was present?). Try to avoid leading questions, but rather ask open ended questions that do not suggest an answer.

- Concentrate the interviews on the employee's personal knowledge, instead of rumor and hearsay.

- Interview only those employees who are necessary, and do not draw the entire workplace into the investigation. Ask for names of additional witnesses. Ask witnesses for information on how the alleged victim and harasser act in the workplace, especially when together. Note during the interview whether the witness appears credible.

- Prepare and ask witnesses, including alleged victim and harasser, to sign a written statement. If a witness refuses to sign, note that on the written statement.

- Review alleged victim's and harasser's personnel files for evidence of previous allegations which may corroborate those under investigation.

- Inform all witnesses, including the alleged harasser, of the general purpose for the investigation. Explain the company policy on sexual harassment, hostile workplace and retaliation. Inform all witnesses, including the alleged victim and harasser, that the employer takes the allegations very seriously. Explain that the employer will attempt to keep the investigation confidential, but do not promise complete confidentiality, and request all witnesses, including the alleged victim and harasser, to refrain from discussing the matter with each other or co-workers or third parties so that the integrity of the investigation is not compromised. Be careful not to appear overly heavy handed in making this request.

- Inform the alleged victim that he or she should immediately contact the Human Resources Department and/or a manager if contacted by the alleged harasser. Find out if the alleged victim discussed the incident with anyone else (contemporaneously or spontaneously). Ask the alleged victim and harasser if they have any documents to support their version of the events.

- Inform the alleged victim and harasser that he/she will be informed (generally) on the conclusions reached in the investigation.

- Once the investigation is concluded, the investigators should prepare a written report, including findings and evidence in support of each finding. Notes, report and documentation should be placed in a separate file, with access to the report and investigatory materials on a "need to know" basis only.

- The investigator should advise the alleged victim and harasser of the investigation's conclusions. Note, the alleged victim should only be notified that "appropriate action" has been taken and that he/she should inform the employer immediately if any further incidents or retaliation occur.

Where the alleged harasser is found to have engaged in inappropriate conduct, remedial action is warranted. The objectives of the remedial action are to stop any inappropriate conduct from occurring or recurring and to mete out appropriate discipline for any unacceptable conduct that has occurred. The exact form of the disciplinary action should be determined after consideration of several factors, including the nature and severity of the unacceptable conduct as well as its impact on others (including the complainant), as well as the employer's policies regarding workplace conduct.

SEE APPENDIX

Exhibit M **Employee Harassment and Other Inappropriate Conduct Investigation Form**

CHECK THE INTERNET

Massachusetts Commission Against Discrimination:
www.mass.gov/mcad/shtoc.html

2.4 Employee Leaves of Absence

A. Health Related Leaves

Many employers struggle with the myriad of legal issues that arise when employees are absent for health reasons. The area is particularly difficult because of multiple legal obligations that may apply, including the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Massachusetts Fair Employment Practices Act (Chapter 151B), and the workers' compensation statute.

The following outlines some general tips to help employers establish consistent policies and avoid abuse of leaves of absence and workers' compensation insurance. Given the complicated issues and complex regulatory requirements, employers and employees should contact employment counsel for specific guidance.

1. Develop a Comprehensive Leave of Absence Policy

- The leave of absence policy should cover all forms of possible leave--FMLA, personal, short-term disability, long-term disability, leave under the Massachusetts Maternity Leave Act (MMLA), and workers' compensation.
- Include in the policy a specific, reasonable deadline for a return to work, such as a provision that employment will generally be terminated if the employee cannot return to work within that time frame (for example, six months or one year). This provision, however, must include language informing the employee that the employer may extend or eliminate this deadline if necessary to provide the employee with a reasonable accommodation. In this way, employees cannot obtain successive leave entitlements that would extend leave substantially.

- Require an employee to use any paid time off (such as vacation or personal leave) during the leave, so that the employee's absence is not extended unintentionally beyond the expiration of the specific leave. Note that according to the MCAD an employer may *not* require an employee taking leave under the MMLA to use available vacation and other paid time off concurrently with maternity leave.

- Include in the policy a specific, reasonable deadline for a return to work, such as a provision that employment will generally be terminated if the employee cannot return within that time frame (for example, following completion of FMLA leave, six months or one year). Although such a deadline may need to be modified depending on the circumstances as a form of reasonable accommodation, the implementation of a bright-line, neutral rule will provide the employer with a degree of finality when dealing with extended leaves.

- Provide that reinstatement cannot be guaranteed after a certain point (for example, after conclusion of FMLA entitlement).

- Provide that the employer retain discretion with regard to leave decisions whenever possible (note that employers may not have substantial discretion in decisions regarding FMLA leave).

2. <u>Update and Maintain Accurate Job Descriptions</u>

Whether an employee is a "qualified" individual with a disability and therefore entitled to reasonable accommodation often turns on whether she can perform the "essential" functions of the job. Although not controlling, a clear, well-drafted, accurate job description specifically detailing the employee's job duties is often the best record of what is an essential job function and can be very useful in dealing with leave of absence issues. Especially

important is identifying whether regular, timely attendance is an essential function of the position.

3. Determine FMLA/ADA Applicability

While it may seem obvious, employers should as promptly as possible determine whether the FMLA, ADA or a Massachusetts statute applies to the leave at hand. A medical situation does not always mean that any one statute applies. A "serious health condition" that is covered by the FMLA might not be a "disability" covered by the ADA, and vice versa, as not all disabilities are serious health conditions as defined by the statute.

4. Designate as FMLA Leave and Determine FMLA Eligibility Immediately.

When an employee requests leave that may be covered by the FMLA, the employer must do two things within two business days: determine if the leave is covered by the FMLA and determine if the employee is eligible. See Part I, Section 1.4(A) above. When in doubt regarding whether the leave is covered by the FMLA, the employer can *preliminarily* designate the leave as FMLA leave and retroactively revise the designation if necessary. With respect to whether employees are *eligible* for leave, it is important to comply with this provision promptly as the employee seeking leave needs to know whether she is eligible and whether, among other things, she has job reinstatement rights prior to taking the leave.

5. Notice

Under the FMLA and MMLA the employer must provide specific notice to the employee of her rights and obligations under the statutes once the employer learns that the employee is seeking leave that is covered by the statutes. This provides important information so that the employee can make informed decisions about taking leave and returning to work.

6. Document

Make sure leaves are properly documented, particularly with respect to FMLA. The U.S. Department of Labor publishes a form for an employer's response to a request for FMLA leave which can be found at: http://www.dol.gov/libraryforms/go-us-dol-form.asp?FormNumber=36&OMBNumber=1215-0181.

7. Take Affirmative Steps to Prevent Abuse

Both the FMLA and ADA contain provisions designed to prevent employee abuse. For example, if an employee seeks a leave of absence, the employer can require the employee's physician to respond to requests for information or have the employee submit to a medical examination. The FMLA allows employers to require a second or even third medical opinion if it has a good faith reason to doubt a medical certification submitted by the employee's provider in support of FMLA leave. Similarly, employers can require "recertification" of a serious health condition when an FMLA leave takes longer than anticipated.

8. Consider the Effect of an Extended Leave of Absence As Soon As Possible

Many employers get caught in the trap of providing a short-term leave of absence as an accommodation without anticipating the impact that the grant of a request for short-term leave may have on a subsequent request for extending the leave. Consequently, an employer that granted a short-term leave often cannot reverse position and claim that extension of the leave would cause an undue hardship. Depending on the circumstances, an employer may be well advised to address the issue immediately by informing the employee requesting leave that the employer may not be able to extend leave.

9. Provide for "Light Duty" With Clear Documentation

Employers often provide "light duty" programs in order to return the injured employee to work as soon as possible to reduce workers' compensation costs. While the ADA and Massachusetts law do not require creation of light duty jobs for employees who cannot otherwise perform the essential functions of their job, there may be an obligation to provide "light duty" as a reasonable accommodation in some circumstances—either as job restructuring so that the employee is able to perform the job temporarily while recovering (or on a permanent basis), or as a reassignment to a vacant position with essential functions that the employee can perform. If a light duty assignment is intended to be only temporary, the employer should make it clear, in advance and in writing that the assignment is for a specific period of time. By doing so, the employer reduces the potential that the "essential functions" of the employee's position are modified due to the light duty assignment.

B. Family Leave and Other Leaves of Absence

There are a number of other reasons why an employee may be absent and entitled to leave, unrelated to health. Employers should adopt policies to cover leaves of absence for family-related reasons under the FMLA, the MMLA and the Small Necessities Leave Act (SNLA). See Part I, Sections 1.4(A), (B) and (C). Other reasons may include bereavement leave, personal leave, military leave or leave for jury duty. Employers should ensure that: (1) their practices are compliant with statutes and regulations governing such leave; and (2) their practices are consistent among similarly situated employees to avoid the perception (or claim) of unequal treatment. To accomplish the latter goal, it is often advisable to charge a specific manager to administer leave requests and to make sure that documentation of such

requests and the employer's responses is maintained which will assist in ensuring consistency.

2.5 Approaches to Discipline

How employers handle disciplinary matters can have a significant impact on their exposure to legal claims, as well as productivity and workplace morale. From an employer's perspective, employee discipline generally should be handled with three primary goals in mind: (1) correcting substandard work performance or conduct; (2) establishing expectations of employees; and (3) minimizing risk of employee claims. The following identifies important considerations in handling employee discipline.

- Employers should be careful not to promise "progressive discipline" either in writing or orally, unless the employer is committed to following such a process. By avoiding such promises, an employer retains the discretion to discipline in a manner it deems fit with less risk of claims.

- Employers should take efforts to ensure that discipline is handled consistently. Similarly situated employees who have similar performance issues or engaged in similar misconduct should generally be treated the same. Consistent equal treatment is a good business practice and is likely to have a beneficial effect on employee morale. Moreover, an employer that treats employees consistently, regardless of protected category or for other reasons, is less likely to be sued and substantially more likely to win a suit that is filed.

- In maintaining an effective disciplinary process, employers should be aware that if the disciplinary process is not documented, they will have difficulty proving it happened. If litigation ensues, the employer and employee may dispute

whether oral warnings occurred and the content of any disciplinary discussions. Without a written record, employees can readily deny that they were subject to discipline. Consquently, employers should generally maintain written records of discipline, including memos to file, incident logs, emails to the offending employee or written warnings or memoranda. Depending on the issue, it is often preferable to obtain the employee's signature on such documentation to provide evidence of receipt. Emails can often serve the same purpose in a less formal, intimidating manner.

- When discipline pertains to performance issues it should not necessarily be handled as a "punishment" but rather as a real opportunity to improve. Many litigation cases are the result of a perception on the part of the former employee that she was not given a chance to improve and was fired summarily without advance notice. By providing employees a real opportunity to correct a problem (and the time and tools necessary to make such a correction), employers can achieve multiple goals: (1) potentially avoiding the need to terminate with the attendant risks of claims and resulting costs and uncertainty of recruiting and hiring; (2) possibly turning around a poor performer and assisting the employee in becoming a productive member of the workforce; and (3) if improvement does not occur, avoiding surprising the poor performing employee, thereby reducing the risk of employee litigation.

- When discipline pertains to misconduct, an employer should make sure it has investigated fully by reviewing all relevant documents, speaking to witnesses and getting the employee's version of events. Only when the employer believes it has

fully reviewed the facts should it then consider discipline. Otherwise, the employer risks claims of unfair treatment (or worse) should it react on a snap judgment.

- Documentation that is generated should be drafted with thought and care. Although a lack of documentation can be problematic, poor documentation can be worse. Supervisors should be trained in proper documentation techniques, and human resource personnel should review documentation before it is issued.

2.6 Managing the Termination Process

A thoughtful and consistent approach to terminating employees is in everyone's best interest. Treating employees fairly and respectfully particularly when they are being terminated is a good business practice, is good for morale, and will reduce the chance of litigation over the termination. Here are practice points to follow.

HOW TO AVOID THE TOP TEN TERMINATION MISTAKES

1. <u>Eliminate Unconscious Bias From Decision-Making</u>: Bias more often arises from unconscious stereotypes and skewed perceptions than from conscious efforts to hurt persons in protected groups. Proactive steps to ensure that employees are evaluated objectively include educating decision makers to compare every decision to how similar situations were handled.

2. <u>Talk to Employees with Disabilities</u>: Disability laws do not allow employers to make unilateral decisions about employees with disabilities but require a flexible interactive process. Employers must initiate a dialogue with employees requesting an accommodation and be creative in seeking solutions, involving doctors where necessary to resolve questions and concerns.

3. <u>Don't Retaliate</u>: Terminating an employee who has recently complained of workplace discrimination or other illegal conduct will likely give rise to a retaliation claim. Before terminating a complaining employee, employers must ensure that it consistently treats the conduct as a terminable offense.

4. Listen to Whistleblowers: Most employers realize that they cannot fire an employee for complaining to a regulatory agency about possible violations of law. But internal whistle blowers may be protected as well, as long as they have a reasonable belief regarding possible violations. Investigate all compliance concerns raised (and resolve the problem, if the employee is correct).

5. Be Honest About the Reason for Termination: Employers who lie in court about why they fired a person in a protected category may be found to have a discriminatory motive. Employers must scrupulously avoid giving false reasons from the beginning, even those intended to spare the employee's feelings, or to hide undesirable -- though legal --- reasons, such as cronyism.

6. Strive for a Soft Landing: Although employers may legally fire employees without good reason and without notice or warning, callous terminations increase the risk of being sued, especially with a long-term employee with a basically good record. Failing to give reasonable notice and to offer a fair severance package can cost more money than it saves.

7. Document Employee Performance: Employees who are terminated for misconduct or failing to adhere to performance standards should have such shortcomings documented in personnel records, either through performance appraisals or records of warning. Where the reasons for the termination are not documented or, worse, where the record suggests the opposite, the employer leaves itself wide open to discrimination liability as a result of false reasons.

8. Follow Personnel Policies on Discipline: Elaborate progressive discipline policies, despite "guideline only" and "at-will" disclaimers, can give rise to breach of implied contract claims or provide evidence of pretext when the procedures are not followed.

9. Don't Use Terminations to "Send a Message": Employers sometimes make the mistake of demonstrating the consequences of employee misconduct by publicizing a termination orally or by conducting it in a public way (e.g., escorting the offending employee out of the building in full view of the staff). Such treatment may not only create liability, it is not a sound business practice. All terminations should be conducted as discreetly as possible.

10. Pay Attention to the Details: Terminations are highly regulated affairs. Even where the decision to terminate is proper, and the termination has been carried out appropriately, employers can make a mistake by ignoring secondary issues regarding wages and benefits. Don't forget to hand terminated employees their last paycheck, don't forget to offer extended health care coverage under COBRA or "Mini-COBRA, and don't forget to inform terminated employees of other rights, such as the right to file for unemployment benefits.

Use of an appropriate process is essential whenever an employer must terminate an individual's employment. While the process may vary according to circumstances, general considerations will apply. Planning is essential. Anticipate compensation issues such as last paycheck, payment of bonuses, commissions, vacation and personal days, and whether to provide severance. An employee terminated involuntarily must be paid in full as of the date of termination, including payment for accrued vacation and commissions owed. Employees who resign need be paid only at the next regular pay period. See Part I, Section 1.4(J). Written notice minimizes misinterpretation and should make clear that the decision is non-negotiable.

Employees should be terminated in a face-to-face meeting, and managers should clearly understand what should and should not be said during the meeting (*e.g.*, avoid discriminating or abusive remarks). The termination meeting should take place in a private setting, for example, the office of the employee's manager or human resource representative. Employers should have two people present at the termination meeting, which provides one extra witness but does not make the employee feel outnumbered. There should be a principal spokesperson, someone with authority, who can explain to the employee that the termination is legitimate and can respond appropriately to the employee's questions and concerns. Additionally, the spokesperson should have a working knowledge of the facts leading to the decision to terminate and should be prepared to respond to excuses or comments made by the employee.

The significant reasons for the decision to terminate should be given to the employee at this time. Honesty about the reason is critical. Employers should resist the urge to spare the employee's feelings and should cite the most forceful reasons for the discharge, because

these same reasons will be relied on by the employee, if it comes to that. The employee should be given an opportunity to talk and to ask questions. However, the employee must know the decision is non-negotiable and be firmly advised that the decision is final and debate will serve no purpose. Discuss compensation issues such as severance, salary owed, vacation, bonuses and commissions, personal days, sick leave, pension and other benefit plans. Tell the employee she will get information about electing to continue health insurance under COBRA. The employer must provide information about how to apply for unemployment benefits. See Section 2.7(B) below.

The employer should try to minimize feelings of anger or hostility. Preserving the employee's dignity, including in the way she is treated after being notified, is important. This means, among other things, that the timing of the meeting (*e.g.*, at the end of the workday) is important to preserve the employee's dignity. At the conclusion of the meeting, the employee should be provided with an opportunity to clear out her desk after hours or on a weekend, with supervision to avoid the embarrassment of doing so before co-workers.

In some instances where an employer believes the potential for a lawsuit is great, the employer may strike a deal in which the employee receives enhanced separation benefits in exchange for signing a release of the employer's liability for any and all claims related to the employee's employment and termination. Finally, minutes of the meeting documenting the termination should also be prepared and placed in the employee's personnel records.

PRE-TERMINATION CONSIDERATIONS CHECKLIST

- **Does the termination deprive the employee of benefits/compensation already earned and/or create a windfall for the employer?**
- **Does the termination violate a contract that is oral, written, or implied by the conduct of the parties?**

- **Is the termination contrary to a representation by the employer on which the employee reasonably relied?**
- **Is the termination contrary to public policy – *e.g.*, for refusing to testify falsely in a criminal proceeding, for enforcing safety laws that it is the employee's responsibility to enforce, for cooperating with a criminal investigation, for consulting with an attorney regarding employment issues, or for reporting unlawful conduct to management?**
- **Is the termination the result of unlawful discrimination?**
- **Is the termination the result of a facially neutral employment practice or policy that has a disproportionate impact on members of a protected category?**
- **Is the termination prohibited because it violates the National Labor Relations Act's "right to self-organization, to form, join, or assist labor organizations … and to engage in other concerted activities for the purpose of … mutual aid or protection [or] the right to refrain from any or all such activities?"**
- **Did the employer follow its own policies and past practices in terminating the employee?**

SEE APPENDIX

Exhibit N Sample Exit Interview Form

2.7 Post Termination Considerations and Issues

A. References

Employers should have a policy regarding post-employment references and should endeavor to follow the policy and encourage their employees to do so. In general, employers should designate one individual or a limited number of people to respond to requests for references. All people in the organization should know to whom reference requests should be forwarded and should understand that only the designated individuals have the authority to respond to reference checks. The individuals responsible for responding to reference

checks should document every reference carefully and timely. Additionally, responses to reference checks should be limited to information documented and contained in the employee's personnel file.

While Massachusetts provides limited protections to employers providing references, many employers seek to limit the information they provide to try to minimize the risk of liability or claims against them by former employees or others. However, because this practice limits the usefulness of the reference to both a prospective employer and a former employee, employers may feel pressure to provide additional information. The issue of how to respond to a request for a reference is often an issue best addressed directly at the time of the employee's separation from the company if the circumstances of the separation make such a discussion possible and appropriate.

1. A Limited or Conditional Privilege

Massachusetts law provides limited protection from liability for a former employer to provide information to a potential employer regarding the employee and her job performance. However, this privilege is not absolute and can be lost under various circumstances, including the following:

- excessive or unreasonably broad dissemination of the information;
- release of information for an improper or malicious purpose;
- release of information with a knowing disregard for the truthfulness of the information that is shared.

Particularly in light of these limitations, caution should be used in the sharing of information. Regardless of the circumstances, an employer will want to focus any reference on matters strictly relating to the employee's job and job performance. The employer should avoid purely personal and non-job-related issues and should avoid information which may

indicate or identify the employee's status as a member of a protected class based on race, ethnicity, sexual orientation, religion, marital status or disability.

2. Limited Disclosure of Reference Information

To minimize potential claims or liability, many employers try to strictly limit the information they provide in response to a reference request. Thus, many employers have a policy to provide only name, dates of employment, and positions held. In addition, employers may also provide last rate of pay and whether the separation was voluntary or, for example, part of a general reduction in force (RIF). If an employer has such a policy, it should seek to apply it consistently. This often means that human resources or executive personnel must ensure that managers are familiar with the reference policy and consistently follow it.

3. More Expansive Reference if Authorized

Many employers who limit the information they provide as a matter of policy will agree to provide additional information if an employee signs a written authorization permitting the company to do so. The authorization should be broad enough to encompass any information the company may want to share. It should also include specific language releasing the company from liability for sharing information.

4. Negotiating Reference at Time of Separation

Under many circumstances, particularly in the context of a broader severance negotiation, it is advantageous to negotiate the substance of a reference and a reference protocol at the time of separation. Issues that employers may want to include in any such agreement include:

- The person or persons to whom a reference request will be directed (often a specific manager or supervisor or, in other cases, a human relations staffer).

- The particular information to be provided in response to a request for reference. This may be very limited (*i.e.*, names, dates, positions held, last salary) or more expansive, *i.e*. including description of reasons for leaving, job performance.

- The substance of a written reference. In some cases, the departing employee may write a first draft of a written reference.

B. <u>Unemployment Issues</u>

Absent misconduct, most employees in Massachusetts who are forced to leave employment involuntarily through circumstances such as firing, layoff, or other involuntary separation and who actively seek new employment may be entitled to collect unemployment benefits. Further, employees whose employment is substantially reduced to less than full-time may be entitled to collect partial unemployment benefits. However, workers in the following areas may not be eligible to receive unemployment benefits:

- certain services performed for a church or religious institution;
- real estate salespeople or brokers compensated solely by commission;
- certain insurance agents compensated solely by commission
- certain student financial assistance employment at the institution attended by the student and certain work-training experiences administered by non-profit groups;
- certain work by a minor child for his parent;
- sole proprietors or members of a partnership;
- bona fide independent contractors;
- certain elected or other government officials.

Requirements to establish and maintain eligibility for employment fall into 3 categories: (1) earnings eligibility; (2) separation eligibility; (3) continuing requirements to maintain eligibility.

1. <u>Earnings Eligibility</u>

In order to be eligible to receive benefits, an employee typically must have been paid a minimum of $2,400 in wages in the applicable "base period," which usually is the 52 weeks prior to separation.

2. Separation Eligibility

In order to be entitled to unemployment, a worker must be:

- partially or totally unemployed through no fault of his own;
- able to work;
- available to work; and
- actively seeking employment.

The following can disqualify a worker from receiving benefits:

- voluntarily quitting his job without good cause attributable to the employer;
- quitting a job to move or to follow a spouse to another location;
- being terminated for deliberate misconduct on the job in willful disregard of the employer's interests or a knowing violation of a reasonable and uniformly enforced rule;
- job loss due to conviction of a crime.

An employer should keep in mind, however, that the overriding purpose of the unemployment system is to provide benefits to employees who are out of work. Accordingly, the above disqualification factors are fairly strictly construed against an employer.

3. Continuing Eligibility

In order to receive benefits, an employee must make application to the Massachusetts Department of Employment and Training's Division of Unemployment Assistance (DUA). If DUA determines the employee to be eligible, the employee must provide DUA with information on an ongoing basis to establish her continued eligibility. Factors that can disqualify an employee from continued eligibility for benefits include:

- lack of availability for work due to illness;
- lack of availability as a result of voluntary factors such as taking a vacation or full-time engagement in charitable or other non-employment-related activities;
- failure to seek employment;
- failure to accept a suitable offer of employment;
- full-time self-employment;
- part-time employment which results in earnings in excess of applicable unemployment benefits;

- receipt of vacation, severance or other continuation pay.

Employers should note that if the employee has to sign a release of claims to receive severance the DUA will not view payment of severance or other benefits as an event that disqualifies a person from receiving unemployment benefits during the period for which such payments are made.

4. Procedure

- The employer must provide employee with a Separation Notice (DET Form 0590-A) at the time of separation.

- The employer must promptly respond to DUA wage inquiry that will be sent to the employer upon filing of an unemployment application by a former employee. Failure to respond promptly can result in penalties and/or loss of the employer's right to appeal an adverse decision.

- DUA will notify the employer and employee of its initial decision. Included in the notice will be information regarding the appeal rights of the party that did not prevail.

- Appeals are initially administrative, through the DUA, with rights of further appeal to the District Court and Massachusetts Court of Appeals. Employers should be aware of applicable deadlines which, in the case of the appeal of the initial DUA determination, are as short as ten days.

CONCLUSION

Employment law is one of the hottest areas of the law, generating new legislation, regulations, and thousands of court opinions each year. The complexity of this legal area results, in part, from the interaction of many different levels of legal authority – most

notably, state and federal legislatures, administrative agencies, and courts – and often addressing politically charged issues. Moreover, the law is not always easy for non-lawyers to understand, as many statutes are difficult to read, and court decisions are sometimes inconsistent.

The complexity of employment law also results, in part, from the very nature of the employer–employee relationship, which varies with each business and individual employee. A particular employer's situation might differ from the situation envisioned by a statute and might require a creative solution, such as a contract addressing its particular needs. While **this Guide is not a substitute for legal advice from competent employment counsel**, it is meant as a helpful and informative overview of Massachusetts employment law. Employers and employees are encouraged to use this Guide as a starting point in understanding their rights and obligations. Some other resources can be found in Appendix O.

SEE APPENDIX

Exhibit O **Selected Internet Resources for Employment Law (Websites)**

Any comments for future editions of this Guide may be submitted to the Boston Bar Association, 16 Beacon St., Boston, Massachusetts 02108, www.bostonbar.org.

2.8 Appendix

Exhibit A. MCAD Fact Sheet: Discrimination in the Workplace on Race, Color, National Origin or Ancestry

Exhibit B. MCAD Fact Sheet: Age Discrimination

Exhibit C. MCAD Fact Sheet: Parental Leave

Exhibit D. MCAD Fact Sheet: Sexual Harassment in Employment

Exhibit E. MCAD Model Sexual Harassment Policy

Exhibit F.	MCAD Fact Sheet: Employment Discrimination on the Basis of Disability
Exhibit G.	MCAD Fact Sheet: Genetic Testing
Exhibit H.	MCAD Fact Sheet: Employment Discrimination on the Basis of Criminal Record
Exhibit I	MCAD Fact Sheet: Pre-Employment Inquiries
Exhibit J	Request For Publicly Accessible Massachusetts CORI
Exhibit K	Sample Offer Letter for Executive Position
Exhibit L	Sample Offer Letter for Non-Executive Position
Exhibit M	Sample Employee Harassment and Other Inappropriate Conduct Investigation Form
Exhibit N	Sample Exit Interview Form
Exhibit O	Selected Internet Resources for Employment Law

Exhibit A

Massachusetts Commission Against Discrimination

FACT SHEET: DISCRIMINATION IN THE WORKPLACE BASED ON RACE, COLOR, NATIONAL ORIGIN OR ANCESTRY

Massachusetts and federal laws prohibit discrimination in employment based on race, color, national origin or ancestry. Some laws make it a criminal offense to discriminate and the penalties for discrimination are often very serious.

The Massachusetts Commission Against Discrimination ("MCAD") is the state agency that enforces the laws in Massachusetts. If you believe that you have been the victim of discrimination, the MCAD will investigate your claim and take whatever action is necessary. If you believe that you have a discrimination claim, you need to contact the MCAD immediately; in most circumstances, you must file a charge at the MCAD within 300 days of the alleged discriminatory action.

The terms "race," "color," "national origin," and "national ancestry," are not meant to be complex and technical terms, but should be given their obvious meaning. In fact, the state legislature has given the MCAD the authority to define these terms broadly to prevent discrimination. For example, a person who refuses to hire an individual from Puerto Rico can be found to have discriminated based on his or her "national origin" even though he or she is a United States citizen.

It is important to note that discrimination against an individual because he or she is married to or related to a member of a "protected class" is as unlawful as discrimination directly against a person on account of his race, color, national origin or ancestry. Therefore, if you are discriminated against because of the race, color, national origin, or ancestry of your family member or spouse, you may be entitled to bring a discrimination claim.

Unlawful Practices by Employers

It is a violation of both state and federal law for an employer to discriminate against employees or job applicants based on race, color, national origin, or ancestry. An employer may not make hiring decisions or take any adverse employment actions against you based on your race, color, national origin, or ancestry. This includes:

- Using advertisements, publications, or job applications that suggest restrictions in hiring based on race, color, national origin, or ancestry;

- Asking job applicants where they were born, where their families or spouses were born, or the origin of their name;

- Asking job applicants about their race, for purposes other than affirmative action;

- Refusing to hire a job applicant based on his or her race, color, national origin or ancestry;

- Terminating, discharging or laying off an employee based on his or her race, color, national origin or ancestry;

- Refusing to promote an employee based on his or her race, color, national origin or ancestry;

- Paying lower wages or giving fewer benefits to an employee based on his or her race, color, national origin or ancestry;

- Discriminating in any other term or condition of employment, including engaging in harassment based on one's race, color, national origin or ancestry; or

- Requiring employees to speak only English in the workplace.

However, an employer does not necessarily violate the law merely because it terminated you and did not terminate another person of a different race, color, national origin or ancestry, or hired or promoted that person instead of you. If the employer has a legitimate, non-discriminatory reason for its action or practice, its conduct may not be discriminatory.

Employers Not Covered

The following "employers" are not covered under Massachusetts law:

- Employers with fewer than six employees.

- Nonprofit clubs, fraternal associations, or corporations that are exclusively social. The "Moose" and "Elks Club" are examples of the kind of clubs not covered under Massachusetts law.

Unlawful Practices by Labor Organizations

Labor organizations are also prohibited from discriminating based on race, color, national origin, or ancestry. For example, it is unlawful for a labor organization to:

- Exclude or expel a person from union membership based on that person's race, color, national origin, or ancestry;

- Discriminate in any way against a person or employer based on that person's or employer's race, color, national origin, or ancestry; or

- Discriminate in any way against an employer's workers based on the employer's race, color, national origin, or ancestry.

Massachusetts law provides for recovery of damages for victims of employment discrimination, including: hiring, reinstatement, or promotion; lost wages; emotional distress; and attorney's fees.

If you believe that you have been the victim of discrimination, you should contact the nearest Massachusetts Commission Against Discrimination office immediately, so that appropriate action can be taken on your behalf:

Boston:	**Springfield:**
One Ashburton Place	436 Dwight Street
Room 601	Room 220
Boston, MA 02108	Springfield, MA 01103
(617) 994-6000	(413) 739-2145
TTY (617) 994-6196	

Exhibit B

Massachusetts Commission Against Discrimination

MCAD FACT SHEET: AGE DISCRIMINATION

Federal law and Massachusetts law both prohibit employers from discriminating against their employees based on their age. The Massachusetts Commission Against Discrimination (MCAD) is the state agency that enforces these laws in Massachusetts. Employers of six or more individuals are covered by the state statute. The Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces the federal statute. Employers of twenty or more individuals are covered by the federal statute.

These laws mean that if you are 40 years old or older, an employer may not take any adverse employment actions against you because of your age. This includes:

- Refusing to hire
- Terminating, discharging, or laying off
- Refusing to promote
- Paying lower wages or giving fewer benefits, or discriminating against you in any other term or condition of employment.

An employer may have violated the law if your age was the reason or one of the reasons for the action taken against you. If you were terminated and replaced because of your age, your replacement does not have to be under 40 in order for you to have a valid claim. However, an employer does not necessarily violate the law merely because it terminated you in favor of someone younger, or hires or promotes someone younger instead of you.

Your employer generally may not require you to retire at a certain age. There are exceptions to this rule for certain public employees and for certain high-compensated executives.

Waiver of Rights: Employees are sometimes asked to sign statements releasing their employers from any liability they may have for violating age discrimination laws. If you are asked to sign such a statement, you may wish to consult an attorney. However, you should know such waivers may not be enforceable unless certain conditions are met. Some of the conditions are:

- The waiver must be clear and understandable.
- The employer has to be offering you something in return (such as increased severance benefits).

- The waiver must specifically refer to the Age Discrimination in Employment Act (ADEA) and G.L. c.151B.

- The employer must advise you that you can consult a lawyer, give you 21 days to consider the agreement, and give you 7 days to revoke it even after you have signed.

- If you are part of a group layoff, under federal law your employer may have to provide you with even more time (45 days) to consider any waiver of rights. In addition, your employer may have to give you certain information, including the ages of the employees being laid off and the ages of the employees being retained.

If you believe you have been the victim of age discrimination, you have the right to file a complaint within 300 days of the alleged discriminatory act.

Boston:	**Springfield:**
One Ashburton Place	436 Dwight Street
Room 601	Room 220
Boston, MA 02108	Springfield, MA 01103
(617) 994-6000	(413) 739-2145
TTY (617) 994-6196	

Exhibit C

Massachusetts Commission Against Discrimination

FACT SHEET: PARENTAL LEAVE

Under federal and state law, certain employees may take an unpaid leave from work at the birth or adoption of a child. Federal and state law may also allow a pregnant woman who develops a serious health condition to take an unpaid leave of absence if her doctor certifies the need for such a leave.

Parental Leave

Massachusetts Maternity Leave Act, M.G.L. c. 149, § 105D, allows a female employee to take up to 8 weeks of unpaid leave at (1) the birth of a child, (2) the adoption of a child under 18 years old, or (3) the adoption of a person under 23 years old who is mentally or physically disabled.

Eligibility: To be eligible, the employee must have worked for the employer in a full-time position for at least 3 months or finished a probationary period (which cannot exceed 6 months), and the employer must employ at least 6 employees. The employee must give the employer 2 weeks notice of her departure date and notice that she intends to return to her job.

Job restoration: Under most circumstances, the employer must restore the employee to her job or to a reasonably similar position with the same status, pay, length of service credit and seniority.

Male employees: Because state and federal law prohibit sex discrimination in employment, male employees may have a right to take the same 8 weeks of leave a female employee is entitled to take at the adoption of a baby, and to take a certain amount of leave at the birth of a child.

The MCAD enforces the Massachusetts Maternity Leave Act. If you think your employer has violated this law, contact the MCAD.

Family & Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, is a federal statute that allows eligible male and female employees to take up to 12 weeks of unpaid leave at the birth or adoption of a child.

Eligibility: To be eligible, your employer must have 50 or more employees; and you must have worked for your employer for 12 months and at least 1,250 hours in the prior year.

Job restoration: The employer ordinarily must restore you to the same or equivalent job when your FMLA leave ends.

The employer can require the employee to use paid leave, such as vacation time, personal leave, or sick leave, for parental leave taken under the FMLA.

For more detailed information on rights and obligations under the FMLA contact the U.S. Department of Labor, Wage & Hour Division.

Pregnancy-Related Disability Leave

If an employee develops a serious health condition during pregnancy, and her doctor certifies her need for leave, she may be able to take unpaid leave under the FMLA or she may be considered to be a "qualified handicapped person" entitled to a leave of absence as a reasonable accommodation. See MCAD Fact Sheet on Employment Discrimination on the Basis of Disability.

You may be entitled to leave in addition to the (8) weeks as accommodation for a pregnancy-related disability.

Use of Paid Leave

The employer may restrict the use of paid sick leave to leave taken by a female employee at the birth of a child or leave taken because of a pregnancy-related health condition.

Employer's Parental Leave Policies Must Be Consistent with Other Leave Policies

- If the employer provides pay for all other leaves of absence, the employer must also provide pay for parental leave.

- If the employer provides pay for only medical leaves of absence, the employer must also provide pay for a pregnancy-related disability, but is not required to provide pay for leaves involving normal pregnancies, adoption by female employees, or leaves involving birth or adoption by male employees.

- If the employer provides pay for benefits, plans, or programs associated with other types of temporary disability, the employer must provide pay for benefits, plans or programs associated with birth-related parental leave taken by female employees.

- Any employer policy or collective bargaining agreement that provides for greater or additional benefits than those required by law must be followed.

Employees should consult their personnel officer, benefits officer, or union officer to receive the most current information about their employer's parental leave policies.

If you believe you have been discriminated against, contact the MCAD immediately because, in most circumstances, you must file a charge at the MCAD within 300 days of the alleged discriminatory action.

Boston:
One Ashburton Place
Room 601
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TTY (617) 994-6196

Springfield:
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Springfield, MA 01103
(413) 739-2145

Exhibit D

Massachusetts Commission Against Discrimination

FACT SHEET: SEXUAL HARASSMENT IN EMPLOYMENT

Massachusetts and federal law prohibit both sexual harassment in employment and retaliation against persons who resist or object to sexual harassment or cooperate in investigations of sexual harassment. The Massachusetts Commission Against Discrimination enforces these laws.

Sexual harassment consists of:

1. any verbal or physical acts or conduct,
2. of a sexual nature,
3. which is unwelcome by the victim, and
4. (a) submission to such conduct is necessary to obtain or keep your job, or (b) submission or resistance to such conduct affects your pay, job assignments, promotions, or other aspects of your job, or (c) the conduct unreasonably interferes with doing your job, or creates an intimidating, hostile, humiliating or offensive working environment.

Examples of conduct that may constitute sexual harassment include: inappropriate touching; sexual epithets, jokes, gossip, sexual conduct or comments; requests for sex; displaying sexually suggestive pictures and objects; and leering, whistling, or sexual gestures.

Unwelcome means "not received by choice or willing consent, regarded as undesirable or offensive." Whether or not something is unwelcome is decided by the victim. Sexual harassment may exist even in the absence of economic or tangible job consequences.

Employer Responsibility

1. Employers may be held responsible for acts of sexual harassment and retaliation by their supervisors even if the employee has not complained.

2. Employers may also be responsible for the acts of co-workers if the employer knew or should have known of the conduct and failed to take prompt and effective corrective action.

3. Employers may be responsible for the acts of non-employees at work if the employer knew or should have known of the conduct and failed to take prompt and effective corrective action within the employer's legal ability to do so.

4. Employers must investigate complaints of sexual harassment or retaliation carefully and thoroughly in a timely manner.

5. Employers must maintain a sexual harassment policy that they distribute annually to all employees. Employers should have effective procedures in place to enable an employee to complain of sexual harassment or retaliation without having to complain to the offending person.

Corrective Action

When harassment or retaliation has occurred, the employer must take prompt and effective corrective action designed to:

- do whatever is necessary to end the harassment or retaliation,
- restore lost employment benefits and opportunities,
- prevent the misconduct from recurring, and
- prevent retaliation.

Disciplinary action against the offending person, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct.

Filing a Complaint

If you believe you have been the victim of sexual harassment or retaliation, contact the MCAD immediately because, in most circumstances, you must file a charge at the MCAD within 300 days of the alleged discriminatory action.

Boston:
One Ashburton Place
Room 601
Boston, MA 02108
(617) 994-6000
TTY (617) 994-6196

Springfield:
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Room 220
Springfield, MA 01103
(413) 739-2145

Exhibit E

Massachusetts Commission Against Discrimination

Model Sexual Harassment Policy MCAD Policy 96-2

Adopted by the Commission on October 25,1996

Please Note: Massachusetts employers are strongly encouraged to supplement their sexual harassment policies with equivalent broader harassment policies. These broader policies should specify that employees are protected from harassment on the basis of their race, color, religion, national origin, ancestry, sex, age, handicap (disability), participation in discrimination complaint-related activities, sexual orientation, and genetics. Like the sexual harassment policy, the general harassment policy should name a harassment officer (the same or a different person than the sexual harassment officer), and provide examples of prohibited verbal and nonverbal behavior. Prohibited behavior includes slurs or other derogatory comments, objects, pictures, cartoons, or demeaning gestures connected to one's membership in a protected group. The overall structure of the general harassment policy should parallel the structure of the sexual harassment policy (or can be combined as one policy).

Under the provisions of G.L. c. 151B, §§ 2 and 3 the Commission is authorized to adopt policies and issue such rules necessary to effectuate the purposes of G.L. c. 151B. It is the goal of the Commission that such policies and rules assist members of the public in understanding the role, function, and process of the MCAD.

As a result of the enactment of St. 1996, c.278 “An Act Relative To Sexual Harassment and Training In The Workplace” the Commission is required to adopt a model sexual harassment policy. This Policy Guideline is promulgated to effectuate the purposes of that chapter and provides a model for employers to use. The model policy contains minimum standards which may be exceeded by the employer's policy.

SEXUAL HARASSMENT POLICY OF [name of employer]

I. Introduction

It is the goal of [name of employer] to promote a workplace that is free of sexual harassment. Sexual harassment of employees occurring in the workplace or in other settings in which employees may find themselves in connection with their employment is unlawful and will not be tolerated by this organization. Further, any retaliation against an individual who has complained about sexual harassment or retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is similarly unlawful and will not be tolerated.

To achieve our goal of providing a workplace free from sexual harassment, the conduct that is described in this policy will not be tolerated and we have provided a procedure by which inappropriate conduct will be dealt with, if encountered by employees.
Because [name of employer] takes allegations of sexual harassment seriously, we will respond promptly to complaints of sexual harassment and where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary, including disciplinary action where appropriate.

Please note that while this policy sets forth our goals of promoting a workplace that is free of sexual harassment, the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment.

II. Definition Of Sexual Harassment

In Massachusetts, the legal definition for sexual harassment is this: "sexual harassment" means sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when:

(a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or,

(b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.

Under these definitions, direct or implied requests by a supervisor for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits, or continued employment constitutes sexual harassment.

The legal definition of sexual harassment is broad and in addition to the above examples, other sexually oriented conduct, whether it is intended or not, that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating, or humiliating to male or female workers may also constitute sexual harassment.

While it is not possible to list all those additional circumstances that may constitute sexual harassment, the following are some examples of conduct which if unwelcome, may constitute sexual harassment depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness:

*Unwelcome sexual advances -- whether they involve physical touching or not;
*Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess;

*Displaying sexually suggestive objects, pictures, cartoons;
*Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
*Inquiries into one's sexual experiences; and,
*Discussion of one's sexual activities.

All employees should take special note that, as stated above, retaliation against an individual who has complained about sexual harassment, and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated by this organization.

III. Complaints of Sexual Harassment

If any of our employees believes that he or she has been subjected to sexual harassment, the employee has the right to file a complaint with our organization. This may be done in writing or orally.

If you would like to file a complaint you may do so by contacting [Name, address and telephone number of the appropriate individual to whom complaints should be addressed. Such individuals may include human resources director, manager, legal counsel to organization or other appropriate supervisory person]. [This person] [These persons) [is/are] also available to discuss any concerns you may have and to provide information to you about our policy on sexual harassment and our complaint process.

IV. Sexual Harassment Investigation

When we receive the complaint we will promptly investigate the allegation in a fair and expeditious manner. The investigation will be conducted in such a way as to maintain confidentiality to the extent practicable under the circumstances. Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate inform the person filing the complaint and the person alleged to have committed the conduct of the results of that investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct, and where it is appropriate we will also impose disciplinary action.

V. Disciplinary Action

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate under the circumstances. Such action may range from counseling to termination from employment, and may include such other forms of disciplinary action as we deem appropriate under the circumstances.

VI. State and Federal Remedies

In addition to the above, if you believe you have been subjected to sexual harassment, you may file a formal complaint with either or both of the government agencies set forth below. Using our complaint process does not prohibit you from filing a complaint with these agencies. Each of the agencies has a short time period for filing a claim (EEOC - 300 days; MCAD - 300 days).

1. The United States Equal Employment Opportunity Commission ("EEOC") One Congress Street, 10th Floor Boston, MA 02114, (617) 565-3200.
2. The Massachusetts Commission Against Discrimination ("MCAD") Boston Office: One Ashburton Place, Rm. 601, Boston, MA 02108, (617) 994-6000. Springfield Office: 436 Dwight Street, Rm. 220, Springfield, MA 01103, (413) 739-2145.

Exhibit F

Massachusetts Commission Against Discrimination

MCAD FACT SHEET: EMPLOYMENT DISCRIMINATION ON THE BASIS OF DISABILITY

Under Massachusetts law (Chapter 151B) and the federal Americans with Disabilities Act, it is illegal for an employer, an employment agency, or a labor organization (such as a union) to discriminate against someone based on his or her disability or handicap. The Massachusetts Commission Against Discrimination enforces these laws as well as other Massachusetts laws that prohibit disability discrimination in housing, public accommodations, and credit.

“Qualified Handicapped Persons” Are Protected By These Laws

1. **What is a handicap or a disability?**

   A handicap or a disability is a physical or mental condition that substantially limits one or more of a person's major life functions. Examples of major life functions include seeing, hearing mobility, and working. Massachusetts law uses the word “handicap” and the federal Americans with Disabilities Act uses the word “disability”- the laws are very similar.

   Examples of impairments that may limit a major life function include paraplegia, blindness, deafness, epilepsy, AIDS or being HIV positive, diabetes, heart disease, cancer, mental retardation, psychiatric disabilities and learning disabilities.

   Alcoholism is also a disability covered by these laws, but recreational use of alcohol is not covered. People with addictions to illegal substances who are currently using drugs illegally are not protected. Persons who are not current illegal drug users but are discriminated against based on their past history of drug addiction are protected.
   The law protects people who are discriminated against based upon their record of disability. For example, a person who has a history of hospitalization for a psychiatric disability but who is not presently mentally ill is protected if s/he is refused employment based on her/his history of hospitalizations. In addition, the law protects people who are discriminated against based upon other people's belief that they are disabled, even if they are not disabled. A person who is fired from his job because the employer believes s/he has AIDS is protected under the law even if the employee does not have AIDS.

2. **Who is “qualified”?**

   In order to be protected, a person with a disability must be “qualified.” “Qualified” means able to perform the essential functions of the job with or without reasonable accommodation.

Essential Functions: The law recognizes that jobs may have many functions. Some parts of the job are essential and some are not. If you can do the essential functions of a job, you cannot be discriminated against because of your disability. For example, a person who has a disability applies for a job as one of a group of ten mail clerks for a large company. Because of his/her disability s/he does not drive. The main functions of the mail clerk job are sorting and distributing incoming mail to various departments and processing outgoing mail. Sometimes one of the mail clerks is asked to perform miscellaneous tasks which involve driving, such as picking up supplies. Driving would probably not be an essential function of the job of mail clerk and so it would be illegal to refuse to hire the applicant because his/her disability prevented him/her from driving.

Reasonable Accommodation: An employer must make reasonable accommodations to allow a disabled person to work. Reasonable accommodations may include changes in the physical work area such as installing a ramp or providing adaptive equipment such as an accessible telephone (such as a TTD), making changes in job requirements such as assigning certain non-essential job functions to another employee, allowing an employee to perform a job in a different way (for example, sitting down instead of standing up), or making changes in work schedules to allow employees to take periodic rests or keep medical appointments. An employer may require a person who needs a reasonable accommodation to provide documentation of her/his disability and the need for the reasonable accommodation. Although an employer does not necessarily have to provide the exact accommodation requested, failure to provide a reasonable accommodation may violate the law.

Undue Hardship: An employer does not have to provide an accommodation if it would cause undue hardship. Some of the factors to be considered in determining undue hardship are: the nature and cost of the accommodation needed; the overall size and resources of the employers business; the number of employees; the number and type of facilities, and the size of budget; and the composition and structure of the employers work force.

Reasonable Standards: An employer is permitted to establish reasonable qualification standards for applicants and employees. Examples of such qualification standards are the ability to type 60 words a minute, a Masters degree in Library Science, or at least 2 years of nursing experience. An employer is permitted to reject a person with a disability who is unable to meet these qualification standards with reasonable accommodation unless the qualification standards are an excuse for illegal discrimination.

Employment Tests

Employers are permitted to test applicants and employees to make sure that they can perform essential job functions, but they must give the test in a way that does not unfairly discriminate against a person because of his or her disability. For example, a person with a speech impediment who is applying for a clerical position may not perform well on a test which requires oral responses. However, if the job does not require clear speech, another type

of test must be given (such as a written test) which does not unfairly discriminate against the applicant.

If you believe you have been discriminated against, contact the MCAD immediately because, in most circumstances, you must file a charge at the MCAD within 300 days of the alleged discriminatory action.

Boston:	**Springfield:**
One Ashburton Place	436 Dwight Street
Room 601	Room 220
Boston, MA 02108	Springfield, MA 01103
(617) 994-6000	(413) 739-2145
TTY (617) 994-6196	

Exhibit G

Massachusetts Commission Against Discrimination

FACT SHEET: GENETIC TESTING

Massachusetts General Law, Chapter 151B as amended, through "An Act Relative to Insurance and Genetic Testing and Privacy Protection" makes it discriminatory for an insurance company or employer to use genetic information in any way.

What is "genetic information"? Any written, recorded individually identifiable result of a genetic test or explanation of such a result or family history pertaining to the presence, absence, variation, alteration, or modification of a human gene or genes.

What is the purpose of this law? The law aims to protect individuals' right to keep genetic test results private, and ensures that genetic information will not be used to a person's disadvantage by insurance companies or employers. The law prohibits disclosure of genetic test results without the individual's consent, any requirement of genetic test results as a condition of employment or insurance, and discrimination by insurance companies based on genetic test results.

Who enforces the law? This fact sheet focuses on the employment-related aspects of the law that are enforced by the Massachusetts Commission Against Discrimination. The Massachusetts Division of Insurance enforces the insurance-related aspects of the law, and questions can be directed to them at 617-521-7349.

What does it mean for employers? Employers are forbidden to use genetic information in making decisions relating to an employee or prospective employee. Employers may not require or induce disclosure of genetic information or submission to testing. Employers who require employees to undergo medical examination should confirm that the medical examination does not require the disclosure of genetic information. Employers should ensure that genetic information is not inadvertently provided to them, and that no employee's file includes genetic information of any kind.

What does it mean for an individual employee or prospective employee? It means that you cannot be subjected to genetic testing by your employer and that information based on your genetic testing cannot be used against you in any employment decisions.

IT IS UNLAWFUL FOR AN EMPLOYER:

- to base employment decisions on genetic information (such as hiring or firing)
- to use the results of a genetic test or genetic information to affect the terms, conditions, compensation, or privileges of a person's employment

- to require or request genetic information as a condition of employment
- to offer an inducement to take a genetic test or disclose genetic information
- to question a person about previous genetic testing, or genetic information about themselves or family members
- to seek, receive, or record genetic information

COMPLAINTS

Information on filing a complaint can be obtained by contacting the MCAD at the following locations:

Boston:	**Springfield:**
One Ashburton Place	436 Dwight Street
Room 601	Room 220
Boston, MA 02108	Springfield, MA 01103
(617) 994-6000	(413) 739-2145
TTY (617) 994-6196	

Exhibit H

Massachusetts Commission Against Discrimination

FACT SHEET: EMPLOYMENT DISCRIMINATION ON THE BASIS OF CRIMINAL RECORD

Massachusetts General Laws Chapter 151B, Section 4; 804 CMR 3.01

It is illegal for an employer to ask certain questions about a job applicant's or employee's criminal record. Employers may not ask about, maintain a record of, or base any employment decision on the following information if they have requested it:

- Arrests or prosecution that did not lead to a conviction;
- A first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
- Misdemeanors where the date of conviction or the end of any period of incarceration was more than five years ago, provided that there have been no subsequent convictions within those five years;
- Any record of a court appearance which has been sealed under state law;
- Anything pertaining to juvenile record, including delinquency and child in need of services complaints, unless the juvenile was tried as an adult in Superior Court.

An employer may not take action against an applicant or employee for answering an unlawful question untruthfully.

An employer may ask:

- Have you ever been convicted of a felony?
- Within the last five years have you been convicted of, or released from incarceration for a misdemeanor which was not a first offense for drunkenness, simple assault, speeding, a minor traffic violation, an affray, or disturbing the peace?

IT IS ALSO ILLEGAL FOR AN EMPLOYER TO REQUEST FROM AN APPLICANT OR EMPLOYEE A COPY OF A PROBATION OR ARREST RECORD,* OR TO ASK AN APPLICANT OR EMPLOYEE TO SIGN A RELEASE PERMITTING ACCESS TO SUCH INFORMATION.

* An employer that applies for and is granted access to criminal record information by the Massachusetts Criminal History Systems Board under the Criminal Record Information Act (CORI) may obtain some information on applicants'/employees' criminal records. Access to information under CORI is limited to that which is necessary to perform the relevant criminal justice or statutory duties.

Boston:
One Ashburton Place
Room 601
Boston, MA 02108
(617) 994-6000
TTY (617) 994-6196

Springfield:
436 Dwight Street
Room 220
Springfield, MA 01103
(413) 739-2145

Exhibit I

Massachusetts Commission Against Discrimination

FACT SHEET: PRE-EMPLOYMENT INQUIRIES

Massachusetts law guarantees that no person shall be denied the right to work because of his or her race, color, religion, national origin, sex, sexual orientation, age (over 40), criminal record, or mental or physical handicap/disability. In order to comply with this law, an employer should generally not ask on a job application or during an interview any question that:

- Identifies a person as being within a protected category
- Results in the screening out of members in a protected category
- Is not a valid basis for predicting successful job performance

EMPLOYERS WITH FEWER THAN SIX EMPLOYEES AND NON-PROFIT CLUBS, ASSOCIATIONS, OR CORPORATIONS WHICH ARE EXCLUSIVELY SOCIAL ARE NOT SUBJECT TO THIS LAW

As a general rule, an employer may seek information that is directly related to the applicant's ability to perform the job for which he or she is applying. As a convenience, the following chart has been developed to serve as a quick reference guide when determining what are and are not appropriate questions to ask on an application or during an interview. Of course, there are other questions that will not be included within this quick reference guide that could be construed as attempting to elicit information for the purpose of discrimination on the basis of a protected category. If you require further information about the legality of certain pre-employment inquiries, refer to M.G.L c. 151B sec. 4, 804 C.M.R. 3.01 et seq., MCAD Handicap Guidelines, or contact the MCAD at (617) 994-6000.

AGE

Employer May Ask

- Are you under 18?
- Questions about age may be allowed if necessary to satisfy provisions of a state or federal law (i.e. certain public safety positions have age limits for hiring and retiring).

Employer May Not Ask

- When were you born?

- How old are you?
- Are you over 40?
- What is your date of birth?

NATIONAL ORIGIN/ANCESTRY

Employer May Ask

- Are you legally authorized to work in the United States?

Employer May Not Ask

- Where were you born?
- What is your primary language?
- What is your ancestry or ethnicity?
- What is your national origin?
- What is the origin of your name?
- Where are your parents/spouse from?
- What is the language of your parents/spouse?
- What is the national origin of your parents/spouse?
- What is the ancestry or ethnicity of your parents/spouse?

HANDICAP/DISABILITY

Employer May Ask

- Can you perform any or all of these specific job functions?
- Please describe or demonstrate how you would perform a specific task. (This request should be asked to all applicants unless there is an obvious disability or voluntarily disclosed hidden disability related to a job function. The employer may need to provide reasonable accommodation for the demonstration.)

- Can you meet the attendance requirements?

- What was your attendance record at your prior place of employment?

- Invite applicants to voluntarily disclose their disability for purposes of assisting the employer in its affirmative action efforts. Make it clear that information will be used solely in connection with its affirmative action efforts, will be kept confidential, and that non-disclosure will not subject the applicant to adverse treatment.

Employer May Not Ask

- Do you have a handicap/disability?

- Do you have any job-related handicaps/limitations that would prevent you from doing the job?

- Have you ever received Workers' Compensation?

- Have you ever been addicted to illegal drugs or treated for drug abuse/alcoholism?

- Have you ever been absent from work due to illness?

- Do you have AIDS?

- Questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such a public or private facility or facilities and is no longer under treatment directly related to such admission.

- Questions regarding the nature, severity, treatment, or prognosis of an obvious disability or of a hidden disability voluntarily disclosed by the applicant.

RACE/COLOR

Employer May Ask

- Questions for affirmative action purposes. (See section on disability.)

Employer May Not Ask

- What is your race?

- What is your color?

- Request applicant to send a photograph to accompany application.

RELIGIOUS CREED

Employer May Ask

- NO QUESTIONS ALLOWED

Employer May <u>Not</u> Ask

- To what religious denomination, church or synagogue, or any related organizations do you belong?
- What are your religious obligations?
- What religious holidays do you observe?
- Do you go to church/temple/etc. regularly?

SEX (GENDER)

Employer May Ask

- Questions relating to a legitimate requirement for a particular position (i.e. sex of an applicant for an acting role of a female character, or a prison guard who performs strip searches).

Employer May <u>Not</u> Ask

- What is your maiden name?
- Do you have/plan to have children?
- Do you have child care arrangements?
- Questions of only one sex.

SEXUAL ORIENTATION

Employer May Ask

- NO QUESTIONS

Employer May Not Ask

- Are you gay/lesbian/bisexual/ heterosexual?
- Why aren't you married?
- Are you engaged?
- Do you plan on getting married?
- Questions about relationships or living arrangements.

CRIMINAL RECORD

Employer May Ask

- Have you ever been convicted of a felony?
- Have you been convicted of a misdemeanor within the past five years other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace?

Employer May Not Ask

- Questions regarding an arrest, detention, or disposition regarding any violation of law in which no conviction resulted.
- Questions about first convictions of drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace.
- Questions regarding a conviction of a misdemeanor where the date of the conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 5 or more years prior to the date of inquiry, unless such person has been convicted of any offense within 5 years immediately preceding the date of the inquiry.
- An applicant to be held under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of his/her failure to recite or acknowledge such information as s/he has a right to withhold by 804 C.M.R. 3.02.

EDUCATION/EXPERIENCE/REFERENCES/MEMBERSHIPS

Employer May Ask

- What school, college or vocational program did you attend?
- Did you graduate?
- What is your work experience?
- Do you have any references?
- Questions about work experience shall also contain a statement that the applicant may include in such history any verified work performed on a volunteer basis.

Employer May Not Ask

- Questions about education or work experience designed to determine an applicant's age.
- About the organizations which the applicant for employment is a member, the nature, name or character of which would likely disclose the applicant's protected class status.

MILITARY EXPERIENCE

Employer May Ask

- Are you a U.S. Veteran?
- What is your U.S. military service history?

Employer May Not Ask

- Are you receiving a service-connected disability pension?
- What is your foreign military service history?
- What was the nature of your discharge?

MEDICAL EXAMINATIONS

Employer May Ask

- Once an offer of employment has been made, an employer may condition that offer on the results of a medical examination conducted solely for the purpose of determining whether the employee, with or without reasonable accommodation, is capable of performing the essential functions of the job.

Employer May Not Ask

- Applicant to take a medical examination prior to making an offer of employment to that applicant.

LIE DETECTOR TEST

Employer May Ask

- NO QUESTIONS

Employer May Not Ask

- It is unlawful to require or administer a lie detector test as a condition of employment or continued employment.

Massachusetts Commission Against Discrimination

Boston:	**Springfield:**
One Ashburton Place	436 Dwight Street
Room 601	Room 220
Boston, MA 02108	Springfield, MA 01103
(617) 994-6000	(413) 739-2145
TTY (617) 994-6196	

Exhibit J

REQUEST FOR PUBLICLY ACCESSIBLE MASSACHUSETTS CORI

It is lawful to request this agency to provide a copy of another person's publicly accessible adult conviction record. For the adult conviction record to be "publicly accessible" the person whose record is requested must have been convicted of a crime punishable by a sentence of five years or more, or has been convicted of any crime and sentenced to any term of imprisonment, and at the time of the request:

1. is serving a sentence of probation or incarceration, or is under the custody of the parole board; or

2. having been convicted of a misdemeanor, has been released from all custody or supervision for not more than one year; or

3. having been convicted of a felony, has been released from all custody or supervision for not more than two years; or

4. having been sentenced to the custody of the department of correction, has finally been discharged therefrom, either having been denied release on parole or having been returned to penal custody for violating parole for not more than three years.

Directions: Please fill this request form out as completely as possible. The more information you are able to provide, the more easily this agency will be able to process your request. ***A non-refundable processing fee of $30.00 is charged for each record requested and must be included with your request(s)****. There will be no exceptions made to this rule. Only checks or money orders made payable to the Commonwealth of Massachusetts will be accepted. A self-addressed, stamped envelope must also be enclosed with your request(s).*

Walk in requests or faxed requests will not be accepted. Requests will be processed in the order in which they are received. Mail all requests to: the Criminal History Systems Board, 200 Arlington Street, Suite 2200, Chelsea, MA 02150, ATTN: CORI Unit.

All requests must be typed. Requests containing any illegible identifying information will be returned. If you are making more than one request, please copy this form and fill in the requested identifying information accordingly.

1. ______________________ ______________________ ____________
   Last name First name Middle initial

____________________	____________________
Maiden name	Alias
____________________	____________________
Date of Birth (MM/DD/YY) (requested but not required)	Social Security Number

2. ____________________	____________________	____________
Last name	First name	Middle initial

____________________	____________________
Maiden name	Alias
____________________	____________________
Date of Birth (MM/DD/YY)	Social Security Number

(requested but not required)

Exhibit K

Sample Offer Letter for Executive Position

[SAMPLE OFFER LETTER TO BE PLACED ON COMPANY LETTERHEAD]

- for executive position
- includes language for grant of stock option
- includes language for payment of a discretionary bonus (this is only an example of a bonus provision; bonus provisions should be given careful attention as to whether they are an absolute obligation of the employer or a discretionary entitlement. If the bonus has been agreed upon prior to hiring, spell out the formula clearly in the letter – this can be contentious later)
- no background checks

[DATE]

[NAME]
[ADDRESS]

Re: Employment Offer

Dear [Name]:

I am extremely pleased to confirm our offer to you to join our company in the position of __________________________ . We look forward to your joining us during the week of _________________ , with our full understanding that your start date may be sooner or later depending upon your satisfying all obligations with your current employer.

Your initial base salary will be $______________ per month less payroll deductions and withholdings. This equates to $ ____________ on an annualized basis. In addition to your salary, you will be eligible to receive the following additional compensation:

1. A signing bonus in the amount of $ _______________ , which bonus will be due and payable to you _______ days after you start working.

2. An annual, discretionary bonus due and payable to you within ____ days of the close our fiscal year. The terms of this discretionary bonus will be mutually agreed upon between you and _______________. Typically, calculation of a discretionary bonus takes into account your individual performance and the overall performance of the company.

You will be entitled to receive such bonuses only in the event that you are an employee of the company on the date each particular bonus is due you.

Subject to the approval of the Company's Board of Directors and your execution of the Company's Individual Stock Option Agreement, you will be granted an option to purchase __________ shares of the Company's shares of common stock pursuant to the Company's Stock Option Plan. The purchase price of the option shares and the vesting schedule of your option, as well as all other details of the grant, will be set forth in your Individual Stock Option Agreement.

This offer is subject to satisfactory completion of: a) your provision of appropriate documentation to confirm your eligibility to work in the United States, as required by federal immigration laws; and b) your signing the Company's Proprietary Information and Inventions Agreement, a copy of which is enclosed with this letter.

As an employee of the Company, at such time as you become eligible, you will receive the benefits, from time to time, provided to our employees, consistent with the terms of each particular benefit plan or contract. Of course, the Company reserves the right to modify these benefits from time to time, as it deems necessary.

As a member of our team, you will be informed periodically of the Company's policies and procedures for employees. As an employee of the Company, you will be expected to abide by these policies and procedures.

Your employment with the Company is "at will." This means that either you or the company may terminate your employment with the Company at any time, with or without cause or advance notice. This at-will employment relationship cannot be changed by any statement, promise, policy, course of conduct or manual, except by a writing signed by you and an appropriate officer of the Company.

The terms in this letter supersede any other agreements or promises made to you by anyone on behalf of the Company, whether oral or written. By accepting this offer, you represent and warrant that your employment with the Company will not violate any agreements, obligations or understandings that you may have with any third party or prior employer.

If you choose to accept our offer under the terms described above, please sign this letter where indicated below and return to us no later than _____________ . If we have not received your signed acceptance by such date, this offer shall be revoked and considered null and void. If you any questions about this letter or any other document, please call _______________________ .

We are looking forward to having you as a member of our team. We look forward to your favorable reply, and to a productive and enjoyable work relationship.

Very truly yours,
[COMPANY NAME]

By: ______________________________

Name: ________________________

Title: _________________________

Enclosures: Copy of Offer Letter
Company's Proprietary Information and Inventions Agreement
Employment Eligibility Verification (I-9)

I have read the foregoing and agree to these terms and conditions of employment.

____
(sign name)

____
(print name)

Exhibit L

Sample Offer Letter for Non-Executive Position

[SAMPLE OFFER LETTER TO BE PLACED ON COMPANY LETTERHEAD]

- for non-executive position
- no background checks
- includes option grant

[DATE]

[NAME]
[ADDRESS]

Re: Employment Offer

Dear [Name]:

____________ (the "Company") is pleased to offer you the position of _______________. You will report to ___________________, and work out of the Company's _______ office. Your state date will be not later than _____________ or such earlier date as we may mutually agree upon.

Your initial base salary will be $_____________ per week/month less payroll deductions and withholdings.

This offer is subject to satisfactory completion of the following:

1. your provision of appropriate documentation to confirm your eligibility to work in the United States, as required by federal immigration laws; and

2. your signing the Company's Proprietary Information and Inventions Agreement, described below.

As an employee of the Company, you will be provided with and have access to the Company's confidential and proprietary information. The Company's Proprietary Information and Inventions Agreement is enclosed for your review and signature. This must be signed and returned to the Company prior to your first day of work.

Subject to the approval of the Company's Board of Directors and your execution of the Company's Individual Stock Option Agreement, you will be granted an option to purchase __________ shares of the Company's common stock pursuant to the Company's Stock Option Plan. The purchase price of the option shares and the vesting schedule of your

option, as well as all other details of the grant, will be set forth in your Individual Stock Option Agreement.

As an employee of the Company, at such time as you become eligible, you will receive the benefits, from time to time, provided to our employees, consistent with the terms of each particular benefit plan or contract. Of course, the Company reserves the right to modify these benefits from time to time, as it deems necessary.

As a member of our team, you will be informed periodically of the Company's policies and procedures for employees. As an employee of the Company, you will be expected to abide by these policies and procedures.

Your employment with the Company is "at will." This means that either you or the company may terminate your employment with the Company at any time, with or without cause or advance notice. This at-will employment relationship cannot be changed by any statement, promise, policy, course of conduct or manual, except by a writing signed by you and an appropriate officer of the Company.

The terms in this letter supersede any other agreements or promises made to you by anyone on behalf of the Company, whether oral or written. By accepting this offer, you represent and warrant that your employment with the Company will not violate any agreements, obligations or understandings that you may have with any third party or prior employer.

If you choose to accept our offer under the terms described above, please sign this letter where indicated below and return to us no later than _____________ . If we have not received your signed acceptance by such date, this offer shall be revoked and considered null and void. If you any questions about this letter or any other document, please call ______________________ .

We are looking forward to having you as a member of our team. We believe that the Company's success will depend on the quality and teamwork of its people. We look forward to your favorable reply, and to a productive and enjoyable work relationship.

Very truly yours,
[COMPANY NAME]

By: ________________________________

Name: __________________________

Title: ___________________________

Enclosures: Copy of Offer Letter
Company's Proprietary Information and Inventions Agreement
Employment Eligibility Verification (I-9)

I have read the foregoing and agree to these terms and conditions of employment.

____
(sign name)

____
(print name)

Exhibit M

SAMPLE EMPLOYEE HARASSMENT AND OTHER INAPPROPRIATE CONDUCT INVESTIGATION FORM

Name of Person Allegedly Harassed ____________________________________

Position/Location: ____________________________________

Employee Registering Complaint ____________________________________

Complaint Received by: ____________________________________

Date/Time: ____________________________________

1. How was the complaint brought to your attention? (Check one)

_____ In Person _____ By Telephone
_____ In Writing _____ Other (Please describe __________)

2. Reported Cause of Complaint/Harassment:

_____ Race _____ National Origin
_____ Sex _____ Religion
_____ Age _____ Other (Please describe __________)

3. Nature of Complaint: Please document below complaint exactly as reported. Include names, dates, relationships, incidents, etc. Use additional paper as needed.

____
____
____
____

4. List below specifics as to the nature of alleged harassment (use additional paper as needed)

Physical Contact:____
____
Words:____
____
Threat:____
____
Offer or Promise:____
____
Gestures:____
____

Other: ____

____

5. Time and place where incident reportedly occurred:

____

Incident	*Place*	*Time*	*Date*

6. Witnesses, if any, identified by Complainant:

NAME LOCATION

____

____

7. To the complainant's knowledge, are there any other employees being harassed?

_____ No
_____ Yes (Please explain)

____

____

8. Has the Complainant identified <u>all</u> incidents of harassment?
____ Yes
____ No (please explain)

____

____

PREPARER'S
SIGNATURE ______________________________ **DATE** ______________

EMPLOYEE'S
SIGNATURE ______________________________ **DATE** ______________

Exhibit N

SAMPLE EXIT INTERVIEW FORM

Name______________________________ Department____________________________

Date______________

1. How would you rate your company in the following areas?

	Excellent	Very Good	Acceptable	Poor
Benefits	_____	_____	_____	_____
Sick Leave	_____	_____	_____	_____
Vacation	_____	_____	_____	_____
Education Assistance	_____	_____	_____	_____
Rate of Pay for Position	_____	_____	_____	_____
Performance Evaluations	_____	_____	_____	_____
On-The-Job-Training	_____	_____	_____	_____
Employee Morale	_____	_____	_____	_____
Physical Working Conditions	_____	_____	_____	_____

Comments/Suggestions:

Discuss: any areas where you have selected Acceptable or Poor.

2. Did you feel your opportunities for advancement were:

_____Excellent _____Unable to tell
_____Good _____Did not seek advancement
_____Poor

Comments/Suggestions:

3. How did you like your supervisor?

4. How would you rate your supervisor on the following:

	Always	Usually	Sometimes	Never
Follows policies & procedures	______	______	______	______
Provides recognition on the job	______	______	______	______
Demonstrates fair & equal treatment	______	______	______	______
Develops department cooperation	______	______	______	______
Resolves complaints & problems	______	______	______	______
Follows through on commitments	______	______	______	______
Provides opportunities for advancement	______	______	______	______
Allows freedom to perform	______	______	______	______
Communication Ability	______	______	______	______

<u>Discuss</u>: Any areas where you have checked Sometimes or Never.

5. What was your length of employment with this company?

6. What was your last assignment?

7. Did you understand what was expected of you?

8. What did you like best about your position?

What did you like least about your position?

9. What was your main reason for terminating?

10. Do you have another job?
    - Where?
    - Starting Salary
    - Benefits
    - How did you learn of this job opportunity?

11. Overall, how would you rate the company as an employer?

    _____Above Average
    _____Average
    _____Below Average

12. If possible, would you return to work at the company? If the response is no, why not?

13. How did you get along with other employees at the company?

14. Did you think that there was a good team environment at the company?

15. Were you treated fairly while employed at the company? If not, what was the specific nature of the problem?

16. Do you know of, or had you heard of, any problems that employees have had working while working at the company?

17. Would you recommend the company to your friends as a good place to work?

18. What, if anything, prevented you from performing high quality work at the company?

19. What, if any, changes in equipment, procedures, training or work space flows would have helped you better perform your job responsibilities?

20. May we call you for clarification or additional information if necessary?

    Yes______ No______

    Home phone number___________________

ADDITIONAL COMMENTS:

____________________________________ ________________________

Exit Interviewer's Signature Date of Exit Interview

Exhibit O

SELECTED INTERNET RESOURCES FOR EMPLOYMENT LAW (WEBSITES)

- AFSCME Guide to the Family and Medical Leave Act

  www.afscme.org/wrkplace/fmla.htm

- American Law Sources On-Line

  www.lawsource.com

- Americans With Disabilities Act Technical Assistance Program

  www.adata.org

- Department of Health and Human Services (Age Discrimination)

  www.aoa.gov/factsheets/ageism.html

- Equal Employment Opportunity Commission

  www.eeoc.gov

- Garland's Digest on Employment Discrimination Law

  www.garlands-digest.com

- General Laws of Massachusetts

  www.mass.gov/legis/laws/mgl/Index.htm

- Human Services Personnel Collaborative

  www.diversityinitiative.org

- Job Accommodation Network

  www.jan.wvu.edu

- Legal Information Institute at Cornell Law School

  www.law.cornell.edu/topics/employment_discrimination

- Massachusetts Commission Against Discrimination

  www.mass.gov/mcad

- U.S. Department of Justice Civil Rights Division Employment Litigation Section's "Frequently Asked Questions"

  www.usdoj.gov/crt/emp/faq.html

- U.S. Department of Labor

  www.dol.gov

- U.S. Office of Personnel Management

  www.opm.gov

- United States Code (*find materials by title and section*)

  www4.law.cornell.edu/uscode

About the Authors

JUSTINE H. BROUSSEAU is a partner with the Boston law firm Kimball Brousseau LLP. She focuses her practice on employment law and civil litigation. Ms. Brousseau represents plaintiffs, individuals and management in state and federal court, before the U.S. Equal Employment Opportunity Commission, the Massachusetts Commission Against Discrimination, as well as in arbitration and mediation. In her employment practice, she advises clients on a wide range of issues including employment contracts, executive compensation, severance/separation agreement negotiation, employee handbooks, non-competition and non-solicitation agreements, discrimination matters, disability issues, wage and hour laws and other related statutes. Ms. Brousseau is active in both the Boston Bar Association and the Massachusetts Bar Association. Ms. Brousseau serves as a member of the BBA Education Committee, and a Co-Chair of the Brown Bag Luncheon Program (2006-2008) for the Labor and Employment Section, and has been a member of the Labor and Employment Steering Committee since 1999, including serving as Steering Committee Co-Chair (2001-2003). Ms. Brousseau served on the Labor and Employment Section Council of the MBA. She has chaired its Employee Rights and Responsibilities Committee where she co-chaired the MBA Subcommittees responsible for drafting the MCAD Disability Law Guidelines and the MCAD Employment Regulations. Ms. Brousseau is a frequent lecturer and author of articles on employment law for continuing legal education programs, and co-authored the "Employment Law 101" chapter of *Winning Legal Strategies for Employment Law* (Aspatore Books 2005). She is a graduate of Providence College and New England School of Law, and is a member of both the Massachusetts and Rhode Island bars.

MARK BURAK is a partner with Morse, Barnes-Brown & Pendleton, P.C. Mr. Burak regularly represents employers before administrative agencies and in state and federal courts in defense of sexual harassment, discrimination, wrongful termination, wage-hour, ERISA disputes, and other employment-related claims, and in the litigation of non-compete and trade secret matters. Mr. Burak advises employers in all aspects of employment law with a focus on implementing preventive employment practices. He counsels employers on a full range of employment matters, including sexual harassment, supervisory skills, EEO training, employment and human resource policy development, employee discipline and terminations, severance, privacy issues, leave, disability and family medical leave, wage-hour and other employment issues, as well as transactional related matters. His clients span a number of industries including software and high-tech, construction, retail, health care, manufacturing, and professional employer organizations. Mr. Burak also regularly represents high-level executives in employment-related issues, including negotiation of employment agreements and advice on exit issues. Mr. Burak is a member of the Steering Committee for the Labor and Employment Section of the Boston Bar Association and co-chairs the Equal Employment Opportunity Subcommittee. He is also a member of the Associated Industries of Massachusetts (AIM) Human Resource Committee, and he frequently writes and lectures on employment-related issues. Before joining Morse, Barnes-Brown & Pendleton, P.C., Mr. Burak was a partner in the Boston office of Nixon Peabody LLP. Mr. Burak graduated *magna cum laude* from Boston University School of Law in 1991. He received his bachelor of business administration from the University of Massachusetts at Amherst in 1987.

ANTHONY J. CICHELLO is a partner at Krokidas & Bluestein LLP.

DAVID C. HENDERSON is a partner in the Boston office of Nutter McClennen & Fish, LLP. His practice concentrates in civil litigation and corporate general counsel advice, with a particular focus on employment and labor issues and general business and commercial matters. Mr. Henderson is a member of the bars of Massachusetts and the District of Columbia, and has represented major corporations, private universities, public entities, and individual employers and managers in a broad range of civil matters in federal and state courts. Mr. Henderson received J.D. and LL.M. degrees from the Yale Law School, an M.A. degree from the Fletcher School of Law and Diplomacy, and a B.S. degree (distinguished graduate) from the United States Air Force Academy. Prior to joining Nutter, he was on active duty in the United States Air Force as a pilot, instructor pilot, and judge advocate.

JODY L. NEWMAN is a partner at Dwyer & Collora, LLP.

ANDREW C. PICKETT is the Managing Partner of the Boston office of Jackson Lewis LLP, a national law firm representing management exclusively in labor, employment, benefits, immigration law and related litigation. Mr. Pickett concentrates his practice in employment litigation and counseling on behalf of management. He advises clients regularly on employment law issues, including discrimination, reductions in force, FMLA leave, the Americans with Disabilities Act, non-competition agreements, and litigation under the Employee Retirement Income Security Act. Mr. Pickett has substantial trial experience, and appears frequently in state and federal courts in employment-related litigation, including the defending clients against the United States Equal Employment Opportunity Commission in

"pattern and practice" class action discrimination litigation. He also defends employers in administrative proceedings at the Equal Employment Opportunity Commission, the Massachusetts Commission Against Discrimination, and other state agencies. Mr. Pickett served as a Special Assistant District Attorney in the Middlesex County District Attorney's Office in 1990 and 1991 and also served as law clerk to the Honorable Albert W. Coffrin, Chief Judge of the United States District Court for the District of Vermont, during 1986 and 1987. Prior to joining Jackson Lewis, Mr. Pickett was with the prominent Boston firm Ropes & Gray. Mr. Pickett is a 1983 graduate, *magna cum laude*, of Princeton University, and a 1986 graduate, *cum laude*, of the Cornell Law School. Mr. Pickett is a member of the Bar of the federal and state courts in both Massachusetts and Vermont, as well as the United States Court of Appeals for the First Circuit and the United States Supreme Court. Mr. Pickett was Co-Chair of the Labor and Employment Law Section of the Boston Bar Association from 2000 to 2002, and is also a member of the Massachusetts, Vermont and American Bar Associations. He holds an A.V. rating from Martindale Hubbell. Chambers & Partners has repeatedly recognized Mr. Pickett as one of the leading employment law practitioners in Massachusetts in the 2003, 2004, 2005 and 2006 editions of *Chambers USA America's Leading Lawyers For Business: The Client's Guide*.

VALERIE SAMUELS is a partner at Posternak Blankstein & Lund LLP where she co-chairs the Employment Law Group. Ms. Samuels's employment law practice is comprehensive and involves representing Massachusetts and nationwide employers in all types of employment matters, including those involving discrimination, sexual harassment, wrongful termination, reductions in force, wage and hour, breach of contract and covenants

not-to-compete. Ms. Samuels regularly counsels employers regarding comprehensive audits of personnel policies, harassment and discrimination awareness training, revisions to employee handbooks, drafting of employment agreements, non-competition covenants, the solicitation of clients and other employment issues. Ms. Samuels also represents executives in the negotiation of employment contracts, non-competition covenants, and severance packages. Ms. Samuels routinely appears before federal and state agencies, including the Massachusetts Commission Against Discrimination, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration and the U.S. Department of Labor. She represents clients in federal and state courts and before the National Labor Relations Board on a variety of matters. Ms. Samuels mediates cases for private parties, as well as the Equal Employment Opportunity Commission and the United States District Court of Massachusetts. She was trained in civil mediation by the Community Dispute Settlement Center in 2001. Ms. Samuels is also certified as a harassment prevention and disability discrimination trainer by the Massachusetts Commission Against Discrimination. She trains human resources personnel, managers and employees regarding harassment, diversity and discrimination issues, as well as employee discipline and litigation avoidance techniques. Ms. Samuels was named Massachusetts Super Lawyer in 2004 and 2005 in Boston Magazine. She was named one of the "Top 10 Attorneys" in 2006 in Women's Business.

About the Editor

NINA JOAN KIMBALL is a founding partner in Kimball Brousseau LLP, where she has an extensive employment law practice advising and representing individuals, executives, non-profit organizations, and corporations in state and federal court and in administrative

proceedings. She also resolves disputes for her clients through negotiation, arbitration and mediation. She advises clients on a wide range of employment issues including hiring and firing practices, non-compete agreements, employee handbooks, wage and hour issues, privacy rights, Family and Medical Leave Act, executive compensation issues and discrimination. Ms. Kimball is active in the Boston Bar Association, where she was elected as a Member of the Council of the BBA (2005-2008). She is a member of the Labor and Employment Law Steering Committee, and a former Co-Chair of the BBA's Solo and Small Firm Section. Ms. Kimball also Chaired the Massachusetts Bar Association's Labor and Employment Section Council and Co-Chaired the MBA Committee that drafted the MCAD's Maternity Leave Guidelines. Ms. Kimball has lectured and written widely on employment law topics, including co-authoring the "Employment Law 101" chapter of *Winning Legal Strategies for Employment Law* (Aspatore Books 2005). Ms. Kimball was named Massachusetts Super Lawyer by Boston Magazine in 2006. Ms. Kimball received her B.A. from Yale College *cum laude* and her J.D. from George Washington University, where she was Editor in Chief of *The George Washington Law Review*. She clerked for Chief Judge Spottswood W. Robinson III of the United States Court of Appeals for the District of Columbia Circuit.

About the Assistant Editor

ELIZABETH E. HENNESSY is a paralegal at Kimball Brousseau LLP, providing legal support to the partners, as well as providing administrative support in office management. Ms. Hennessy has more than nineteen years of paralegal experience, during which she has worked actively in many areas of law, including employment law, corporations, municipal law, and all aspects of litigation. She works with the firm's attorneys in all aspects of their

employment law practice. Ms. Hennessy often assists the attorneys in preparing their articles and presentations for various employment law conferences and seminars in which they participate and has assisted in producing and editing the Newsletter for the BBA Labor and Employment Law Section. She received her undergraduate degree from the University of Massachusetts at Amherst and is a graduate of the Northeastern University Paralegal Certificate program, where she also completed extended courses in legal research and writing.