



# Foley Hoag LLP 10<sup>th</sup> Annual Labor and Employment Law Seminar

The Latest Developments in  
Labor and Employment Law

**May 24, 2007**



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Update 2007

William B. Koffel

- Attorney General Martha Coakley and the Massachusetts Business and Labor Bureau
- MCAD and EEOC Activity
- U.S. Department of Labor Activities
- New Developments/ On the Horizon



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- Walter Sullivan, new Chair of MCAD
- New Standing Order on “Pre-Determination Case Process”
- Investigative Conferences no longer automatically scheduled
- Extensions of time limited to total of 25 days
- MCAD’s 2006 Annual Report / Case Statistics

# Comparison of Types of Charges Filed at EEOC and MCAD

	<u>MCAD</u>	<u>EEOC</u>
Disability	19.7%	20.6%
Sex	18.9%	30.7%
Race	18.5%	35.9%
Retaliation	12.6%	29.8%
Age	9.6%	21.8%
National Origin	7.8%	11%
Sexual Harassment	6.6%	15.9%
Sexual Orientation	2.0%	NA
Creed	1.9%	3.4%

- New EEO-1 Form effective 9/30/07
- EEOC pursuing more “pattern or practice” lawsuits
- OFCCP statistics

Fiscal Year	Financial Remedies Obtained	Workers Recompensed by OFCCP Agreement	Average Benefit per Person	Compliance Evaluations
2006	\$51,525,235	15,273	\$3,374	3,975
2005	\$45,156,462	14,761	\$3,059	2,730
Change from 2005 to 2006	14.1%	3.5%	10.3%	45.6%

- Wage and Hour Division
- FLSA Enforcement Statistics

	Cases	Back Wages Collected	Percent of FLSA Back Wages	Employees Receiving Back Wages	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	11,867	\$15,228,183	11%	52,701	13%
Overtime	11,223	\$120,500,820	89%	194,811	87%

- Administrative Exemption Cases
- Focus on Low-Wage Industries
- FMLA Cases Down
- Enforcement of H-1B Labor Condition Application (LCA) requirements
- Massachusetts Minimum Wage
  - \$7.50 per hour
  - Effective January 1, 2007

- NLRB defines a “Supervisor”
  - Proposed legislative response
- Genetic Information Non-Discrimination Act (H.R. 493)
  - Passes in the House, 420-3
- Gender Based Discrimination Act (House Bill 1722)
  - MA proposal concerning transgender persons
- Representative Byron Rushing proposes ban on discrimination based on weight and height




Office of Attorney  
General Martha Coakley

**Kevin Conroy**, *Bureau Chief*  
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# An Update On the Massachusetts Health Care Reform Law

Robert A. Fisher



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# The Status of Implementation

- Health Care Reform law is now over 1 year old
- Legislature has twice amended the law to make “technical” corrections
- Some deadlines have been pushed back
- Still waiting for regulations on some issues
- Bottom line is that there are still many unanswered questions despite looming deadline of July 1, 2007

- By July 1, 2007, every person in Massachusetts will be expected to have health insurance
- Individual will lose personal income tax exemption for 2007, if not insured and can afford it
- Connector has established a sliding scale for affordability based upon:
  - (1) Income
  - (2) Family size
  - (3) Cost of monthly premium under employer-sponsored plan

An employer that

- employs 11 or more full-time equivalent employees in Massachusetts, and
- is NOT a “contributing employer,”

will be required to pay a per employee contribution on an annual basis, not to exceed \$295 per employee.

An employer is NOT a “contributing employer” if it does not:

- offer a group health plan, AND
- make a “fair and reasonable” premium contribution, as defined by regulations

Two tests for determining whether the employer has made a “fair and reasonable” premium contribution:

1. At least 25% of full-time employees in MA enrolled in the group health plan (but many special rules) OR
2. Employer offered to pay at least 33% of the premium cost of any group health plan offered to its full-time employees

Satisfaction of either test means that the employer is exempt from the fair share contribution

These regulations have been in place since October 2006

- A “non-providing employer” shall be assessed a “free rider” surcharge for the state’s provision of free care to its employees or their dependents
- A “non-providing employer” is one that employs 11 or more employees and does NOT adopt and maintain a cafeteria plan, pursuant to the rules of the Connector
- Surcharge takes effect as of July 1, 2007
- However, there are no regulations yet on this surcharge

# Cafeteria Plan Requirements

- Every employer with 11 or more employees must adopt and maintain a cafeteria plan, as defined by Section 125 of the Internal Revenue Code, by July 1, 2007
- Cafeteria plan allows an employee to set aside wages on a pre-tax basis for qualified benefits, such as health insurance premiums
- Plan must also comply with the rules of the Connector and be filed with the Connector

# Cafeteria Plan Regulations

- Must comply with the requirements of IRC Section 125
- Must include, at a minimum, a premium-only plan
- All employees in MA must be eligible to participate, but the plan may exclude some categories of employees
- May impose a waiting period of no more than 2 months
- The employer has no obligation to make contributions to the plan
- The employer may use more than one plan

- Every employer with 11 or more employees must complete the Health Insurance Responsibility Disclosure form (HIRD)
- Must report whether it maintains a cafeteria plan and any other information required by the Division of Health Care Finance and Policy
- Currently, there are no regulations and no forms
- Effective July 1, 2007

- Any employee who declines coverage under the employer's group health plan must complete the employee HIRD
- Employee must report whether he or she has alternative source of coverage and other information required by the Division
- Employer must retain the employee HIRD for 3 years
- Currently, there are no regulations and no forms

# Insurance Contract Requirements

- Insurers may only issue blanket health insurance policies if
  - the insurance is offered by the employer to all full-time employees who live in the Commonwealth
  - the employer does not make a smaller health insurance premium contribution to an employee than it makes to any other employee who receives an equal or greater hourly or annual salary
- Exempts employees covered by collective bargaining agreements
- Requirements do not apply to dental plans

- Family coverage must allow young adults to remain in the plan until the earlier of age 26 or two years after loss of dependency status under the Internal Revenue Code (19 years of age or 24 years of age if student)
- Individuals, 19-26 years old, are eligible for special insurance products through the Connector



# 2007 Immigration Update

Kevin Fitzgerald and  
George Lester



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- Over 120,000 petitions received on April 2<sup>nd</sup> and April 3<sup>rd</sup>
- USCIS random selection process to select 60,000 for processing
- Even special advanced degree cap reached on April 30<sup>th</sup>
- No new H-1B slots available until October 1, 2008

- New DOL labor certification regulations issued
  - Labor certifications expire in 180 days
  - Eliminates labor certification substitution
  - Prohibits aliens from paying cost of labor certification
- Effective in July

- DOL Backlog Center working through backlog
  - Rapidly approving cases converted to Reduction in Recruitment
  - Working through supervised recruitment on other cases
  - Expects to be done with all backlog cases by end of year
- Delays in PERM labor certification approvals

# Employer Enforcement Activities

- Employer enforcement is a primary area of focus
- Employer raids
  - New Bedford
  - More aggressive ICE activity
  - Use of informants
  - Use of undercover agents
  - Sharing of SSA info

- Trained staff who know what to look for
- Proper completion of forms
- Keeping copies of documents presented
- When to ask for more
  - Standard is “knowing” employment of unauthorized worker
  - knowledge may not be inferred from appearance
  - “knowledge that may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition”
  - cannot refuse to honor documents that “on their face appear to be genuine”

- Keeping copies of documents reviewed
- Reverification when appropriate
- Retain for minimum of 3 years
- Or one year from end of employment if longer
- Electronic recordkeeping

- When/what can you ask
  - Prohibitions on immigration and national origin discrimination
  - Acceptable questions on application
  - Pre-hire use of I-9 forms

# Other Available Programs to Verify Employment Eligibility

- Social Security Administration verification program
- Federal Employment Eligibility verification pilot program
- IMAGE program
- Comment by Matt Allen, Chief, ICE Office of Investigations

- What they are
- Increasing use by SSA
- How to respond
- “Safe Harbor” regulation

- Comprehensive Immigration Reform - The Concept
- Border Security
- Interior Enforcement of Immigration Laws
- Enforcement Against Unlawful Employment
- Work Authorization and Path to Legal Status for Undocumented
- New Temporary Worker Program for Future Labor Flow
- Backlog Reduction, Reforms in Current Programs

# The Senate's "Grand Bargain": The "Border Security and Immigration Reform Act of 2007"

- "Triggers" Must Be Met Before New Benefit Programs Begin
- More Infrastructure, Technology, Personnel for Border Security
- Tougher Laws and Penalties for Immigration Violations
- More Requirements for Employers, Penalties for Noncompliance
  - Electronic Employment Eligibility Verification System
  - Secure ID Card

# The Senate's "Grand Bargain": The "Border Security and Immigration Reform Act of 2007"

- New Temporary Worker Program - The "Y visa"
  - Y-1 Non-Seasonal Workers - Two Year Admission, Renewable Twice, But Must Spend One Year Outside U.S. Between Each Admission, 400,000 initial cap.
  - Y-2A Agricultural Workers - 10 Month Admission; 100,000 initial cap
  - Y-2B Non-agricultural Season Workers - 10 Month Admission; 100,000 initial cap
  - Wage Protections

# The Senate's "Grand Bargain": The "Border Security and Immigration Reform Act of 2007"

- Restructures Current Permanent Residence Preference System
  - Eliminates Current Family Based Categories Except Spouses, Minor Children and Parents of Citizens, With Strict Numerical Limits
  - Eliminates Current Employment Based Categories
  - Eliminates Diversity Visa (DV Lottery) Program

## The Senate's "Grand Bargain": The "Border Security and Immigration Reform Act of 2007"

- Instead, Creates "Merit Based Points System" for Permanent Residence Eligibility, based on:
  - Ability to Speak English
  - Level of Schooling, including added points for science, math and technology
  - Job offer in specialty or high-demand field
  - Work experience in the U.S.
  - Employer endorsement
  - Family ties in U.S.
- Numerical Limitations Still Apply

# The Senate's "Grand Bargain": The "Border Security and Immigration Reform Act of 2007"

- Relief for Undocumented Population - the "Z visa"
  - Must Prove Illegal Presence in U.S. Before January 1, 2007
  - Immediate "Probationary" Status and Work Authorization
  - Converts to Z Visa With Background Checks, Payment of \$1000 Penalty
    - Work, travel freely
    - Renew after 4 years
  - Limited Path to Permanent Residence After 8 Years

- H-1B Cap Relief
  - More Exempt Categories
  - Non-exempt Limit Raised to 115,000, With Annual Market-Based Adjustment
- Employment Based (EB) Immigrant Preference Backlog Relief
  - Certain U.S. educated or highly skilled aliens not subject to numerical limits
  - Recaptures unused visa numbers

## What We Do Not Like: The “H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007”

- Recruitment requirements prior to H-1B filing, for all employers
- Non-displacement attestation, for all employers
- No H-1B “outplacement”
- No more than 50% of workforce may be H-1B (if more than 50 employees)

# Employers Need to Make Their Views Known in Congress

- Professional and Trade Association Lobbying
- Contact Your Representatives Directly
- Work With Foley Hoag LLP

# Avoiding Retaliation Claims

Barbara Hamelburg



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# I: Introduction Setting The Stage

A recent case (DeRoche v. MCAD, 447 Mass. 1 (2006))

Facts:

- Employee resigns at age 65, believing that retirement is mandatory at this age; Employer's mandatory retirement age is actually 70 but no one informs him of this
- Employee finds out 2 years later and files a claim with the MCAD alleging age discrimination (forced retirement)
- Employer offers to reinstate Employee at his former position but actually assigns him to a slightly different position
- Employee goes back to work but resigns the next day and amends his MCAD complaint to add a claim of retaliation

# I: Introduction Setting The Stage

- MCAD determination: no discrimination, yes retaliation; awards \$260,000 in damages
  - \$210,000 in back and front pay, \$50,000 in emotional distress

# Why We Are Talking About Retaliation Today

- Substantial increase in retaliation claims brought
- Employers can be liable for retaliation even if they are not liable for the underlying claim/issue
- Recent Supreme Court decision that redefined the standard under federal law
- Retaliation claims sometimes used by bad employees to manipulate their employer and the legal system
- Damages can be substantial
- Practical tips for avoiding retaliation claims

# Substantial Rise in Retaliation Claims

- Retaliation claims are on the rise and represent the fastest growing type of discrimination claim
- Since 1992, there has been a **100% increase** of retaliation claims filed with the EEOC
    - In 1992: 15% of all charges filed included a retaliation claim
    - In 2005: 30% of all charges filed included a retaliation claim
  - By comparison, the number of race, age, sex, and other discrimination claims has remained relatively flat

## II: What Retaliation Claims Look Like

Retaliation =

An adverse action taken by the employer against the employee for engaging in some sort of protected activity

To prove retaliation, the plaintiff must prove three elements:

- 1) Employee engaged in protected activity
- 2) Employee was subject to an adverse action
- 3) There was a causal connection between the two

# First Element: Engaged in Protected Activity

- In the employment discrimination context, **protected activity** typically means participating in an inquiry into, or opposing some unlawful practice.
- Common examples:
  - Filing a claim of discrimination or otherwise complaining about a discriminatory practice
  - Assisting another employee in reporting the same
  - Testifying in an investigation
  - Refusing to enforce a company policy that is discriminatory
- Note: Although often tacked-on to a discrimination claim, retaliation claims can also be free-standing; an employee can file a retaliation claim without an underlying claim of discrimination

# First Element: Engaged in Protected Activity

- Keep in mind: although retaliation claims are most commonly seen in the employment discrimination context, these claims can also arise in other contexts:
  - Asserting one's statutory rights (e.g. Worker's Comp, FMLA, etc.)
  - Whistle blowing
  - Refusal to violate the law (public policy)

# Second Element: Subject to an Adverse Action

Typically, we think of adverse actions as comprising things like:

- termination
- demotion
- failure to promote
- denying benefits

However....

# Second Element: Subject to an adverse action

- Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006):
  - Plaintiff complained of discrimination and was thereafter assigned to a less desirable position within the same classification, rate of pay and benefits
  - The Supreme Court held that adverse employment actions under Title VII include more than just actions affecting the terms and conditions of employment
    - This significantly broadens the standard of “adverse action”
  - What this means: an employer can be liable for retaliation even where an employee’s salary, seniority, title and benefits remain unchanged

- Massachusetts Law, chapter 151B
  - Employee must still show that he suffered some tangible and material employment action
    - E.g. MacCormack v. Boston Edison Co., 423 Mass 652 (1996)
    - E.g. Faunce v. City of Fall River, MCAD, August (2006)

- In order to prevail on a retaliation claim, the Plaintiff needs to prove that the adverse action was taken **because of** her involvement in the protected activity and not for some other reason
  - At least part of the employee's burden is to show that the employer actually knew of employee's protected activity at the time it took the adverse action

# III: Why These Claims Deserve Your Attention

# Significant Potential Damages

- Can lead to significant damages
- Under M.G.L. c. 151B, retaliation claims are subject to the same kinds of damage awards as discrimination claims:
  - Back pay, front pay, emotional distress, punitive damages, attorney's fees & costs
    - E.g. Zimmerman v. Direct Federal Credit Union, 262 F. 262 F.3d 70 (1st Cir. 2001)

# Possible Source of Manipulation

- Can enable a bad employee to manipulate the employer and the legal system
- As the California Court of Appeals has noted:
  - “Consider a hypothetical of a ne’er do well employee who wants to manipulate the system to his or her advantage: ‘Not doing your job well? Ax about to fall? Never fear: file a discrimination claim, no matter how meritless. Your employer will be afraid to take any action because now you can sue for retaliation.’”

- An employee who files a discrimination claim is not automatically immune from discipline
- Timing is not everything: employers do not need to suspend previously planned employment actions just because they have discovered that a suit has been filed
- An employer should not be subject to this type of manipulation if it follows the important tips to avoiding these claims

# IV: Top Five Tips For Avoiding Retaliation Claims

# 1. Promulgate a Policy

- Maintain clear EEO and non-retaliation policies
  - Publicize and consistently enforce an explicit non-retaliation policy

## 2. Provide Training

- Train managers on what constitute retaliation and how to respond when a complaint is brought to their attention
  - Make this a part of your yearly harassment and discrimination training
  - Offer special sessions on retaliation claims

## 3. Identify Claimants

- Stay Ahead of the Curve: Identify potential retaliation plaintiffs
  - Ask yourself: has this person recently requested an accommodation, complained of discrimination or participated in an investigation?
  - If so, have a high level manager review any employment action directed at that employee to ensure that this person is not being unfairly targeted

## 4. Review Changes

- Review all employment actions carefully
  - Ask yourself whether or not the change may be viewed as a demotion, or less desirable by the employee

- Document, Document, Document
  - Document all performance issues and possible employment changes, as they arise



# Wage & Hour Laws: Eight Traps for the Unwary

James W. Bucking



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- As employers have focused on reducing or eliminating sexual harassment and discrimination, the potential for successful lawsuits in these areas has decreased
  - Employers are increasingly being targeted by class actions and government audits on wage and hour issues
  - Claims under the FLSA have now surpassed the number of race and gender class actions

- Suits can be brought privately, by the U.S. Dept. of Labor or by the Massachusetts Attorney General
- Employers face not only the potential for large back pay awards, but also hefty penalties for certain violations

- Kaiser Foundation Health Plan pays \$9 million to settle class-action alleging the HMO failed to pay proper overtime amounts
- UPS pays \$87 million to settle class-action brought by drivers claiming they were denied meal and rest breaks
- Gas station owner pays \$1 million to settle Labor Dept. lawsuit claiming the company failed to pay the minimum wage and required overtime
- Albertsons, Inc. pays \$53.3 million settlement to employees alleging “off-the-clock” violations

- Wal-Mart pays over \$33 million to resolve alleged violations of the FLSA involving incorrect computation of overtime
- Wells Fargo pays \$12.8 million to settle a class-action brought by workers claiming they were improperly classified as exempt and were denied meal breaks
- IBM pays \$64 to settle claims brought by technical and support workers alleging they were misclassified as exempt
- Marriott International pays \$1.35 million to settle a class-action brought by hotel employees to enforce minimum wage laws

# 1. Employee vs. Independent Contractor Determination

- Employers must take great care before classifying a worker as an independent contractor rather than an employee
  - There can be serious consequences under tax law, employment law and benefits law for misclassification
  - A common mistake is to assume that if an employer calls a person an independent contractor, the IRS and state agencies will accept that characterization.
- Agencies look at different sets of factors

- Degree of control
- Right to discharge
- Right to delegate work
- Hiring practices
- Pay practices
- Training
- Skill
- Duration of relationship
- Control over hours of work
- Industry customs
- Independent trade
- Furnishing of tools
- Place of work
- Profit and loss
- Intent of the parties
- Principal in business
- Sequence of work
- Reports required
- Same work as regular employees
- Integration

- Degree of employer's right to control the manner in which the work is to be performed
- Worker's opportunity for profit or loss depending upon his/her managerial skill
- Worker's investment in equipment or materials required for work or his/her employment of helpers
- Degree of permanence of the of the working relationship
- Whether the service rendered is an integral part of the employer's business

# Massachusetts Wage & Hour Test

- Under Massachusetts law, there is a rebuttable presumption that any person performing services for another is an employee
- The presumption can be overcome by meeting a three-prong test:
  - Individual has been and will continue to be free from control and direction in connection with the performance of his service
  - Service is performed outside the usual course of business
  - Individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the performed service
- Failure to comply with the Massachusetts law is a criminal misdemeanor with possible fines up to \$1,000 and potential imprisonment for up to two months

## 2. Classifying Employees as Exempt

- Several categories of workers may be exempt if they are paid at least \$455 per week and meet certain “duties” tests
  - Administrative employees
  - Executive employees
  - Professional employees

## 2. Classifying Employees as Exempt

- Exemptions may also apply to other categories:
  - Computer employees
  - Outside sales employees
  - Business owners
  - Highly-compensated employees

## 3. Paying Exempt Employees

- Exempt employees must be paid on a “salary basis”
- Department of Labor regulations require an employer to regularly pay salaried employees a predetermined amount of pay each pay period “which amount is not subject to reduction because of variations in the quality or quantity of work performed”

- Absences from work for a full day or days for personal reasons other than sickness or disability
- Full day absences occasioned by sickness or disability if deduction is made in accordance with a bona fide plan, policy or practice providing compensation for loss of salary due to sickness/disability
- Penalties imposed in good faith for infractions of safety rules of major significance

- Deductions due to variations either in quality or quantity of work
- Deductions for absences that are required by the employer, including lack of work
- Deductions for a partial day's absence from work
- Deductions for a whole day of work due to illness or disability without having a bona fide plan, policy or practice of providing compensation for this reason
- Deductions for jury duty or military leave that exceed the amount an employee received for such service

## 4. Recording and Paying for Work Time

- Employees must be compensated for all “working time”
- Working time generally includes all time during which an employee is required to be on the employer’s premises, on duty or at the prescribed workplace as well as time during which an employee is “suffered” or “permitted” to work

## 4. Recording and Paying for Work Time

- U.S. Supreme Court has held that time spent “donning and doffing” unique protective clothing constitutes working time
- May also include on-call time, training time and travel time
- Working time does not include meal times during which the employee is relieved of all work-related duties

## 5. Wage Payment Timing

- Hourly employees must be paid either weekly or bi-weekly
- Salaried employees can be paid weekly, bi-weekly, semimonthly or, at the employee's option, monthly

## 5. Wage Payment Timing

- Employees who are fired from work must be paid all wages owed on the day of discharge
- Employees who quit, retire or leave employment for other reasons must be paid in full on their next regular payday
- Employers generally are not free to withhold from the final paycheck of a former employee amounts they believe are owed to them by the employee. Only where there is a definite amount of money at issue and there can be no dispute that the money is owed, can the employer “set off” that amount from the employee’s final paycheck

## 6. Identifying and Computing Overtime Pay

- Employers are prohibited from working any non-exempt employee more than 40 hours in a workweek without paying the employee extra compensation for the overtime hours worked
- The required overtime premium rate is one and one-half times the employee's "regular rate" of compensation
- The law does not require that an employee's use of sick, vacation or holiday time during a workweek be counted toward the 40 hours; the employee must actually work for 40 hours to qualify for overtime pay

## 7. Recording and Paying for Vacation Time


- While an employer is not obliged to provide paid vacation time to its employees, once it decides to do so, Massachusetts law will treat the paid vacation time as if it were wages
- Amendments to vacation policies may apply prospectively only
- Accrued holiday or vacation pay that is owed to an employee must be paid upon termination of employment
- The Massachusetts Attorney General has allowed “use it or lose it” policies

## 8. Paying Male and Female Employees Equally

- The federal Equal Pay Act prohibits employers from discriminating against employees on the basis of sex
  - In particular, by paying employees of one sex at a wage rate less than that paid to employees of the opposite sex in the same establishment for equal work
  - This is measured by whether the jobs being compared require equal skill, equal effort and equal responsibility and are performed under similar working conditions

# Make Sure Your Wage & Hour House is in Order!

- Evaluate employees' activities and identify which are and are not work time
- Review all positions classified as exempt
- Review job descriptions
- Review nonexempt personnel timekeeping requirements to ensure that starting and ending times are being properly documented, as well as lunch and break times
- Review policies regarding pay deductions
- Review vacation policies to be sure they are clear



# Lawful Screening Strategies for Applicants and Employees

Kimberly Y. Jones



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- Screening of prospective employees may include:
  - Criminal background checks
  - Drug testing
  - Education verification and
  - Reference checking

# Negligent Hire, Negligent Retention

- Employer becomes aware, or should have become aware, of problems with an employee that indicated his/her unfitness, and fails to take further action such as investigating, reassignment or discharge.
- Brimage v. City of Boston, (Mass.Super. 2001): summary judgment denied on negligent hire claim
  - Criminal background check would have revealed recent prison time for rape
  - Employee's resume reflected long, unexplained gap in employment history

# Protect Your Organization Against Claims of Negligent Hiring

Did employer adequately investigate the fitness  
of the prospective employee?

- Employer has a duty to protect its employees, customers, clients and other third parties from injury caused by an employee the employer **knew – or should have known –** posed a risk of harm to others
- Possible liability to third parties injured by an employee if the employer was negligent in hiring or retaining the employee

# Pre-Employment Screening and Prohibited Inquiries

- Various laws restrict what employers can ask and do in the course of interviews and background checks and require certain disclosures to applicants
- Employers should develop a standard protocol for interviews and background checks that meet the requirements of all applicable federal and state laws

- All inquiries must be job-related
- Employer may not seek information likely to disclose protected status

# Preventative Screening Measures to Avoid Negligent Hiring Claims

1. Obtain written consent to acquire information from previous employers
2. Follow through and contact prior employers
3. Verify academic credentials and employment history
4. Request and contact applicant's professional and personal references
5. Document and maintain information obtained during interview and verification process

When seeking references, the **hiring employer** should:

1. State on employment application that any misrepresentation may result in termination
2. Ask prospective employee to provide references and obtain written consent to contact present and former employers
3. Verify dates of employment, title, duties and responsibilities and other pertinent information
4. Ask: Is this person eligible for rehire?

When providing references, the **former employer** should:

- Designate individual to whom employment verification inquires should be directed
- Develop policy regarding employment verification inquiries – name, title, salary, dates of employment
- Rely only on statements contained in employee's personnel file which are known to the employee
- Document caller's identity, contact information and response to reference inquiries

# Liability Issues and Job References

- Issue: Concern that providing honest, negative references about former employees places employers at risk of defamation claims
- Many employers have adopted “no comment” policies, providing only the former employee’s dates of employment and job title
- But employers also want to be warned about a prospective employee’s history

- Qualified privilege
  - “Where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it.” Bratt v. IBM Corp., (Mass. 1984)
  - Employee must show that the disclosure resulted from an expressly malicious motive, was recklessly disseminated, or involved a reckless disregard for truth or falsity of the information

The Federal Fair Credit Reporting Act (FCRA), (15 U.S.C. § 1681, *et seq.*)

- Regulates use of consumer information and other background information received from consumer reporting agencies (CRAs)
- Includes consumer credit reports and investigative consumer reports

- Any communication, written or oral, of information by a consumer credit reporting agency about a person's creditworthiness, payment history, credit standing/rating, overall indebtedness or credit capacity

# Investigative Consumer Reports

- Information about individual's character, general reputation and mode of living that may be gathered through interviews with neighbors, friends, associates and other acquaintances

Prior to requesting consumer report, employer must:

- Provide clear, conspicuous written disclosure to individual that a consumer report may be requested for employment purposes
- Written disclosure must be a separate document
- Obtain written authorization from applicant or employee

Employers have additional notice and disclosure requirements if seek **investigative consumer reports**:

- Must be clear, conspicuous written disclosure
- Employer must obtain individual's written consent with 3 days of seeking information
- Include statement informing individual of right to request additional information and to receive a summary of legal rights

# The Massachusetts Fair Credit Law

- Similarly, Massachusetts law restricts employers ability to obtain consumer reports
- Employers are subject to, and must comply with, both FCRA and the Massachusetts Fair Credit law (M.G.L. c. 93, section 50, *et seq.*)
- Disclosure may be made in employee manual
- Prior written authorization only required for investigative consumer report
- If adverse action taken based on consumer report, employee must be notified, in writing, within 10 business days of the adverse decision

## Massachusetts law limits:

- Ability to ask current and prospective employees about their criminal histories.
- Type of information an employer can obtain from the Massachusetts agency that maintains criminal records.

- M.G.L. c. 151B, section 4(9): employer may not request any information or discriminate against an applicant or employee by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding:
  - An arrest or detention in which no conviction resulted,
  - A first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace, or
  - Any misdemeanor conviction over five years old at the time of application for employment or request for information, unless the person has been convicted of any offense within five years immediately preceding the date of the request for information.

- Employers can, however, ask about felony convictions, as long as the inquiry complies with the sealed records notice requirement of M.G.L. c. 276, sections 100A to 100C
- Caveat: law does not prohibit employers from requesting such information from other sources or from relying on such information, if obtained from sources other than applicant, in making a decision regarding hiring

- Conviction and, in some instances, arrest data can be obtained from the Criminal History Systems Board, which administers the CORI law
- Most employers can obtain conviction data and criminal custody status from the Criminal History Systems Board, provided that the individual named in the request was convicted of a crime punishable by imprisonment for five years or more or was convicted and sentenced to any term of imprisonment *and*, at the time of the request:
  - A. Is incarcerated, on probation, or under the custody of the parole board; or

- B. Having been convicted of a misdemeanor, has been released from all custody or supervision for not more than one year; or
- C. Having been convicted of a felony, has been released from all custody or supervision within the last two (2) years; or
- D. Having been denied release on parole or returned to custody for parole violation, has been discharged for not more than three years.

- Massachusetts law guarantees a “right against unreasonable, substantial or serious interference with privacy.” M.G.L. c. 214, section B
- An employer’s disclosure of information regarding an employee’s state of health can constitute an invasion of privacy. Galdauckas v. Interstate Hotels Corp. (D.Mass. 1995)
- No violation of G.L. c. 214, section 1B, where disclosure is reasonable or justified

- Bratt v. IBM Corp. (Mass. 1984) established a balancing test:
  - balance the employer's legitimate business interest in disseminating the information against the nature and substantiality of the intrusion
- Disclosure should be to a limited group of people who can help the employer determine whether the employee is fit to work

- Employees forbidden from using, possessing, selling or transferring any legally controlled substances, including alcohol, in the workplace, or while acting as an agent of the company at any time in any location
- Exception for medically-prescribed drugs and over-the-counter medications taken in accordance with the instructions for their use
- Assistance with seeking treatment for chemical dependencies

- Types of drug screening programs
- Applicants v. current employees

- *Bratt* balancing test continues to apply
- General recognition that requiring an employee to submit to a drug test is an invasion of privacy
- Whether drug testing is appropriate will depend upon the legitimate needs of the business and procedural safeguards put in place
- May be reasonable for some positions but not others