Employing Workers in Massachusetts: A Guide for Emerging Companies

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Introduction

At some point, every emerging company must identify and retain people to work for the business. The founders or owners of the business recognize that they cannot do it alone, and they need to bring on talented individuals to help the company grow. However, employment relationships are highly regulated. Federal and state laws impact such things as hiring and firing decisions, compensation, benefits, recordkeeping, safety, and workplace conduct. Emerging companies and new employers face unique challenges in this regard. They may lack experience with the vast array of legal requirements that affect employment decisions. In addition, managers of new businesses face so many other issues that labor and employment law matters may not receive the attention they require.

This Guide is intended to provide new businesses, particularly those in Massachusetts, with information about the basic requirements of federal and state law in the area of labor and employment. The format of this Guide is a series of frequently asked questions designed to address issues that are commonly confronted by new businesses.

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Getting Started

Q: I know that I need help but I am not sure I want to hire a permanent employee. Can I bring someone on as an independent contractor?

Probably not. Many new businesses question whether they need to retain an individual as an employee in the first place, thinking instead that an independent contractor relationship might be preferable. Oftentimes this stems from a concern that the relationship will be short-lived or from the perception that treating the individual as an employee will be a hassle or more expensive.

However, classifying someone as an independent contractor rather than as an employee is risky, particularly in Massachusetts, and could expose your business to legal liability. Independent contractors do not get the benefit of the many legal protections available to employees, such as unemployment insurance, wage and hour laws, workers' compensation and laws against discrimination. Independent contractors also are solely responsible for any taxes stemming from the relationship. For these reasons, the classification of individuals as independent contractors rather than employees is closely scrutinized by the government and is the subject of a significant amount of litigation. The fact that a worker signs a contract saying that he or she is an independent contractor does not immunize the company from these risks.

Massachusetts has a particularly stringent test for determining independent contractor status. For purposes of its wage and hour laws, individuals are presumed to be employees unless the employer can prove all of the following:

(1) the worker performs services free from control and direction;

(2) the services performed are outside those of the employer's normal course of business; and

(3) the worker is engaged in an independently established trade or profession of the same nature as the services performed.

This test, particularly the second prong, is difficult to satisfy, and it has become a boon for plaintiffs' lawyers seeking to challenge the use of independent contractor relationships.

The potential liability associated with misclassifying employees as independent contractors can be significant. Independent contractors often are not paid in accordance with state and federal wage and hour laws, leading to liability for unpaid wages and overtime. These claims carry the potential for double or triple damages. Employers also risk liability for unpaid payroll taxes, unemployment insurance, and workers' compensation premiums. Thus, new businesses should proceed with caution when considering the use of independent contractors rather than employees.

SPECIAL NOTE:

This Guide is not a comprehensive or exhaustive description of all of the laws with which Massachusetts employers must comply. Rather, it is intended as a primer for new businesses on getting started as an employer and as a quick reference guide on matters of most widespread concern to emerging companies. Because of the varying circumstances facing businesses in Massachusetts and elsewhere, this Guide is for general information only and should not be construed as legal advice or a legal opinion on any specific issue. Many laws governing the employment relationship depend on the size of the employer. Particular businesses or industries may be subject to different legal requirements than those discussed in this Guide. You are urged to consult with an attorney concerning your own situation and about any specific legal questions you may have. Finally, the law governing the workplace is constantly changing. While this Guide is current at the time of publication, you should discuss with your attorney about any subsequent changes or developments in the law.

If the company doesn't have money to pay employees, can it pay employees with stock or defer payment?

No. As discussed in the section below regarding wages and benefits, employees must be paid at least the minimum wage and on a timely basis in accordance with state and federal law.

Many college students and recent graduates are looking for work experience through unpaid internships. Can I hire someone as an unpaid intern?

Probably not. It is not unusual for new employers to consider retaining individuals as unpaid interns rather than employees. Like independent contractor relationships, the use of unpaid interns is under attack and closely scrutinized by the U.S. Department of Labor. In general, individuals who perform work for and at the behest of a for-profit business are employees entitled to at least the minimum wage for all hours worked. Only internships that are training programs for the benefit of the intern and not the employer are appropriately unpaid.

The Hiring Process

Is an employer required to use a standard employment application, and, if so, what can I ask on the application?

No, you do not have to use an application, but many employers choose to do so. Massachusetts and federal law impose numerous requirements regarding what employers can ask on an employment application. The following are some of the key restrictions on what an employer can say on an application:

- **Criminal records:** Massachusetts prohibits employers from asking about an employee's criminal history on an employment application.
- **Polygraphs:** All applications must contain a statement that it is unlawful to require a candidate to submit to a lie detector test as a condition of employment.
- **Work history:** If an employment application inquires about an individual's work history, it also must state that the applicant may include verifiable volunteer work.
- **Protected Categories:** Applications should not inquire about an applicant's race, national origin, color, gender, sexual orientation, gender identity, ancestry, religion or age. However, an employer may invite applicants to disclose this information voluntarily for purposes of the employer's affirmative action program. With respect to age, the Massachusetts Commission Against Discrimination takes the position that generally the only proper question is, "Are you under 18, yes or no?"

May I require a job applicant to submit to a medical examination to ensure that the candidate can perform the job?

No. Employers may not require a job applicant to undergo a medical examination or answer questions about his or her medical history before a conditional offer of employment is made. However, employers may require post-offer, pre-employment medical examinations to determine whether a prospective employee can perform the essential functions of a job, so long as all employees entering that job must submit to the examination. Note that employers are forbidden by Massachusetts law from testing applicants, offerees or employees for AIDS or the HIV virus.

Can I require an applicant to submit to a drug test?

Maybe. In some industries, drug testing may be required by law. In general, however, drug testing is considered an invasion of privacy under Massachusetts law. Employers may require job applicants to submit to a drug test provided that there is a legitimate business reason for the testing and the employer is careful to protect the confidentiality of the results. To the extent that the employer requires the applicant to be tested at a certain facility or by a certain physician, it must reimburse the applicant for any associated costs.

May I conduct background or credit checks on applicants for employment?

Yes. In some industries, a background and credit check may be required. For most, it is at the discretion of the employer. However, this area is heavily regulated, and, in general, an employer should have a good business rationale for conducting a background check. Under the federal Fair Credit Reporting Act, an employer must get an applicant's prior written consent before initiating a third-party background or credit check or obtaining such a report. Many employers utilize a third party to manage the screening process. If you intend to reject the candidate due to negative information in the report, before doing so, you must disclose the report to the individual and give them an opportunity to correct any inaccurate information. Thereafter, you must give the applicant notice of your decision and provide

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her with additional disclosures, including: the name, address and toll-free telephone number of the agency that made the report; a statement that the agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished.

There are additional requirements if the background check includes criminal records. In Massachusetts, an employer that performs five or more criminal background checks per year must maintain a written policy regarding such checks. Further, an employer cannot question an applicant about his or her criminal history without first giving the applicant a copy of the criminal record information. If the employer decides to not hire an applicant due to criminal record information, the employer must provide that information to the applicant, along with a copy of the employer's written policy and information about how to correct a criminal record.

Q: One of my applicants appears to be pregnant. A manager is concerned that if we hire her, the company will need to hire somebody else in a few months when she goes on leave or if she does not return to work. Can the company reject her on this basis?

No, this is not a legitimate business reason for declining to employ her. Unless based upon a bona fide occupational qualification, employers may not refuse to hire someone because of race, color, religion, national origin, sex (including pregnancy), ancestry, gender identity, sexual orientation, age (40 years old or older), genetic information or military service. Nor may employers discriminate against qualified individuals with a disability who are capable of performing the essential functions of the job with or without reasonable accommodation, except in certain limited circumstances where the required accommodation would impose an undue hardship on the employer's business.

Q: My top choice for an open position is a foreign national. Is there anything special that I need to do or worry about?

Employers are required to verify and document that their employees are legally authorized to work in the United States, and must maintain I-9 forms on all employees for this purpose. This is true for all employees, not just those that are foreign nationals. The federal government conducts random audits on employers to ensure compliance with this law.

Employers wishing to employ foreign nationals must obtain approval from the federal government. There are several available visa categories depending on the particular situation of the foreign national.

Q: How do I document an offer of employment to a candidate?

The most common way of making an offer of employment is through a written offer letter. An offer letter typically includes the title of the job being offered, a proposed start date and a description of the wages and benefits being offered. It is typical for the offer letter to describe rights to equity or stock options. The offer letter may also spell out any contingencies applicable to the offer, such as a satisfactory background or reference check or the employee's execution of a standard non-competition or non-disclosure agreement.

Most offer letters make clear that the employment relationship is "at will," meaning that employment is not guaranteed for a particular duration. The employee may quit at any time and for any reason, and the employer may terminate the employee at any time and for any lawful reason. Although Massachusetts law presumes that employment is "at will," it is good practice to state this in the offer letter.

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For key employees or officers, employers may wish to enter into more formal, written employment contracts. These agreements often establish a particular period of employment or limit the circumstances under which the employer may terminate an employee, such as for "cause." These contracts should be carefully drafted to ensure that the employer's intent is reflected in the written agreement, since Massachusetts courts will enforce the contract according to its express terms.

I want to prevent an employee from leaving and going to work for a competitor or stealing my clients. Is that something to worry about at the hiring stage?

Yes. Some employers seek to restrict an employee's post-employment conduct for some specified period of time. Non-competition provisions prohibit the employee from working for a competitor, while non-solicitation provisions prevent the employee from soliciting away the employer's customers or employees. Whether an employer will want these kinds of agreements typically depends on the nature of the industry involved and the type of position the employee holds.

It is preferable to have a non-competition agreement signed at the inception of the employment relationship. To be valid, there must be consideration for the post-employment restriction. Generally, the offer of employment is viewed by courts in Massachusetts as sufficient. Non-competition agreements signed after employment has begun may require additional consideration such as a wage increase or a bonus. It is a good practice to specifically reference the non-competition or non-solicitation agreement in the offer letter and make clear that the offer of employment is conditioned on the candidate's execution of the agreement.

Every state has its own rules regarding the extent to which it will enforce a non-competition agreement, if at all. With every hire, employers should think about where the employee lives and works. Some agreements will specifically identify Massachusetts law as applying to the agreement. Some states, such as California, will not honor such choice of law provisions because they have a strong public policy against non-competition agreements.

Do I need an agreement to protect my business's confidential information?

Yes. Like a non-competition agreement, employers may wish to enter into written non-disclosure agreements at the outset of employment to protect their trade secrets, inventions and confidential and proprietary business information. Non-disclosure agreements generally prohibit the employee from divulging or misusing such information at any time during or after the employment relationship. They also include provisions regarding rights to inventions and copyrightable materials.

Wages and Benefits

Our business does not have enough cash to pay employees. Can an employee voluntarily work for no pay?

No. Employees are entitled to at least the minimum wage. Currently, the Massachusetts minimum wage is $8.00 per hour for most employees. The minimum wage rate will increase to $9.00 hour on January 1, 2015, to $10.00 an hour on January 1, 2016 and to $11.00 an hour on January 1, 2017. Other states have their own minimum wage rates. Currently, the federal minimum wage is $7.25 an hour. An employee and employer cannot contract out of these requirements.

What if the employee is also an owner? Can she work for no pay?

Probably not, at least under state law. Under federal law, an employee who owns at least a bona fide 20% equity interest in the business, whether a corporation, partnership or other entity, is exempt from the minimum wage rules. This means that such an employee-owner could work for no pay. However, Massachusetts law does not have a similar exemption. As a result, there has been a significant amount of litigation by former company founders who claim to be owed wages under state law because they worked for no pay.

Can we defer payment of wages until the company receives financing if the employee agrees to the deferral?

No. In general, Massachusetts law requires employers to pay hourly employees either weekly or bi-weekly and within six days of the end of the pay period. Certain salaried employees can be paid on a bi-monthly or monthly basis if they voluntarily agree to that. However, an employer cannot defer payment beyond these time periods, nor can the employee and the employer contract out of the state wage and hour laws.

Under Massachusetts law, an employee is automatically entitled to triple damages, attorneys' fees and interest if an employer fails to pay wages in a timely manner.

I understand that we are not supposed to defer wages, but what is the worst that can happen if we ultimately pay our employees what they are owed?

Under Massachusetts law, an employee who prevails in a lawsuit to recover unpaid wages is automatically entitled to triple damages, attorneys' fees and interest if an employer fails to pay wages in a timely manner. Late payment by the employer of the wages due after a complaint is filed is not a defense. Plus, non-payment of

wages is a crime which is punishable by fines and imprisonment in egregious cases.

Q: Can we pay people in equity if the value of the equity is equivalent to the minimum wage?

No. Employees must receive at least the minimum wage in cash.

Q: If we pay an employee the minimum wage, can we defer other compensation?

Yes. A good practice is to set the employee's wage at the minimum wage (or the minimum salary needed to maintain an exemption from the overtime requirements) and offer a discretionary or conditional bonus to the employee to be paid in the future.

Q: We have an office environment, so all of our employees are paid only a fixed salary rather than an hourly wage plus overtime. Is that ok?

Probably not. The general rule is that unless an exemption applies, employees are entitled to overtime pay for hours worked in excess of 40 hours in a workweek. The required overtime premium rate is one and one half times the employee's "regular rate" of compensation. The regular rate of pay is generally the employee's hourly rate. Thus, the payment of a fixed salary each week without regard to the number of hours worked by the employee might violate the overtime rules.

Certain employees are "exempt" from overtime pay requirements, and the law sets forth specific tests for determining whether an employee qualifies for an exemption. The most common positions excluded from the law are executive, professional and administrative employees and outside sales people. To be an executive, professional or administrative employee, the individual generally must satisfy a salary test ($455 per week) and a "duties" test. These exemptions are viewed narrowly and are the subject of a significant amount of regulation and litigation. The fact that an employee works in an office and is paid a salary does not render her exempt from the overtime requirements.

Q: All of our employees work 40 hours per week, no more and no less. Is there anything that we need to do or worry about?

Yes. Employers cannot assume that employees are working a specific number of hours or at specific times per day. For non-exempt employees, you must maintain accurate records showing the actual hours worked each day and each week by each employee. You do not have to maintain a time clock, but there needs to be a system in place to record work times. Further, employees must be paid based on those actual hours worked.

Q: I do not offer my employees sick time. Do I have to?

Beginning on July 1, 2015, employers must allow employees to accrue and use up to 40 hours of sick time per calendar year. For employers with 11 or more employees, whether full-time or part-time, the sick time must be paid. For smaller employers, the sick time can be unpaid.

Q: What must I withhold from employees' paychecks?

Employers are required to withhold state and federal income tax from employees' wages for remittance to governmental taxing agencies. They also must withhold Social Security and Medicare payroll taxes from employees' wages. Beginning January 1, 2013, employers are responsible for withholding an additional Medicare tax of 0.9% on an employee's wages and compensation above a threshold amount based on the employee's filing status (i.e., $200,000 for an employee who is single). At the time wages are paid, employers must provide employees with a written breakdown of each withholding, usually via the employee's pay stub.

Beyond required taxes and costs of benefits, Massachusetts law strictly limits what amounts may be withheld involuntarily from an employee's paycheck

Employers may also deduct from wages the cost of fringe benefits selected by the employee. These deductions should be documented on the pay stub too.

Beyond required taxes and the costs of benefits, Massachusetts law strictly limits what amounts may be withheld involuntarily from an employee's paycheck. Even where an employee owes money to the employer, these amounts can only be withheld from the employee's wages under specific and limited circumstances.

Employers should keep in mind that a material change in the employment relationship, such as a cut in pay, may invalidate an existing non-competition agreement with the employee. You may need to enter into a new agreement in connection with the new rate of pay.

Q: I want to cut an employee's pay. Is that ok?

It depends. If the employee has a written employment contract promising a particular wage for a period of time, cutting the employee's pay could be a breach of the agreement. Further, a

cut in a pay could have wage and hour implications. Several of the overtime exceptions require that the employee be paid at least $455 per week, and of course, you generally cannot cut an employee's rate of pay below the minimum wage. With these potential complications in mind, generally an employer can reduce the pay of an at-will employee on a prospective basis.

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Q. Do I need workers' compensation insurance?

Yes. All private employers are required to participate in the state workers' compensation system, usually by purchasing workers' compensation insurance. Employees who suffer work-related injuries or illnesses may make claims for compensation, which are paid as insurance benefits under this system. As with other insurance programs, premium payments correlate to the size of the employer's payroll, the nature of the employer's business, and the number and amount of claims. Employees making claims for workers' compensation are entitled to certain statutory rights, including preference in re-employment and protection from discrimination.

Q. What do I have to do, if anything, about state unemployment assistance?

All employers are required to participate in the state unemployment compensation system by making contributions to a state-run fund. In Massachusetts, employers must register with the Division of Unemployment Assistance and make quarterly filings regarding hours worked by employees. Employers are required to make quarterly payments based on those filings, and the unemployment fund pools payments from all employers together. An employer's contribution rate is determined in part based upon the number of benefit claims made by that employer's former employees.

Terminated employees may make claims for unemployment benefits. Not all employees who become unemployed are entitled to unemployment compensation. For example, employees who voluntarily leave a job or are fired for certain deliberate misconduct generally will not be eligible to receive unemployment benefits. Employers can oppose specific unemployment compensation claims.

Q. Am I required to offer benefit plans to employees, and, if so, what do I have to do?

In general, an employer can determine what benefits, if any, it wishes to offer to its employees. Once an employer establishes a benefits program, however, certain legal restrictions govern the implementation and provision of those benefits.

There is a complex federal law, the Employee Retirement Income Security Act (ERISA), which governs employee benefit plans. ERISA governs how such plans are run, including record-keeping requirements, employee notices, funding and fiduciary obligations. Employers wishing to establish benefit plans should first check all of the requirements governing them.

Also, employers should carefully evaluate any informal procedures used to confer benefits on employees. Such informal policies may be construed as an ERISA-governed plan, requiring an employer to follow all of ERISA's procedures.

Q. Do I need to worry about federal health care reform?

Yes. The Patient Protection and Affordable Care Act (ACA), otherwise known as national health care reform, imposes certain requirements on employers regarding the provision of group health insurance. A "large" employer, meaning one with at least 50 full-time equivalent employees, may be subject to certain fees beginning on January 1, 2015 if it does not offer health insurance. One fee, referred to as 4980H(a) liability (in reference to the particular statutory provision), applies when the employer fails to offer full-time employees and their dependents the opportunity to enroll in an employer sponsored health plan and at least one full-time employee received a tax credit for health insurance premiums. The employer will be assessed an annual, per employee fee of $2000 for all full-time employees with the first thirty excluded. The other fee, 4980H(b) liability, applies when the employer offers a health plan to its full-time employees and their dependents, but one or more full-time employees is certified as receiving the premium tax credit and the employer's coverage is unaffordable or does not provide minimum value. Under these circumstances, the employer is assessed $3,000 annually for each full-time employee who is certified as receiving the premium tax credit. Thus, while the ACA does not require that an employer offer a health plan, so-called large employers that do not face significant fees.

Small employers (those with fewer than 25 full-time equivalent employees) may be eligible for a tax credit if they offer a group health plan. To be eligible, the employer must contribute at least 50% of the cost of single coverage, and employees' average

wages must be less than $50,000. Beginning in 2014, the health coverage must be purchased through the Small Business Health Options Program (SHOP) Marketplace. The amount of the credit varies by tax year and is subject to a formula.

I want to offer stock options to employees. What do I need to do?

It is typical for emerging companies to offer stock options to employees as part of their overall compensation package. Certain employee stock options called incentive stock options (ISOs) confer a tax benefit on the employee in that the employee may not have to pay ordinary income tax or employment taxes on the difference between the exercise price and the fair market value of the shares. A stock option must meet certain requirements to qualify as an ISO. Among other requirements, the option may only be granted to an employee, and the employee must exercise the option while she is an employee or within three months after termination of employment. The options must be granted pursuant to a written plan document, and the grant must be made to the employee pursuant to a written ISO agreement. The exercise price must equal or exceed the fair market value of the stock at the time of the grant.

Terms and Conditions of Employment

What kinds of records must I maintain on my employees?

As described above, employers must retain payroll records regarding employees' hours of work and pay. You also must maintain information constituting a personnel record under state law. Personnel records typically include applications for employment, resumes, offer letters, performance evaluations, records of any disciplinary actions and supporting documents, compensation terms or agreements, and information about the termination of employment.

Medical records should not be part of the personnel file. Employers must be careful not to include highly personal information about someone other than the employee in the employee's personnel file. Additionally, employers should ensure that the access to personnel files is restricted.

Do I have to tell an employee about what is in her personnel file, and can she review the file?

Under Massachusetts law, an employer is required to notify an employee within 10 days when negative information is placed in the employee's personnel record. This rule is difficult to apply in practice because it applies to any information that might be used to affect the employee's job or opportunity for promotion.

In addition, employees have the right to review their personnel records, make copies of them, and correct or expunge any false information. Employers with twenty or more employees may not remove any information from an employee's personnel record without the consent of the employee until at least three years after the employment relationship ends. When an employee makes a written request for his or her personnel file, the employer must provide it within five business days.

Am I required to have an employee handbook or written employment policies?

Employers are not required by law to have employee handbooks, although many employers choose to create such handbooks in order to spell out the terms, conditions and benefits of employment. The U.S. Department of Labor requires that a handbook include a notice regarding employees' rights and responsibilities under the Family and Medical Leave Act (if the law applies to the employer). If you do not maintain a handbook, you must provide this notice to new employees when they are hired.

Massachusetts requires employers to promote a workplace free from sexual harassment by adopting a written anti-harassment policy and establishing procedures for internal reporting of sexual harassment complaints. Employers are required to distribute this policy to new employees and to redistribute it to all workers annually.

Except for a sexual harassment policy (described below), employers are not required by law to have written personnel policies. As in the case of employee handbooks, employers often want detailed policies on certain key subjects, such as vacation, computer use and confidentiality.

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Can I set employees' work schedules?

Yes. Employers generally are free to set whatever hours of work they wish for employees and are not bound to a 9:00-5:00 schedule or to any other set schedule. Employers involved in certain industries, however, such as manufacturing, are required to provide employees with one day off in seven.

Can I require that employees work on Sundays or legal holidays?

Massachusetts law imposes restrictions on Sunday work, which can vary greatly depending on the nature of the business involved. These restrictions include when (if at all) the employer is permitted to be open, whether a police permit is required, whether employees may be compelled to work or penalized for refusing to work, and whether employees must be paid at time-and-one-half their regular rate of pay. Employers should check the law applicable to their particular situation before employing workers on Sunday.

The restrictions applicable to Sunday work also apply to the following legal holidays: Memorial Day, Independence Day, Labor Day, Columbus Day (until noon), Veterans' Day (until 1:00 p.m.), Thanksgiving and Christmas Day. In addition, retail establishments are subject to special restrictions on New Year's Day. Employers are not required to pay employees for holiday time off but it is customary to do so.

Am I required to give paid vacation?

No. Employers are not required to provide paid vacation time to employees. However, if an employer chooses to provide paid vacation time, there are a number of legal restrictions on the administration of vacation policies, and it is recommended that an employer maintain a written policy regarding vacation time. It is generally acceptable in Massachusetts (but not in some states) for employers to have "use it or lose it" vacation policies, to cap the amount of vacation time an employee can accrue, to require certain scheduling procedures and to limit carryover from year to year. However, an employer must ensure that employees have adequate prior notice of the policy and a reasonable opportunity to use accumulated vacation time within the established time limits. Also, employers must pay employees their wages when they take a paid vacation in the same manner as if they had worked.

I don't want to track vacation time. Can I have a "no-vacation-policy" policy, meaning that employees can take as much vacation as they want, so long as they get their work done?

Generally, yes. So long as employees have a reasonable opportunity to take vacation and the policy is implemented fairly, an employer can have a policy that does not place a cap on the amount of vacation time. One practical challenge occurs, however, when the employer believes that an employee is abusing the policy. An employer should treat the issue as a performance problem rather than create a de facto but unwritten cap on vacation time.

Am I required to let employees take a meal or rest break?

Employees who work more than six hours in a day must be given a break of at least thirty minutes for a meal, which can either be paid or unpaid. If the time is to be unpaid, the employee must be completely relieved from duty.

Employers are not required to allow employees to take other breaks during the workday, but it is customary to do so. Such breaks must generally be paid.

Am I required to provide paid sick days?

Effective on July 1, 2015, all employees in Massachusetts must be allowed to accrue up to 40 hours of sick leave time per year. For employers with at least 11 employees this leave must be paid.

Under what circumstances am I required to allow employee to take leave time from work?

Massachusetts and federal law requires that employers provide the following categories of leave to employees:

Jury duty: Under state law, employers must permit employees to take time off to serve on a jury. Employers must pay employees for their first three days of jury service.

Military duty: Employers must permit employees to take up to seventeen days off each calendar year to satisfy a military reserve training obligation in the United States armed forces. Further, under the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the pre-service employer must reemploy service members returning from a period of service in the uniformed services where the cumulative period of service is five years or less.

Military family leave: Under the federal Family and Medical Leave Act (which covers employers with 50 or more

employees), employees whose family member is on covered active duty or called to active duty may take up to 12 weeks of leave for certain qualifying exigencies. These include attending military events, arranging for alternative childcare or addressing financial or legal arrangements. Employees are also entitled to up to 26 weeks of leave to care for a family member who is a covered service member or veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness.

Parental leave: Under the Massachusetts Parental Leave Act, employers with six or more employees must permit employees to take up to eight weeks off for the purpose of giving birth to or adopting a child. While the law does not require the leave to be paid, if an employer offers paid leave it must treat male and female employees the same and must treat an adoption-related leave the same as a leave for the birth of a child.

Family and Medical leave. Pursuant to the federal Family and Medical Leave Act, employers of 50 or more employees must permit certain employees to take up to twelve weeks off each year to care for a newly born child, because of the placement of a child with the employee for adoption or foster care, because of the employee's serious health condition, or to care for a close relative with a serious health condition.

"Small Necessities" leave: Massachusetts law requires employers with 50 or more employees to permit eligible employees to take a total of 24 hours of leave in a 12 month period to participate in school activities directly related to the educational advancement of a son or daughter of the employee, such as parent-teacher conferences, or interviewing for a new school; to accompany the son or daughter of the employee to routine medical or dental appointments, such as check-ups or vaccinations; and to accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services relating to the elder's care, such as interviewing at nursing or group homes.

Domestic violence leave: An employer with 50 or more employees is required under Massachusetts law to allow employees to take up 15 days of leave if they or a covered family member are victims of domestic violence or abuse and the need for the leave is directly related to the abuse.

Q: One of my employees is disabled. What are my obligations?

Employers must provide qualified disabled employees with reasonable accommodations necessary to enable them to perform essential job functions, unless the required accommodation would impose an undue hardship on the employer's business. Such accommodations may include making physical facilities accessible to disabled employees; acquiring or modifying equipment or devices; providing readers or interpreters; modifying position requirements, training materials or policies; restructuring of jobs or work schedules; and reassignment to a vacant position. The extent of the employer's legal obligation will depend upon the particular facts and circumstances. Employers should keep in mind that the term "disability" encompasses a wide array of physical and mental conditions which require reasonable accommodation.

Q: I understand that discrimination in the workplace is improper. Does that mean that I have to treat all employees exactly the same?

No. Discrimination under federal and state law has a precise legal meaning. Employers may not discriminate in the terms, conditions, or privileges of employment on the basis of race, color, national origin, age, religion, disability, genetic information, military service, sex or pregnancy. Under Massachusetts law, discrimination on the basis of sexual orientation, gender identity or ancestry is also unlawful. In general, employers can treat employees differently for reasons other than their membership in any of these protected categories. However, a good practice is to make sure that there is a business justification for the employment decision.

Q: What is sexual harassment, and must I offer training on harassment?

The law recognizes two types of unlawful sexual harassment: Quid pro quo harassment occurs when an employer, usually by one of its supervisors, conditions job benefits on an employee's willingness to submit to sexual requests. The second form of harassment is a hostile work environment. A hostile work environment exists when an employee is subjected to unwelcome sexual comments, unwelcome physical touching, and other behavior of a sexual nature. Employers can be liable for a hostile work environment created by a supervisor or a co-worker.

Massachusetts law encourages but does not require employers to offer training about workplace harassment. Some states do require training. As described above, employers in Massachusetts are required to maintain a sexual harassment policy.

Q: Employees have a lot of legal rights. Am I required to tell employees about their rights?
Massachusetts employers are required to post notices regarding employees' rights under certain state and federal laws. Below is a list of required notices and the agencies responsible for them.

MASSACHUSETTS

"Domestic Violence Leave Law"
(Attorney General)

"Fair Employment Law"
(Massachusetts Commission Against Discrimination)

"Parental Leave Act Notice"
(Massachusetts Commission Against Discrimination)

"Massachusetts Wage and Hour Laws"
(Attorney General)

"Notice to Employees"
(Division of Industrial Accidents)

"Information on Employees' Unemployment Insurance Coverage"
(Division of Unemployment Assistance)

"Sexual Harassment in the Workplace"
(Massachusetts Commission Against Discrimination)

"Smoke Free Workplace"
(Department of Public Health)

FEDERAL

"Employee Polygraph Protection Act"
(Department of Labor)

"Your Rights Under the Fair Labor Standards Act"
(Department of Labor)

"Your Rights Under the Family and Medical Leave: Act of 1993" *(Department of Labor)*

"Equal Employment Opportunity Is the Law"
(Equal Employment Opportunity Commission)

"Job Safety & Health Protection"
(Occupational Safety & Health Administration)

"Uniform Service Employment and Reemployment Rights Act"
(Department of Labor)

These notices must be posted prominently in a location, which is accessible to the general workforce.

Termination of Employment

Do I need to have a good reason to terminate an employee?

Unless an employee has an employment contract setting a particular period of employment (e.g., one year), or otherwise limiting the circumstances under which the employee can be terminated (e.g., only for "good cause"), employment is at will. This means that employers are permitted to fire employees at any time and for any lawful reason, and an employee can quit at any time and for any reason.

There are specific limitations on the general rule that an employer has the right to decide whether and when to fire an employee. While an employer can fire an employee for a good reason or even for no reason at all, an employer cannot fire an employee for a "bad" reason. The most frequently litigated bad reason is discrimination. Employees cannot be terminated on account of race, color, religion, national origin, sex, ancestry, military service, sexual orientation, gender identity, disability, age (40 years old or older) or genetic test results. Nor can employees be terminated in retaliation for exercising certain legal rights, such as serving on a jury, cooperating with a criminal investigation, filing a workers' compensation claim, complaining about discrimination or refusing to commit perjury. Employees also cannot be terminated to prevent them from obtaining benefits under an ERISA plan or earning a commission or bonus.

What is the difference between a layoff and a firing?

A layoff differs from a firing in that a layoff typically is the result of economic/business factors, rather than the performance of a particular employee. The legal standards for the two, however, are very similar. Absent reliance on impermissible factors (e.g., discrimination), an employer generally can decide whether there will be a layoff, when it will occur and who will be laid off.

If I am laying off a group of employees, is there any concern about discrimination?

Yes, there can be. A common problem in layoffs is allegations of age discrimination. In situations where large numbers of employees laid off are 40 years old or older, and many of those who remain are under 40, an age discrimination claim becomes more likely. Similarly, if a layoff disproportionately affects employees in a particular protected category, this too could lead to allegations of

discrimination. Employers must plan layoffs carefully so as to anticipate these and other charges of wrongdoing.

I am unhappy about the performance of one of my employees. However, I think it is easier to label the termination as a layoff than confront the employee about his performance. Is that ok?

You can do it, but it creates unnecessary risk. It is recommended that an employer is honest and direct with an employee about the reasons for the termination. If the employee sues for discrimination, the employer must establish a legitimate, non-discriminatory reason for the termination. Telling the employee that he is being laid off when he is in fact being fired for poor performance could undermine the employer's position in litigation.

Are there particular legal requirements associated with a layoff?

Yes. There are federal and state laws that impose restrictions on businesses that lay off large numbers of employees or who shut down an entire plant. The federal law, known as WARN, requires that employers with 100 or more employees give sixty days advance notice of a mass layoff or plant closing. Whether notice is required under WARN depends on the particular circumstances, including the number of employees affected.

When do I have to provide a final paycheck?

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 by the next regular payday. Full payment to former employees includes any holiday or vacation pay that is owed to the employee.

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 when an employee has agreed in writing to repay a loan or salary advance by the employer and there is no dispute regarding the amount owed may an employer "set off" the amount due from a final paycheck.

Am I required to pay severance?

Unless there is a written contract promising severance, employers generally are not obligated to pay severance benefits to employees who are terminated involuntarily. However, many employers choose to do so in order to assist the employees financially until they find a new job or for other reasons. Oftentimes, severance is paid in exchange for a release and waiver of claims. There are specific legal rules regarding what constitutes a valid waiver of claims, and severance payments may be subject to certain tax rules. Depending on the nature of the severance payments, they also may be subject to the detailed requirements of ERISA. It is advisable for businesses to check with legal counsel before instituting a severance program.

Do terminated employees have the right continue group health coverage?

There are federal and state laws requiring that employers continue group health benefits to employees after their employment ends or after they become disabled. State law requires that health, dental and disability coverage for involuntarily terminated employees be continued for thirty-one days after the termination. The federal law, commonly known as COBRA, requires that employers offer terminated or disabled employees and their dependents the option to continue participation in group health plans at the former employee's expense. COBRA applies to terminated employees whether the termination was voluntary or involuntary. There is also a state law, known as mini-COBRA, which applies to smaller companies not covered by COBRA.

Is there anything that I need to do regarding unemployment insurance?

Under Massachusetts law, employers must provide terminating employees a specific pamphlet entitled, *How to File for Unemployment Insurance Benefits*, along with the name and address of the employer and the employer's unemployment identification number. This information should be provided regardless of whether the employer believes the employee is eligible for unemployment benefits.

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Michael has extensive experience in litigating and advising clients about non-competition, non-solicitation and non-disclosure agreements, as well as related issues of unfair competition, misappropriation of trade secrets and breach of fiduciary duty. Michael founded and contributes to the Massachusetts Noncompete Law Blog.

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