



# Labor & Employment Law Section

## December 2007 **Newsletter**

# Section Co-Chairs' Corner

The Labor and Employment Section has embarked on an active year, filled with educational programs and public service initiatives, and we encourage you to participate. We kicked off the year with an event that focused on developing strategies for achieving genuine diversity in our professional community. Our reception and panel discussion on October 3rd (Achieving Real Diversity in the Legal Profession: Meet the Experts and Learn Best Practices) brought together various experienced individuals to discuss this topic, including Brent Henry (General Counsel for Partners Healthcare), Jane Bermont, (Verna Myers Consulting Group, LLC), Judge Angela Ordonez (Probate and Family Court) and Lauren Stiller Rikleen (Bowditch Institute For Women's Success). These experts shared their personal and professional experiences, providing attendees with recommendations and strategies for promoting measurable progress in this area.

The Section continues its tradition of providing members with a thought-provoking lunchtime educational program, at the BBA, on the first Tuesday of each month. Our initial program consisted of a standing room only presentation by Joanne F. Goldstein and Jocelyn Jones (Chief and Deputy Chief, Massachusetts Fair Labor Division) on October 2nd. Mediation was the topic of our most recent program, at which Christopher Kauders (Pre-Trial Solutions), Hon. Gordon L. Doerfer (Ret.) of JAMS, and Diane Zaar Cochran provided invaluable insights. We will also be presenting CLEs throughout the year, on a wide variety of topics ranging from labor law basics to cutting edge employment discrimination issues. We urge you to attend these programs and to contact us if you would like to propose a topic or participate in a presentation.

As always, we are focusing on public service projects as well. Our Section joined with the Criminal Law, Civil Liberties, Delivery of Legal Services, Health Law, College and University and Young Lawyers Sections in supporting CORI Reform, a cause which I was fortunate enough to be able to testify on, on behalf of the BBA, before the Joint Committee on the Judiciary in September. We will continue to work during the coming year on the re-writing of Massachusetts General Laws Chapter 151B, first with an eye to making the statute more accessible, coherent and internally consistent. This project will occur in phases and is moving forward under the capable guidance of Jay Shepherd and James Weliky. Finally, we have distributed via email to members of the Section the Employment Law Guide: A Practical Guide to Understanding Massachusetts Employment Law. This guide is the product of over two years of dedicated effort by

several members of our Steering Committee, and we are proud to recommend it to you.

Please communicate with us about any ideas you have for programs or events, and attend as many programs as possible! We look forward to working with all of you to make Section membership as rewarding and productive as possible.

## Section Co-Chairs



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# Calendar of Section Events

## Luncheon Series Meetings

**NEW DATE:** Monday, January 7, 2008 Program TBA.

Note the date of the January program has been changed since the usual date (the first Tuesday of the month) falls on a holiday.

## CLE Programs

### Labor Law Basics

Thursday, December 13, 2007

4:00 pm – 7:00 pm

Boston Bar Association - 16 Beacon Street

A panel of experienced practitioners will provide an overview of the relevant federal and state statutes and will culminate with audience participation in the analysis of a hypothetical union grievance, challenging an employer's decision to discipline an employee.

#### Panelists:

- **Bryan C. Decker**, Esq., Sandulli Grace P.C.
- **Donald W. Schroeder**, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo P.C.

#### Program Co-Chairs:

- **Michael C. Doheny**, Esq., Segal, Roitman & Coleman
- **Robert H. Morsilli**, Esq., Jackson Lewis, LLP

### Litigating and Winning Discrimination Cases

Wednesday, March 12, 2008

4:00 pm – 7:00 pm

Boston Bar Association - 16 Beacon Street

Details TBA

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## Past Events

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The October brown bag focused on hot topics and new developments in the wage and hour arena. Guest speakers Joanne Goldstein and Jocelyn Jones, the Chief and Deputy Chief of the Attorney General's Fair Labor Division, spoke about the types of wage statute violations the Attorney General is interested in pursuing and discussed the agency's enforcement of the strict independent contractor laws, among other things. The session was very well attended and lively and interesting questions about wage and hour issues were addressed by the speakers.

The topic of the November brown bag was best practices for the mediation of employment related disputes. Mediators Chris Kauders and Diane Zaar Cochran and Hon. Gordon Doerfer gave their individual thoughts on when to mediate a case, mediator selection, mediation briefs, and strategies during mediation including opening statements and opening offers/demands. This session brought many different opinions as to the best practices, and the sharing of ideas and opinions across the table led to a lively and interesting debate.

The December brown bag addressed the new Massachusetts Data Security Breach Law. State Representative Marty Walz of Littler Mendelson P.C. and Becca Rausch of Krokidas & Bluestein LLP described obligations imposed by the new law, which requires employers to provide notice to current and former employees and applicants if their "personal information" has been improperly disclosed, and also imposes new obligations on how employers dispose of documents and electronic data containing personal information.

## Judicial Update

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### **Trustees of Health and Hospitals of the City of Boston, Inc. v. MCAD, 449 Mass. 675 (2007).**

Bringing to an end 13 years of proceedings before the MCAD, the Superior Court, and the Appeals Court, the Supreme Judicial Court ruled in this case that the Trustees of Health and Hospitals of the City of Boston, Inc. (the "Trustees") had unlawfully discriminated against five African-American women by the manner in which it terminated their employment in connection with a lay-off.

The complainants were employed by the Trustees at its Healthy Baby/Healthy Child Program in Hyde Park. In 1994, due to funding restrictions, the Trustees determined that it would be necessary to layoff eight employees from this facility. In addition to the five complainants, a woman of Venezuelan ancestry and a white male were among the employees selected for layoff.

After deliberating about how to conduct the layoff, the Trustees decided that all employees would receive no advance notice, and would be monitored as they gathered their belongings. However, when the layoff was carried out, only the five African-American women were subject to both no advance notice and to monitoring as they gathered their belongings. They testified that the monitoring was insulting and demeaning, making them feel like criminals. The woman of Venezuelan ancestry received no advance notice, but was not monitored; the white male received advance notice and was not monitored.

The Trustees offered two reasons for treating the white male employee differently from the complainants: safety concerns and the necessity of protecting confidential client records. The MCAD hearing commissioner found that the Trustees had no nondiscriminatory reason to suspect that the complainants posed a safety concern, as they offered no evidence to support the existence of such concerns. Likewise, the Commissioner disbelieved the Trustee's asserted need to protect client records. Three of the five complainants did not handle such records. Moreover, the Trustees took no other measures to ensure the integrity of client files, such as determining in advance whether any of the complainants were in possession of such files, or inquiring of them at the time of layoff whether they possessed such files.

The MCAD hearing commissioner also concluded that the complainants and the white male employee were similarly situated in all relevant respects pertaining to the layoff procedure. In part, the Commissioner relied on the fact that the Trustees had determined the employees to be similarly situated by specifying a layoff procedure that was to be applied to all.

The Superior Court reversed the MCAD decision, holding that the white male and the complainants were not similarly situated because the white male “had a different job title and different responsibilities. Unlike some of the [complainants], [he] was not a supervisor, and he had no contact with [Trustee] clients. [He] worked part-time, rather than full-time and he could work from multiple locations, including his home if he so desired.” The Superior Court judge based this decision on a comparison of the job “performances, qualifications and conduct,” of the individuals, a standard drawn from the SJC’s decision in *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122 (1997).

The SJC reversed the Superior Court on the grounds that it had applied an erroneous standard to determine that the white male and the African-American women were not similarly situated. As the Court explained, the individuals’ respective job “performances, qualifications and conduct,” were not relevant factors under the circumstances of this case, because the Trustees had already determined that all employees subject to the layoff were to be treated identically. The Trustees had “essentially eliminat[ed] any discretion in layoff procedures based on the existing job-related criteria.” The standard drawn from *Matthews* was only a “general” standard which did not supply relevant factors for consideration on the facts of this case. In particular, the fact that the white male employee had different job duties, worked a part-time schedule, and was permitted to work at home or in another office were not probative of whether he would pose a safety threat in response to being told of his layoff.

***Dixon v. International Brotherhood of Police Officers*, 504 F.3d 73 (1st Cir. 2007).**

In this case, the First Circuit upheld a jury verdict and award of punitive damages for a member of the International Brotherhood of Police Officers (the “Union”) who was subjected to sexual harassment during a Union event, and subsequently retaliated against both by a member of the Union and the Union itself. The jury awarded the plaintiff \$1.2 million in compensatory damages and \$1 million in punitive damages.

The plaintiff joined the Lowell Police Department in 1994, as one of fewer than 10 female police officers in a force of nearly 300. She was eventually assigned as a full-time resource officer at an inner city school, where she worked with Department of Social Services and juvenile probation authorities assist students and their families. She was also an active member of the Union.

In October 1998, the plaintiff joined a Union-sponsored bus trip to Boston to participate in a political rally. On the return trip, the other officers, who were all male, engaged in a “barrage” of “totally inappropriate conversation, [that was] verbally abusive, [and] threatening”, shouting sexually explicit statements directed at the plaintiff. The President of the Union, who was on the bus and had organized and was supervising the trip, took no action. The plaintiff, terrified by the abusive conduct, persuaded the bus driver to drop her off near Boston Common. Again, the Union president took no action and did not try to persuade her to stay on the bus. While attempting to return home, the plaintiff suffered an attempted sexual assault.

A few weeks later, the Chief of the Lowell Police Department learned of the incident and started an internal investigation in which the plaintiff cooperated. After the Chief sent letters to the male officers on the bus trip ordering them to have no contact with the plaintiff, one of the officers obtained an ex-parte Chapter 209A TRO against the plaintiff. In his affidavit in support of the TRO, which the SJC described as “ cursory”, he alleged that the plaintiff had made threatening comments to him the evening of the bus incident. Although the plaintiff went to court to get the TRO vacated, the male officer never returned to court to defend it or to seek continued protection, and instead allowed it to expire after its initial 15 day period. Nevertheless, the Lowell Police Department was forced to put the plaintiff on administrative leave and confiscate her weapon while the TRO was in effect. The TRO was also reported in the local newspaper.

As the internal police department investigation proceeded, the president of the Union used a local television show he hosted (which was financed by the Union) to defend the male officers and to disparage the plaintiff, the Chief, and the city manager for pursuing the investigation. The President made statements describing the plaintiff as unfit for her job and also that she would pay a cost for pressing her discrimination claims.

On appeal, the Union and the officer who took out the TRO argued that the plaintiff had failed to establish her claims of retaliation because she did not offer evidence

that she had suffered an adverse action pertaining to her union membership. Having shown only adverse action pertaining to her employment, they argued, her claim must fail. In rejecting this argument, the Court held that neither Title VII nor Chapter 151B require a plaintiff alleging retaliation by a fellow union member, or by the Union itself, to show that the alleged retaliation impacted her union membership. The Court reasoned that “if an employer can effectively retaliate against an employee by taken taking actions not directly related to his employment or by causing him harm outside the workplace, then it follows that a union can effectively retaliate against a member in any context, including within the workplace.” The Court further noted that even if the plaintiff were required to show an adverse effect on her union membership, the evidence was sufficient to support such a finding, noting that because of her participation in the investigation, she was “shunned and shut out of her union.”

The Union also unsuccessfully argued that because the jury had found against the plaintiff on her defamation claim against the Union based on the president’s televised statements, its finding that the same conduct constituted retaliation had to be vacated. The Court interpreted this as an argument that speech alone cannot support a retaliation claim. However, the Court observed that “the idea that employers [and unions] can be held liable for speech such as the use of racial or sexual affidavits is inseparable from the very purpose of antidiscrimination statutes.” While the jury may have found for any number of reasons that the plaintiff had not proven defamation, there was no reason to accept the union’s argument that the speech on the television program could not support a retaliation claim.

Finally, the Court rejected the argument that the Union was not responsible for the harassment that took place on the bus trip itself. While the Court acknowledged the truth of the proposition that unions do not have an affirmative duty to prevent workplace discrimination, it held that the Union was responsible for discrimination by union members under the “supervision and acquiescence” of the Union’s president.

**Carl Zeiss Meditec, Inc. v. William Shields, C.A. No. 07-2453 (Mass. Super., Oct. 12, 2007).**

In this decision, Justice Fabricant, sitting in the Business Law Section of the Suffolk Superior Court, allowed a motion pursuant to the anti-SLAPP statute, G. L. ch. 231, § 59H, to dismiss a counterclaim by the defendant former employee in an action by his former employer to enforce contractual confidentiality and non-interference obligations.

The plaintiff, Carl Zeiss Meditec, Inc. (“CZMI”), is in the business of supplying medical technology, particularly in the ophthalmology field. Its principal place of business is in California. The defendant, William Shields, is a resident of Massachusetts who worked for CZMI from 2004 to 2007 as its European sales manager. During this period, Shields worked out of his home in Massachusetts, traveling to Europe for business purposes. He never worked in CZMI’s California offices.

When he joined CZMI, Shields signed an employment agreement which barred him from engaging in activities detrimental to CZMI’s interest during employment, and “interfering with” its business for a period of two years following employment. The agreement also included a covenant that he would preserve CZMI’s confidential information and return it to CZMI upon termination of his employment.

In April of 2007, Shields resigned from CZMI and went to work for its competitor, Optovue, Inc. (“Optovue”), as its Vice President of International Sales. Before leaving CZMI, he allegedly provided Optovue certain confidential information belonging to CZMI. He also allegedly retained confidential information belonging to CZMI. Shields admitted transmitting to Optovue certain material, and retaining certain material, but denied misappropriating any confidential information.

In June of 2007, CZMI filed a verified complaint alleging five counts, including breach of contract, breach of fiduciary duty, and unfair competition. It sought a declaratory judgment that Shields’ employment by Optovue in a sales position with responsibility for the areas for which he had been responsible at CZMI was a violation of the employment agreement and/or his fiduciary duties. The Court (Gants, J.) issued a temporary restraining order, which ripened into a preliminary injunction, barring Shields from using, disclosing, or destroying confidential information of CZMI in his possession. The court did not bar Shields from working for Optovue.

In his answer and counterclaim to the suit filed by CZMI, Shields sought a declaratory judgment that the non-interference provision of the employment agreement was void under §16600 of the California Business & Professions Code, which sets forth California’s strong public policy against contracts in restraint of trade. In a second count, he sought damages on the theory that CZMI’s attempt to enforce the non-interference provision of the employment agreement constituted unfair competition in violation of §17200 of the California Business & Professions Code.

CZMI moved to dismiss the unfair competition counterclaim pursuant to the anti-SLAPP statute on the grounds that it was based solely on CZMI's petitioning activity and sought attorney's fees. As the Court observed, the anti-SLAPP statute was initially intended to protect "individual citizens of modest means [who spoke] publicly against development projects." However, the broad statutory language protects not only disputes involving matters of public concern, but also purely private disputes. Likewise, the protection offered by the statute is not delimited by the resources available to the parties on either side.

To prevail on its motion, CZMI was required to make a threshold showing that the counterclaim was based on its petitioning activities and had "no substantial basis other than or in addition to the petitioning activities." Because the counterclaim itself identified CZMI's "attempt to improperly enforce" the allegedly void non-interference provision of his employment agreement, Judge Fabricant found that CZMI had met this burden. While Shields also pointed to certain statements made by CZMI officials, the court found that each of those statements pertained to CZMI's lawsuit, and were therefore protected petitioning activities.

Once CZMI made this showing, the burden shifted to Shields to show that CZMI's lawsuit was devoid of any reasonable factual support or arguable basis in law. Shields attempted to meet this burden by arguing that the contractual provision at issue was unlawful under § 16600. However, Judge Fabricant rejected this argument for three reasons. First, she noted that Judge Gants' previous decision to issue a preliminary injunction against Shields established that at least some of CZMI's claims had reasonable factual and legal support. Second, Judge Fabricant was skeptical of the notion that the California statute had any application to the employment agreement between the parties. Despite the fact that Optovue, like CZMI, is based in California, Shields continued to perform services for it based out of his home in Massachusetts. Thus, there was no factual nexus to California that would support application of California law. As a result, the Judge granted CZMI's motion to dismiss and its request for attorney's fees.

This case stands in contrast to an earlier decision in the Business Law Session, *Brooks Automation Inc. v. Blue-shift Technologies, Inc.*, in which Judge Gants denied an employer's motion to dismiss counterclaims under the anti-SLAPP statute in a similar case. It appears that the difference between the two cases turns on the facts. In *Brooks Automation*, the case went to the jury, which agreed with the defendant that there had been no rea-

sonable basis for the employer's lawsuit, and awarded him damages on his Ch. 93A counterclaim.

- Submitted by Christopher J. Powell,  
Ropes & Gray LLP

**Skirchak v. Dynamics Research Corp., Nos. 06-2136, 06-2180 (1st Cir. Nov. 19, 2007).**

The First Circuit ruled that a class action waiver clause in a company-imposed arbitration agreement was unconscionable under Massachusetts law. Two managers at Dynamic Research Corporation (DRC) had brought a class action suit to challenge violations of the Fair Labor Standards Act. The company moved to dismiss on the grounds that they were required to arbitrate their dispute and that they could only proceed as individuals because the mandatory arbitration provision contained in the company's Dispute Resolution Program (Program) waived the right to bring a class action. The Program had been announced to employees via a company-wide e-mail that was sent out the Tuesday before Thanksgiving. The waiver provision was contained in two paragraphs in a multi-page appendix to the 15-page Program memorandum. The memorandum did not state that it modified any employment rights or that there were any potential disadvantages. Employees were not required to respond to the memo. Instead, returning to work the Monday following Thanksgiving was deemed an acceptance. The District Court issued an order compelling arbitration but striking the class action waiver as unconscionable. Both parties appealed, though the plaintiffs later decided to accept arbitration and not pursue that issue on appeal.

The First Circuit, in a decision written by Judge Sandra Lynch, ruled narrowly that based on the particular circumstances in this case, the class action waiver was unconscionable under Massachusetts law and thus unenforceable. Noting that the Federal Arbitration Act applies state law to determine if a waiver provision is unconscionable, the Court applied factors drawn from both contract law and the law of waiver of rights under employment statutes, which require that a waiver be knowing and voluntary. The Court determined that "the timing, the language and the format of the presentation of the Program obscured, whether intentionally or not, the waiver of class rights." The Court did not rely on any one particular factor but found many factors "in the mix" contributed to its ruling, including that the waiver lacked prominence and clarity; there was short timing (over a holiday weekend); it failed to give notice that there was a modification to the employees' employment contract; there was no opportunity to signify acceptance. The

Court specifically did not rule on whether class action waivers under the FLSA can ever be waived by agreement, or whether class action waivers are per se against public policy.

**Okerman v. VASoftware, 69 Mass. App. Ct. 771 (2007), rev. denied, 450 Mass. 1102 (2007).**

In an important decision clarifying how the state Wage Act, Mass. Gen. L. c. 149, § 148, applies to commissions, the Appeals Court clarified that many restrictions that have made on recovering commissions under the Wage Act have been “improperly engrafted onto the statute.” Plaintiff, a marketing manager, was paid a base salary of \$90,000 and commissions on sales of certain products under a series of compensation plans that were amended retroactively from year to year. After he was laid off he brought claims for unpaid commissions under various theories—the Wage Act, breach of contract, and breach of the implied covenant of good faith and fair dealing. His Wage Act claims were dismissed on the grounds that the Wage Act did not apply to his commissions because they were earnings “above and beyond his salary”; his commissions were “in addition to a healthy salary”; the Wage Act did not apply to highly compensated employees; he was not paid on a weekly basis; and the right to commissions were contingent and therefore not “definitely determined.” The Appeals Court rejected all of these restrictions because none are contained within the language of the statute, explaining, “[b]y its terms, the language of the wage act regarding commissions applies broadly, and is restricted in its application only by the requirements that the commissions be ‘definitely determined’ and ‘due and payable.’” Note that the SJC denied further appellate review on this decision.

**Killeen v. Westban Hotel Venture, LP, 69 Mass.App.Ct. 784 (2007).**

In a decision under Mass. Gen. L. c. 149, § 152A involving tip pooling, in which the plaintiff recovered only \$1.26 in compensatory damages, which was tripled to \$3.78, the defendant appealed the trial judge’s award of attorneys’ fees and costs in the amount of \$153,717.77, claiming that due to the minimal recovery, the plaintiff was not a “prevailing party” and therefore not entitled to any fees. The Court of Appeals found that the plaintiff was a prevailing party and that even though her recovery was “de minimus” it still represented “a significant legal conclusion serving an important public purpose.” Nevertheless, the Court vacated the trebling of the damages and the fee award and remanded for a determination as to whether the defendant’s conduct was “outrageous”,

and whether the amount of time spent on the case was reasonable in light of the results obtained.

**Argued at the Supreme Court: Federal Express v. Howecki, No. 06-1322.**

On November 6, 2007, the U.S. Supreme Court heard arguments in a case raising the issue of what is sufficient to constitute a “charge” filed at the EEOC under the Age Discrimination in Employment Act for purposes of initiating suit under the ADEA. On December 3, 2001, the plaintiff, a courier for Federal Express, had filled out a Form 283 Intake Questionnaire at the EEOC accompanying her affidavit that alleged that the company had a number of age discriminatory policies and practices. The EEOC did not assign a charge number to the submission, did not inform FedEx that it had received the intake form, and did not attempt conciliation. On April 30, 2002, the plaintiff filed a class action against FedEx under the ADEA, and a month later submitted to the EEOC a Form 5 Charge of Discrimination.

The District Court granted FedEx’s motion to dismiss on the grounds that the Intake Questionnaire was not a “charge” under the ADEA. The Second Circuit reversed, finding that a charge need only comport with the EEOC regulations which require (1) that the employee name the employer and generally describe the discriminatory acts, and (2) that the employee manifest an intent to file a charge. It concluded that the Intake Questionnaire was sufficient as it manifested an intent to activate the machinery of the EEOC to institute a charge of discrimination. In its brief to the Supreme Court and at oral argument, FedEx added an argument that plaintiff’s charge failed because the EEOC had never notified FedEx of her filing and that the Intake Questionnaire did not meet the statutory charge requirements. Plaintiff and the U.S. as amicus argued that the statute did not define what was required in a “charge” and that plaintiff should not be penalized by the EEOC’s failure to notify FedEx, and that such failure of notice could be cured by other trial tools – issuing a stay for attempted conciliation or the doctrine of laches to prevent filing of stale claims. A decision in this case is expected by June 2008.

*- Submitted by Nina Joan Kimball,  
Kimball Brousseau LLP*

# Agency Update

## **EEOC Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities**

The EEOC has issued Enforcement Guidance concerning unlawful disparate treatment of workers with caregiving responsibilities under Title VII and the Americans with Disabilities Act. The Guidance is richly illustrated with numerous examples of circumstances in which an investigator might conclude that unlawful discrimination had taken place, as well as circumstances where such a finding would be inappropriate. These examples, and EEOC's explanatory glosses, will likely be useful to lawyers on both sides of the bar to understand the boundaries of lawful decision-making concerning employees with caregiving responsibilities.

The Guidance begins with a general discussion of the caregiving responsibilities of workers and the existence of work-family conflicts. In this first section, the EEOC observes that women now comprise nearly half of the US labor force, and that mothers of young children are now almost twice as likely to be employed as were their counterparts 30 years ago. It also acknowledges that caregiving responsibilities are not limited to workers with children, but include those who care for elderly or disabled relatives. It also discusses the impact of discriminatory stereotyping concerning caregiving obligations on men and people of color. It briefly discusses the difficulties faced by workers in all areas of the economy in balancing work and family obligations and encourages employers to adopt practices that will make it easier for all workers to balance work and personal responsibilities.

The second and longest section of the Guidance discusses the various aspects of discrimination against caregivers. From the Title VII perspective, the Guidance explores unlawful disparate treatment based on stereotyping of appropriate gender roles for women and men, including the effects of stereotyping on subjective assessments of work performance, and also looks at pregnancy-based discrimination, the intersection of gender-based discrimination with discrimination based on a race and national origin, and the creation of hostile work environments based on any of these factors. From the ADA perspective, the Guidance discusses both unlawful disparate treatment and the creation of hostile work environments based on stereotyping connected with an employee's association with an individual with a disability.

The Guidance is a useful and informative tool for attorneys practicing in this area. It is available on the Internet at: <http://www.eeoc.gov/policy/docs/caregiving.html>

## **Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, 351 N.L.R.B. No. 28 (September 29, 2007).**

In this decision, consisting of two consolidated cases, the National Labor Relations Board modified its recognition-bar doctrine governing challenges to a union's majority status for a reasonable period following recognition of majority status by the employer following a card check.

In this case, two separate employers, Dana Corporation and Metaldyne Corporation, had each entered into neutrality and card check agreements with the union. In December 2003, after checks conducted by neutral third parties, each had voluntarily recognized the union as the exclusive bargaining representative of its employees. Shortly thereafter, and before contract negotiations began, two petitioners at Metaldyne and one at Dana filed petitions for Board decertification elections.

The recognition-bar doctrine has been a part of Board jurisprudence since the late 1960s. In *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), the Board dismissed an unfair labor practice charge alleging unlawful execution of a collective bargaining agreement with a minority union. The petitioner had stipulated that the Union enjoyed majority status when it was recognized, but alleged that it had lost that status at the time the contract was executed. The Board dismissed the complaint, reasoning that the policies of the National Labor Relations Act required that the parties be permitted a reasonable period of time in which to rely on the continuing representative status of the lawfully recognized union.

However in *Dana Corporation*, the Board reasoned that it was necessary to strike a "finer balance" between the interests of employee free choice and the promotion of stability in bargaining relationships. To this end it held that, going forward, no election bar will be imposed after a voluntary card-based recognition unless (1) employees in the bargaining unit are given notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date

of notice without the filing of such a petition.

In reaching this conclusion, the majority analyzed the differences between Board-supervised elections and voluntary recognition based on card checks. It found four reasons to prefer Board-supervised elections. First, it found that the secret ballot process tends to insulate employees from group pressure in a way that the card check process does not. Second, it found a greater likelihood that employees will make an informed choice after a contested Board election than in the card check process, particularly where there is a neutrality pledge. Third, it found that Board elections provide “a clear picture of employee voter preference at a single moment” which it found superior to extended card check processes (which in the *Metaldyne* case took over a year) during which employees might change their mind. Finally, it noted the existence of procedural safeguards to protect against the employer’s use of improper electioneering tactics to pressure employees to vote in its favor during board-supervise elections.

The majority further distinguished the recognition-bar doctrine from other election-bar situations. First, it noted that the election-bar doctrine, under which no Board election can be held in a bargaining unit for twelve months following an election, had been formulated by the Board, then approved, first by the Supreme Court, and then by Congress when it codified the doctrine in the 1957 Taft-Hartley Act amendments to Section 9(c)(3) of the Act. Thus, it found a “consensus of the Board, the Congress, and the Court” that the result of a Board-supervised election deserves the immediate imposition of an election bar. Second, it distinguished circumstances in which an election bar is imposed following a finding that an employer has dissipated a union’s majority by unfair labor practices, finding in such situations a remedial purpose that is not present in the circumstances of a voluntary recognition. Finally, it distinguished the imposition of an election bar following the settlement of an unfair labor practice charge, on the policy grounds that the Board should effectuate an employer’s pledge to bargain in settlement of unfair labor practice charges by dismissing subsequent petitions.

## Updated Guidance for Employers About the Massachusetts Health Care Reform Law

By Martha Walz, Esq.

Littler Mendelson, Boston, MA (August 2007)

All employers with employees in Massachusetts, including employers with ERISA plans, have obligations under the state’s new health care reform law. While implementation of the law is well underway, the state continues to issue new regulations and forms. Some important deadlines are on the horizon. This article contains information on what employers should be doing to ensure compliance with the law.

### Final Section 125 Plan Requirements

To help make health insurance more affordable, employers with 11 or more full-time equivalent employees in the Commonwealth are required to have a Section 125 cafeteria plan as of July 1, 2007. A Section 125 plan allows employees to pay for their health insurance coverage on a pre-tax basis, and the premium payments are not subject to state and federal income taxes or FICA. Employers must meet this requirement even if they are self-insured. Nearly all employers that offer health insurance to their employees already have a Section 125 Plan in place. They must either amend that plan or implement a separate plan for their non-benefits eligible employees who enroll in the Commonwealth Choice health insurance plans offered through the Commonwealth Health Insurance Connector Authority. At present, employees may not pay their Commonwealth Care premiums through a Section 125 Plan.

The Connector Authority has written a Section 125 Plan Handbook for Employers that contains sample plan documents and forms. Five documents are particularly important:

- o The Plan Document
- o The Adoption Agreement
- o The Plan Description (distributed to eligible employees)
- o The Employee Waiver/Election Form
- o The Employee Revocation/Change in Status Certification

At present, employers are required to file their Section 125 Plan(s) with the state by October 1, a postponement from the July 1 deadline. As of this article's writing, the state legislature is considering a bill that would eliminate this filing requirement. The bill is likely to become law, and employers will simply be required to confirm in the Employer Health Insurance Responsibility Disclosure Form that they have a Section 125 Plan. This form is described below.

Employers that have not yet done so should register with the Connector Authority so they are prepared to make these pre-tax deductions when an employee seeks to enroll in a Commonwealth Choice plan offered through the Connector. Employers must have an account with the Connector Authority before they may remit premium payments on behalf of their employees. Information on how to register is available on the Connector Authority's website, [www.mahealthconnector.org](http://www.mahealthconnector.org)

### **Employee Health Insurance Responsibility Disclosure Form**

In late June, the state issued emergency regulations concerning the Employee Health Insurance Responsibility Disclosure (HIRD) Form.

An employee of a Massachusetts employer with 11 or more full-time equivalent employees must sign the Employee HIRD Form if he or she: (1) declines to enroll in an employer-sponsored health plan; or (2) declines to participate in the employer's Section 125 plan. When completing the form, the employee must indicate whether he or she has an alternative source of insurance coverage. Employers are not subject to penalties if their employees decline insurance coverage or decline to participate in a Section 125 plan.

The state has provided a sample form, which may be found on the Connector Authority's website. The form states that employers may "recreate" their own version of the form. The form further states, however, that all of the information on the state-provided form must be included "with the same wording and order, and the sequence and numbering of the [q]uestions must be exactly as it appears on the version provided by the Commonwealth of Massachusetts."

The emergency regulations allow an employer to collect the required information and acknowledgement from employees in any form or manner, including any electronic or other media.

An employer must obtain a signed Employee HIRD Form

upon the earlier of:

- o 30 days after the close of each open enrollment period for the employer's health insurance;
- o 30 days after the close of each open enrollment period for the employer's Section 125 plan; or
- o September 30.

If an employee who is enrolled in an employer's health insurance plan terminates his or her participation in the plan, the employee must sign an Employee HIRD Form within 30 days of the date participation terminated. Employers must obtain the signed Employee HIRD Form from new hires within 30 days of the applicable open enrollment period.

If an employer's open enrollment period for 2007-2008 ended before July 1, 2007 and an employee has signed an employer's form acknowledging that he or she was offered and declined employer-sponsored insurance, the employee is not required to sign an Employee HIRD Form until the next applicable open enrollment period. The employer must retain the form signed by its employee until July 1, 2009.

Employers are responsible for distributing and collecting the forms. They must retain the Employee HIRD form (or its electronic equivalent) for three years and should file it with other confidential employee records. Employers must provide a copy of each signed Employee HIRD Form to an employee.

If an employee refuses to comply with an employer's request to complete and sign the Employee HIRD Form, the employer must document its diligent efforts to obtain the form and maintain that documentation for three years. The regulations also require employers to retain for three years documentation that an individual employee was not required to sign the Employee HIRD Form. The regulations do not specify what type of documentation this must be, so employers have discretion on what records will satisfy this requirement.

### **Employer Health Insurance Responsibility Disclosure Form**

An employer with 11 or more full-time equivalent employees must report certain information on an Employer HIRD Form. The state has determined that this form will be consolidated with the form employers must file with the Division of Unemployment Assistance in connection with the Fair Share Contribution.

## Required Filing to Establish Compliance with Fair Share Contribution

The state issued regulations in Fall 2006 providing guidance for determining whether an employer makes a fair and reasonable contribution to the health care costs of its employees. An employer with 11 or more full-time equivalent employees that does not make a fair and reasonable contribution is required to pay a per-employee Fair Share Contribution (FSC) of up to \$295 annually.

The determination of an employer's liability for payment of the FSC is based on data from the period October 1 to September 30 each year. Employers liable for the FSC may make such contribution in a single payment or in equal amounts semi-annually or quarterly.

The Division of Unemployment Assistance (DUA), which is responsible for administering this program, is working to implement the necessary filing and payment procedures for employers. The filing must be done electronically between October 1 and November 15 of each year. DUA will provide additional information in the Fall about how to make this filing, but employers should be aware that DUA may not send them a notice directing them to file.

In addition, employers using a payroll service should be aware that filing must be done on an employer-by-employer basis for 2007. DUA will not have the capacity initially to accept bulk electronic files from payroll services. Consequently, employers should consult with their payroll service companies to determine how the filing requirement will be met.

## Equivalent Employee Contribution Percentages

Beginning July 1, 2007, health insurance companies may offer insured group health care plans to Massachusetts employers only if: (1) the coverage is offered by that employer to all full-time employees who live in Massachusetts; and (2) the employer does not discriminate against lower paid full-time employees in establishing its percentage of contribution toward the premium payment. This provision does not apply to an employer that establishes separate contribution percentages for employees covered by collective bargaining agreements.

Employers may have different percentage contributions for different plan choices, as long as the contributions made with respect to each plan do not differ based on the salary level of the employees who earn less than others. Employers are permitted to pay a smaller percentage of

the premiums for their more highly compensated workers.

The practical effect of this requirement is that fully insured health care plans offered only to senior executives must be modified. An employer may no longer pay a higher percentage of the monthly premiums for its senior executives than it pays for its lower paid employees.

## Minimum Creditable Coverage

With only limited exceptions, Massachusetts residents age 18 and older are required to have health insurance ("creditable coverage") as of July 1, 2007. The law contains a six month grace period. The state will assess the penalty for not being insured only against those people who remain uninsured on December 31, 2007. A variety of insurance plans satisfy this mandate, including student health insurance plans, the Young Adult and Commonwealth Care plans offered by the Connector Authority, Medicare Part A or Part B, Medicaid, and a plan that meets the definition of "minimum creditable coverage."

To ease implementation of the law, the state has determined that coverage under most health care plans from July 1, 2007, to December 31, 2008, will be sufficient to satisfy the individual mandate. Beginning on January 1, 2009, residents must have insurance that meets the definition of minimum creditable coverage or they will be considered to be uninsured. While this is an obligation imposed upon individuals, employers should determine if their plans (whether insured or self-insured) meet the minimum standards. If an employer's plan does not, participating employees will not be able to satisfy the mandate for insurance coverage. The definition of minimum creditable coverage may be found at 956 CMR 5.03(2).

Each employer should compare its plan(s) with the required minimum standards. If a plan falls short, an employer should consider upgrading the plan prior to the 2007 or 2008 open enrollment period. By offering a plan that meets the minimum standard during the upcoming open enrollment period, employers will ensure that participating employees will have insurance that satisfies the definition of minimum creditable coverage by the January 1, 2009 deadline.

## Annual Health Insurance Coverage Statements

Starting in January 2008, employers, including those with self-insured plans, must provide a written coverage statement to each individual who resides in Massachusetts to

whom it provided health insurance in the previous calendar year. The coverage statement must be provided annually, on or before January 31 of each year.

The statement must include:

- o the name of the carrier or the employer
- o the name of the covered individual and any covered dependents
- o the insurance policy or similar number
- o the dates of coverage during the year
- o other information as required by the Commissioner of Revenue

Plan participants will use the information in the coverage statement to complete the section of their state income tax form that establishes their compliance with the individual mandate. Employers may contract with service providers or insurance carriers to meet this obligation. In addition, all employers must provide the state with a separate report verifying the statements given to plan participants. The Department of Revenue has not further specified the content or format of these statements.

### **Employers Should Revise Their Non-Discrimination Policies**

Employers are prohibited from discriminating against an employee based on a number of factors set forth in the health care reform law. Employers should revise their anti-discrimination policies, employee handbooks, and employment applications to include these new factors. Employers are prohibited from discriminating against an employee because of the employee's receipt of free care; the employee's reporting or disclosure of his or her employer's identity and other information about the employer (which the state uses to assess the free rider surcharge); the employee's completion of a Health Insurance Responsibility Disclosure form; or any facts or circumstances relating to the free rider surcharge assessed against the employer if the employee receives free care.

**NEXT ISSUE'S FEATURED ARTICLE:** "Warning Signs That It May Be Time To Revise an Employment Policies Handbook," by **Paul Holtzman, Esq.**, Krokidas & Bluestein LLP – You shouldn't wait for a lawsuit to remind you of the need to make sure your company's employment policies reflect the latest developments in technology, law and risk management. This article will address the importance of periodically updating employment policies and handbooks in light of the ever-evolving law.

## **New and Pending Legislation**

### **The New State Card Check Law**

On September 27, 2007, the Massachusetts Legislature enacted Chapter 120 of the Acts of 2007, An Act Relative to Certain Written Majority Authorization Evidence of Collective Bargaining Results. The Act amended Chapter 150A to eliminate the private ballot in public-employer union organizing campaigns, requiring the certification of any union that secures a simple majority of signatures through the card check process. The Act is accessible at <http://www.mass.gov/legis/laws/seslaw07/sl070120.htm>.

Congress recently rejected a similar bill that would have amended the NLRA to cause the same result for employees of private employers. The Employee Free Choice Act would have required the NLRB to certify a union without an election if a majority of the employees in the bargaining unit signed authorization cards. The House of Representatives passed the bill but the Senate rejected it by a vote of 51 to 48.

### **The New Massachusetts Data Security Law**

On August 2, 2007, the Massachusetts Legislature enacted Chapter 82 of the Acts of 2007, An Act Relative to Security Freezes and Notification of Data Breaches. The Act creates two new chapters in the Massachusetts General Laws, Chapter 93H ("Security Breaches") and 93I ("Disposition and Destruction of Records"). Chapter 93H goes into effect on October 31, 2007; Chapter 93I will go into effect on February 3, 2008. The Act is accessible at <http://www.mass.gov/legis/laws/seslaw07/sl070082.htm>. Although the new law is not limited to the theft of employees' personal information from an employer, this summary addresses only that aspect.

Massachusetts is the 39th state to enact a notice-of-security-breach statute. Multistate employers should keep in mind that while employees in other states are not protected by the new Massachusetts law even if the breach occurs in Massachusetts, they may be covered by similar laws in the states where they live.

### **Notice of Security Breach**

The new Chapter 93H will impose notice obligations on any employer that knows or has reason to know of a

“breach of security” concerning the “personal information” of any of its current or former employees, or job applicants, who reside in Massachusetts. “Breach of security” is defined as the unauthorized acquisition or use of unencrypted personal information (or encrypted personal information plus theft of the decryption process or key), whether in paper or electronic form, that creates a substantial risk of identity theft or fraud. “Personal information” is defined as the employee’s name combined with any one or more of the following: his or her (1) Social Security number, (2) driver’s license number or state-issued identification card number, or (3) financial account number or credit or debit card number.

If a breach occurs, the employer must notify the affected employees “as soon as practicable and without unreasonable delay.” The notice must include information on (1) how the employees can obtain a police report, (2) how they can ask consumer reporting agencies (Equifax, Experien, and Transunion) to impose a security freeze, and (3) any fees required to be paid to the consumer reporting agencies.

The employer also must provide notice to the Massachusetts Attorney General and the Director of Consumer Affairs and Business Regulation (“Director”). The notice must state (1) the nature of the breach, (2) the number of affected employees who are residents of Massachusetts, and (3) any remedial steps the employer has taken or plans to take. Upon receipt of the notice, the Director must identify any relevant consumer reporting agencies and forward their names to the employer, which must then give those agencies notice containing the same information it already gave the Attorney General and the Director.

The notice must be in writing. Letters are preferred, since notice by e-mail is permitted only if it meets the requirements of the Electronic Signatures in Global and National Commerce (E-SIGN) Act, 15 U.S.C. § 7001(c), as well as M.G.L. c. 110G. The E-SIGN Act requires, among other things, that the employer obtain the employees’ consent to electronic notice before relying on notice by e-mail – in other words, the employer must send each employee two e-mails. Special notice procedures apply if the cost of providing written notice will exceed \$250,000, or more than 500,000 employees are to be notified, or the employer lacks sufficient contact information to provide written notice.

### **Disposition of Records**

The new Chapter 93I will dictate how employers may dispose of documents or data containing personal informa-

tion of any Massachusetts residents who are current or former employees or job applicants. “Personal information” is defined as an employee’s name combined with one or more of the following: his or her (1) Social Security number, (2) driver’s license number or Massachusetts identification card number, (3) financial account number or credit or debit card number, or (4) a biometric indicator.

Paper records containing personal information must be “redacted, burned, pulverized or shredded” and electronic data must be “destroyed or erased.” Regardless of the medium, the records must be destroyed “so that personal information cannot practicably be read or reconstructed” (e.g., by using a shredder with a cross-cut or confetti cutter to destroy paper records).

### **Pending State Legislation to Mandate Treble Damages for a Wage Act Violation**

Democratic Senator Cynthia Creem has introduced a bill that would mandate treble damages for any violation of the Wage Payment Act, MGL ch. 149, § 148. The bill, S. 1059 (an Act to Clarify the Law Protecting Employee Compensation), would override the SJC’s holding in *Wiedmann v. Bradford Group, Inc.*, 444 Mass. 698 (2005), that treble damages are discretionary rather than mandatory. The bill was recently released with a favorable report by the Joint Committee on Labor and Workforce Development, and awaits a vote by the Legislature. The bill can be accessed at: <http://www.mass.gov/legis/bills/senate/185/st01/st01059.htm>.

### **Pending Federal Legislation to Overrule Ledbetter**

In May the Supreme Court ruled in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), that a Title VII pay discrimination claim filed by a 20-year employee of Goodyear was untimely with regard to all pay decisions made more than 180 days before she filed her EEOC charge. The *Ledbetter* Fair Pay Act, H.R. 2831, would overrule the Supreme Court’s decision by amending Title VII, the ADEA, and the ADA to clarify that an unlawful act occurs each time compensation is paid pursuant to a discriminatory decision or practice. The House of Representatives passed the bill in July, but as of this writing, the Senate has not yet voted on it.

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