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ALERT | New Identity Theft Prevention Regulations Must Be Implemented Soon

New Identity Theft Prevention Regulations must be implemented by all businesses which store personal information of Massachusetts residents in their records. Companies located outside Massachusetts must comply if they maintain specified information on Massachusetts residents in their files.

These new regulations issued by the Massachusetts Office of Consumer Affairs and Business Regulation apply to any business which stores or maintains personal information on Mass residents, i.e., first name/last name (or first initial/last name) in combination with one or more of the following:

1. Social Security number
2. Driver's license number or state-issued ID card number;
3. Financial account number or credit card/ debit card number.

The regulations require that the company establish and maintain a comprehensive information security program or "CISP" no later than May 1, 2009. The deadline for encryption of portable devices (other than laptops) is January 1, 2010.

For more information, please see page 11.

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Under the Limbo Stick—How Low Can You Go?

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The Americans with Disabilities Act of 1990 ("ADA") has been amended. The ADA prohibits discrimination against qualified individuals with disabilities in employment and requires employers to provide reasonable accommodations to employees with disabilities. The ADA Amendments Act of 2008 takes effect January 1, 2009 and dramatically lowers the threshold for determining whether an employee is disabled. The ADA applies to employers with at least 15 employees. [1]

While the core definition of "disability" has not changed, the qualifiers contained within the core definition have been amended. "Disability" means (i) an impairment that substantially limits one or more major life activities, or (ii) a record of such an impairment, or (iii) being regarded as having such an impairment. The definitions of "substantially limits" and "major life activities" have been significantly expanded. Further, the Amendment instructs that the definition should be construed broadly.

"Substantially limits" has been clarified to include impairments that are episodic or in remission, if the impairment when active would substantially limit a major life activity.

"Major life activities" has been expanded to include two, non-exhaustive lists. The first list includes activities that the Equal Employment Opportunity Commission (EEOC) had previously identified as "Major life activities" *plus* many newly identified activities such as reading, bending and communicating. The second list specifically enumerates major bodily functions, such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

The Amendment also all but eliminates the "mitigating measures" exception, bringing the ADA into alignment with Massachusetts law. Previously, under the ADA, if the impairment was mitigated through medication, or assistive devices, the individual was no longer deemed to have a disability. This is no longer the case.

It is important to remember that not only does the ADA (and MGL 151B) prevent discrimination against individuals with disabilities with regard to hiring, firing, promotion and the other terms, conditions and benefit of employment; the ADA also requires that the employer provide a qualified individual with a reasonable accommodation if required to perform the essential functions of the job. This is an area with many traps for the unknowing. The Employer's duty is not only to provide a reasonable accommodation (absent demonstrable undue hardship – which, in and of itself, is a high bar) but, more critically, to engage in an inter-active dialogue with a the employee to find a reasonable accommodation that will enable that employee to perform the essential functions of the position; or thoroughly and fully exhaust the possibilities if no reasonable accommodation exists. The duty to engage in an interactive dialogue

exists even if the employee has not requested a reasonable accommodation, rather, when the employer reasonably knows that the employee may have a disability and may require an accommodation. Failure to engage in an interactive dialogue is deemed to be a per se violation of the disability statutes.

As an employer, to reduce your exposure to a possible claim for disability discrimination or failure to provide a reasonable accommodation, your company should:

- immediately review its Disability Accommodation and EEOC policies, ensuring compliance with the provisions of the ADA *and* MGL 151B, and the FMLA if applicable;

- provide training to management regarding the company's obligation to engage in an interactive dialogue with an employee regarding reasonable accommodation—even if the employee has not requested an accommodation

- provide training to management and employees alike regarding applicable anti-discrimination and anti-harassment laws

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[1]The ADA's state counterpart, Massachusetts General Law Ch. 151B ("151B") applies to employers with at least 6 employees. Note however that in light of Thurdin v. SEI Boston, LLC, 452 Mass. 436 (2008) employers with fewer than 6 employees may be subject to suit under the Massachusetts Equal Rights Act and should therefore implement practices to ensure compliance with MGL 151B.

General Contractor Held Liable for Harassment Directed at Non-Employee on Job Site

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In a case of first impression, the Massachusetts Appeals Court has held a general contractor liable for failure to remedy a racially hostile work environment which caused an employee of a specialty subcontractor to walk off the job. Liability was found under G.L. c. 151 B §4 (4A) which makes it unlawful for any person to "coerce, intimidate, threaten, or interfere with another person" in the exercise or enjoyment of rights granted under the state anti-discrimination act. The case is Thomas O'Connor Constructors, Inc. v. Massachusetts Commission Against Discrimination, 72 Mass. App. Ct. 549 (2008).

The facts of this case illustrate the importance of proper training of supervisory personnel, as well as the taking of proper remedial action once a complaint of discrimination surfaces. Here, one Daley was the job site superintendant for Thomas O'Connor Company. On two separate occasions at the construction site he used the word "nigger" to refer to a black worker also employed by Thomas O'Connor. He did so in the presence of one Aldridge, a black employee of a fire protection subcontractor also working on the site. Later, Daley referred directly to Aldridge as a "black bastard" and a "___ing nigger." Aldridge wrote a letter complaining about these incidents which he gave to a union representative. Eventually, the letter made its way up to Thomas O'Connor's project manager.

The project manager conducted what is best described as a cursory investigation. He questioned Aldridge very briefly about Daley's comments. He met with Daley who adamantly denied using any racial slurs. The project manager also questioned the on-site witnesses, only one of whom would directly corroborate Aldridge's account of Daley's actions. O'Connor concluded its investigation without speaking again to Aldridge, without disciplining or warning Daley, or removing Daley from the work site.

When Aldridge saw that Daley had returned to the work site, he packed up his tools and left for good. Thereafter, he filed a complaint against O'Connor with the Massachusetts Commission Against Discrimination. The MCAD ultimately found in favor of Aldridge against O'Connor. In affirming, the Massachusetts Appeals Court highlighted the unique nature of the claim:

Aldridge's claim is unusual…in that he sought recovery not against [the subcontractor], his employer, or even against Daley, the perpetrator, but against O'Connor, the general contractor, on account of Daley's racially offensive remarks. O'Connor at 554.

The Appeals Court noted that MCAD found O'Connor liable under G. L. c. 151 B § 4(4A), which makes it unlawful:

For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this Chapter[.]

The right to work in an environment free from racial harassment is among the rights protected by c. 151B, the MCAD found. The Appeals Court agreed that O'Connor was properly held liable to a non-employee under this section because of O'Connor's "failure to remedy a racially hostile work environment of which it had notice." Id. at 559-560:

An employer who passively tolerates the creation of a hostile working environment implicitly ratifies the perpetrator's misconduct and thereby encourages the perpetrator to persist in such misconduct, whatever the employer's precise legal relationship to the perpetrator. Modern Continental, 445 Mass. at 105, 533 N.E.2d 1130. See College-Town, 400 Mass. at 167-168, 508 N.E.2d 587 (employer that fails to take remedial action after notification of harassment is liable therefore).

The Appeals Court was not happy with the cursory investigation and ultimate decision to take no action with respect to Aldridge's complaint:

O'Connor failed to take the remedial steps that would discipline Daley and assure Aldridge that his concerns had been heard and that Daley's behaviors would not be tolerated. Instead, O'Connor returned Daley to his job as work site superintendent. Such apparent inaction led directly, and reasonably predictably, to Aldridge's leaving the work that he loved at considerable emotional cost. In such circumstances, we hold that an employer who is on notice of unlawful discriminatory acts by its supervisor, directed toward an employee of a subcontractor at a unitary work site, and fails to take reasonably adequate remedial action is liable under G.L. c. 151B §4(4A).Id. at 560.

The cost of O'Connor's insouciance was dear. O'Connor was ultimately ordered to pay $50,000 in emotional distress damages, a $10,000 civil penalty, and compelled to conduct annual harassment training sessions for 5 years.

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Massachusetts Court Rules Gender Discrimination Law Applies to Businesses with Fewer than Six Employees

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The Massachusetts Supreme Judicial Court ("SJC") recently issued a decision in a case challenging a former employee's right to sue her old company for gender discrimination despite a prohibition on such claims against businesses with fewer than six employees.

The Defendant company offered the Plaintiff a job as a technology consultant in February 2005. The Plaintiff accepted the offer and began working for the Plaintiff on March 15, 2005. Less than a month later, the Plaintiff informed the Defendant that she was pregnant with a due date of June 27, 2005. The Plaintiff alleges that the president of the Defendant's parent corporation was upset at the revelation of the Plaintiff's pregnancy and the day following the Plaintiff's revelation, asked her to take an unpaid leave of absence immediately. The Plaintiff further alleged the Defendant accused her of unethical behavior in not informing it of her pregnancy during her interviews and that the Defendant could not place the Plaintiff onsite with the Defendant's clients during her pregnancy or maternity leave. The Defendant placed the Plaintiff on unpaid administrative leave eight days later. The Plaintiff did not return to work.

The Defendant successfully moved to dismiss the complaint on the ground that under Massachusetts law, a business with fewer than six employees does not meet the definition of an "employer" subject to suit under the Massachusetts employment discrimination statute. The Plaintiff argued, however, that she can maintain an action against the Defendant for violation of the Massachusetts Equal Rights Act ("MERA").

Ultimately, the SJC disagreed with the Defendant's interpretation that Massachusetts law states small firms are exempt from pregnancy discrimination. In deciding that the Plaintiff had a viable cause of action under MERA, the SJC stated that courts construe civil rights statutes liberally, "giving effect to ever provision to produce a consistent body of law."

The SJC found there is nothing within the plain language of MERA that excludes small employers from its application. Section 102 of MERA states that all persons shall have a right to make and enforce contracts without regard to gender. The court also found there was nothing in the plain language of the Massachusetts anti-discrimination statute that states where that law does not apply, aggrieved parties are excluded from using other statutes to vindicate their right to be free from employment discrimination. The SJC found persuasive the text in the anti-discrimination statute stating that "nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth," unless inconsistent with the statute. The SJC held

that the phrase "nothing contained in this chapter" included the definition of employer. In addition, the SJC ruled there is nothing inconsistent between the two statutes because they do not cover the same employers and provide different remedies.

The SJC also held that the Massachusetts anti-discrimination statute is not the exclusive remedy for employment discrimination and pointed to several cases in which the court held that when the statute was unavailable to a plaintiff, there were other laws under which the plaintiff could sue.

As a result, the SJC ruled that an aggrieved party who is precluded from asserting an employment discrimination claim under the anti-discrimination statute may assert a claim under MERA.

SJC went on to provide a historical background of MERA and how the legislature intended MERA to apply to all aspects of the employment relationship, including harassment and discharge. According to the SJC, the Massachusetts legislature assumed the SJC would give the obvious and intended meaning and scope to the clear language in the statute. In a news release accompanying MERA's passage into law, Governor Michael Dukakis stated the bill "effectively gives back job discrimination protections that the U.S. Supreme Court recently took away." The news release further stated the legislation reinstated employment discrimination protection and "restores to workers the ability to sue for money damages in cases of on-the-job discrimination."

The court determined that although the Defendant was a business having fewer than six employees, thereby precluding claims under the state's anti-discrimination statute, the Plaintiff has a viable MERA claim.

Having determined the Plaintiff was entitled to bring a claim under MERA, the SJC next turned to the issue of whether the phrase "make and enforce contracts" in section 102 of MERA is limited to the hiring phase of employment as set forth by the U.S. Supreme Court in interpreting federal employment discrimination law. The Defendant argued that MERA is inapplicable to post-hiring employment decisions. The Defendant contended that the U.S. Supreme Court interpreted this phrase to encompass contract formation claims only, but not to discrimination by an employer such as a breach of contract or imposition of discriminatory working conditions.

The SJC ruled that section 102 of MERA is not limited to the hiring phase of employment because the Massachusetts legislature did not amend MERA in 1991 at the same time Congress amended federal employment discrimination statutes. In determining the phrase "make and enforce contracts" applies to more than just the initial hiring phase, the SJC referred to its obligation to interpret civil rights statutes broadly. The SJC ruled that being able to "enforce a contract" must cover discriminatory conduct during the course of employment.

As a result of this ruling, more plaintiffs will have opportunities to file claims as civil rights violations even though a more specific statute might exclude a claim. The underlying case will be returned to the trial court where it will proceed on the merits.

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How Can Employers Save Money on Health Insurance?

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Saving money on health insurance is never easy, particularly in today's economy. Given the price of gas and modest increases in salaries, employers are at a crucial point where they cannot continue to pass along health insurance increases to employees.

There is a win-win solution that can save employers and employee's money -a high deductible health plan with a Health Reimbursement Arrangement (HRA). This may sound complicated, but this is actually a relatively simple concept that has been successfully implemented at companies, (large and small). It does not require changing insurers, re-enrolling employees or passing along additional costs to employees.

Example:
A company with 150 employees is spending $1,000,000 per year for a typical copay medical plan, (the employer pays 75 percent and the employee contributions cover the other 25 percent). A $1,000 deductible plan with the same insurer costs $750,000, ($250,000 less than the copay plan). Please keep in mind that a number of services, including the following are not subject to the $1,000 deductible; (preventive services, prescription drugs and emergency room). The employer agrees to fund through an HRA, 50 percent of the 1,000 individual deductible and 50% of the $2,000 family deductible.

The HRA is an employer owned account that is simply a promise to reimburse, if there are deductible expenses. Assuming 100 single employees and 50 employees with family coverage, and that 60 percent will fully spend the HRA fund, [(100 x $500) + (50 x $1,000)] x .6 is $60,000 is the expected HRA reimbursement. The HRA administration cost is approximately $10,000 per year, (approximately $5 per employee per month) so the total premium of $750,000, + HRA funding $60,000, + administration $10,000 is $820,000, or $180,000, 18 percent less than the typical copay plan.

What does this mean for employees? Most medical plans have copays of $250 or $500 per outpatient surgical procedure, hospitalization, or MRI. These copays are all eliminated and replaced by a once a year $1,000 deductible. The deductible does not apply to preventive care, emergency room and prescription drugs. The employer is reimbursing the first $500 of the individual deductible, or the first $1,000 of the family deductible. Most employees, (approximately 70 percent will not spend the entire HRA fund reimbursed by the employer, which means that they essentially will not have a deductible). The other 30 percent of employees that do have more extensive health care services will spend about the same that they would have with the traditional copay plans, (hospital copays, surgical copays and MRI copays).

Any unused money in the HRA can be carried over to next year, giving employees an incentive to become

better consumers of health care. Employees and the employer save 18 percent on health insurance; they get a better plan and get to rollover any unused money. So…what's the catch? One of the key factors to the success of high deductible HRA plans is a commitment by the employer to communicate how the plan works. There are a lot of resources and tools available by insurance companies, but the employer must be prepared to, (with the support of their broker/advisor and insurance company) communicate the plan. It is important to work with an insurance broker/ advisor who is knowledgable about HRA's and has experience designing and communicating these plans.

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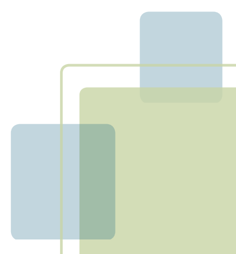

"Rank-And-File" Employee Not Subject to Fiduciary Duty Rule, Says Federal Court

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Interpreting Massachusetts law, the Federal District Court in Boston has ruled that a breach of fiduciary duty claim cannot stand against a so-called "rank-and-file" employee. The ruling was made in the context of a suit brought against an ex-employee. The employee had signed a restrictive covenant prohibiting him from accepting certain employment for a period of 12 months after he stopped working for his old company. The job he took with a new employer violated the covenant at issue. The former employee was an IT systems administrator who left his old company and immediately began working for a competing business. There was no allegation that in doing so the former employee had absconded with confidential or proprietary information of his ex-employer, or had somehow conveyed the same to his new employer.

The Court analyzed carefully the relationship between the systems analyst and his former employer. The Court noted that "[a]t common law, employees have a duty of loyalty to their employer, which precludes competing with their employer." TalentBurst, Inc. v. Collabera, Inc. 507 F. Supp. 2d 261, 265 (D. Mass. 2008). The Court found, however, that Massachusetts had appeared to adopt a more limited rule that only "employees occupying positions of trust and confidence owe a duty of loyalty to their employer." Id. citing Chelsea Indus., Inc. v. Gaffney, 389 Mass. 1, 11 (1983) (emphasis in original). The Court identified these individuals as being "company officers, directors, executives, and partners," and that the "employer-employee relationship is not one from which the law will necessarily imply a fiduciary duty in every case." (Citation omitted.) Ultimately, the Court ruled as to the ex-employee at issue:

> In sum, Massachusetts law makes clear that only certain employees owe their employers a fiduciary duty of loyalty. TalentBurst, however, makes no allegations in the complaint that permit this Court to conclude that Pallerla is one of those employees. First, Pallerla is described in the complaint as a systems administrator who was hired out to clients to perform IT work. His title, the type of work associated with it, and the fact he was hired out to do work for clients all indicate Pallerla was a "worker bee," not a manager, executive, or officer. Second, TalentBurst makes no allegations in the complaint that give rise to the inference that Pallerla was entrusted with confidential information or that other special circumstances existed such that he could be said to have occupied a position of "trust and confidence." Accordingly, he falls outside the

scope of the class of employees that, under Massachusetts law, owe a fiduciary duty of loyalty to their employers. Id. at 266-267. (Emphasis added).

The case illustrates the importance of drafting non-compete agreements to specifically include recitations that the signatory employee agrees and acknowledges that as an employee he will be exposed to the confidential and proprietary business information of the employer, if such is the case. Otherwise, in an enforcement action seeking to vindicate rights under a restrictive covenant such as a non-compete, an employer's complaint may prove futile.

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ALERT | New Identity Theft Prevention Regulations Must Be Implemented *(continued from page 1)*

The general requirements of such a program are that the company must assess both the internal and external risks associated with maintaining such information. This assumes that unauthorized access and use of such information could lead to identity theft. Specific policies and procedures must be implemented which include physical restrictions on accessing, transporting and handling of records containing personal information; and storage of paper records in locked areas/containers.

Encryption of all files containing personal information that will travel across public networks or be transmitted wirelessly is also required. Employees must be trained on the proper use of the computer security system and the importance of personal information security.

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