MASSACHUSETTS EMPLOYMENT LAW

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1. Overview

It is critical that social sector organizations familiarize themselves with relevant employment laws that affect their employees and their organization. Often social sector organizations begin with like-minded persons informally coming together for the purpose of addressing a challenging social problem. However, regardless of the ties that bind those who work together on a social mission, the social sector organization must comply with applicable employment laws and implement relevant policies and procedures.

The following provides an overview of federal and Massachusetts employment laws that could apply to social sector organizations and their employees located in Massachusetts. This overview does not provide a complete and comprehensive analysis of all potentially applicable employment laws in Massachusetts and the U.S. and it should not be acted upon without specific legal advice based on particular situation. Employment laws can differ greatly by state; if your organization and employees are located in another state, you should consult the employment law pages of LawForChange™ for that state.

1 With contributions from Michael L. Rosen, Jennifer Duke and Punam Rogers at Foley Hoag LLP for Massachusetts laws.
2. General Issues

a. At Will Employment

The conventional relationship between an employer and an employee hired for an indefinite period of time is called “employment at will.” Under this arrangement and setting aside the potential applicability of a number of special laws, either the employer or the employee may terminate the employment relationship at any time, with or without cause, and with or without advance notice. In the absence of a written contract or other evidence indicating that an employee may be terminated only “for cause,” employment is generally presumed to be at will.

It is important to remember, however, that there are a number of special laws, both federal and state, that limit an employer’s unfettered right to terminate traditional “at will” employees. These laws, many of which are identified and discussed below, prevent employers from firing any employee, whether at will or not, for illegal reasons (e.g., discriminatory reasons, whistleblowing, or engaging in certain activities protected by law).

b. Temporary Employment and Consulting Relationships

In addition to traditional at will employees or contract employees, many employers may use the services of temporary employees, independent contractors, or consultants (and employees of independent contractors or consultants).

When an employer hires an employee for a temporary period or for a season, the temporary employee is still an at will employee of the employer, and the relationship is governed by the same laws as those applicable to at will employees. As with permanent employees, legally-mandated benefits, such as workers’ compensation insurance and unemployment insurance, must be offered to temporary employees. Optional benefits, such as 401(k) plans, need not be offered to temporary employees.

An independent contractor or consultant is not considered an employee of the employer. Instead, an individual independent contractor is self-employed, and payments made to the independent contractor are considered contract payments rather than wages.

On the federal level, the U.S. Internal Revenue Service (“IRS”) and other governmental agencies have a variety of tests for determining whether a worker is an employee or an independent contractor, which tend to share the same primary factors. Essentially, workers who are performing the same job and performing under the same supervision as regular employees are usually deemed to be employees. Additional factors shared by the
various tests include: the degree of control the employer exercises over the worker’s hours and manner of performance; whether the employer provides the worker’s tools and/or employee benefits (e.g., medical insurance, vacation pay); the length of service; and the method of payment (e.g., is the worker paid hourly or on a project basis).

On the state level, Massachusetts has its own test for independent contractor status that is among the most stringent in the nation, making it extremely difficult for employers in the Commonwealth to establish that a worker is truly an independent contractor rather than an employee. State law creates a presumption of employee status, unless all three of the following criteria are met:

1. The worker performs services free from control and direction; and
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.

The consequences of incorrectly classifying an employee as an independent contractor can be far-reaching and expensive. In addition to liability for unpaid payroll taxes and penalties, administrative claims for benefits provided to regular employees, liability for unpaid unemployment insurance and workers’ compensation premiums, increased exposure to governmental audits, and potential exposure to employment-related civil suits and administrative claims, the Massachusetts law provides for criminal prosecution, fines of up to $50,000, and mandatory triple damages in civil suits against employers who are found to have misclassified a worker as an independent contractor. Massachusetts businesses should thus proceed with extreme caution when considering characterizing a worker as an independent contractor, and are advised to consult legal counsel regarding the specifics of their situation before doing so.

c. Employment Agreements

While it is not required or necessary to enter into an employment agreement with any employee, social sector organizations may wish to enter into written employment agreements with one or more key leaders. If an organization chooses to enter into an employment agreement with a particular employee, such agreements typically spell out the term of employment (even if it is “at will”), duties, compensation and circumstances under which the agreement may be terminated by either party. In addition, such agreements often contain provisions requiring key employees to keep information confidential even after they leave employment and barring them from becoming employed by certain competing organizations for a limited period of time following termination. The provisions of these agreements and whether any such agreement
should be used should be discussed with an employment attorney before they are presented to an employee or prospective employee.

d. Government Contractors

A number of laws impose specific requirements on employers who contract with the government or a government-funded agency and on employers who receive grants or other funding from the government. These laws include special equal opportunity laws, affirmative action laws, prevailing wage laws, and drug-free workplace laws. The application of the laws depends on the value of the contract or funding and/or the number of employees in the company.

e. Employee Records

Under Massachusetts and federal employment laws, an employer is either required to or should maintain the following records on each employee:

4 years – all records related to payment for services, including: name, social security number, beginning and end dates for each pay period, dates on which work was performed during each pay period, date and amount of wages paid, dates of hire, re-hire, or return to work after some period of separation, any special payments such as bonuses, etc.

3 years from date of termination – all employment related records such as: applications, promotional or hiring criteria, job descriptions, performance evaluations, results from background screening and/or pre-employment testing, documents describing and relating to the selection process for a position, names and applications of all who applied for a promotion, records of discipline, records considered when deciding to award or deny a promotion, and any other relevant documents to employment decisions that may be challenged under the Massachusetts Anti-Discrimination Statute.

In general, under federal laws, an employer is either required to or should maintain the following records on each employee:

1 year – documents related to hiring, accommodations, promotions, discipline, and discharge, including: job applications, resumes, or any other form of employment inquiry whenever submitted in response to an advertisement or notice of job opening, including records pertaining to failure or refusal to hire any individual; records relating to promotion, demotion, transfer, selection for training or apprenticeship, layoff, recall, or discharge of any employee; job orders submitted to an employment
agency or labor organization for recruitment of personnel; test papers completed by
applicants or candidates for any position; results of any physical examination if such
is considered in connection with a personnel action; advertisements or notices relating
to job openings, promotions, training, or opportunities for overtime work; requests for
reasonable accommodation for disability or religious observance and what
accommodation, if any was granted. This will cover the limitations period of claims
under Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with
Disabilities Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”)
(see Section 8 below for summaries of these and other federal laws).

3 years – Payroll records listing employee’s full name, home address, date of birth,
sex (for Equal Pay Act purposes), occupation/job title, time of day and day of week
on which workweek begins, regular rate of pay, the basis for determining regular rate
of pay (including any payments excluded from the regular rate of pay), straight-time
earnings, overtime premium earnings, additions/subtractions from wages for each pay
period, total wages for each pay period, and date of payment and pay period covered
by each payment. This is for claims under the ADEA and Fair Labor Standards Act
(“FLSA”).

2 years – Supplementary payroll records such as basic time sheets or production
records that contain the daily starting and stopping times of individual employees
and/or amount produced that day, wage rate tables for computing piece rates or other
rates used in computing straight-time earnings, wages, salary, or overtime, and any
records needed to explain the wage rate differential based on sex within the
establishment (e.g., production, seniority, or other bona fide business criteria). Such
information may be necessary in responding to claims under the FLSA, including the
Equal Pay Act.

1 year after plan terminates – Employee benefit plan records including: pension
plans, insurance plans, seniority systems, merit systems. This includes benefit plans
covered by ERISA as well as set plans for advancement, layoff, or reinstatement
based on seniority, merit, or some other formula which will be pertinent to either an
issue under a collective bargaining agreement or claims of age or other
discrimination.

3 years – Records related to qualified Family and Medical leave including: basic
payroll and employee data (used to determine qualification for protection under the
Family and Medical Leave Act (“FMLA”)), dates and hours FMLA leave is taken,
hours worked in 12 months prior to start of leave, copies of employee notices
furnished to employer, copies of notices provided to employee of rights and
responsibilities under FMLA, employer polices applicable to use of Family and
Medical leave, documents verifying premium payments of employee benefits (both employer paid and employee portion of premium), records of any disputes with employees over use of FMLA leave. These documents will assist in supporting compliance with FMLA.

**30 years** – Records of employee exposure to toxic substances. Such records are required by the Occupational Safety and Health Act (“OSHA”).

**5 years** – Occupational illness or injury records. These records, required by OSHA, should be kept for 5 years after the year in which the injury was sustained or treatment ended, whichever is longer.

**3 years or 1 year after termination** – I-9 Employment Eligibility Verification Form. These forms must be kept for a minimum of 3 years or 1 year after the employee’s employment ends, whichever is longer.

**4 years** – Tax records related to income tax withholdings. This is required by the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

Employers in Massachusetts with fewer than 20 employees should maintain, at a minimum, one or more personnel files for each employee. The personnel files should contain any offer letters and agreements signed by the employee, required wage and hour records, records regarding promotion, additional compensation, termination, disciplinary action, and any documents used to determine the employee’s qualifications for employment.

Medical records, immigration information, and other confidential documents, such as reference checks and investigative files for harassment claims, should be kept separately from an employee’s regular personnel file and should be kept confidential.

For employers in Massachusetts with 20 or more employees, the following documents pertaining to each employee must be kept in personnel records if they have been prepared by the employer: name, address, and date of birth; job application; resumes or forms of employment inquiries submitted in response to the employer’s advertisement; job title and description; compensation; starting date; list of probationary periods; performance evaluations; written warnings of substandard performance; any other documents relating to disciplinary action; dated termination notices; and waivers signed by employees. This information cannot be deleted until at least three years after the employee leaves the employer.

Employers in Massachusetts are obligated to allow an employee to view his or her personnel record within five days of the employee’s request. However, the employer
does not have to permit more than two separate reviews of the personnel records for an employee in a calendar year. Additionally, employers must notify employees whenever potentially negative information is added to their personnel records.

3. Employment Policies and Employee Handbooks

Every employer, except perhaps those with only two or three employees, should have written employment policies. Written policies serve to clarify expectations, reduce risk and, in some cases, comply with statutory requirements such as those in the Family and Medical Leave Act (“FMLA”). In addition, both state and federal law require that certain laws be posted in an area accessible to all employees. There are several services that provide updated posters containing these notices. Most concern compliance with the FMLA, Title VII, the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), worker’s compensation, the organization’s anti-harassment policy and state and federal wage and hour laws.

Policies for any employment manual or handbook should include:

a. Nondiscrimination

Under federal law, employers are prohibited from discriminating on the basis of race, color, religion, sex, national origin, veteran status, pregnancy, age, disability, or genetic information. Massachusetts law also prohibits discrimination on the basis of sexual orientation, gender identity and expression, military status, or ancestry. The discrimination laws prohibit an employer from making employment related decisions, such as hiring, firing, promotions, pay increases, or conditioning other terms and conditions of employment on a person’s protected status. Some local communities may have ordinances that provide for even greater protections, so it is important to check those local laws for any additional requirements.

Failing to comply with discrimination laws can result in expensive lawsuits or administrative investigations. In general, these laws require that all employees be treated equally without regard to their protected status. In addition, employers may not retaliate against employees who seek to further or enforce employment discrimination laws. Employers also should be aware of their obligations to make reasonable accommodations for employees where the employees’ disabilities or religious beliefs conflict with employment requirements. These obligations, which exist under both federal and state law, are unlike other equal employment opportunity laws in that treating all employees equally will not satisfy the obligations. Instead, employers must take positive steps to reasonably accommodate employees with disabilities and specific religious practices.
See federal laws regarding discrimination in “Federal Law” section below. See Massachusetts laws regarding discrimination in “Other State Specific Considerations” section below.

b. Harassment

Both federal and Massachusetts laws also prohibit harassment in the workplace against any of the classes of employees protected under federal and state discrimination law. Two types of conduct constitute “harassment in the workplace.” The most obvious occurs when a supervisor makes a job promotion or benefit dependent on the receipt of sexual favors (often called “quid pro quo” sexual harassment). The other type occurs when an employee has to endure comments, physical contact, physical gestures, or other behavior that creates an offensive atmosphere for that employee (often called “hostile environment” harassment). While sexual harassment is most often thought of, harassment, particularly “hostile environment” harassment, on the basis of race, disability, age, or any other protected characteristic is also prohibited.

An employer is required to take all reasonable steps necessary to prevent the occurrence of either type of harassment, which includes having an appropriate and comprehensive policy against harassment. For this reason, a harassment policy that both expressly prohibits harassment and provides avenues for employees to report harassing behavior are a must in any workplace. The Massachusetts Commission Against Discrimination publishes a model anti-harassment policy on its website, www.mass.gov/mcad, that employers may use as a guide.

Employees should be encouraged to report any harassing behavior to their supervisor and/or a human resources person or senior manager designated to investigate such claims. Reasonable steps to prevent harassment would also include periodic dissemination of the harassment policy, harassment training (particularly for supervisors), investigations of any complaints, and, when harassment occurs, prompt and effective remedial action. As with discrimination, employers cannot retaliate against an employee who complains about harassment.

c. OSHA Injury and Illness Prevention

The Occupational Safety and Health Act ("OSHA") regulates workplace safety for employers in businesses which affect commerce. Under OSHA, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing, or are likely to cause, them death or serious physical harm. Employers must also comply with occupational safety and health standards which are issued under the Act. "Right to know" regulations issued under OSHA require that employees in certain industries be warned about hazardous materials and chemicals to which they may be
exposed. OSHA sets forth a detailed procedure for adopting safety and health standards and provides for inspection, investigation and enforcement. Citations issued for noncompliance can result in civil and criminal penalties, including fines and, for violations causing the death of an employee, imprisonment. States are allowed to develop and enforce their own plans setting and enforcing occupational safety and health standards. Some industries have specific statutes which regulate employee safety and health.

d. Workplace Violence

Employers should take steps to prevent violence in the workplace. This may include policies against bringing weapons into the workplace, taking prompt and appropriate action against any acts or threats of violence, and creating an environment that will reduce the likelihood of violence in the workplace.

e. Breaks for Nursing Mothers

Under a new federal law, employers must provide “reasonable” unpaid breaks for non-exempt, nursing employees to express breast milk. Nursing mothers must be furnished with a private location, other than a bathroom, for these breaks. These breaks must be provided for up to one year after the child’s birth. Employers with fewer than 50 employees may be exempt from this requirement if the breaks would cause “undue hardship” by subjecting the employer to “significant difficulty or expense.” This policy need not be included in the employer’s policy manual, but employers must comply with this standard.

4. Hiring Process

The hiring process involves receiving and reviewing applications, interviewing potential candidates, and selecting the employee. Several federal and Massachusetts laws limit what employers can ask during the process.

a. Applications, Interviewing, Reference Checks and Background Checks

The application process generally includes publishing the open position and accepting applications. Every help-wanted advertisement should contain an equal employment opportunity statement. Discrimination laws prohibit certain questions on the application, particularly those that elicit information about a person’s protected status and are not job related. For a sample job application that employers may use as a guide, see Section 11, below.

The interviewing process generally involves interviews and reference checks. Federal and Massachusetts anti-discrimination laws prohibit employers from asking certain questions
during the hiring process. For example questions regarding a person’s age, disability, child bearing decisions or plans, or other questions related to a person’s protected status that are not directly related to the qualifications for the job are absolutely prohibited. As described below, employers in Massachusetts also face a number of restrictions regarding inquiring into an applicant’s criminal history. Every person who interviews candidates and conducts reference checks should have a working knowledge of the laws that govern employment interviews.

Employers who use outside organizations to conduct background checks must comply with the federal credit-reporting law under the Fair Credit Reporting Act, which requires certain disclosures and reports to be made available to applicants.

i) Criminal Record Inquiries in Massachusetts

In Massachusetts, employers are prohibited from asking applicants about their criminal history on an initial written application or form prior to an interview. However, there is an exception for positions that are subject to state or federal laws mandating or creating a presumption of disqualification of applicants with certain types of conviction records.

Employers who wish to screen an applicant’s criminal record, known in Massachusetts as a Criminal Offender Record Information ("CORI") report must ensure they comply with the state’s privacy and criminal information reporting laws. Organizations can request a CORI report over the internet for a fee from the Department of Criminal Justice Information Services by registering with the newly created iCORI Service, which can be found on https://icori.chs.state.ma.us.

Employers who conduct five or more criminal background checks annually are required to maintain a written criminal offender record information policy. The policy must (1) notify applications of a potential adverse decision based on criminal offender record information, (2) provide that a copy of the criminal offender record information will be given to the applicant, along with a copy of the policy, and (3) explain the process for correcting a criminal record. CORI forms, applications, and model policies can be found on http://www.mass.gov/eopss/crime-prev-personal-sfty/bkgd-check/cori/cori-forms-and-applications.html.

The law requires employers to discard both applicants’ and former employees’ criminal offender information after 7 years from the adverse hiring decision date or last date of employment, respectively.

Before conducting a criminal record check, the employer must have the applicant sign a CORI Acknowledgement Form authorizing the employer to obtain his or her record and must verify the applicant’s identity by reviewing a form of government-issued
identification. The employer must then sign and date the form, certifying that the individual was properly identified.

In addition to these administrative aspects of Massachusetts law, employers have an affirmative duty to provide an applicant with a copy of any criminal record information prior to questioning the applicant about it or using it as a basis for an adverse employment decision.

Although employers may not ask about criminal records on initial application forms, the law permits questioning about criminal records at other stages of the hiring process. Note, however, that employers are prohibited from inquiring into the criminal history of applicants regarding arrest, detention and disposition for a violation of law where:

1. no conviction resulted,

2. there is a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or

3. there is any conviction of a misdemeanor where the date of conviction or completion of incarceration (whichever is later) occurred five years or more prior to the date of application or request for information, unless the person had been convicted of any offense within the five years immediately preceding the date of application or request for information.

The law places no restrictions on an employer’s ability to ask about felony convictions. In addition, employers can inquire about misdemeanor convictions subject to the limitations imposed by paragraphs 2 and 3 above. More information about employers’ lawful inquiries into, and use of, criminal records can be found on the website of the Massachusetts Commission Against Discrimination: http://www.mass.gov/mcad/crimrec.html.

ii) Pre-Employment Testing

Federal and Massachusetts disability laws impose certain affirmative obligations on employers to ensure that disabled persons have a fair opportunity to participate in the hiring process. If any pre-employment testing is administered, then reasonable accommodations must be made to those applicants who require them. Further, the use of testing or other criteria not related to the essential functions of the position being filled should not be used as they may tend to have a discriminatory impact on disabled applicants.

iii) Drug Tests
If an employer is going to administer a drug test, then it should have a set policy and make sure it is applied across the board. Applicants may be required to disclose the use of prescription drugs to the test administrator, and that information should be kept confidential and only used to determine if the applicant passed or failed the drug test. Such information is not provided to the employer. Under Massachusetts law, random drug testing of existing employees is permitted only with respect to employees in safety-sensitive positions.

b. Immigration

All employers are required to verify that every new hire is either a U.S. citizen or authorized to work in the U.S. All employees must complete Employment Eligibility Verification (I-9) Forms and produce required documentation within three days of their hire date. Failure to follow the I-9 process can result in penalties and an audit by the Immigration and Customs Enforcement (ICE).

Employers cannot discriminate against employees based on their immigration status. Thus, once an employee has satisfied the employer that he or she is eligible to work in the U.S, the employee’s immigration status may not be used in any other employment decisions.

5. Compensation and Benefits

Several different federal and Massachusetts laws regulate various forms of compensation and benefits. Each social sector organization should adopt a compensation scheme that is compatible with the organization’s mission and furthers its human resources goals.

a. Wages

Most employers — regardless of size — are governed by both federal and state wage and hour laws. Federal and state wage and hour laws differ slightly, and employers must be aware of both. On July 24, 2009, the federal minimum wage was increased to $7.25/hr. In Massachusetts, however, the minimum wage is $8.00/hr. Under Massachusetts law, the minimum wage in the Commonwealth must be at least ten cents more per hour than the federal minimum wage. Massachusetts employers must pay at least the Massachusetts minimum wage rate.

The two major requirements in both federal and Massachusetts wage and hour laws concern: (1) payment of the minimum wage and (2) payment for overtime hours. Under the minimum wage laws, employers must pay employees an amount that is at least the statutory minimum wage multiplied by the number of hours that the employee worked in any given work week. Under the laws governing overtime, employers must pay most
employees additional compensation at a rate of one and a half times their regular rate for overtime hours, i.e., hours above forty per week.

Minimum wage and overtime laws are not limited to hourly employees. Employees who are paid in other ways, such as by salary or commission, may also be entitled to minimum wages and overtime pay. The minimum wage laws apply to all employees and the overtime laws apply to all employees except those who fall into one of the “exempt” classifications under federal law.

Under the Massachusetts Wage Act, M.G.L. c. 149 § 148, all employees, whether salaried or hourly, must be paid within six days of the end of the employer’s pay period, which will usually be either one or two weeks long. If an employee leaves her employment voluntarily, she must be paid all wages due her no later than the next regular pay day following her last day on duty. If an employee is terminated involuntarily, she must be paid all wages due her immediately. Employers who violate this law are subject to mandatory triple damages. In addition, the president or treasurer of a corporation and any “officers or agents having management of the corporation” are deemed to be “employers” and therefore can be individually liable for failure to pay wages due.

Generally, accrued but unpaid vacation time is considered “wages” under the Massachusetts Wage Act and must be paid at termination. “Sick time” is not considered “wages.” However, if vacation time and sick time are combined into a pool of paid leave time (such as a Paid Time Off (PTO) or Earned Time Off (ETO) policy), such accrued leave time must be paid at termination. Employees cannot waive their rights under the Wage Act, so deferred compensation arrangements, as, for instance, when the founders of a fledgling company agree not to draw a salary until the company begins to make a profit, are illegal in Massachusetts. Employees must be paid at least the minimum hourly wage rate for all hours worked, plus overtime where applicable.

b. **Bonuses**

Bonuses can improve employee retention and provide extra incentives for reaching certain targets. Employers who provide bonuses (other than gift bonuses like holiday bonuses) should have a written bonus plan to ensure clarity, and to avoid unintended implied contracts. Furthermore, how bonuses are determined and whether they are guaranteed (for example, for hitting certain production goals) or discretionary will also have an effect on calculating an employee’s overtime.

c. **Taxes**

Employers are required to withhold federal income tax and social security tax from taxable wages paid to employees. Under federal law, funds withheld must be deposited in certain depositories accompanied by a Federal Tax Deposit Coupon (IRS Form 8109) or
through the Electronics Federal Tax Payment System (EFTPS). An Employer’s Quarterly Federal Tax Return (IRS Form 941) must then be filed before the end of the month following each calendar quarter. Willful failure on the part of the employer to collect, account for, and pay withholding taxes will subject the employer to a significant monetary penalty, and in some cases will impose personal liability on those responsible for remitting the withholding taxes.

Most employers, including nonprofit organizations that are not 501(c)(3) organizations, must also file an Employer’s Annual Federal Unemployment (FUTA) Tax Return (IRS Form 940) and pay any balance due on or before January 31 of each year. Details may be found in IRS Circular E, available at http://www.irs.gov/publications/p15/index.html. Employers who are 501(c)(3) organizations, however, are not required to file a FUTA Tax Return. If payment of tax is required, any balance is due on or before January 31 of each year. Details may be found in IRS Circular E, available at http://www.irs.gov/publications/p15/index.html and in Publication 15A.

d. Mandatory Benefits

i) Workers’ Compensation

All employers must provide worker’s compensation insurance for their employees. There are some very limited exemptions from this requirement, but the worker’s compensation benefits are the only benefits available for an employee injured in an “on the job accident.” What this means for employers is that an employee who is injured while performing work for the employer cannot sue the employer for his/her injury, but is compensated through worker’s compensation. Failure to obtain coverage not only exposes the employer to the risk of a tort lawsuit from an injured employee, but may result in stiff fines and penalties from the Massachusetts Department of Industrial Accidents, which also has the authority to shut down the employer’s business until it obtains coverage. In Massachusetts, employers may not deduct the costs of workers’ compensation insurance from employees’ wages. Further information is available on the Department’s website, www.mass.gov/dia.

ii) Unemployment Insurance

Employers who pay wages of more than $1,500 in any given calendar quarter, or those that have people working one or more days in each of 13 weeks during a calendar year, must contribute to the Massachusetts unemployment insurance fund. Employers pay contributions under the experience rating provisions of the law at a rate of between 1.26% and 12.27% of their payroll. The employer’s contribution rate depends on its individual benefit ratio (benefits charged to its
account for a certain period divided by its total payroll for the same period) as well as the level of funding of the Unemployment Compensation Fund.

Nonprofit employers may opt out of the experience rating system and instead choose from one of two payment options—the reimbursable method and the contributory method. The reimbursable method allows the employer to incur costs only when a former employee files a claim that will be charged against its account. The contributory method requires employers to pay a quarterly contribution to the Unemployment Insurance Trust Fund based on a set percentage assessed on the first $14,000 annually paid to each employee. A pamphlet regarding how to choose the least costly option is available at [http://www.mass.gov/lwd/docs/dua/business/2024-508.pdf](http://www.mass.gov/lwd/docs/dua/business/2024-508.pdf).

When an employee is granted unemployment compensation benefits, whether and to what extent those payments are counted against the employer’s account depends on several factors, including how long the employee worked, the amount of wages the employee earned, and other recent jobs the employee may have or have had, if any. Further information is available on the website of the Massachusetts Division of Unemployment Assistance, [www.mass.gov/dua](http://www.mass.gov/dua).

An employee’s eligibility for unemployment compensation benefits is discussed in detail below in the “Termination” section.

### iii) Massachusetts Health Insurance Mandate

Massachusetts employers with 11 or more full-time equivalent employees must show that they have made a “Fair Share Contribution” to satisfying the state’s health insurance mandate, either by offering employer-sponsored health insurance to their employees at cost and coverage levels satisfying state regulations, or by making quarterly payments to the Commonwealth Care Trust Fund. Such employers are required to file a Health Insurance Responsibility Disclosure Form. Employers who do not comply with these requirements are subject to penalties. Detailed information on the Fair Share Contribution requirements may be found at [www.mass.gov/fairshare](http://www.mass.gov/fairshare). The federal Patient Protection and Affordable Care Act, which is referenced in the “Federal Law” section below, is not likely to affect the Fair Share Contribution requirement.

### iv) Federally Mandated Benefits

See summaries of ERISA, COBRA and HIPAA in the “Federal Law” discussion below. If applicable, these federal laws mandate certain specified benefits.
e. Mandatory Leave of Absence

Several federal and Massachusetts laws either require or govern leaves of absence, depending upon the reason for the leave. Although these leave laws can be very complicated, application of the laws usually depends on the size of the employer, and some of the more complicated laws do not apply to small employers. Various special leave provisions are discussed in the “Federal Law” section and “Massachusetts Law” sections below.

With certain exceptions, the federal Family and Medical Leave Act (“FMLA”) requires employers with 50 or more employees to provide unpaid family or medical leave of up to 12 weeks in a 12-month period for the birth or adoption of a child, for the serious health condition of the employee or spouse, parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in the support of a contingency operation. A “serious health condition” includes inpatient hospitalization and subsequent treatment therefore and continuing treatment by a health care provider, including pregnancy. To be eligible for FMLA leave, the employee must have worked 12 months or longer, performed at least 1,250 hours of service for the employer in the 12 months prior to the date of leave, and must work at a site within 75 miles of which the employer has 50 or more employees. If the employee’s need for leave is foreseeable, the employee must provide his or her employer with 30 days notice before taking leave. When the need for leave is unforeseeable, the employee is required to provide notice as soon as practicable.

An individual who believes his or her FMLA rights have been violated is entitled to file a lawsuit. Remedies include lost compensation, liquidated damages, other out of pocket expenses, equitable relief, and attorneys’ fees.

f. Voluntary Benefits

The benefits listed below are not required by law. However, many employers choose to provide employees with such benefits in order to attract and retain the most qualified workers.

An employer is not required to provide employees with retirement benefits, welfare plans, severance pay, or other voluntary benefits. If an employer does establish such plans, however, they are governed by a federal law called the Employee Retirement Income Security Act (“ERISA”). See “Federal Law” section below. Under ERISA, employee benefit plans must comply with numerous and complex procedural requirements.
An employer is not required to provide employees with vacation pay. If an employer elects to provide such benefits, however, they should be uniformly applied in conformity with a written policy. This will provide protection against claims of discrimination and may be necessary to ensure the employer complies with the pay provisions of the Fair Labor Standards Act (“FLSA”) as it relates to “exempt” employees.

Although it is not uncommon to do so, employers are not required to give employees paid holidays. Indeed, except in cases where accommodation of religious holidays might be required, employers are not even required to give employees time off during holidays.

Employers are not required to offer paid sick leave to employees. Traditional sick leave is often limited to time off for dealing with the employee’s own illness or possibly to care for a sick child or spouse. Upon termination, the employer has no legal obligation to pay out unused sick leave, which means the employer’s written policy will control.

Many employers choose to combine vacation, sick leave, personal days, and floating holidays into a single “paid time off” or “PTO” policy. This makes it easier to administer employee time off and a single policy for accumulating and using PTO will often suffice. However, as noted above, under state law all unused PTO is considered “wages” and must be paid out to employees upon termination, whereas if an employer administers sick and vacation time separately, only the unused vacation time will be counted as “wages.”

Paid leaves of absence, such as paid maternity or paternity leave, are not required by law.

6. Termination of Employment

Absent an employment contract that provides otherwise, an employee of a social sector organization may ordinarily be terminated with or without cause provided there is no violation of applicable anti-discrimination laws. Prior to termination, social sector organizations should thoroughly review all records concerning the employee or employees in question and carefully assess the risks of litigation. Normally, advance notice of termination should be given. In most cases, employment counsel should be consulted before terminating one or more employees.

a. Pay

All wages earned and unpaid at the time of discharge are due and payable upon the termination of employment and must be paid on or before the next regular pay date. See discussion of Massachusetts Wage Act above.
b. **Severance Agreements / Releases**

Generally, employers are not required to provide severance pay, unless they have agreed to do so. If the employer wants to offer severance to an employee, the employer may ask the employee to sign a release in exchange for the severance, in which the employee waives all legal claims the employee may have against the employer. If an employer seeks a release, the employee must be provided severance or other consideration in addition to any payments the employee was already entitled to receive. Federal law contains specific statutory requirements for waivers of age discrimination claims and prohibits the waiver of certain wage claims.

c. **Unemployment Insurance / Compensation**

Employers must post a copy of the Division of Unemployment Assistance (“DUA”) poster informing workers of the availability of unemployment insurance and give a copy of a pamphlet regarding how to file a claim for unemployment insurance benefits to all employees who are separated from work for seven or more days. Links to the poster and pamphlet are available on: [http://www.mass.gov/lwd/unemployment-insur/resources/questions-and-answers/employers-and-businesses/unemployment-insurance.html](http://www.mass.gov/lwd/unemployment-insur/resources/questions-and-answers/employers-and-businesses/unemployment-insurance.html)

To be eligible for unemployment insurance payments, an applicant generally must either (1) have been terminated for reasons other than serious misconduct connected with his or her work or (2) have quit for one of the reasons approved by the DUA, such as illegal harassment on the part of the employer. In addition, an applicant must be available and actively looking for work during the entire period of benefits, and (1) have earned at least $3,500 during the last four quarters and at least 30 times the amount they would be eligible to collect in weekly benefits (this is usually 50% of their average weekly wage); (2) be unemployed for a waiting period of one week; (3) make a claim for benefits for each week of unemployment; (4) have registered to work and continue to report to the employment office; (5) be available and able to work; and (6) actively seek, but be unable to obtain work in four of the last five quarters.

Unemployment benefits come from taxes paid by employers on wages of their workers. These taxes are put in a special trust fund that is used solely to pay unemployment benefits to workers who lose their jobs through no fault of their own. The benefits are intended to be temporary to help people with basic needs while seeking new employment. More information regarding employers’ required contributions to the fund can be found above in the “Compensation and Benefits” section.

To be “unemployed,” individuals must perform no services in a given week and receive no remuneration. In situations where individuals receive payments from their employers
for periods in which they render no personal services, e.g., back pay awards, holiday and vacation pay, certain severance payments or employer funded disability pay, they are not “unemployed” and are not entitled to unemployment benefits.

d. HealthCare Continuation (COBRA) Requirements

The Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) requires employers who provide employee health and medical benefits to provide notification to employees of their COBRA rights at the time of a “qualifying event” such as a resignation or an involuntary termination of employment. COBRA applies to employers with 20 or more employees. See “Federal Law” section below.

Massachusetts has its own, similar “mini-COBRA” law that covers employers with between 2 and 19 employees.

7. Immigration

With globalization and the increasing benefits of a diverse workforce, private or public sector employers located in the U.S. often seek to employ foreign personnel. This is particularly true with organizations that are already working and addressing problems not just in the U.S. but around the world. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien’s qualifications and citizenship, and the relationship between the U.S. employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the U.S. for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

When planning to bring foreign personnel to the U.S., U.S. employers should allow several months for processing by the United States Citizenship and Immigration Services (“USCIS”), as well as the Department of State and Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, change of job sites, and changes in job duties, may dramatically affect (if not invalidate or at very least require additional steps) the employment authorization of foreign employees.

a. Permanent Residency (the “green card”)

Permanent residency is commonly based on either family relationships, such as marriage to a U.S. citizen, or offer of employment. Permanent residence gained through employment often involves a time-consuming process that takes several steps spanning over a number of years. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that immigration
filing and the timing of each step before contemplating this approach for employment in the U.S. Most often, an alien is already in the U.S. on a temporary visa and the employer will utilize this approach while the alien is already working for it. Even then, this process can take several years.

b. Temporary Visas.

The following are the most commonly used temporary visas:

i) **B-1 Business Visitors and B-2 Visitors for Pleasure**

These visas are commonly utilized for brief visits to the U.S. of six months or less. Neither visa authorizes employment in the U.S. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the U.S. B-1 or B-2 visitors cannot be on the U.S. payroll or receive U.S. source remuneration.

ii) **F-1 Academic Student Visas Including Practical Training**

Often foreign students come to the U.S. in F-1 status for academic training or M-1 status for vocational training. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.

iii) **J-1 Exchange Visitor Visas**

These visas are for academic students, scholars, researchers, and teachers traveling to the U.S. to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J-1 exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the U.S.

iv) **TN Professionals**

Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted one to three years of authorized stay for
specific employers and other employment is not allowed without prior USCIS approval.

v) **E-1 Treaty Trader and E-2 Treaty Investor Visas**

These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the U.S. E visas are commonly used to transfer managers, executives or engineers with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its U.S. operations. Generally, E visa holders receive a five-year visa stamp but only two-year entries at any time.

vi) **E-3 Treaty Alien in a Specialty Occupation Visas for Australian Citizens**

E-3 visas are for Australian citizens who will be employed in the U.S. in specialty occupations that require at least a bachelor’s degree. Like H-1B visas, the U.S. employer must pay the E-3 worker the higher of the actual wage paid by such employer to U.S. workers or the prevailing wage paid to U.S. workers in local commuting area as determined by Department of Labor online wage library or other valid salary survey. These temporary visas are granted for a period of 2 years and are renewable indefinitely.

vii) **H-1B Specialty Occupation Visas**

H-1B visas are for persons in specialty occupations that require at least a bachelor’s degree. Examples of such professionals are computer programmers, engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. There are instances where an H-1B temporary worker may be able to extend their stay for a longer period. H-1B visas are employer-and job-specific. A U.S. employer must pay H-1B workers the higher of actual wage paid by such employer to U.S. workers or the prevailing wage paid to U.S. workers in local commuting area as determined by Department of Labor online wage library or other valid salary survey. There are specific record keeping rules for all H-1B petitions filed by the U.S. employer.

viii) **L-1 Intra-company Transferee Visas**

Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to U.S.-related companies. L-1 visas provide employer-specific work authorization for an initial three-year
period with possible extensions of up to seven years for L-1A visa transfers of executives and managers; up to five years for L-1B specialized knowledge employees. As in the case of certain E visa capacities, some L managers or executives may qualify for a faster approach in the employment based permanent residence process.

ix) O-1 and O-2 Visas for Extraordinary Ability Persons

O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.

x) P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor Visas

These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time, to come to the U.S. and work. Essential support personnel can also be included in this category.

xi) Others

There are a number of other non-immigrant visas categories that may apply to specific desired entries.

c. Immigration and Nationality Act ("INA")

The Immigration and Nationality Act ("INA") includes provisions addressing employment eligibility, employment verification and nondiscrimination. Employers may hire only persons who may legally work in the U.S. (i.e., citizens and nationals of the U.S.) and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing Employment Eligibility Verification Form (I-9). Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.

d. Immigration Reform and Control Act ("IRCA")

The Immigration Reform and Control Act ("IRCA") requires that employers, regardless of size, inspect and verify documentation establishing the identity and eligibility to work in the U.S. of every newly hired employee, and makes it unlawful to hire an alien who is ineligible for work in the U.S. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under the IRCA, as well as for hiring
unauthorized workers. IRCA also prohibits employers of four or more workers from discriminating against lawfully admitted aliens.

8. Federal Law

Described below are some of the more significant federal laws and regulations, not including immigration, affecting the employment relationship.

a. Title VII of the Civil Rights Act of 1964 ("Title VII")

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, sex, color, national origin, or religion. Title VII applies to all employers with 15 or more employees and prohibits discrimination in areas of advertising, recruiting, hiring, promotion, compensation, benefits administration, and termination. Title VII also prohibits harassment based on an individual’s protected characteristics, as well as retaliation for engaging in conduct protected by Title VII. To recover damages, any individual who has suffered such discrimination must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discrimination. In Massachusetts this time period is extended to 300 days from the alleged discrimination for most claims. Once the EEOC investigates the allegations and makes a determination regarding the sufficiency of the evidence to prove the alleged discrimination, the EEOC will notify the employee in writing of his or her right to bring a civil action. Regardless of the EEOC’s determination, the employee may, within 90 days of receipt of the notice, bring a legal action based on his or her allegations. An individual’s possible remedies under Title VII include compensatory and punitive damages, back pay and front pay, reinstatement, and attorneys’ fees.

b. Age Discrimination in Employment Act ("ADEA")

The Age Discrimination in Employment Act ("ADEA") makes it unlawful for employers to fail or refuse to hire, to discharge, limit, segregate or classify protected employees, or otherwise discriminate against them with respect to their compensation, terms, conditions or privileges of employment because of their age. The ADEA protects employees who are at least 40 years old and applies to all employers with 20 or more employees employed in an industry affecting commerce. There are limited exceptions to the ADEA where age is a "bona fide occupational qualification" necessary to the particular business, or where the differentiation is based on reasonable factors other than age. Employees may file charges of discrimination with the EEOC, which enforces the ADEA. The employee or the EEOC may then sue in federal court for damages and other relief. Remedies under the ADEA include reinstatement or front pay, back pay, liquidated damages, and attorneys’ fees.
c. **Americans with Disabilities Act (“ADA”)**

The Americans with Disabilities Act (“ADA”) makes it unlawful for employers to discriminate against a qualified individual with a disability based on the existence of a disability, a record of a disability, or on the employer’s perception that an employee is disabled. The ADA requires that employers take reasonable steps to accommodate disabled individuals in the workplace unless such measures would constitute an undue hardship on the employer. The ADA applies to employers engaged in interstate commerce that have 15 or more employees. The procedures for pursuing a claim under the ADA, as well as the available remedies, are similar to those provided by Title VII.


e. **Employee Polygraph Protection Act (“EPPA”)**

Employee Polygraph Protection Act (“EPPA”) generally prohibits the use of polygraph machines by an employer in determining whether to hire, promote or terminate an individual. Some private employers, including those within the security field, those involved in the protection of the public, those involved in operations impacting national security, and those authorized to manufacture, distribute, or dispense any controlled substance, are exempt from the EPPA. The EPPA also permits the use of a lie detector by any employer when the employer sustains an economic loss, the employee to be tested had access to the property that is the subject of the investigation, the employer has a reasonable suspicion that the employee was involved in the incident being investigated, and the employer obtains a statement from the employee authorizing the test. Even in these limited situations where use of a lie detector is permissible, an employee being tested can terminate the examination at any time. Either the Secretary of Labor or an aggrieved employee can bring an action against an employer for violating the EPPA. Remedies include reinstatement, promotion, back pay, and attorneys’ fees. The Department of Labor may also impose a fine up to $10,000.

f. **The Equal Pay Act of 1963 (“EPA”)**

The Equal Pay Act of 1963 requires employers to pay men and women equal wages for equal work. Equal pay is required for any jobs "the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions." There are exceptions for seniority systems, merit systems, pay systems based on quantity or quality of production, or other pay differentials based on factors other than sex. The Equal Pay Act applies to employers who have two or more employees engaged in interstate commerce, in the production of goods for interstate commerce, or in
handling or working with goods and materials in interstate commerce. An employee who believes his or her employer has violated the EPA may bring an action in federal court or file a charge with the EEOC. The employee need not first bring the claim before the EEOC in order to sue. Remedies include back pay, attorneys’ fees, and court costs.

g. The Federal Fair Labor Standards Act ("FLSA")

The Federal Fair Labor Standards Act ("FLSA") regulates wages and hours of certain covered employees. Employers must keep accurate records of hours worked by covered employees and those employees must receive a regular rate of pay for each hour they work up to 40 hours in a week. The regular rate must be at least equal to the required "minimum wage," which was increased to $7.25 on July 24, 2009. All hours over 40 in a week are considered "overtime." Generally, an employer must provide compensation to any covered (i.e., non-exempt) employee who works in excess of 40 hours in a week at an amount not less than one and a half times the worker’s regular rate of pay for each hour of overtime. These protections may not be eliminated by individual agreement or by union contract. While appearing simple, the FLSA is subject to many regulations, exceptions, interpretations and exemptions and is not capable of short summary. For example, professional, executive and administrative employees, as defined by regulations, are exempt from both the minimum wage and overtime pay requirements and some occupations and industries have special minimum wage provisions. Employers who violate the FLSA are subject to civil penalties, including fines, and prevailing employees may recover unpaid wages, unpaid overtime compensation, liquidated damages, and attorneys’ fees.

h. The Patient Protection and Affordable Care Act ("ACA")

All employers sponsoring group health plans should consult an attorney and/or a health insurance and benefits consultant to ensure that they comply with the applicable provisions of the new federal health care reform law, the ACA, on a timely basis. The applicable provisions of the ACA are not capable of short summary.

Some provisions of the ACA that affect employers have already been implemented. For example, group health plans need to provide participants and applicants with a Summary of Benefits and Coverage that comply with the ACA regulations, and employers must include the aggregate cost of employer-sponsored coverage in Box 12 of the employee’s Form W-2 issued in January 2013.

Unlike the Massachusetts penalties for employers who do not comply with the Fair Share Contribution (described above), the employer penalties under the ACA will apply to employers with more than 50 workers only. The employer penalties under the ACA will start in 2014.
i. **The Family and Medical Leave Act (“FMLA”)**

The Family and Medical Leave Act (“FMLA”) requires that eligible employees working for organizations with 50 or more employees be allowed to take up to 12 weeks of unpaid leave per year for the birth or adoption of a child, for the serious health condition of the employee or spouse, parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in the support of a contingency operation. A “serious health condition” includes inpatient hospitalization and subsequent treatment therefore and continuing treatment by a health care provider, including pregnancy. To be eligible for FMLA leave, the employee must have worked 12 months or longer, performed at least 1,250 hours of service for the employer in the 12 months prior to the date of leave, and must work at a site within 75 miles of which the employer has 50 or more employees. If the employee’s need for leave is foreseeable, the employee must provide his or her employer with 30 days notice before taking leave. When the need for leave is unforeseeable, the employee is required to provide notice as soon as practicable.

An individual who believes his or her FMLA rights have been violated is entitled to file a lawsuit. Remedies include lost compensation, liquidated damages, other out of pocket expenses, equitable relief, and attorneys’ fees.


The Federal Employee Retirement Income Security Act of 1974 ("ERISA") regulates employee benefit plans maintained by employers engaged in commerce or in an industry or activity affecting commerce. ERISA contains specific requirements governing the creation, modification, maintenance and reporting of employer pension and retirement plans as well as other plans relating to employee health and welfare benefits. Welfare plans include, for example, plans providing medical, hospital, death or other insurance benefits, vacation and severance benefits. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, providing exemptions for religious institutions, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA does not prescribe any particular level of severance, insurance, pension or welfare benefits, nor does it require that they be provided at all. This is a matter to be decided by the employer and, if the employer is unionized, to be bargained between the employer and the union. However, if benefits are offered, they must comply with regulations prohibiting discrimination and must be administered fairly under the terms of the benefit plan. ERISA generally preempts state laws governing employee plans and arrangements.
k. The Consolidated Omnibus Budget Reform Act ("COBRA")

The Consolidated Omnibus Budget Reform Act ("COBRA") requires employers with more than 20 employees who provide health and medical benefits to offer continuation of those benefits to former employees and their covered dependents (“qualified beneficiaries”) upon the occurrence of certain “qualifying events.” COBRA generally provides a maximum continuation period of 18 months. In certain circumstances where a qualified beneficiary is disabled at any time during the first 60 days of COBRA coverage, the period can be extended to 29 months. Also, if certain qualifying events occur during the original 18 months of COBRA coverage, qualified beneficiaries become entitled to receive 36 months of continuation coverage. Employers may require electing qualified beneficiaries to pay the entire premium for COBRA coverage plus a 2% administrative charge. COBRA contains very specific procedures for notifying qualified beneficiaries of their COBRA rights. COBRA applies whether employees leave voluntarily or involuntarily.

l. Health Insurance Portability and Accountability Act ("HIPAA")

The Health Insurance Portability and Accountability Act ("HIPAA") establishes limitations on the use of preexisting condition exclusions (so-called “portability” rules). HIPAA prevents group health plans or health insurance issuers from imposing a preexisting condition exclusion of more than 12 months (18 months for late enrollees) for coverage of any condition that was present during the six-month period ending on the individual's enrollment date. In addition to various other provisions, HIPAA mandates that preexisting condition limitations generally may not be imposed upon newborns or adopted children under age 18, and may not apply to pregnancy. The preexisting condition exclusion period must be reduced by periods of “creditable coverage”, generally defined as periods of continuous coverage the individual has under other health plans. HIPAA also imposes various other requirements on employers and group health plan providers and insurers, such as nondiscrimination and disclosure requirements, special enrollment rights, and special notice obligations. The HIPAA privacy rules extend privacy protection to all types of “protected health information” held by “covered entities”. Covered entities include health plans, health care clearinghouses, and health care providers. The HIPAA security rules impose requirements with respect to safeguarding and protecting the confidentiality, integrity and availability of electronic protected health information.

m. The Occupational Safety and Health Act ("OSHA")

The Occupational Safety and Health Act ("OSHA") regulates workplace safety for employers in businesses which affect commerce. Under OSHA, employers are required to furnish their employees with a place of employment free from recognized hazards that
are causing, or are likely to cause, them death or serious physical harm. Employers must also comply with occupational safety and health standards which are issued under the Act. "Right to know" regulations issued under OSHA require that employees in certain industries be warned about hazardous materials and chemicals to which they may be exposed. OSHA sets forth a detailed procedure for adopting safety and health standards and provides for inspection, investigation and enforcement. Citations issued for noncompliance can result in civil and criminal penalties, including fines and, for violations causing the death of an employee, imprisonment. States are allowed to develop and enforce their own plans setting and enforcing occupational safety and health standards. Some industries have specific statutes which regulate employee safety and health.

n. The Fair Credit Reporting Act (“FCRA”)

The Fair Credit Reporting Act (“FCRA”) prescribes the extent to and manner in which employers may use credit information in making employment decisions, including hiring and termination. The FRCA imposes strict guidelines requiring employers to use such credit reports only for a permissible purpose, after disclosure to employment applicants or employees of the intent to seek and use credit information, and after obtaining the written consent of the employee/applicant. The disclosure/consent may not be made a part of the employer’s application form. Additionally, employees/applicants must be notified of any adverse decision based in whole or in part upon credit information. Additional requirements apply to investigative consumer reports.

o. The Uniformed Services Employment and Reemployment Rights Act (“USERRA”)

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual’s membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

p. Genetic Information Nondiscrimination Act (“GINA”)

The Genetic Information Nondiscrimination Act (“GINA”) prohibits an employer from discriminating against an individual in hiring, firing, compensation, terms, or privileges of employment on the basis of genetic information of the individual or family member of the individual. The law defines genetic information as (1) an individual’s genetic tests;
(2) an individual’s family member’s genetic tests; or (3) the manifestation of a disease or disorder in the individual’s family member. Subject to a number of narrowly defined exceptions, GINA prohibits an employer from requesting, requiring, or purchasing genetic information of the individual or family member. An employer may engage in genetic monitoring of biological effects of toxic substances in the workplace but only in certain narrowly defined situations. Employees may sue in a court of competent jurisdiction for relief from violations of GINA and obtain back pay, front pay, compensatory and punitive damages and attorney’s fees.

9. Other State Specific Considerations

a. Massachusetts Anti-Discrimination Statute, M.G.L. ch. 151B

The Massachusetts Anti-Discrimination Statute prohibits discrimination on the basis of race, color, religious creed, sex, sexual orientation, gender identity and expression, national origin, age, genetic information, military status, ancestry, and physical or mental handicap. It also prohibits retaliation against those who claim that one of the anti-discrimination provisions has been violated. It is applied much like Title VII of the Civil Rights Act of 1964. Claims of discrimination under the Act must be filed with the Massachusetts Commission Against Discrimination (or the EEOC for “dual filing”) within 300 days of the alleged discrimination. Upon agency review of his or her administrative charge, and after a certain amount of time has elapsed (generally at least 90 days), the aggrieved person may be able to proceed with his or her claim in state or federal court. Prevailing employees or applicants may obtain back pay, front pay, compensatory and punitive damages, equitable relief, and attorney’s fees.

b. Massachusetts Maternity Leave Act

The Massachusetts Maternity Leave Act (MMLA) requires employers to provide female employees who have completed the initial probationary period (if any) with at least eight weeks of maternity leave for the purpose of giving birth or adopting a child under the age of 18 (or under the age of 23 if the child is mentally or physically disabled). To be eligible for maternity leave under the MMLA, the employee must give her employer at least two weeks’ notice of her anticipated date of departure and intention to return. The leave may be paid or unpaid. Although the MMLA as written does not apply to male employees, the Massachusetts Commission Against Discrimination (MCAD) has cautioned that refusing to provide maternity leave to male employees could constitute sex discrimination under state and federal law.

All employers must post a notice about the MMLA in a conspicuous place. Details about the posting requirement can be found on the MCAD’s website at http://www.mass.gov/mcad/ maternity2.html#9.
The MMLA is applicable to all employers in the Commonwealth, regardless of size. However, employers with more than 50 employees will be covered by the federal Family and Medical Leave Act (FMLA), which requires twelve weeks of unpaid leave be granted to employees of either gender for purposes of childbirth or adoption, among other reasons. For those employers, MMLA leave may be subsumed under FMLA leave, so that the total amount of leave does not exceed twelve weeks.

c. Massachusetts Small Necessities Leave Act

The Massachusetts Small Necessities Leave Act, M.G.L. ch. 149, § 52D, requires that employers grant employees a total of 24 hours of unpaid leave time per year for purposes of attending school or education-related events of the employee’s son or daughter, or accompanying the employee’s son, daughter, or elderly relative to medical and dental appointments. The Massachusetts Attorney General has stated that the Small Necessities Leave Act is to be applied “liberally,” so other situations may qualify for leave as well. This law only applies to employers and employees who are covered by the federal Family and Medical Leave Act, and the 24 hours of unpaid leave are in addition to the 12 weeks granted by the FMLA.

10. Employment Law Resources

a. Federal

i) Agencies
   • National and Labor Relations Board (NLRB), http://www.nlrb.gov
   • Dept. of Justice Civil Rights Division http://www.usdoj.gov/crt
   • Immigration and Naturalization Service (INS) http://www.ins.usdoj.gov/graphics/index.htm

ii) Websites
   • United States Code: http://www4.law.cornell.edu/uscode/

iii) Additional Materials
   • Employment Law tips: http://employmentlawpost.com/
   • Society of Human Resources Management: http://www.shrm.org/Pages/default.aspx
• Bureau of National Affairs (BNA) publications on employment
• Publications by the American Bar Association Section on Labor and Employment

b. State

i) Agencies
• Massachusetts Commission Against Discrimination: http://www.mass.gov/mcad
• Massachusetts Executive Office of Labor and Workforce Development (includes info on unemployment insurance and workers’ compensation) http://www.mass.gov/eolwd

ii) Websites
• Massachusetts Statutes: http://www.mass.gov/legis/laws/mgl