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Nelson Mullins Riley & Scarborough LLP is a national firm comprised of over 750 attorneys and professionals in 26 offices throughout the United States. The firm's Labour and Employment Group comprises 40-plus attorneys in a multidisciplinary team practicing labour, employment, benefits and immigration. The Group's attorneys are seasoned practitioners before the National Labor Relations Board (NLRB), the U.S. Equal Employment Opportunity Commission (EEOC), state and federal courts and arbitrators. Nelson Mullins represents public and private companies across a range of industries from manufacturing and healthcare to financial services, utilities, retail, colleges and universities. The Group's practice covers: non-compete, confidentiality and other employment-related agreements and enforcement; termination and employment issues; wage-and-hour, whistle-blower, breach of contract and tort employment claims; discrimination, harassment and retaliation claims; trade secrets and employee mobility; internal investigations, including wage-hour audits; defence of individual, class and collective lawsuits brought on by employee(s); guidance for union organising, labour disputes or collective bargaining matters; training of management on compliance with federal and state employment laws. Nelson Mullins is particularly strong in the areas of employee benefits, trade secrets, employee mobility, and employment litigation.

Authors

Bret Cohen chairs Nelson Mullins' Labour and Employment practice and co-chairs Nelson Mullins' Trade Secrets and Employee Mobility practice. His work primarily entails: litigating high stakes complex trade secret and employment cases, drafting and enforcement of non-compete, confidentiality, and other employment-related agreements throughout the United States; representing individual employees, typically high-level executives, in such matters on behalf of the companies who seek to hire them; advising public company executives on terminations and employment issues; advising clients on a range of matters involving employment agreements, termination of high-level executives, worker classification, deal diligence, hiring oversight, and best practices; negotiating and drafting relevant agreements and the regular enforcement in litigation of the claims of employers seeking to enforce those agreements. Bret is a former chair of the American Bar Association subcommittee on Employment Litigation (2003-2009), and is a contributing author for the employment litigation chapter of the American Bar Association's Annual Review of Developments in Business and Corporate Litigation.

Robert Sheridan joined Nelson Mullins as Of Counsel in August 2017. His key practice areas are: discrimination and harassment; wage-and-hour law compliance; independent contractor and employee classification; reasonable accommodation for disabled employees; employee discipline and terminations; enforcement of non-compete, non-disclosure and other employment-related agreements; advising company executives on terminations, employment negotiations, and other employment issues; misappropriation of trade secrets; defending clients in employment and business litigation before federal and state courts and administrative agencies, including state fair employment and human rights agencies. Prior to his career in law, Mr Sheridan worked as a corporate financial analyst and with legal counsel for two investment banks, and now applies the skills acquired through investment banking to providing employment guidance on corporate mergers and acquisitions and in negotiating and drafting executive employment agreements.

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

The Northeast United States, in addition to the West Coast, has been an area of innovation and investment in the technology and life science industries. Biotechnology companies have been particularly successful in Boston because of the city's world-class hospitals and universities. The Massachusetts Institute of Technology and Boston's entrepreneurial culture have contributed to many successful robotics and computer technology-based startups and consumer product companies. The young workforce attending and graduating from Boston's many universities have also embraced the flexibility of the "gig" economy.

With all of the innovation in these industries, it is especially important that employers protect their intellectual property and trade secrets. Any new venture or employment agreement should specify the ownership of intellectual property. Currently in Massachusetts, employers may require employees to sign non-compete agreements, which prohibit employees from working for a competitor for a period of time after leaving the employer, but a new Massachusetts law is likely to curtail the use of non-compete agreements, except for high-level employees. Meanwhile, there are some new laws, such as the federal Defend Trade Secrets Act, that make it easier for employers to protect and recover trade secrets in this very competitive environment.

1.2 "Me Too" and Other Movements

The #MeToo movement has been a social campaign to raise awareness about sexual harassment. United States culture, especially in the Northeast region, is now very sensitive about accusations of sexual harassment in the workplace. Allegations of sexual harassment can lead to expensive litigation and create a lot of negative attention in the media. Therefore, employers should have strong policies to educate employees about acceptable behavior and be prepared to respond to allegations of sexual misconduct with a thorough investigation and discipline when appropriate.

The rise of the #MeToo movement has also increased attention and criticism on non-disclosure agreements. In the past, some executives and employers have paid sexual harassment accusers to sign a non-disclosure agreement in order to prevent the accuser from publicizing the allegations. The U.S. Internal Revenue Service has generally allowed employers to take tax deductions for confidential settlements and attorney fees related to the defense of such claims, but a recent change to the U.S. Tax Code now explicitly prohibits employers from taking tax deductions for payments made to individuals alleging sexual harassment or sexual abuse if the settlement or payment requires the claimant to execute a non-disclosure agreement.

Nevertheless, non-disclosure agreements are legal, and there are many other good reasons to use non-disclosure agreements. For example, when an employee leaves a company after any type of dispute, a non-disclosure agreement can provide finality and prevent both sides from speaking negatively about the other. Thus non-disclosure agreements are likely to endure despite this recent scrutiny.

1.3 Decline in Union Membership

Union membership in the private sector has declined significantly since its peak in the 1940s and 1950s, although the rate of decline has varied by industry and region. Recently, however, a political coalition that included union and non-union groups successfully advocated for a new law that will increase the minimum wage in Massachusetts from $11 per hour to $15 per hour by 2023. Massachusetts will join California and New York as the only states in the United States to require a $15 minimum wage. The success of this effort is evidence that non-union groups and coalitions can fill the traditional organizing and advocacy roles of unions, which will likely further contribute to the decline in union membership in the private sector.

1.4 National Labor Relations Board

The reconstituted National Labor Relations Board ("NLRB") under the Trump administration has already reversed policy decisions by the prior Obama NLRB that favored union organizing and broad protection of workers' rights. The Obama NLRB decisions addressed, among other topics, the definition of "joint employer status," which made it easier for unions to organize in situations involving staffing agencies or franchises; "micro units," which made it easier for employees to organize bargaining units; and a policy to invalidate employer rules if they could be interpreted to violate workers' rights. On the issues of joint employer status and micro units, the new Trump NLRB returned the rules to their pre-Obama status, while it set new standards for analyzing employee handbooks and policies. These NLRB decisions are consistent with the Trump administration's general policy of reducing restrictions on businesses. It remains to be seen whether the Trump NLRB will simply reverse Obama NLRB's policies or set new policies that are even more favorable for employers than the policies that existed before the Obama NLRB.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

At the outset of any relationship between an entity and its agent, it is critical to define the nature of the relationship and to delineate, as clearly as possible, the rights of each party. In Massachusetts, when choosing between an employer-employee or independent contractor relationship, it is important to consider that Massachusetts has a very

stringent independent contractor statute. *See* M.G.L. c. 149, § 148B. Therefore, only a traditional independent contractor relationship is likely to survive statutory scrutiny in Massachusetts. Another consideration is the applicability of "joint employment" and the shifting definition applied by the NLRB. The Obama NLRB significantly broadened the scope of what could be considered "joint employment" between two entities. The Trump NLRB, however, has overturned or overhauled numerous Obama-era NLRB policies including those related to defining "joint employment." Thus, indirect control by one organization over another is likely no longer sufficient to establish joint employment. Yet another critical consideration for any employer is whether there is a legal obligation to compensate interns. In Massachusetts, an employer is generally not required to pay an intern receiving academic credit. Otherwise, barring applicability of a narrow class of exceptions, employers are legally required to compensate an intern pursuant to state minimum wage laws. *See* M.G.L. c. 151, § 2.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

In addition to clearly defining the nature of the relationship between the entity and its agent, it is essential to delineate the specific characteristics and resulting legal implications of that relationship. Some of these considerations include whether an employee is considered at will or is bound by a contract, whether an employee is considered exempt or non-exempt under federal and state law, and whether an employee is subject to any statutory probationary period.

In Massachusetts, the default employment status is "at will" unless otherwise provided for. Thus, when drafting an offer letter, or handbook, the employer should carefully consider the language used in order to effectuate the desired relationship.

Just as important is understanding whether an employee is considered exempt or non-exempt under the state and federal statutory schemes. *See* M.G.L. c. 151, § 1A; 29 U.S.C. §§ 201, 213. Exempt employees have what might be considered a freer rein over their employment, while non-exempt employees are traditionally paid an hourly wage and are entitled to overtime. The federal and state regulatory schemes applicable to exemptions are enforced by the Department of Labor at the federal level and the Attorney General at the state level. With regard to the federal statutory scheme, employers must familiarize their human resources and legal staff with the salary-basis and duties tests for determining an employee's exempt or non-exempt status.

Employers should also be wary of misclassifying an employee (exempt v. non-exempt), as penalties for misclassification can be harsh. *See* 29 U.S.C. § 216. Likewise, misclassifications of large groups of similarly-situated employees can create situations ripe for class action litigation.

Employers should also be familiar with state and federal statutory schemes, whereby certain rights or benefits are not available to new employees until they have satisfied a requisite probationary period. For example, Massachusetts law prohibits an employee from using accrued sick time until they satisfy a 90-day probationary period of employment. *See* M.G.L. c. 149, § 148C(d)(1). Similarly, to be eligible for leave under the Family and Medical Leave Act, an employee must have at least 1,250 hours of service during the 12-month period immediately preceding commencement of the leave. *See* 29 C.F.R. § 825.110.

2.3 Immigration and Related Foreign Workers

United States employers who would like to employ foreign citizens should ensure compliance with work visa requirements under federal law. *See* 8 U.S.C. § 1153(b). Employers should also consider that the Trump administration has made immigration regulation and reform a priority, meaning even routine work visas are being more heavily scrutinized and may be more difficult to obtain.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

To the extent any employees are or may become unionized, employers must understand how the collective bargaining agreement will define and otherwise affect the employer-employee relationship. To that end, any employer with unionized employees should be well informed on the applicable provisions of the National Labor Relations Act. *See* 29 U.S.C. § 151, *et seq*. While union membership is generally declining in the United States, certain unions continue to maintain a strong presence and remain active in Massachusetts.

3. Interviewing Process

3.1 Legal and Practical Constraints

A variety of intersecting laws and regulations either directly prohibit or place strictures on lines of inquiry in the process of interviewing prospective employees in Massachusetts. Before a discussion of prohibited or limited areas of inquiry, the following topics, just by way of example, are generally considered safe areas of inquiry in Massachusetts: work history, qualifications, education, expectations, significant challenges, and personal strengths and weaknesses.

Impermissible Interview Questions

Any inquiry about an individual's membership in a protected class is prohibited in Massachusetts. Employers in Massachusetts are required to abide by both federal and Massachusetts anti-discrimination laws. Protected classes under federal law include, race, color, national origin, religion, sex (including pregnancy, childbirth and other related medical

conditions), disability, age (40 or older), citizenship status, and genetic information. Protected classes under Massachusetts law include physical or mental disability, marital status, sexual orientation, military service, arrest record, and gender identity. If a prospective employee volunteers such information in an interview (e.g., an applicant volunteers they recently got married), a savvy interviewer is well advised to steer the topic away from the line of discussion concerning protected class membership.

In addition, under the Massachusetts Equal Pay Act, M.G.L. c. 149, § 105A, inquiries concerning salary history are prohibited (either directly or through an agent like a headhunter).

Interview Questions Subject to Limitations

In 2010, Massachusetts became one of the first states to adopt "ban the box" measures, which bar employers from requiring applicants to check a box if they have a criminal history. Massachusetts prohibits any inquiry into an applicant's criminal history on an initial written application and significantly limits potential inquiries into criminal history during the interview and intake stages of hiring. For instance, during an interview, employers are specifically prohibited from asking about an (i) arrest, criminal detention or disposition that did not result in a conviction; (ii) a first conviction for any misdemeanors involving drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; or (iii) misdemeanor convictions where the date of conviction occurred more than five years prior to the inquiry. These prohibitions will become even more stringent when further restrictions go into effect on October 13, 2018, which reduce the misdemeanor conviction inquiry lookback to three years and prohibit any inquiries into sealed or expunged records. In short, unless mandated by state or federal law requiring employers to make criminal inquiries of applicants (wherein certain exceptions will apply to the restrictions discussed here) employers should proceed very cautiously with any inquiry into a job applicant's criminal history.

Finally, any employer intending on making inquiries into a job applicant's credit history must abide by the federal Fair Credit Reporting Act, which contains requirements concerning obtaining written consent and providing a variety of written disclosures to applicants. These disclosures include forms which must be provided to an applicant before and after taking adverse action (i.e., not-hiring) an applicant based on information contained in a credit report.

4. Terms of the Relationship

4.1 Restrictive Covenants

At the end of July 2018, the Massachusetts legislature passed a new bill regulating, and placing substantial limitations on, the execution and enforcement of non-competition agreements that arise from the employment relationship. The Governor signed the bill into law on August 10, 2018, and it goes into effect on October 1, 2018.

Massachusetts's new law applies to non-compete agreements entered into on or after October 1, 2018 between employees (including independent contractors) and employers. It does not, however, apply to employment non-competes made in connection with the termination of an employee's employment – provided that the employer allows any employee seven days in which to revoke her acceptance of such an agreement. Please note that Massachusetts's new non-compete legislation does not govern other types of restrictive covenants in employment agreements apart from non-competes, such as non-solicitation and confidentiality agreements.

Under the new law, employers may not enforce a non-compete executed on or after October 1, 2018 against several broad categories of employees: (1) any employee who is non-exempt under the federal Fair Labor Standards Act; (2) part-time employees who are attending college or graduate school; (3) employees under the age of 18; or (4) any employee who is laid off or terminated without cause. Any employee non-compete under the new law may not exceed 12 months in duration from the cessation of employment, unless the employee has engaged in unlawful misappropriation of the employer's physical or electronic property or has committed a breach of fiduciary duty.

In addition to these substantive requirements, the new law places new procedural protections for employees. For a non-compete entered into at the commencement of employment to be valid: the employer must present the non-compete to the employee at the time it presents the employee with a formal offer letter or at least ten business days before the employee's first day of work (whichever is earlier); the agreement must be signed by both the employer and employee; and the agreement must expressly advise the employee of her right to consult counsel before executing it. Similarly, a non-compete presented after the commencement of employment must be in writing, signed by both parties, provide for at least ten days' notice before becoming effective, and advise of the employee's right to consult counsel before signing it (and must be supported by additional consideration as discussed below).

Significantly, under the new legislation, although an offer of employment is itself sufficient consideration to support a non-compete entered into at the commencement of employment, this is no longer the case for non-competes entered into after the commencement of employment. Post-commencement non-competes, to be enforceable, must be supported by "fair and reasonable" consideration – i.e., some

additional payment or benefit to the employee – independent of continued employment (like a bonus or stock options).

Under both Massachusetts common law and the new non-compete legislation, restrictive employment covenants may not be broader in scope than is necessary to protect an employer's legitimate business interests. Such interests include protection of trade secrets, confidential information and preservation of business goodwill. Restrictive covenants must also be reasonably limited in time and geographic scope. Because restrictions on competition are generally less favored than other types of restrictive covenants, employers should always consider whether they may adequately protect their legitimate business interests through alternatives to a non-compete, such as non-solicitation and non-disclosure or confidentiality agreements. While most non-compete agreements in Massachusetts will be covered by the new statute and its one-year limitation, Massachusetts courts have generally upheld restrictions that endure for multiple years.

4.2 Privacy Issues

Massachusetts recently adopted the Uniform Trade Secrets Act ("UTSA"). The UTSA broadly defines an employer's trade secrets to mean "specified or specifiable information, whether or not fixed in tangible form or embodied in any tangible thing, including but not limited to a formula, pattern, compilation, program, device, method, technique, process, business strategy, customer list, invention, or scientific, technical, financial or customer data." Trade secrets are subject to protection under the UTSA if they provide "actual or potential" economic advantage, meaning they need not be in current or continuous use by the employer. The key to an employer's ability to protect its trade secrets in Massachusetts is whether, and to what extent, the employer has undertaken efforts to maintain the information's confidentiality (and communicated its confidential nature to employees).

Employers in Massachusetts must also take care to safeguard the confidential information of third parties that they possess. Employers whose employees are provided access to the confidential information of third parties owe a legal duty to prevent employees' foreseeable misuse of that confidential information. Additionally, any business in Massachusetts that maintains or stores personal information about Massachusetts residents must comply with the state's regulatory standards for storing and protecting the security of personal information. Among others, the regulations mandate that personal information be encrypted when stored on portable devices or transmitted wirelessly on public networks. By statute, businesses in Massachusetts are subject to prompt notification requirements when they know or have reason to know of a breach of data security or of unauthorized use of personal information.

Apart from customer or client confidential information, employers also have obligations with respect to their employees' privacy. The Massachusetts Privacy Act protects all individuals from "unreasonable, substantial, or serious interference[s]" with their privacy. In determining whether an employer has violated the Privacy Act, courts balance the employer's legitimate business interests against the degree of the intrusion on privacy. Thus, for example, courts have held that employers' general interest in promoting a drug-free workplace is insufficient to justify a random drug testing policy. Rather, such a policy should focus on employees whose job duties create a safety risk or exigency.

4.3 Discrimination, Harassment and Retaliation Issues

Employees in Massachusetts enjoy robust protections against workplace discrimination. Employers with six or more employees are prohibited from discriminating against current or prospective employees based on race, color, religious creed, national origin, ancestry, sex, gender identity or expression, age, handicap (disability), mental illness, sexual orientation, genetic information and military status. Under this rubric, sexual harassment is classified as unlawful sex discrimination. As well, most employers are prohibited from asking about an applicant's criminal history on an initial job application, and employers may not ask – at any stage of the hiring process – an applicant for employment to provide a copy of his or her criminal offender record information or arrest records. The employment discrimination laws also protect against retaliation for engaging in protected conduct, which would include lodging an internal complaint of discrimination or harassment. All employers are under a duty to thoroughly and competently investigate any claims of unlawful harassment or discrimination and, in the event evidence of unlawful conduct is found, take prompt remedial action.

Although Massachusetts law makes clear that courts may not second-guess an employer's honest business judgment with respect to the performance of its employees, recent cases have also emphasized the importance of conduct or remarks evidencing implicit bias in proving discrimination claims. As courts become more receptive to claims of implicit or unconscious bias in the employment discrimination context, it is important for employers to be proactive in providing employees with training on proper workplace conduct and the roles that stereotyping and unconscious bias play in the experiences of persons that belong to groups that have historically suffered from discrimination and unequal treatment. Employers should also be mindful that all of their personnel policies, whether related to disability leave, paid time off or progressive discipline, are applied in an evenhanded manner. Failure to do so can lead to unnecessary exposure to claims of discrimination.

Lastly, employers have an obligation under the Massachusetts Personnel Records Law to maintain employees' personnel records, which are records that identify an employee, to

the extent that the record is used or has been used, or may affect or be used relative to, that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. *See* M.G.L. c. 149, § 52C. Employers of 20 or more employees must retain employees' personnel records for three years after termination of employment. Employees have a right to review their personnel records, to obtain copies of them, and to include statements in the personnel record with respect to any disagreement with the record. An employer must allow an employee to review his or her personnel records, upon request, within five business days of a written request, up to two times per calendar year. Note that employees have an expectation of privacy of in their personnel files, and accordingly an employer should not disclose such records except upon request by the employee or pursuant to a court order or other compulsory process.

4.4 Workplace Safety

In Massachusetts, regulation of workplace safety in private workplaces is principally governed by the federal Occupational Safety and Health Act of 1970 ("OSHA"). OSHA, and regulations promulgated thereunder, set forth standards for ensuring safe working conditions and provision of a workplace free from serious recognized hazards. Employers should examine their workplace conditions to make sure they conform to applicable OSHA standards. Additionally, OSHA requires employers to maintain records of work-related injuries and illnesses.

Under the Massachusetts workers' compensation statute, employees who suffer personal injuries arising out of and in the course of their employment must apply for benefits administratively with the Department of Industrial Accidents. Employees (unless they notify their employers at the time of hire of their intent to retain their rights at common law) are barred under the workers' compensation scheme from bringing actions at common law against their employers for workplace injuries. Any appeal from a denial of benefits must likewise be applied administratively, subject to judicial review.

4.5 Compensation & Benefits

Distribution of an employee personnel manual or handbook is a way in which an employer may establish clear expectations and standards of conduct to be applied uniformly across the workforce. To ensure that the provisions of an employee handbook are not construed to alter the at-will nature of employment or give rise to contractual obligations to the employee, a handbook or manual for Massachusetts employees should contain an explicit and prominent disclaimer of contractual rights and a clear statement that the handbook or manual is not intended to alter the at-will default rule. Handbooks should contain written non-discrimination and sexual harassment policies.

In addition to the federal Consolidated Omnibus Reconciliation Act of 1985 ("COBRA law"), which governs continuation of employer-based health and welfare benefits plans after the cessation of employment for employers with 20 or more employees, Massachusetts also has a "mini" COBRA law that applies to employers with between two and 19 employees. Under Massachusetts's mini-COBRA law, small group health carriers must provide continuation of coverage benefits, at the employee's expense, for periods of 18 or 36 months, depending upon the nature of the mini-COBRA qualifying event. The employer's small group carrier must promptly notify an employee or qualified beneficiary of his or her rights to continuation coverage.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

Employers are well advised to clearly delineate the parameters of the employment relationship at its inception in order to maintain control of the termination process. Key considerations include the nature of employment, whether the employer wants the employee to be bound by restrictive covenants, the procedure for terminating an employee, and any resulting employment disputes and litigation.

One of the most important considerations for an employer is whether an employee will be subject to a non-compete agreement at the end of his or her employment. Massachusetts recently passed new legislation significantly limiting the enforceability of non-compete agreements, such that agreements will only be enforced if the employee is terminated for "cause." M. G. L. c. 149, § 24L (2018). This new law applies prospectively only and will apply to non-compete agreements entered on or after October 1, 2018. Thus, defining "cause" at the inception of the employment relationship is likely to play an outsized role in the enforceability of most non-compete agreements in Massachusetts. Notably, this new legislation also contains a "garden leave" provision, which requires that the employer pay the employee 50% of the employee's highest base salary over the preceding two years for the duration of the restricted period. Alternatively, the employer may provide the employee with mutually agreed-upon consideration. Employers should note that this new legislation does not affect other types of restrictive covenants, such as non-solicitation agreements.

To the extent an employer grants a release or is involved in a settlement with a former employee, the employer should be cognizant of certain protections for individuals over the age of 40 under federal law. The Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA") expressly prohibit discrimination on the basis of age. *See* 29 U.S.C. 621, *et seq*. In order to comply with the provisions of the ADEA and the OWBPA,

an employee must be given 21 days to consider and accept the terms of any agreement, and is further allowed to rescind the agreement within seven days of signing. In the context of group layoffs or reductions in force, the OWBPA and the ADEA also impose obligations on employers to provide individuals being terminated with a schedule containing certain statistical information concerning the other individuals affected by the termination.

Employers should also establish whether the termination of an employment relationship will be handled through alternative dispute resolution at the outset of the relationship. There is clear deference to arbitration in both Massachusetts and federal courts. Employers should also consider that they may be able to eliminate the threat of class action litigation through a well-drafted class action waiver. Notably, the Supreme Court recently upheld the enforceability of class action waivers in relation to an employee arbitration agreement, signaling the continued viability of this option for employers moving forward. *See Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018).

With regard to plant closings or mass layoffs, employers must be aware of federal and state legislation containing specific notice requirements. Under the Worker Adjustment and Retraining Notification ("WARN") Act, employers must provide 60 days' notice when laying off more than 50 employees within a 30-day period. *See* 29 U.S.C. 23 § 2101, *et seq.*

When the employment relationship ends, employers should also be aware of requirements under the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"). This federal law requires that employers of 20 or more employees who offer health care must continue to provide coverage to employees who are terminated or fall into other specific categories. *See* 29 U.S.C. § 1161, *et seq*. In addition, the Massachusetts small group continuation of coverage law requires the continuation of health benefits to employees of small businesses with two to 19 employees. *See* M.G.L. c. 176J, § 9. Besides health care-related concerns, employers should also consider potential issues raised pursuant to the Employment Retirement Income Security Act ("ERISA") when an employee departs or is terminated. *See* 29 U.S.C. ch. 18.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

In Massachusetts, absent an employment agreement providing for employment for a defined temporal period, employment is at will, meaning the employment relationship is terminable by either the employee or the employer without notice, for almost any reason or for no reason at all. However, Massachusetts courts have recognized certain exceptions to this rule. First, employees may bring wrongful termination claims against their employers for breach of the implied covenant of good faith and fair dealing (a covenant that is implied in every Massachusetts contract, including employment contracts) where a discharged employee is terminated in bad faith for the purpose of depriving the employee of future compensation that is clearly connected to work already performed. Under this bad faith theory, the employer's conduct must be taken in bad faith either to deprive the employee of the benefits of labor already substantially earned, or for the purpose of unfair leveraging of contract terms to secure undue economic advantage. Thus, for example, an employee whose termination was motivated by the employer's desire to avoid paying commissions already earned may state a claim for breach of contract against her employer.

Another narrow exception to the at-will employment rule has been recognized in Massachusetts where the employment is terminated contrary to a well-defined public policy. Thus, an employee who is terminated for asserting a legally guaranteed right (such as the filing of a workers' compensation claim), for engaging in legally required conduct (such as jury service) or for refusing to commit a violation of law (such as committing perjury) may state a claim for wrongful termination against the employer. Additionally, the public policy exception has been recognized in the case of retaliation for an employee's cooperation with a law enforcement investigation concerning the employer.

Wrongful termination and breach of contract claims against employers may be pursued in the Massachusetts state courts. If a basis for federal jurisdiction exists, such as diversity of parties with an amount in controversy at or above $75,000, then such claims may also be adjudicated in the federal courts located in Massachusetts.

6.2 Discrimination, Harassment and Retaliation Claims

The Massachusetts Commission Against Discrimination ("MCAD") has original jurisdiction over complaints of employment discrimination under Massachusetts's anti-discrimination statutes, which include claims of sexual harassment and retaliation for complaining of alleged discriminatory conduct either internally or to an administrative agency. An aggrieved employee asserting a discrimination complaint generally must file an administrative charge with the MCAD within 300 days of the last discriminatory act complained of. Beginning 90 days after the filing of an MCAD complaint, the plaintiff may elect to remove the case from the MCAD and file a claim in the Massachusetts Superior Court. Upon removal, a plaintiff must file any complaint in the Superior Court within three years of the date of the last discriminatory act. Prevailing plaintiffs in discrimination cases are entitled to various types of damages, including back pay, front pay and emotional distress damages. Punitive damages are also available in cases where the employer's

conduct is found to be outrageous due to an evil motive or reckless indifference to the rights of others.

Provided that an employer places clear and conspicuous disclaimers of contractual obligation in a personnel handbook or manual, as a general matter an employer's failure to comply with its handbook provisions (e.g., a discipline policy) will not give rise to independent liability for breach of contract. An employer's failure to follow its own internal policies and procedures with respect to a particular employee, however, may be used as evidence of discrimination or retaliation.

Claims that are substantially dependent upon analysis of the terms of a collective bargaining agreement are governed exclusively by the federal Labor Relations Act. Accordingly, when a court is confronted with such claims couched in terms of state law, it will either dismiss the complaint as preempted by federal labor law or it will treat the claim as arising under federal labor law. Federal courts maintain exclusive jurisdiction over all disputes requiring interpretation of a collective bargaining agreement.

6.3 Wages and Hours Claims

The Massachusetts Wage Act, and Minimum Fair Wages law, require prompt payment of wages. For employees who voluntarily leave their employment, all outstanding wages must be paid in full on the following regular payday; employees who are discharged from their employment must be paid in full on the day of their termination. "Wages" under the Massachusetts Wage Act include, in addition to salary, accrued and unused holiday or vacation time to the extent provided under an oral or written agreement. Wages also include commission payments to the extent such commissions are definitely determined and due and payable to the employee. Bonus and other incentive payments that are contingent in nature, as well as fringe benefits (e.g., provision of a company car or business expense reimbursements) generally do not constitute wages. Additionally, although employers with 11 or more employees must allow employees to accrue paid sick time, accrued and unused sick leave does not constitute wages. However, employees may, with the consent of the Massachusetts Attorney General, file civil actions against their employers to recover unpaid sick leave.

The Massachusetts Minimum Fair Wages law provides for the minimum hourly wage that an employer may pay to employees. The current minimum wage for non-tipped employees is $11 per hour. Under recent legislation, this minimum wage will gradually increase between January 1, 2019 and January 1, 2023 to $15 an hour. Employers are strictly liable for violations of the Massachusetts Wage Act and Minimum Fair Wages laws, and violations of these laws automatically result in trebling of damages and recovery of attorneys' fees and costs.

Massachusetts also has enacted a new Equal Pay Act, which came into effect on July 1, 2018. The new law prohibits the payment of different wages to employees of different genders for "comparable work," which is broadly defined to mean "substantially similar" work in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions. The Equal Pay Act also makes it unlawful for employers to prohibit employees from discussing their salaries with each other or inquiring regarding each other's compensation, and the law prohibits employers from asking about an employee's salary history prior to extending an offer of employment that includes a salary offer. Unlike other discrimination claims, plaintiffs need not file a charge at the MCAD before bringing suit under the Equal Pay Act. Violations of the Equal Pay Act result in automatic double damages.

6.4 Whistleblower/Retaliation Claims

The discrimination, earned sick leave, Equal Pay Act, and wage and hour laws in Massachusetts all prohibit employers from retaliating for exercising their legal rights under the law or engaging in protected activity. Such protected conduct includes the filing of a complaint for alleged violations of the law; communicating with another person, including coworkers, about any violation; participating in an administrative or judicial action regarding an alleged violation of the law; or assisting another person in that person's exercise of his or her rights.

In addition, employers should be aware of state and federal whistleblower statutes, which provide protections under certain circumstances against retaliation. Under the Massachusetts False Claims Act, private litigants, known as " *qui tam* relators," may bring claims on behalf of the Commonwealth for recovery of damages resulting from false or fraudulent claims for payment made to the Massachusetts government and its agencies and instrumentalities. The Massachusetts False Claims Act provides protections for employees against retaliation by employers for filing a *qui tam* action against their employers. The federal False Claims Act similarly provides protections against retaliation for employees who bring *qui tam* actions in federal court for alleged fraudulent or false claims for payment from the federal government. A number of other federal laws also provide whistleblower protections for employees who report suspected violations of law, including OSHA, the Sarbanes-Oxley Act of 2002, the Clean Air Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Securities and Exchange Commission's whistleblower program.

6.5 Dispute Resolution Forums

Under Massachusetts law, employers may require employees to agree to arbitration of disputes arising out of the employment relationship. This includes claims of discrimination and claims under the Massachusetts Wage Act. Thus, as a general matter, employers may require arbitration of dis-

putes with employees and may require employees to do so individually. Please note that, although employment arbitration agreements are enforceable, such agreements may not preclude state or federal agencies, such as the MCAD or the federal Equal Employment Opportunity Commission, from investigating claims of workplace discrimination or bringing enforcement actions under state or federal law. Apart from arbitration, the Massachusetts Superior Courts, which are the state trial courts of general jurisdiction, have jurisdiction over such claims. Additionally, where a basis for federal jurisdiction exists, for example, where the employee has asserted claims under a federal law (e.g., the Family and Medical Leave Act of 1993, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990), employment disputes are often also litigated in the federal courts located in Massachusetts. As noted above, the MCAD has original jurisdiction over claims of employment discrimination arising under Massachusetts law, and the federal Equal Employment Opportunity Commission exercises concurrent jurisdiction over complaints of discrimination that assert violations of federal civil rights laws.

6.6 Class or Collective Actions

A general release of liability contained in a settlement agreement will not suffice to release an employer from liability under the Massachusetts Wage Act. Thus, employers looking to secure such a release in a separation or settlement agreement should ensure that it contains an explicit release of Wage Act claims.

Additionally, the Supreme Court of the United States recently held that waivers of class or collective arbitration of employment disputes do not violate federal labor law. Previous federal and Massachusetts case law had made clear that class action arbitration waivers also may not be invalidated on grounds that an individual plaintiff's pursuit of a claim would be financially prohibitive.

Massachusetts courts will apply forum selection clauses so long as they are fair and reasonable. This extends to forum selection for employment-related disputes, and includes adjudication of Wage Act claims; under Massachusetts law, there is a presumption that forum selection clauses are enforceable with respect to Wage Act claims. Thus, employers who wish to select a forum other than Massachusetts for resolution of employment-related disputes may generally do so. Note, however, that the new non-compete legislation requires the application of Massachusetts law with respect to employment agreements entered into with any employee who has been a Massachusetts resident for 30 days at the time of termination. Thus, courts may meet forum selection clauses that have the effect of skirting the choice of law requirement of the non-compete act with skepticism.

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6.7 Possible Relief

Prevailing plaintiffs in discrimination cases are entitled to several elements of damages, including back pay (compensation for lost wages from the time of an employee's unlawful termination or constructive discharge until the time of judgment), front pay (a prospective award of lost wages running from the time of judgment until a date in the future), and emotional distress damages. Punitive damages are also available in cases where the employer's conduct is found to be outrageous due to an evil motive or reckless indifference to the rights of others. Prevailing discrimination plaintiffs are also entitled to awards of attorneys' fees and, where applicable, costs.

Employers are strictly liable for violations of the Massachusetts Wage Act and Minimum Fair Wages laws, and violations of these laws automatically result in trebling of damages and recovery of attorneys' fees and costs. Violations of the Equal Pay Act result in automatic double damages, along with attorneys' fees and costs.

7. Extraterritorial Application of Law

Most U.S. laws do not apply outside of its national borders. Similarly, most U.S. companies do not need to comply with the laws of other countries when they operate within the United States. There are, however, some exceptions. For example, an arbitration clause in a contract could require the parties to settle a dispute under the laws of a foreign country or even in a foreign country. One particularly notable U.S. law is the Foreign Corrupt Practices Act, which makes it illegal for an employee to bribe a government official anywhere in the world if the employer is listed on a U.S. stock exchange. This law allows the U.S. government to charge hundreds of millions of dollars in penalties to foreign companies for conduct that occurs outside the United States. It is very important that any company that is traded on a U.S. stock exchange have strong policies and trainings to prevent bribery.

Some foreign laws may also apply to companies operating in the United States. For example, under some circumstances, the EU's General Data Protection Regulations may apply to

companies in the United States if they process personal data and have certain connections to the EU or EU citizens. In addition to its employment policies, any company with U.S. operations should make sure its data storage and security policies comply with all applicable laws.