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Recent Developments in Employment Law

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RECENT CASE LAW DEVELOPMENTS

MCAD Issues Largest-Ever Award

MCAD and Switzer v. OfficeMax

- Switzer, a District Sales Manager for OfficeMax, alleged discrimination on the basis of gender, age, and retaliation.
- Switzer testified that OfficeMax maintained an "old boy network" office culture, from which she and other females were excluded. Switzer also testified her pay was unequal to her male counterparts, despite her seniority and experience.
- After making a complaint to her supervisors, Switzer was terminated – part of a restructuring that required the elimination of one sales position.
- OfficeMax argued that Switzer was terminated based on her quota attainment and non-adherence to "company values."

MCAD and Janice Switzer v. OfficeMax

- MCAD: OfficeMax's assessment of Switzer's character was based on "unflattering stereotypes" of female professionals, and "the real reason for her termination was that she was a strong and persistent female who did not conform to the standards of behavior expected of a woman in the workplace."
- MCAD: OfficeMax relied upon "neat and convenient justifications" to mask its subtle discrimination.
- Award: Over $540,000 in back pay, $650,000 in front pay (5 years), and $300, 000 in emotional distress damages.

SJC Rules that MA Law Prohibits "Associational Discrimination" Based on Disability

- ***Flagg v. AliMed, Inc.***
- Employee's wife had brain tumor and needed post-surgical rehabilitative care. Employee became responsible for his children's care, and had to pick up his daughter from school. Employee was absent from work for approximately 25 minutes on such afternoons, over a three-week period.
- Employee did not punch out for the school pickup; manager was fully aware of this and told the employee to take as much time as needed to take care of his family.
- Employee was later terminated for failing to punch out when leaving to pick up his daughter, thereby being paid for time not worked.

Flagg v. AliMed, Inc.

- The employee alleged that the real reason he was terminated was in order to avoid paying for health plan costs incurred by his wife. (Employee's termination would result in immediate termination of his health insurance).
- The employee filed a complaint alleging "associational discrimination" under G.L. c. 151B, § 4(16).
- Does MA law prohibit an employer from discriminating against an employee on the basis of the disability of someone with whom the employee associates?
- SJC: Yes. The employee could proceed with his claim of "associational discrimination"

"Associational Discrimination"

- Court: Employee could proceed with the claim because AliMed allegedly treated the employee as if he were "disabled" because of the financial burdens his wife's known medical condition placed on the company.
- The court DID NOT decide whether an employee with a handicapped spouse is entitled to reasonable accommodation; decision was based on the employer's alleged motive to cut health care costs.
- MCAD: has also found "associational discrimination" viable in claims of race, religion, gender discrimination.

"*Associational Discrimination*"

- The outer boundaries of the *Flagg* ruling were defined in federal court, in *Perez v. Greater New Bedford Vocational Technical School District*.
- In *Perez*, a special education teacher brought a claim based upon her association with disabled students at her school.
- The teacher alleged that she was fired for her advocacy on behalf of disabled students.
- Court: a student-teacher relationship is too attenuated to support a discrimination claim.

Supervisors Beware: Comments to Employees Regarding Their Protected Class May Override an Otherwise-Valid Reason for Termination

Kelley v. Correctional Medical Services, Inc.

- Employee with a broken pelvis often sought accommodations. In response, her supervisor made negative comments regarding her medical issue and was reluctant to grant the employee's requests.
- Employee was later fired for insubordination when she refused to perform one of the core job duties associated with a particular assignment.
- Employee alleged that termination was in retaliation for her requests for accommodation.

Kelley v. Correctional Medical Services, Inc.

- The employee sued, claiming that the employer's claim of insubordination was a pretext masking underlying discriminatory animus.
- The First Circuit Court of Appeals reversed the lower court's dismissal of the case, concluding that the supervisor's comments and irritation regarding the employee's disability and need for accommodation = evidence of retaliatory intent.
- Court: a jury could conclude that the employer seized on a single instance of misconduct as a convenient pretext for terminating her after repeated requests for ADA-protected accommodations.

Rochat v. L.E.K. Consulting

- A female employee was terminated after several months of declining performance.
- Employee alleged that her supervisor's prior gender-based comment ("oh, that's a typical female thing to do") revealed a gender animus that infected the decision to terminate.
- MA Appeals Court: Rational jurors could conclude that at least one key actor had a discriminatory intent or motive against females, and this could have been an important ingredient in the discharge.
- Court also found that the male-dominated work environment could be a relevant factor; there were NO female managers and only one female partner in the entire company.

Take-Away Lessons

- Before taking adverse action, conduct a full review of all underlying circumstances, including evaluating a supervisor's attitude or statements about the employee at issue.
- Assess whether the performance review process could have been infected by the biases of those performing the evaluations.
- Remember that prior discriminatory comments can override a supervisor's otherwise-legitimate reason to discharge an employee.

Can Employees Sue Employer Under MA Workplace Harassment/Bullying Statute?

Beiermeister v. Cracker Barrel

- M.G.L. c. 258E – new law to provide individuals with right to obtain retraining orders as a result of harassment/stalking (outside of the domestic context).
- Employee filed suit under c. 258E, alleging harassment at work, and sought monetary damages.
- MA Superior Court dismissed the claim, holding that c.258E does not allow an employee to recover civil damages; only certain compensatory damages in the context of a TRO/petition for an order of protection.
- Claim also barred if also based on sexual harassment under c. 151B.

G.L. 258E and Workplace Harassment

Shipley v. Nagel Cutrell Wendell & Associates

- Here, as in *Cracker Barrel*, the employer argued that the 258E claim should be dismissed because Chapter 151B provides the exclusive remedy for all employment discrimination claims.
- Notwithstanding the Court's decision in *Cracker Barrel*, the Court ruled that 151B does not bar an employee from seeking damages against her employer for civil (non-sexual) harassment or bullying under 258E.
- Court: 258E provides injunctive relief and monetary compensation for losses suffered as the result of harassment, incl. loss of earnings, out of pocket losses and attorneys' fees.

Shipley v. Nagel Cutrell Wendell & Associates

- Court: "to the extent that defendant's motivation for some or all of his acts may not have been discriminatory, the exclusivity provisions of [151B § 9] do not apply."
- Put another way, if part of the motivation for the defendant's harassing conduct was *not* discriminatory, the plaintiff CAN recover civil damages under 258E.
- Since two Superior Court decisions have reached different conclusions, the appellate courts in MA might take up this issue in the near future – watch for further developments!

Supervisors May Be Found Individually Liable Under the FMLA

Chase v. U.S. Postal Service

- A letter carrier in the Brookline, Massachusetts post office received good performance reviews until several injuries caused him to be absent from work and need FMLA leave.
- Plaintiff's manager expressed unhappiness with his absences and asked the plaintiff's union steward to convince plaintiff not to file for workers' compensation because it would reflect badly on the manager's statistics.

Chase v. U.S. Postal Service

- Manager allegedly made comments on the public address system which were found to further establish his animus towards plaintiff's leave-taking.
- PA announcements were: "Will Bob Chase, the injury fraud specialist, please report to the office" and "There's a job posted on the bulletin board for an injury compensation specialist, since you're the biggest fraud when it comes to injuries."
- The U.S. District Court in MA: public officials can be sued in their individual capacity under the FMLA.
- While this case concerned the issue of whether a public official can be held individually liable under the FMLA, the Court noted that it had already been determined that supervisors in the private sector can be individually liable under the FMLA.

Lesson from *Chase v. U.S. Postal Service*

- This case stands as a reminder to employers and supervisors of the importance of training, and the need for supervisors to understand their role in administering the FMLA and maintaining professionalism. Failing to do so may result in potential liability not only for the employer, but also the individual supervisor.

Lateral Transfers Can Be Retaliation

Kelley v. Commonwealth, et al.

- Superior Court Judge upholds a jury verdict giving a low level employee $750,000, following her complaint of retaliation is response to her complaint of a hostile work environment.
- The court used a "totality of the circumstances" test to determine that the lateral transfer was "adverse in character."
- The new job required greater skills, a longer commute, and a different schedule.

Lessons from *Kelley*

- Be extremely cautious when making changes, after an employee has engaged in protected activity.
  - Preserving salary and benefits is not enough
- Even if a legitimate business reason exists to move an employee, the MCAD and courts will closely examine those reasons.
- If transferring an employee, ensure that it is to a position where they are not set up to fail.

Internships: Rapid Increase in Wage & Hour Litigation

Glatt v. Fox Searchlight Pictures Inc.

- Federal Court in NY held that interns working on the film *Black Swan* were "employees"
- Private sector focus, but perhaps not limited to for-profit companies
- And, court rulings will apply to students at internships with for-profit companies

- *Glatt* was just the spearhead: wage and hour lawsuits have been brought against the Hearst Corporation, NBC Universal, Warner Music, Atlantic Records, Charlie Rose, and many more.

Internships con't: The Law

- The *Glatt* court applied a six-factor internship test originally published by the US DOL in April 2010.
- The test, from DOL Fact Sheet #71, requires for-profit employers to meet each of the six elements to avoid minimum wage and overtime responsibility.
- The test is difficult but not impossible to satisfy.
- It is unclear if the six factor test will apply in non-profit settings.

Internships: How to Respond

- Employers have responded to litigation in a number of ways
  - *Conde Nast* discontinued its internship program
  - *The New York Times* raised intern pay to the minimum wage
- Recommendations to Employers
  - Pay interns in accordance with wage and hour laws, unless
  - Each of the six factors is met, ideally as part of credit earning externship opportunity for the intern

MCAD/EEOC TRENDS

EEOC Enforcement Stats

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Total Charges	93,277	99,922	99,947	99,412	93,727
Race	33,579	35,890	35,395	33,512	33,068
	36.0%	35.9%	35.4%	33.7%	35.3%
Sex	28,028	29,029	28,534	30,356	27,687
	30.0%	29.1%	28.5%	30.5%	29.5%
National Origin	11,134	11,304	11,833	10,883	10,642
	11.9%	11.3%	11.8%	10.9%	11.4%
Religion	3,386	3,790	4,151	3,811	3,721
	3.6%	3.8%	4.2%	3.8%	4.0%
Color	2,943	2,780	2,832	2,662	3,146
	3.2%	2.8%	2.8%	2.7%	3.4%

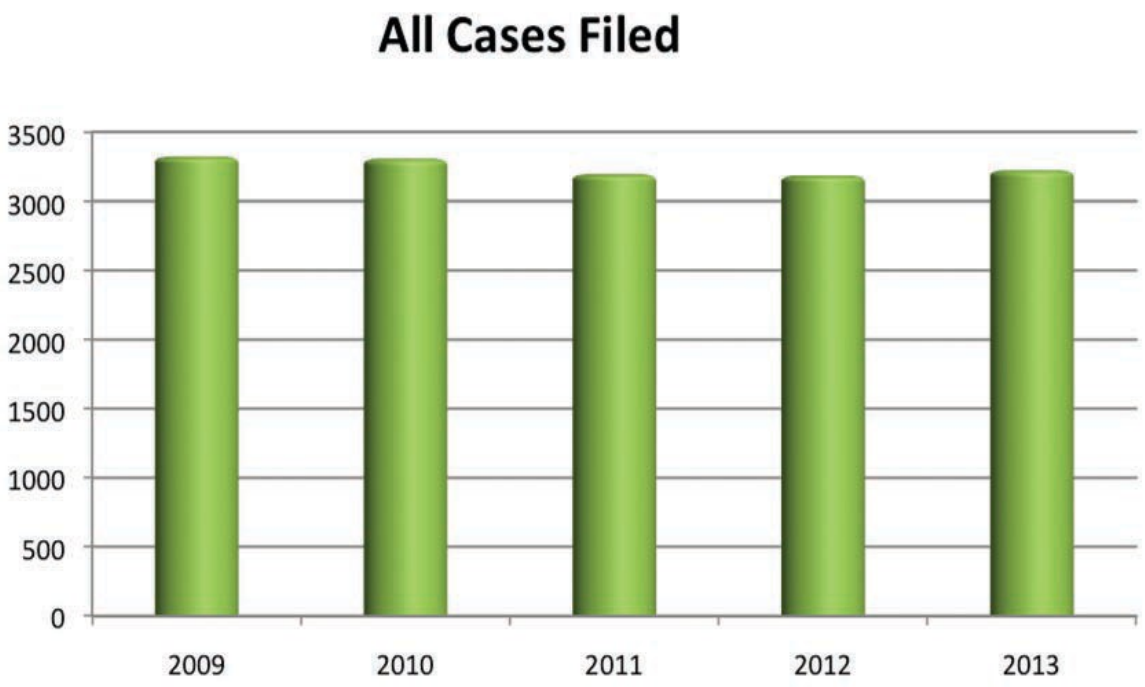
EEOC Stats cont'd

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Age	22,778	23,264	23,465	22,857	21,396
	24.4%	23.3%	23.5%	23.0%	22.8%
Disability	21,451	25,165	25,742	26,379	25,957
	23.0%	25.2%	25.8%	26.5%	27.7%
Equal Pay Act	942	1,044	919	1,082	1,019
	1.0%	1.0%	0.9%	1.1%	1.1%
GINA		201	245	280	333
		0.2%	0.2%	0.3%	0.4%

EEOC Stats cont'd

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Retaliation - All Statutes	33,613	36,258	37,334	37,836	38,539
	36.0%	36.3%	37.4%	38.1%	41.1%
Retaliation - Title VII only	28,948	30,948	31,429	31,208	31,478
	31.0%	31.0%	31.4%	31.4%	33.6%

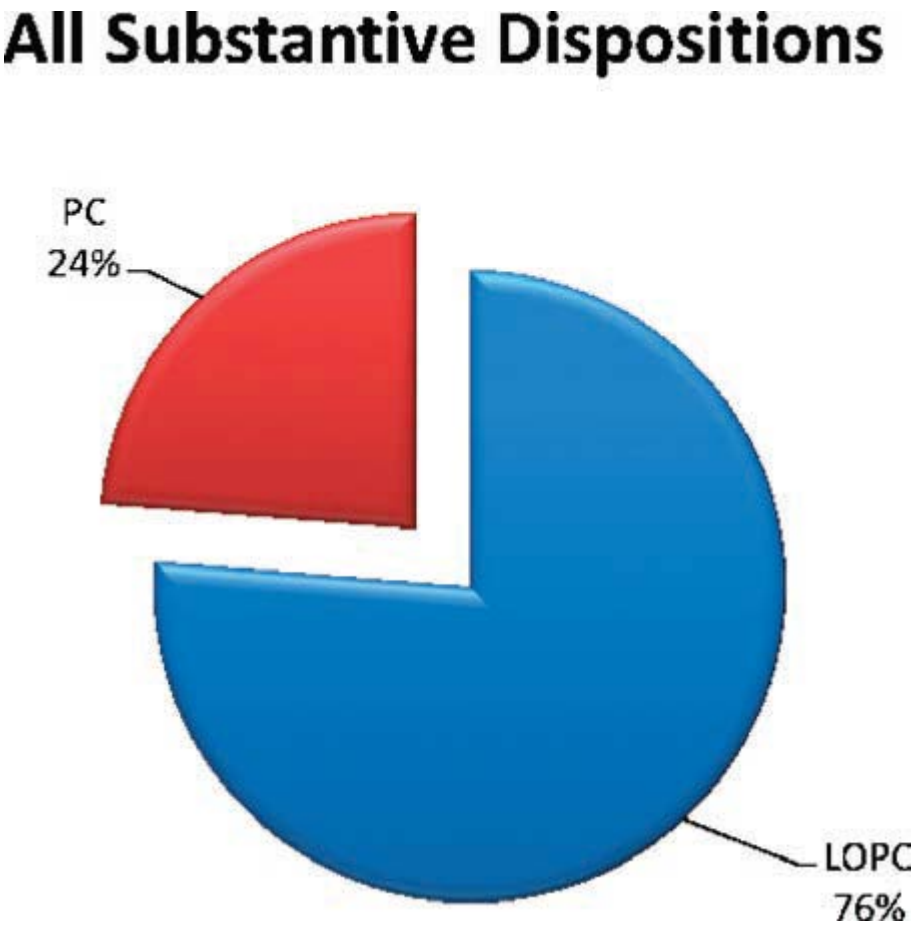
MCAD Stats



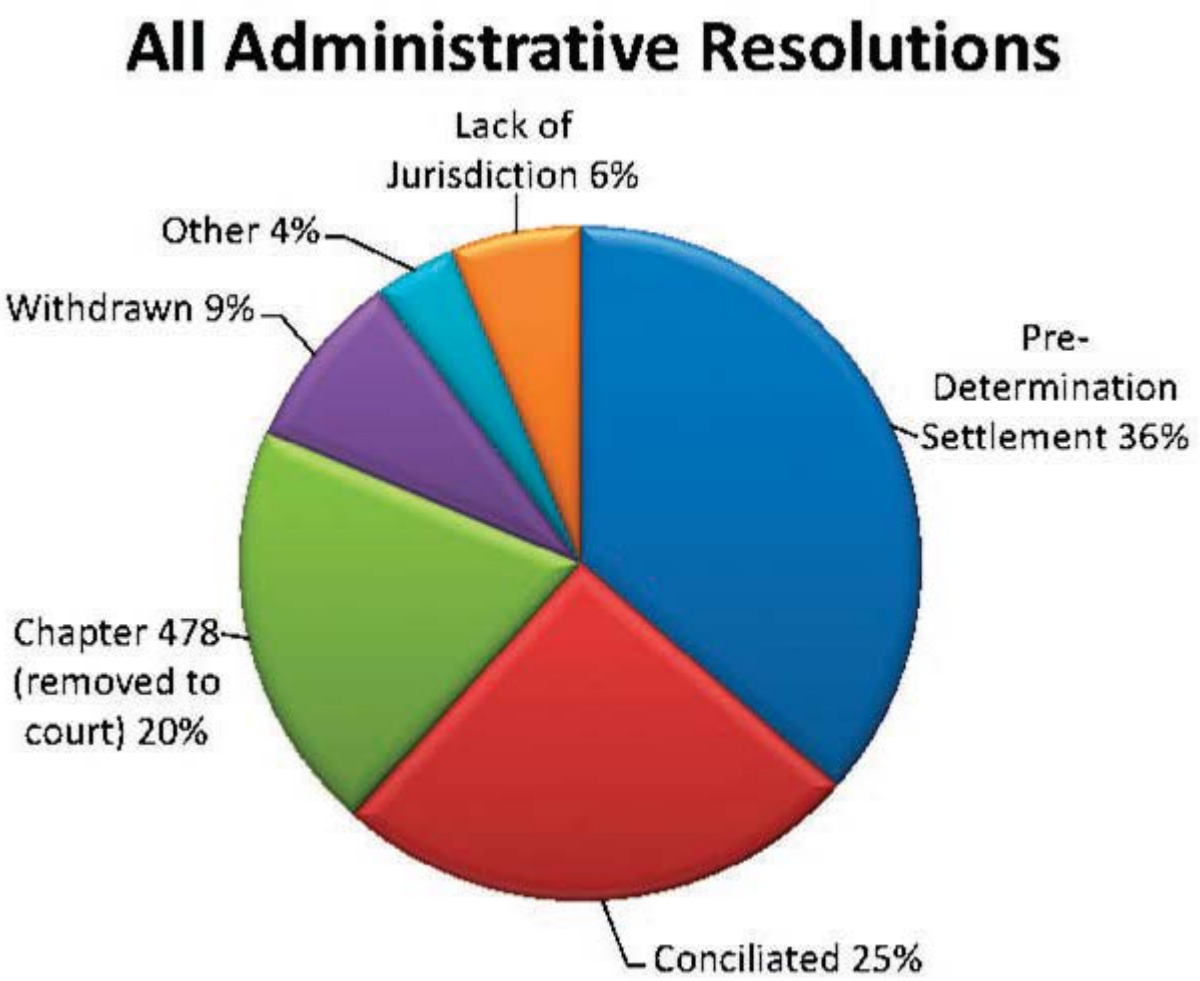
All Cases Filed

2013 – 3,224
2012 – 3,186
2011 – 3,195
2010 – 3,308
2009 – 3,323

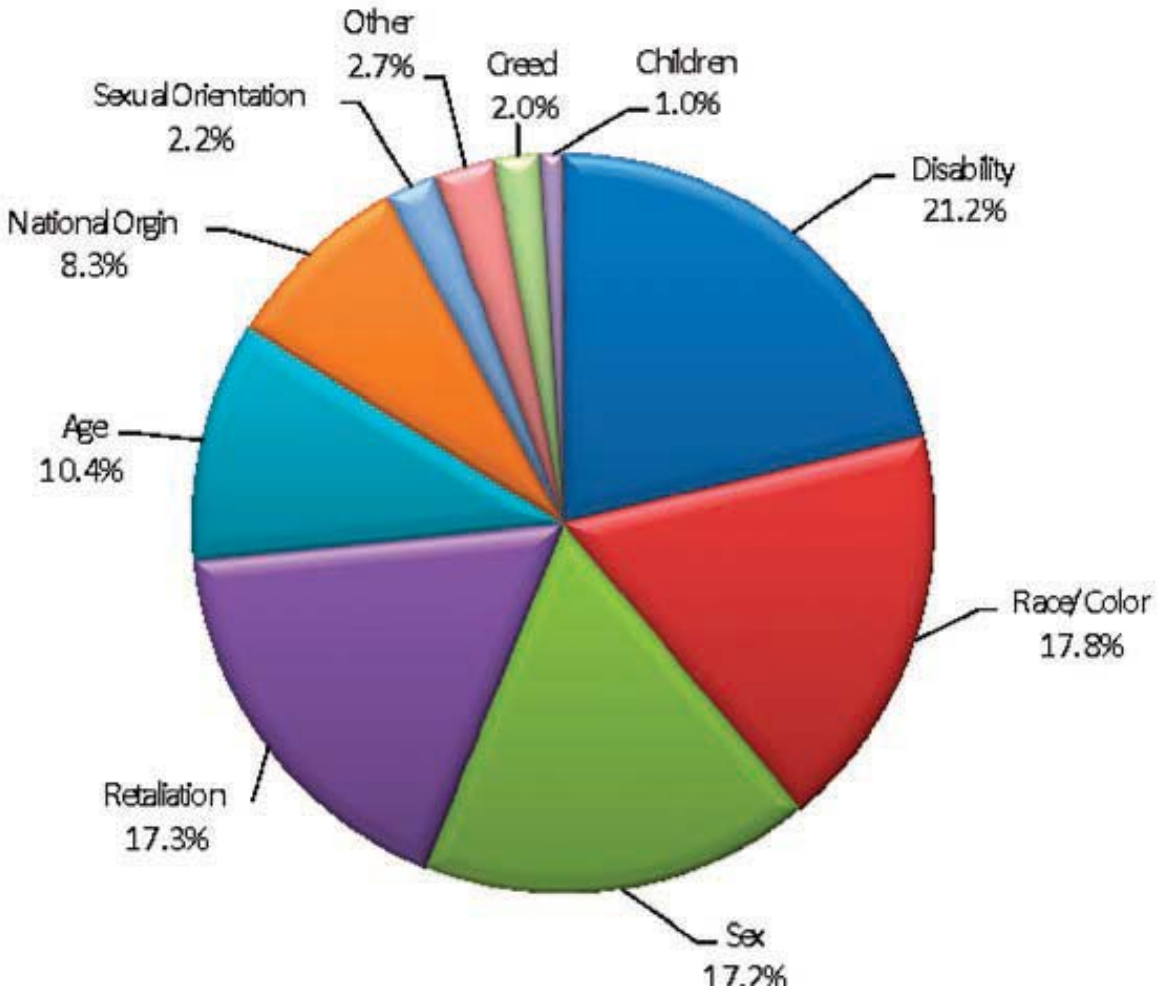
MCAD Stats cont'd



MCAD Stats cont'd



Complaints Filed by Protected Category



MCAD "Early Mediation" Program

- MCAD's "early mediation" program was offered to over 426 parties and 283 mediations were conducted.
- 219 of the sessions held resulted in settlement – a 77% settlement rate.
- The total amount of mediation settlements agency wide was approximately $2,175,137.00.

MCAD Conciliation Efforts

- MCAD Conciliation Division held 273 post-probable cause conciliation conferences
- 177 settlements reached – a 65% settlement rate
- Total amount of conciliation settlements agency wide: approx. $5,420,248.00

LEGISLATIVE AND REGULATORY UPDATE

MA Domestic Violence Leave

- On August 8, 2014, Gov. Deval Patrick signed a law creating a new right to leave for employees involved in incidents of domestic violence.
- Employers must:
  - Provide up to 15 days of leave in any 12 month period for employee or a covered family member
  - Employee or family member must be a victim of domestic abuse (i.e., not the alleged abuser)
  - Leave must be for issues directly related to the abuse, i.e., seeking/obtaining medical attention, counseling, attending court proceedings

MA Domestic Violence Leave

- Leave need not be paid
- Employee must first exhaust all personal, sick and vacation leave, unless employer permits otherwise
- Employee must provide advance notice of need to take leave, unless there is a threat of imminent danger to the health or safety of the employee or a family member
- If employee doesn't provide notice, must notify employer within three work days
- Employer cannot condition the leave on the victim maintaining or ceasing contact with alleged abuser

MA Domestic Violence Leave

- Employee entitled to restoration of his/her job upon return from leave
- Employer may require employee to provide documentation of the domestic abuse incident (police report, court papers)
- Employee can bring a civil action in court for violation of the Act
- Employers MUST NOTIFY EACH EMPLOYEE of the Act and its provisions
  - Update handbook or develop a policy
  - MB&J has a model policy

EEOC Issues Guidance on ADA Reasonable Accommodations

- In the past year, EEOC has issued 4 informal "guidance " documents
- Guidance documents highlight specific types of reasonable accommodations for:
  - Cancer
  - Diabetes
  - Epilepsy
  - Intellectual Disabilities
- Provides variety of Q&A and examples

EEOC Guidance: Religious Garb in the Workplace

- In March 2014, the EEOC issued new guidance regarding religious dress accommodation in the work place
- Religious dress or grooming can not be barred unless the practice places an undue hardship on the organization
- Employers must accommodate sincerely held beliefs, even if they are non-traditional or new to the employee
- Cannot segregate employees from client contact because of customer preference

Confidentiality in Internal Investigations

- NLRB Advice Memorandum reiterates the Board's position that employers may not require confidentially in all internal investigations
- Under Section 7, employers cannot limit employees, unionized or not, from engaging in concerted activity for mutual aid or protection
- In a 2012 decision, *Banner Health* System, the Board held that employers are required to show specific circumstances to warrant an order of confidentiality in investigations, or else the employer will be found to have violated employee Section 7 rights

Confidentiality in Internal Investigations

- The Advice Memorandum was issued regarding an employer's code of conduct, which required confidentiality for all internal investigations, citing the reasons identified in *Banner Health*
- The Board wrote "the Employer cannot maintain a blanket rule regarding the confidentiality of employee investigations, but must demonstrate its need for confidentiality on a case-by-case basis"
- As of yet, the Board has not ruled on specific challenges to the factors identified in *Banner Health*

SOCIAL MEDIA AND TECHNOLOGY: BEST PRACTICES

Social Media, Confidentiality, and IP

Risks of Social Media Use by Employees

- With the push of a button, employees can do great damage
  - Expose confidential or proprietary information
  - Engage in workplace harassment
  - Damage reputation / cause embarrassment
- Risk exacerbated by increased use of
  - Mobile devices
  - Cloud computing platforms
  - Variety of ways to share and transfer data

Social Media: Best Practices

- Have a policy and enforce it
- Set clear expectations
- Limit what can be posted
  - » No confidential information
  - » No abuse or harassment
- Create a culture in which employees understand the risks of social media use
- Encourage employees to report inappropriate social media behavior

NLRB: Social Media Policies Must be Narrowly Tailored

- Policies must be carefully drafted
- Cannot ban subjective conduct (such as “disruptive” or “disrespectful”)
- Cannot ban posting of photos
- Can require compliance with policies
- Can prohibit posting of confidential information and “extreme” material
- Check other policies with related language (such as standards of conduct and information technology)

Data Security: Lax Attitudes Toward Value of Data and IP

- Data theft and misappropriation cases on the rise
  - Number of cases expected to double by 2017
- More than 85% of data thefts: violator is an employee, not a third party
- Lax attitudes by EMPLOYERS and employees!
- Sources of attitude
  - General cavalier attitude towards data theft
  - Lack of employee loyalty
  - Rise in telecommuting

Studies of Departing Employees

- 79% admitted to stealing data
- 67% (of the 79%) admitted they'd use data to leverage their new job
- 42% took on USB drive
- 38% sent attachments to personal email

Data Security Issues Continue to Create Problems for Employers

- Lack of employer policies and best practices contributes to problem
- Studies show employer missteps
  - 82% said employers failed to conduct review of ESI in connection with departure
  - 24% still had access to network after separation

Best Practices: Data Security

- Take steps to deter data theft
- Make data security important in everyday practice
- Audit on-boarding and exit practices
- Explain policies clearly and *repeatedly*

THANK YOU

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