



# MANCHEL BRENNAN

COUNSELLORS AT LAW

## **CLIENT UPDATE** **(FEBRUARY 15, 2013)**

### **RECENT DECISION REQUIRES SPECIFIC LANGUAGE TO CREATE EFFECTIVE RELEASE OF MASSACHUSETTS WAGE ACT CLAIMS**

In a recent decision by the Massachusetts Supreme Judicial Court, Crocker v. Townsend Oil Co., Inc., 464 Mass. 1 (2012), the Court held that a general release, which does not specifically mention the Massachusetts Wage Act, is not an effective release of claims under that statute. The Court ruled that a release of claims must be “in clear and unmistakable terms” in order to effectively release claims under the Massachusetts Wage Act. The Court elaborated that the release must be “plainly worded and understandable to the average individual” and “it must specifically refer to the rights and claims under the Wage Act that the employee is waiving.”

As a result, all Massachusetts employers should review their existing severance agreements and other forms that contain a release of claims to make sure that they specifically refer to “the Massachusetts Wage Act, M.G.L. c. 149, § 148, et seq.,” and that they are plainly worded and understandable.

### **FAIR CREDIT REPORTING ACT “SUMMARY OF RIGHTS” FORM UPDATED**

The Consumer Financial Protection Board (CFPB) recently issued new regulations that call for updates to certain forms used under the Fair

Credit Reporting Act (FCRA). Employers must comply with the FCRA when they use outside agencies to conduct background checks regarding applicants and/or employees. When an employer intends to take adverse action against an applicant or employee, the employer must provide: a pre-adverse action notice with an attached copy of the background report and a “A Summary of Your Rights Under the Fair Credit Reporting Act” form; and, later, an adverse action notice. The new regulations update the “Summary of Rights” form referenced above to reflect that the CFPB is now the appropriate federal agency for applicants or employees to contact if they would like more information about their rights under the FCRA (the CFPB recently took over this responsibility from the Federal Trade Commission).

The updated Form can be downloaded from:  
<http://www.ecfr.gov/graphics/pdfs/er14no12.041.pdf>.

### **FMLA MODIFICATIONS AND REVISED FMLA WORKPLACE POSTER GO INTO EFFECT ON MARCH 8, 2013**

The United States Department of Labor (DOL) recently issued revisions to the Family and Medical Leave Act (FMLA) regulations relating to military caregiver leave and leave for family members of service members for “qualifying exigencies.” In general terms, the revisions now provide greater flexibility for employees who are family members of current service members and veterans to use FMLA leave to attend to personal matters and medical

needs related to their family members' military service. To achieve this goal, certain of the definitions relating to military caregiver leave and qualifying exigency leave have been expanded. Therefore, employers should review their existing FMLA policies to determine whether any updates are required.

The revised regulations also updated the existing FMLA workplace poster titled, "Employee Rights and Responsibilities Under the Family and Medical Leave Act." The updated poster can be downloaded from the DOL's website:

<http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>.

Also, employers should remember that there are now five different certification forms (WH-380-E, WH-380-F, WH-384, WH-385, and WH-385-V) for the many different scenarios in which employees may be eligible for FMLA leave. Those five certification forms also are available on the DOL's website:

<http://www.dol.gov/WHD/fmla/index.htm>.

### **NEW NONCOMPETE LAW IN NEW HAMPSHIRE**

New Hampshire recently enacted a statute that places an additional burden on employers in enforcing non-compete or "non-piracy" agreements in New Hampshire. The New Hampshire statute, N.H. Rev. Stat. § 275:70, states, in total, that "[p]rior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in

compliance with this section shall be void and unenforceable."

The statute fails to define any of its terms, including, "non-piracy agreement," "employment agreement," or "job classification." It is unclear whether "non-piracy" agreement includes: agreements that prohibit solicitation of the company's employees; agreements that prohibit solicitation of and/or doing business with the company's customers or potential customers; and/or agreements that restrict the disclosure or use of confidential information or trade secrets. Also, given the lack of a definition of "employment agreement," it is unclear whether this statute applies to an at-will employment relationship, which by definition, is not a contractual relationship. Finally, given the lack of a definition of "job classification," a change of something as simple as pay grade or job title could conceivably trigger the statute. Given the lack of clarity of this statute, there likely will be much litigation regarding its scope and application.

Employers in New Hampshire should be sure to attach a copy of any post-employment restrictive covenant agreement and/or confidential information or trade secret agreement to every offer letter, both for new employees and when employees change positions (whether a promotion, demotion, or other "job classification" change).

Please contact us if we can be of assistance with regard to the issues presented in this Client Update.

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