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COUNSELLORS AT LAW

## **Labor & Employment Newsletter**

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#### **GOVERNMENT ISSUES REVISED FORM I-9**

On November 7, 2007, the United States Citizenship and Immigration Services (USCIS) released a revised Employment Eligibility Verification Form (known as the I-9), which employers must complete each time an employee is hired to work in the United States. The most significant change to the Form I-9 concerns the list of acceptable documents that may be used to prove employees' work eligibility and identity. The amended form contains 4 types of acceptable "List A" documents: (1) a United States passport (unexpired or expired); (2) an unexpired Permanent Resident Card or Alien Registration Receipt Card (Form I-551); (3) an unexpired foreign passport with a temporary I-551 stamp; or (4) an unexpired Employment Authorization Document that contains a photograph (Form I-776, I-688, I-688A, or I-688B). In addition, the new form modifies one additional List A document - the unexpired foreign passport. The revised form replaces the previously acceptable "unexpired foreign passport with an attached Form I-94 indicating unexpired employment authorization" with "unexpired foreign passport with an unexpired Arrival-Departure record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer."

This modification of the acceptable List A documents should make it easier for employers to complete I-9 forms. For example, the employment authorization documents are now identified as one category. The amended Form I-9 also informs employees that providing their Social Security number is voluntary, pursuant to section 7 of the Privacy Act. (Note, however, that employees must provide their Social Security number if the employer participates in E-verify, formerly known as Basic Pilot Program or Electronic Employment Verification.) Finally, the Form I-9 clarifies that there is no filing fee associated with the form.

The USCIS has published a comprehensive guide titled "Handbook for Employers, Instructions for Completing the Form I-9," which reviews the recent changes to the form, provides detailed instructions on completing the Form I-9, and includes helpful additional information, including electronic retention of the Form I-9. The Handbook is available at: <http://www.uscis.gov/files/nativedocuments/m-274.pdf> and the revised Form I-9 at: <http://www.uscis.gov/files/form/I-9.pdf>.

#### **NEW EEOC GUIDANCE: DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES**

The EEOC recently issued an Enforcement Guidance concerning unlawful disparate treatment of workers with caregiving responsibilities, under both Title VII and the Americans With Disabilities Act (available at: <http://www.eeoc.gov/policy/docs/caregiving.html>). Neither federal nor Massachusetts anti-discrimination laws directly prohibit discrimination against caregivers - those employees with responsibility for the care of children, elderly parents/relatives, or disabled family members. The Guidance, however, provides several examples of situations in which discrimination against caregivers might constitute unlawful disparate treatment and reminds employers that they are prohibited from retaliating against employees (including caregivers) who oppose unlawful discrimination or participate in EEOC proceedings.

The Guidance analyzes and illustrates 6 different types of caregiver discrimination: (a) sex-based disparate treatment of female caregivers; (b) stereotyping and other disparate treatment of pregnant workers; (c) sex-based disparate treatment of male caregivers; (d) disparate treatment of women of color with caregiving responsibilities; (e) disparate treatment of workers with responsibility for a disabled relative; and (f) harassment that results in a hostile work environment for a worker with caregiving responsibilities. By way of example, Section IIA of the Guidance provides the following two contrasting scenarios:

- A female police detective received glowing performance reviews during her first 4 years with a City police department. However, after she returned from leave to adopt a child, her supervisor frequently asked her how she was going to "manage to stay on top of her case load while caring for an infant." Although the employee continued to work the same number of hours and close the same number of cases as she did before the adoption, her supervisor removed her from high-profile cases and assigned her more routine cases, usually handled by less experienced detectives. The city violated Title VII by treating the detective less favorably because of gender-based stereotypes about working mothers.

🔊 *As of January 1, 2008, the Massachusetts minimum wage increased from \$7.50 to \$8.00 per hour.* 🔊

- After an associate at a law firm returned from maternity leave, she was frequently absent and began to miss important deadlines. The firm lost a large client and the associate was given a written performance warning. Continued childcare difficulties caused her to miss more deadlines, which resulted in her transfer to another department, where she would be excluded from higher profile cases. The employer in this situation did not violate Title VII, after an investigation revealed that it treated the associate consistently with other employees who had missed deadlines or otherwise performed poorly and failed to improve.

### **HOLIDAYS ARE INCLUDED WHEN CALCULATING INTERMITTENT FMLA LEAVE**

The First Circuit Court of Appeals has determined that holidays should be counted in the calculation of intermittent leave taken under the Family and Medical Leave Act. The case, *Mellen v. Trustees of Boston University*, involved a claim by Linda Mellen that her former employer, Boston University, miscalculated the amount of leave to which she was entitled under the FMLA (and the Massachusetts Small Necessities Leave Act). Mellen had applied for two periods of leave to care for her ailing mother (with a previously scheduled three-week vacation in between the leave periods). Prior to her scheduled return date, however, Mellen notified her supervisor that she had decided to extend her leave by one day in light of an internal holiday that had been granted to University employees during her leave. The supervisor responded that the holiday did not serve to extend Mellen's leave and when Mellen failed to return to work as originally scheduled, the University notified her that it considered her to have voluntarily resigned.

Upholding the lower court's decision in favor of the employer, the First Circuit held that the University had properly calculated Mellen's FMLA leave. The Court concluded that if an employee's intermittent leave includes a full, "holiday-containing week," the "amount of leave used" includes that holiday. Thus, the University properly counted the holidays that fell within Mellen's intermittent leave. As an aside, the Court noted that, even if the University had incorrectly calculated the leave, intermittent leave requires prior approval, which Mellen did not obtain before unilaterally extending her leave.

### **SUPREME JUDICIAL COURT FINDS MBTA LIABLE FOR RELIGIOUS DISCRIMINATION**

In a recent decision, the Supreme Judicial Court upheld a finding by the Massachusetts Commission Against Discrimination that the Massachusetts Bay Transportation Authority discriminated against a prospective employee by refusing to accommodate his religious beliefs. David Marquez, a Seventh-Day Adventist, was hired by the MBTA as a part-time bus operator and was assigned to begin his bus

driver training. During the application process, Marquez informed the MBTA that, due to his religious beliefs and practices, he could not work from sundown on Fridays to sundown on Saturdays. When the training schedule conflicted with his religious observances, Marquez notified the human resources department; however, the MBTA told him that it could not accommodate his request to refrain from working on Friday evenings and therefore would not be extending him an offer of employment.

The SJC began by noting that there was ample evidence to support the MCAD's finding that the MBTA required Marquez to violate a religious practice compelled by his sincerely held belief and that he provided advance notice of the religious observation. The burden then shifted to the MBTA to demonstrate that any possible accommodation of that belief would cause it an undue hardship. The Court addressed the standard for determining whether an undue hardship exists under Chapter 151B in the context of religious discrimination. Federal cases generally have held that Title VII does not require employers to bear more than a "de minimis" cost to accommodate an employee's religious beliefs. The SJC recognized that the undue hardship standard under Massachusetts law allows for slightly broader religious protection than under federal law. However, without expressly adopting a "de minimis" standard under Massachusetts law, the Court made clear that it would consider federal case law in interpreting Chapter 151B in the context of the accommodation of religious beliefs.

Although it ruled that the MBTA was not required to accommodate Marquez by leaving his shift uncovered or by paying a replacement worker overtime to cover the shift, the Court ultimately determined that the MBTA's failure to take *any* steps to accommodate Marquez violated Chapter 151B. In particular, the Court denounced the failure even to investigate possible accommodations, such as allowing other full-time or part-time employees to swap shifts voluntarily with Marquez. Additionally, the Court rejected the MBTA's argument that requiring it to engage in an interactive process with Marquez would itself be an undue hardship. Notably, however, the Court also stated that the failure of an employer to engage in the interactive process, in and of itself, is not a violation of Chapter 151B.

This case is a strong signal to employers that they have an obligation to reasonably accommodate their employees' sincerely held religious observances. At the very least, all employers should, and are required to, engage in an interactive dialogue with employees who request religious accommodations.

### **UPDATE ON THE MASSACHUSETTS INDEPENDENT CONTRACTOR LAW**

Consistent with an aggressive enforcement philosophy with regard to the proper classification of workers in the Commonwealth, Attorney General Martha Coakley has issued a Proposed Advisory on the Massachusetts Independent Contractor Law, M.G.L. c. 149, §148B. Comments to the

Proposed Advisory are being accepted until January 25, 2008. If implemented, the Proposed Advisory will supersede the 2004 Advisory on this law.

The Proposed Advisory outlines in detail the three-part test that an employer must satisfy in order to properly classify an individual as an independent contractor: (1) the individual must be free from the company's direction and control in connection with the performance of the service, under contract and in fact; (2) the individual must perform a service outside the employer's usual course of business; and (3) the individual must be customarily engaged in an independently established trade, occupation, profession, or business. The Proposed Advisory also contains enforcement guidelines for employers. Specifically, it sets forth factors that the Attorney General considers "strong indications" of misclassification that warrant further investigation, including: (1) individuals performing services not reflected on the employer's books; (2) paying workers "off the books" or "under the table"; (3) insufficient or nonexistent worker's compensation coverage; (4) failure to provide workers with 1099 or W-2 forms; (5) classification of workers as independent contractors who perform identical services as employees of the entity; (6) providing so-called independent contractors with the employer's tools or equipment; and (7) the failure of alleged independent contractors to withhold taxes or contribute to the Unemployment Compensation Fund.

All employers in Massachusetts should carefully review the classification of any workers providing services as independent contractors, paying careful attention to the three-part test and the enforcement factors. In sum, this Proposed Advisory signals the Attorney General's focus on the Independent Contractor Law and apparent intent to enforce it vigorously.

### **GOVERNOR FILES BILL REFORMING CORI**

On January 11, 2008, Governor Deval Patrick filed legislation that would substantially revamp the Massachusetts Criminal Offender Record Information system. The proposed CORI reforms are aimed at enhancing employment opportunities for rehabilitated individuals with criminal records. The bill includes numerous reforms to the present CORI system, including reducing the time the public may view certain criminal felony records from 15 years to 10 years and increasing access to sealed criminal records for police and criminal justice agencies. While these proposed changes are awaiting legislative approval, the governor also issued an Executive Order, which, among other things, implements several changes in how state agencies are to handle criminal records. For example, the Order directs that agencies will be permitted to check a job applicant's criminal background only

after the applicant has been deemed qualified for a position and when the contents of a criminal record are relevant to the duties of the job. The Order also requires the implementation of new training standards for employees that handle criminal record requests. Moreover -- and this is especially beneficial to employers -- the Order mandates that, in order to provide greater clarity to employers, the Criminal History Systems Board must develop an electronic learning system for CORI users. Overall, the reforms are expected to reduce barriers faced by ex-offenders in accessing job opportunities and re-integrating into society.

### **DON'T FORGET THE DISCLAIMER!**

Reminding employers once again of the importance of including a prominent statement disclaiming any enforceable rights and promises in employee handbooks, the Massachusetts Appeals Court ruled that an employee of the Massachusetts Turnpike Authority was entitled to unpaid sick time that he had accrued before the MTA revised its attendance incentive policy. The employee worked for the MTA from 1975 until he retired in 2002. During his employment, the MTA offered an incentive program with regard to employee attendance, contained in its personnel policy manual, which allowed employees to reserve a percentage of accrued sick leave until retirement, which could then be applied toward future health insurance premiums or a lump-sum cash payment. The program was frequently revised, and in 1996, the MTA eliminated the insurance premium benefit and reduced the percentage of the cash payment to which employees were entitled from 50% to 20% of the accrued time. When the plaintiff retired in 2002, he was paid the 20%, rather than the 50% to which he would have been entitled under the former policy.

The MTA claimed that the changes to the policy constituted modifications to the handbook, thereby superseding any prior policies or promises. The Court rejected this argument and held that each promise (or revision) constituted a legally enforceable contract, despite the fact that the policy manual contained language that the MTA reserved the right to unilaterally modify its terms. Such language was insufficient to alert employees that rights already obtained could be altered or taken away. Rather, if an employer wishes to issue a handbook with no legally binding promises, the Court said, it must include an appropriate statement to that effect in a very prominent position.

The Court's decision highlights that employers must be extremely careful, particularly when adopting incentive programs that include future compensation, to include clearly worded disclaimers in all handbooks and policy manuals.