

DAVIS MALM & D'AGOSTINE P.C.

ATTORNEYS AT LAW

EMPLOYMENT LAW ALERT AUGUST 2016

MASSACHUSETTS ENACTS "AN ACT TO ESTABLISH PAY EQUITY"

On August 1, 2016, Massachusetts Governor Charlie Baker signed into law a bill amending the Commonwealth's Equal Pay Act. The purpose of the new law is to ensure that all workers in Massachusetts are paid equally for comparable work performed and to provide the opportunity to earn competitive salaries in the workplace. This new law imposes strict equal pay obligations on employers and limits certain information employers can request regarding the salary history of job applicants. Below is a summary of the new law and recommended steps for employers.

SUMMARY OF MASSACHUSETTS EQUAL PAY ACT

The law requires employers to pay men and women equally when their work is "comparable," (i.e., when the work is "substantially similar" in skill, effort, responsibility, and working conditions). Employers must post about an employee's rights under the law.

Wage variations are allowed if based on:

- ▶ Seniority;
- ▶ A bona fide merit system;
- ▶ A bona fide system which measures earnings by quantity or quality of production or sales;
- ▶ Geographic location;
- ▶ Education, training, or experience to the extent such factors are reasonably related to the job in question and consistent with business necessity; and/or
- ▶ Travel.

A violation of the statute will result in liability for the amount of the unpaid compensation wages, plus an equal amount in liquidated damages and attorney's fees.

An employer is also prohibited from:

- ▶ Banning employees from discussing their compensation;
- ▶ Requesting that an applicant disclose prior wages or salary history;
- ▶ Seeking a prospective employee's salary history from a former employer, except after presenting a formal offer and with the written consent of the prospective employee; and/or
- ▶ Retaliating against an employee.

The law creates an affirmative defense for employers who timely complete a self-evaluation of its pay practices and can demonstrate reasonable progress eliminating gender-based pay disparities.

WHAT SHOULD I DO NOW?

The law does not go into effect until July 1, 2018. However, employers should review their job applications and hiring forms now and eliminate mandatory wage or salary history disclosure. Policies should also be revised to eliminate any ban on employee discussion of compensation and benefits. Most importantly, employers should proceed to conduct a self-evaluation of their pay practices.

CONTACT

Please contact a member of our [Employment Law Practice](#) to discuss the impact of this new law on your company's policies and practices.

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EMPLOYMENT LAW ALERT

JULY 2017

HANDICAPPED EMPLOYEES CAN USE MEDICAL MARIJUANA OFF-SITE UNDER MASSACHUSETTS ANTI-DISCRIMINATION LAW

On July 17, 2017, the Massachusetts Supreme Judicial Court (SJC) determined that Massachusetts law permits the off-site use of medical marijuana by handicapped employees, provided that this accommodation does not unduly burden the employer.

THE FACTS

Cristina Barbuto, the plaintiff, was hired by the defendant company, pending successfully passing a drug test mandated by company policy. The company fired Barbuto after she failed the company's mandatory drug test due to the presence of marijuana. Barbuto explained that she used medical marijuana off-site at night to treat symptoms associated with Crohn's Disease, to no avail.

SJC'S LEGAL ANALYSIS

The SJC held that Barbuto could pursue a claim under the Massachusetts anti-discrimination laws (codified as G.L. c. 151B) because there was evidence that she was a "qualified handicapped person" who was entitled to reasonable accommodation when requested. The SJC rejected the company's argument that because the accommodation sought was illegal under federal law, it was facially unreasonable and defeated her claim of handicap discrimination. It also rejected the company's claim that the company could enforce, without exception, a uniform drug-free company policy. Since the medical marijuana act expressly protected "any right or privilege" of a medical marijuana user, the SJC held that the right to reasonable accommodation under G.L. c. 151B was one such right contemplated by the medical marijuana act. The inclusion of this language in the medical marijuana act, moreover, distinguished it from other states' laws that omitted similar language, and where courts in those states had held that employers were not obligated to accommodate an employee's marijuana use.

The SJC left open the question of whether Barbuto's requested accommodation—to permit off-site use of medical marijuana—would impose an "undue hardship" on the company. Under Massachusetts law, an employer is not required to provide an employee with an accommodation that would impose an undue hardship on the company. The SJC clarified that an employer's violation of a statutory or contractual obligation that prevents employment of any worker who uses marijuana is not reasonable and would constitute an undue hardship on the employer. The Court cited federal contractors who must maintain drug-free workplace policies as one such example of an employer who may suffer an undue burden if forced to accommodate an employee's off-site medical marijuana use.

While Barbuto can pursue a claim under G.L. c. 151B, the SJC rejected other claims arising from her termination. It found that the medical marijuana act did not create a private right of action for an employee and likewise rejected Barbuto's claim that her termination violated public policy.

IMPLICATIONS

Massachusetts is unique among states that have legalized medical marijuana in that its employers must now accommodate the off-site use of medical marijuana unless it imposes an undue hardship on the employer. If the employee is handicapped and can be accommodated without undue hardship to the employer, even if the accommodation includes the toleration of the off-site use of medical marijuana, then the employer must (1) engage in an interactive process with the employee; and (2) provide the employee with reasonable accommodation. Whether exempting a handicapped employee from a company-wide drug policy constitutes a reasonable accommodation will require a case-by-case analysis. Undue hardship may exist in the case of safety-sensitive positions, where employees are impaired at work or where the employer has a statutory or contractual obligation that precludes employment of employees who test positive for marijuana.

Employers retain full authority to enforce drug-free workplaces and to discipline employees for on-site medical marijuana use. *Barbuto* expressly distinguishes off-site and on-site medical marijuana use. The decision has no applicability to recreational marijuana, which was legalized in November 2016.

CONTACT

Please contact a member of our [Employment Law Practice](#) to discuss the impact of this new law on your company's policies and practices.

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EMPLOYMENT LAW ALERT
JUNE 2015

**LESSONS FROM THE U.S. SUPREME COURT RULING AGAINST
ABERCROMBIE & FITCH IN HEADSCARF CASE**

Ms. Samantha Elauf, a practicing Muslim, appeared for her employment interview at Abercrombie & Fitch wearing a headscarf as per her religious beliefs. Abercrombie & Fitch refused to hire her because her appearance violated its "Look Policy."

On June 1, 2015, the United States Supreme Court ruled that the Company unlawfully discriminated against Ms. Elauf on the basis of her sincerely held religious beliefs. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*

The Court's decision provides stern warnings to employers dealing with religious diversity and other accommodation issues.

First, an employer's obligation to reasonably accommodate a religious practice, or at least engage in an interactive dialogue about the need for accommodation, is triggered when the employer suspects that an accommodation is needed, even if the employee or prospective employee does not request accommodation or disclose his/her religion.

In addition, the Supreme Court stresses that employers cannot rely on the neutrality of a policy, such as the Abercrombie & Fitch "Look Policy" against wearing caps, to protect against liability. Employers must assess any need for accommodation on a case-by-case basis.

Employers in Massachusetts must know that these important lessons are also applicable to circumstances involving disabled employees needing accommodation.

Companies are encouraged to consult with legal counsel prior to deciding about a job applicant or current employee if the company has any concerns about accommodation or discrimination.

CONTACT

If you have any questions about this alert, please contact one of the attorneys in our [Employment Law Practice](#).

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EMPLOYMENT LAW ALERT JANUARY 2015

MASSACHUSETTS ENACTS PARENTAL LEAVE ACT

On January 7, 2015, former Governor Deval Patrick signed into law "An Act Relative to Parental Leave." This Act replaces the Massachusetts Maternity Leave Act, which is no longer in effect.

The Act requires employers of 6 or more employees to provide parental leave to employees regardless of gender, extending the benefits of parental leave to male employees. To be eligible, employees must have completed an initial probationary period of no more than three months, or have completed three months of consecutive full-time service. Under the Parental Leave Act, both male and female employees are entitled to 8 weeks of unpaid leave for:

- ▶ the purpose of giving birth;
- ▶ adoption of a child under the age of 18;
- ▶ adoption of a child under the age of 23, if the child is mentally or physically disabled; and/or
- ▶ placement of a child with an employee under a court order.

The leave may be with or without pay at the discretion of the employer. Employees shall return to the employee's previous or similar position, unless other employees of equal length of service credit and status in the same or similar position have been laid off due to economic or business conditions. If the employer grants a request for a leave longer than 8 weeks, the employer shall not deny reinstatement to the employee unless the employer gave written notice prior to the commencement of leave that taking longer than 8 weeks will cause denial of reinstatement or loss of other rights and benefits. Any two employees of the same employer shall only be entitled to 8 weeks of parental leave in total for the birth or adoption of the same child.

Any leave taken under the Act will not impact an employee's right to receive or attain other benefits (i.e. vacation time, sick leave, bonuses, advancement, seniority, length of service credit, or other benefits) which the employee was eligible for on the date the leave begins.

Employers must post in a conspicuous place a notice describing the Act and the employer's policies relating to parental leave. All Massachusetts employers should review their written policies and practices to effect immediate compliance with the Parental Leave Act.

Please contact a member of our [Employment Law Practice](#) to discuss the impact of this Act on your company's policies and practices.

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EMPLOYMENT LAW ALERT AUGUST 2017

MASSACHUSETTS PREGNANT WORKERS FAIRNESS ACT BECOMES LAW

On April 1, 2018, the Pregnant Workers Fairness Act will become effective and require Massachusetts employers to provide reasonable accommodations to pregnant employees. The Act also prohibits employers from taking adverse action against an employee who requests or uses a reasonable accommodation for the employee's pregnancy or pregnancy-related condition, denying an employment opportunity to an employee based on the need to provide such a reasonable accommodation, or refusing to hire an individual because she is pregnant. The Act expands the scope of current law, which protects pregnant employees with a pregnancy-related disability.

Employers must engage in a timely, good faith interactive process with the employee to determine effective reasonable accommodations to enable the employee to perform the essential functions of her job. An employer must provide a reasonable accommodation unless the employer can demonstrate that the accommodation would impose an undue hardship.

The statute expressly provides that reasonable accommodations may include, among other things:

- more frequent or longer breaks;
- time off to recover from childbirth;
- temporary transfer to a less strenuous or hazardous position;
- job restructuring;
- private non-bathroom space to express breast milk; or
- a modified work schedule.

The statute also limits what documentation an employer can require regarding the need for certain accommodations, for example, more frequent restroom or food breaks.

Lastly, employers are required to provide timely written notice to employees of the right to be free from discrimination in relation to pregnancy or a condition related to the employee's pregnancy, including the right to reasonable accommodations.

CONTACT

Please contact a member of our [Employment Law Practice](#) to discuss the impact of this new law on your company's policies and practices as well as steps that should be taken to provide notice to employees prior to the effective date of the law.

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EMPLOYMENT LAW ALERT NOVEMBER 4, 2014

MASSACHUSETTS VOTERS APPROVE SICK-LEAVE INITIATIVE

On November 4, 2014, Massachusetts voters decisively approved a sick-leave ballot initiative. Under the measure known as Question 4, an employee will be entitled to sick time if the employee or a family member must attend routine medical appointments, care for a physical or mental illness, injury or medical condition, or address the effects of domestic violence.

Massachusetts employers with 11 or more employees, including part-time and temporary employees, must provide their employees with one hour of paid sick time for every 30 hours worked, beginning on July 1, 2015. The earned paid sick time may be used starting on the 90th day after hire, and its use will be limited to 40 hours in a calendar year, although up to 40 hours of unused sick time can be carried over to the next year. Massachusetts employers with fewer than 11 employees must grant their employees up to 40 hours of unpaid sick time, subject to the same conditions.

The proposed law does not override employers' obligations under any contract or benefit plan with more generous provisions. The Attorney General will prepare a notice regarding the right to earned sick time, which employers will be required to post in a conspicuous location and to provide to employees. Employers may not discriminate or retaliate against employees who exercise their rights.

If you have questions about updating your leave policies and otherwise complying with the law, please contact [Gary M. Feldman](#) or [Tamsin R. Kaplan](#) in our [Employment Law Practice Area](#).

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The Lenny Zakim Fund
Employment Law Essentials
November 8, 2017

Presenters:

Mark Irvings, Esq.

Tamsin Kaplan, Esq.

1. Part time and temporary workers can always be treated as independent contractors.
 True False
2. It is never necessary for non-profits to pay volunteers or student interns.
 True False
3. An employer can ask a job applicant about their history of criminal convictions.
 True False
4. An employee with performance problems must be given a final written warning before they can be discharged.
 True False
5. Annual performance evaluations are required by law.
 True False
6. An employee must be notified when anything that might have a negative impact on their employment is placed in their personnel records.
 True False
7. Massachusetts law requires that all employees be provided with paid sick time.
 True False
8. Every employer is required to have a Written Information Security Program.
 True False

9. All employees are entitled to parental leave upon the birth of a child.

True

False

10. An employer is automatically liable when a supervisor unlawfully harasses or discriminates against a subordinate.

True

False

11. Employers are required to provide reasonable accommodation to enable disabled and pregnant employees to perform the essential functions of their jobs.

True

False

12. All employers are required to provide private, non-bathroom space for nursing mothers to express breast milk.

True

False