COMMON EMPLOYMENT LAW PITFALLS FACING MASSACHUSETTS EMPLOYERS

The state and federal employment laws applicable to Massachusetts employers are complex and filled with many pitfalls that can be avoided. Too often, employers unwittingly create corporate liability, and in some cases, individual liability, without knowing how or where they went wrong. For most employers regardless of their size, it is wise to hire experienced employment law counsel to review standard documents, postings, policies and practices in an effort to minimize the risk of liability and to treat employees properly as required by law.

Below is a non-exhaustive, high-level overview of some of the most common legal pitfalls encountered by Massachusetts employers.

This article should not be considered or construed as legal advice. If you are a Massachusetts employer (or an out-of-state employer which hires employees in Massachusetts) and you want legal advice to avoid the below-described pitfalls, among others, please reach out to Mike Chinitz to schedule a consultation.

HIRING

PITFALL: Inquiring about prospective employee's salary histories or prior wages.

- Pursuant to the Massachusetts Equal Pay Act (MEPA), it is unlawful for employers to inquire about an applicant's salary history until an offer of employment including compensation is made.
- Employers should train those employees conducting interviews concerning what are permissible questions to ask during the interview process.

- If a Massachusetts company strays from MEPA, it opens itself up not only to employee claims but also potential regulatory action.

PITFALL: Failing to compensate employees for training and internships.

- Whether employees are entitled to compensation for their participation in pre-employment training or internships depends on a number of factors.
- According to Massachusetts law, interns and trainees performing services in Massachusetts workplaces must be paid minimum wage unless they are under a training program in some type of charitable, educational or religious institution.

- ***In addition***, such workers must meet all of the below requirements of the below six-part test:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in an educational environment.
2. The training is for the benefit of the trainee.
3. The trainee does not displace regular employees but works under close observation.
4. The employer derives no immediate advantage from the activities of the trainee; and on occasion the employer's operations may actually be impeded.
5. The trainee is not necessarily entitled to a job at the conclusion of the training period.
6. The employer and intern understand that the intern is not entitled to wages for the time spent in the internship.

- This requirement is distinct from federal law as the latter does not require interns to be working in a training program in a charitable, educational or religious institution.

- If an employer cannot meet all of the above criteria, they must pay the intern/trainee at least minimum wage to avoid violation of the Massachusetts Wage Act, which may trigger a mandatory recovery of treble (three times) damages and attorneys' fees as discussed below.

PITFALL: Failing to post or circulate certain posters and notices to employees

- State and federal employment laws impose many poster and notice requirements for employers, including but not limited to:
  - Notices of rights to sick leave;
  - Notices of rights to family and medical leave (under the Federal Family and Medical Leave Act, if applicable, and the Massachusetts Paid Family and Medical Leave Act);
  - Notices of employee rights under wage and hour laws (including the Massachusetts Wage Act).

⚠ • Failure to provide the proper posters and notices may result in fines and other liabilities for employers. Given the COVID-19 pandemic and the remote nature of the current workforce, employers should consider distributing posters and other required notices to their employees electronically.

MASSACHUSETTS WAGE ACT

PITFALL: Not understanding the detailed requirements of the Massachusetts Wage Act and the severe consequences of noncompliance.

- The Massachusetts Wage Act requires Massachusetts employers to pay employees all wages they have earned on either a weekly or bi-weekly basis (subject to a narrow exception for executive employees) and also governs the timing of final wage payment when an employee is terminated or voluntarily resigns (see below).
- "Wages" is a broadly defined term under the Wage Act, and includes the employee's regular salary (or hourly pay), earned commissions, and earned holiday and vacation time. Certain bonuses may qualify as commissions and fall within the Wage Act.

⚠ • When a violation is found, the Massachusetts Wage Act provides for an award of attorney's fees and ***mandatory*** treble (triple) damages, as well as ***individual liability*** for the president and treasurer of a corporation and any officers or agents having the management of such corporation. M.G.L. c. 149, § 150. This means that liability extends beyond the corporate employer, and even when the corporate employer files for bankruptcy, certain owners and officers may have individual liability.

PITFALL: Application of the misconception that "good-faith efforts" are sufficient to avoid paying treble damages.

- As mentioned above, Massachusetts Wage Act violations result in mandatory treble damages.
- However, a recent (2022) MA Supreme Judicial Court opinion has clarified that paying wages before an employee brings his or her complaint in court will not limit the award of treble damages to accrued interest on the late-paid wages. Instead, a successful plaintiff employee is entitled to trebling of the full amount of unpaid (late) wages plus interest.

⚠ • Employers are liable for mandatory treble damages and attorney fees regardless of good-faith efforts to comply with the law after a complaint is brought. As such, it is important that employersremain cognizant of technical requirements and are up to date on recent case law and interpretation of the Massachusetts Wage Act.

PITFALL: **Failure to pay all final wages (including accrued, unused vacation time) on time.**

- Under the Massachusetts Wage Act, an employer is required to pay a discharged employee "in full" by the date of discharge, and an employee who otherwise leaves employment must be paid "in full" by the next regular pay day. M.G.L. c. 149, § 148.
- Failure to pay full wages as required under the Massachusetts Wage Act may result in treble damages, attorneys' fees, and individual liability as described above.

WORKER CLASSIFICATION

PITFALL: **Misclassifying employees as independent contractors.**

- Massachusetts has one of the strictest tests in the USA for determining whether a worker is properly classified as an independent contractor. Under this so-called "ABC Test," all three of the following criteria must be satisfied:
  A. The worker must be free from control and direction in connection with the performance of the service; **and**
  B. The service must be performed outside the usual course of the business of the employer; **and**
  C. The worker must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.
- For example, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises, the service of the plumber is not part of the store's usual course of business and the store would not reasonably be seen as having engaged the plumber to provide services to it as an employee.

- An employer who misclassifies an employee as an independent contractor may be held civilly and criminally liable, including (but not limited to) as follows:
  - Pursuant to the Massachusetts Wage Act, a prevailing employee plaintiff will be awarded treble damages plus attorneys' fees and costs, and liability may flow to the Company's officers and agents with management of the company, as discussed above.
  - Other penalties may include (1) income tax liability which should have been withheld from wages; (2) contributions pursuant to the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act, and the Massachusetts Unemployment Insurance Law; (3) workers compensation insurance premiums; (4) other civil and criminal penalties as assessed by the Attorney General.

PITFALL: Misclassifying employees as exempt from overtime laws.

- ⚠ The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees.
- ⚠ Massachusetts generally follows the FLSA as to overtime exemption tests, which can be highly nuanced (read more here). Of course, as with many employment laws, Massachusetts has its own additional requirements.
- ⚠ Currently, under both federal and Massachusetts law, to qualify as an exempt employee, the employee must (1) have a salary of at least $684 weekly, and (2) meet the detailed "duties" tests articulated under each of the relevant exemptions.
- ⚠ Under Massachusetts law, nonexempt employees (i.e., those who do not meet the above 2-part test for exemption) are entitled to 1.5x their standard hourly rate for every hour worked over 40 in a given workweek.

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- Employers who do not properly classify and pay their employees pursuant to the FLSA and Massachusetts law, leave themselves exposed not only to claims from employees but also wage and hour audits by federal and state regulators that can lead to penalties and interest.
- Employers who misclassify employees as exempt from overtime laws may be subject to liability not only for back wages, but also for treble damages and attorneys' fees under the Massachusetts Wage Act, and other liquidated damages and penalties assessed by state and federal regulators.

TRADE SECRETS

PITFALL: Failing to establish and implement clear protocols and policies to ensure trade secret protection.

- ⚠ Employers must take reasonable steps to protect their confidential information. In particular, Massachusetts courts evaluate whether or not the employer has taken reasonable measures to notify its employees of what it considers to be trade secrets and to take steps to protect such information.
- ⚠ Employers should require all employees to sign a confidentiality agreement that clearly defines the information the company seeks to protect.
- ⚠ Creating and implementing protocols for the use of company property, computer hardware and software is critical. For example, confidential software and database content can be protected by a password protected pop-up form that notifies employees and others that they are dealing with protectable trade secrets.
- Employers should establish clear protocols for sharing information with third parties, including restricting the scope of the third-parties who will be granted access to the trade secrets.
- In addition, other procedures for accessing, handling, marking, storing, retaining, and shredding paper documents (such as ones with "confidential" legends, use of locked file cabinets, adoption of a "clean desk" policy) are important to consider.

⚠ • To establish trade secret protection for business information, a company must prove, among other things, that it took reasonable protective measures to safeguard the confidentiality of the information. A company that does not protect its own trade secrets is less likely to receive such protections from a court.

NONCOMPETITION AGREEMENTS

PITFALL: Noncompliance with the Massachusetts Noncompetition Act.

⚠ The Massachusetts Noncompetition Act (MNCA) applies to any employee who "is, and has been for at least 30 days immediately preceding his or her cessation of employment, a resident of or employed in Massachusetts at the time of his or her termination of employment."

⚠ Although the MNCA applies to all non-competition agreements entered into ***on or after October 1, 2018***, we have very little guidance from the courts (or the legislative history) on its requirements. A recent case, which we summarized in this recent posting, makes clear that non-competes must follow the statutory requirements of providing explicit notice of right to counsel, and that something more than just "employment by the Company" must be offered as consideration for the non-compete.

⚠ In addition to the requirement that the agreement explicitly state that the employee has the right to counsel, there are several requirements set forth in the MNCA, including but not limited to:

- Strict process/timing requirements which differ for new and continuing employees.
- Additional consideration requirements for non-competes – either in the form of a "garden leave clause" (50% of highest base salary in 2 years preceding termination, to be paid for duration of restricted period) or other "mutually agreed upon consideration." It is not yet certain what will and will not constitute adequate other "mutually agreed upon consideration" under the statute. We know from the recent *KPM* case discussed in the linked article above that it needs to be something more than just employment or continued employment.
- Clear limitation on the duration of non-competes to 12 months post-termination in duration (except in the case of certain breaches of duty which may extend the duration of the restriction).
- Clear articulation of the continued standard of reasonableness (i.e., the geographic reach/proscribed activity must be reasonable in relation to the interests protected), providing some clear lines as to what is *presumptively reasonable*.
- Prohibiting non-competes for certain categories of employees, including (1) any employee classified as non-exempt; and (2) employees that have been terminated without cause or laid off. Note that we have no guidance as to what the "cause" standard is for this, but many clients choose to include a broad, performance based standard.

⚠ If a Massachusetts non-compete is entered onto on or after October 1, 2018, and does not comply with the MNCA's very detailed requirements, there is a risk that it simply will not be enforceable.
Although Massachusetts courts still have the ability to "blue pencil" and thus reform certain aspects of non-compliant non-competes, failure to adhere to the MNCA's technical requirements may be enough to render the non-compete unenforceable.

DISCRIMINATION

PITFALL: Failing to ensure compliance with applicable employment discrimination laws.

- ⚠ The threshold for coverage under federal Title VII of the Civil Rights Act of 1964 is 15 employees.
- ⚠ In the state of Massachusetts, when an employer has six employees (including the owner/employees), it becomes covered by the Massachusetts Fair Employment Practices Act, M.G.L. c.151B ("Chapter 151B"), which prohibits discrimination in hiring and the terms and conditions of employment on the basis of race, color, religion, national origin, sex, ancestry, age, sexual orientation, veteran's status, genetic information, or disability. Chapter 151B also prohibits harassment as well as certain preemployment inquiries regarding criminal history and prior psychiatric hospitalization.
- ⚠ Chapter 151B also forbids retaliation against an individual because of his or her opposition to prohibited practices or participation in Massachusetts Commission Against Discrimination ("MCAD") proceedings.
- ⚠ Chapter 151B additionally requires covered employers of six or more employees to adopt a sexual harassment policy that includes specific provisions. This policy must be provided annually to all employees, and to new employees at the time of their hire. Chapter 151B also encourages employers to conduct sexual harassment training.

⚠ • Given the volume of claims filed at the MCAD and the availability of substantial damages, covered employers should be familiar with the provisions of Chapter 151B and put procedures into place to avoid violations. Note also, that there are other statutory protections and remedies against discrimination that apply in instances where there are fewer than six employees in the workplace.

PITFALL: Treating applicants or employees in a less favorable manner that could be construed as age-related.

- ⚠ The Age Discrimination in Employment Act (ADEA) forbids age discrimination against individuals ages 40 and older by employers with 20 or more employees. Massachusetts state law has its own protections and remedies for employees 40 years of age or older.
- ⚠ The law prohibits discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment.
- ⚠ An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees ages 40 or older and is not based on a reasonable factor other than age (RFOA).

⚠ • The RFOA affirmative defense, as permitted by the ADEA, requires that the employer prove that the practice was reasonably designed and administered to achieve a legitimate business purpose while taking into proper consideration the potential harm it may cause older workers. Absent such a defense, employers may be subject to among other forms of relief, compensatory damages, and attorneys' fees, and costs. Under the ADEA, employers may also be liable for

liquidated damages in the same amount as compensatory damages if the employer willfully violated the statute.

PITFALL: Paying unequal salaries to employees of different genders, who perform "comparable work."

- ⚠ The Massachusetts Equal Pay Act (MEPA) prohibits employers from paying workers a salary or wage less than what they pay employees of a different gender for comparable work. The law defines "comparable work" as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.
- ⚠ Employees' salary histories are not relevant or a defense to an employer's liability.
- ⚠ ***Affirmative defense***: the law provides a complete defense for any employer that, within the previous three years and before an action is filed against it, has conducted a good faith, reasonable self-evaluation of its pay practices. To be eligible for this affirmative defense, the self-evaluation must be reasonable in detail and scope and the employer must also show reasonable progress towards eliminating any impermissible gender-based wage differences that its self-evaluation may reveal.
- ⚠ There is a one-year statute of limitation on MEPA, which begins either on the date the employee receives the unequal paycheck or the date at which the employee realizes the pay violation, whichever occurs later.
- ⚠ An employer can avoid liability for a wage differential between employees of different genders only if it can establish that the difference is based on one of the following factors:
    - A system that rewards seniority; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave shall not reduce seniority;
    - A merit system;
    - A system that measures earnings by quantity or quality of production, sales, or revenue;
    - Geographic location in which a job is performed;
    - Education, training, or experience to the extent such factors are reasonably related to the particular job in question; or
    - Travel, if the travel is a regular and necessary condition of the particular job.

⚠ • Absent proof of such factors, employers may be liable for attorneys' fees and twice the amount of unpaid wages owed to the employee (the difference between the employee's wages and the wages paid to another employee performing comparable work of a different gender).

PITFALL: Failing to promote hiring and employment practices that are free from gender bias.

- ⚠ MEPA forbids gender-based discrimination against employees when deciding and paying wages.
- ⚠ Employers cannot pay workers a salary or wage less than what they pay employees of a different gender for comparable work. The law defines "comparable work" as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.
- ⚠ ***Affirmative defense***: the law provides a complete defense for any employer that, within the previous three years and before an action is filed against it, has conducted a good faith, reasonable self-evaluation of its pay practices. To be eligible for this affirmative defense, the self-

evaluation must be reasonable in detail and scope and the employer must also show reasonable progress towards eliminating any impermissible gender-based wage differences that its self-evaluation may reveal.

- ⚠ There is a one-year statute of limitation on MEPA, which begins either on the date the employee receives the unequal paycheck or the date at which the employees realize the pay violation, whichever occurs later.

⚠ • Employers may be liable for compensatory damages from wage loss, emotional distress damages attorneys' fees and punitive damages. The types and amounts of damages for which an employer may be liable depends upon several factors such as the employer's history of discrimination or lack thereof and whether the conduct was egregious or malicious.

PITFALL: Failing to consider conducting a comprehensive and frequent self-evaluation of pay practices.

- ⚠ Conducting a thorough internal self-evaluation of their pay practices enables employers to discover any gender-based pay discrepancies.
- ⚠ These self-evaluations are critical for providing employers with a complete affirmative defense to liability under MEPA. Under MEPA, if an employer conducts a good-faith self-evaluation and demonstrates reasonable progress towards eliminating any gender-based wage discrepancies, they can avoid liability under MEPA.
- ⚠ In addition, the audit must be "reasonable in detail and scope in light of the size of the employer."
- ⚠ Employers are only covered by affirmative defense for a three-year period after the self-evaluation is conducted and before any equal pay claims are filed against the employer.

⚠ • A self-evaluation may not be "reasonable" unless it is extensive. The Massachusetts Office of the Attorney General issued guidance on the state's new pay equity law, suggesting steps employers should consider as a part of a thorough self-evaluation if the employer can demonstrate it has implemented a genuine attempt to identify any unlawful pay disparities among employees providing comparable work.

PITFALL: Failure to take action when faced with sexual harassment complaints.

- ⚠ An employer is liable for the sexual harassment of its employees committed by managers and persons with supervisory authority, ***regardless of whether or not the employer is aware of the conduct***. In addition, an employer may also be liable for sexual harassment by individuals without actual or apparent supervisory authority.
- ⚠ Moreover, even if certain non-employees commit the sexual harassment, such as customers, patients, clients, independent contractors or other acquaintances, an employer may also be liable.
- ⚠ The District Court of Massachusetts, in *Chapin v. University of Massachusetts at Lowell*, held that that an employer's failure to investigate any known sexual harassment in the workplace violates M.G.L. c. 151B, §4(5) by aiding and abetting the discrimination.

⚠ In addition, an employer's failure to take remedial measures against sexual harassment complaints is a direct violation of Chapter 151B.

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- If an employer is found liable for sexual harassment, the damages may include compensatory damages (back pay), lost wages and benefits, emotional distress damages, attorneys' fees and costs, and punitive damages if the acts were found to be malicious.

ACCOMODATIONS AND LEAVES OF ABSENCE

PITFALL: Failure to accommodate employees with disabilities.

⚠ The federal Americans with Disabilities Act and Chapter 151B of the Massachusetts General Laws both prohibit employment discrimination against individuals with disabilities. Chapter 151B, however, covers some private employers and certain medical conditions not covered by the ADA.

⚠ Both the ADA and Chapter 151B apply to public and to private employers. The ADA covers employers with 15 or more employees. The state law, Chapter 151B covers employers with 6 or more employees. (There are other statutory protections for employees who work where there are fewer than 6 employees).

⚠ Both the ADA and Chapter 151B provide that an employer may not discriminate against a "qualified individual with a disability" ("qualified handicapped person" under Chapter 151B)

⚠ A "reasonable accommodation" is any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment.

⚠ The law provides that an employer is obligated to provide reasonable accommodation to an individual's handicap, unless the employer can demonstrate that the accommodation required would pose an "undue hardship" to its business. Mass. Gen. L. ch. 151B, section 4(16). Factors to be considered in determining whether a particular accommodation poses an undue hardship include: 1. the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; 2. the type of the employer's operation, including the composition and structure of the employer's workforce; and 3. the nature and costs of the accommodation needed.

⚠ ⚠ Failure to properly accommodate employees may lead to reinstatement, compensatory damages for front and back pay, damages, attorneys' fees and punitive damages. The sum of punitive damages and future compensatory damages depends on the amount of employees working for an employer. For example, punitive damages may not exceed $50,000 per person for employers with up to 100 employees; $100,000 per person for employers with 101-200 employees; $200,000 per person for employers with 201-500 employees and $300,000 per person for employers with more than 500 employees.

<u>PITFALL</u>: Failure to understand employee entitlements pursuant to the Massachusetts Paid Family and Medical Leave laws.

- ⚠ Under the Massachusetts Paid Family Medical Leave (PFML), all Massachusetts employees are eligible for a state-offered benefit that allows up to 26 weeks of leave for medical and family reasons. It is imperative that employers provide written notice to their current work force of PFML benefits.
- ⚠ Unlike the Federal Family and Medical Leave Act (FMLA), *all* Massachusetts employers are required to participate in PFML, regardless of size. Employees who have earned at least $5,100 in the previous 12 months are eligible. In addition, any W-2 workers, self-employed workers and 1099 workers, who are not deemed as independent contractors and who make up more than 50% of their employer's workforce, qualify.
- ⚠ PFML ensures job protection by mandating all employers must provide an employee the opportunity to return from leave in a position of similar compensation and job duties.
- ⚠ Failure by an employer to provide PFML leads to a civil penalty of $50 per employee for a first violation and a $300 per employee for any subsequent violations.
- ⚠ According to MGL c. 175M 9(d), an employer who violates PFML may lead the court to (i) issue temporary restraining orders or preliminary or permanent injunctions to restrain continued violations of this section; (ii) reinstate the employee to the same position held before the violation or to an equivalent position; (iii) reinstate full fringe benefits and seniority rights to the employee; (iv) compensate the employee for 3 times the lost wages, benefits and other remuneration and the interest thereon; and (v) order payment by the employer of reasonable costs and attorneys' fees.

<u>PITFALL</u>: Treating an employee differently before and after leave.

- ⚠ Subjecting an employee to stricter scrutiny upon their return from leave could make employers vulnerable to retaliation claims.
- ⚠ For example, a poor performance review immediately following the employee's leave, when all prior performance reviews were positive, could lead an employee to initiate such a claim.
- ⚠ Employers should be cautious to exercise fair and accurate judgment of employees' workplace contributions, irrespective of an employee's use of leave under the FMLA or MA PFMLA.

<u>PITFALL</u>: Expecting employees to work in lieu of or while on protected leave.

- ⚠ Offering light-duty work, for example, in the case of an injured employee, is a violation of the FMLA.
- ⚠ If an employee requests FMLA leave, an employer must refrain from suggesting the employee continue to work, even in a lesser capacity or in the context of time-sensitive deadlines.

FIRING

PITFALL: Terminating an employee without first evaluating the risks.

- ⚠ Many employers proceed with termination decisions without thoroughly evaluating the risks.
- ⚠ Prior to terminating any employee, an employer should first ask whether (1) performance reasons are documented, if performance is the reason for termination; (2) whether the employee is a member of a "protected class" under state or federal law; and (3) the employee's risk profile/potential litigiousness.
- ⚠ If a departing employee falls into a risk-prone category, the employer may want to consider providing severance in exchange for a release (see Separation Agreements Section, below).

- Jumping the gun on an employee termination, and/or not properly evaluating whether a severance agreement should be offered, can open employers to significant liability.

PITFALL: Conducting a layoff or downsizing without exploring alternative possibilities.

- ⚠ After downsizing or a major layoff, employers often find themselves faced with many claims.
- ⚠ Under state law, the Massachusetts Fair Employment Practices Act (M.G.L. c. 151B) prohibits employers, with more than six employees, from discriminating in hiring and the terms and conditions of employment on the basis of race, color, religion, national origin, sex, ancestry, age, sexual orientation, veteran's status, genetic information, or disability. Chapter 151B also prohibits harassment as well as certain preemployment inquiries regarding criminal history and prior psychiatric hospitalization.
- ⚠ Employers should carefully contemplate other options before moving forward with large layoffs, such as a reduced workweek or reduced salary.

- ⚠ If an employee is successful in a case of discrimination pursuant to M.G.L. C. 151B, employers may be liable for lost wages, emotional distress damages, double damages or punitive damages depending upon the plaintiff employee's protected class, and payment of the employee's attorneys' fees and costs.

PITFALL: Misstating the reasons for an employee's termination.

- ⚠ It is important that Massachusetts employers not misstate the reasons for an employee's termination and that the employer instead be candid and forthcoming about the lawful reasons for terminating an employee.

- A divergence between the articulated/stated reasons and the true reasons for a termination can create an inference of pretext which can be sufficient to get the plaintiff employee's case to a jury for decision.

PITFALL: **Failing to properly pay final wages and provide proper final documentation after termination.**

- ⚠ Under the Massachusetts Wage Act, employers must pay final wages – to include all accrued and unpaid salary/hourly wages plus accrued and unused vacation – on the last day of employment if the employee is terminated involuntarily, or – if the termination is voluntary, on the next payroll date.
- ⚠ In addition, employers must provide departing employees with the mandatory MA pamphlet laying out the process for applying for unemployment benefits.
- ⚠ • As set forth above, failure to comply with the Massachusetts Wage Act upon terminating an employee may result in treble damages, attorneys' fees, and individual liability.

SEPARATION AGREEMENTS

PITFALL: Failing to put the separation agreement in writing in order to ensure all terms are properly memorialized, and all releases are effective.

- ⚠ Absent a contractual agreement or policy that entitles an employee to severance upon termination, employers have no legal obligation to provide employees severance pay upon termination.
- ⚠ In many involuntary termination scenarios, however, it is in the best interest of the employer to enter into an agreement that defines the terms of the separation and provides a fulsome release of claims from the employee in exchange for severance pay.
- ⚠ • Without a written agreement that properly releases claims and states the consideration being provided in exchange for such release, the employer is not protected against future claims by the departing employee.

PITFALL: Failing to include all requirements in the Release of Claims.

- ⚠ When drafting a separation agreement, it is important that careful consideration be given to all terms in the separation agreement to avoid unintended consequences.
- ⚠ Among other considerations, employers need to evaluate the following for inclusion in any separation agreement:
    - If the departing employee is 40 or older and the employer has 20 or more employees, the employer will need to ensure compliance with the Age Discrimination in Employment Act (ADEA) and Older Workers Benefit Protection Act (OWBA), which establishes strict requirements for an employer to "knowingly and voluntarily" release ADEA claims.
    - The release must explicitly and clearly include a waiver of Massachusetts Wage Act claims.
    - The employer may want to include a standalone post-employment non-compete restriction in order to avoid the strict consideration requirements of the MNCA (discussed

above), which expressly carves out from its application noncompetition agreements entered into in connection with the separation of employment.

- The employer will want to consider what key elements of post-employment compliance will be required in order for the employee to be eligible to receive severance, including return of company property and ongoing compliance with non-competition, non-solicitation, non-disparagement, and other post-employment covenants.

⚠ • If the necessary elements are not included and the release is later invalidated, the employer maybe subject to claims of liability *despite* already making severance payments under a separation agreement to an employee.

PITFALL: Broad confidentiality or non-disparagement clauses may be misconstrued as inhibiting an employee's right to engage in certain protected activity.

⚠ Employers must be aware that there are certain rights an employee cannot waive, including, for example, an employee's right to file a charge of discrimination with the EEOC.

⚠ In addition, OSHA has published policy guidelines for approving settlement agreements in whistle-blower cases whereby they would not approve of any settlement agreement that includes a "gag" provision which prohibits, restricts, or otherwise discourages an employee from filing a whistle-blower claim.

⚠ ⚠ Employers must review and revise their agreements to add clarifying language that waivers of an employee's right to collect monetary relief in a lawsuit does not apply to whistle-blower claims.