

# Massachusetts Update: A Roundup of Federal and State Actions

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## Agenda

- COVID-19 vaccine mandates
- Independent contractor status in flux
- Supreme Court updates
- The Massachusetts Paid Family and Medical Leave Act (the “PFMLA”)
- Massachusetts Wage Act – relevant litigation
- Families First Coronavirus Response Act

## COVID-19 Vaccine

- Vaccines and mandates are a controversial issue
  - Public health goals conflicting with individual freedoms to refuse a medical procedure
  - Concerns over rushed development of vaccines and possible side effects

## Government Vaccine Mandates

- Federal:
  - No federal mandates yet; public health and safety generally delegated to the States under the Constitution
- States:
  - State and local governments have relatively broad discretion to mandate vaccines, based on (old) U.S. Supreme Court precedent, Jacobson v. Massachusetts (1905), subject to limitations for medical and religious reasons
  - Bills pending in at least 9 states to prohibit discrimination because of vaccinated status; not just for employees

## Massachusetts - Vaccine Mandates

- No COVID-19 vaccine mandate for the general public and no bills pending
- Assisted Living Facilities- Dept. of Public Health Rule, 651 CMR 12.06, (10/16/20), health screening requirements:
  - Each Residence shall ensure all personnel are vaccinated against other novel pandemic or novel influenza virus(es) in accordance with guidelines issued by the Commissioner of Department of Public Health
  - All persons working in the Residence are vaccinated annually with seasonal influenza vaccine
- Rule not yet extended to other health care facilities or industries

## Can employers mandate employees receive a COVID-19 vaccine?

**Answer:** Yes (maybe)

- EEOC guidelines (12/16/20) suggest employers can mandate COVID-19 vaccines for their employees without violating the Americans with Disabilities Act if:
  1. the employees get the vaccine from a third-party; and
  2. the employers make accommodations for religious objections under Title VII of the Civil Rights Act and disability-related objections under the ADA
- EEOC opinion rests on assumption employer has not done a disability-related screening inquiry

## Can employers mandate employees get a COVID-19 vaccine? (cont.)

- BUT, if vaccine is administered by the employer or its contractor, the employer must show that any disability-related screening inquiries are “**job-related and consistent with business necessity**”
- To meet this standard, an employer would need to have a reasonable belief, **based on objective evidence**, that an employee who does not answer the questions and, therefore, does not receive a vaccination, **will pose a direct threat to the health or safety of her or himself or others**

## Is an unvaccinated employee a “direct threat” to others?

- The EEOC suggests unvaccinated worker could be a direct threat, but also emphasizes an “individualized assessment” is needed to assess “potential harm”
- What’s the objective evidence an unvaccinated person is direct threat to others?
- The EUAs for the current vaccines were granted on showing the vaccines reduced moderate to severe COVID-19 symptoms
- No data exists that the currently approved vaccines reduce transmission according to the CDC, Dr. Fauci, and the manufacturers
- A reasonable question exists as to whether an unvaccinated employee poses any greater risk of transmission than a vaccinated employee based on current data



## Do mandates for COVID-19 vaccine trigger the public policy exception to employment at-will?

- Public policy exception: an employer cannot terminate an employee if it would violate the doctrine of public policy of a state, or state statute, or federal statute
- Current vaccines only given Emergency Use Authorization (EUA), which allows the use of “**unapproved medical products**” in certain emergencies
- FDA requires recipients be informed they have the option to refuse the vaccine offered under an EUA
- Massachusetts recognizes the possibility of a public policy exception to employment-at-will

## Additional Issues With COVID-19 Vaccine Mandate

- Religious Exemptions
  - Extends not just to organized religions but extends to “others who have sincerely held religious, ethical, or moral beliefs”
- Unionized employers - vaccination would be a mandatory subject of bargaining
- Possible negative impact on morale, including risk of collective activity protected by the NLRA
- OSHA retaliation issues
- Workers’ compensation claims for vaccine injuries

## Independent Contractor Rules

Trump Administration (Proposed Rule 9/22)	Biden Administration*
Economic Reality Test	ABC Test
<p><b>Core Factors:</b></p> <ul style="list-style-type: none"> <li>• Nature and degree of worker's control over the work</li> <li>• Worker's opportunity for profit or loss based on initiative or investment</li> </ul> <p><b>Other Factors:</b></p> <ul style="list-style-type: none"> <li>• Amount of skill required, degree of permanence of the working relationship, whether the work is part of an integrated unit of production</li> </ul>	<p>Companies must show a worker has freedom from control over how to perform the services they provide; that the services are outside the business' normal variety of work; and that the worker is engaged in an independently established role</p> <p><i>Vazquez v. Jan-Pro Franchising Int'l</i> (Cal. 2021) says ABC test applies retroactively, making businesses potentially liable for lawsuits filed years before the standard existed</p>
<b>Bottom Line:</b> Comparatively flexible standard resulting in more contractor classifications	<b>Bottom Line:</b> Broader test resulting in more employee classifications

\*Note that state law may call for a more stringent standard

## Supreme Court Updates

- *Bostock v. Clayton County* (2020) – Title VII prohibition of employment discrimination because of sex prohibits employment discrimination because of both transgender status and sexual orientation of plaintiff.
- *Henry Schein Inc. v. Archer and White Sales Inc.* No. 19-963- Court will review whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise "clear and unmistakable" delegation of questions of arbitrability to an arbitrator.
- *Van Buren v. United States*, U.S. Supreme Court, No. 19-783 – Court will review whether a person authorized to access information on a computer for specific purposes violates the federal Computer Fraud and Abuse Act by accessing the same information for an improper purpose.

## **The Massachusetts Paid Family and Medical Leave Act (the “PFMLA”)**

- 12 weeks (birth, adoption, caring for seriously ill family member, etc.)
- Coverage: all private sector employers, state government employees
- Employers must restore employees to the same position or an equivalent position with the same pay, seniority, and benefits
- Note: leave is available for birth, adoptions and foster care placements occurring during 2020 if the covered individual otherwise qualifies for leave, and the leave is taken during the first 12 months after the qualifying event and is completed within 2021

## ***Parker v. EnerNoc, Inc 484 Mass. 128 (2020)***

- Plaintiff was a senior sales manager, paid a base salary plus a commission
- Before her termination, Plaintiff earned a commission to be paid in 2 installments – at contract formation and 1 year after formation if contract still in existence
- Court held unpaid commission constituted lost wages under the Wage Act
- Court looks to see if commissions are “definitively determined” and “due” and “payable.” If so, considered lost wages

## Additional Developments

- Families First Coronavirus Response Act - parts extended to 3/31/21
- NLRB - President Biden calling for resignation of GC Robb; signals swift end to pro-management era

## Questions?

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