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2021 Developments in Massachusetts Employment Law

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Retaliation Claims Under Domestic Violence and Abuse Leave Act

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- *Osbourne Trussell v. The Children's Hospital Corporation*
- Supreme Judicial Court of Massachusetts, August 2021
- Summary: SJC ruled on elements of retaliation claim under DVLA. Employer could be liable where it rescinded a conditional offer of employment after applicant disclosed she was victim of domestic violence and that her abuser violated a protective order that she was seeking to enforce.

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- DVLA: M.G.L. c. 149, s. 52E; enacted in 2014; requires Massachusetts employers of 50 or more employees to permit an employee to take up to 15 days of job-protected leave in any 12-month period when the employee or a family member of the employee is the victim of abusive behavior
- Purposes of DVLA Leave: To obtain medical, legal, or counseling services; to obtain a protective order from a court; to meet with a law enforcement official
- Employer Prohibitions: Employers are prohibited from interfering with an employee's attempts to exercise the right to take leave and from taking an adverse action or otherwise discriminating against an employee for invoking those rights
- Employee obligations: Employees are required to provide appropriate advance notice of the need for leave

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- Facts of Trussell: the Plaintiff, a registered nurse, pursued claims for violations of the retaliation and interference provisions of DVLA against the Hospital
  - She alleged she was the victim of “repeated stalking, threats, harassment, abuse, and overt threats” and had obtained a harassment protective order that barred the abuser from contacting the Plaintiff, making social media posts about her, and going to her home or workplace.
  - 3 months after the protective order issued, she applied to the Hospital for employment; she claimed the Hospital aggressively recruited her, invited her to several interviews, contacted her references, and ordered a background check, and ultimately offered her a staff nurse position
  - The Hospital sent a letter to the Plaintiff listing her start date and noting that employment was conditioned upon completion of reference, background, and licensure checks, a fitness for duty assessment, and passing a new hire clinical orientation test.

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- Facts of Trussell (continued):
  - Plaintiff was issued a photo ID, an employee ID number, and a training schedule.
  - In the weeks leading up to her start date at the Hospital, Plaintiff's abuser violated the protective order by posting threats and false statements about the Plaintiff on social medial.
  - The abuser tagged the Hospital on these disparaging and threatening social media posts.
  - The Plaintiff reported the abuser's violations to the police and contacted the Hospital's HR Dept. She disclosed the abuse of the protective order, gave the Hospital a copy of the order, and indicated that she was cooperating with law enforcement to enforce it.
  - The Hospital asked for information about the abuser and an HR Representative told the Plaintiff that he planned to speak with the abuser to hear "the other side of the story."
  - Less than two weeks later, the Hospital rescinded her job offer.

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- The Case and the SJC's Legal Analysis: the Trial (lower) Court dismissed the Plaintiff's DVLA retaliation and interference claims, the Plaintiff appealed to the Appeals Court, and then the SJC transferred the case for decision and reversed the Trial Court's order dismissing the DVLA claims
  - The Hospital argued that the DVLA should be limited to "current employees" who are performing services for the employer, and that dismissal was correct because: the complaint did not allege that the Plaintiff notified the Hospital that she required leave or that she requested time off for any specific date.
  - The SJC found that Plaintiff's allegations suggested that she was in an employment relationship with the Hospital although she had not yet started orientation.
  - The SJC also found that the limitation sought by the Hospital would impede the broad remedial purpose of the DVLA to: "protect employees who were experiencing the effects of domestic violence from adverse consequences at work."
  - If the DVLA applied to "current" employees only, "an individual would have no recourse when, perhaps on the verge of achieving a measure of financial security, he or she were stripped of it by an employer who determined it would be inconvenient to accommodate the individual's protected leave rights."

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- The Case and the SJC's Legal Analysis (continued):
  - The SJC also rejected the Hospital's argument that the Plaintiff needed to have requested a specific leave date, finding that the Plaintiff had notified the Hospital of the conditions that could have required leave: the existence of the protective order; the social media posting; and her enforcement efforts.

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Retaliation Claims Under Domestic Violence and Abuse Leave Act (DVLA)

- Takeaways:
  - An employee need not explicitly ask for leave to have protection from retaliation and interference under the DVLA.
  - An employee need not know specific dates for which leave may be needed.
  - The DVLA's retaliation and interference provisions may extend beyond "current" employees to job applicants/successful candidates though the limiting principal is not clear
  - If investigating, tread carefully in light of safety concerns. The Plaintiff alleged that the HR Representative said he intended to contact the abuser. Dissenting judge voiced concerns about making direct contact with the subject of a protective order, and whether doing so is necessary or appropriate.

Federal Appeals Court Upholds Dismissal of Massachusetts Wage Act Claims Because of Union Agreement

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Fed. Appeals Court Upholds Dismissal of Mass. Wage Act Claims Because of Union Agreement

- *Rose v. RTN Federal Credit Union*
- First Circuit Court of Appeals, June 2021
- Summary: The First Circuit approved the dismissal of the Plaintiff's state-law claims under the Wage Act for failure to pay wages and overtime because she was a member of a union and RTN had an existing collective bargaining agreement (CBA) with the union. Because the CBA governed her wages and overtime pay, her Wage Act claims were preempted by federal labor law.

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Fed. Appeals Court Upholds Dismissal of Mass. Wage Act Claims Because of Union Agreement

- Facts of Rose: The Plaintiff was employed by RTN as a member services representative (non-exempt). Her position was covered under the CBA between RTN and the Office of Professional Employees International Union, AFL-CIO, Local 6.
  - Rose typically worked at RTN's Hudson branch but periodically was assigned to the Dedham location. She claimed that going to Dedham increased her commute by one hour each way and that RTN's failure to pay her for the extra time violated the Massachusetts Wage Act.
  - Rose also claimed that RTN violated a state regulation that provides that an employee who "regularly works at a fixed location" must be paid for the extra time and expense caused by travelling to a different work site.
  - Rose's lawsuit against RTN sought unpaid wages and expenses plus overtime pay for workweeks that exceeded 40 hours because of the additional commuting time.

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Fed. Appeals Court Upholds Dismissal of Mass. Wage Act Claims Because of Union Agreement

- Dangers of Mass. Wage Act: Automatic treble damages, attorneys' fees and costs, individual liability, and three-year lookback.
- Federal Labor Law: The Labor Management Relations Act (LMRA) is a body of federal labor law that governs the interpretation of CBAs between unions and employers.
- First Circuit's Question: Whether the LMRA preempted Rose's state law claims. If a plaintiff's state-law employment claims require interpretation of one or more provisions of a CBA, the claims come under the LMRA and therefore federal law take precedence. Not all disputes are preempted. If state law establishes a right independent of the CBA, the LMRA does not apply and the state law claim may move forward (ex. discrimination claims).

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Fed. Appeals Court Upholds Dismissal of Mass. Wage Act Claims Because of Union Agreement

- First Circuit's Decision: The First Circuit affirmed the District Court's dismissal of Rose's Wage Act claims because adjudicating the claims would require the interpretation of a provision in the CBA between RTN and the Union: The CBA contained a provision that governed "temporary transfers" of employees between branches
- Reasoning: Lawsuits involving the analysis or calculation of what is owed to an employee will "almost always" rely on an interpretation of the CBA, and therefore will be preempted by the LMRA.
  - Whether RTN lawfully compensated Rose for her travel time, overtime hours, or minimum wage would require an analysis of the CBA provisions governing "hours of work," "premium time," "overtime," and "classification and wages."
  - Rose was bound to pursue her claims through the grievance and arbitration provision of the CBA.

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Fed. Appeals Court Upholds Dismissal of Mass. Wage Act Claims Because of Union Agreement

Takeaway: When presented with a union member-employee's threatened Wage Act claim or lawsuit (which could cover, e.g., wages, hours overtime pay, benefits, or travel time), an employer should carefully examine the provisions of the CBA to ascertain whether such claims may be preempted by federal labor law.

Employee Fired After Sending PIP Rebuttal Protected From Discharge By Public Policy

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Employee Fired After Sending PIP Rebuttal Protected From Discharge By Public Policy

- *Terence Meehan v. Medical Information Technology, Inc.*
- In January 2021, Mass. Appeals Court upheld the trial judge's dismissal of Meehan's claim that he was wrongfully discharged in violation of public policy.
- On December 17, 2021, the MA Supreme Judicial Court revered the Appeals Court and held:

  An employer cannot terminate an at-will employee simply for exercising the right to file a rebuttal to a PIP to be included in the employee's personnel file.

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Employee Fired After Sending PIP Rebuttal Protected From Discharge By Public Policy

- Facts of Meehan: Terence Meehan had been an employee-at-will of Medical Information Technology, Inc. He filed a one-count complaint in Norfolk Superior Court asserting wrongful termination in violation of public policy.
- Meehan claimed he was discharged as a consequence of submitting a rebuttal, utilizing the mechanism outlined in G. L. c. 149, § 52C, to a performance improvement plan (PIP) on which he had been placed:
  - "An employer shall notify an employee within 10 days of the employer placing in the employee's personnel record any information ... that ... negatively affect[s] the employee's qualification for employment . . . or the possibility that the employee will be subject to disciplinary action."
  - "If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position which shall thereupon be contained therein and shall become a part of such employee's personnel record."

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Employee Fired After Sending PIP Rebuttal Protected From Discharge By Public Policy

- Issue: Whether an employee's right under the Personnel Records law to rebut documents in a personnel file (M.G.L. Chapter 149, s. 52C) creates a public policy that is "sufficiently well defined and important such that the exercise of that right brings an employee within the public policy exception to the general rule that an at-will employee may be terminated without cause."

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Employee Fired After Sending PIP Rebuttal Protected From Discharge By Public Policy

- Decisions: The Appeals Court held that it was not and refused to expand the process under s. 52C into a public policy protection from discharge, but the SJC reversed and found that it was.
- Takeaway: Employers should tread carefully in responding to an employee's exercise of rights under the personnel records law, including an employee's submission of a rebuttal to performance criticism and/or a request to inspect/copy a personnel file.

Appeals Court Weighs in on Issues in Overtime Misclassification Case

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Appeals Court Weighs in on Issues in Overtime Misclassification Case

- *Tam v. Federal Management Co., Inc.*
- Massachusetts Appeals Court, January 2021
- Facts: Mary Jane Raymond was employed by Federal Management Co., Inc. as a property manager at one of its apartment buildings. She was paid a salary and was classified as exempt from the requirement to pay overtime. Raymond became disappointed with her salary and complained to federal that she "felt overworked and underpaid." Soon after, Federal terminated her employment.

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Appeals Court Weighs in on Issues in Overtime Misclassification Case

- Lawsuit: After her discharge, Raymond filed a lawsuit asserting claims against Federal for unpaid overtime under the Massachusetts Minimum Fair Wage Law (M.G.L. c. 151, s. 1) and for retaliation under the Massachusetts Wage Act (M.G.L. c. 149, s. 148A)
- Retaliation Claim: The Appeals Court affirmed dismissal of Raymond's claims and rejected her retaliation claim. The Court noted that "although an employee need not expressly invoke her statutory rights for a retaliation claim to lie, ***abstract grumblings about pay*** are not sufficient" to trigger the Wage Act's anti-retaliation provisions.
- Overtime Statute of Limitations: Claims seeking unpaid overtime are subject to a two-year statute of limitations. Not tolled for "fraudulent concealment" where employer told employee she was not exempt and not entitled to overtime.

Attorney General
Wage & Hour Enforcement

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Attorney General Wage & Hour Enforcement

- Recording Studio cited $400,000 for failing to pay interns and Earned Sick Time violations; restitution owed to more than 60 unpaid interns

- Chelsea Cannoli Factory assessed $105,000 in restitution and penalties. From January 2018 through December 2020, the company failed to pay workers for all hours worked; failed to provide notice of a compliant earned sick time policy; retaliated against workers who tried to exercise their rights by firing them; and failed to furnish true and accurate timekeeping and payroll records

- Home Health Agency assessed $85,000 for failing to pay workers overtime and travel time. Employer was paying employees a reduced hourly rate for overtime hours worked and also was not paying employees for travel time between job sites.

Federal Update

(We are still talking about COVID. . . .)

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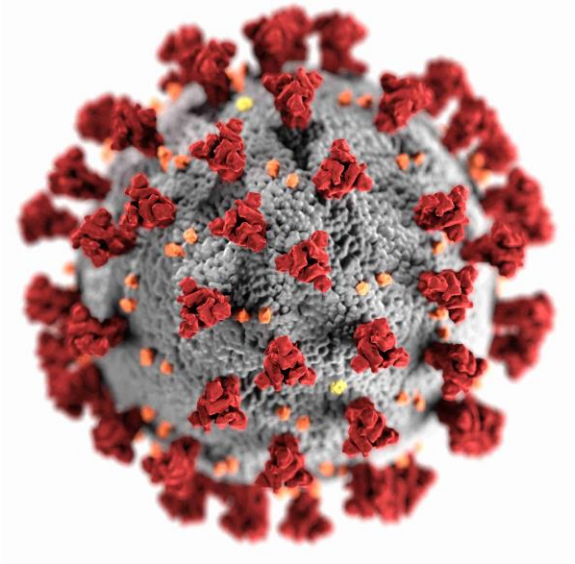

COVID-19

- Vaccine Mandates
  - OSHA 100 plus ETS – Stayed by Supreme Court
  - CMS Mandate – Upheld by Supreme Court
  - Federal Contractor Mandate - Split Jurisdictional Determinations
  - Best Practices Generally
- CDC Guidance for Employers
  - Boosters
  - Close Contact/Quarantine Periods
- Wage and Hour Questions Related to COVID-19

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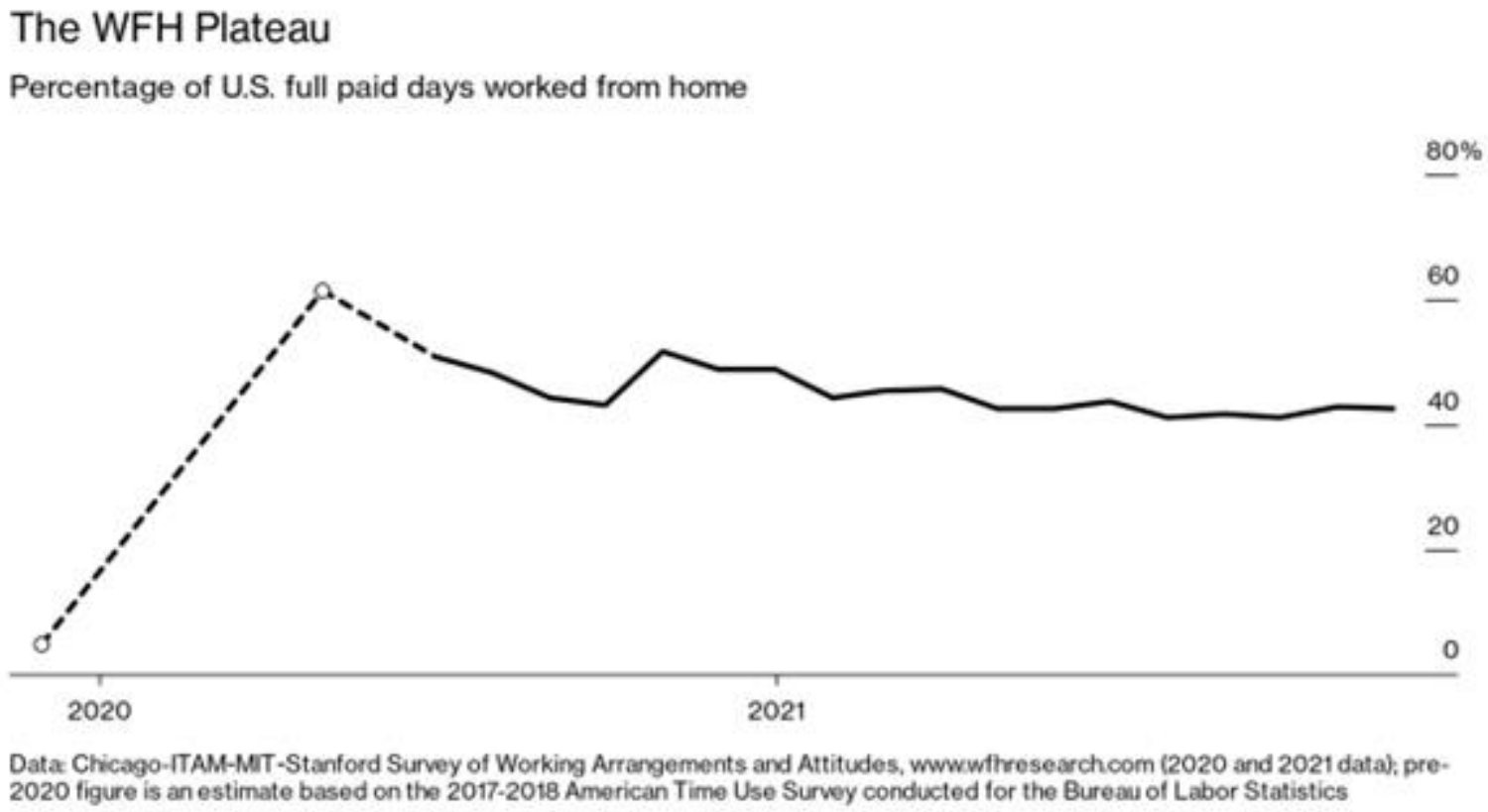
Employee Mobility



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Employee Mobility

- Hiring/Attracting/Retaining
  - I-9 Remote
- Remote Work Policies
  - Tax implications
  - Safety implications
  - Security Considerations
  - Electronic Monitoring and State Law
- Wage and Hour Implications for Non-exempt Employees
  - Tracking time
  - Expense reimbursement

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National Labor Relations Board - 2022

- Employment Status
- Legality of Workplace Rules
- Appropriateness for Smaller Bargaining Units
- Availability of Consequential Damages
- Confidentiality Clauses in Arbitration Agreements

Questions?

Thank you!

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