Employment Law Round-Up: Inflection Points

What Massachusetts Employers Need to Know For Q4 2020

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Faced with a work environment that is pressurized by the COVID-19 pandemic and a contentious election cycle, employers are finding themselves, increasingly, at employment law compliance "inflection points" – crisis events that involve unusual employee conflicts or complicated employment law compliance questions. Such inflection points can be acutely disruptive when they occur in the closing months of the business year.

The following summary discusses several key concepts and new employment law standards that may help Massachusetts employers avoid or navigate these inflection points in the closing months of 2020.

POLITICS IN THE WORKPLACE

An employee displays political material at her desk or uses Company email to campaign for a favored candidate. Such activities create conflict within the office, and negatively affect productivity. *Can an employer restrict such political speech in the workplace?* The answer is generally "yes," with certain important exceptions.

The First Amendment limits government actions that affect individual free speech. The First Amendment does not, however, limit the rights of private employers to regulate employee communications, nor does it provide any constitutional right for workers to express thoughts or opinions at work. As a result, in general, there is no right of "free speech" in a private employer workplace, and employers may adopt policies that restrict political activity and speech in the workplace.

There are two important exceptions to this general rule:

1. The National Labor Relations Act ("NLRA") restricts an employer's right to limit so-called "Concerted Activities" – workers' communications about wages, hours and the terms or conditions of employment during non-work time in non-work areas. Many of the NLRA's Concerted Activity protections are applicable to non-union employers and apply to workers who do not belong to a union. The line between unprotected "purely political" communications and NLRA-protected Concerted Activity may blur when the subject matter touches on wages, hours or other terms or conditions of employment. For example, displaying posters or distributing leaflets stating, "Raise the Minimum Wage," or wearing a T-shirt asking co-workers to "Support Workers' Rights" likely are protected by the NLRA. Employers who restrict those types of communications risk exposure to a Board unfair labor practice charge.
2. Several States have adopted local laws that provide employees with certain rights related to political discourse. For example, Massachusetts employers are prohibited from taking any adverse employment action against an employee – or rewarding an employee through higher wages or favorable employment terms – because of the giving or withholding of a vote or a political contribution. Such local laws that affect political

discourse in the workplace vary widely from state to state, and employers, particularly those employers that operate in multi-jurisdictions, should be careful to understand the state and local laws where they operate.

In light of NLRA standards and applicable local laws, employer policies that impose absolute bans on employee political expression are not recommended. However, employers are free to adopt policies that limit employees' political communications (including distribution of campaign materials and solicitations of money or support) during work times in work areas that:

- state that communications about political issues related to wages, hours and work conditions are permitted when all employees involved are on non-work time; and
- allow distribution of materials about political issues related to wages, hours and work conditions in non-work areas during non-work times.

If adopted, policies that limit employee political speech should be enforced on a "content neutral" basis – meaning that the policy restrictions should be enforced without regard to the political position of the employee or the substance of the speech.

EMPLOYEE SOCIAL MEDIA ACTIVITY

A group of employees post photographs violating face covering ordinances or social distancing mandates. An employee posts racist or politically charged content that is contrary to the employer's values and business interests. *Can employers respond to such off-the-clock, public activities of employees?* The answer is nuanced.

Some states prohibit employers from taking adverse employment actions against employees based on lawful off-duty conduct. Currently, California, Colorado, Louisiana, New York, and North Dakota (*but not Massachusetts*) ban employers from terminating or retaliating against employees for any off-duty lawful activity, including speech. Arguably, this could include conduct that their employers and co-workers may find offensive. In addition, off-duty social posting that constitutes Concerted Activity would similarly be protected by NLRA standards.

However, employers can create legal or reputational risks by ignoring off-duty conduct, particularly if the conduct constitutes discriminatory harassment. For example, an employer may be subject to "hostile work environment" liability, if it is aware that an employee is engaging in racist expression and fails to act —*even if the content is expressed on the employee's personal social media use, and outside of work hours*—if the conduct impacts other employees' abilities to perform their job functions.

As such, it is ill-advised for employers to completely ignore off-duty social media activities of employees.

Employers should consider adopting social media use policies that address inappropriate and offensive off-the-clock conduct. Employers should inform employees that their personal social media accounts, online networking accounts, blogs, and other online communications may be reviewed, and that any inappropriate or offensive content could subject them to discipline, up to and including termination. Employers should specify problematic content, including harassing and bullying behavior or discriminatory or offensive language.

RESPONDING TO WORKSITE INFECTIONS

An employee reports that she has tested positive for COVID-19. *What is the required employer response?*

The Massachusetts and federal governments have recently revised guidelines related to COVID-19 infections in the workplace (collectively, the "Workplace Infection Guidelines").

These new Workplace Infection Guidelines emphasize a four-step process if an employer is notified of a positive COVID-19 case in the work environment:

- **Remove all individuals suspected of infection from the workplace.** Employees who test positive for COVID-19 (using a viral test, not an antibody test) should be excluded from work and remain in home isolation if they do not need to be hospitalized. Employers should provide education to employees on what to do if they are sick.
- **Notify the local Board of Health in the city or town where the workplace is located and assist the local Board of Health as reasonably requested to advise likely contacts to isolate and self-quarantine.** Employers should affirmatively work with local health department officials to determine which employees may have had close contact with the employee with COVID-19, and who may need to take additional precautions, including exclusion from work and remaining at home. Testing of other workers may be recommended consistent with guidance from the local Board of Health.
- **Shut down and disinfect the affected worksite in accordance with federal Centers for Disease Control and Prevention ("CDC") Guidance.** In most cases, the complete shut down an entire facility will not be required. However, employers will need to take steps to close off areas used for prolonged periods of time by the infected employee. CDC cleaning and disinfection recommendations suggest that employers wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets.
- **Determine which employees/members may have been exposed to the virus, and take additional precautions.** If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the Americans with Disabilities Act. Most workplaces should follow the Public Health Recommendations for Community-Related Exposure, and instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms. Employees may have been exposed if they are a "close contact" of someone who is infected, which is defined as being within about 6 feet of a person with COVID-19 for a prolonged period of time. All other employees should be instructed to self-monitor for symptoms and wear cloth face coverings when in public. Employees should not return to work until they have met the recently revised CDC criteria related to the discontinuation home isolation, and have consulted with a healthcare provider.

In addition, the Occupational Safety and Health Administration ("OSHA") has issued new guidelines that relate to the reporting of confirmed positive cases of COVID-19 in the workplace. Those guidelines provide, in relevant part:

- Employers must record and report to OSHA:(1) an in-patient hospitalization within 24 hours of a work-related COVID-19 "incident," or (2) a fatality within 30 days of a work-related COVID-19 "incident."
- The term "incident" means "an exposure to SARS-CoV-2 in the workplace." An "incident" is thus when an employee is exposed to the virus at work, as opposed employee infections that are not the result of work activities or are the result of unknown sources.

WORKPLACE SAFETY

An employee refuses to follow COVID-19 safety policies or refuses to answer questions related to potential COVID-19 exposure. *What are the employer's options?* Recent guidance from the Federal government provides some insight.

The Federal Equal Employment Opportunity Commission (the "EEOC") has published: "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." This guidance includes several new instructions related to employer rights with respect to

enforcing COVID-19 workplace safety policies.

1. **COVID-19 Inquiries.** Employers are entitled to ask an employee, as a pre-condition to entering a physical worksite, whether the employee is sick or is experiencing symptoms of COVID-19, without violating the Americans with Disabilities Act (the "ADA"). However, employers may not ask such questions to a teleworking employee who has no contact with co-workers or other persons related to the employer, such as customers. In addition, the Genetic Information Nondiscrimination Act ("GINA") prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease.
2. **Travel Inquiries.** Employers may not require that employees disclose locations of personal travel. But, if the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal
3. **Temperature Testing.** During the COVID-19 pandemic, employers are permitted to take employees' temperatures, even though doing so is generally considered a prohibited medical examination. Employers may bar an employee from physical presence in the workplace if he or she refuses to have his or her temperature taken, or refuses to answer questions about whether or she has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19.
4. **COVID-19 Testing.** Employers may require employees to take COVID-19 tests to determine whether any employee is currently infected with the COVID-19 virus, either initially before allowing employees to return to the workplace, or periodically to screen for COVID-19 if the tests are job-related and consistent with business necessity (*Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety*). Any such testing must be accurate and reliable based on available guidance from the Centers for Disease Control. Employers may not require employees to submit to a COVID-19 antibody test to enter the workplace. The EEOC has concluded that antibody tests are not "job related and consistent with business necessity."
5. **Additional Screenings.** Employers may require an individual employee to undergo additional screening or testing beyond that generally required of other employees if the employer has a reasonable belief, based on objective evidence, that the individual may have COVID-19. For example, an employer may ask a specific employee to submit to a COVID-19 test if such employee failed a temperature reading, without requiring all employees to submit to such tests.
6. **Confidentiality.** The ADA requires that an employer keep all medical information about employees confidential. The information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information, and subject to this rule. As such, an employer should not disclose the identity of employee who is ill with COVID-19, or is suspected of COVID-19 infection, generally to the workforce. However, these confidentiality considerations do not prevent a manager from reporting the identity of an ill, or potentially ill employee, to appropriate employer officials so that the employer may take actions consistent with guidance from public health authorities. In addition, the ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity.
7. **Remote Working and Reasonable Accommodation.** Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide

telework as an accommodation. To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request — after the workplace reopens — to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA does not require an employer to eliminate an essential function as an accommodation for an individual with a disability. The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship.

MASSACHUSETTS PAID FAMILY AND MEDICAL LEAVE

An employee reports a need to care for a family member with suspected COVID or some other health condition. *What is the appropriate employer response?* In addition to rights under the federal Families First Coronavirus Response Act (FFCRA), an upcoming Massachusetts law imposes new obligations on employers.

The Massachusetts Paid Family and Medical Leave Act (the "PFMLA") takes effect on **January 1, 2021**. Under the PFMLA, most Massachusetts workers will be eligible for extended medical and/or family leave benefits from their employers. Specifically, beginning on January 1, 2021:

- Covered workers may be entitled to up to **20 weeks of medical leave** in a benefit year if they have a serious health condition that incapacitates them from work.
- Covered workers may be entitled to up to **12 weeks of family leave** in a benefit year related to the birth, adoption, or foster care placement of a child, or because of a qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call to active duty in the Armed Forces.
- Covered workers may be entitled to up to **26 weeks of family leave** in a benefit year to care for a family member who is a covered service member with a serious health condition.

Beginning on July 1, 2021:

- Covered workers may be entitled to up to **12 weeks of family leave** to care for a family member with a serious health condition.
- Covered workers are eligible for no more than **26 total weeks**, in the aggregate, of family and medical leave in a single benefit year.

Under the law, covered workers are eligible to receive partial wage replacement benefits during PFMLA leave periods through either: (a) a state-sponsored insurance fund (financed through the collection of a special employer payroll to) that works much like current state unemployment insurance; or (b) at the employer's election, through a compliant employer-sponsored private insurance benefit plan. A "covered" worker is defined as: (1) a current employee of a Massachusetts employer; (2) a self-employed individual who has elected coverage under the Act and reported self- employment earnings; and (3) a former employee, assuming that the employee has not been separated from employment for more than 26 weeks at the start of the former employee's family and medical leave.

The PFMLA applies generally to all Massachusetts employers (with some statutory exceptions). As January 1, 2021 approaches, Massachusetts employers should take steps necessary to ensure PFMLA compliance, including revision of leave policies and handbooks.

UNEMPLOYMENT INSURANCE FRAUD

An employer receives multiples notices that current employees have applied for unemployment benefits. *What is happening?*

The Federal Bureau of Investigation and the Massachusetts Attorney General's office are both reporting a spike in fraudulent unemployment insurance claims complaints involving the use of stolen personally identifiable information. We have received similar, anecdotal reports from clients that have received unemployment claim confirmations relating to currently-employed employees.

The general scheme appears to involve criminal actors impersonating victims and using the victims' stolen identities to submit fraudulent unemployment insurance claims online. The schemes appear to be accomplished through a variety of techniques, including: online purchase of stolen information; previous data breaches; computer intrusions; cold-calling victims while using impersonation scams; email phishing schemes; physical theft of data from individuals or third parties; and from public websites and social media accounts, among other methods.

Unidentified unemployment fraud can result in significant economic losses to both employers and employees and can be burdensome to unwind if not immediately identified.

Massachusetts employers are cautioned to confirm the sufficiency of their data privacy and data protection systems, and to report evidence of unemployment insurance to the Massachusetts Department of Unemployment Assistance, upon discovery.

Morse is focused on assisting our clients through these unprecedented and challenging times. Please contact Matt Mitchell should you have questions concerning this subject, or any other COVID-19 response matters.