

Recent Legislative Developments for Massachusetts Employers

Several legislative developments may have a significant impact on Massachusetts employers, including the recently enacted law providing universal health care coverage and a proposed law to provide twelve weeks of paid family and medical leave. This month's *Employment Law Advisor* reviews those recent developments in Massachusetts law and highlights how they may affect employers.

Universal Health Care Coverage

This highly publicized new law aims at providing nearly universal health care coverage for all Massachusetts residents by July 1, 2007. Under the law, all Massachusetts employers of more than 10 employees must: (i) offer health insurance options to their employees; (ii) adopt and maintain a Section 125 cafeteria plan to permit employees to pay health insurance premiums on a pre-tax basis; and (iii) file the Section 125 cafeteria plan with the state.

The new law provides penalties for employers who do not comply. Employers who do not provide health insurance to their employees (which includes making a "fair and reasonable" contribution toward premiums) would be required to pay an annual penalty of \$295 per full-time employee and a pro-rata penalty for part-time or seasonal workers (called the "Fair Share Contribution"). While Governor Romney exercised a line-item veto of this provision, the Massachusetts House of Representatives and Senate recently voted to override the veto, leaving the penalty in place. (This predetermined penalty has caused some employers to observe that since paying \$295 per year, per employee, is far cheaper than the annual costs of providing health insurance to an employee, the penalty may have the unintended result of causing employers to forego providing health insurance in favor of paying the relatively small penalty.)

Non-complying employers will also be assessed a "Free Rider Surcharge" when an employee receives free care more than three

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times in a year, or when a company has five or more instances of employees receiving free care in a year. This penalty ranges from 10% to 100% of the state's costs of services provided to the employees, but with the first \$50,000 per employer exempted.

Another provision of the new law is aimed at small businesses and individuals, who can "connect" with certified health insurance products of high value and good quality through the "Commonwealth Health Insurance Connector." The Connector ensures health care portability from job to job, and permits more than one employer to contribute to an employee's health insurance premium. Eligibility in the existing Insurance Partnership Program has also been expanded for employees with incomes up to 300% of the Federal Poverty Level. These employees may also participate in the Commonwealth Care Health Insurance Program if they are ineligible for Mass Health. Massachusetts residents will be required to confirm on their state income tax forms that they have secured health insurance coverage, and will suffer financial penalties for failure to do so.

Proposed Paid Family and Medical Leave

New legislation (Senate Bill 2646) has been introduced in the Massachusetts Senate that would require paid family and medical leave for all Massachusetts employees. This bill provides that employees who take a leave under the federal Family and Medical Leave Act ("FMLA"), or employees who would be eligible to take an FMLA

leave but for the small size of their employer or the length of time they have worked for their employer, would be entitled to take a leave and receive a stipend in the amount of their wages or salary, up to \$750 a week, for twelve weeks. The types of leave covered are those permissible under the FMLA: (i) for the birth of a child, and to care for the newborn child; (ii) for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child; (iii) to care for an immediate family member (spouse, child, or parent) with a serious health condition; and (iv) when the employee is unable to work because of a serious health condition.

To be eligible, an employee must have been employed for at least nine months with the employer from whom leave is requested, and must have worked at least 900 hours during the previous twelve month period with that employer. An employee must first take five days of sick or vacation time, and will then receive twelve weeks of paid leave. Leave taken under this new legislation will be job-protected; employees may not be fired for taking this leave and are entitled to return to their position or its substantial equivalent when the leave is completed. Employers will be required to post information about the availability of paid leave, and

to provide employees with the form needed to apply for the stipend.

The proposed law does not require employers to pay for employees' time off. Instead, the legislation proposes that employees will fund the paid leave through an employee payroll premium, which is anticipated to be between \$1.50 and \$2.50 a week per employee. This amount will be placed in a state fund, administered by the Department of Workforce Development, which will pay out the stipends. The payroll premium provision is likely to draw criticism from businesses and labor groups, and the legislation must still get through the House before it is finalized.

Proposed Changes to the Personnel Records Law

Senate Bill 1110 would modify the current Personnel Records Law (M.G.L. c.149, §52C) in several respects. Most importantly, it would require employers to notify an employee within ten days of placing negative information in the employee's personnel record. The type of information triggering the notice is broadly defined: "any information to the extent that the information is used or has been used or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or disciplinary action."

This requirement may have a significant impact on employers, who will have to give notice almost any time meaningful written information about an employee is created (since the existing definition of "personnel record" covers relevant documents, no matter where located, arguably notice could be triggered whether or not the document is placed in the actual, physical file). For example, employers or supervisors who have a practice of making written records of verbal counseling sessions or other conversations with employees (a practice we often

recommend) may have to give notice of such record to the employee, creating added complexity to the discipline process.

Further, the bill expands an employee's ability to review his or her personnel file from once per year to twice per year, unless notified of negative information being placed in the file, which triggers an additional right to see the file. The bill also expands the law to cover public employers, and provides that an employer who violates its provisions may be subject to criminal and civil penalties, including imprisonment, criminal fines, and civil penalties of up to \$15,000 for a first offense and \$25,000 for subsequent offenses.

Proposed Minimum Wage Increase

House Bill 4781 proposes that the minimum wage in Massachusetts be increased by fifty cents to \$7.25 an hour. This bill, recommended by the committee on Labor and Workforce Development, is a revision of House Bill 3782, which proposed a seventy-five cent per hour increase in the minimum wage, and also provided that the minimum wage continue to increase, at a rate tied to the increase in the consumer price index. These provisions are likely to be the subject of debate when the bill comes to the House floor.

Proposed Restrictions on Height and Weight Discrimination

House Bill 3752 proposes adding height and weight to the protected categories set forth in M.G.L. c.151B. If passed, this law would prohibit employers from discriminating against employees based upon their height or weight in making employment decisions, including hiring, terms and conditions of employment, and termination. Further, employees who engaged in protected activities concerning claims of height and weight discrimination would be protected against retaliation from their employers. Penalties for discrimination on the basis of an employee's height or weight would be the same as those for other forms of employment discrimination, including

compensatory, emotional distress, and punitive damages.

Proposed Arrest and Conviction Discrimination Prohibitions

Senate Bill 1135 would prohibit unfair discrimination in employment against otherwise qualified individuals by reason of arrest record or conviction record. Under this bill, it would be unlawful discrimination to refuse to hire, to terminate, or discriminate against in terms and conditions of employment any individual on the basis of his or her arrest or conviction record. The bill also prohibits employers from asking applicants for employment (verbally or through an application form) for any information regarding any arrest record except a record of a pending charge, with certain narrow exceptions.

The bill lists certain circumstances under which denying employment or taking other employment action with regard to an individual on the basis of their arrest or conviction record will not be unlawful discrimination, including when the individual has been convicted of a felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job or activity.

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