Employment Law Advisor: “Magic” Numbers

When Growing Businesses Become Covered Under Federal And State Employment Laws

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An ever-increasing array of laws governs the workplace. This issue of the Employment Law Advisor outlines some of the laws regulating employment practices that come into play as a business grows. While even the smallest company is subject to certain employment laws, other requirements are not triggered until the company reaches specific levels of employment. Awareness of these laws and their applicability is important for a growing company to maintain legal compliance and avoid legal exposure.

Corporate Officers (But No Employees?)

Is it possible for a company to have no employees at all? Not really, according to the Massachusetts Department of Industrial Accidents. Because a company with one or more employees must maintain worker’s compensation insurance, and corporate officers may be considered employees, even a newly formed company will be subject to this requirement if its corporate officers receive compensation for services performed as an officer or director, or if they perform any work on behalf of the corporation. (The legal issues raised by allowing individuals to perform work without pay are beyond the scope of this ELA). Moreover, any entity with any employees will be subject to unemployment compensation and withholding requirements.

Fewer Than Six Employees

There are numerous laws pertaining to all employers, regardless of how many employees they employ. These laws include the Uniformed Services Employment and Re-employment Rights Act (USERRA, which prohibits discrimination on the basis of uniformed service and provides re-employment rights), the Massachusetts Equal Rights Act (M.G.L. c. 93, §102(a), §103(a), which prohibits discrimination on the basis of sex, race, color, creed, national origin, age, and handicap in connection with making and enforcement of contracts), the Massachusetts Civil Rights Act (M.G.L. c. 12, §11H, §11I, which prohibits interference with secured rights by threats, intimidation or coercion), the Massachusetts Equal Pay Act (M.G.L. c.149, §105A, which prohibits gender-based pay discrimination), the general Massachusetts law prohibiting sexual harassment (M.G.L. c. 214, §1C), the Massachusetts Earned Sick Time Law (M.G.L. c. 149, §148C), which provides that all employers must provide up to 40 hours of sick leave (unpaid for companies of fewer than eleven employees), and the Massachusetts laws governing timely payment of wages, minimum wage and overtime pay.

There are also numerous common law doctrines (including contract, tort, and defamation theories) which apply to employers of all sizes. Further, some federal laws such as the Fair Labor Standards Act (governing pay issues including minimum wage and overtime) and the Equal Pay Act (prohibiting gender-based pay discrimination), and Massachusetts’ “mini-COBRA” law (see discussion under twenty employees, below) apply to employers of two employees or more.

Six Employees

Six is a “magic” number for Massachusetts employers. When an employer has six 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. Employees claiming a violation of Chapter 151B must first file their claim with the Massachusetts Commission Against Discrimination ("MCAD"), which will investigate the claim, make determinations, and can award significant penalties, including emotional distress and attorney's fees, if discrimination is proven. Chapter 151B also forbids retaliation against an individual because of his or her opposition to prohibited practices or participation in MCAD proceedings. Chapter 151B 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 this law and put procedures into place to avoid violations.

The Massachusetts Parental Leave Act requires that employers of six or more employees give eligible employees eight weeks of unpaid leave for birth or placement of a child. This law was expanded in April, 2015 to allow male employees as well as female employees to take parental leave. To be eligible, an employee must be full-time and have completed the initial probationary period set by the employer, of no more than six months, or, if there is no such probationary period, the employee must have been employed for at least three consecutive months. The employee must give two weeks' notice of his or her expected departure date and intention to return. If two employees work for the same employer, they shall only be entitled to eight weeks of parental leave in the aggregate for the birth or placement of the same child.

Eleven Employees

Eleven is the magic number for triggering paid (as opposed to unpaid) sick leave obligations under the Massachusetts Earned Sick Time Law, which went into effect on July 1, 2015. Employers with eleven or more employees must allow all employees (including part-time and temporary employees) to earn at least one hour of paid sick time annually for each 30 hours worked. This time off can be used as follows: to care for the employee's own physical or mental illness, injury, or medical condition, or that of the employee's child, spouse, parent, or parent of a spouse; to attend the employee's routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of a spouse; to address the psychological, physical, or legal effects of domestic violence; or for travel to and from an appointment, pharmacy, or other location related to the purpose for which the time was taken. The time off must be compensated at the same hourly rate as the employee earns at the time the paid time is taken.

Fifteen Employees

Title VII of the Civil Rights Act of 1964 is a federal law prohibiting discrimination on the basis of race, color, creed, national origin and sex; the federal Americans with Disabilities Act prohibits disability discrimination. Because Chapter 151B is substantially similar to these laws, and is applicable to employers with only six employees, most employers will not have to change their practices when they reach fifteen employees.

Twenty Employees

The federal Age Discrimination in Employment Act ("ADEA") prohibits employers from discriminating against employees aged forty and older. As with Title VII, this law is substantially similar to Chapter 151B, and therefore Massachusetts employers do not have to alter their practices to comply with the ADEA as they reach twenty employees (except with regard to particular requirements concerning the knowing and voluntary waiver of ADEA claims, as set forth in the federal Older Workers Benefit Protection Act of 1990 –which is particularly significant in the context of separation agreements).

The federal Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires

employers to provide employees (and their spouses and dependent children) who are leaving a group health or dental insurance plan with the opportunity to continue group insurance coverage at the employee's own expense. COBRA generally applies to private employers who employ twenty or more people, with some exceptions (including employers who normally employed fewer than twenty employees on a typical business day during the preceding calendar year). Smaller Massachusetts employers may also be subject to "mini-COBRA," M.G.L. c. 176J, §9, the Massachusetts law requiring that COBRA-like continuation benefits be provided to employees in small group health insurance plans covering from two to nineteen employees.

The Massachusetts personnel records law, M.G.L. c. 149, §52C, requires that employers with twenty or more employees maintain personnel files for three years after termination of employment, which files must include specified documents and information. Pursuant to this law, an employer must provide personnel records to an employee within five business days of a written request.

Fifty Employees

Fifty is another "magic" number for employers, as employers of fifty employees are required to comply with the federal Family and Medical Leave Act ("FMLA"), which gives eligible employees the right to up to twelve weeks per year of unpaid leave, as well as benefit continuation and reinstatement rights.

An employer is covered if it has employed fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. To be eligible for FMLA leave, an employee must have worked for the employer for at least twelve months, for at least 1,250 hours in the twelve months prior to the first day of leave, and there must be fifty or more employees employed at or within seventy-five miles of the employee's work site.

Once an employer is covered by the FMLA, it is obligated not only to provide leave, but to follow regulations regarding management of FMLA leave. For example, an employer must designate appropriate leaves as FMLA-qualifying, and tell the employee of this designation within two business days. Additional regulations govern when an employer may request more information from an employee concerning a leave, what information the employer may request, and what records must be kept by the employer. If an employer has an employee handbook, FMLA information must be contained in the handbook; if no handbook or similar documentation exists, the employer must provide written guidance to employees concerning FMLA rights and obligations.

Massachusetts' Small Necessities Leave Act ("SNLA") provides that employers who are subject to the FMLA must provide eligible employees with up to twenty-four hours of additional unpaid leave to attend to particular family obligations. SNLA leave may be taken to participate in school activities directly related to the educational advancement of a child of the employee, accompany a child to routine medical or dental appointments, or accompany an elderly relative to routine medical or dental appointments or appointments for other professional services.

Massachusetts' Domestic Violence Leave Act ("DVLA") provides that employers who employ fifty or more employees must provide eligible employees with fifteen days of unpaid leave in a twelve-month period to employees who are victims of abusive behavior, which is defined by the DVLA as domestic violence, stalking, sexual assault or kidnapping.

Certain federal contractors who have fifty or more employees (and private employers with one hundred or more employees) are required to file an Employer Information EEO-1 report annually. This report includes information on employee sex and race/ethnic category for each of nine occupational categories.

One Hundred Employees

The federal Worker Adjustment and Retraining Notification ("WARN") Act requires employers of one hundred or more employees to provide notification sixty calendar days in advance of plant closings and mass layoffs (essentially a layoff at a single site of thirty-three percent of the workforce or five hundred full time employees). Private employers with one hundred or more employees must file an EEO-1 report annually (as discussed above).

Posting Requirements

Employers covered by the federal and state laws discussed above are often required to post information concerning their obligations and employee rights. Such postings can usually be obtained directly from the government agency administering the law, or from businesses that sell consolidated posters.