

Labor and Employment Law Update

MAY 2008

In This Issue

Recession Reality: Reductions In Force And The Accompanying Legal Risks (p. 1)

Massachusetts Wage Act Now Imposes Mandatory Treble Damages (p. 1)

Updated FMLA Regulations Proposed By U.S. Department Of Labor (p. 2)

Out With The Old, In With The New: DHCPF Issues 2008 HIRD Form (p. 3)

Employment Law Boot Camp (p. 3)

Significant Changes And Developments In Non-Competition Law In Oregon, Wisconsin And Massachusetts (p. 4)

FMLA Expansion Effective Immediately (p. 6)

OFCCP Gears Up For Second Wave Of Compliance Audits (p. 6)

Washington, D.C. Becomes Second City In Nation To Require Employers To Provide Paid Sick Leave (p. 7)

The Shrinking Definition Of Independent Contractor (p. 10)

Recession Reality: Reductions In Force And The Accompanying Legal Risks

By G. Michael Palladino

Recent recession fear is fueling concern among workers that shrinking corporate revenue may lead to substantial job cuts across industries. With the difficult decisions ahead for employers comes the legal minefield created by a reduction in force ("RIF"). While many employers recognize the potential plant closing or mass layoff obligations associated with a significant elimination of jobs, too often these same employers fail to properly plan for a more limited reduction in force, one that may be similarly fraught with peril.

For example, consider the employer that, as a cost-cutting measure, elects to eliminate its entire sales force in one of its branch offices. Can the employer clearly explain why each individual's employment will be terminated? Could that reason be interpreted as discriminatory based on the raw demographics of the laid-off employees? Are the employees entitled to notice (or notice pay)? Do the employees' commission plans contain a termination provision that could affect whether they have earned certain sales commissions? Will the employ-

ees be entitled to severance pay? How should the severance pay be calculated, and what should the terms of the severance agreement be? Is the severance policy documented? Will the employees be entitled to health insurance continuation coverage under COBRA or mini-COBRA or unemployment assistance? How will the termination decision be communicated to employees and when? Each of these issues contains an inherent pitfall that could expose the employer to potential liability.

continued on page 8

...the risks associated with a RIF can be greatly limited through planning and preparation, consistent and lawful decision-making and consultation with expert legal counsel.

Massachusetts Wage Act Now Imposes Mandatory Treble Damages

By Paul Dubois

As of July 13, 2008, Massachusetts employers will face automatic treble damages (tripling the monetary amount of any damages awarded) for any violation of the Massachusetts Wage Act. The newly amended Act, passed by the Legislature on April 15, 2008, will become law despite opposition from Governor Deval Patrick, who feels that the imposition of such potentially crippling penalties might unfairly harm those employers who violate the Act in good faith.

Prior to passage of this amendment, treble damages were generally awarded only if an employer's conduct was found to be willful or egregious. Beginning July 13, 2008, employers will not be permitted to present evidence of intent if the court finds the employer liable for violating the Act. This means that employers will be held liable for treble damages, to be paid to prevailing employees, even for *unintentional* violations of the Act.

Accordingly, we urge Massachusetts employers to audit their compliance with all of the requirements of the Wage Act in order to avoid the risk of owing treble damages to prevailing employees. We recom-

mend a compliance audit of the following topics, at a minimum, that is completed prior to July 13, 2008:

- Are employees earning the minimum wage under Massachusetts law?
- Are employees classified improperly as exempt when they should be non-exempt?
- Are workers improperly classified as independent contractors when they should actually be employees?
- Are employees receiving proper meal and rest breaks?
- Are commission plans, policies and practices in compliance with Massachusetts law and implemented lawfully?
- Are non-exempt employees being compensated for all overtime hours (which may include holidays and weekends) at the proper corresponding overtime rate?

continued on page 3

Updated FMLA Regulations Proposed By U.S. Department Of Labor

By Todd A. Newman

The United States Department of Labor (“DOL”) recently issued a proposed set of updated regulations regarding the Family and Medical Leave Act of 1993 (the “FMLA”). The FMLA is the federal law that provides eligible workers with certain job protections, including the right to take twelve weeks of unpaid leave, in connection with absences resulting from the birth or adoption of a child or the serious health condition of the worker or a qualifying family member.

While the proposed regulations include changes in many areas important to employers (such as when employers may be penalized for technical FMLA violations), the proposed regulations do not address many key areas where employers had hoped for real change (such as significantly greater restrictions on the use of intermittent leave). Although the new regulations are only proposed, it is expected that the DOL will issue a final set of regulations shortly after the public comment period closes on April 11, 2008. If implemented without change, the proposed regulations, among other things, would:

- Eliminate the categorical penalties imposed on employers for failing to timely designate leave as FMLA leave, replacing these penalties with a rule that the employer may be liable to the employee only if the untimely designation of leave as FMLA leave caused the employee to suffer individualized harm;

Although the new regulations are only proposed, it is expected that the DOL will issue a final set of regulations shortly after the public comment period closes on April 11, 2008.

- Establish that time spent performing light-duty work does not count against an employee’s FMLA leave entitlement;
- Clarify that employees may voluntarily settle their FMLA claims without the need for court or DOL approval of the settlement agreements;
- Confirm that employees with proper medical certification may use FMLA leave in lieu of working required overtime hours;
- Allow employers to let employees use paid leave concurrently with FMLA leave only if the employee fully complies with the applicable paid leave policy (e.g., if an employer’s paid leave policy prohibits the use of vacation leave in less than full-day increments, then the employee would have no right to use less than a full day of vacation leave while on FMLA leave);
- Permit employers to deny a “perfect attendance” award to any employee whose otherwise perfect attendance was interrupted by FMLA leave, as long as the employer treats employees taking non-FMLA leave in the same manner;

- Give employers the unconditional right to directly contact an employee’s health care provider to authenticate the employee’s medical certification, i.e., to verify that the medical certification was in fact completed or authorized by the health care provider and, thus, is not fraudulent;
- Give employers the right to directly contact an employee’s health care provider to clarify the substance of a medical certification, provided that the employee (a) had an opportunity to cure any deficiencies in the medical certification, and (b) authorized his or her medical provider to communicate directly with the employer, as required by the HIPAA Privacy Rule. Employees who refuse to provide the required HIPAA authorization would jeopardize their FMLA rights;
- Authorize employers to (a) require that fitness-for-duty certifications address the employee’s ability to perform the essential functions of the employee’s job, and (b) demand a fitness-for-duty certification when an employee returns from intermittent leave if reasonable job safety concerns exist;
- Fine-tune the procedures concerning notices and medical certifications, such as by (a) extending the time for employers to provide eligibility and designation notices from two business days to five business days, and (b) establishing that when an employer wants an employee to cure deficiencies in a medical certification, the employer must specify the deficiencies in writing and give the employee seven business days to provide the missing information; and
- Provide guidance regarding the meaning of “serious health condition” by specifying that (a) under the definition of serious health condition requiring three consecutive days of incapacity plus two visits to a health care provider, the two visits to a health care provider must occur within thirty days of the period of incapacity, and (b) for purposes of chronic health conditions, “periodic visits” means at least two visits to a health care provider per year.

The proposed regulations also seek comments concerning how best to implement the new servicemember family leave provisions signed into law on January 28, 2008. Those provisions: (a) permit FMLA leave in connection with a family member’s active duty, or call to active duty, under certain circumstances to be defined in the final regulations; and (b) provide for twenty-six weeks of FMLA leave in a single twelve month period to care for a family member who has incurred a serious injury or illness in the line of active duty for the Armed Forces. (See *FMLA Expansion Effective Immediately*, which also appears in this Update.)

We will keep you apprised of any significant developments up to and including the issuance of the final updated regulations. Meanwhile, the Firm is available to answer questions about the proposed FMLA regulations and to assist with FMLA compliance efforts. ◆

Out With The Old, In With The New: DHCPF Issues 2008 HIRD Form

By Shannon M. Lynch

The Massachusetts Division of Health Care Policy and Finance (“DHCPF”) has issued a new Employee Health Insurance Responsibility Disclosure Form (“HIRD Form”) for 2008.

Massachusetts employers with 11 or more full-time equivalent employees (“reporting employers”) must obtain a completed HIRD Form from each employee who either:

- Declines to enroll in the employer-sponsored health insurance plan; and/or
- Declines to participate in the employer’s Section 125 plan.
- Reporting employers must obtain a signed HIRD Form from each such employee upon the earliest of (as applicable):
- Thirty (30) days after the close of each open enrollment period for the reporting employer’s health insurance plan;
- Thirty (30) days after the close of each open enrollment period for the reporting employer’s Section 125 plan; or
- September 30th of the reporting year.

Reporting employers also must collect signed HIRD forms within thirty (30) days of either of the following: (1) the date a new hire waives employer-sponsored health plan participation and/or Section 125 plan participation, or (2) the date an employee waives or terminates health plan participation and/or Section 125 plan participation.

Reporting employers must return a copy of the signed HIRD Form to the employee and retain the original signed HIRD Form for three (3) years. If an employee does not return the signed HIRD Form upon request, then the reporting employer must document its efforts to obtain the signed HIRD Form. Portuguese and Spanish versions of the 2008 HIRD Form should be available by March of 2008.

Please note that an employer is a “reporting employer” subject to the HIRD requirement if the sum of payroll hours for all employees who have worked at least one month from October 1 through September 30, capped at 2000 hours per employee, divided by 2000, is greater than or equal to 11. Payroll hours include all hours for which an employer paid wages, including regular, vacation, sick, Family and Medical Leave Act, short term disability, long term disability, overtime and holiday hours.

We are available to assist you in complying with the HIRD requirement, and to address any questions that you may have regarding it or Massachusetts Health Care Law in general. ♦

Massachusetts Wage Act Now Imposes Mandatory Treble Damages

continued from page 1

- Are employees being paid in a timely manner?
- Are employees being paid for all time actually worked?
- Are service employees receiving tips as required by law?

Although penalties for violations of the Act can be costly, employers can avoid such expenses by meeting the requirements of the law. In this vein, we also recommend a thorough review of all relevant employee handbook policies as well as job descriptions.

Massachusetts employers have been experiencing an increase in the number of wage and hour claims, even before the new amendment to the Wage Act, as well as a significant increase in the number of class action wage claims filed in Massachusetts. Given that a \$10,000 claim will now automatically be a \$30,000 claim, this is a great time to ensure compliance.

As always, we are available to assist you with a wage and hour compliance audit as well as otherwise complying with the Massachusetts Wage Act. ♦

EMPLOYMENT LAW BOOT CAMP

September 22 & 23, 2008

8:30 a.m. to 4:30 p.m.

at Schwartz Hannum PC

Topics will include:

- Hiring And Firing Traps And Strategies
- Effectively Managing Employee Performance
- Background Checks And Substance Abuse Testing
- Critical Employment Policies That Help Limit Liability
- Harassment: It’s Not Just About Sex Anymore
- Leaves of Absence: FMLA And More
- How To Conduct An Investigation Of Employee Misconduct
- Limiting Exposure To A Wage And Hour Complaint

To register, please contact Elizabeth Morin at
(978) 623-0900 or emorin@shpclaw.com

If you prefer to receive a copy of the Firm’s Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Anu Gupta-Lundberg at alundberg@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf format.)

A searchable archive of past Update Articles and E-Alerts is available on the Firm’s website, at www.shpclaw.com.

Significant Changes And Developments In Non-Competition Law In Oregon, Wisconsin And Massachusetts

By Todd A. Newman

Significant changes in non-competition law have occurred in Oregon and Wisconsin, and a distinct line of non-competition cases continues to develop in Massachusetts. These changes and developments, which apply immediately to employers with operations in those states, are summarized below.

Oregon

Oregon has enacted a non-competition law that marks a radical change in favor of employees. This new law, which imposes numerous restrictions on employers, applies to all non-competition agreements entered into after January 1, 2008. The new restrictions impose some unusual requirements, as follows:

1. *New Employees Must Receive Advance Notice.* Oregon non-competition agreements are enforceable as to new hires only if the employer provides written notice at least two weeks before the commencement of employment that a noncompetition agreement is required as a condition of employment. Thus, employers should consider including this information in their job applications and offer letters.

If an employer wants an existing employee to sign a non-competition agreement, Oregon law continues to require that this be done in connection with a “bona fide advancement.”

2. *Non-Exempt And Lower-Paid Employees Cannot Be Subject To Such Agreements.* Employees properly classified as non-exempt under Oregon’s wage and hour law cannot be bound by a non-competition agreement. Similarly, a non-competition agreement will not be valid as to an exempt employee unless, at termination of employment, his or her gross annual compensation exceeds the median income of a four-person family under U.S. Census Bureau guidelines (presently, about \$61,000).

3. *Employers Must Pay Income Substitution During The Restrictive Period.* Oregon employers seeking to enforce non-competition agreements must pay income substitution to the affected employees during the restrictive period. This payment must be equal to the greater of: (a) fifty percent of the employee’s gross annual salary plus commissions, or (b) fifty percent of the median income for a four-person family under U.S. Census Bureau guidelines (presently, about \$30,500). This provision might result in employers narrowing the circumstances in which they require non-competition agreements.

4. *Non-Competition Agreements Cannot Exceed Two Years.* Under the new Oregon law, the term of a noncompetition agreement cannot exceed two years from the date of termination of employment. If a non-competition agreement contains a longer term, then the portion

exceeding two years will not be enforceable.

Importantly, the new Oregon restrictions do not apply to either: (a) covenants not to solicit employees or customers of the employer, or (b) “bonus restriction agreements,” which require an employee who goes to work for a competitor to forfeit unpaid profit sharing or bonus compensation. Thus, the new law, while one of the most restrictive in the nation, still provides a measure of protection against competitive harm.

As a result of the new law, Oregon employers are likely to use non-competition agreements sparingly, *i.e.*, only with employees who have access to trade secrets and narrowly defined confidential business information; require employees involved in developing and maintaining customer goodwill to sign non-solicitation agreements only; and become more expansive and creative in their use of bonus restriction agreements.

Wisconsin

In Wisconsin, if a non-competition or non-solicitation agreement calls for the restrictive period to be extended by the duration of a breach by the employee, then this provision may operate to *void the entire agreement*. This

new rule was announced by the Wisconsin Court of Appeals in *H&R Block Eastern Enterprises, Inc. v. Swenson*, 745 N.W.2d 421 (Wis. Ct. App. 2007).

In this case, the employer, H&R Block, was in the business of preparing tax returns for its customers. To protect its customer goodwill, the employer required each tax preparer to sign an employment agreement containing non-competition and non-solicitation provisions. These provisions prohibited the tax preparer from competing with the employer and soliciting its customers for two years after termination of employment. Each provision qualified the two-year restriction by stating “such period to be extended by any period(s) of violation” (the “Extension Provision”).

Subsequently, six tax preparers resigned. Each had from ten to twenty-five or more years of experience with H&R Block. Two of the tax preparers formed a competing business and hired the other four. H&R Block filed a lawsuit alleging, among other things, that the former employees breached the restrictive clauses in their contracts. The trial court, however, dismissed H&R Block’s claims. The trial court reasoned that the two-year restriction was adequate to protect H&R Block’s interests and, therefore, that the Extension Provision rendered this restriction “plainly invalid.”

On appeal, H&R Block argued that the Extension Provision was

continued on page 5

As a result of the new law, Oregon employers are likely to use non-competition agreements sparingly, i.e., only with employees who have access to trade secrets and narrowly defined confidential business information...

continued from page 4

reasonable because its effect was to restrain the former employees for a total of only two years, a reasonable restrictive period. H&R Block explained that “a one-day violation leads to a one-day extension, a one-week violation to a one-week extension.” Thus, in H&R Block’s view, the Extension Provision merely ensured that H&R Block received the benefit of its bargain.

The Appeals Court rejected H&R Block’s argument on the basis that the Extension Provision rendered the two-year restriction unduly vague. In the court’s words:

What constitutes a ‘one-day’ violation? Is it any day in which there is any contact with a company client for whom one of the listed services is to be provided? Does the violation then extend until the service is completed for that client? If there are contacts with different company clients on one day for the purposes of providing the listed services, does that count as a one-day violation, the same as if there were contact with only one company client in a day? These questions, unanswered by the contract terms, mean that a former employee cannot tell from the terms of his or her contract how long the extension will be for the particular conduct in violation of the clauses.

agreement between the employee and the employer.

To illustrate, suppose that a new hire accepts the position of sales representative and signs a non-competition agreement at the commencement of employment. Three years later, based on her exemplary sales record and the strength of her client relationships, this employee is promoted to regional sales manager. This promotion may operate to invalidate the non-competition agreement—even though the employee possesses significant client goodwill and, as a result of the promotion, will be in a position to develop this goodwill further. In this unfortunate scenario, the employer proceeds on the assumption that the non-competition agreement remains in place, only to discover years later, after the employee departs and causes competitive harm, that the non-competition agreement had become invalid and, therefore, is no longer enforceable.

The reasoning behind this noteworthy line of cases is not entirely clear. The decisions state that the material job change renders the existing restrictive covenant void for lack of consideration. Employee expectations, however, may be a consideration. In this respect, the decisions suggest that employees generally do not expect non-competition agreements to follow them up the corporate ladder, but rather, view such agree-

A distinct line of cases concerning non-competition agreements continues to develop and survive in Massachusetts, posing a trap for the unwary employer.

The court also determined that if “legitimate disputes” arose over whether certain conduct violated the non-competition and non-solicitation provisions, then the employee would not have guidance until a court resolved the disputes. Only then, explained the court, would the employee know if there is an extension and how long it is. Thus, in the court’s view, the effect of the Extension Provision was to make the duration of the restraint “not a fixed and definite time period but a time period that is contingent upon outcomes the employee cannot predict.”

For these reasons, the Appeals Court affirmed the trial court’s decision to dismiss H&R Block’s claims. Consequently, the six former employees were permitted to continue with their competitive business, even though they had well-developed relationships with H&R Block clients, many of whom returned year after year.

Provisions like the one at issue here are common in non-competition and non-solicitation agreements. Accordingly, Wisconsin employers should immediately review and, if necessary, revise all such agreements to remove provisions of this kind. Otherwise, the interests that they sought to protect through non-competition and non-solicitation provisions will be at risk.

Massachusetts

A distinct line of cases concerning non-competition agreements continues to develop and survive in Massachusetts, posing a trap for the unwary employer. Under these cases, a material change in an employee’s job, as might result from a promotion or lateral move, can operate to void any existing non-competition or non-solicitation

agreements as part of the terms and conditions of employment that they leave behind upon accepting a new role. Under this theory, seeking to enforce a non-competition agreement signed prior to one or more material job changes would constitute unfair surprise as to the employee. Evidently, and unfortunately, the courts are less concerned with the unfair surprise that this line of cases imposes on the employer. The key decisions in this line of cases are *Cypress Group, Inc. v. Stride & Associates, Inc.*, 17 Mass. L. Rep. 436 (Mass. Super. Ct. 2004); *R.E. Moulton, Inc. v. Lee*, 18 Mass. L. Rep. 57 (Mass. Super. Ct. 2004); and *Lycos, Inc. v. Jackson*, 18 Mass. L. Rep. 256 (Mass. Super. Ct. 2004).

The solution for employers is to condition promotions and other such job changes upon the employee’s execution of a new non-competition agreement. In this scenario, the increased compensation and benefits of the new position would serve as consideration for the new non-competition agreement. The employee could decline to accept the new non-competition agreement and, as a result, forego the promotion, but this would be unlikely, particularly because a similar non-competition agreement already will have been in place.

Conclusion

As these changes and developments in Oregon, Wisconsin and Massachusetts demonstrate, non-competition laws differ dramatically from state to state, posing challenges for all employers and especially those with multi-state operations. The Firm is available to assist with the review, development and enforcement of non-competition and related agreements to help protect employers against undue competitive harm caused by departing employees. ◆

FMLA Expansion Effective Immediately

By Todd A. Newman

On January 28, 2008, President Bush signed legislation to expand the Family and Medical Leave Act ("FMLA") to include "servicemember family leave." This FMLA amendment is effective immediately.

Under the new servicemember provisions, eligible employees may: (a) use their twelve (12) weeks of FMLA leave in certain circumstances when a spouse, child or parent is on, or called to, active duty in the United States military ("Active Duty Family Leave"), and (b) extend their FMLA leave to twenty-six (26) weeks in order to care for a spouse, child, parent or next of kin who suffers a serious injury or illness in the line of duty for the United States military ("Injured Servicemember Leave").

Although the specific circumstances in which Active Duty Family Leave may be used are to be determined by the United States Department of Labor ("DOL") through regulations to be published soon, the FMLA now permits eligible employees to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." DOL encourages employers to provide this type

of leave to qualifying employees during the interim before the regulations are finalized

The key features of Injured Servicemember Leave are as follows:

- This leave is limited to "a single 12-month period," a limitation that the DOL is expected to clarify in its implementing regulations.
- This leave applies to the care of Armed Forces members, National Guard members and Reservists who are undergoing medical treatment, recuperation or therapy, are in medical hold or medical holdover status, or are on the temporary disability retired list for a serious injury or illness.
- A covered condition is any injury or illness incurred in the line of duty while on active duty "that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating."
- Employees are eligible for this leave if they are a servicemember's next of kin, defined as closest blood relative, a broader category than the FMLA has previously recognized.
- The combined total amount of Active

Duty Family Leave and Injured Servicemember Leave that may be taken is twenty-six (26) weeks during a twelve (12) month period.

With respect to both Active Duty Family Leave and Injured Servicemember Leave, eligible employees may take the leave intermittently or on a reduced leave schedule; employees may elect, or employers may require, that accrued paid leave be substituted for unpaid leave; and employers are not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide such paid leave.

The new legislation does not specify whether, or the extent to which, it is intended to be coordinated with the Uniformed Services Employment and Reemployment Rights Act ("USERRA") or state leave laws.

The Department of Labor is preparing comprehensive guidance regarding rights and responsibilities under this FMLA amendment. In the interim, the government will require employers to act in good faith in providing leave under the new legislation. We encourage covered employers to promptly comply with this amendment to the FMLA and to revise FMLA policies accordingly. We are available to answer questions and to assist with compliance efforts. ♦

OFCCP Gears Up For Second Wave Of Compliance Audits

By Jessica L. Herbster

The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") has identified 5,000 additional federal contractors who will be subject to audit between now and September 30, 2008, the end of OFCCP's fiscal year. This completes OFCCP's list of 7,500 audit targets for this fiscal year. (The first 2,500 audit targets were identified in September, 2007.)

OFCCP has mailed a Corporate Scheduling Announcement Letter ("CSAL") to the Chief Executive Officer (or designated point of contact) of each parent company with more than one affiliated federal contractor on the OFCCP list. The CSAL is not an audit scheduling letter, but rather, provides advance warning that an audit may be imminent. The purpose of the CSAL is to:

- Notify the federal contractor's internal EEO staff of the need to obtain management support for EEO and self-audit efforts;
- Invite the federal contractor to take advantage of OFCCP compliance assistance offerings;
- Encourage the federal contractor to focus on self-audit efforts so as to save OFCCP time and resources in the event

of a formal audit; and

- Help the federal contractor manage and budget the time required for audit activity.

While not every federal contractor identified in the CSAL will be selected for an audit, the converse is also true – a federal contractor may be selected for an audit even if its parent company was not sent a CSAL. For example, a federal contractor may be selected for audit after receiving a contract award notice or in response to an individual complaint. OFCCP will send a Scheduling Letter to each federal contractor ultimately selected for audit. This starts the formal audit process.

Employers should take steps to ensure that any Scheduling Letter received from OFCCP will be forwarded immediately to the appropriate manager. This is critical because the time period for responding to an OFCCP Scheduling Letter is typically only thirty (30) days.

As always, please feel free to call with any questions you may have about your potential status as a federal contractor, the OFCCP audit process, or OFCCP affirmative action plans in general. ♦

Washington, D.C. Becomes Second City In Nation To Require Employers To Provide Paid Sick Leave

By Mary Pat Hagan

Washington, D.C. recently followed San Francisco's lead and became the second city in the country to require employers to provide paid sick leave to their employees. D.C.'s City Council passed the measure, known as the "Accrued Sick and Safe Leave Act of 2008," in March. Congress has thirty legislative days to review the measure. Assuming Congress does not intervene, the measure is expected to become law on May 13, 2008, with an effective date six months later. This six-month waiting period provides D.C. employers with an opportunity to review their leave policies to ensure full compliance with the new law.

D.C.'s sick leave law (the "Law") provides for three levels of benefits, depending on the size of the employer. Employers with one hundred or more employees are required to provide employees with one hour of paid leave for every thirty-seven hours worked, up to seven paid sick days per calendar year. Employers with at least twenty-five but no more than ninety-nine employees are required to provide employees with one hour of paid leave for every forty-three hours worked, up to five paid sick days per calendar year. Finally, employers with twenty-four or fewer employees are required to provide employees with one hour of paid leave for every eighty-seven hours worked, up to three paid sick days per calendar year.

Number of Employees in D.C.	Paid Sick Days
100 or more	7
25-99	5
1-24	3

The Law applies to all employers with at least one employee. However, the following individuals are not covered:

- Independent contractors;
- Students;
- Health care workers who choose to participate in a premium pay program (a plan offered by an employer under which an employee may elect to receive extra pay in lieu of benefits); and
- Restaurant wait staff and bartenders who work for a combination of wages and tips.

The Law allows employees to use paid leave for their own physical or mental illness or injury, to obtain preventive health care, or to care for an ill child, parent, spouse, domestic partner or any family member. The Law also provides paid leave if the employee or the employee's family member is a victim of stalking, domestic violence or sexual violence. In such cases, the employee may use paid sick days to take legal action; obtain psychological, medical, legal or victim's rights counseling; or temporarily or permanently relocate, if necessitated by the stalking, domestic violence or sexual violence.

Paid leave will accrue under the Law in accordance with the employer's established pay period. An employee shall start to accrue paid leave at the beginning of his or her employment; however, an employee must work for ninety days before using this benefit. The Law provides that accrued but unused leave will carry over annually, but another provision of the Law states, somewhat inconsistently, that an employee may not use in one year more than the maximum hours that may accrue in a single year. Employers are not required to pay accrued but unused sick leave upon termination of employment.

The Law allows employers to require appropriate certification if an employee's leave is for three or more consecutive days. Such certification may take the form of a doctor's note; a police report indicating that the employee or the employee's family member was the victim of stalking, domestic violence, or sexual abuse; a court order; or a signed statement from a victim and witness advocate or domestic violence counselor affirming that the employee is involved in legal action related to stalking, domestic violence, or sexual abuse.

Employers that currently provide paid leave options will not be required to modify their policies as long as one of the options provides benefits equal to or greater than those required by the Law. An option will be considered to satisfy this standard only if it allows an employee to access and accrue paid leave at least as quickly as under the Law and for the same purposes set forth in the Law.

The Mayor of D.C. will issue a posting that all employers will be required to display prominently in the workplace. Employers that do not make the required posting or provide employees with required leave will be fined \$500 for the first offense, \$750 for the second offense, and \$1,000 for the third and each subsequent offense. The Mayor will also establish rules to exempt certain businesses from the Law if they can prove "hardship" as a result of this Law.

Employers with offices in D.C. should review their sick leave policies to ensure that they satisfy the Law when it goes into effect. The Firm is available to assist with updating employee handbooks and leave policies to ensure compliance with the Law, as well as with other federal and state requirements.

PLEASE SAVE THE DATE

SCHWARTZ HANNUM PC

Is Pleased To Announce Its

8TH ANNUAL "HOT TOPICS" SEMINAR

Hot Topics In

Labor and Employment Law

Thursday, November 6, 2008

From 7:45 a.m. – Noon
(Full breakfast will be served)

Where: The Hilton Woburn, Woburn, MA

We will discuss the most current issues in
labor and employment law

(Please feel free to contact us at emorin@shpclaw.com with suggested topics. You may register on-line at <http://www.shpclaw.com/news/events.php>.)

Recession Reality: Reductions In Force And The Accompanying Legal Risks

continued from page 1

Like any other corporate decision that affects the bottom line, the key to a properly executed RIF is having a structured RIF plan that has been reviewed and approved by human resources, senior management and legal counsel. At a minimum, an effective RIF plan should contain the following components.

Establish Objective Selection Criteria

Every reduction in force that affects more than one employee should be supported by a justification statement. A justification statement is an internal document that contains a list of objective criteria supporting the decision to eliminate the position and/or layoff the employee and that flags potential issues that may impact the company's future liabilities to the laid-off employees. For example, the justification statement should contain:

- Each employee's protected characteristics under equal employment opportunity laws, recent workplace injuries, leaves of absence and internal complaints of misconduct;
- A description of any employment-related promises (*e.g.*, bonus, term of employment, benefits) that have been made to the employee;
- Any restrictive covenants under which the employee may have future obligations to the company;
- A summary of any immigration-related implications of the RIF (*i.e.*, forfeiture of authorization to work and/or reside in the United States);
- The names and ages of employees in the same division with the same title and responsibilities who will be subject to the RIF, and another list with the names and ages of employees with the same title and responsibilities who will *not* be subject to the RIF;
- Non-discriminatory factors supporting the reason for the termination of employment, such as lack of seniority, elimination of a job function or performance or skill deficiencies; and
- Names of those involved in the RIF decision.

Again, it is important for senior management, human resources and legal counsel to be involved in preparing the justification statement. The justification statement is of critical importance because it will serve as the foundation for decision-making and outline the defense to any legal challenge that the RIF was based not upon objective, non-discriminatory criteria, but upon a protected class, most commonly the age of the terminated employees.

N.B. This document should be copied to counsel, to protect it under the attorney-client privilege.

Identify Any Triggered Plant Closing/Mass Layoff Laws

Whether the company has any obligations under state or federal plant closing/mass layoff laws depends primarily on the total number of employees in the company, the location of the company and the number of employees subject to the RIF. For example, under the federal Worker Adjustment and Retraining Notification Act ("WARN") Act, which applies to businesses employing one hundred (100) or more employees, covered employers must provide sixty (60) days' notice to employees and government officials of any "plant closing" or "mass layoff." A "plant closing" means the permanent or temporary shutdown of a single site of employment or one or more facilities or operating units within a single site of employment, if the shutdown results in an "employment loss" of fifty (50) or more employees during any thirty (30) day period.

A "mass layoff" means a reduction in force that results in an employment loss at a single site during a thirty (30) day period of either: (a) at least thirty-three percent (33%) of the employees and a total of fifty (50) employees, or (b) five hundred (500) or more employees.

Even when federal WARN Act requirements are satisfied, employers sometimes fail to acknowledge state plant closing laws. For example, New Jersey recently enacted a law governing plant closing that contains more employee protections than afforded under federal law, such as more expansive employer notice obligations and stiffer penalties for non-compliance with such notice provisions.

Other states, such as New Hampshire, have enacted laws requiring specific employer notice requirements to state unemployment agencies and other government entities.

It is critically important for a company undergoing a RIF to identify whether the RIF may *potentially* trigger a plant closing or mass layoff, and to contact legal counsel for a more thorough analysis of coverage and notice obligations. Penalties for state or federal WARN Act obligations are extensive.

Severance Plan or Policy

Although many companies establish and publish a severance policy in the employee handbook, other companies maintain confidential severance practices, most often to allow for increased flexibility of the post-employment payout. (N.B. These unpublished practices can create de facto severance plans under federal law, which may impose unintended obligations on the employer.) Regardless, however, during RIF planning, it is important to establish a RIF plan or policy regarding severance pay and related matters to ensure that post-employment benefit decisions are consistent and objective. If a company's severance plan or policy fails to establish objective criteria (*e.g.*, one week of severance per year of service and/or one month of paid health insurance coverage per year of service), and if laid-off employees are treated inconsistently, then the company could be vulnerable to discrimination claims.

At a minimum, an effective RIF plan should contain the following components:

- **Establish Objective Selection Criteria**
- **Identify Any Triggered Plant Closing/ Mass Layoff Laws**
- **Severance Plan or Policy**
- **Separation Agreement And Release**
- **Communicating The RIF**

continued on page 9

continued from page 8

Separation Agreement And Release

Properly-drafted separation agreements are the key to ensuring an effective release of future employment claims and a clear communication of the rights and obligations of the departing employee. Such agreements should clearly outline the consideration (*i.e.*, the severance payment/benefits being offered by the company) to ensure enforceability of the release being provided by the employee in exchange. The release contained in the separation agreement should identify any state-specific employment statutes that could otherwise have been the basis of an employment claim and state that the employee is waiving his or her potential rights under those statutes in exchange for the severance benefits.

Moreover, under the Age Discrimination in Employment Act (“ADEA”) and the Older Workers Benefit Protection Act (“OWBPA”), a severance agreement concerning employees who are forty (40) years of age or older must include an attachment containing a statement of the objective criteria used for the RIF decision, the list of names, job titles and ages of employees subject to the RIF and a similar list of employees not subject to the RIF. The separation agreement also must contain certain notice provisions. In all RIFs, the separation agreement should be tailored to the specific situation. Therefore, we encourage you to seek assistance from legal counsel when preparing the separation agreement, and to avoid using standard form release agreements that may be non-compliant with federal and state laws.

Communicating The RIF

Perhaps the most overlooked yet arguably most important component of the RIF is determining the method and form by which the RIF is communicated to affected employees. Prior to communicating a RIF, management, human resources and legal counsel should agree on a standard script to provide to managers communicating the RIF. At a minimum, the script should contain the following instructions:

- Consistently state the legitimate business reason supporting the RIF;
- Limit discussing personal matters with the employee, including reacting to an employee’s emotional response with shared criticism of the company;
- Be prepared to answer standard questions, such as why the decision was made, who else was impacted and what the employee should expect to happen next;
- Treat employees with respect and dignity; and
- Identify resources available to the employee, should the employee have any follow-up questions.

If an employee is subject to immediate termination without any required prior notice, the manager should appear at the termination meeting with a check for final pay for all earned wages, including accrued but unused vacation time and earned commissions (although termination payment provisions vary by state law); information concerning unemployment and COBRA health insurance continuation benefits; and the separation agreement, if applicable.

In addition, if the employee is subject to one or more post-employment restrictive covenants, such as a confidentiality, non-disclosure or non-competition agreement, a copy of that agreement should be produced to the employee and accompanied by a verbal reminder of the employee’s obligations under the agreement.

In sum, no manager handling the termination meeting should appear at the meeting unprepared. It may also be advisable to have another member of management or human resources present at the meeting to document the discussion and serve as a witness.

* * *

A RIF is an unfortunate, complicated and potentially perilous reality of conducting business. However, the risks associated with a RIF can be greatly limited through planning and preparation, consistent and lawful decision-making and consultation with expert legal counsel. We are available to assist you with planning a RIF, preparing separation agreements and addressing the complex employee compensation and benefit implications of a reduction in force. ◆

The Shrinking Definition Of Independent Contractor

continued from page 10

penalties for misclassification.

The recent surge in federal and state enforcement efforts is already leading to costly fines and lawsuits. The plight of FedEx Ground Package System, Inc. (“FedEx”) is illustrative. The issue arose at FedEx when the IRS audited its employment classifications. The IRS determined that drivers had been misclassified as independent contractors and ordered FedEx to pay \$319 million in back taxes plus interest. But the matter did not end there. The IRS action led to some thirty-five lawsuits, mostly class actions, by FedEx drivers located throughout the country. They allege that FedEx’s misclassification resulted in the failure to pay required wages and overtime. Similar actions are likely to follow as federal and state enforcement actions mount.

Massachusetts employers that are unsure whether certain workers have been misclassified as independent contractors should consider taking the following steps:

- Determine whether the workers in question satisfy the three-part independent contractor test set forth above;
- For workers who do not satisfy this test, determine whether they should be treated as exempt or non-exempt employees for purposes of the wage and hour laws; and
- Ensure that all payroll, tax, unemployment insurance, workers’ compensation and other employer obligations are extended to those workers who must be treated as employees.

Understanding applicable independent contractor laws is a complex and critically important obligation. Multi-state employers are cautioned to consider all applicable state laws, which can vary significantly with respect to defining who can be classified as an independent contractor. The Firm is available to assist with compliance and, if necessary, litigation. ◆

The Shrinking Definition Of Independent Contractor

By Jessica L. Herbster

It is increasingly difficult to lawfully classify a worker as an independent contractor in Massachusetts. Massachusetts Attorney General Martha Coakley recently released an Advisory on the Massachusetts Independent Contractor/Misclassification Law (the "Advisory"). The Advisory emphasizes that a Massachusetts employer must establish that a worker satisfies each of the following three requirements in order to lawfully classify the worker as an independent contractor:

1. The worker must be free from control and direction in connection with the performance of the service;
2. The service the worker performs must be outside the usual course of business of the employer; and
3. The worker must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

According to the Advisory, "[t]he burden of proof is on the employer, and the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee." The Attorney General will not consider an employer's good-faith belief that a worker should be an independent contractor, the status of the worker as a "sole proprietor or partnership," or the employer's history of not withholding taxes, paying unemployment insurance premiums, or providing workers' compensation to the workers in question. Such considerations have been deemed "irrelevant."

In enforcing the Independent Contractor Law, the Attorney General will consider the following factors to be "strong indications of misclassification" that warrant further investigation:

- The absence of business records concerning services provided by alleged independent contractors;
- The payment of alleged independent contractors "off the books," "under the table," or in cash;
- The absence of sufficient workers' compensation coverage;

- The non-receipt by alleged independent contractors of 1099s or W-2s by any entity;
- The provision of equipment, tools and supplies to alleged independent contractors by the contracting entity, or a requirement that these workers purchase such materials directly from the contracting entity; and
- The non-payment of income taxes or employer contributions to the Division of Unemployment Assistance by alleged independent contractors.

According to the Advisory, "[t]he burden of proof is on the employer, and the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee."

The Attorney General intends to pursue enforcement against employers believed to use straw or sham entities as a means to evade compliance with the Independent Contractor Law. In these situations, the Attorney General will consider such factors as whether (a) the services of the alleged independent contractor are not actually available to entities beyond the contracting entity, even if they purport to be so; (b) the business of the contracting entity is no different than the services performed by the alleged independent contractor; and (c) the alleged independent contractor has been organized as a business at the request of, or as a requirement of, the contracting entity.

The Advisory states that the Attorney General may impose "substantial" civil and criminal penalties, and in certain circumstances, debar violators from public works contracts. Such liability extends to "both business entities and individuals, including corporate officers, and those with management authority over affected workers."

The Attorney General's release of the Advisory follows Governor Deval L. Patrick's establishment of a task force to crack down on

employers that misclassify workers as independent contractors. The Joint Enforcement Task Force on the Underground Economy and Employee Misclassification (the "Task Force") is a multi-agency group composed of representatives from the Labor Department, the Attorney General's Office, the Department of Industrial Accidents, the Division of Occupational Safety, the Department of Public Safety, the Division of Professional Licensure and the Division of Apprentice Training.

While ferreting out violations of the Independent Contractor Law, the Task Force will expose offending employers to liability for the many derivative violations that flow from this transgression. Such derivative violations include failure to pay required wages, carry workers' compensation insurance, comply with safety rules and remit income and payroll taxes. In some cases, the remedy will include mandatory treble damages under the Commonwealth's recently amended wage law.

The Task Force will identify violators by soliciting information from the public and encouraging workers to report suspected misclassifications. The Task Force will also identify industries and sectors where employee misclassification is believed to be most prevalent. Task Force members will focus their agencies' investigative and enforcement resources there. Governor Patrick has already identified the construction industry as an area of interest.

The Attorney General's Advisory and the Governor's Task Force are consistent with efforts by the federal government to root out underground economies and misclassified workers. In this regard, the Wage and Hour Division of the U.S. Department of Labor has made the misclassification of workers as independent contractors one of its top five enforcement priorities. Low-wage industries, such as construction, janitorial, hotel/motel and day labor, are expected to be the focus of these federal efforts.

Massachusetts joins the ranks of a growing number of states that are focusing their enforcement efforts on this issue. In particular, Michigan, New Jersey, and New York have established similar task forces or advisory panels. Other states, such as Illinois, Kansas and Kentucky, have enacted laws to clarify the definition of "employee" and/or increase

continued on page 9