

MCLE PRACTICAL SKILLS COURSE

**Employment Law
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**David Rapaport
Davis Malm & D'Agostine, P.C.
One Boston Place
Boston, MA 02108**

I. Introduction

Employment law has become an extremely broad and varied field in the last ten years. It is a dynamic area in which the law changes every day. Even for the attorney who specializes in employment law, it is almost impossible to keep up with the many statutes, regulations, and common law developments. There is no way I can possibly cover the topic in an hour.

Some of you will become generalists. Some will become plaintiff's employment attorneys. Some will represent employers either as in-house counsel or as attorneys in law firms who do this kind of work. I will try to aim my presentation at the generalist who has almost no experience in employment law. For those of you who want to represent plaintiffs I can recommend the Massachusetts Employment Lawyers Association which is the local chapter of the National Employment Lawyers Association. Those of you who represent management will usually receive specialized training in your law firms.

I am going to organize the material into three basic sections. First, I will outline the various legal issues you may face in the employment field. Second, I will discuss the litigation aspects of employment law here in Massachusetts. Third, I will address what I call the "office practice" of employment law. I will conclude with suggested employment law texts and practice guides which provide far more detailed information than I can cover today. Many of these are published by MCLE. You will find practice tips at various points in the materials.

II. Legal Issues

A. Traditional labor-management law

This is the area of collective bargaining between unions and management which obviously applies only to that segment of the work force which is unionized. I think the current union membership is about 10% of the workforce which is less than most people think. This kind of practice was

really the beginning of employment law, but today represents only a small segment of the employment bar. These lawyers negotiate collective bargaining agreements, handle union grievances, and deal with the National Labor Relations Board and the Massachusetts state labor agencies. The basic concept here is that an employee may not be fired without just cause, which is very different from the “at-will” status which characterizes most people’s employment.

B. Discrimination laws

1. Chapter 151B is the central Massachusetts law prohibiting discrimination in the workplace and protects workers against discrimination based on age, race, national origin, religion, gender, and handicap. It also prohibits sexual harassment. You must be familiar with this statute and the federal counterparts, such as Title VII (gender, race, national origin, religion), the Age Discrimination in Employment Act, and the Americans With Disabilities Act.
 - a. The Massachusetts Commission Against Discrimination administers Chapter 151B and has promulgated regulations (804 C.M.R. §1.10) and guidelines. All Chapter 151B claims must be commenced at the MCAD within 300 days of the discriminatory act.
 - b. Special rules in handicap cases. Unlike other forms of discrimination, the law prohibiting terminating employees because of their handicap provides an additional right – to reasonable accommodation. This means that the employer must make reasonable changes in the employee’s working conditions to accommodate the handicap.
 - c. Special rules in sexual harassment cases. Here, there is great emphasis on preventing sexual harassment in the workplace, and the MCAD has required employers to adopt policies designed to prevent s/h including postings, methods for employees to complain of s/h, and an investigation process designed to find out what happened and to remedy it.
2. Practice Note. In Massachusetts, most knowledgeable plaintiff’s attorneys will use Chapter 151B and not the federal laws since over the last twenty years many federal courts have become hostile to employment claimants, and plaintiffs find they are

better off in state court. This is particularly true in the handicap discrimination area where the U.S. Supreme Court and many federal courts have severely restricted the ADA to the point where very few plaintiffs ever succeed. Currently, 96% of all ADA cases in federal court result in a defense judgment. In addition, Chapter 151B provides for individual liability, whereas most federal employment laws do not.

C. At-Will Employment

1. Most employees are at-will which means they have no specific term of employment, i.e., a two-year contract. This means that they can be fired at any time, with or without cause. Literally, the employer can fire the employee for wearing a blue shirt. The employer can be stupid, unfair or unjust and there is little the employee can do about it. This comes as a shock to many people in the workforce who seem to think that they cannot be fired without just cause. Not so. There is also a common misconception that employees are entitled to severance pay if they are terminated, particularly in a layoff or reduction in force. Not so, unless the company has a severance plan or voluntarily decides to grant severance, usually based on a formula like 2 weeks of base pay for every year of service.
2. Claims which may be asserted by at-will employees.
 - a. The Fortune case. 373 Mass. 96 (1977)
 - b. “Whistleblowers”
 - (1) Common law public policy exception to the at-will rule
 - (2) Statute protecting public sector employees who blow the whistle – Chapter 149, §185
 - c. Defamation in the workplace
 - (1) Note that the Supreme Judicial Court recently refused to adopt the doctrine of “compelled self-defamation”
 - d. Deceit
 - e. Promissory Estoppel

- f. Negligent Misrepresentations
- g. Contract Claims
 - (1) What was promised to the employee?
 - (2) Employee handbooks
 - (3) Statute of Frauds defenses
- h. Employees of close corporations

In cases of startup corporations, or close corporations, the key employees are often also the owners and look to present and future employment with the company as a way of obtaining a return on their investment of time and/or capital. The courts have developed a line of cases establishing certain protections for persons in this position. See *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842 (1976) and its progeny. The general requirement is that the company have a legitimate business purpose for terminating the employee, but more recent cases have found an exception where there is an agreement providing a procedure for terminating these employees.

D. Written Employment Agreements

- 1. These are rare
 - a. Usually found at the executive level
 - b. Sometimes salespeople have them
- 2. The executive agreements typically provide severance if the employee is terminated without “cause” which is a defined term, or if the employee resigns for “good reason”
- 3. Ordinary contract law principles apply
- 4. Often provide that disputes will be resolved by binding arbitration before the AAA or another alternative dispute resolution provider

E. Noncompetition and Trade Secret Issues

These subjects require a good deal of study in order to understand the working principles, and one must be very careful about giving advice to clients.

1. Noncompetition agreements. Massachusetts recognizes non-competition agreements which are designed to protect the legitimate business interests of the employer. This means, for example, that salespeople or others who can take business with them are certainly subject to restraint. Typically, a laboratory worker or administrative assistant would not be restricted. The restrictions must be reasonable, however, and there is a trend towards shortening the time limits. Today, one year is quite common and will almost certainly survive a court challenge. I see two year terms, but rarely more unless the restraint is in connection with the sale of a business, where five years has been upheld. Years ago geographical restrictions were common, such as prohibiting competition within 10 miles of the former employer. The modern trend, at least with companies whose business is nationwide, is to prohibit working for any business which competes with the former employer. Note that noncompetition restrictions can be challenged on traditional equitable grounds which means both sides find it difficult to predict what a court will do in any particular case. Former employees will emphasize the economic hardship imposed by a broad noncompetition agreement and their need to earn a living. Litigation of noncompetition agreements is usually over after the court rules on a request for preliminary injunction. These cases require a great deal of legal effort in a very short period of time, so counsel should make sure the client understands this and is willing to pay for the work.
2. Trade secrets. While many upper level employees are required to sign confidentiality agreements at the time of hire, there is also a common law duty of loyalty to one's employer which would restrict the employee's ability to give trade secrets to a competitor. You should be aware that a Massachusetts statute, Chapter 92, §42 and §42A, must also be considered if you have a case in this area. One of the newer concepts in trade secret law is called "inevitable disclosure" which is used by employers where the former employee asserts that he or she is not giving any of the former employer's trade secrets to the new employer. It is not yet settled whether Massachusetts will follow the

inevitable disclosure rule. The former employer argues that since the employee is well aware of the secrets, it is “inevitable” that he or she will use them in the new job, even if no formal disclosure is made to the new employer. Trade secret issues often arise in the high tech area and it is important to have a basic understanding of the technology involved in order to develop your legal position.

F. Payment Of Wages Statute

Chapter 149, §148 has spawned an increasing amount of litigation. The statute sets forth certain times within which employees must be paid wages, both during the term of employment and at the time of termination. Treble damages for violation of the statute are likely mandatory, and there is an attorney’s fees provision. Currently, there is great controversy over what types of compensation beyond straight salary are included in the concept of “wages,” i.e., stock options, bonuses, and certain kinds of commissions. There have been some recent appellate rulings in this area and you should be sure to consult the relevant law. For a relatively recent Appeals Court case refusing to consider severance pay as covered by the statute, see *Prozinski v. Northeast Real Estate Services, LLC*, 59 Mass.App.Ct. 599 (2003).

G. Minimum Wage/Overtime Laws

This is a complicated subject, covered by both the Fair Labor Standards Act, and Chapter 151, and numerous regulations. When confronted by a problem in this area, it makes sense to consult a specialist, or prepare to spend a good deal of time in the library reading the statutes and regulations.

H. ERISA

ERISA is a federal statute relating to retirement plans and benefit plans in the workplace, and is another of those areas where you would be well advised to consult a specialist. It is difficult to find plaintiffs lawyers here in Massachusetts who are willing to take on ERISA issues since it is regarded as an esoteric subject and the law has been interpreted in a way that makes it hard for plaintiffs to recover. You will likely find more management attorneys who are familiar with ERISA since they need to deal with it when developing and administering benefit plans. One of the main features of ERISA for employment law practitioners is that it preempts many common law causes of action.

I. Massachusetts Privacy Act

Chapter 214, §1B is concise. It states: “A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.” The law is relatively new, and no one is certain of its boundaries. Note that Massachusetts has also recognized a common law right of privacy. Issues arising in the workplace include employer inspection of employee e-mail, drug testing, and surveillance of employees.

J. Equal Pay Act

The Massachusetts Equal Pay Act, Chapter 149, §105A, was designed to protect employees from gender based compensation discrimination. The principal case interpreting this statute is *Jancey v. The Everett School Committee*, 427 Mass. 603 (1998). There is also a federal Equal Pay Act. 29 U.S.C.A. §206.

K. Family and Medical Leave

1. **FMLA.** The federal statute provides for up to 12 weeks of unpaid leave for employees to deal with specified family and medical matters. It applies to companies with 50 or more employees.
2. **Small Necessities Leave Act.** This Massachusetts law, enacted in 1998, requires employers subject to the FMLA to grant employees up to 24 hours of unpaid leave in a 12 month period, in addition to any leave taken under the FMLA. Chapter 149, §52D.

L. Compulsory Arbitration

Over the last several years, more and more employers have been forcing employees to sign binding arbitration agreements at the commencement of the employment relationship. While such provisions have frequently been used in executive employment agreements, which are negotiated by persons of at least relatively equal bargaining power, a lower-level employee joining a large corporation obviously has little choice. For this reason, the practice has become quite controversial, with opponents arguing that it deprives employees of their right to use the court system, have a trial by jury, and develop a body of case law under the various employment statutes such as Title VII, the ADA, etc. It can also be much more expensive for employees than the court system, which only requires a minimal filing fee, since

arbitrations can cost \$5,000 to more than \$20,000 in fees. The U.S. Supreme Court has been the driving force behind compulsory arbitration, ruling that it is enforceable pursuant to the Federal Arbitration Act. These provisions can be challenged on grounds of unconscionability, duress, and other such common law defenses, and there are very few rulings in Massachusetts on the subject. Many federal courts have struck down attempts by employers to eliminate statutory rights and damages (such as punitive damages) or to force employees to bear part of the cost of arbitration. This area is rapidly developing, and is another example of where you should consult with an attorney experienced in arbitration issues or do the necessary research yourself. Practice Tip. While most employers perceive that arbitration helps them, there are instances where it can work to the advantage of the employee. This is because, despite what you hear about the occasional large plaintiff's verdict, employers have been doing very well in the courts and have numerous defenses and tactics which can derail a plaintiff's case. Arbitration generally does not permit motion practice or summary judgment, and there are no post-trial motions for remittitur and hardly any right to appeal. It can definitely be a two-edged sword for employers.

III. Litigation Of Employment Claims

A. Plaintiff's Considerations

1. Case Evaluation

This is critical since many people who are mistreated in the workplace believe they have a case based on their general notions of fairness, or information they may have heard from friends or read in the newspapers. Be very careful not to give advice until you have thoroughly interviewed the client and reviewed relevant records including the personnel file. The latter must be provided to an employee upon request. Chapter 149, §52C. Check to see what kinds of performance reviews the client has been receiving. Are there independent witnesses who will verify the client's story?

2. Litigation or Counseling?

Not all cases mandate filing suit. Often you can counsel the employee about ways to improve the workplace situation through involving the company's Human Resources Department or developing better relations with the supervisor. In these cases, you will need to consider whether to "surface" and send a letter to the employer, or remain in the background quietly advising the client.

Employment litigation can be extremely costly and time-consuming. It is not unusual for the litigation of a discrimination claim in Superior Court to involve more than \$100,000 of attorney time and costs or expenses exceeding \$10,000. Before filing suit, you must make sure that the client is willing to engage in this lengthy and expensive process, and that you too are willing to make the necessary commitment. These cases generate strong feelings on both sides of the caption, and almost always involve extensive discovery, a motion for summary judgment, trial and post-trial motions, and sometimes an appeal. It can take two to four years to achieve resolution.

3. Alternative Dispute Resolution

For the reasons set forth above, it usually makes sense to consider ADR which generally means mediation. There are several excellent mediation services in this area. I have had particularly good experiences with JAMS (Judicial Arbitration and Mediation Service) located at One Beacon Street in Boston. The mediation session usually lasts half a day or an entire day and quite often results in the settlement of cases which both sides never thought would reach resolution. There are some administrative fees and both sides usually split the hourly charge of the mediator. The entire process usually costs each side only a few thousand dollars, and returns a great deal of reward for this relatively minimal investment. Even if the case does not settle, both side leave the mediation with a much more realistic view of the case. In some cases it makes sense to engage in mediation at the very start of a case, while in others it is best to wait until several months before trial.

4. Fee Agreements

While clients who only need some counseling are generally charged on an hourly basis, very few can afford an hourly arrangement for litigation, given the many hours of attorney time required. For this reason, employment cases are generally undertaken on a contingent fee basis, or a modified contingent fee where the client pays a retainer which is then credited against any contingent fee recovery. It is very important to use a sophisticated fee agreement since employment cases involve issues not seen in tort cases. For example, what will happen to your fee if the employer offers reinstatement and the employee accepts? I suggest consulting with an experienced plaintiff's employment attorney before you prepare your fee agreements in this area.

5. Contacting Employees Of The Company

Traditionally, this area has been fraught with ethical problems for plaintiffs' counsel who attempted to interview co-workers or others still employed by the company before suit was filed. The SJC has made this task somewhat easier in two recent decisions which must be read by anyone contemplating such interviews. See *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 436 Mass. 347 (2002); *Patriarca v. Center for Living & Working, Inc.*, 778 N.E.2d 877 (2002).

6. MCAD

You must begin all statutory discrimination cases at the MCAD within 300 days of the discriminatory act. The MCAD can award the same kinds of relief as the Superior Court except for punitive damages. In recent years, the Commission has been underfunded and overloaded, and it can take years to go through the process. After a claim has been pending for 90 days, the plaintiff can have the case dismissed without prejudice and re-file in Superior Court. Under a recent ruling by the Supreme Judicial Court, a plaintiff can choose to leave his or her case at the Commission, and the employer is then bound to litigate the entire case there.

7. Chapter 151B

All plaintiff's counsel must be familiar with Chapter 151B and the relevant case law. Plaintiffs are entitled to recover back pay, front pay, damages for emotional distress, and punitive damages. There are many, many cases interpreting the statute but an important one you should read is *Lipchitz v. Raytheon Co.*, 434 Mass. 493 (2001) which sets forth the basic jury charges which judges are supposed to give in discrimination cases.

8. Trial Skills

It is obviously important to have developed your litigation and trial skills before undertaking employment litigation. The cases involve numerous sophisticated issues, such as disputes over records of mental health providers, motions to dismiss, confidentiality orders which employers insist on before producing documents, depositions of top corporate executives, lengthy motions for summary judgment, jury selection, post-trial motions, appeals, etc. The larger employers are often represented either by firms specializing in employment defense work, or by large firms who represent the company generally. In either case, you will be up against a skilled and well-financed adversary.

B. Defense Considerations

1. Insurance Issues

One of your first duties if you are faced with an employment lawsuit is to determine whether your client has insurance coverage, often referred to as EPLI, or Employment Practices Liability Insurance. There may, however, be coverage even if your client does not have insurance specifically designed for employment claims. In any event, you need to place the carrier on notice if there is potential coverage. Usually, the carrier will choose defense counsel, but there are some cases where this issue can be negotiated. Furthermore, there may be some claims which are covered, and some which are not, and separate counsel may need to be retained.

2. Conflicts of Interest

In some employment cases, the plaintiff sues not only the company but also the supervisor. This often happens in sexual harassment claims. You need to determine whether one attorney can represent both the company and the individual defendant(s).

3. Alternate Dispute Resolution

The comments made above under Plaintiff's Considerations apply equally to the defense. Since defense counsel are paid on an hourly basis, it can be very expensive for an employer to litigate employment claims and take the chance that it may end up paying its own attorney, the plaintiff's attorney, and damages to the plaintiff.

4. Early Assessment

It is important to conduct an investigation as soon as you are aware that suit is threatened or has been filed. This is somewhat easier when you are defense counsel since usually the employer has almost all of the relevant documents and you will have access to all the company witnesses. Early assessment of the case will enable you to advise your client whether to attempt a quick settlement, use ADR, go the litigation route, etc.

5. MCAD

All statutory discrimination cases begin at the MCAD. Some remain there, so it is important to be familiar with the MCAD's regulations and guidelines.

IV. Office Practice

Much of an employment lawyer's work does not involve litigation. Employees will consult an employment attorney for help in drafting employment agreements or negotiating a severance package. Management counsel are called upon to draft company policies in the employment area, to draft employment agreements, and to advise the company regarding claims. For those just starting out in this kind of work, MCLE offers an excellent publication entitled *Drafting Employment Documents In Massachusetts*. Since the most common activity in this kind of "office" practice is preparing and negotiating severance agreements, I will outline the issues which tend to appear.

A. Severance Agreements

1. **Amount of Severance.** This is a matter for negotiation. Assuming the employee has no contractual right to severance, the amount negotiated will reflect the strength of the employee's legal claims, the length of service, the esteem in which the employee is held, "equitable" arguments in the employee's favor, and the company's general approach to severance pay.
2. **Timing of Payment.** If you are representing the employee, make sure that the time for making payment is very clear.
3. **Release.** The employer will always want a very inclusive release in return for providing severance. If you are representing the employee, remember that a release should only be provided if the employee is receiving something to which he or she would not otherwise be entitled. Make sure that the release only covers claims up to the date of the agreement (or future claims relating to the employee's employment) so that if the employee, for example, were to be hit by a company car in the future, he could still assert a claim. Also, be sure that the release does not prevent the employee from suing for breach of the severance agreement itself.
4. **Confidentiality.** This has become pretty standard. If you are representing the employee, make sure that it provides an

exemption for the spouse, possibly family members, attorney and financial advisor.

5. **Non-Disparagement.** This is sometimes requested by the employer, and should go both ways. For the employee, make sure the clause is not overly broad or vague. Many employers make the point that they cannot control what every single employee may say in the future, and often this is negotiated to be limited to officers and managers, specified individuals who are perceived to be the problem, or some such arrangement.
 6. **Tax Issues.** Will the employer withhold? This is very likely if the payments are meant to replace salary, but be aware that if there are claims for non-salary issues, like emotional distress, these should be paid as 1099 income. I strongly recommend you consult a tax attorney or accountant before getting very deeply involved in the tax angles.
 7. **References.** Most employers want to use the “name, rank and serial number” approach, agreeing to limit responses to future inquiries to just a confirmation of dates of employment and title. Sometimes, the employee can negotiate the provision of a brief, general reference on company letterhead that he or she can use in the future.
 8. **Outplacement.** This is often offered to upper-level employees and can be worth \$3,000-\$15,000, depending on the type of services being provided.
 9. **Unemployment Compensation.** Employees often ask about this. The Division of Unemployment Assistance will generally provide benefits to employees who are terminated as a result of a reorganization, layoff, or general dissatisfaction with performance. If the employee is accused of serious misconduct or insubordination, the employer may contest the application. Sometimes the employer will agree not to contest as part of the severance negotiations. Generally, the DUA makes the employee use up her severance payments before getting unemployment compensation, unless the employee is giving the employer a release of claims.
- B. Avoiding Employment Claims.** If you represent management, one of your functions will be to tell your client how to avoid or minimize claims. There are, of course, lots of written materials on this subject, but a few basic, time-tested precepts are:

1. Treat employees fairly, and with dignity and respect. Remember that hurt feelings are the reason for many employment claims.
2. Train your client to spot performance problems early and document, document, document.
 - a. Make sure your client provides regular written performance reviews which are honest and accurate. Too many managers give positive reviews when they really have negative feelings about the employee's performance. This can be very damaging if there is ever litigation.
3. Managers should be trained in avoiding sexual harassment, harassment of employees on the basis of handicap, age, etc.
4. Encourage your client (if the company is large enough) to have a knowledgeable Human Resources Department, or at least one person who is charged with responsibility in this area. Small or family-run companies who ignore this are often breeding grounds for employment claims.
5. Encourage your client to pick up the phone and call you if they sense that an employee is becoming a problem, or if they are thinking of firing the employee. In this area, an ounce of prevention can save your client a ton of money in the long run.

V. Publications

- A. Drafting Employment Documents In Massachusetts, an MCLE publication in two volumes
- B. Massachusetts Employment Law, an MCLE publication in two volumes
- C. Labor and Employment in Massachusetts, a Lexis-Nexis publication by Jeffrey Hirsch of Robinson & Cole
 1. This is a comprehensive work which is particularly good at answering the kind of issues which employers, HR professionals, and management attorneys are asked every day, such as questions about the details of benefit plans, how to provide a COBRA notice, how to handle overtime claims, etc.
- D. Employment Law, 45 Massachusetts Practice Series, by Moriearty, Adkins and Lipsitz.

1. This is an excellent review of the law in Massachusetts, fairly presented, and comprehensive in scope.

E. Miscellaneous

The Massachusetts Bar Association, Labor and Employment Section holds an annual conference in April which reviews all significant developments during the past year, and generates excellent materials. MCLE, the MBA, the BBA and other groups offer many seminars in employment law areas; these are very informative.