

MASSACHUSETTS MUNICIPAL ASSOCIATION

ANNUAL LABOR LAW UPDATE*

January 19, 2018
Boston, Massachusetts

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UPDATE ON LABOR CASES³

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³ Remarks and handouts are for informational and training purposes only and do not constitute legal advice. You should contact Labor Counsel concerning any specific legal questions you may have.

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II. CASE LAW

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Gannon v. City of Boston, 476 Mass. 786 (2017)

2. The Supreme Judicial Court held that an employee who used medical marijuana to treat a debilitating medical condition may proceed with a claim of handicap discrimination after being terminated from employment based on her testing positive for her off-site use of physician-prescribed marijuana.

Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456 (2017)

3. The Appeals Court held that a Massachusetts employer may consider the results of a lie detector test lawfully administered by an out-of-state employer as part of an individual's application for employment in another state.

Saliba v. City of Worcester, 92 Mass. App. Ct. 408 (2017)

4. **The Appeals Court held that a school bus driver was entitled to partial unemployment benefits for a three day recess during Thanksgiving week in 2012 for which she was not paid, notwithstanding the fact that the bus driver performed services immediately before the Thanksgiving recess, and a had reasonable assurance of performing services immediately following the Thanksgiving recess.**

Cape Cod Collaborative v. Director of the Department of Unemployment Assistance, 91 Mass. App. Ct. 436 (2017)

5. **The Appeals Court held that the City of Somerville was exempt from liability under the Massachusetts Tort Claims Act where the Plaintiff's complaint against the City was rooted in the City's licensing process – specifically, its firearm licensing process.**

Andrade v. City of Somerville, 92 Mass. App. Ct. 425 (2017)

6. **The Appeals Court affirmed a \$2.9 million dollar jury award for the former chairmen of the Chelmsford Board of Selection who was defamed by a local resident in connection with the Chairman's role in a real estate development in the town.**

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Commonwealth v. Harvey J. Bigelow, SCJ-11974 (September 27, 2016).

I. LEGISLATION

1. **Pay Equity Act** – In August 2016, Governor Baker signed into law the Pay Equity (the “Act”), which goes into effect on July 1, 2018. The Act strengthens the current Massachusetts statutory prohibition on discrimination in wages based on gender to ensure that all Massachusetts employees receive equal wages for comparable work. The Act defines wages broadly as “all forms of remuneration for employment,” which includes hourly wages, salaries, bonuses, commissions, expense accounts, health insurance and other fringe benefits. To achieve its goal, the Act prohibits Massachusetts employers from discriminating against employees “on the basis of gender in the payment of wages” or from “pay[ing] any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work....” The Act defines comparable work as work that is “substantially similar” in that the work must involve “substantially similar skill, effort and responsibility” and be “performed under similar working conditions.” An employee’s job title and/or position description are not dispositive in determining whether two employees are performing comparable work.

Despite the Act’s equal pay mandate, employers are permitted, in certain circumstances, to establish variations in the payment of wages among employees. Any such variation must, however, be based upon seniority¹, merit, a system that “measures earnings by quantity or quality of production, sales, or revenue” (e.g., commission payments), the geographic location where a job is performed, education, training, or experience if such factors are reasonably related to the particular job, and/or travel (if the travel is a regular and necessary condition of the job). The Act also prohibits employers from (i) screening applicants based on wage or salary history, (ii) seeking the salary history of an applicant (unless the employer has made an offer and the applicant consents), and (iii) prohibiting employees from discussing their compensation with co-workers or colleagues. The Act creates an affirmative defense for an employer if the employer has completed a good faith self-evaluation of its pay practice within the previous three years and can demonstrate reasonable progress to eliminate pay differential based on gender.

The Attorney General’s Office is currently working on guidance regarding the Act that it expects to release later this spring.

2. **Pregnant Workers Fairness Act** – On July 27, 2017, Governor Charlie Baker signed the Massachusetts Pregnant Workers Fairness Act (“PWFA”). The PWFA goes into effect April 1, 2018 and amends Chapter 151B to:

¹ Protected leaves of absence, including leaves due to a pregnancy-related condition and parental, family, and medical leave, may not be used to reduce an employee’s seniority.

- Add “pregnancy or a condition related to said pregnancy, including, but not limited to, lactation, or the need to express breast milk for a nursing child” as a protected classification;
- Require employers to provide a reasonable accommodation (see below) for an employee’s pregnancy, or *any* condition related to the pregnancy, unless the employer can demonstrate that the accommodation would impose an undue hardship;
- Prohibit employers from retaliating against an employee for requesting an accommodation;
- Provide that employers must reinstate the employee to her original employment status or equivalent position with equivalent pay and accumulated seniority when the need for reasonable accommodations ceases; and
- Prohibit employers from requiring pregnant employees to accept a reasonable accommodation or take a leave of absence.

With respect to the requirement that employers provide reasonable accommodations to pregnant employees, the PWFA specifically enumerates several reasonable accommodations, including: (1) more frequent or longer paid or unpaid breaks; (2) paid or unpaid time off to recover from childbirth; (3) acquisition or modification of equipment or providing seating; (4) temporary transfer to a less strenuous or hazardous position; (5) job restructuring; (6) light duty; (7) private non-bathroom space for expressing milk; (8) assistance with manual labor; and (9) modified work schedules. Under the ADA, employers can require employees to submit documentation to support their need for a reasonable accommodation. The PWFA, however, prohibits employers from requiring documentation to support four reasonable accommodations: more frequent restroom, food, and water breaks; seating; limits on lifting over 20 pounds; and private non-bathroom space for expressing milk.

Employers must provide notice of the protections and rights created by the PWFA to all employees in a Handbook or by other means, and must provide notice to: (a) all new employees at the commencement of employment; and (b) any employee who notifies the employer of a pregnancy or related condition within 10 days of such notification.

3. **Marijuana Law** – On November 8, 2016, Massachusetts voters approved a ballot question legalizing marijuana for recreational and commercial use, Chapter 334 of the Acts of 2016 (the “Marijuana Law”). This past July, however, the Marijuana Law underwent a fairly significant re-write via Chapter 55 of the Acts of 2017, known as “An Act to Ensure Safe Access to Marijuana.” As revised, the Marijuana Law includes several key points relative to municipalities:

(a) Prohibiting / Regulating Marijuana Establishments:

- Communities that voted 'Yes' on Question 4 in November of 2016 may prohibit one or all types of recreational marijuana establishments by local referendum.
- Communities that voted 'No' on Question 4 may prohibit one or all types of recreational marijuana establishments by town meeting or city council vote only, up until December 31, 2019.
- In lieu of a full or partial ban, communities may still adopt bylaws or ordinances imposing reasonable regulations on the time, place and manner of marijuana establishment operations.
- The new Marijuana Act clarifies that zoning provisions may not prevent a medical marijuana establishment licensed as of July 1, 2017 from converting to a recreational facility.

(b) Local Referenda:

- The Marijuana Law now provides a form of ballot question for the local referendum seeking to prohibit recreational marijuana establishments, and provides authorization to place such a question on a regular or special election ballot.
- Municipal acts regulating or prohibiting recreational or medical marijuana establishments prior to July 1, 2017 are not affected by the new Marijuana Law.

(c) Host Agreements:

- Recreational and medical marijuana establishments must enter a Host Community Agreement with the municipality.
- Impact fees under a Host Community Agreement are capped at 3% of the facility's gross sales and are effective for no longer than 5 years.

(d) Local Sales Tax:

- Municipalities may, by local option, adopt a local sales tax on recreational marijuana establishments of up to 3% of sales (increased from 2%)

(e) Cannabis Control Commission:

- The Cannabis Control Commission expands to a 5-member body, with consolidated regulatory powers over both recreational and medical marijuana establishments.

On December 28, 2017, the state's Cannabis Control Commission released draft regulations. Once finalized, the regulations will govern the licensure of recreational marijuana established in Massachusetts, a process intended to start this spring. The draft regulations do not provide much in the way of additional guidance on the local regulation of recreational marijuana, beyond the limitations set forth in the statute approved by voters in November of 2016 and amended by the Legislature in July of 2017.

Under the draft regulations, marijuana operators would need to hold "community outreach hearings" before submitting a license application to the Cannabis Control Commission. In addition, the draft regulations provide that upon written request from the Cannabis Control Commission, municipalities have 60 days to certify that a proposed marijuana establishment complies with local zoning provisions. The draft regulations also provide that if a municipality has no local siting requirements, recreational marijuana establishments may not be sited within 500 feet of a public or private school, daycare center, or any facility in which children commonly congregate.

The final regulations are due by March 15, 2018. The Cannabis Control Commission will hold public hearings on the draft regulations in February

- 4. Proposed Changes to Fair Labor Standards Act Overtime Exemptions –** On May 18, 2016, the United States Department of Labor ("DOL") issued rules setting forth a new salary threshold for exempt employees under the Fair Labor Standards Act ("FLSA") which would have increased salary threshold increased from \$455 per week, or \$23,660 annually, to approximately \$913 per week, or \$47,476 annually, representing a substantial increase from the amount previously proposed by the DOL in 2014. The rules would have also tied the salary test to the 40th percentile of weekly earnings for full-time salaried employees, as determined by the United States Bureau of Labor Statistics for the lowest paid census region (South).

The regulations were set to take effect on December 1, 2016. On November 22, 2016, however, Judge Mazzant of the United States District Court for the Eastern District of Texas issued an injunction and ruled that the DOL exceeded its authority and ignored Congressional intent when it published its Final Rule raising the minimum salary level from \$23,660 annually to \$47,476 annually. In addition, the Court ruled that the DOL lacked authority to impose the automatic salary increase provision found in the Final Rule, which would have taken effect in January 2020.

In July 2017, the DOL announced a request for information which initiated a new rule-making process relative to the salary level test. The DOL's action in this regard is seemingly intended to create a salary threshold more reasonable than the one previously attempted by the Obama administration.

On August 31, 2017, Judge Mazzant struck down the May 2016 overtime rule in its entirety indicating that the DOL exceeded its authority.

As noted above, it is expected that the DOL will attempt to enact a more reasonable salary level test.

5. **The Tax Cuts and Job Act** passed by Congress on December 22, 2017, includes a provision that may have a significant impact on settlements of sexual harassment and other claims. Under Section 13307 of that Act, the Internal Revenue Code provision relative to the deductibility of expenses in carrying on a trade or business, was amended to read:

Payments Related to Sexual Harassment and Sexual Abuse – No deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment.

The amendment (which becomes Section 162(q) in the tax code) takes effect immediately.

6. **OSHA's Potential Application to Municipalities** – This past October, the Massachusetts Senate and the House of Representatives passed two bills that would make the workplace safety standards of the Occupational Safety and Health Administration applicable to state and local workers in Massachusetts. Before heading to Governor Baker's desk for his signature or veto, the Legislature must reconcile the two bills. If signed, a reconciled bill likely would extend OSHA standards to an estimated 400,000 public workers in Massachusetts.
7. **OPEB Reform Act** – In February 2013, then-Governor Patrick filed legislation to reform health insurance benefits for retirees that he contended would save \$20 billion dollars for the Commonwealth and municipalities over the next thirty years. Ultimately, the new legislation was not adopted. The current law, M.G.L. Ch. 32B § 20, provides that a city or town may establish an Other Post-Employment Benefits Liability Trust Fund, and may appropriate amounts to be credited to the fund. Any interest or other income generated by the fund shall be added to and become part of the fund.
8. **Cadillac Tax** – The Cadillac Tax (the "Tax") is a 40% excise tax on high end health insurance plans, passed by Congress as part of "ObamaCare." More specifically, the Tax only applies to health insurance plans that have premiums in

excess of \$10,200.00 for individuals, and \$27,500.00 for families. Therefore, every dollar spent in excess of \$10,200.00 for individuals, and \$27,500.00 for families, will be taxed at a rate of 40% (i.e., if an individual's premium costs \$10,500.00, only \$300.00 will be taxed at a rate of 40%). Notably, individual beneficiaries are not responsible for paying the Tax; rather, the Tax is paid by health insurance issuers and sponsors of self-funded group health plans. It is, however, expected that a portion of this tax will be passed on to the consumer by the health insurer.

On December 18, 2015, the President signed the "Consolidated Appropriations Act, 2016," a provision of which delayed the implementation of the Tax from 2018 until 2020.

At this point, for those under the GIC health plans it is unclear how the GIC will deal with the Tax if, and when, it becomes effective. For example, questions remain regarding how the Tax will impact a municipality's existing health insurance plans, and whether the Group Insurance Plan, itself, will pay the tax, or whether it will pass the Tax's costs on to municipalities.

Recently, House Ways and Means Committee Chairman Kevin Brady talked about potentially eliminating the Tax.

II. CASE LAW

- 1. The Plaintiff – a Boston police officer – who was permanently assigned to desk duties as a result of head injuries he suffered from his time as a mixed martial arts fighter, was entitled to a jury trial to determine whether he was a qualified handicapped individual who was capable of performing the essential functions of the job as a patrol officer without posing an unacceptably significant risk of serious injury to himself or others.**

Gannon v. City of Boston, 476 Mass. 786 (2017)

The City of Boston employed the Plaintiff, Sean Gannon, as a police officer beginning in 1996. For ten years, the Plaintiff served as a patrol officer. Outside of his employment, the Plaintiff was an avid mixed martial arts (MMA) fighter who made his professional debut in August, 2004. Plaintiff suffered several serious head injuries during the course of his fighting career. On October 7, 2005, during his last professional fight, he lost by a technical knockout and broke his right eye socket. A week later, when the Plaintiff returned to work, he was limited to “inside only” work (i.e., a desk job).

Throughout the time Plaintiff was limited to desk work, Plaintiff’s mental capabilities – in light of his MMA fighting – were evaluated by his own personal physicians, as well as physicians retained by the City. In 2008, Plaintiff’s psychiatrist, Dr. Tuesday Burns, opined that there were no “psychiatric or neurologic contraindications to Mr. Gannon being reinstated to full duty at the Boston Police Department.” The City’s psychiatrist, Dr. Marcia Scott, disagreed with Dr. Burns’ assessment stating that “Mr. Gannon has a serious chronic mental disorder as well as a history of repeated head trauma. These impairments interfere with his ability to accurately assess situations, communicate accurately, make accurate judgments, solve problems and manage the stresses involved in the job of an armed police officer.” Dr. Scott’s findings were supported by the City’s neuropsychologist.

The Plaintiff filed an MCAD claim against the City in 2012 alleging that it violated G.L. c. 151B, § 4(16) by refusing to return him to full duty. Plaintiff later removed his case to the Superior Court, which ultimately granted summary judgment in favor of the City. The Plaintiff appealed and the case went directly to the Supreme Judicial Court.

In its analysis, the Supreme Judicial Court described this type of case as one where “the employer admits that the adverse action was taken because of the plaintiff employee’s handicap, but contends that the employee is not protected under the statute because the employee was not capable of performing the essential functions of the job even with reasonable accommodation, and therefore is not a qualified handicapped person.” The Superior Court erred, however, when it did not analyze the above facts under this framework.

Under this framework, an employer can only prevail if “the employee fails to prove by a preponderance of evidence that he or she was able to perform the essential duties of the position with a reasonable accommodation.” Because there was conflicting testimony from expert

physicians as to whether the Plaintiff could capably perform the essential functions of his job, the City's motion for summary judgment should have been denied.

Should the Plaintiff demonstrate that he is, in fact, capable of performing the essential functions of his job, the City is entitled to present evidence showing that the employee would pose "an unacceptably significant risk of serious injury to the employee or others" if he was reinstated. Assuming the employer meets its burden of production, the plaintiff employee must "prove that he or she is capable of performing the essential functions of the job without posing an unacceptably significant risk of serious injury to the employee or others."

2. The Supreme Judicial Court held that an employee who used medical marijuana to treat a debilitating medical condition may proceed with a claim of handicap discrimination after being terminated from employment based on her testing positive for her off-site use of physician-prescribed marijuana.

Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456 (2017)

Christina Barbuto was hired into an entry-level position by Advantage Sales & Marketing, where she would be assigned to supermarkets to set up and hand out food samples to supermarket customers. After having accepted an offer of employment, Ms. Barbuto was informed that she would be required to submit to a mandatory drug test. Ms. Barbuto immediately informed her supervisor that she would test positive for marijuana because she suffers from Crohn's disease - a debilitating gastrointestinal condition. To treat her condition, Ms. Barbuto's physician had provided her with a written certification allowing her to use marijuana for medicinal purposes. Specifically, Ms. Barbuto's marijuana use enabled her to appropriately gain and maintain a healthy weight.

In response to Ms. Barbuto's disclosure, the supervisor stated that her medicinal use "should not be a problem." Despite the supervisor's confident assurance, Ms. Barbuto's employment was terminated for testing positive for marijuana after only completing one day of work. The employer's stated rationale was that it followed Federal, and not state, law with respect to marijuana use, and marijuana is a Scheduled I Controlled Substance under Federal law. According to the employer, it would have been "facially unreasonable" to accommodate the employee's use, which constituted a crime under Federal law.

Following her employment termination, Ms. Barbuto filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") and then withdrew her complaint to file her claims in Massachusetts Superior Court. Ms. Barbuto's Superior Court complaint pled six claims including, among others, handicap discrimination under M.G.L. chapter 151B and invasion of privacy under M.G.L. chapter 214, Section 1B. In May 2016, the Superior Court dismissed all of Ms. Barbuto's claims except for the invasion of privacy claim, which it stayed pending her appeal of the dismissed claims.

Barbuto appealed her decision and the case went directly to the SJC which made the following noteworthy findings:

- "Under Massachusetts law, as a result of the [medical marijuana] act, the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication;"
- "Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation;" and
- "A qualified handicapped employee has a right under G.L. c. 151B, § 4(16), not to be fired because of her handicap, and that right includes the right to require an employer to

make a reasonable accommodation for her handicap to enable her to perform the essential functions of her job.”

In making the above findings, the SJC made clear - in response to the employer's argument - "the fact that the employee's possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation." As the Court noted, an employer "would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use." Thus, the Court reasoned, the "only person at risk of Federal criminal prosecution for [such] possession" is the employee.

The SJC was also clear that upon request by an employee for an accommodation in the form of off-site use of medical marijuana, the employer is obligated to participate in the interactive process to explore whether there are any alternative, equally effective medications that could possibly be used that would not run afoul of the employer's drug policy. As stated by the Court: "[t]he failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination provided the plaintiff proves that a reasonable accommodation existed that would have enabled her" to perform the essential functions of the job with or without a reasonable accommodation.

3. The Appeals Court held that a Massachusetts employer may consider the results of a lie detector test lawfully administered by an out-of-state employer as part of an individual's application for employment in another state.

Saliba v. City of Worcester, 92 Mass. App. Ct. 408 (2017)

In 2007, after being honorably discharged from the United States Marine Corps, Philip Saliba applied for a job with the Connecticut State Police ("CSP"). As part of the application process, Mr. Saliba voluntarily took a polygraph examination (i.e., a lie detector test). Plaintiff was ultimately denied employment with CSP because of his past use of anabolic steroids.

Around the same time Saliba had applied for a job with the CSP, he also applied for a job with the Worcester police department ("WPD"). In connection with his WPD application, WPD sought and obtained the results of the polygraph test administered by the CSP. The WPD conducted its own investigation of Saliba, which included a personal interview. Following its investigation, WPD's chief of police recommended that Saliba be bypassed for the job. The chief's recommendation was based, in part, on the results of the polygraph test.

In 2011, Saliba applied for a job with the Worcester fire department ("WFD"). In 2012, Saliba was bypassed for a position with the WFD, in part, because of the polygraph test. In 2013, the plaintiff applied for a second time to the WFD. Again, however, Saliba was bypassed, in part, because of the results of the polygraph test. Saliba appealed this bypass to the Civil Service Commission. Around the same time, Saliba also filed a lawsuit in Superior Court alleging that the City violated G.L. c. 149 §19B by considering the polygraph test results in its decisions to bypass him for employment in 2011 and 2013.

G.L. c. 149 § 19B provides, in relevant part, that it is:

[U]nlawful for any employer ..., with respect to any of his employees, or any person applying to him for employment, including any person applying for employment as a police officer, to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations.

Saliba argued that §19B was enacted to protect "applicants for employment both from being required to take a lie detector test and from a potential employer's use of test results in the hiring decision, regardless of when and by whom such a test is administered." The City argued that §19B only prohibits it from "subjecting" an applicant "to, or request[ing] such person to take a lie detector test[,]" and that it "does not specifically prohibit an employer from using preexisting results from tests not requested or administered by the employer."

The Appeals Court agreed with the City, reasoning that the statutory language of §19B was unambiguous. The statute plainly prohibits an employer from "subject[ing]" an applicant to,

or “request[ing]” that an applicant take, a lie detector test. In this instance, the City did not subject Saliba to, nor request that he take, a lie detector test. Consequently, there was not violation of §19B. Instead, the City merely requested Saliba’s employment application from the CSP, which happened to contain the results of his polygraph examination. The City was free to consider the results in deciding whether to bypass Saliba for a position with the WFD.

4. **The Appeals Court held that a school bus driver was entitled to partial unemployment benefits for a three day recess during Thanksgiving week in 2012 for which she was not paid, notwithstanding the fact that the bus driver performed services immediately before the Thanksgiving recess, and a had reasonable assurance of performing services immediately following the Thanksgiving recess.**

Cape Cod Collaborative v. Director of the Department of Unemployment Assistance, 91 Mass. App. Ct. 436 (2017)

Stephanie Harris was a full-time bus driver for the Cape Cod Collaborative (“CCC”) who was responsible for transporting students to and from educational programs. Ms. Harris worked approximately 45 hours per week – two shifts per day, Monday through Friday. Under her contract with CCC, Ms. Harris did not receive holiday pay for time off when school was not in session.

During Thanksgiving week in 2012, CCC did not have school on Wednesday, Thursday, or Friday. Thus, that week, Ms. Harris only worked Monday and Tuesday for approximately 15 hours. CCC did not pay her for the three days when school was not in session, “even though she was ready and available to work.” Having not been paid, Ms. Harris filed a claim for unemployment benefits. The Department of Unemployment Assistance (“DUA”) approved her claim on the grounds that she was partially unemployed on Wednesday, Thursday, and Friday of that week.

CCC appealed the DUA’s finding to the District Court. CCC argued that Ms. Harris was “precluded from collecting unemployment compensation benefits during school vacations and any days not included in their contracts.” CCC’s position in that regard was based on G.L. c. 151A §28A(c) which precludes payment of benefits for “any week commencing during an established and customary vacation period of holiday recess....” CCC argued that “because Hennis performed services for [CCC] during the period immediately before the Thanksgiving recess, and had a reasonable assurance of performing services for [CCC] immediately following the Thanksgiving recess, she was not eligible to receive partial unemployment compensation benefits for the week ending November 24, 2012.” The District Court agreed with CCC’s interpretation and found that Ms. Harris was not eligible for benefits. The DUA appealed the District Court’s decision to the Appeals Court.

The Appeals Court noted that the plain meaning of G.L. c. 151A §28A(c) precludes the payment of benefits for “any week commencing during an established and customary vacation period or holiday recess....” Ms. Harris sought benefits for the week that commenced on Sunday, November 18th. The Court reasoned that because the week commenced on Sunday, November 18th, and the holiday recess did not start until Wednesday, November 21st, Ms. Harris “was not precluded from receiving unemployment compensation benefits by the exclusion set forth in §28A(c).” The Appeals Court distinguished this circumstance from one where a week commences during the vacation recess (i.e., Sunday of February vacation).

5. The Appeals Court held that the City of Somerville was exempt from liability under the Massachusetts Tort Claims Act where Plaintiff's Complaint was rooted in the City's licensing process – specifically, its firearm licensing process.

Andrade v. City of Somerville, 92 Mass. App. Ct. 425 (2017)

The Plaintiff, Carlos Andrade, was “grievously and permanently injured” when he was shot in the neck by Santano Dessin. Mr. Andrade sued the City of Somerville under the Massachusetts Tort Claims Act on the grounds that the City wrongly returned to Dessin the gun that he subsequently used to shoot Andrade.

By way of background, in January 2010, the Somerville police department (“SPD”) informed Dessin that his license to carry had been revoked because of an adjudication of delinquency in his juvenile record. Subsequently, the SPD took possession of three firearms from Dessin. Dessin appealed the SPD’s decision to Superior Court, which held that Dessin was allowed to possess firearms. After the Judge’s order, but before the Massachusetts Executive Office of Public Safety and Security (“EOPSS”) could determine whether to issue Dessin a new license to carry, the SPD returned Dessin’s three firearms to him in August 2011. Subsequently, the EOPSS notified the SPD that Dessin was disqualified from obtaining a license to carry based on his juvenile record. The EOPSS’s decision in that respect was affirmed by a Superior Court Judge in January 2012.

At that January 2012 hearing, the SPD “acknowledged that the firearms should not have been returned to... Dessin and that they would need to be surrendered to the police department.” The SPD also indicated to the Court that it would reacquire and secure Dessin’s firearms. Ultimately, however, the SPD did not recover the firearms. Ten months later, in October 2012, Dessin shot Andrade with one of the firearms the SPD failed to recover from Dessin. Thereafter, Andrade filed a complaint in Superior Court against the City under the Massachusetts Tort Claims Act alleging gross negligence, negligent supervision and training in violation of G.L. c 258 § 2, and loss of consortium.

The City moved to dismiss Andrade’s claims under § 10(e) of the Massachusetts Tort Claims Act (G.L. c. 258) which exempts public employers from liability for “any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.” In response, Andrade argued that §10(e) did not apply to his claims because his injuries were not the result of a firearm licensing decision made by the SPD. Instead, Andrade argued that the SPD was grossly negligent in returning the firearms to Dessin, and for failing to retrieve them.

The Appeals Court found Andrade’s interpretation of §10(e) was too narrow. Indeed, the Appeals Court noted that §10(e) “cuts a broad swath, exempting from recovery ‘any claim’ in a variety of named circumstances.” Citing prior precedent, the Appeals Court observed that §10(e)’s language encompasses claims ‘rooted in’ the licensing process, such that “if the gravamen of a plaintiff’s complaint can be traced back to any one or more of the types of events or activities delineated in §10(e), then the action is barred.”

Here, although Andrade's injuries were not directly caused by the firearm licensing process, they were "based upon" the SPD's decision to revoke Dessin's license to carry. Given that Andrade's complaint could be traced back to SPD's duty to "receive, store, and dispose of weapons when a person's firearm's license is revoked or denied[,] it fell within the purview of §10(e) and the City was, therefore, immunized from liability.

6. The Appeals Court affirmed a \$2.9 million dollar jury award for the former chairmen of the Chelmsford Board of Selection who was defamed by a local resident in connection with the Chairman's role in a real estate development in the town.

Van Liew v. Eliopoulos, 92 Mass. App. Ct. 114 (2017)

In 2007, Chelmsford's fire department and department of public works began considering options for a new fire station headquarters. One of the sites considered was a 2.41 acre property near the center of town owned by Eastern Bank (the "Property"). Ultimately, however, the fire department and department of public works decided not to purchase the Property.

In 2008, a local real estate developer, Michael Eliopoulos, approached the bank about purchasing the Property. Michael Eliopoulos was the father of Philip Eliopoulos. Philip served as Chairmen on the Chelmsford Board of Selectmen (the "Board") in 2007 and, thus, was familiar with the town's previous interest in purchasing the Property. Michael negotiated the sale of the property with Eastern Bank. Philip, also a real estate lawyer, reviewed the draft agreements for his father and served as his real estate counsel. For a part of these negotiations, Philip remained in his position as Chairmen of the Board.

In 2009, after his term on the Board had ended, Philip assisted Michael with developing the Property. Together, they put together a plan for rehabilitating a historic house on the Property, and for constructing a new four-unit, family-owned office building. Philip represented Michael's corporation throughout the permitting process and in several hearings before the historic district commission, conservation commission, and planning board.

Vociferous opposition to the project to develop the Property was led by a local business owner, Roland Van Liew. Mr. Van Liew "published statements criticizing Philip for engaging in self-dealing and conflicts of interest at the expense of Chelmsford[,]" and he "flooded Chelmsford residents with his messaging, accusing Philip and other Chelmsford official of violating State and local ethics laws...." Mr. Van Liew's actions were intended to "conjur[e] up unsavory images of shady 'back room' dealing at Chelmsford town hall, influence peddling, and fixed governmental proceedings." Mr. Van Liew's messaging went to extremes and was communicated across several avenues including mass emails, letters, a DVD sent to thousands of Chelmsford residents, Web site postings, a "glossy newsletter entitled 'Why Perjury matters,' law signs, bumper stickers, letters to newspapers, automated telephone calls, and video recordings of conferences and meetings."

After Philip responded publically to Van Liew's allegations, Van Liew filed suit against Philip for defamation. Philip then filed a counterclaim against Van Liew for defamation. At trial, the jury found Van Liew liable for defamation and awarded Philip \$2.9 million dollars in damages. Van Liew filed several post-trial motions, all of which were denied. Left with no alternative, Van Liew appealed the decision to the Appeals Court.

The central thrust of the Appeals Court decision dealt with whether Philip proved the elements of defamation of a public official.² The Appeals Court ultimately held that the evidence was sufficient to support the jury's finding that Van Liew defamed Philip and concluded that the \$2.9 million dollar award was appropriate.

The Appeals Court's analysis on these issues was extensive and is beyond the scope of this summary. However, by way of example, Van Liew twice stated in his crusade against Philip that Philip was under investigation – "Cohen, Eliopoulos Under Investigation.... [T]he Attorney General's office is now focusing on the town of Chelmsford and in particular the former selectman Phil Eliopoulos." Contrary to Van Liew's allegation, the Attorney General was not investigating anything, and Van Liew made this statement knowing its falsity.

With respect to Philip's time as Chairman of the Board, Van Liew had alleged that "Eliopoulos was simultaneously serving as Chairman of the [Board] and voted against [Chelmsford] purchasing [the Property]" in 2009. Van Liew's statement in this regard was, likewise, false, as neither Philip nor the Town voted against purchasing the property in March 2009, or at any other time. Van Liew knew this statement to be false because he admitted at trial "he had possession of the board minutes and had watched the video recording many times before making and repeating the false statement about the board vote."

² In addition to pleading and proving the common law elements of defamation, Philip, as a public official, was required to prove that Van Liew acted with actual malice when he published his statements regarding Philip.

7. **The Appeals Court held that when a police officer performs detail work for a third party, the Municipal Finance Law, G.L. c. 44 § 53C, will apply and payment for the detail work shall be made no later than ten working days after receipt of payment from the third party to the City, but where the detail work is performed for the City, the Wage Act, G.L. c. 149 § 148, applies and wages are due within six or seven days of termination of the pay period.**

Malden Police Patrolman's Association v. City of Malden, 92 Mass. App. Ct. 53 (2017)

The Malden Police Patrolman's Association ("Union") consists of seventy-nine police officers employed by the City. The Union and City were parties to a collective bargaining agreement which included provisions regarding paid detail work done by officers. In the summer of 2014, the union informed the city that it was in arrears on compensating the officers for the detail work, requested an explanation for the nonpayment, and demanded the outstanding pay. The City argued that "because the officers earned the detail pay for work performed for third parties, the city was exempt from the provisions of the Massachusetts wage and hour laws, requiring timely payment of earned wages."

Consequently, the union filed a lawsuit against the City alleging the City owed approximately \$410,000 to the officers for the past detail work. The union lawsuit was comprised of five counts: breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, and violation of G.L. c. 149 s. 148 (the "Wage Act"). With respect to the union's claim under the Wage Act, the Superior Court held that the "[U]nion could not prevail under the Wage Act due to the municipal finance law, G.L. c. 44 s. 53C."

Under the Wage Act, employers must pay wages to employees within *six or seven days* of termination of the pay period during which the wages were owed. In contrast, G.L. c. 44 §53C (the "Municipal Finance Law") provides that "[a]ll money received by a city... as compensation for worked performed by one of its employees on an off-duty work detail which is related to such employee's regular employment... shall be paid to such employee... no later than *ten work days* after receipt by the city... of payment for such services."

The Union ultimately appealed to the Appeals Court. The Appeals Court agreed, but only in part. Specifically, the Appeals Court held that "where the detail work is performed for third parties, the plain language of G.L. c. 44 s. 53C, governs with respect to detail pay. But, to the extent that the [C]ity 'hires' its own offices as 'employees' to perform detail services within the meaning of G.L. c. 149 s. 148B, payment is governed by the Wage Act."

The Appeals Court's holding was premised on the fact that in enacting s. 53C, the legislature seemingly made a conscious choice to afford a municipality more time to pay its employees compensation for detail work that is coming from a third party – where prompt payment to employees is dependent on the third party paying the City without delay. When the wages are coming directly from the City itself, however, the same concerns regarding delays in

payment from a third party do not apply. Consequently, in that instance, the City would be expected to comply with the Wage Act.

8. **The Supreme Judicial Court held that the Commissioner of Administration and Finance did not violate G.L. c. 150E §7(b) or G.L. c. 150E §10(e)(5) when he submitted an appropriation request to the Legislature that was accompanied by statements regarding the possible fiscal consequences if the Legislature, in fact, approved the appropriation request to fund CBA obligations.**

Commissioner of Administration & Finance v. Commonwealth Employment Relations Board, 477 Mass. 92 (2017)

In April 2009, Massachusetts entered into CBAs for the periods of July 1, 2009 – June 30, 2010, and July 1, 2010 – June 30, 2013. The latter agreement contained three scheduled salary increases, 1%, 3% and 3%, which would go into effect after each year of the agreement. Around the same time, Massachusetts executed a similar CBA with the correction officers union governing the 2010-2013 time period.

In June 2009, Governor Patrick submitted a revised appropriation for fiscal year 2010. In doing so, Governor Patrick anticipated that, as compared to earlier projections, there would be \$1.5 billion less in revenue, which he attributed to the global recession.

In June 2010, the Secretary of Administration and Finance submitted the costs items to the Legislature for the two CBAs scheduled to run from 2010 – 2013 as required by G.L. c. 150E § 7(b). The Secretary's letter to the Legislature stated that:

In addition to previous requests, I am fulfilling my statutory obligation to ask your consideration of the attached additional collective bargaining items in Section 2 of H.2, the Governor's fiscal year 2011 budget proposal. These items fund the collective bargaining agreements negotiated some time ago with [MCOFU] (Unit 4) and [COPS] (Unit 5). We are submitting them now because their costs first occur in fiscal year 2011.

These items provide for collective bargaining salary increases similar to contracts that were not funded during calendar year 2009. We have worked with the MCOFU and COPS leadership to reach agreement on contracts similar to those signed by other unions for this fiscal year and have failed to reach an agreement. Funding of these items will trigger a reopener in collective bargaining agreements that the Legislature recently did fund only because they contained delays in the salary increases.

One week after the Secretary sent the above letter, the corrections officers union filed a charge of prohibited practice "alleging that the Commonwealth failed to bargain in good faith, as required by G.L. c. 150E §10(a)(5), because the Secretary's letter did not support the 2010-2013 agreement."

The hearing officer found that the Secretary violated §7(b) because he refused to "take all necessary and appropriate steps to support the collective bargaining agreement." The hearing officer further concluded that the Secretary's failure to affirmatively support the appropriation

for the 2010-2013 CBA was also a violation of its duty to bargain in good faith, as required by §10(a)(5). The hearing officer's decision was affirmed by the CERB.

On appeal, the Supreme Judicial Court found that the CERB's decision was flawed in three major respects:

- First, the Secretary was under no obligation to affirmatively support a §7(b) appropriation request; instead, the Secretary was merely obligated to submit the request to the appropriate legislative body for an appropriation, which he did.
- Second, the Secretary's act of including a statement in his letter to the Legislature "regarding the fiscal consequences of approving the submitted appropriation in its §7(b) request" did not constitute a failure to bargain in good faith in violation of §10(e)(5). Indeed, there was no evidence to suggest that the Commonwealth bargained in bad faith when it agreed to the CBA that later necessitated the appropriation request.
- Third, an employer's obligation to submit an appropriation request pursuant to §7(b) is not linked to its obligation to bargain in good faith pursuant to §10(e)(5). §10(e)(5) governs an employer's conduct during the negotiations until completion; §7(b), to the contrary, deals with conduct occurring after a CBA has been finalized and executed. Thus, even if the Secretary had violated §7(b) – which he did not – such a violation, alone, would not constitute a failure to bargain in good faith under §10(e)(5).

In light of the foregoing, the Supreme Judicial Court reversed "the board's finding that the Commonwealth violated G.L. c. 150E §7(b) and committed a prohibited practice in violation of G.L. c. 150E §10(a)(5)."

- 9. The City of Springfield was held to have retaliated against Will Quarterman, an African American, when it denied his application for a liquor license, after Mr. Quarterman had filed an MCAD complaint against the City naming the mayor as a defendant.**

Quarterman v. City of Springfield, 91 Mass. App. Ct. 254 (2017).

Plaintiff, Will Quarterman, an African American, was denied a liquor license for his nightclub by the City of Springfield. During the license application process, Springfield's Mayor argued against the granting of the license to the Plaintiff. Shortly after Plaintiff's liquor license application was denied, however, the City voted – with the Mayor's support – to approve a liquor license for a nightclub in the same City district as where the Plaintiff's club was located.

Plaintiff later sued the City (and the chairman of the board of license commissioners) alleging (i) that the denial of his liquor license application was discriminatory, and (ii) that it was done in retaliation for him filing an earlier MCAD complaint. The jury found in favor of the Plaintiff on his retaliation claim, but against him on his claim of discrimination. The jury awarded the Plaintiff \$250,000 in lost profits and \$100,000 for emotional distress as a result of the City's retaliation. However, upon a motion by the City, the Superior Court amended the judgment by reducing the City's damages from \$350,000 to \$100,000. The Superior Court held that there was insufficient evidence present to sustain an award of \$250,000 for lost profits.

The Appeals Court upheld the jury's verdict in favor of the Plaintiff on the retaliation claim, holding that there was sufficient evidence “from which the jury could have inferred retaliatory animus” by the City against the Plaintiff. In particular, the Appeals Court observed that after the Plaintiff had filed an MCAD complaint in which he named the mayor as a defendant, the “mayor took an unusual interest in [the Plaintiff's] liquor license application.” To that end, the mayor physically appeared at the hearing for the Plaintiff's liquor license where he testified against the Plaintiff, and “recruited other witnesses to testify against the application.”³ The mayor's testimony at the hearing persuaded at least one board member to vote against the application.

The Appeals Court also upheld the Superior Court's ruling reducing the Plaintiff's damages. Although the Appeals Court held that lost profits are, generally speaking, recoverable as damages in cases involving G.L. c. 151B (the Massachusetts Anti-Discrimination Statute), there was insufficient evidence in this case supporting a recovery of lost profits. Specifically, Plaintiff's testimony was not supported by any substantive documentary evidence including shareholder agreements and employment agreements

³ It was very rare for the mayor to attend such hearings.

10. **Arbitrator's award reinstating terminated employee without loss of pay or other rights was upheld by the Appeals Court despite the arbitrator's finding that the employee had, in fact, engaged in conduct amounting to sexual harassment.**

City of Springfield v. United Public Service Employees Union,
89 Mass. App. Ct. 255 (2016).

The Massachusetts Appeals Court held that an arbitrator did not exceed her authority when she ordered a terminated employee reinstated without loss of pay or other rights, even though she found the employee to have engaged in conduct amounting to sexual harassment.

The City of Springfield ("City") terminated a male employee after he engaged in sexually inappropriate conduct. The Union grieved the employee's termination and the case was submitted to an arbitrator to determine whether "the termination of Grievant... [was] supported by just cause? If not, what shall be the remedy?"⁴

As an employee with the City, the grievant worked as a messenger, answering telephones, and making deliveries. The City terminated the grievant for an incident occurring at work on December 12, 2012. Specifically, the grievant was working at the main desk and received a telephone call that made him upset. The grievant then went into a female employee's office with whom the grievant regularly interacted.⁵

The arbitrator found that, after entering the female employee's office, the grievant:

"[T]old [the female employee] that 'the [expletive] p***y called again,' asked [the female employee] about the meaning of the word p***y [after she had previously told him not to use such language]; referenced 'not getting any,' grabbed his crotch on the outside of his pants, put his hand inside his pants, started to unbuckle his belt, and said 'sorry babe' as [the female employee] exited the room."

Despite the grievant's explicit and inappropriate behavior, the arbitrator found that his conduct "was a single, short-lived episode of anti-social behavior by an employee who posed no reasonable threat to others." The arbitrator concluded that the grievant's termination "was an excessive reaction in light of [his] long and problem-free work history and his developmental delays."⁶

⁴ At the arbitration, the arbitrator found that the grievant had significant physical and mental health problems, and that he suffered from cerebral palsy, epilepsy, and depression, and had an overall IQ of 74. The arbitrator also noted that, prior to his termination, the grievant had no disciplinary history.

⁵ The grievant's interactions with the female employee consisted of bringing her food and gifts and following her around the office. The grievant was also described to have had a "crush" on the female employee.

⁶ The arbitrator also found that the grievant was subjected to disparate treatment in that the City had declined to terminate another employee who had "engaged in a six-month course of sexual harassment directed at a co-worker" and received only a reprimand.

The City appealed the arbitrator's decision claiming that the arbitrator violated public policy when she reinstated the grievant in light of her finding that he had engaged in conduct amounting to sexual harassment, and that such reinstatement precluded the City from taking action required by state and federal law regarding sexual harassment. The Court rejected both arguments.

First, the Appeals Court noted that it was within the arbitrator's "ample authority to conclude that," in light of the grievant's "significant mental and physical limitations, his pliant demeanor, and his twenty-two year problem-free work history, [his] misconduct, despite its severity, did not require termination." Second, the Court held that the arbitration award did not preclude the City from fulfilling its state and federal statutory mandates to take remedial action to prevent and correct sexually harassing behavior. The Court reasoned that, while the employee was reinstated without loss of pay or other rights, the City could, nonetheless, provide the grievant with counseling and training regarding his sexual harassment. Such actions would allow the City to satisfy its statutory obligation to address and prevent sexual harassment.

- 11. The Supreme Judicial Court held that a private citizen did not criminally harass an elected official when he sent anonymous letters to the elected official sharply criticizing his job performance and seeking his resignation, but further held that the private citizen may have criminally harassed the elected official's wife when he sent three vulgar letters to her.**

Commonwealth v. Harvey J. Bigelow, SCJ-11974 (September 27, 2016).

Harvey Bigelow was convicted of two counts of criminal harassment under G.L. c. 265 § 43A for sending five letters he allegedly wrote to Michael Costello and his wife, Susan Costello, after Michael Costello was elected selectmen in the town of Rehoboth. Between May 9 and July 23, 2011, Bigelow sent five anonymous, typed-written letters to the Costello's.

The first letter Bigelow wrote began: "Michael Costello – The biggest f*cking loser I have ever met. You should be utterly ashamed of yourself for even suggesting that anyone take you seriously as 'chairman of the board of selectm[e]n.' It won't be long before you crash and burn big time." The second letter Bigelow sent referred, in part, to Michael Costello's 'criminal mess[,] that Costello was being investigated by several governmental agencies, and that he was guilty of fraud.

The third and fourth letters Bigelow sent were addressed to Susan Costello. The third letter stated, in part, that: "I am sure you are not surprised to receive another letter regarding the disgusting cheat you are married to... [W]hat were you thinking getting tied up with such a scum bag." The letter concluded: "Have you selected a new place to live? Maybe now would be a good time to preplan your future... If I were you, I'd spend less time defending this worthless human being and more time worrying about yourself." In his fourth letter, also addressed to Susan Costello, Bigelow enclosed a letter to the editor of a local newspaper that was critical of her husband, with the handwritten note.⁷ Bigelow's fifth letter was addressed to "Susan 'The Maid' Costello" on July 23, 2011 and contained allegations that her husband was having an affair with certain female town employees.

Bigelow was ultimately charged and convicted of criminal harassment for sending the aforementioned letters. Bigelow appealed his convictions to the Supreme Judicial Court, claiming that his letters constituted protected, political speech.

The Supreme Judicial Court held that Bigelow's letters to Michael Costello constituted protected political speech. In so holding, the Supreme Judicial Court reasoned that the letters constituted protected political speech because their "central thrust [wa]s criticism of [Costello] as a selectman in the town; the personal insults and allegations concerning Michael's alleged criminal past and sexual improprieties appear to be intended to persuade him to resign from his elected position." In addition, the Court further held that Bigelow's conduct in writing and mailing the anonymous letters to Michael Costello was not, by itself, a criminal act.

⁷ Bigelow's handwritten note read: "[t]he authorities will continue to hound [Michael] until you and he can't stand it anymore. Maybe you will have to live like Whitey Bulger frequenting plastic surgeons to have any hope of a peaceful lifestyle. The only difference is that Whitey had unlimited funds and you don't."

The Court had a different opinion of the letters Bigelow sent to Susan Costello – who was not a selectman and did not hold political office – holding that the letters’ content may have constituted true threats – conduct that is proscribed by § 43A. Indeed, the three letters to Susan Costello “contained vulgar and hateful insults and comments that in their choice of language and their repetitive nature were disturbing....” In addition, certain of the comments, “such as Susan’s possible future need to have plastic surgery to change her appearance as a self-protective measure, [and] her current need to move out of their home... could be found to qualify as expressing a danger to Susan’s personal safety, especially in her home.”

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D. is a member of the firm's Labor, Employment and Employee Benefits Group and is the former chair. He has extensive experience in labor and employment law. He has frequently represented management in labor and employment cases before government agencies, including the National Labor Relations Board, the Department of Labor and the Massachusetts Commission Against Discrimination. He has personally conducted more than 600 labor negotiations, including numerous negotiations involving teachers, factory workers, hospital employees, and public employees. D. also practices education law and represents public and private schools in Massachusetts. Presently, D. is labor counsel for various private and public employers in Massachusetts and regularly advises employers on labor and employment law issues.

He drafted a portion of the Massachusetts Labor Statute and is a founder and former management chair of the State Joint Labor Management Committee (Dunlop Committee) and the Worcester County Bar Association Labor and Employment Law Committee.

In 2013, D. received the 2013 Cushing-Gavin Labor-Management Counsel Award. Also in 2013, D. was awarded a rare honorary membership in the International City Management Association (ICMA). Honorary membership in ICMA is rarely awarded and is given to an individual outside of the profession of local government management because of his or her distinguished public service and contributions to the improvement and strengthening of local government.

Human Resource Executive Magazine and *Lawdragon* have recognized D. as being one of the "Top 100 Corporate Employment Attorneys in the United States" and in 2014 elected him to the Human Resources Hall of Fame. D. was selected by his peers for inclusion in *The Best Lawyers in America* ©2018 in the fields of Employment Law – Management and Labor Law – Management (Copyright 2018 by Woodward/White, Inc., of Aiken, SC). D. was also named Best Lawyers' 2014 Worcester Employment Law – Management "Lawyer of the Year." In 2007, the Massachusetts Municipal Personnel Association selected him as the recipient of its annual Emil S. Skop Award for outstanding contributions to human resources management. D. has been named one of Massachusetts "Super Lawyers" by *Boston* magazine and *Law & Politics* every year since 2006. D. has received an AV® Preeminent Peer Review Rating by *Martindale-Hubbell*, the highest rating available for legal ability and professional ethics. In 2015 the Worcester County Bar Association gave D. their Distinguished Service Award.

He is a fellow of the College of Labor and Employment Lawyers which includes the leading labor lawyers in the U.S.

He is a lecturer of labor relations at Clark University.

ATTORNEY BIOGRAPHY – DEMITRIOS M. MOSCHOS

Publications (Partial Listing)

- “Workplace Emergencies,” *HRMA Perspectives* (October 2013)
- “How to Conduct an Employment Investigation,” *HRMA Perspectives* (October 2012)
- “Federal Court Upholds NLRB’s Notice-Posting Rule, but Invalidates Enforcement Penalties Contained in Final Rule,” (April 2012)
- “Summary of Seminar on Lobbying Law,” WCBA, Legal Lines (May 2011)
- “2010 Amendments to the Massachusetts Personnel Records Law,” *HRMA Perspectives* (October 2010)
- “New Wage Law Prompts Review of Pay Practices,” *HRMA Perspectives* (September 2008)
- “Identity Theft,” *HRMA Perspectives* (February 2007, updated April 2008)
- “U.S. Department of Labor Proposes to Review Overtime Regulations,” *HRMA Perspectives* (May 2003)
- “Change in Employer and Individual Liability Under Harassment Law,” *MBA Journal*, Section Report (Spring 2001)
- “Employers Can Be Held Liable for Sexual Harassment that Takes Place Without Their Knowledge,” *Boston Business Journals*, June 20-July 6, 2000

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Department of Labor Relations Advisory Council, chair, re-appointed by Governor Baker

Labor and Employment Relations Association, MA Chapter past chair

National Association of College and University Attorneys, Continuing Legal Education Committee

Town of Sherborn, Personnel Board

Greek Orthodox Metropolis of Boston Council, Board of Directors

MassEdCo, Board of Directors

Nick is a member of the Firm's Labor, Employment and Employee Benefits Group and chair of the Higher Education Group. His practice includes traditional private- and public-sector labor law, litigation of employment disputes, and counseling on labor, employment and human resource matters. While maintaining a diverse practice, he has developed a significant emphasis on labor relations. Nick regularly counsels clients on traditional labor issues, including election campaigns, complex contract formation disputes, grievance adjustment and arbitration, unfair labor charges, strikes, picketing, and other work stoppage issues and reduction-in-force planning. Nick has negotiated over 150 collective bargaining agreements and successfully represented public sector clients at the JLMC. He has appeared before numerous state and federal agencies including the National Labor Relations Board, the Massachusetts Division of Labor Relations, the Equal Employment Opportunity Commission, Massachusetts Commission Against Discrimination and the Occupational Safety and Health Administration.

Boston magazine and *Law & Politics* have recognized Nick as a Massachusetts "Super Lawyers" since 2013 and a Massachusetts "Rising Star" from 2006 to 2010. He was also selected by the Worcester Business Journal as one of "40 Under Forty" young professionals honored for their professional achievements and community service. In 2017, *Human Resource Executive Magazine* and *Lawdragon* have recognized Nick as being one of the "Top 20 Lawyers in Traditional Labor & Employment Law."

Representative Matters

- Successfully represented City in obtaining permanent stay of arbitration based upon unenforceable "Evergreen" clause
- Successfully negotiated sweeping municipality-wide (including School Unions) plan design changes through informal coalition bargaining
- Developed strategies for a health care provider during picketing and work stoppage
- Successfully guided a service-industry client during union organizing, including defending related unfair labor charges, and card-check election
- Co-represented an employer and union in union duty of fair representation litigation in federal court
- Represented a municipality in a \$4 million arbitration related to health insurance premium contribution for unionized employees

ATTORNEY BIOGRAPHY – NICHOLAS ANASTASOPOULOS

Representative Matters (Continued)

- Represented a higher education institution in a complex union recognition dispute
- Defended an unfair labor charge related to a municipality's decision to lay off police officers

Publications/Presentations

- Quoted in, "NLRB says RAs may be deemed 'employees'," *Massachusetts Lawyers Weekly*, May 4, 2017
- "MOOCs: When Opening Doors to Education, Institutions Must Ensure that People with Disabilities Have Equal Access," *The New England Journal of Higher Education*, August 2013 (co-author)
- "Yeshiva Redux: Religiously Affiliated Institutions and the Right to Unionize," National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 2013
- "What the Presidential Election Means for Non-Unionized Workplaces," Mirick O'Connell Labor, Employment and Employee Benefits Seminar, March 2013
- "Laboratory Safety (and Liability) in the Research Environment," NACUA, Fall 2012 CLE Workshop, November 2012
- "OSHA and Criminal Prosecution of UCLA," College of Worcester Consortium, November 2012
- "OSHA Announces Extended Compliance Date for New Residential Construction – Fall Protection Directive," ABC, Inc./Gould Construction Institute, June 2011
- "The Future Employee Voice in the Workplace—Union and Non-Union," 32nd Annual Labor and Employment Law Spring Conference, Massachusetts Bar Association, June 2011
- NLRB Labor Law Update, in-house client presentation, June 2011
- Public Sector Labor Law Update, Massachusetts Municipal Management Association, June 2011
- "Labor Law Update," Massachusetts Municipal Management Association, June 2011
- "EFCA" Seminar, in-house client presentation, June 2011
- Records Management and Documentation, Massachusetts Municipal Personnel Association, May 2011
- "Collective Bargaining in the Brave New World: Exploring the Impact of Electronic Media on Negotiations, Protected Activity and Privacy in the Modern Workplace," 38th National Conference, National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 2011
- "What Every Non-Unionized Employer Needs to Know About the New National Labor Relations Board (NLRB)," Mirick O'Connell Labor, Employment and Employee Benefits Seminar, March 2011
- "Employee Documentation," in-house client presentation, March 2011
- "CORI and Personnel Records," in-house client presentation, March 2011
- "Organizing Activity in a Non-Union Workplace," Healthcare Program, January 2011
- "The Ins and Outs of OSHA – Preparing for an Audit," Gould Construction Institute, May 2010
- "Workplace Investigations: An Overview of When, Why, and How to Conduct a Workplace Investigation," April 2010
- "College Campuses and Labor Law," Colleges of Worcester Consortium, April 2010
- "OSHA: Preparing for an Audit and Legislative Update," Mirick O'Connell Labor and Employment Law Update Seminar, March 2010
- "Union Avoidance in the EFCA ERA," Mirick O'Connell Seminar, February 2009
- "President Starts Making Good on Campaign Promises to Unions" *HRMA Perspectives*, February 2009
- "The New Family and Medical Leave Act" HRMA Seminar, January 2009
- "NLRB Addresses Two Significant Issues: Voluntary Recognition and Unfair Labor Practice Charge Involving Union Salts," *HRMA Perspectives*, December 2007
- "Balancing Employee Privacy Rights with an Employer's Need to Know," Mirick O'Connell Labor and Employment Law Update Seminar, November 2007
- "Collective Bargaining and the GIC; What Are Your Options?" Association of Town Finance Committees Annual Meeting, November 2007
- "Basic Legal Aspects of Collective Bargaining," lecture, UMass/McCormack Graduate School, Topics in Municipal Governance, Fall 2006-present
- "Communicating across Generational and Gender Gaps in the Workplace," Mirick O'Connell Labor and Employment Law Update Seminar, November 2006
- "NLRB Strengthens Employers' Ability to Maintain Harassment-Free Workplace," *HRMA Perspectives*