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# ***ANNUAL LABOR LAW UPDATE***

***Selected Case Law, MCAD Review, and  
Legislation Update***

**February 9, 2022**

**Presented by: Michael J. Maccaro**

# Agenda

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- **Case Update** – Overview of selected case law developments
- **Massachusetts Commission Against Discrimination** – Overview of Commission statistics and selected decisions
- **Legislation Updates** – Overview of recent and pending legislation

# Case Law Update

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- Selected Massachusetts Supreme Judicial Court Decisions
- Selected Massachusetts Appeals Court Decisions
- Selected Massachusetts Superior Court Decisions
- Selected First Circuit Court of Appeals Decisions

# MA Supreme Judicial Court: Civil Service - Just Cause, Race Retaliation

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## **Town of Brookline v. Alston, 487 Mass. 278 (2021)**

- The underlying dispute began with a racist comment that was left on the voice mail of the Plaintiff, an African American Fire Fighter.
- After a tumultuous six years, the Plaintiff was ultimately terminated for extended absences from work.
- The issue in the case was whether the Civil Service Commission may consider evidence related to a racially hostile or retaliatory work environment when assessing whether a municipality had just cause to terminate a tenured civil service employee?

# MA Supreme Judicial Court: Civil Service - Just Cause, Race Retaliation

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## **Town of Brookline v. Alston, 487 Mass. 278 (2021)**

- **Court's Analysis**: Racist and retaliatory acts, combined with an employer's arbitrary and capricious response, may be sufficient to support a determination that a termination was unjustified. The Commission may find that an employer is responsible for intolerable workplace conditions, including racist and retaliatory acts, that render an employee unfit to perform his or her job duties and result in the employee's termination, and therefore, the employee's unfitness is not just cause for termination.

# MA Supreme Judicial Court: Rebuttal for Personnel File

## **Meehan v. Medical Information Technology, Inc., SJC-13117** **(December 17, 2021)**

- At-will employee was terminated after he sent his supervisor a rebuttal to having been placed on a performance improvement plan.
- Employee filed a suit against his employer arguing that his termination was in violation of public policy.
- M.G.L. c. 149, Section 52C provides a statutory right to submit rebuttals in personnel files.
- Lower court dismissed claim finding that statutory right was “not a sufficiently important public policy.”

# MA Supreme Judicial Court: Rebuttal for Personnel File

## Meehan v. Medical Information Technology, Inc., SJC-13117 (December 17, 2021)

- SJC determined that the termination of an employee for exercising statutory right to file a rebuttal to information included in a personnel file fell within public policy exception to employment at will. Termination on basis of employee filing such rebuttal is wrongful discharge violating public policy
- SJC did not address the question of whether an individual could be terminated for what was contained *within* the rebuttal
  - Protection for strongly worded disagreements
  - No protection for threats of personnel violence, abuse or similarly egregious responses if included in rebuttal

# MA Appeals Court: Duty to Bargain – Fitness for Duty Examinations

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## City of Newton v. Commonwealth Employment Relations Board, No. 20-P-1269 (December 30, 2021)

- The chief of police for the City of Newton noted that a captain had taken an unusually high number of personnel days following a death in the family and a non-work injury.
- The chief placed the captain on paid administrative leave pending results of physical and psychological fitness for duty examinations.
- The union sent a letter seeking certain information regarding the completed physical and impending psychological examinations and *demanding to bargain over*, the selection of the examiner, the information to be transmitted, the testing protocols, and information relating to the results.



# MA Appeals Court: Duty to Bargain – Fitness for Duty Examinations

## **City of Newton v. Commonwealth Employment Relations Board, No. 20-P-1269 (December 30, 2021)**

- Affirmed Commonwealth Employment Relations Board decision that city had to engage in impact bargaining over how police department in Newton will implement the criteria and procedures for the fitness for duty examinations
- Criteria that union sought to bargain was different than City's order for the examinations themselves
- For purposes of bargaining: recognizing difference between ordering an examination and the criteria/procedures for implementation

# MA Appeals Court: Mandatory Retirement Age

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## **Demers v. Town of Foxborough, 99 Mass. App. Ct. 603 (2021)**

- The Plaintiff served as a reserve police officer for twenty-one years (never a full-time officer).
- The police department had a written policy that its reserve police officers must retire at age sixty-five (same as regular police force).
- The Plaintiff's service was terminated when he reached age sixty-six.
- The Plaintiff filed a complaint in Superior Court alleging termination was age discrimination in violation of M.G.L. c. 151B, Section 4.

# MA Appeals Court: Mandatory Retirement Age

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## **Demers v. Town of Foxborough, 99 Mass. App. Ct. 603 (2021)**

- State and municipalities can make age based employment decisions if those decisions are authorized by any general or special law.
- Reserve officers were in the “occupation” of a uniformed member of a police department as that term was defined in St. 1987, c. 415, § 2 and therefore subject to the mandatory retirement age provision contained in that law

# MA Superior Court: Offer Letter

## **Moore v. LGH Medical Group, 1981CV00081 (March 5, 2021)**

- After a favorable interview, the Defendant issued the Plaintiff an e-mail and attachment entitled “Offer Letter – Lowell General Hospital.”
- The e-mail stated, in pertinent part, that the hospital was “pleased to make you an offer to join us.”
- The attached letter spelled out the compensation package.
- The e-mail also stated that the attachment was not a binding document, but acceptance would prompt the parties to generate an employment contract.
- After several e-mails between the parties, the hospital informed the Plaintiff that they would not move forward with an offer of employment and proposed contract.

# MA Superior Court: Offer Letter

## **Moore v. LGH Medical Group, 1981CV00081 (March 5, 2021)**

- The Plaintiff sued for breach of contract and promissory estoppel
- The Superior Court granted Defendant's motion to dismiss on both counts.
- Regarding enforceability of precontractual agreements, e.g. Offer Letter, "the controlling fact is the intention of the parties."
- Offer Letter and subsequent conduct □ Not parties' intention that Offer Letter constitute an employment contract.
- Offer Letter □ intended to confirm interest in position and acceptance of proposed compensation
- Also disposed of promissory estoppel claim
  - "...hope or expectation even though well founded, is not equivalent to either legal detriment or reliance."

# MA Superior Court: COVID-19 Vaccination Mandates

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## **State Police Association of Massachusetts v. Commonwealth,** **2184CV02117 (September 23, 2021)**

- On August 19, 2021, Governor Baker issued Executive Order 595 which mandated that the state establish a policy requiring that all employees of the Commonwealth's Executive branch prove that they have received full COVID-19 vaccination by October 17, 2021.
- The State Police Union issued a demand to bargain the impacts of the order.
- The Union filed a charge of prohibited practice with the Department of Labor Relations.
- The Union also filed for injunctive relief in Superior Court.

# MA Superior Court: COVID-19 Vaccination Mandates

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## **State Police Association of Massachusetts v. Commonwealth,** **2184CV02117 (September 23, 2021)**

- The Superior Court denied the Union's motion for a preliminary injunction.
- No irreparable harm to union because any discipline imposed pursuant to the vaccination policy could be rescinded and an employee made whole through an award of back pay and removal of the discipline.
- Balancing of harms □ union's harms outweighed by public interest in protecting the health and safety of workforce and public

# MA Superior Court COVID-19: Vaccination Mandates (cont.)

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## **Local 589, Amalgamated Transit Union v. Massachusetts Bay Transportation Authority, 2184CV02779 (December 22, 2021)**

- Union's motion for preliminary injunction denied; ordering arbitration for parties to resolve disagreement of MBTA vaccination policy provisions
- Union did not demonstrate that it is likely to prevail on merits
- Balance of irreparable harms does not favor issuance of injunctions.



# U.S. Court of Appeals First Circuit: Religious Exemption to Vaccination Policy

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## Together Employees v. Mass. Gen. Brigham, 19 F.4th 1 (2021)

- Affirmed denial of a preliminary injunction to reinstate employees placed on unpaid leave before termination
- Plaintiffs failed to show an adequate remedy at law □ money damages is the proper remedy, not reinstatement
- District Court held: Plaintiffs could likely *not* show that they could defeat the defendant's assertion of *undue hardship*. First Circuit did not disagree with this
- Because deadline for vaccination passed, plaintiffs cannot point to impossible choice as a special factor because they already made their choice- to not get the vaccine

# U.S. Court of Appeals First Circuit: Wage Act Day of Discharge

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## **Knous v. Broadridge Financial Solution, Inc., 991 F.3d 344 (2021)**

- The Plaintiff, an at-will employee, was notified in a meeting that the company was eliminating his position.
- The Company informed the Plaintiff that his pay and benefits would continue until the following Friday.
- The Company informed the Plaintiff to return all equipment and immediately cease performing any work.
- The following Friday, the Company paid the Plaintiff his final paycheck, including all accrued vacation pay.
- Plaintiff filed a lawsuit claiming a violation of the Wage Act, alleging he should have been paid on the day he was sent home.

# U.S. Court of Appeals First Circuit: Wage Act Day of Discharge

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## **Knous v. Broadridge Financial Solution, Inc., 991 F.3d 344** **(2021)**

- After removal to federal district court, court granted summary judgment finding that “discharge from employment” under the Wage Act “occurs upon the severance of the employment relationship,” not simply when employer tells an employee to stop working.
- First Circuit affirmed- Wage Act evidences a concern that employees be paid all wages and benefits on time, and that the day of discharge is “the time for a final accounting and payment.”

# MCAD Agenda

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- Review of MCAD Operations and Statistics
- Selected Massachusetts Commission Against Discrimination Decisions

# MCAD

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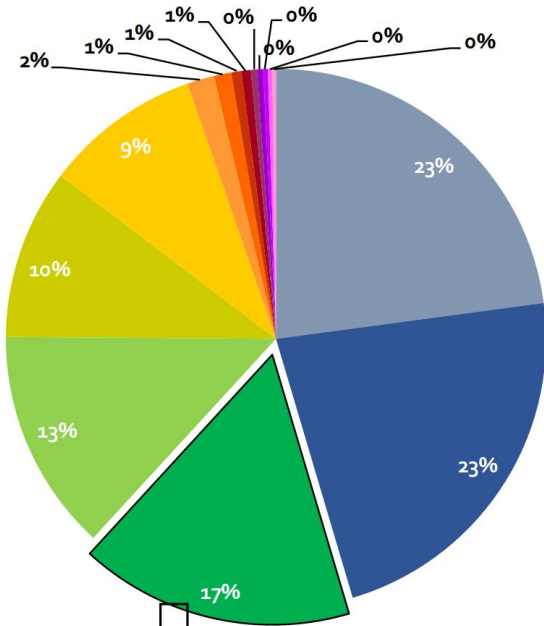
- Due to the COVID-19 health crisis, the MCAD closed its doors to the public but remains open doing business through email, telephone and video conference technology.
- Many of the agency's proceedings are held via telephone, such as investigative conferences, mediations, conciliations, preliminary hearings (LOPC Appeals), status conferences and pre-hearing conferences.
- MCAD ran several public awareness training and outreach programs.
- FY21 MCAD Annual Report:
  - The MCAD received 2,463 new complaints in FY 2021, an approximately 11% decrease from FY 2020.

# MCAD

Breakdown of Complaints by Protected Category

Complaints by Protected Category	
Disability	1,060
Retaliation	1,044
Sex	760
Race	616
Age	473
National Origin	434
Sexual Orientation	75
Religion	48
Public Assistance	28
Gender Identity	26
Children	17
Family Status	17
Lead Paint	13
Other*	12
Military Status	10

\* Includes Criminal Record, Marital Status, and Genetics



**Sex Discrimination Breakdown**

Sex	477
Harassment	228
Parental / Pregnancy	89

# MCAD Statistics

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- FY21 Investigative Findings
  - Probable Cause – 241
  - Lack of Probable Cause - 1158

# Selected MCAD Decisions

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- MCAD & Aime v. Mass. Dept. of Correction, 43 MDLR 1 (2021).
  - Complainant's transfer was not retaliatory action because it did not objectively disadvantage him and Hearing Officer did not err by considering evidence of an audio recording of an interview with an absent witness
- MCAD & St. Marie v. ISO New England, Inc., 43 MDLR 5 (2021).
  - In analyzing retaliation, the Appeals Court rules that prior disciplinary incidents involving the Complainant should have been taken into account by the hearing officer



# Selected MCAD Decisions

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- O’Leary v. Brockton Fire Dept. & Nardelli, 43 MDLR 15 (2021).
  - Complainant firefighter brought claims against Respondent for hostile work environment due to humiliating pranks and failure to accommodate learning disability. Respondent employer was found liable for the former hostile work environment claim but the latter claim was dismissed
- Reed v. Pipefitters Association of Boston, Local 537, No. 13-BEM-03479 and 14-BEM-01975 (Nov. 22, 2021).
  - Labor organizations must provide reasonable accommodations for union members with disabilities

# Legislation Update Agenda

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- Emergency COVID-19 Paid Sick Leave
- Juneteenth
- MA Paid Family and Medical Leave Act (PFML)
- Massachusetts Police Reform
- OSHA

# Emergency COVID-19 Paid Sick Leave, *Effective May 28, 2021*

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- Employers must provide paid leave to employees for COVID-related illnesses, quarantine, and vaccinations. Employers are eligible to apply for reimbursement from the state for leave granted.
- Employers are required to pay up to \$850 per employee, and the employer may seek reimbursement up to \$850 per employee.
- September 29, 2021: Law amended to extend duration of program and expand reasons for taking leave

# Emergency COVID-19 Leave (cont)

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- Employees who work 40+ hours per week  40 hours of paid sick leave
- Employees who work less than 40 hours per week  leave equal to the avg. number of hours weekly
- Employees with varied schedules  leave equal to the avg. number of hours weekly over the past 6 months. If the employee worked less than 6 months  leave equal to number of hours weekly that the employee reasonably expected to work when hired.

# Emergency COVID-19 Leave (cont)

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- **Reasons for Leave**

- Employee's need to self-isolate and care for themselves or a family member due to a COVID-19 diagnosis;
- Employee's need or the employee's family member's need to obtain a medical diagnosis, care, or treatment for COVID-19 symptoms;
- Employee's need or the employee's family member's need to obtain or recover from a COVID-19 vaccine;

# Emergency COVID-19 Leave (cont)

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- **Reasons for Leave (cont)**
  - Employee or the employee's family member received a quarantine order or other similar determination by a government official, health authority with jurisdiction, the employer, or a health care provider; or
  - Employee's inability to telework because of COVID-19 symptoms.

# Emergency COVID-19 Leave (cont)

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- To obtain reimbursements for providing such leave, employers must require employees to submit requests for leave and should therefore develop and distribute a form requiring employees to include their name, dates requested for leave, a statement of the COVID-19 related reason along with written support for the reason, and a statement that because of the COVID-19 related reason the employee is unable to work or telework.

# Emergency COVID-19 Leave (cont)

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- All health information of an employee or an employee's family member is confidential and cannot be disclosed to third parties without express permission by the employee.



# Emergency COVID-19 Leave (cont)

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- Employers cannot require employees to use other types of available paid leave before they use leave under this law. Employers also cannot require employees to find a replacement worker to cover time missed while using leave under this law.
- Further, employers must not retaliate against any employee for exercising their rights under this law.
- Employers can send questions to [ESL@dor.state.ma.us](mailto:ESL@dor.state.ma.us).

# Juneteenth

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- June 2021: Juneteenth was added as a Federal Holiday
- Massachusetts added Juneteenth as a State Holiday in the Summer of 2020

# Massachusetts Paid Family and Medical Leave Act (PFML)

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- Applies to Municipalities that Specifically Adopted PFML program
- Maximum State Average Weekly Benefit Amount Increased on January 1, 2022 to **\$1,084.31** per week
- Proposed legislation to subject municipalities to PFML without the need for local adoption of the statute (c. 175M). House Bill No. 2044/Senate Bill No. 1160

# Massachusetts Police Reform

## *An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth (Signed 12/31/2020)*

- Includes mandatory certification process for police officers for more accountability and transparency
- Generally identifies when appropriate to use physical force
- Bans use of chokeholds
- Prohibits firing to a fleeing vehicle unless necessary to prevent imminent harm and proportionate to risk of harm
- Prohibits use of rubber pellets, chemical weapons, or canine units against a crowd
- Violations of the above could result in suspension or revocation of certification

# Massachusetts Police Reform (cont.)

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- Limits use of “no-knock” warrants- must be issued only where officer’s safety would be at risk if they announced their presence and no children or adults over the age of 65 are in the home.
  - Except: Those children or older adults are themselves at risk of harm.
- Court order requires court order to conduct facial recognition searches except in emergencies.
- Establish a special legislative committee to assess impact of the Qualified Immunity Doctrine.

# OSHA: H1966 and S. 1190

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- H.1966 and S. 1190, An Act Relative to Workplace Safety and Disclosure Violations
- Procurement contracts for supplies and services (including construction) estimated to cost \$50,000+
- Bills would require every awarding authority to remain informed of any OSHA violation even after a contract is executed.
- This could include any information on settlement agreements and documentation verifying whether identified hazards have been corrected.

# Questions?

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