In an effort to keep our readers abreast of recent developments and legal trends, we summarize below what is new in the law (both in legislation and in the cases) and provide a “heads up” regarding what to expect in the coming months. We hope you find this helpful.

**What’s New**

**Motion to Compel Arbitration Denied Over Disregard of the Personnel Record Law**
Disputes regarding the enforceability of arbitration agreements have led to many hotly contested legal battles covering a wide range of legal theories, e.g., waiver, lack of consideration, unconscionability, violation of public policy, etc. In a recent victory for employees, an employer’s lax response to a statutory request for a personnel record led to a finding of waiver by the employer, and the denial of a motion to compel arbitration.

Under the Massachusetts Personnel Record Law, M.G.L. c. 149, § 52C, an employee shall be given a copy of his or her Personnel Record within 5 business days of a written request. In *Hernandez v. Universal Protection Service, LLC*, No. 2181cv00335 (Middlesex Super. Ct. Aug. 23, 2021) (Frison, J.), the employer failed to provide the employee with a copy of the arbitration agreement in response to her Personnel Record request. Moreover, the employer did not disclose its intent to seek enforcement of the arbitration agreement at any time until the matter was filed in court. Given the circumstances, the court held the employer’s failure to disclose the arbitration agreement acted to waive the employer’s rights thereunder, and the employer’s motion to compel arbitration was denied.

And Speaking of the Personnel Records Law...

Massachusetts’s highest court, the Supreme Judicial Court (“SJC”), recently ruled in *Meehan v. Medical Information Technology, Inc.*, 177 N.E.3d 917 (Mass. 2021), that an employee who was terminated for exercising his statutory rights under the Personnel Record Law to file a written rebuttal may, indeed, pursue a claim for wrongful termination in violation of public policy, reversing the dismissal of plaintiff’s claim by the lower courts.

In the context of an at-will employment relationship, the basis of a “wrongful termination” claim is often misunderstood. In short, there is no generalized claim for wrongful termination. The source of legal rights and protections for an at-will employee may be rooted in statute (e.g., our state and federal anti-discrimination, payment of wages and whistleblowing laws) or under the common law (e.g., in violation of the covenant of good faith and fair dealing or of public policy).

Courts in Massachusetts have long recognized a common-law exception to the at-will doctrine that permits employee to seek redress for asserting a legally guaranteed right, refusing to do what the law forbids, doing what the law requires, and other important public deeds. While the SJC’s holding in *Meehan* is important from a broader public policy standpoint, clarifying that an employer may not simply terminate an employee for exercising a legal right, and that public policy exemption extends to the exercise of rights under the Personnel Record Law, it is worth noting the unusual procedural posture of this case.

In *Meehan*, at least for purposes of the Defendant’s Motion to Dismiss, there was no dispute as to the reason for the termination decision (i.e., the act of submitting a written rebuttal to a performance review), and the content of written rebuttal was not at issue. This is atypical. It is far more common that both the reasons for the termination and the content and substance of the rebuttal are central issues in the litigation.
Accordingly, as satisfying a victory this may be employees, to make use of it, employees need to proceed cautiously and strategically.

**Retaliatory Investigations: When the Accuser Becomes the Accused**

As we have discussed previously in our newsletters, what constitutes an “adverse employment action” in discrimination and retaliation cases is not limited to discrete acts causing immediate economic harm, such as termination or demotion. Rather, the protections against unlawful discrimination also encompass employment actions that adversely affect “terms, conditions and privileges of employment.” Yee v. Mass. State Police, 481 Mass. 290, 295 (2019); see also High Court Reinforces Discrimination is About More Than Money.

In the context of retaliation cases, the U.S. Supreme Court has made it clear that an adverse act may include any conduct that “could well dissuade a reasonable worker from” engaging in the protected activity, such as the filing of a discrimination claim. See Burlington North & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

Unfortunately, as illustrated a recent case from the U.S. District Court of Massachusetts, Stuart v. City of Gloucester, 2021 WL 4477476 (D. Mass, Sep. 30, 2021), employees who come forward with good faith internal complaints can sometimes find themselves the subject of retaliatory investigations. While the plaintiff in Stuart was ultimately unsuccessful on several of his legal claims, the Court did readily acknowledge that an internal investigation launched on the heels of the plaintiff’s protected activity (here the exercise of his First Amendment rights) may constitute an adverse employment action, noting that an “internal investigation into Plaintiff’s conduct can also qualify as an adverse employment action because even the threat of an investigation by one’s employer could deter an ordinary employee from making complaints or otherwise exercising their [legal] rights.”

Investigating whistleblowers and those who raise complaints is an increasingly common page out of management-counsel’s playbook, and navigating such investigations is treacherous—having the benefit of experienced counsel to assist could prove critical.

**Joint Employer Analysis under Massachusetts Wage and Hour Laws**

Under Massachusetts wage and hour laws, employers are subject to strict liability and there are robust remedies available for employees who have been misclassified as independent contractors, or otherwise deprived of earned wages, including mandatory treble damages and attorneys’ fees. For successful employees, having a “million-dollar” judgment in hand for wages owed is of little solace when the company is bankrupt and/or there is no otherwise viable path to collection. Accordingly, one strategic question, particularly in situations where there are concerns about employer solvency, is whether more than one entity can be held liable as the “employer” under a joint employer analysis.

In Jinks v. Credico (USA) LLC, 177 N.E.3d 509 (Mass. 2021), the SJC recently addressed the proper standard for determining joint employer status under Massachusetts wage and hour laws. In short, the SJC adopted the “totality of the
The circumstances" standard utilized under Federal wage and hour law, guided by a useful framework of four factors. These factors include whether the alleged employer (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

Be mindful, however, that the SJC cautioned that these four factors are not “etched in stone and will not be blindly applied,” and that no one factor is dispositive.

What’s Coming

The Timing and Scope of Mandatory Treble Damage Awards under the Massachusetts Wage Act

The Massachusetts Wage Act, G.L. c. 149, § 148, requires prompt, full payment of all earned wages. Employees deprived of timely payment of such wages are entitled to a mandatory award of treble damages, plus attorney’s fees. Id., § 150. Currently pending before the SJC are two cases that will further clarify the timing and scope of damage awards under the Wage Act.

Reuter v. City of Methuen, SJC-13121

In Reuter, the SJC will decide whether—when wages are paid late but before the employee files suit—an employee is entitled to trebling of the entire amount of untimely paid wages or is limited to recovering treble the interest accrued from the delay in payment.

Devaney v. Zucchini Gold, SJC-13176

The Massachusetts Wage Act and the Federal Fair Labor Standards Act (“FLSA”) are similar but not identical, e.g., the FLSA does not provide for mandatory trebling of damages. The question for the SJC in Devaney is whether, when an employer violates the FLSA but not the Wage Act, the Wage Act’s mandatory treble damages apply. Many lower courts have answered yes, and Devaney provides an opportunity for Massachusetts’ highest court to answer this question definitively.

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