



# Labor & Employment Law Section

Fall/Winter 2009 **Newsletter**

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## Section Co-Chairs' Corner



**Jay Shepherd**



**Leigh Panettiere**

We are pleased to write this first letter of the year as co-chairs of the Labor & Employment Section. Although the year is still young, it has already been an exciting experience. We had an extremely successful “kickoff” event on October 1, attracting about 65 people. Later in the month, we had the pleasure of attending the BBA’s 2009 leadership retreat in Chatham. All of us left there with a renewed commitment to serving the legal community and those who are most in need of legal services.

The L&E Section is stepping up its efforts to involve the BBA’s membership in the activities of the L&E Section leadership. Our Steering Committee is richly populated with a diverse, hardworking group of labor and employment professionals who are developing programs to keep the Section up to date on developments in labor and employment law. We invite members of the Section to contact us and volunteer to serve on subcommittees. Working on a subcommittee provides an opportunity to contribute to the Section’s educational efforts and collaborate with fellow labor and employment attorneys.

Additionally, in the wake of the BBA’s new communications initiative, the Labor & Employment Section has taken up the challenge to begin using social media — specifically, a Section Blog — to better serve the Section, the BBA membership,

and the community at large. The Public Service subcommittee, chaired by Nicole Corvini, Anne Ladov, and Julie McCarthy, is spearheading the project, with some guidance from Section Co-chair (and veteran blogger) Jay Shepherd. The goal will be to create a vibrant, working Section Blog to help get the Section’s news and information out to the world. The Blog will feature case notes, legislative updates, practice-related tips and articles, career news, job openings, and event reminders for the Section, the membership, and the community. If you’re interested in getting involved in the Blog Project, send an email to [nicole@shepherdlawgroup.com](mailto:nicole@shepherdlawgroup.com).

Finally, we applaud the co-chairs of the Brown Bag Committee and the Labor Committee for putting together terrific educational programs this fall. On September 25, the Brown Bag Committee energetically staffed by David Cogliano, Jennifer Bombard McGovern, Brian MacDonough and Sara Smolik — presented a panel discussion entitled SJC Challenges to Enforceability of Arbitration Awards and Mandatory Arbitration Clauses; on November 3, they presented a discussion of the recent *Ashcroft v. Iqbal* Supreme Court decision; and on December 1, they presented a discussion on the recent changes in the independent contractor analysis. All these panels featured speakers who were involved in the formative litigation, and were extremely well attended, sparking in-depth discussion on the latest development and where we can expect the law to go from here. On November 12, the Labor Committee presented a three-hour “Labor Basics” CLE, which was also very well attended and generated many insightful questions — a pleasant reminder that the practice of Labor Law is still attracting bright new attorneys.

Again, we want to encourage your involvement in these and future efforts of the L&E Section Steering Committee. So please stay tuned to the L&E Section newsletter, and get ready to participate in the Blog.

Leigh and Jay

# Brown Bag Lunches

Jennifer Bombard McGovern, Littler Mendelson LLP

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On September 25, 2009, the Section sponsored its first Brown Bag Lunch of the year entitled “SJC Challenges to Enforceability of Arbitration Awards and Mandatory Arbitration Clauses.” Approximately 30 people attended to hear Mary Jo Harris of Morgan, Brown, & Joy, LLP and Ellen J. Zucker of Burns & Levinson, LLP, discuss two recent Massachusetts Supreme Judicial Court decisions: *Warfield v. Beth Israel Deaconess Medical Center*, in which the SJC refused to compel arbitration, as provided for in a written employment agreement, reasoning that the language of the arbitration clause did not explicitly cover statutory claims, and *MBTA v. Boston Carmen’s Union, Local 589, Amalgamated Transit Union*, where the SJC ruled that the strong public policy against workplace discrimination outweighed a union’s right to enforce a collective bargaining agreement. Program attendees also discussed and identified situations in which the Court will overturn arbitration decisions and contractual provisions mandating arbitration based on public policy grounds.

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On November 3, 2009, the Section sponsored a Brown Bag Lunch, “How to Avoid or Deliver the Knockout Punch: Pleading Requirements After *Iqbal*, *Twombly* and *Iannacchino*” to discuss recent Supreme Court decisions, *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, and the SJC decision, *Iannacchino v. Ford Motor Co.*, which clarified and tightened the pleading requirements sufficient to withstand a motion to dismiss. This program was styled as a round-table discussion, led by Moderator Nina Joan Kimball, of Kimball Broseeau, LLP. Attendees discussed the heightened federal and state pleading requirements under the Rules of Civil Procedure, how plaintiffs’ attorneys can avoid motions to dismiss and how defense attorneys can capitalize on the new requirements.

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On December 1, 2009, the Section sponsored a well-attended program, “To Be or Not to Be: The Current State of Independent Contractors after *Somers*.” The program involved a roundtable discussion led by Harold L. Lichten, of Lichten & Liss-Riordan, P.C., and Robert M. Shea, of Morse Barnes-Brown & Pendleton PC, regarding the current state of independent contractors in Massachusetts in light of recent cases, which highlight both the importance and difficulty of appropriately treating workers as independent contractors. The discussion focused on the benefits and pitfalls of using independent contractors in Massachusetts, and highlighted avenues of relief wrongfully classified workers can pursue and steps employers can take to minimize their risks.

# New Amendments to Federal Rules

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Effective as of December 1, 2009 the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure and the Federal Rules of Criminal Procedure were amended pursuant to the Statutory Timer Period Technical Amendments Act of 2009 (Pub. L. No. 111-016). Some highlights:

- Most periods shorter than 30 days have been changed to multiples of 7 days.
- The new Federal Rules of Civil Procedure eliminate 10 day periods; the new Federal Rules of Appellate Procedure change certain 7 and 8 day periods to 10 days

A description of the changes to the Local Rules for the District of Massachusetts, including a chart of deadlines under the Local Rules and the Rules For Magistrate Judges in the District of Massachusetts is available at the website of the District Court at: <http://www.mad.uscourts.gov/general/pdf/PubNotice-LR-MJrulesRevisionsEff12-1-09.pdf>.

The updated Federal Rules of Appellate Procedure are available at the First Circuit's website at: <http://www.ca1.uscourts.gov/files/rules/rulebook.pdf>

# Judicial Update

Christopher Powell and Vanessa Hackett, Ropes & Gray LLP

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## Supreme Judicial Court

*Warfield v. Beth Israel Deaconess Medical Center*, 454 Mass. 390 (July 27, 2009)

In this case, the Supreme Judicial Court confirmed that state law discrimination claims can be subject to mandatory arbitration under an individual employment agreement, but declined to compel arbitration based on the specific facts at issue. Plaintiff Warfield, a Beth Israel anesthesiologist, had executed an employment agreement that contained a mandatory arbitration provision shortly after her appointment to chief of anesthesiology. Subsequently, Warfield alleged that the chief of surgery, the hospital's president, and the hospital discriminated against her on the basis of sex and retaliated against her for reporting the discrimination. Despite the arbitration provision requiring that any dispute arising out of the agreement or its negotiations be settled by arbitration, Warfield filed a complaint relating to the alleged discriminatory treatment in Superior Court. The defendants moved to dismiss the claims and compel arbitration in accordance with the terms of the agreement, but the Superior Court denied both motions.

On appeal, the Supreme Judicial Court balanced the competing interests of the public policy favoring arbitration and the public policy prohibiting workplace discrimination to conclude that an employment agreement containing a mandatory arbitration clause is enforceable with respect to such claims only if it "clearly and unmistakably" provides for arbitration of them. Looking at the arbitration clause in Warfield's agreement, which provided for arbitration of claims, "arising out of or in connection with this Agreement or its negotiations" the Court held that it fell short of this standard because it could be read to suggest an intent to arbitrate

only disputes arising directly out of the contractual terms or the negotiation of the contract and did not specifically mention employment discrimination claims.

*DiFiore v. American Airlines*, 454 Mass. 486 (August 4, 2009)

In response to a question certified from the United States District Court for the District of Massachusetts, the SJC clarified that the prohibition contained in Chapter 149, Section 152A (the "Tips Statute") against employers retaining service charges imposed on patrons in lieu of tips for service workers applies equally to third party entities, such as contractors. In this case, skycaps employed by a staffing agency filed suit against American Airlines after American instituted a two dollar per bag charge for curbside baggage check-in, alleging that American violated the Act by failing to distribute the proceeds to the skycaps and failing to adequately notify customers in writing that the charge was not a gratuity for the skycaps. The skycaps were required to remit the full amount of this fee received by customers to the staffing agency, which then split the proceeds with American. After a jury verdict for the skycaps, the federal court granted a motion for a new trial, based on an argument by American that at least a portion of the definition of a "service charge" in the Tips Statute applied only to a fee charged by an employer and, therefore, did not apply to the two dollar service charge because American was not the skycaps' employer.

Writing for the Court, Justice Gants examined the legislative intent behind the statute to determine that the Legislature intended that service employees receive the proceeds from service charges and that the definition of "service charge" in the statute must be interpreted to reflect that intent.

*Somers v. Converged Access*, 454 Mass. 582 (August 21, 2009)

In this case, the Supreme Judicial Court held that the measure of damages available to an individual misclassified as an independent contractor is based on what the individual was paid as a contractor, not what the employer claims it would have paid the individual had it hired her.

The plaintiff, had applied for a position with Converged Access twice, and had twice been rejected. Converged Access then offered him the opportunity to work in the same position as an independent contractor for a 60-day term, followed by a 90-day term. While Converged Access paid him more than the hourly wage paid to employees in comparable positions, it did not provide him with holiday pay, vacation pay, or other benefits. When Somers filed suit alleging that he was owed treble damages for unpaid holiday pay, vacation pay and overtime pay, the trial court granted summary judgment to Converged Access on the theory that he had suffered no damages because the company had paid him substantially more than it would have offered had it properly classified him as an employee.

In reversing the lower court, the SJC held that if Converged Access were unable to prove at trial that Somers was properly classified as an independent contractor, then pursuant to G.L. Chapter 149, §§ 148 and 148B he would be an employee and his wage rate would be measured by what he was actually paid. The Court rejected the notion that the employer's claimed intent to pay him less had he been classified as an employee was relevant to the determination of damages. To hold otherwise, the Court concluded, would be to undermine the remedial purpose of Sections 148 and 148B. Likewise, the Court rejected the notion that an employee in Somers' shoes would enjoy a "windfall", noting that the Legislature had likely been more concerned with the windfall enjoyed by employers who avoid paying vacation, holiday and overtime pay, providing benefits, and paying various

taxes and insurance premiums when they classify individuals as independent contractors.

*Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91 (October 5, 2009)

Reinstating a jury verdict awarding punitive damages to the plaintiff in a sex-based discrimination case, the Supreme Judicial Court upheld the jury's award of punitive damages in a sex-based discrimination case where there was sufficient evidence of egregiousness, setting forth a new standard for the award of punitive damages in Chapter 151B cases.

Plaintiff Haddad was a long-term employee with a good performance record. For thirteen months beginning in March of 2003, Wal-Mart temporarily promoted Haddad to a pharmacy manager position, but she was compensated at a rate substantially lower than that of male pharmacy managers and was not paid a pharmacy manager wage differential paid to those other managers. Haddad complained on several occasions, and ultimately received a bonus check, but was not compensated for the thirteen months of lost differential pay. Shortly thereafter, Wal-Mart conducted an investigation into two prescriptions that had been fraudulently written and filled by a subordinate. Although the investigation revealed that only one had been written during Haddad's shift, Wal-Mart terminated Haddad's employment, telling Haddad that she had "failed to secure the pharmacy" by briefly leaving the pharmacy area during her shift. A male pharmacist, whose initials were on one of the fraudulent prescriptions, and who testified at trial that he commonly left the pharmacy area for brief periods but was never disciplined, was promoted in Haddad's place. In addition, there was evidence suggesting that the decision to terminate Haddad's employment was made before the investigation and that Haddad had been reprimanded for filing state-mandated reports of discrepancies in narcotics counts while a male pharmacist who was caught stealing narcotics was not disciplined.

At trial, the jury returned a verdict in Haddad's favor and awarded her one million dollars in punitive damages. The Superior Court vacated the award, concluding that Haddad had failed to provide evidence that Wal-Mart knowingly or intentionally violated G.L. c. 151B and that there was no evidence that Wal-Mart's conduct was "otherwise outrageous, evil in motive, or that it could be viewed as exhibiting a reckless indifference for the plaintiff's rights."

Reversing the Superior Court's decision, the SJC held that the evidence of Wal-Mart's discrimination on the basis of sex was sufficient to support the award of punitive damages. Articulating a new description of when punitive damages are appropriate, the Court held that a plaintiff must demonstrate that the defendant's conduct is either outrageous or egregious or that the conduct is so offensive that it justifies punishment and not merely compensation. Punitive damages are appropriate where the fact finder determines that it is necessary to deter such behavior toward the protected class or where the conduct is so egregious that it deserves public condemnation. To determine whether punitive damages should be awarded, the fact finder should consider: (1) whether there was a conscious effort to demean or diminish the protected class; (2) whether the defendant was aware that the conduct would cause serious harm or recklessly disregarded the likelihood of serious harm; (3) the actual harm to the plaintiff; (4) the defendant's conduct after learning that the initial conduct would likely cause harm; and (5) the duration of the wrongful conduct and any concealment of that conduct.

*Dahms v. Cognex Corp.*, 455 Mass. 190 (October 15, 2009)

In this sexual harassment case, the Supreme Judicial Court upheld the decision of the lower court judge to admit testimony that the plaintiff's clothing, speech, and conduct were sexually provocative at trial. Plaintiff Dahms alleged that a Cognex officer had subjected her

to quid pro quo and hostile work environment sexual harassment, and that the company and its CEO failed to investigate or take corrective measures after she reported the conduct. Before trial, Dahms had moved to exclude character evidence of "her sexual behavior, general sexual predisposition, and 'wild' nature," but the court failed to rule on her motion. At trial, the court permitted defense witnesses to testify that the plaintiff had worn (what the witness viewed as) inappropriately revealing clothing at a company meeting, had made a crude joke at a party, had told a sexual story to co-workers, had used blunt sexual language in conversation and had engaged in other sex-related talk. On appeal, Dahms argued that the court should have granted her motion and that it improperly allowed the introduction of evidence, which unfairly prejudiced the jury against her.

The Court held that the trial judge had acted within his discretion in admitting the evidence, because the evidence was probative of Dahms' subjective offense at the alleged hostile work environment. Also, it was probative of the CEO's state of mind when he asked for certain photographs of the plaintiff taken at company events, an act Dahms had painted as part of an effort to harass and retaliate against her. The Court also noted that Dahms's counsel had been the first to introduce evidence of this type.

### **Appeals Court**

*Augis Corp. v. Massachusetts Commission Against Discrimination*, 75 Mass. App. Ct. 398 (October 14, 2009)

The Appeals Court affirmed an award of \$10,000 in emotional distress damages by the MCAD, holding that a single instance of a supervisor calling a black employee a highly offensive racial epithet was sufficient to hold the employer liable for racial harassment under G.L. c. 151B §4. The plaintiff, who is African American, worked as a security officer for Augis. During an argument over company rules,

the plaintiff's supervisor called the plaintiff a "f\*\*\*\*\* n\*\*\*\*\*" and stormed out of the room. After filing an incident report with Augis, to which the company failed to respond, the plaintiff filed a charge with the MCAD. Augis subsequently terminated the plaintiff's employment due to a policy infraction. The hearing officer concluded that the racial slur constituted racial harassment and created an "abusive working environment" and ordered Augis to pay him the emotional distress damages plus attorneys' fees and costs. Both the full MCAD and the Superior Court upheld the award of damages.

The Appeals Court affirmed, holding that a supervisor using that slur toward a subordinate "has engaged in conduct so powerfully offensive that the MCAD can properly base liability on a single instance [because] the term inflicts cruel injury by its very utterance."

The Appeals Court also affirmed the hearing officer's exclusion of the plaintiff's supervisor as a witness, on the grounds that Augis had not indicated during the two-year period prior to the hearing that it would require witness subpoenas for deposition of its employees then decided subpoenas were necessary the week before the scheduled hearing. The Appeals Court held that under these circumstances, the hearing officer could conclude that Augis acted in bad faith and could properly prohibit the supervisor's testimony as a sanction.

## Federal Courts

*Sensing v. Outback Steakhouse of Florida LLC*, 575 F.3d 145 (1st Cir. August 11, 2009).

In this case, the First Circuit reversed a grant of summary judgment for the plaintiff's former employer on a claim that she was discriminated against because she was regarded as disabled in violation of Chapter 151B.

The plaintiff worked as a "takeaway" at an Outback Steakhouse in Peabody, in which position

she took customers' takeout orders by phone, packaged the orders and delivered them to the customers in their cars. In November of 2004, she had a flare-up of multiple sclerosis, during which she was bedridden and unable to talk, which resulted in her taking a month's leave of absence, after which she returned to work on light duty. After a few months, she was able to return to regular duty with only minor accommodations to which the employer apparently raised no objections. When she experienced a mild recurrence of her symptoms in the form of numbness in her legs a few months later, she was advised by her supervisor to leave work early, despite her objection that she could work. Before her next shift, the supervisor told her not to report to work. Although she assured him that she could work, he expressed discomfort with her falling while at work and expressed concern about "liability" if she did. Over the following week or so, the plaintiff repeatedly contacted the supervisor and asked to return to work. She also provided him a certification from her doctor that she could return to work without restrictions. The supervisor again expressed vague concerns about "liability" and repeatedly put the plaintiff off, telling her that he would have to consult with his superiors. Finally, the supervisor sent the plaintiff a fax indicating that she would be required to submit to an independent medical examination before returning to work and offered to schedule her for light duty work, paid at half her regular rate, pending such examination. The plaintiff agreed to the medical examination and asked the supervisor to get back to her regarding the arrangements. However, she concluded that she could not afford to agree to take the light duty position while waiting for the examination and instead applied for unemployment and contacted an attorney. The supervisor never followed up with the plaintiff, never arranged the examination and, when he did not hear from her for a few days, assumed that she had abandoned the job.

The parties disputed whether the plaintiff could establish the first and third prongs of the pri-

ma facie case. As to whether the plaintiff had a “handicap” within the meaning of Chapter 151B, the First Circuit held that there was a genuine issue of material fact as to whether the supervisor viewed the plaintiff as having a physical impairment that substantially limited her in a major life activity. He was aware of her diagnosis. Co-workers had provided affidavits that they had expressed concerns about the plaintiff’s ability to perform her job to the supervisor. And the supervisor had expressed concerns about her falling on the job. In the Court’s view, a jury could infer from these facts that the supervisor viewed the plaintiff as being limited in her ability to work in a broad class of jobs that would require her to stand, as well as in other major life activities such as walking and performing manual tasks.

With respect to the adverse employment action element, the Court held that a jury could reasonably find that the supervisor’s refusal to let the plaintiff return to work and his failure to set up the medical examination resulted in her employment being terminated by Outback. Likewise, the Court held that a jury could find that such actions sufficiently disadvantaged the plaintiff in the terms and conditions of her employment as to constitute independent adverse employment actions.

Finally, the Court held that a jury could find pretextual the employer’s proffered reason for removing the plaintiff from the schedule and requiring her to submit to a medical examination, namely, its concerns about her ability to do her job quickly and safely. The Court reasoned that a jury could conclude that removing the plaintiff from the schedule based solely on her co-workers’ and the supervisors’ concerns was unwarranted where her doctor had provided three notes certifying that she could perform her job. And the Court observed that the supervisor’s stated concerns about “liability” could be interpreted to indicate concerns about future injuries, a prohibited form of discrimination under MCAD guidelines.

*Globe Newspaper Co. v. Machinists Local 264*, 2009 WL 2425798 (D.Mass. August 5, 2009).

In this case, the District Court vacated a portion of an arbitration award that had determined the terms of a collective bargaining agreement between the Globe and Machinists Local 264. The award had been issued pursuant to the interest arbitration provision of the expiring agreement, which required the parties to submit to arbitration any “disagreement relative to a succeeding contract which [could not] be settled through negotiation or conciliation.” After the parties made little progress in negotiations for a new agreement, they agreed to submit the terms of the new agreement to interest arbitration. At the fourth arbitration session, the Globe withdrew a number of proposals containing desired concessions, and indicated that, for the first time in fifty years, it was opposed to including an interest arbitration provision in the agreement. The Globe repeated its position several times prior to the arbitrator’s issuing the award, but the arbitrator included the provision in the new agreement, nonetheless.

In vacating the interest arbitration portion of the award, the District Court first observed that, pursuant to “clear First Circuit authority,” an interest arbitration award is a permissive, not mandatory, subject of bargaining. The Court then went on to note that, every other court to consider the issue, including the Fifth, Sixth, Eighth and Ninth, as well as National Labor Relations Board Administrative Law Judges had determined that permitting an interest arbitrator to impose an interest arbitration provision over a party’s objection would violate public policy. The Court identified two rationales in these cases. First, courts were concerned that interest arbitration would become self-perpetuating. Second, courts were concerned that permitting arbitrators to impose so-called “second generation” interest arbitration provisions would eliminate the distinction between mandatory and permissive subjects of bargaining.

# Agency Update

Christopher Powell  
Ropes & Gray LLP

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## NLRB

- *Supreme Court to Review Two Member Board Decisions.* On November 2, the Supreme Court agreed to review the Seventh Circuit's decision in *New Process Steel v. NLRB* in which the Court of Appeal upheld the validity of an unfair labor practice decision issued by the two remaining members of the NLRB. The Supreme Court is expected to resolve a split among the circuits on this issue. The First and Second Circuits have agreed with the Seventh. However, the D.C. Circuit in its *Laurel Baye Healthcare v. NLRB* decision held that under Section 3(b) of the National Labor Relations Act, a two member decision is invalid due to lack of a three-member quorum. The Board has been operating with only two members in office since January 1, 2008.
- *NLRB Annual Report Shows Unfair Labor Practice Charges Up, Representation Petitions Down.* The General Counsel of the NLRB released its annual report on December 1. According to the report, the agency received 22,491 unfair labor practice cases in FY 2009, slightly up from 22,501 in FY 2008. Meanwhile, the Board conducted 1,690 initial representation elections in FY 2009, down from 2,085 the year before. Representation case intake was down 14% from FY 2008, declining from 3,400 to 2,912 petitions. The full text of the report is available at the Board's website [www.nlr.gov](http://www.nlr.gov).

## EEOC

- *Federal Genetic Information Nondiscrimination Act Takes Effect.* The prohibitions on discrimination in employment under Title II of the Genetic Information Nondiscrimination Act (GINA) took effect on November 21. Genetic information includes information about genetic tests on an individual or the individual's family members, as well as information about an individual's family medical history. The law prohibits discrimination, harassment and retaliation. With few exceptions, it is also unlawful for an employer to disclose genetic information about applicants or employees.
- *Revised "Equal Employment Opportunity is the Law" Poster Available.* The EEOC has revised this poster to reflect new developments in federal employment discrimination law, including GINA and the Americans With Disabilities Act Amendments Act of 2008. Copies of the poster can be downloaded, and instructions for ordering 10 or more copies of the new poster, are available at <http://www1.eeoc.gov/employers/poster.cfm>.

## OSHA

- *National Emphasis Program on Recordkeeping.* On October 1, OSHA announced a new national emphasis program on recordkeeping to assess the accuracy of illness and injury data being recorded by employers. In this one-year program, each Area Office of OSHA will target five establishments of 40 or more

employees for inspection using a new set of procedures. These inspections will be carried out in specific industries, including: animal (except poultry) slaughtering, scheduled passenger air transportation, steel foundries, other nonferrous foundries (except die-casting, concrete pipe manufacturing, soft drink manufacturing, couriers, mobile home manufacturing, rolling mill machinery and equipment manufacturing, iron foundries, nursing care facilities, fluid milk manufacturing, seafood canning, marine cargo handling, copper foundries (except die-casting), bottled water manufacturing, refrigerated warehousing and storage, motor vehicle seating and interior trim manufacturing, pet and pet supplies stores, poultry processing, support activities for animal production, and the construction industry. A full description of the program is available at: [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02\\_09-08.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02_09-08.pdf)

- *Workplace H1N1 Influenza Precaution and Protection Information for Workers and Employers.* On November 9, OSHA announced the publication of fact sheets to promote safety in the workplace during the flu season by providing workers and employers with ways to reduce the risk of exposure to H1N1 influenza. Additionally, Enforcement Procedures for High to Very High Occupational Exposure Risk to 2009 H1N1 Influenza, a directive which went into effect on November 20, provides uniform inspection procedures to minimize H1N1 threats to workers in higher risk health care professions. OSHA intends to update these publications as information becomes available, so employers and workers are encouraged to check the site regularly. These materials can be accessed at: <http://www.osha.gov/h1n1/>.

## DOL

- *Wage and Hour Division's Increased Enforcement and Outreach Efforts.* On November 19, Secretary Solis issued a statement that with the hire of 250 new wage and hour investigators, the Division has increased its staff by more than one third. This expansion will enable the Division to promptly respond to complaints and undertake more targeted enforcement. In early 2010, the Department plans to launch a national public awareness campaign titled "We Can Help" to inform workers about their rights.
- *Updated Employment Law Guide.* On November 30, the Department of Labor announced an updated version of the Employment Law Guide, which addresses the federal minimum wage increase, expansion of the Family and Medical Leave Act to encompass military caretaker leave and qualified exigency leave, and child labor regulations in the agriculture industry. The Guide is designed to be user-friendly, and is geared towards workers and employers without a dedicated legal or human resources staff and is designed to be user-friendly. It is available at: <http://www.dol.gov/compliance>.
- *FMLA Coverage Expanded for Military Personnel.* On October 28, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 ("NDAA 2010"), which expands the scope of Family and Medical Leave Act coverage for military personnel. Key changes include the extension of FMLA qualifying exigency leave coverage to family members of active duty members of the Armed Forces and expansion of FMLA caregiver leave for up to five years after a veteran ends active duty. Additionally, "covered active duty" will now include deployment to a foreign country, in addition to contingency

operations, and will cover leave to care for military service members whose pre-existing conditions are exacerbated in the line of duty, rather than just care for service members whose illness or injury is first incurred in the line of duty. The full text of the NDAA 2010 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2647enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2647enr.txt.pdf).

in approved training programs to receive unemployment compensation. The Executive Office of Labor and Workforce Development can use these funds to pay unemployment compensation benefits or legislature can appropriate the funds and apply them to the administration of the unemployment insurance program or to other employment services.

### **Executive Office of Labor and Workforce Development**

- *Additional Extended Unemployment Benefits.* On December 1, the Executive Office of Labor and Workforce Development announced that additional extended unemployment benefits will become available to eligible claimants due to the enactment of federal legislation to expand the Emergency Unemployment Compensation Program, which allows for up to 14 additional weeks of benefits in all states. The first batch of extended benefits will be paid on December 15 and will be available to claimants who are not eligible to establish a regular unemployment benefit claim and have exhausted their first 59 weeks of benefits.
- *DOL Releases over \$100 Million in Unemployment Insurance Modernization Incentive Funds to Massachusetts.* On November 4, the Department of Labor announced that it certified for the release of \$108,455,561 in unemployment insurance modernization incentive funds under the American Recovery and Reinvestment Act. Massachusetts became eligible to receive these funds by allowing unemployed workers enrolled in training to receive unemployment compensation as part of its dependents' allowance provisions and by expanding its provisions to allow workers enrolled

### **Office of Consumer Affairs and Business Regulation**

- *OCABR Files Final Version of Data Privacy Regulations.* On November 4, the OCABR filed its final version of its Data Privacy Regulations with the Secretary of State. The regulations are scheduled to take effect on March 1, 2010 and require that all entities that own or license personal information about a Massachusetts resident to maintain comprehensive information security programs. The final regulations are available at <http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf>.

# Section Leadership

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