

Employment Alert

Employment Law in 2022: What You Need to Know at the Start of the New Year

January 2022

As we turn the page on 2021, we reflect on a year of uncertainty and challenges, and look forward with hope to the year ahead. Last year, employers and employees alike faced uncharted waters as we began to envision a post-pandemic world and start the recovery journey. We heard the term “great resignation” for the first time, employees returned to offices and began adjusting to new office protocols, and employers grappled with establishing vaccination policies. So, what are the key legal takeaways from 2021, and what will employers face in the new year? Here’s what you should know:

NEW MINIMUM WAGE

Effective January 1, 2022, the minimum hourly wage in Massachusetts was raised from \$13.50 to \$14.25. The minimum wage rate will increase again in Massachusetts in one year, to \$15.00 effective January 1, 2023. At this point, the Massachusetts minimum wage is \$7.00 more than the federal minimum wage of \$7.25. Massachusetts has one of the highest hourly minimum wage rates in the country, with California at \$15.00 for employers with 26 or more employees and the State of Washington at \$14.49 for all employers.

In Massachusetts, the gradual phasing out of the Sunday premium rate for certain retail establishments also continues in 2022, as the premium rate decreased from 1.2x the regular hourly rate to 1.1x the regular hourly rate at the start of the new year. This premium rate also applies to certain holidays. In 2023, the premium rate for Sundays and certain holidays will be eliminated (please note “major” holidays still require a premium rate of 1.5x the regular hourly rate, both in 2022 and beyond). The determination of major holidays and premium rates is complex under the existing statutes and legal advice should be sought as needed.

COVID-19 VACCINATION POLICIES

Over the past year, it has become increasingly common for employers in Massachusetts to establish and enforce mandatory COVID-19 vaccination policies. Such policies are legal and appropriate in Massachusetts. Unless required by law (see below), implementation of mandatory vaccination policies is at the discretion of the employer. Other than strict mandatory vaccination requirements for all employees, options include an alternative to vaccination in the form of regular testing, masking and social distancing requirements. Also, depending on such considerations as the nature of your business, the various duties and conditions of employment of your workforce, whether your employees are on site or remote, and whether they interact with the public, it may be reasonable to establish and enforce different policies for different groups of employees. It is recommended that employers carefully consider what makes sense for their needs and the needs of their employees.

State Requirements

Currently, the Commonwealth of Massachusetts requires mandatory COVID-19 vaccination for certain employees working in skilled nursing facilities, long-term care facilities, nursing homes, rest homes, assisted living residences, and hospice programs, as well as certain home care workers.

Federal Requirements

The “Path Out of the Pandemic” plan announced by President Biden on September 9, 2021 includes, among other things, mandatory COVID-19 vaccination for employees of private employers with at least 100 employees, certain healthcare entities, the federal government, and certain federal contractors and subcontractors. Since then:

- For employers with 100 or more employees, the Occupational Safety and Health Administration (OSHA) put in place an Emergency Temporary Standard (ETS) requiring that all employees either be fully vaccinated or be subjected to weekly COVID-19 testing. ***At this time, employers of 100 or more employees must establish compliant policies by January 10, 2022 and must begin their testing programs no later than February 9, 2022.*** Emergency appeals testing this ETS have been filed with the U.S. Supreme Court, which is scheduled to hear oral arguments on January 7, 2022.
- For most healthcare facilities, including hospitals, dialysis facilities, ambulatory surgical sites, and home health agencies, the Centers for

Medicare and Medicaid Services (CMS) and the Biden Administration issued an interim final rule requiring healthcare workers to be fully vaccinated by January 4, 2022, as a condition of continued federal funding. However, the CMS has suspended implementation and enforcement of this rule pending litigation. The U.S. Supreme Court will also hear oral arguments on January 7, 2022 regarding challenges to this rule.

- For federal contractors and subcontractors, requirements are coordinated by the Safer Federal Workforce Task Force, which issued guidance requiring mandatory vaccination for employees of covered federal contractors and subcontractors, masking and distancing rules in covered contractor workplaces, and designation of a coordinator or coordinators. Currently, these mandates are blocked nationwide because of a preliminary injunction which was upheld on December 17 by the U.S. Court of Appeals for the Eleventh Circuit. The U.S. Supreme Court is not currently scheduled to review the Eleventh Circuit ruling.

Regardless of whether a mandatory vaccination policy is required by law or implemented at the discretion of an employer, all employers must provide exemptions from mandatory vaccination to reasonably accommodate those employees with disabilities or sincerely held religious beliefs which preclude them from being vaccinated. According to guidance from the U.S. Equal Employment Opportunity Commission, providing an exemption to a mandatory vaccination policy based on disability or religion must be handled on an individualized, case-by-case basis. Following an employee's accommodation request to be exempt from mandatory vaccination, the employer is required to evaluate the request and engage in an interactive dialogue with the employee to determine if the requested exemption will allow the employee to perform the essential functions of their job and not create an undue hardship for the employer.

MASSACHUSETTS PAID FAMILY AND MEDICAL LEAVE

Effective January 1, 2022, the maximum weekly benefit rate for employees on leave under the Massachusetts Paid Family and Medical Leave (PFML) will increase from \$850.00 to \$1,084.31. Employers in Massachusetts are required to provide written notice to their employees of 2022 contribution and benefit rates. You can find 2022 notice templates containing complete information for your employees [here](#).

In addition, all Massachusetts Employers are required to update their workplace poster providing employees with basic information about PFML. The 2022 poster can also be found [here](#). This poster should be hung in a prominent place to which all employees have access. It is recommended that a copy of the poster be distributed to all remote workers, along with the requisite written notice described above.

JOINT EMPLOYMENT

There are many situations in which more than one entity can be subject to liability for the same employment-related claim brought by the same employee. This situation arises when the two separate entities are determined to be joint employers. Regarding wage and hour claims, the Massachusetts Wage Act does not define the term “employer.” On December 13, 2021, in *Jinks v. Credico (USA) LLC*, the Massachusetts Supreme Judicial Court identified the correct method for determining whether a company is an employer in circumstances involving possible joint employment under the Wage Act.

The applicable analysis involves consideration of the “totality of the circumstances of the parties’ working relationship.” Importantly, whether or not an entity issues paychecks to the individual is not pertinent to this analysis. Rather, to determine whether an employment relationship exists requires consideration of the “totality of the circumstances” of the relationship, guided by the following four factors.

Whether the possible employer:

1. has the ability to hire and fire the individual;
2. supervises and controls the individual’s work schedule or conditions of employment;
3. determines the rate and method of payment; and

4. maintains employment records.

No one factor is dispositive. All four should be considered. Moreover, the court warns against a mechanical application of the factors, stressing that the four factors are intended as a useful “framework” for contemplating whether the totality of the circumstances creates an employment relationship.

Notably, this totality of the circumstances or “right to control” analysis also applies for determining whether an entity is a joint employer outside of the wage and hour context, including with respect to discrimination, harassment and retaliation claims under the Massachusetts Fair Employment Practices Act.

CONTACT

For further information and advice regarding the new minimum wage, COVID-19 testing policies and requirements, the PFML, joint employment, and other employment-related issues, please contact a member of our [Employment Law Practice](#).