

Reducing Your Exposure to Employment Litigation With Effective Policies and Procedures

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General Considerations

- Balancing Business Needs With Legal Requirements
- Establishing General Goals and Standards
- Adopting Specific Policies

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The Hiring Process

➤ Interviews

➤ Permissible Scope

- Recent changes to the Massachusetts Criminal Offender Record Information ("CORI") law

➤ Objective Process With Permissible Criteria

- *Rice v. City of Cambridge Historical Comm'n*, 4 M.D.L.R. 1138 (1982)

➤ Documenting the Decision

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The Hiring Process

➤ Employment Contracts

➤ Maintaining At-Will Status

➤ Non-Competition Agreements

- Legitimate Business Interests
- Time and Geography Restrictions
- Public Interest

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The Hiring Process

- Employee Handbooks and Personnel Manuals
 - Handbooks as Implied Contracts
 - *Jackson v. Action for Boston Cmty. Dev., Inc.*, 403 Mass. 8 (1988)
 - Disclaimers
 - *Ferguson v. Host Int'l, Inc.*, 53 Mass. App. Ct. 96 (2001)

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Workplace Manner

- Dress and Grooming Codes
 - Policies must not discriminate among genders, but can treat different genders differently
 - *Hub Folding Box Co. v. MCAD*, 52 Mass. App. Ct. 1104 (2001)
 - *MacIssac v. Remington Hospitality, Inc.*, 61 Mass. App. Ct. 1117 (2004)

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Workplace Manner

➤ Sexual Harassment

➤ Employer Liability

➤ Prima Facie Case

➤ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)

➤ Inter-Office Relationships

➤ *Ritchie v. Dept. of State Police*, 60 Mass. App. Ct. 655 (2004)

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Workplace Manner

➤ Privacy Issues

➤ Massachusetts Right of Privacy Statute,
G.L. c. 214, § 1B

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Workplace Manner- Privacy

➤ Specific Practices

➤ Employee Questionnaires

➤ *Cort v. Bristol-Myers Co.*, 385 Mass. 300 (1982)

➤ Performance Information of Co-Workers

➤ *Williams v. Commonwealth Limousine Serv., Inc.*, No. 98-4351, 1999 WL 1331281, at *1 (Mass. Super. Ct. 1999)

➤ Medical Information

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Workplace Manner- Privacy

➤ Specific Practices, cont.

➤ Drug Testing

➤ *Webster v. Motorola, Inc.*, 418 Mass. 425 (1994)

➤ Phone and E-mail

➤ *O'Sullivan v. Nynex Corp.*, 426 Mass. 261 (1997)

➤ *Restuccia v. Burk Tech., Inc.*, No. 95-2125, 1996 WL 1329386 (Mass. Super. Ct. Aug. 13, 1996)

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Evaluations and Reviews

- Regularity
- Clarity
- Consistency

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Evaluations and Reviews

- Creating the Record
 - Personnel Records Statute, G.L. c. 149, § 52C

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Discrimination- General

- Governing Laws
 - G.L. c. 151B
 - Title VII of the Civil Rights Act of 1964
 - Age Discrimination in Employment Act of 1967 ("ADEA")
 - Pregnancy Discrimination Act of 1978 ("PDA")
 - Americans with Disability Act of 1990 ("ADA")

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Discrimination- General

- The Prima Facie Case
 - Membership in a Protected Class
 - Harm
 - Discriminatory Animus
 - Causation

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Discrimination- General

- Three-Stage Order of Proof (Burden Shifting)
 - Prima Facie
 - Rebuttal
 - Pretext

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Discrimination- Policy Related Defenses

- Standards
- Uniform Application
- Documentary Support

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Discrimination- Policy Related Defenses

➤ Age Discrimination

➤ Bona Fide Seniority System

- *EEOC v. Newport Mesa Unified Sch. Dist.*, 893 F. Supp. 927 (C.D. Cal. 1995)

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Discrimination- Policy Related Defenses

➤ Handicap Discrimination

➤ Defining the Essential Functions

- *Cargill v. Harvard University*, 60 Mass. App. Ct. 585 (2004)

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Termination and Severance

- Termination Checklist
 - Sufficient Supporting Record
 - Prior Circumstances Involving Similarly Situated Individuals
 - Exit Interviews

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Termination and Severance

- Severance
 - Method of Calculation
 - Release of Claims

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Rules to Remember

- Adopt pragmatic policies
- Educate your personnel
- Enforce policies uniformly
- Be truthful about the reasons for job actions
- Create a solid documentary record

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Questions

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