MASSACHUSETTS BROADCASTERS ASSOCIATION

LEGAL GUIDE

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About this Guide

This Guide summarizes many of the important legal issues that reporters and broadcasters routinely face in Massachusetts. The selection of issues to address was based on the authors' experience with the Massachusetts Broadcasters Association Hotline as well as general experience gained in counseling reporters, broadcasters, and other media.

Because of the breadth and complexity of the legal issues highlighted in this Guide, this Guide provides only a general introduction and summary of the law. When legal problems arise, their proper resolution invariably depends upon their specific factual setting, and they should be discussed with an experienced media attorney. The Guide is not intended to be used, and should never be considered, as a substitute for such legal advice. Additionally, the law continuously develops and changes over time, especially in the areas of employment and regulation of content on the Internet. While this Guide is current as of when it was written in September 2008, except where noted, it does not reflect any changes in the law since that date.

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I. JUDICIAL PROCEEDINGS

A. The Court System

There are two separate court systems in Massachusetts: the Massachusetts state courts and the federal courts. The federal district courts sit in three separate locations in Massachusetts, one each in Boston, Worcester, and Springfield; the U.S. Court of Appeals for the First Circuit sits in Boston.

The state courts sit in many different locations and include the municipal or district courts, which typically handle smaller civil cases and relatively minor criminal cases; superior courts, where more significant civil and criminal cases are tried; probate courts, which handle divorce, estate, and family matters; and the Land Court, which handles matters relating to real estate. Each county in Massachusetts has at least one superior court location and several locations for district and municipal courts. District and municipal courts can initially play a significant role in criminal cases, because they are generally the courts where search warrants are issued and arraignments are held.

There are also two levels of state appellate courts in Massachusetts, the Appeals Court and the Supreme Judicial Court, both of which sit in Boston.

B. Rights of Access to Court Proceedings and Records

The media and the public have a right to attend all court proceedings in both state and federal courts, with certain exceptions. The exceptions include juvenile proceedings, grand jury proceedings, and isolated situations where a court finds that closure is necessary to protect a compelling or overriding interest. Absent a court order limiting access, this right of access includes the right to view records of the court as well as to attend court proceedings. Examples of court records that are generally publicly available include: alphabetical indices of parties in pending or closed civil or criminal cases; books containing docket entries; the actual case files;

lists of daily trials and other court activity; names and addresses of people in the jury pool; exhibits introduced into evidence; and search warrants and supporting materials, once the warrants have been returned to the court.

Reporters and broadcasters should be prepared to anticipate situations where one of the parties in a case may seek to exclude the media and the public from all or part of the hearing or trial by contending that a compelling or overriding interest requires the courtroom to be closed. Such requests are often made, for example, when victims testify during trials of criminal cases involving sexual assaults on minors.

A judge may not close the courtroom unless presented with specific evidence, not merely concerns, that closure is necessary in order to protect an important interest. Even if evidence of such a protectable interest is presented, the judge must consider whether the same interest can be protected by other methods or narrower orders that do not interfere with the public's right of access to the courtroom. For example, in the case of a child testifying as the victim of a sexual assault, the judge might find that the child's privacy could be protected adequately by requiring the attorneys to refer to the child by first name only. If the judge nevertheless concludes that there are no alternatives to closing the courtroom, he is required to state his reasons on the record, which may facilitate an immediate appeal. A reporter or broadcaster does not have a right to attend depositions, lobby conferences and side-bar discussions at trial, or show cause hearings on applications for criminal complaints; however, a Magistrate may grant public access to a show cause hearing where the application is one of "special public significance," such that the legitimate interest of the public outweighs the right of privacy of the accused.

If a reporter or broadcaster learns that a party is seeking to close a hearing or that the court is contemplating doing so, he should notify the clerk or other court official that he opposes

closure of the courtroom. The reporter or broadcaster should also request an opportunity to have an attorney present to argue the reasons why closure is not warranted. If necessary, the reporter or broadcaster should request a short recess in order to provide sufficient time to notify counsel and to enable the attorney to participate in the court proceeding. Since courts typically are reluctant to delay ongoing trials and other proceedings in order to hold a hearing on whether they should be closed, it is always preferable to try to learn in advance whether an issue of closing the courtroom is likely to arise during the trial and, if so, to request that the court schedule a hearing in advance, at a time that will minimize interference with the court's schedule.

Similar rules apply to impoundment of court records. While courts occasionally grant impoundment orders simply because nobody opposes them, such orders can be challenged on the same grounds that one would assert in a challenge to closure of a courtroom, namely that there is no compelling or overriding interest that merits protection by impoundment or, alternatively, that the same interests can be protected by means less drastic than total impoundment, such as redacting limited information from the records and releasing the remainder.

C. Cameras and Recording Devices in the Courtroom

1. Federal Courts

The federal courts do not allow any kind of cameras or video or electronic recording devices in the courtroom. They have, however, recognized the right to create visual images by sketch artists.

2. Massachusetts State Courts

In contrast to the federal courts, the Massachusetts state courts generally permit cameras and recording devices. By rule of court, a judge shall permit "broadcasting, televising, electronic recording, or taking photographs" by the news media for news gathering purposes, whenever the court is open to the public, subject to the following limitations:

- A judge should not permit broadcasting, televising, electronic recording, or taking photographs of motions to suppress, motions to dismiss, probable cause hearings, and voir dire (jury selection) hearings.
- During a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client.
- Frontal and or close-up photography of the jury panel should not usually be permitted.

Fear of jurors being exposed to potentially prejudicial information or of witnesses being exposed to the testimony of other witnesses is usually not a valid reason to exclude cameras and recording devices from the courtroom. A judge may limit or temporarily suspend news media coverage "if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence." This exception is noteworthy in its use of the expression "will create" rather than "may create" a substantial likelihood of harm. Examples of situations where a judge may suspend such coverage include prohibiting photography or broadcast of the facial features of a victim of a crime involving sexual activity with a child or of a witness such as an informant whose safety may be endangered if his identity is broadcast.

The judge may exercise substantial control over the placement and manner of use of photographic equipment, including:

- Requiring that all equipment be of a type and positioned and operated in a manner that does not detract from the dignity and decorum of the proceeding.
- Restricting cameras in a manner that does not allow for close up and frontal photography of the jury panel.

- Limitation to a single stationary, mechanically silent video camera and one silent still camera in the courtroom at a time.
- Limiting the movement of the camera equipment and operator within the courtroom to a minimum (particularly in jury trials) while the court is in session.

The judge may also require reasonable advance notice from the press of its intention to photograph, record, or broadcast judicial proceedings. The rule expressly provides that in the "absence of such notice, the judge may refuse to admit" cameras and recording devices. Thus, the media should always give the clerk of court as much advance notice as possible of its intention to record or broadcast court proceedings.

Finally, the limitation of one still camera and one video camera often requires the members of the media to enter into a pooling arrangement. The decision as to who will represent the pool will generally be made by the media and not by the judge. Courts are permitted to place reasonable limitations on the number of counsel arguing on behalf of several interested media who seek to electronically record a hearing; however, judges are expressly prohibited from making an exclusive arrangement for media coverage with any one person or organization.

II. THE OPEN MEETINGS LAW

A. Introduction

The Massachusetts "Open Meetings Law," also known as the "Government in the Sunshine Act," is based on the proposition that open conduct of governmental affairs is essential to the functioning of a democracy. Allowing the public to witness governmental decision-making ensures that the public is kept abreast of official actions as they occur, that members of the public have the opportunity to judge officials' decisions for themselves, and that government officials are held accountable for their actions. The Commonwealth of Massachusetts Office of

the Attorney General publishes an informative guide on the Open Meetings Law, which is accessible at: http://www.mass.gov/Cago/docs/Government/openmtgguide.pdf.

B. Applicability

The Open Meetings Law applies to meetings held by state and local governmental bodies and administrative agencies, although the rules for state agencies differ slightly from the rules for local governmental entities in cities, towns, and districts. The governmental bodies that must maintain open meetings include agencies, boards, commissions, committees and subcommittees, whether elected, appointed, or otherwise formed. The Open Meetings Law applies to any session where the members of a governmental body gather to discuss or vote on any matter over which the governmental body has supervision, control, or advisory power, and which requires a majority vote to adopt. The Open Meetings Law applies to every meeting of a quorum of a governmental body where any public business over which the governmental body has jurisdiction is discussed or considered. Whenever the meeting results in a "verbal exchange," the governmental body is considered to have engaged in "deliberation," and must comply with the requirements of the Open Meetings Law.

The Open Meetings Law does not apply to the General Court (the Legislature), bodies of the judicial branch, and quasi-judicial boards. It also expressly excludes town meetings. The Law does not apply to on-site inspections of projects or programs. Further, the Law does not apply to boards informally appointed by individual officials to carry out duties that are assigned to such officials. For example a committee appointed by a superintendent to aid in the selection of a principal, would not fall under the Law.

C. Requirements under the Open Meetings Law

1. Notice of a Meeting

Notice of any open meeting must be filed with the Secretary of State or the clerk of the

city or town in which the governing body acts, and a copy of the notice must be publicly posted at least 48 hours (including Saturdays, but not Sundays or legal holidays) prior to the meeting. The officer posting the notice need not include a statement of the purposes for which the meeting has been called or the matters to be acted upon. However, the clerk must post the notice in his office or on the official bulletin board of the city or town. The notice must be in easily readable type, and contain the date, time and location of the meeting. The only exception to the 48-hour notice requirement is in an "emergency" situation, defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate attention." Any governmental body that calls an emergency meeting should give as much notice as possible under the circumstances. If it is deemed necessary to adjourn or extend the meeting to another time, the Open Meetings Law's notice requirement applies to the adjourned or extended portion of the meeting.

2. Public Records of the Meeting

Governmental bodies are required to maintain accurate records of their meetings, setting forth the date, time, place, members present/absent, and any action taken at each meeting. This requirement of a public record applies even to closed sessions (discussed below); but records of non-public meetings may remain sealed until their publication will no longer defeat any lawful purposes of the closed session. The record includes any votes taken in open or closed sessions, exactly as they occurred. Secret ballots may not be used in open sessions.

The Open Meeting Law has no provision regarding the form in which minutes of meetings must be maintained. The Law simply requires that a governmental body eventually put its minutes in written form. While the Law is silent on how long a governmental body may take to adopt and make available for public inspection its "official minutes," the Law implies that minutes should be made available within a reasonable period of time after the conclusion of any meeting. A period of two to four weeks is generally considered reasonable. From the time they

are created, the minutes of a meeting of a governmental body are a public record.

3. Closed Sessions (also referred to as "Executive Sessions")

A government entity subject to the Open Meetings Law may close a meeting to members of the general public only where the purpose of the meeting falls into one of several categories described below. The government entity conducting the meeting, however, always retains the discretion to keep the meeting open.

a. Statutory Exemptions to the Open Meetings Law

The following are the nine specific statutory exemptions from the open meeting requirement:

- **Discussion of the reputation, character, physical condition, or mental health of an individual, rather than his professional competence**

A meeting held in closed session for this purpose may be held after 48 hours notice to the individual who will be discussed. If the individual requests to keep the meeting open, it must remain open. If the individual agrees to a closed meeting, the individual has the right to be present during any discussions concerning him, to have his own representative or counsel present to advise him (but not to participate in the meeting), and to speak on his own behalf.

- **Consideration of the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member, or individual**

Like the preceding category, such a meeting may be called only after 48 hours advance notice to the individual who will be discussed, and must remain open if the individual requests to keep the meeting open. The individual's right to have his dismissal considered at an open meeting takes precedence over the general right of the governmental body to go into executive session to consider the matter. If the individual agrees to a closed meeting, the individual has the same rights as set forth above.

- **Discussion of strategy concerning collective bargaining or litigation and conducting collective bargaining sessions**

This exemption applies only if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body.

- **Discussion of the deployment of security personnel or devices**

- **Investigation of charges of criminal misconduct or discussion of the filing of criminal complaints**

- **Consideration of the purchase, exchange, lease, or value of real property**

A meeting may be closed for this reason only where such discussions may have a detrimental effect on the negotiating position of the governmental body with a third party.

- **When necessary to comply with a general or special law, or where required to obtain a federal grant**

This exemption applies where a statute contains a provision that requires the governmental body to consider a particular issue in a closed session. For example, this exemption may apply to the initial stage of a hiring process, where the exemption described immediately below is not applicable.

- **Interviewing and consideration of applicants for employment by a preliminary screening committee**

This exemption applies only to meetings held by local government entities, and only if an open meeting would have a detrimental effect on obtaining qualified applicants. It applies only to applicants who have not yet passed a preliminary screening. This exemption does not apply to screening by a governmental body itself; rather, it applies to special committees and subcommittees. A governmental body that engages in a hiring process may be able to convene in executive session under another exemption.

- **Meeting or conferring with a mediator with respect to any litigation or decision involving public business**

This exemption also applies only to meetings held by local government entities. It is limited to situations where the decision to participate in mediation was made in an open meeting, and it applies only if no action is taken on the mediated issues without first deliberating and obtaining approval at an open meeting.

b. Procedures for a Government Entity to Enter Into an Executive Session

If the government entity wants to conduct a portion of a meeting in an executive session, it must observe specific procedures. It must give proper notice of the meeting. The meeting must convene as an open session, and it cannot close until a majority of the members of the governmental body vote to enter into a closed session. The vote of each member on that question must be recorded in the official minutes of the meeting. The presiding officer of the governmental body must cite in open session the purpose for which the closed session will be held, and must state whether the group will reconvene in an open session once the closed portion is concluded.

Minutes or an equivalent record, mirroring those required for open meetings, must be kept for closed meetings. The minutes must be written, and must set forth the date, time, place, members present or absent, and the action taken. In addition, all votes taken in an executive session must be recorded roll call votes, and included in the minutes. The minutes or record of an executive session are public records from the time they are created; however, such minutes "may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer."

D. Social Meetings Among Members

The requirement that all discussions and actions taken during an official meeting be open

to the public does not apply to "chance or social meetings" during which two or more government officials discuss matters relating to official business, as long as they do not reach an agreement. However, the statute expressly states that officials may not use such a meeting "in circumvention of the spirit or requirements" of the Open Meetings Law (for example, to discuss or act upon a matter over which the governmental body has supervision, control, or advisory power).

E. Speaking at Open Meetings

The public generally does not have the right to ask questions or make comments at open meetings, but individuals are sometimes permitted to do so, with permission from the presiding officer. A person wishing to speak at an open meeting should consider contacting the government entity organizing the meeting in advance of the meeting to request permission to address a meeting of the governmental body. The presiding officer has the power to have a disruptive party removed from an open meeting, if that person persists in being disorderly after being warned by the presiding officer.

F. Recording Open Meetings

The right to record open meetings varies, depending on whether the meeting is held by a state government entity or a local government entity. If the meeting is held by a state governmental body, any person at the meeting may use any means of audio recording to record the meeting. If the meeting is held by a local government entity, any person at the meeting may record the proceedings with an audio recorder, and also use video recording equipment fixed in one or more designated locations determined by the governmental body.

In all cases, however, the recording may not "actively interfere" with the conduct of the meeting. Minimal inconvenience to the government entity does not rise to the level of "active

interference" sufficient to prohibit the recording of the meeting. For example, if the person recording the meeting wants to use an available electrical outlet—even if the outlet is normally used for other purposes—or wants to rearrange the physical facilities slightly to set up the recording equipment, this level of inconvenience should not rise to the level of "active interference" sufficient to prohibit the person from recording the meeting. The First Circuit Court of Appeals interpreted the Open Meetings Law as permitting a reporter to situate camera, which was mounted on a tripod, in the only stationary location that permitted him to capture the faces of the applicants and commissioners at a meeting of a town's Historic District Commission, despite the fact that the chairperson of the Commission had asked him to move the camera. The court considered the fact that the recording equipment had been placed in the same location during prior Commission meetings without incident, that the chairman failed to designate an alternative location to which the reporter could move his camera, and that the reporter's activities did not disrupt or interfere with the ongoing meeting.

G. Violations of the Open Meetings Law

1. Examples of Violations

The Open Meetings Law can be violated in a variety of ways. The most obvious example occurs when the government entity decides to meet in a closed session for impermissible purposes or without proper notice. Other examples include: inadequate public notice prior to the open meeting; conducting an open meeting in a room that is too small to accommodate all of the people who would like to attend; attempting to circumvent the Open Meeting Law by conducting meetings in which a quorum of members participate in serial fashion ("revolving door"); holding non-public telephone or e-mail meetings among members of a governmental body on an issue of public business; and conducting the meeting in a manner that makes tape recording impossible. If a violation occurs during the course of a meeting, it is advisable to bring the violation to the

attention of the presiding officer immediately. However, if the presiding officer fails to remedy the violation or if the violation does not become evident until after the meeting, a variety of remedies are available.

2. Redressing Violations in Court

a. Who can enforce

The Massachusetts Attorney General is responsible for enforcing the Open Meetings Law. Additionally, three or more registered voters, or the District Attorney for the district in which the governmental body is located, may also bring a complaint seeking to enforce the provisions of the law and to obtain a remedial order. The court is required to make a speedy determination and to hear the complaint within ten days after it is filed. The burden of proof is on the governmental body to show that it adhered to the provisions of the Open Meetings Law.

b. Time limits for complaints

A complaint asserting violation of the Open Meetings Law must be filed within 21 days of the date when the action was made "public." For a meeting called in violation of the Open Meetings Law, this 21-day period begins when the meeting was held. For a closed session where the records of the meeting are kept secret, the period begins on the day that the sealed records become public.

c. Remedies

If the court determines that the governmental entity violated the Open Meetings Law, the court will issue a judicial order requiring the governmental body to comply with the Open Meetings Law at future meetings. In addition, the court may, but is not required to, invalidate any action taken at the meeting where the law was violated. The court order may also include a civil fine against the governmental body in an amount no greater than one thousand dollars for each meeting held in violation of the Open Meetings Law. In addition, a judicial order may

require that the records of the closed meeting be made public.

III. PUBLIC RECORDS AND THE FREEDOM OF INFORMATION ACT

A. Federal and State Statutes

Access to records of federal agencies is governed by a federal statute called the Freedom of Information Act ("FOIA"). FOIA requires federal government agencies to make available for public inspection and copying any opinions, orders, policy statements and other documents requested by the public, subject to specific statutory exemptions. Access to records of agencies of the Commonwealth of Massachusetts and its subdivisions is governed by a state statute, called the "Public Records Law," which is closely modeled after FOIA. The Massachusetts Public Records Division publishes an informative guide to the Massachusetts Public Records Law, which is available online at: http://www.sec.state.ma.us/pre/prepdf/guide.pdf.

B. Definition of Public Records in Massachusetts

The Massachusetts statute broadly defines a "public record" to include:

> all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth or of any authority established by the general court to serve a public purpose.

All state agencies, departments, boards, commissions, bureaus, and their respective subdivisions are subject to public records law, as well as all local government entities -- counties, cities, towns, regional districts and their subdivisions, such as school committees, zoning boards, and tax assessors and authorities regulating housing, redevelopment, the Massachusetts Port and the Turnpike. However, the term "government agency" does not include legislative and judicial bodies. Legislative and judicial records may be publicly available through other process or procedure.

C. Statutory Exemptions from Public Records

There is a presumption that all governmental records are public records. Thus, statutory exemptions under the Public Records Law are strictly and narrowly construed. Reporters and broadcasters seeking access to records under the Public Records Law should be aware that agencies' interpretation of these exemptions may vary on a case-by-case and agency-by-agency basis. The categories of records that are exempt from public disclosure under Massachusetts law are:

1. Specific Statutory Exemption

Records which are specifically exempted from disclosure by some other statute are also exempted from disclosure under state and federal law. A government entity may use this exemption to withhold materials, if the exempting statute expressly states or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. One common example of a statutory exemption is the exemption for certain criminal offender records information ("CORI").

2. Materials Related Solely to Internal Personnel Rules and Practices of the Government Unit

Under Massachusetts law, such materials are exempt only to the extent necessary for proper performance of necessary government functions. Such materials are also exempt under federal law. The general purpose of the federal exemption is to relieve agencies of the burden of assembling and maintaining records in which the public cannot reasonably be expected to have a legitimate interest.

3. Records Relating to Private Facts about Specific Individuals

Personnel and medical files are private and may not be released to the public under state or federal law. Massachusetts courts view public employee disciplinary records as exempt

"personnel" files. The same rule applies to other materials relating to a specifically named individual, if their disclosure would constitute an "unwarranted invasion of personal privacy." Courts have interpreted this exemption as applying only to "intimate details of a highly personal nature," examples of which include: marital status, paternity, substance abuse, government assistance, family disputes, and medical information. Unlike some other states, the Massachusetts courts have held that autopsy reports are "medical records" that are exempt from disclosure. Determining whether this exemption applies to a particular record involves a two step analysis: (1) does the record contain information that constitutes an "intimate detail of a highly personal nature"; and, if so (2) does the public interest in disclosure substantially outweigh the individual's privacy interest in keeping such highly personal information private.

In determining if personnel information falls under this exemption, the custodian of the records will take into consideration the nature or character of the document. Generally, information that is useful in making employment decisions regarding an employee is sufficiently personal to be exempt. On the other hand, documents that relate to the workings and determinations of the internal affairs process, such as officers' reports, witness interview summaries, and internal affairs reports, do not fall within the personnel information exemption; however, they may be exempt under other exemptions to the statute.

Courts have generally permitted the public greater access to information that relates to individuals' public employment than to the same individual's private activities, under the reasoning that public employees have a diminished expectation of privacy in matters relating to their public employment. For example, an individual's public employment salary is a public record, but his source or amount of private income generally is not public information.

4. Policy Positions under Development

Inter-agency and intra-agency documents regarding policy positions being developed by an agency are exempt from public disclosure. This exemption is intended to avoid the release of materials that could taint the deliberative process if prematurely disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process; purely factual matters used in the development of government policy are subject to disclosure. Similarly, factual reports that are reasonably complete and inferences that can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt from disclosure under this exemption. Only those portions of materials that have a deliberative or policymaking character and relate to an ongoing deliberative process are exempt from the Public Records Law under this exemption.

5. Notebooks and Other Personal Materials Prepared by Government Employees

Materials prepared by a government employee that are work-related but can be characterized as personal to the employee, such as personal reflections on work-related activities and the employee's notes used to assist him in preparing reports, are protected from disclosure under this exemption. The exemption does not apply, however, to materials that have been shared with other employees or which are being maintained as part of the files of a government unit. In a 2005 decision, the Massachusetts Supreme Judicial Court held that records pertaining to the Barnstable County sheriff's appointment of "reserve deputy sheriffs," in connection with his official status or duties, were not exempt as "personal materials" under the Public Records Law.

6. Law Enforcement Investigatory Materials

Records created by police or other law enforcement officials during the course of an investigation are exempt from disclosure under both state and federal law, if the records were compiled out of public view and if disclosure would likely interfere with effective law enforcement. The goal of the exemption is "the avoidance of premature disclosure of the Commonwealth's case prior to trial, the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions." Massachusetts courts have held that the exemption applies to both open and closed investigations; however, the fact that an investigation has closed weighs in favor of a finding that disclosure would not interfere with effective law enforcement.

7. Trade Secrets, Commercial and Financial Information Provided to the Government in Confidence

Trade secrets and commercial and financial information voluntarily provided to an agency to develop governmental policy are not public under state or federal law if the government promises the provider that such information will be kept confidential. However, information that is required to be submitted to the government or that is submitted in order to secure a government contract is public under Massachusetts law.

8. Bids to Enter into Public Contracts

Proposals and bids submitted to Massachusetts agencies are not public until the time for submitting them has expired, any litigation relative to such appraisal has been terminated, or the time within which to commence such litigation has expired, at which point they become public.

Internal state government communications made in connection with the evaluation of proposals and bids are not public until the agency enters into contract negotiations or a contract with a particular entity, at which point they become public.

9. Real Estate Appraisals

Appraisals of real property made by the government are exempt from disclosure under Massachusetts law, until a final agreement has been entered into, any litigation relative to such appraisal has been terminated, or the time within which to commence such litigation has expired. When one of the three events occurs, the exemption no longer applies, and the appraisals become public records. An "appraisal" is defined by statute as any written analysis, opinion, or conclusion prepared by a real estate appraiser relating to the nature, quality, value or utility of specified interests in, or aspects of, identified real estate.

10. Firearms Registrations Information

All names and addresses contained in applications for licenses to carry or possess firearms, firearms identification cards, or papers relating to any transfer or sale of firearms, rifles shotguns, machine guns, or ammunition, are exempt from disclosure under Massachusetts law. This exemption is limited to restricting the public disclosure of the name and address of an individual applicant. This firearms registrations information can be publicly disclosed as long as the identifying data—names and addresses in particular—is deleted from the record prior to disclosure.

11. Licensing Test Questions and Answers

Licensing test questions and answers, scoring keys, and sheets and other materials used to develop, administer or score a test that may be used subsequently to administer another examination are exempt from public disclosure under Massachusetts law.

12. Contracts for Hospital or Health Care Services

Contracts for hospital or health care services between a government-operated health care facility and a health maintenance organization, health insurance corporation, or self-insured legal entity that provides health care benefits to its employees are exempted from disclosure.

13. Personal Contact Information of Unelected Public Employees

Records that disclose the home address and/or home telephone number of an employee of the judicial branch or an unelected employee of the general court, agency, executive office, department, board commission, bureau, division, or authority of the Commonwealth are exempt from the Public Records Law. Underlying documents containing this information can be publicly disclosed provided that personal contact information is redacted.

14. Building and Transportation Plans and Blueprints

Records relating to the safety or security of persons, buildings, utilities, transportation, or other infrastructure located within the Commonwealth, such as blue prints, plans, schematic drawings, security and emergency preparedness measures, and threat and vulnerability assessments, are exempt from the Public Records Law, if their disclosure, in the reasonable judgment of the records custodian, is likely to jeopardize public safety.

15. Family Members of Public Employees

Records in the custody of a government agency that contain the name, home address, and/or home telephone number of a family member of a Commonwealth employee, and which identify such individual as being the family member of a Commonwealth employee, are exempt from the Public Records Law. As long as this personal contact information is redacted, the underlying documents containing this information can be publicly disclosed.

16. Adoption Contact Information

The registry of vital records and statistics maintains a voluntary adoption contact information registry for purposes of connecting adopted children with the parents listed on their initial birth certificates. The contact information in this registry, which includes addresses and other information supplied by parents and adoptees, as well as any indices of this registry, are exempted from the Public Records Law.

D. The Process to Obtain Access to a Public Record in Massachusetts

1. The Request

Requests for access to public records may be made either orally or in writing. It is recommended, however, that such requests be in writing in order to avoid disagreement or confusion as to what was requested. Also, if the request is denied, it cannot be appealed if it was made orally; only written requests can be appealed.

There is no specific form required for the written request. The request should be specific and clear, so that the public record can be identified and located promptly. The request must be for documents and records, not for information on particular topics. The Massachusetts public records regulations provide that a records custodian should use his superior knowledge of the records in his custody to assist the requester in obtaining the desired records.

The request need not identify the person making the request. Nor is it necessary (or even advisable) to articulate a reason for seeking to inspect the public record. Any member of the public may request access to a public record without a demonstration of need. In short, mere curiosity is sufficient reason to request a copy of a public record.

2. The Response

The Public Records Law only applies to information that is in the custody of the governmental agency at the time the request is received. The government agency must respond

to the request within ten (10) days either by allowing access to the public record or by providing a formal denial if the records sought are exempt from disclosure. Where no exemption applies, the government agency is required to permit inspection of the records at reasonable times (business hours).

A records custodian may charge a reasonable fee to recover the costs of complying with a public records request, including charging a pro-rated fee for search and segregation of records based on the hourly rate of the lowest paid employee capable of performing the task. "Search time" is the time used to locate a requested record, pull it from the files, copy it, and return it to the files. "Segregation time" is the time used to delete exempt data from a requested public record. In addition to the search and segregation fees, records custodians are permitted to charge a fee of $.20 per page for photocopies of public records, and $.50 per page for computer printouts of public records. At times, an agency will provide a fee estimate in advance of commencing a public records search. Should an estimated fee seem too high or unreasonable, the requester might consider asking the agency to identify with specificity how the estimated fees were calculated.

If a request is denied on the basis of an exemption, the government agency must state in writing the specific exemption that applies. If the government agency does not respond within ten (10) days, it is deemed to have denied the request.

3. The Appeal

If a person is denied access to a public record or if the proposed fees are excessive, he may pursue either an administrative appeal to the Supervisor of Public Records (the "Supervisor") or appeal directly to a court of law by filing a complaint in superior court. Pursuit of one appeal route does not exclude the other. The administrative appeal to the Supervisor is often less expensive than a direct complaint to the court. An appeal to the Supervisor must be

made within ninety (90) days of the denial. It must be made in writing and must include copies of the original request and the denial, if available.

Upon receiving an administrative appeal, the Supervisor is required to investigate the matter and to issue a written decision within a reasonable period of time. The Supervisor may elect to conduct a hearing with respect to the appeal. In all proceedings, it is presumed that the information being sought is public. If the Supervisor finds in favor of the party making the request, he will specify which public records must be made available for inspection and copying. The Supervisor may also call upon the Attorney General to enforce the release of the public records. If the Supervisor denies the appeal, the requesting party may file a lawsuit against the record custodian in superior court.

PART II

Regulation of Broadcast Content

IV. LIBEL

A. Introduction to Libel

The most common kinds of lawsuits brought against reporters and broadcasters based on the content of their broadcasts are suits for libel. In its most basic form, "libel" is the publication or broadcast of a statement about a person or an entity that tends to damage the reputation of that person or entity. One sometimes hears the terms, "libel," "slander," and "defamation." "Libel" is distinguished from "slander" in that "libel" refers to statements that are disseminated in writing or through mass media, while "slander" refers to statements disseminated orally through ordinary speech. "Defamation" is a more generic term encompassing both libel and slander.

Traditional libel law underwent substantial change in the United States during the decade between 1964 and 1974 as a result of a series of decisions of the United States Supreme Court. In those decisions, the Court recognized, for the first time, that the First Amendment created legal requirements that had to be met before a reporter or broadcaster could be held responsible for damages in a libel case. Before that time, all that a libel plaintiff needed to prove in order to win a lawsuit was the publication or broadcast of a statement about the plaintiff that tended to diminish the plaintiff's reputation. Truth was a defense, in the sense that the reporter or broadcaster could escape liability by proving the truth of the statement; but if the reporter or broadcaster was unable to do so, the plaintiff was not required to prove the statement false.

The series of cases in the United States Supreme Court that completely changed the libel landscape began with the famous case, New York Times v. Sullivan, in 1964. Today, as a result of that case and other decisions of the Supreme Court that followed it, the plaintiff must prove not only publication of a defamatory statement about him or her in order to win a libel suit, he must additionally prove that (1) the statement was false; (2) the statement was one of fact as opposed to opinion, speculation, humor, or hyperbole; and (3) the statement was disseminated

with the requisite degree of fault by the reporter, publisher or broadcaster.

The following discussion will begin by examining the traditional elements of libel, namely publication or broadcast of a defamatory statement about a person or entity, and then will discuss the additional requirements imposed by the First Amendment that can be remembered as the three "Fs": (1) fact, (2) falsity, and (3) fault. This section will close with a discussion of certain defenses that, where applicable, protect even publication of false and defamatory statements of fact about a person or entity.

B. Requirement of "Publication"

Because the terminology used in libel law predates the invention of radio and television, libel lawyers and courts generally talk about "publication" of a libelous statement rather than "broadcast." A reporter or broadcaster is considered the "publisher" of a defamatory statement, even if the statement was spoken by someone else, such as a guest on a talk show, so long as the statement was transmitted by the reporter or broadcaster, unless the statement was made under circumstances where the reporter or broadcaster had no control over the content, such as, for example, the broadcast of a live press conference. A broadcast does not have to reach a large audience to be classified as a "publication." Courts have held that a defamatory statement can be "published" even when it is transmitted to only one person.

Generally, reporters and broadcasters are subject to the "single publication rule." This means that, if only a single work or story is involved, the statute of limitations begins to run on the day that the story is first published. In Massachusetts, defamation plaintiffs have three years from that date to bring a lawsuit. A defamation claim can be dismissed if the claim is brought even one day outside of this time frame. However, the publication of a new edition or version of a prior work is considered a "republication" which can reset the three-year clock. Massachusetts

has not yet addressed whether re-airing a television show constitutes a republication. District and appellate courts in other states have found, however, that because the rebroadcast is intended to reach a new audience, it is a republication, which re-starts the statute of limitations. With respect to materials published on the Internet, Massachusetts has followed the majority of states in adopting the single publication rule, pursuant to which the statute of limitations begins to run at the time the first posting is made.

The rule is different, however, for reporters and broadcasters who republish allegedly defamatory statements made by another media outlet. The republisher is subject to liability as if it had originally published the statements, and the clock begins to run against the republisher on the day of the republication. Therefore, if a defamatory statement is published in today's newspaper, the plaintiff has three years to bring a claim against the paper. If that same statement is republished in a book published ten years later, the plaintiff may sue the book's publisher within three years, but cannot now sue the paper for that same ten-year-old statement.

If the original publisher authorized or intended the republication, or if its repetition was reasonably foreseeable, the original publisher can be held liable for its subsequent republication. This is also the case where statements are repeated in other forums, such as when a reporter repeats a defamatory statement from one of his articles while being interviewed on a television news program. Furthermore, the reporter or broadcaster can be held liable for both the original defamatory statement and the reporter's repetition of it in other forums, if the reporter was acting with the authority and approval of his publisher in making and repeating such defamatory statements. An important exception to this exists in the case of wire service providers, such as Reuters or the Associated Press. This is discussed in greater detail below.

C. Requirement that the Speech be "Defamatory"

1. Definition

A statement is called "defamatory" if it tends to injure a person's reputation among a substantial portion of the community. The type and size of the audience is a factor that courts will look at, but some cases have allowed defamation actions to continue even where the statement was communicated to only one other person. Examples of "defamatory" statements include accusations that a person has demonstrated incompetence in his profession, committed a crime or is guilty of some other immoral act, and statements that may prejudice the plaintiff's profession or business.

2. Who Can be Defamed

The laws of libel protect rights in reputation. Consequently, any person, corporation, or unincorporated association with a reputation to protect may potentially bring a lawsuit for libel. Governments and governmental departments, on the other hand, may not bring libel lawsuits, regardless of what is said about them, although individual government officials may do so. Nor can a deceased person maintain a libel suit. To paraphrase Shakespeare: their legal rights to protect their reputations do not live after them, but are interred with their bones.

There is a small category of individuals who are considered "libel-proof," because their reputations are already so poor that additional accusations against them, even if false, could not possibly cause any damage. Although there are very few cases involving such people, because they generally do not bring libel claims, an example might be a career criminal or mass murderer serving a life sentence in prison. Whether someone is considered libel-proof depends upon the extent to which the public knows about the individual's crimes, whether through media publicity or other sources. For example, plaintiffs have been found libel-proof in situations where there were "scores of newspaper articles" about their crimes.

3. How Someone Can be Defamed in Addition to Publishing a False and Defamatory Statement

Most libel suits arise out of the publication of false and defamatory statements made directly about another person. There are several other ways in which a person can be defamed, however. These include misquotation, defamatory use of a person's image, innuendo, and physical acts or conduct that imply something defamatory.

a. Misquotation

One way to libel someone without making direct statements about them is to misquote the person in such a way as to convey a false and defamatory impression. For example, when Mike Barnicle worked as a columnist at the *Boston Globe*, the owner of a local gas station sued him for allegedly falsely attributing a racial slur to him; after a trial court found in favor of the plaintiff and the Supreme Judicial Court remanded the case for further findings, the quote could not be verified; the case later settled with the *Globe* making payment to the plaintiff. In another case, the United States Supreme Court held that an author could have defamed Jeffrey Masson, a scholar of Freudian psychoanalysis, by falsely attributing to him the self-description as a kind of "intellectual gigolo." Likewise, a reporter or broadcaster cannot successfully defend against a defamation claim by saying that a person was quoted accurately, where the context of the quote was so altered as to change the meaning of the quote.

b. Images

An image can be considered defamatory due to its improper juxtaposition or incorrect identification of content. A photo or video can convey a defamatory meaning based on its juxtaposition with certain text. For example, a video of a woman standing on a street corner, while the audio describes the rise of prostitution in a particular neighborhood, could be defamatory of the woman if she can be identified in the video. On the other hand, courts have

not created a bright line rule for determining when an image is defamatory. Thus, miscaptioning a photograph with the wrong person's name will not necessarily support a defamation claim unless, in context, the photograph implies something defamatory about either the named or pictured person. The mislabeling itself is not actionable, since a defamation claim cannot be supported by something that requires "several inferential leaps" to be considered defamatory.

However, in a recent case, a photograph was considered defamatory, despite the publisher's printing a disclaimer that there was not a direct relationship between the picture and the accompanying story. In that case, a photograph of a teenage girl that was published in connection with an article on sexually active teenagers was found to be defamatory despite a disclaimer, just above the byline, stating that "the individuals pictured are unrelated to the people or events in this story." Because the disclaimer was written in smaller type than both the byline and the story itself, the court said that it was easy for the average reader to overlook it and thus assume that the girl in the photo engaged in the types of activities described in the article.

c. Innuendo

Even when none of the language involved is explicitly defamatory, defamation may still be inferred from context. It is possible for the context of an article and the juxtaposition of certain statements to create a defamatory "innuendo," even if the individual statements are true when considered in isolation. For example, in a recent case, an article stated that medical records had "disappeared" from office veterinary files, and juxtaposed this statement with the fact that a particular veterinarian had formerly worked at the office where the records disappeared from. The article also included a statement by the owner of a deceased dog treated by that veterinarian that the records, when found, were "doctored to imply that [the veterinarian] made a more complete diagnosis…" The court found that there were triable issues, including

whether the printing of the word "misfiled" in quotes could be viewed as insinuating through innuendo that the veterinarian did not misfile the records, but in fact stole or hid them. Thus, reporters and broadcasters should use caution, even when the facts in a story are true, to ensure that the context and juxtaposition of those facts do not create a defamatory innuendo.

d. Defamation by Conduct

There have also been instances where conduct, rather than words or images, was found to be defamatory. Defamation can result from any communication, including a non-verbal communication, that "brings an idea to the perception of others." For example, a Massachusetts court held that the act of a security guard escorting a store employee around and out of the workplace could be defamatory, if his co-workers interpreted those actions to mean that the employee had committed a crime.

D. "Of and Concerning" Requirement

Instead of saying that a statement must be "about" a particular person, courts use the expression, "of and concerning." In order to be "of and concerning" a person, a statement must either mention the person explicitly, or else reasonably be interpreted to refer to the person. A statement can be found to reasonably refer to a person in situations where the reporter or broadcaster intended to refer to that person or should have reasonably realized that the statement could have been so interpreted. Another way of looking at this is whether or not the statements could reasonably be understood to "hit" the plaintiff. For example, where a photograph of a female high school student was included in an article on sexually active teenagers, a reader could reasonably believe that that the statements in article were intended to refer to the depicted teenager, and thus were "of and concerning" her. Similarly, statements, that the work of a company's employee contained multiple errors, were considered to be "of and concerning" that

company, where the statement was understood by readers as reflective of the quality of service that the company provided.

Another situation in which this issue may arise is where there is more than one person or company with the same name. If, for example, a reporter or broadcaster reports that the "Acme" company is delinquent in paying its debts and has declared bankruptcy, and there is more than one company called "Acme," the "Acme" company that did not go into bankruptcy may have a viable claim against the reporter or broadcaster; the plaintiff company would need to establish that the reporter or broadcaster should have realized that there was more than one "Acme" company and was negligent in not further identifying the company that went into bankruptcy from other companies with the same name.

E. Statement of Fact

The United States Supreme Court has stated, "under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." Based upon that principle, courts have held that the only statements which can be actionable are statements of fact; statements that consist of opinion, speculation, hyperbole, humor, and other matter that is not of a factual nature do not create liability for defamation.

The entire context in which a statement is made determines whether or not the statement is presented as one of fact. For example, editorials are typically considered statements of opinion, not fact. Although a court will also look at whether or not cautionary terms such as "it is speculated" or "it is rumored" were used to indicate that the statement was an opinion, simply qualifying a defamatory statement as being "unconfirmed" or "speculated" is not necessarily enough to make the underlying statement non-actionable. Similarly, attributing a defamatory

statement to someone else (such as a witness) does not exempt the reporter or broadcaster of the statement from liability. Where statements in an article or broadcast are presented as actual events that took place, they will likely be seen as statements of fact, not opinion, and may support a claim for defamation.

Courts have rejected defamation claims by plaintiffs who were called an "absolute barbarian," a "nut," and "paranoid" as being inactionable opinion. An employee who referred to his supervisor as being "sick" and "mentally ill" was found to be expressing a protected opinion, because no reasonable person could have assumed that he meant these words to be understood in their clinical sense. An accusation that someone "turns lives upside down," without more specific charges of misconduct, was also found to be an opinion and not a defamatory statement of fact.

Another example involves a suit by a state police trooper against former radio talk show host, Paul Benzaquin. Benzaquin described on his program an incident where a trooper stopped his car because its registration appeared to have expired. Benzaquin was incensed and used words such as "Nazi," "dictator," "barbarian" and "lunkhead" to describe the trooper's attitude during the stop. The court dismissed the trooper's defamation lawsuit on the grounds that such terms, especially in context, were inherently statements of opinion, and not fact, regardless of how offensive they may have been to the trooper. In another case, a grieving pet owner referred to the veterinarian who treated his dog as having provided "sloppy" and "lazy" treatment that caused his dog's death. The court found that such statements were protected opinion, as a reasonable reader could recognize that they were generalizations uttered by a distraught pet owner, and not statements of fact.

In evaluating statements of opinion, courts also look to see whether the statement implies

the existence of undisclosed facts or whether, on the other hand, the statement discloses the facts upon which the opinion is based. A reporter or broadcaster may be liable for implied undisclosed facts if they could be considered false and defamatory. On the other hand, where statements of opinion include the facts on which they are based, they are protected as opinion and cannot be the basis of a defamation action.

The Massachusetts Supreme Judicial Court gave as an example of this principle the statement that a person is an alcoholic. Standing alone, that statement implies the existence of undisclosed facts about the person's drinking which could be considered defamatory. The Court contrasted that statement with the statement "I saw the person take a drink at lunch and on that basis believe that he is an alcoholic." The latter statement, which discloses its entire factual premise, would be considered protected, non-actionable opinion.

F. Falsity

Establishing that a broadcast is "false" requires more than disproof of its literal truth. A statement may be considered "true" for purposes of the law of libel, even if it is inaccurate in some minor respect, so long as it is substantially true. The test of whether a statement is "substantially true" is whether the "gist" or "sting" of the statement is true. In other words, a statement is "substantially true" if its defamatory impact is no worse than what the impact would have been if the statement had been completely true. For example, a statement that a person is wanted for murder in three states is "substantially true" even if the person is wanted for murder in only two states.

In a February 2009 decision, the First Circuit recognized a narrow exception to the rule that a plaintiff must establish "falsity." Under an archaic Massachusetts statute, a person can be found liable for publishing a true statement, if the plaintiff can show that the defendant acted

with "actual malice" in publishing the statement, where the topic is not a matter of public concern. In this context, "actual malice" was interpreted by the court to mean "ill will," which is different from the definition of "actual malice" that applies to public figures and officials in connection with an analysis of fault, as described below. This decision may be subject to further appellate review.

G. Fault

Perhaps the greatest advancement in the law of libel that arose from New York Times v. Sullivan and the cases that followed it is the rule that a reporter or broadcaster cannot be held liable for damages, even if the reporter or broadcaster disseminates a false and defamatory statement of fact, unless the reporter or broadcaster acted with a specified degree of fault. The degree of fault that must exist to impose liability on a reporter or broadcaster varies, depending upon the status of the person allegedly defamed. Plaintiffs must establish that a reporter or broadcaster acted with a higher degree of fault if the Plaintiff is a public figure or public official, than if the Plaintiff is a private figure. Because the degree of care that a reporter or broadcaster must use is so highly dependent upon the classification of the person who is the subject of the broadcast or report, the distinctions among the different classifications are discussed in more detail below.

1. Public Officials

A person is only considered a "public official" for the purposes of libel law when the comments concern that person's official conduct or qualifications for office. Not all public employees are classified as "public officials" for purposes of the law of defamation. To be considered a "public official," a person must hold some elective office or otherwise be employed in a position in which he exercises discretion in carrying out governmental functions or in formulating governmental policy. In determining whether someone is a public official, courts

look at whether the position would bring public scrutiny upon the person holding the position, the degree to which that person is able to set policy guidelines, the impact of that position on everyday life, the potential for social harm if the position is abused, and the degree to which the employee has access to the press. These must be characteristics that are part of the position, and not simply the tendencies of the person who happens to hold that position at a given time.

By way of example, the superintendent of a public school system would be a "public official," although his administrative assistant would not be. Policemen have been held to be "public officials" because of the degree of discretion they exercise in their law enforcement functions. Other examples of public officials include: court officers, judges (current and retired), school system maintenance managers, high school principals, military commanders with command responsibility over subordinates, and members of a town's Board of Selectmen. While a chief prosecutor is likely to be considered a public official, the courts have held that an assistant district attorney who did not exercise significant judgment without close supervision was not a public official. Similarly, attorneys in private practice are not public officials, although they are technically "officers of the court."

2. Public Figures

The category of "public figures" applies to people and entities if they are widely known or their actions have created a legitimate public interest in learning their activities. The category of public figure is further divided into two sub-categories, "all-purpose," or "pervasive," public figures and "limited purpose" public figures.

In the first category, "pervasive," or "all-purpose," public figures, are generally people who are household names. Examples include people with far-reaching influence or power such as Bill Gates of Microsoft Corporation; well-known entertainers such as Brittney Spears and Angelina Jolie; and famous sports figures such as Tiger Woods and LeBron James. As the term

"all-purpose public figure" implies, such people are treated as public figures for all purposes, regardless of the subject matter of the statements about them.

The second category of public figures is the "limited purpose" public figure. Such people typically occupy highly visible roles in a public controversy, and they are treated as public figures only with respect to statements concerning that controversy. The category of limited purpose public figures is further sub-divided into two additional categories, voluntary and involuntary limited purpose public figures, with the same legal rules applying to both categories. A "voluntary" limited purpose public figure is typically a person who voluntarily thrusts himself into the center of a public controversy. An example might be a person who organizes a community opposition to a new development. Union leaders are also considered voluntary limited purpose public figures.

"Involuntary limited-purpose public figures," by contrast, are people who have substantial involvement in a particular controversy, but their involvement is not voluntary. Examples are relatively rare and might include Richard Jewell, the security guard at the bombing of the 1996 Olympic games in Atlanta (although Jewell ultimately became a voluntary limited-purpose public figure after he subsequently sought publicity about his involvement in the case).

Courts determine the question of who is or is not a public figure on a case-by-case basis, and the results are not always consistent. For example, a corporation accused of creating health-hazards was held to be a public figure, as was a condo developer, in connection with a public controversy about his development. On the other hand, a high-visibility defendant in a first-degree murder trial, and a man detained on suspicion of being the "Hillside Strangler," were not treated as public figures. Courts have generally held that once a person becomes a public figure in connection with a particular controversy, he remains a public figure thereafter for purposes of

later commentary or treatment of that controversy.

The Standard of Fault for Public Officials and Public Figures

If the plaintiff is a "public official" or a "public figure," the standard of fault that is required for liability is sometimes called "actual malice." For a reporter or broadcaster to have acted with "actual malice" in disseminating a statement about a public official or public figure, the reporter or broadcaster must have known that the statement was false, or have acted with a high degree of awareness of probable falsity of the statement, or have published it with "reckless disregard" for whether it was true or false. The issue is not what a reasonable person would have done, but what was in the mind of the defendant when he published the statement.

An example of what could constitute "reckless disregard" for the truth is the failure to investigate obvious key sources of information where there is credible evidence to contradict what a journalist proposes to report. Where there are obvious reasons to doubt the veracity or accuracy of an informant and his reports, and the reporter or broadcaster actually has serious doubts about them, courts have held that the reporter or broadcaster would be reckless in publishing those reports.

Because few reporters or broadcasters are likely to admit that they actually entertained serious doubts, courts permit plaintiffs to prove a reporter's or broadcaster's "reckless disregard" for the truth through circumstantial evidence. Examples of such circumstantial evidence which, taken cumulatively, may support a finding of "actual malice," include: reliance on sources with a clear bias; reliance on a source who lacked first hand knowledge and refused to reveal his own source (despite typically agreeing to do so); purposeful failure to investigate known witnesses; and discarding of notes, presumably in a deliberate effort to conceal inaccuracies in reporting. Similarly, if a reporter or broadcaster falsely creates the context in which statements were

supposedly made, a court may assume that he knew that the remarks themselves were false.

3. Private Figures

People who are neither public officials nor public figures are called "private figures." When reporting about a private figure, and also when reporting about a limited purpose public figure on matters outside the scope of the person's public status, a reporter or broadcaster is held to a higher standard of care than when reporting on public officials and public figures. Under that higher standard, the reporter or broadcaster must exercise the degree of care that a reasonable person would exercise under the circumstances. Failure to adhere to that standard is called "negligence." If a private figure can prove that the statements at issue were false and defamatory, and that the reporter or broadcaster was negligent in publishing them, the private figure may recover for defamation.

H. Privileges

There are some situations in which members of the media are relieved of responsibility to check the accuracy of material they disseminate and are shielded from liability for disseminating such information, even if the information is false and defamatory. In those situations, courts speak of the media enjoying "privileges" to publish the otherwise defamatory or libelous information. While there are a number of different privileges, those most frequently relied on by the media include (1) the privilege to report fairly and accurately on governmental proceedings, and (2) the privilege to report information received from wire services.

1. Fair and Accurate Report of Governmental Proceedings

Because of the important public interest in the workings of the government, the media enjoys an absolute privilege to report on such proceedings. The privilege applies to reports of judicial, legislative, and executive proceedings, including meetings, hearings, and official press conferences. This generally includes pleadings filed in court, once the court has taken action on

those pleadings. The privilege also protects reports of the content of records of executive, legislative, and judicial bodies.

The fair report privilege is an exception to the general legal principle that there can be liability for statements that one knows are false. Reporters and broadcasters are free to report information contained in an official government record or report, even if the underlying information proves false, and even if the reporter or broadcaster knows that the underlying information is false. The privilege extends to the media the right to report this information without holding members of the media liable if the underlying information is untrue.

A plaintiff may defeat the privilege by showing either that the reporter or broadcaster did not provide a fair and accurate report of the official statement, or that the reporter or broadcaster showed "malice," which requires more than just knowledge of falsity. Courts have indicated that such "malice" may be found where the reporter or broadcaster repeats a known falsehood with the intention of causing "maximum injury" to the plaintiff.

The privilege provides complete protection to any broadcast that is a "fair and accurate" summary of the governmental record or proceeding. Courts have described the requirement that the report be "fair and accurate" as meaning that, while a report does not need to be 100% accurate, it must give a "rough-and-ready summary that is substantially correct." A report will be considered "substantially correct" if the "gist" of the report is substantially true.

The privilege applies even when the article or broadcast does not explicitly attribute each statement to an official proceeding, as long as it is clear, in context, that the article or broadcast is quoting, paraphrasing, or otherwise drawing information from official documents or proceedings. While a report or broadcast need not be balanced for the privilege to apply, a reporter or broadcaster cannot expand or embellish the contents or scope of the underlying public

record or official proceeding.

The privilege extends to a wide range of government reports, including confidential internal memoranda reflecting a government agency's concern about the performance of a subcontractor, and status reports prepared for the government by outside agencies regarding workers' compensation claims of municipal employees. Once an arrest has been made, police reports and other official documents that explain the basis for an arrest fall within the scope of the privilege, as do criminal complaints filed in court by a prosecutor, and court-ordered reports filed with the court.

The key to determining whether a statement is covered by the fair report privilege is whether or not the statement is "official." Statements made at an official police press conference or in an on-the-record interview with a police spokesperson are protected by the fair report privilege, because they qualify as official action. For example, if the Chief of Police reports information that he has gathered from witness statements, this is protected by the privilege as an official statement. On the other hand, a statement given by a public official during the course of a private interview with a reporter or broadcaster may not fall within the privilege unless the person making the statement is speaking in an official capacity on a matter within his job authority.

When statements by police, witnesses, lawyers, or parties in a case are made in court proceedings (i.e. such statements are part of an official action), such statements fall within the scope of the privilege. On the other hand, where no official action is taken (such as witness statements to the police, where no arrest is made), such statements are not privileged as a fair report, regardless of whether or not they appear in a police report.

2. Wire Service Privilege

Massachusetts courts have held that reporters and broadcasters are not liable for

disseminating information received from a reputable wire service. This privilege is based upon the theory that reputable wire services are sufficiently reliable sources such that reporters and broadcasters who rely on such sources cannot be considered to have acted either with negligence or with "actual malice," if statements they report from such sources turn out to be false. There are two qualifications to this privilege, in addition to the fact that the wire service must be a reputable one. First, the reporter or broadcaster must accurately repeat the information received from the wire service; and second, the information must not be so inherently improbable on its face that a reasonable person would investigate before repeating it.

Massachusetts also recognizes what it terms a "reverse wire service privilege," which allows wire services like the Associated Press to print news stories from newspapers or broadcasters without being liable for any defamatory statements that may be in those publications. As long as the wire service demonstrates "ordinary care" in preparing and transmitting the article, only the original publisher, not the wire service, will be responsible for any defamatory content in the story, regardless of how many other outlets ultimately pick up the story through the wire.

I. Damages and Retractions

In a defamation case, the plaintiff may only recover for actual injuries that resulted from the defamatory statements. These can include mental suffering and harm to one's reputation; defamation plaintiffs do not have to prove economic loss in order to recover. For example, a court held that a false statement that a physician was dying of cancer could discourage potential patients from using that doctor. Since such a false statement could prejudice that physician's practice, the court found that such a statement was actionable without proof of any economic damage, such as lost business.

Publishing a retraction is not a defense to a suit for defamation. However, where a retraction is published before the answer to a complaint is due, and where the defendant provides written notice and a copy of the retraction to the plaintiff, the fact that such retraction is published is admissible and relevant in mitigation of the plaintiff's damages. Particularly, if the plaintiff receives an offer to publish a retraction and rejects it, such rejection is admissible as evidence of the plaintiff's failure to mitigate damages.

V. INVASION OF PRIVACY

A. Introduction

The term "invasion of privacy" encompasses at least three different kinds of acts that can give rise to a lawsuit for damages. They are called: (1) intrusion, (2) disclosure of private facts, and (3) commercial misappropriation. Each category is discussed separately, below. A fourth category, called "false light," has been recognized in some states, but not in Massachusetts, and therefore is discussed only briefly at the end of this section.

B. Intrusion

A claim for invasion of privacy by "intrusion" relates to acts which typically occur in the news-gathering process rather than in the broadcasting process, as it involves the conduct of the reporters, editors, and/or photographers who gather the story. "Intrusion" denotes a physical or electronic incursion into another person's seclusion, solitude, or private physical space. The plaintiff must prove an "unreasonable, substantial, or serious interference with his privacy." Consent by the plaintiff is a valid defense.

The most common forms of "intrusion" in the media context are a physical trespass onto another person's private property and a non-physical trespass by a camera with a telephoto lens or recording device. Physical "intrusion," however, is not limited to acts that invade a person's private property and can also occur anywhere that a person has a "reasonable expectation of

privacy," as, for example, in a hospital room. In addition, intrusion can occur by electronic eavesdropping or recording, and, in certain circumstances, by the use of hidden cameras.

To prove a claim of "intrusion", the plaintiff must demonstrate that he had an expectation of privacy that was objectively reasonable – it is not enough for the plaintiff in an intrusion action to have had a personal expectation that his actions would be kept private. For example, a court rejected a woman's claim that her privacy was invaded when she was filmed by a hidden camera while she changed clothes and applied sunburn medication to her upper chest and neck in an open area of her workplace. Although she had believed she was alone, the court found that her expectation of privacy was not objectively reasonable, since the area was open to the public, and other employees could enter the area using their keys even though the woman had locked the door. Similarly, courts have held that a person does not have a reasonable expectation of privacy in a voice message recorded on a telephone answering machine, since it is understood that the person who receives the message can do with it as he likes, including playing it for other people or broadcasting it publicly.

It is also possible to interfere with a person's solitude or privacy in public. For example, stalking may be an invasion of privacy. In one well-known case, Jacqueline Onassis won a suit for invasion of privacy against a photographer who frequently followed her in public, often in very close proximity to her, in order to take photographs of her. In another case, a court in Massachusetts allowed a suit to proceed to trial where the plaintiff claimed that a television reporter "ambushed" him in the parking lot of a fast-food restaurant and brandished a microphone in close proximity to his face while he was sitting in his car.

Where a reporter or photographer remains on public property and observes a person's actions from a distance, the legal test for whether that observation amounts to an invasion of

privacy is, again, whether the person who was observed had a "reasonable expectation of privacy" at the time of the actions. If, for example, a person on private property is engaged in activity that can be observed with the naked eye by someone standing on public property, there is no invasion of privacy. On the other hand, if a person's activity cannot ordinarily be seen by the public without sensory enhancing devices, such as binoculars or a telephoto lens, the person may have a "reasonable expectation of privacy" against an observer who uses such a device to observe the person on his private property.

Along similar lines, the Supreme Judicial Court held that a photographer's actions did not constitute "trespassing" where the photographer took pictures of the plaintiffs' deceased daughter's body on a highway, following her death in a car crash. The court ruled that such actions did not interfere with the parents' right of possession of their deceased daughter's body any more than that of the gaze of a bystander, and that such actions were not an unwarranted invasion of the parents' right of privacy.

1. Wiretapping/eavesdropping

One specific type of non-physical invasion of privacy is the act of eavesdropping, defined as secretly hearing, recording, or broadcasting someone else's conversations. Although often colloquially called "wiretapping," the prohibited activity is broader than wiretapping, because it includes secretly and without authorization hearing or recording any oral communication (not just those that are transmitted electronically) with a recording or transmitting device. Such activities are regulated by both federal and state law.

Under federal law, it is a crime to intercept, record, use, or disclose the content of any "oral, wire or electronic communication" (including cellular phone conversations) through the use of any electrical, mechanical or other device, without the consent of at least one party to the conversation, except under certain limited circumstances.

The Massachusetts statute is similar, except the consent of all parties to the communication is required. Anyone who violates the Massachusetts statute faces a fine of up to $10,000.00 and up to five years in prison. Thus, no one, including members of the media, should record or electronically listen in on a conversation in Massachusetts without the consent of all parties.

The United States Supreme Court has recognized an important, but narrow, exception to the statutory rule. It upheld the right of the media to disclose the content of an illegally intercepted conversation where three conditions were met: (1) the media played no part in the recording or interception, (2) the media obtained the information lawfully (for example, by receiving a tape through the mail from an anonymous source), and (3) the subject matter of the intercepted communication was a matter of public interest.

Additionally, courts in Massachusetts have held that an employer's reading employee e-mails after they are transmitted does not constitute an unlawful interception under the wiretap statute. Similarly, an employer's practice of backing up all of its employees' computer files, including e-mail, was found to be a permissible interception that fell within the statute's exception for systems used in the ordinary course of business. However, an employer's reading of employee e-mails could potentially give rise to a claim for invasion of privacy, depending on whether the employee had a reasonable expectation of privacy in his e-mails, and whether the employer's reading of the e-mails constituted an unreasonable, substantial, or serious interference with the employee's privacy. Where companies have written e-mail policies that permit the company to access employees' e-mail files, courts are less likely to find that employees have a reasonable expectation of privacy in e-mail messages that they send or receive from work.

2. Media "Ride-Alongs"

The United States Supreme Court has held that in some circumstances media ride-alongs (reporters and broadcasters joining the police in their law enforcement duties) violate the Fourth Amendment. The Court held that the police violated the right of residential privacy protected by the Fourth Amendment when they allowed a reporter and photographer to accompany them into a home during the execution of an arrest warrant.

C. Disclosure of Private Facts

The category of invasion of privacy claims that generally arises out of publishing or broadcasting, as opposed to news gathering activities, is invasion of privacy for "disclosure of private facts." Such an invasion of privacy occurs when a reporter or broadcaster "gives publicity" to information about a person that is (1) private, (2) highly offensive or embarrassing to a reasonable person, and (3) of no legitimate public concern. This kind of invasion of privacy differs substantially from libel, in that libel is based upon the dissemination of false facts, whereas invasion of privacy typically involves disclosure of facts that are true.

The requirement that the disclosed facts be "private" as a prerequisite to liability means that a reporter or broadcaster does not invade someone's privacy by disclosing highly embarrassing facts that have already been disclosed to at least some segment of the public. Thus, if a television station films and broadcasts images of someone performing a highly embarrassing action in a public place, there will be no claim for invasion of privacy. This is the case even if the person was not aware that his activities were being recorded. In a public place, it is not necessary to announce that a picture is about to be taken. Courts have dismissed claims for invasion of privacy for the publication of photos of individuals being arrested or standing in unemployment lines, since those photos were taken in public places where the plaintiffs did not have a reasonable expectation of privacy. The First Circuit held that it was not an invasion of

privacy for a webpage to publish a publicly available photograph of an individual or a description of his business activity. Financial dealings can present an area of potential confusion when trying to decide what is and is not "private" information. The publication of sales commissions that were paid to a plaintiff was found not to invade his privacy; however, the distribution of a notice indicating that plaintiff's "bad debts" would be discussed at an upcoming meeting of a condominium association raised sufficient issues of material fact regarding damage to the plaintiff's privacy interests to withstand a motion for summary judgment.

Examples of information that has been held to be a matter of legitimate public concern include payroll records of public employees and amounts paid to settle injury claims against the government, on the theory that the public has a legitimate interest in how public money is spent; information about a police officer's fitness for duty; and discussion of a paternity suit filed against a prominent real estate broker and civic leader, based on allegations by his former employee that he fathered her child and refused to pay her medical expenses or child support. Similarly, a town official's claim for invasion of privacy against a newspaper publisher and reporter for publishing statements made in an executive session (closed meeting) of the town's sewer commission failed, because the media was reporting on a matter of public concern.

The courts generally allow the media substantial leeway in determining what is a matter of legitimate public interest and hesitate to second-guess editorial decisions in that area. As the Supreme Judicial Court said in 1951, "many things which are distressing or may be lacking in propriety or good taste are not actionable."

D. Issues of Confidentiality

1. Promises Not to Publish

Reporters and broadcasters must also be mindful of those whose identities and information they have pledged to keep confidential. A former union employee sued the union

for invasion of privacy and misrepresentation for publishing information about his pension benefits in the union's newsletter, following assurances from the editor of the newsletter that such information would not be published. The court said that there was a genuine issue of fact as to whether disclosure of the plaintiff's pension information violated his right to privacy. Thus, plaintiffs who are damaged by the publication of material that a member of the media pledges to hold secret may have a viable cause of action against that publisher.

2. Confidential Sources

In order to gain access to information, reporters and broadcasters often rely on confidential sources. There is currently no statutory protection in Massachusetts or at the federal level to prevent compelled judicial disclosure of the identity of these sources. Such a "shield law" has been debated in the U.S. Senate, but its legislative future remains uncertain.

Rather, the courts in Massachusetts determine whether to protect the identity of a reporter's or broadcaster's confidential source on a case-by-case basis by balancing First Amendment values and the interests of the press with the public interest in the discovery of evidence. Courts have generally recognized that disclosure of confidential sources may not be compelled unless directly relevant to a non-frivolous claim or inquiry taken in good faith, and that disclosure may be denied where the same information is readily available from a less sensitive source. Courts also consider the potential harm to the free flow of information that could result if reporters and broadcasters are routinely required to disclose confidential sources.

The relevance of the identity of the source to the underlying action in which the information is sought is an important factor in this balancing test. For example, in a recent appellate case in Massachusetts, the court did not require two reporters to reveal their sources, where the defamation plaintiff who sought this information did not sufficiently establish that the identity of the reporters' sources was relevant to his claim.

Conversely, a reporter or broadcaster may be compelled to reveal his sources when a judge performs the balancing test and determines that the plaintiff's need for the information is tangible and substantial, and that it outweighs the public interest in protecting the free flow of information. For example, the Supreme Judicial Court has upheld sanctions against a media defendant (including an automatic finding of liability in a defamation action), where the defendant refused to reveal its sources after a trial court determined that the balancing test favored disclosure of this information to the plaintiff.

Particularly where criminal investigations are involved – for example, where the identity of the source is itself relevant to a criminal investigation – and when all other methods of identifying the source have been exhausted, reporters and broadcasters are more likely to be ordered to divulge sources. Refusal to reveal a source after a court has ordered a reporter or broadcaster to do so can result in civil or criminal contempt charges against the reporter or broadcaster, which may lead to fines and/or jail time.

3. Responding to Subpoenas and Other Requests for Information

Reporters and broadcasters may be summonsed or subpoenaed to testify in connection with a court action as to information that they acquired in the course of their role as a reporter or broadcaster. Such summons or subpoena may also require the reporter or broadcaster to provide copies of his notes, research documents, and/or prior drafts or outtake footage from a broadcast.

The First Circuit has recognized that the routine use of summonses and subpoenas to the media poses multiple threats to important First Amendment interests, including: (1) administrative and judicial intrusion into the newsgathering and editorial process; (2) the appearance of a journalist as an investigative arm or a research tool of the government or a private party; (3) a disincentive for journalists to compile and preserve unpublished materials; and (4) a burden on journalists' time and resources in responding to subpoenas. The court will

balance these burdens on the press against the need for disclosure of the material in question, before enforcing the summons or subpoena.

Further, when a summons or subpoena seeks the disclosure of documents or other materials in a criminal matter prior to trial, the party issuing the summons must also establish that: (1) the materials requested are relevant to the matter before the court and will be admissible at trial; (2) they cannot be obtained by other means in advance of trial; (3) there is a specific need for the materials sought, such that the party seeking them cannot properly prepare for trial otherwise; and (4) the application is made in good faith and is not intended as a "general fishing expedition." Thus, where a reporter or broadcaster receives such a summons or subpoena, he should promptly seek legal counsel on whether to move the court to quash the summons or subpoena.

4. Special Issues Surrounding Reporting Information From Medical Records

The Health Insurance Portability and Accountability Act ("HIPAA") includes federal privacy requirements that severely restrict public access to, and use and disclosure of, individually identifiable health information. Under the Department of Health and Human Services ("HHS") regulations, protected health information includes all medical records and other individually identifiable health information held or disclosed by a covered entity (including group health plans, health care providers and health care clearinghouses) in any form, whether communicated electronically, orally or on paper. The media is not a covered entity under HIPAA, and thus cannot be found civilly or criminally liable for lawfully obtaining or disclosing protected health care information under the Act. However, a reporter or broadcaster who knowingly induces a covered entity to violate HIPAA by obtaining or disclosing information may be viewed as soliciting a violation of the Act, which could be a crime itself.

The Act sets forth limited circumstances under which covered entities can release protected information without authorization (e.g., for treatment, payment, or health care operations). Information that is not considered protected health information may be disclosed without violating HIPAA. Furthermore, a covered entity can disclose health information that is not individually identifiable (de-identified) or if the use or disclosure is required by law. While most routine health information exchanges do not require special consent from the patient, other uses and disclosures of health information require specific authorization. Additionally, individuals can restrict the use and disclosure of their own information.

Both the civil and criminal provisions of HIPAA permit the imposition of penalties against any person or entity who violates HIPAA's privacy provisions. While HIPAA does not create a private right of action for violations of the act, it does provide that the Secretary of HHS may pursue civil penalties against certain covered entities that improperly use, obtain or disclose private health information; the Department of Justice ("DOJ") may similarly pursue criminal penalties against offenders. The penalties increase if the disclosed information is sold for commercial advantage or personal gain. Because covered entities cannot release a patient's information without consent, covered entities will be cautious about disclosing individual health information to members of the media.

Thus far, the HHS has interpreted the regulations narrowly and has stated that it has the authority to recover civil penalties only from covered entities. A 2005 opinion from the Office of Legal Counsel of the DOJ states that only covered entities (including health care providers, whether individuals or an entity) and certain other individuals can be prosecuted for violating the privacy rule. Some have interpreted this to mean that rank-and-file employees of covered entities are not subject to criminal sanctions. However, where an individual uses, obtains, or

discloses protected health information for personal benefit, the government may be more willing to prosecute. For example, employees of health care providers have been prosecuted for accessing and sharing a patient's records for the purpose of a legal proceeding and using a patient's information to obtain credit cards.

E. Commercial Appropriation

Massachusetts law prohibits the use of a person's name or likeness for trade or advertising purposes unless the person consents to such use in writing. The issues that generally arise in this area are (1) what is considered a person's "likeness," and (2) what kinds of use are considered "trade or advertising" uses?

1. Likeness or Image

It is not necessary that the individual whose likeness or image is used be directly mentioned in an article or broadcast. A person's likeness or image is not narrowly limited to photographs; a recognizable voice or other characteristic that identifies the person will also suffice. For example, a photograph of the back of a person wearing the distinctive numbered uniform of a well-known football player would likely be considered the player's "likeness," even if the person's face cannot be seen, and even if the uniform actually is being worn by someone else. In a similar situation, a court held that the use of a well-known professional race car driver's distinctive car in an advertisement was a use of the driver's "likeness" even though the driver was not visible in the photograph.

Parodies of a person's likeness are generally permissible. However, courts have not clearly defined where to draw the line between permissible parody and improper appropriation of likeness. In one case, a court held that an advertisement which used a robot as the hostess of a futuristic game of "Wheel of Fortune" was not a permissible parody and violated the rights of television personality Vanna White.

2. "Trade or advertising" use

The definition of using a likeness for "trade or advertising" specifically excludes news reporting as an impermissible use. As a general rule, a use by the media will be considered news reporting and not trade or advertising, and thus will be permitted, as long as the use has some legitimate connection to a news article or report.

F. Deceased Individuals

There is no right of privacy or cause of action for defamation for the deceased – a plaintiff can only bring these claims on his own behalf. In the area of appropriation, however, there is a related right, known as the right of "publicity," that applies to some individuals and will survive the person's death. This right of "publicity" arises where individuals exploited their images or likenesses during their lives in such a way as to give them commercial value. One example of such a person is Elvis Presley, although there are numerous examples, many in the entertainment field. Presley's exploitation of the commercial value of his likeness during his lifetime, through "Elvis" memorabilia and similar items, created a property interest in that likeness that courts have recognized as surviving after his death and lasting as long as his legal successors continue to exploit it.

In contrast, the likenesses or images of the deceased are freely usable if they did not exploit their images commercially during their lifetimes. Thus, for example, there would be no liability for invasion of privacy by misappropriation if someone were to make a commercial use out of the image of Abraham Lincoln.

G. Consent

Consent is a defense to all forms of invasion of privacy. For invasion of privacy by misappropriation, the consent must be in writing; otherwise it may be oral. Where possible, it is helpful to obtain consent in writing or to record it, where convenient, because the existence of a

record may eliminate or limit disputes over whether consent was in fact given and what the scope of the consent was.

While there is no Massachusetts case on point, the majority of courts have found that consent can be withdrawn prior to publication or broadcast. Should an invasion of privacy claim be made where publication or broadcast occurs after consent has been withdrawn, such claim may be defended against on grounds other than consent. Thus, for example, if a person discloses potentially embarrassing private information to a reporter, but later has second thoughts about it and tells the reporter not to repeat the information, if the reporter nevertheless broadcasts the information, the reporter will be unable to rely on the defense of consent to any invasion of privacy claim. If consent is withdrawn but the information has become public from a separate source, the information will no longer be considered "private" and there can be no viable invasion of privacy claim. There is also no invasion of privacy, regardless of whether consent is obtained or withdrawn, if there is a legitimate public interest in the information.

H. Special Issues Concerning Children

It is a common misconception that the rules that apply to children are different from the rules that apply to adults, particularly when children are being photographed or quoted. In fact, the only situation in which children are treated differently from adults is where consent is necessary. Under Massachusetts law, children under the age of 18 years are not considered to be capable of giving legal consent. Consequently, when faced with a situation in which it is necessary to obtain consent of a child, the reporter or broadcaster must make certain to obtain the consent not only of the child, but also of a parent or guardian legally capable of consenting on behalf of the child.

I. False Light

Invasion of privacy by "false light" is a hybrid combining some elements of defamation and some elements of invasion of privacy by appropriation. The tort imposes liability for invasion of privacy on "one who gives publicity to a matter concerning another that places the other before the public in a false light," where the false light would be "highly offensive" to a reasonable person and the defendant "had knowledge or acted in reckless disregard as to the falsity of the matter and the false light in which the other would be placed."

A common form of false light invasion of privacy is fictionalization, where a play, movie, book, or similar work either uses real people in fictionalized events, or else purports to be biographical but in fact contains fictionalized episodes. Claims of false light invasion of privacy have also been asserted as alternative theories of recovery in lawsuits which primarily assert claims of defamation.

Not all states recognize invasion of privacy by false light as a legally valid claim. Massachusetts courts, in particular, have expressly declined to allow such claims, although they have not precluded the possibility of doing so at some point in the future.

VI. COPYRIGHT

A. Works Protected by Copyright

Any creative work can be copyrighted. The primary requirements are that the work be "original" and that it be fixed in tangible form. To be "original," a work needs to meet only minimal requirements. A work is original if it is a unique creation that contains at least a modicum of creativity. Importantly, copyright protects only expression, such as aesthetics, word choice, or columns on a page – not ideas or facts. For example, if an author were to write a play about a love affair between two teenagers whose families have been feuding with each other for generations, where a member of the girl's family is killed in a duel with the boy, the author could

not claim any copyright in those particular plot elements, because the plot elements are ideas, not expression.

A work is not "original" if it is merely a compilation of material arranged in an obvious manner, as in a telephone book that is simply an alphabetic arrangement of names and addresses. Additionally, a work is not "original" to the extent that it copies another preexisting work. However, the particular selection and arrangement of the preexisting works—rather than the preexisting works themselves—may be considered original and thus protected by copyright.

The other requirement is that the work be fixed in a tangible form. For example, with a piece of music, this requirement could be met by writing down the musical score or creating a recording of the music. For works consisting of sounds or images, the fixation must occur simultaneously with the transmission. Thus, live telecasts are considered to be fixed and protected by copyright. This is particularly relevant in the context of sports telecasts, where broadcasters must pay a licensing fee in order to obtain a live telecast. Additionally, only the author (usually the creator of the work) or someone with permission from the author may fix (place in tangible form) a work. In the context of live musical performances, only the performers or those with permission from the performers may fix, transmit to the public, or distribute copies or sound recordings of the performances.

B. Ownership of Copyright

The rights conferred by copyright initially belong to the "author" of a work. As a general rule, the "author" of a work is the person who created it. There is a significant exception for works created by employees in the course of their employment; those works are called "works for hire," and the employer is the author under the copyright laws. Importantly, a work created by a person who is an independent contractor rather than an employee, or who is commissioned

to create the work, are ***not*** works for hire; the person who creates the work is the author. There is an exception to this rule, however, if (a) the commissioned work falls into one of nine enumerated categories (contributions to a collective work; motion pictures and audiovisual works; translations; supplementary works [such as forewords and afterwords]; compilations; instructional texts; tests; answer material for tests; and atlases), and (b) the parties execute a formal written agreement, called a "work for hire agreement," which specifically states that the work is made for hire and that the author is the person for whom it is being made, rather than the creator.

Consequently, if a person commissions a work to be created by someone else, and the parties do not execute a written agreement that expressly assigns the copyright to the person who commissioned the work, the creator is the "author." The creator therefore owns the copyright and owns the rights to reproduce the work and to create derivative works, even though the actual tangible original work may be owned by the person who commissioned it. For example, if a person hires a photographer to create a portrait, the photographer owns the copyright in the portrait. The person who hired the photographer owns the portrait, but has no right to make additional copies of it; nor does the owner have the right to authorize a reporter or broadcaster to reproduce the portrait or to display it publicly without the permission of the photographer. Consequently, when a reporter or broadcaster wishes to use a photograph that was taken by somebody other than his employee or colleague, it is important to determine who owns the copyright in the photograph and to obtain that person's authorization before broadcasting the photograph or copies of it.

To illustrate the rules of authorship, suppose a person hires an architectural firm to design a building to be built on land he owns. The firm, in turn, employs one or more architects to work

on the design; the building is ultimately constructed pursuant to the plans that the architects prepared. The architectural plans and the building itself are works that are protected by copyright. Even though the owner of the land owns the building and paid for the building and the plans, he does not own the copyright in the building and plans. The individual architects who designed the building are not the authors, and do not own the copyright, either, because they created the work in their capacities as employees of the architectural firm. The architectural firm is the "author" and owns the copyright.

As with other property rights, copyright owners may transfer their rights to others. In the example above, the architectural firm may assign its rights in the building and/or plans to the owner of the building. Transfer, termination, and duration of copyright ownership are governed by several statutes that are beyond the scope of this legal guide. Please consult with an attorney for specific legal advice concerning such issues.

C. Rights Conferred by Copyright

Copyright is often described as a "bundle of rights." The owner of a copyright in a particular work of authorship enjoys the exclusive right, for the duration of the copyright, to copy or reproduce the work. The owner also has the exclusive right to prepare what are called "derivative works," including condensations, translations, and adaptations, such as a play based on a novel or a work fashioned as a sequel to an existing copyrighted novel. Other rights included within copyright are the right to perform and to display works publicly, which includes use of audio or visual material in a broadcast.

The owner's rights may be divided up in many ways, which will vary greatly depending on the nature of the work and the common practices in the industry. The author of a novel, for instance, may grant the rights to publish the novel in the United States to one publisher, the

rights to publish the novel in other countries to another publisher, the rights to create a play based upon the novel to a Broadway producer, and the rights to create a screenplay based upon the novel to a movie studio. A photographer who owns the rights in a portrait may license a cosmetics company to use the photo in advertising, but may retain the rights to publish the photo in a coffee table book.

The exclusive rights in music can be particularly complex. An audio recording of a piece of music, called a "sound recording" in copyright lingo, may be covered by three different copyrights: the copyright in the music, the copyright in the lyrics, and the copyright in the sound recording itself. (For example, Jimi Hendrix's rendition of "All Along the Watchtower" is a sound recording; Bob Dylan's music and lyrics for that song comprise the underlying musical work). The lyricist and composer – who may be and often are different people – own the exclusive rights in the words and music, and they are entitled to royalties whenever the song is publicly performed, for instance, as part of a radio broadcast or as part of a soundtrack to a television show. The performing artist who created the sound recording – who may be and often is different from the lyricist and composer – owns the rights in the recording (often these rights are owned by the performer's record label). Traditionally, owners of the copyright in sound recordings did *not* have the right to control the public performances of their sound recordings. Thus, radio broadcasts of sound recordings are permitted, royalty-free, at least with respect to the sound recording itself. The composer and lyricist, however, are entitled to be paid a royalty for the public performance of the underlying musical composition and lyrics. These artists are generally represented by performance rights organizations, such as ASCAP, BMI, or SESAC, which sell blanket licenses to broadcasters (or other entities) to their entire catalogs. These organizations also police the marketplace by keeping logs of the songs played by radios and TV

stations, to ensure that broadcasters and other performers are not infringing on owners' copyrights.

The advent of digital recordings, and the potential they created for an unlimited number of perfect copies without degradation in quality, led to some changes in the framework governing copyrights in music. To protect record companies and recording artists from a reduction in record sales, Congress passed the Digital Performance Right in Sound Recordings Act ("DPRA") in 1995. This law granted a performance right for the digital transmission of sound recordings through subscription or interactive services. The DPRA sets out a three-tiered system for categorizing digital transmissions based on their likelihood to affect record sales, and the rules that broadcasters must follow vary depending on those categories.

Because interactive services – like a "digital jukebox" that permits users to select songs they wish to hear – pose the greatest threat to record sales, they are subject to discretionary licenses from individual rights holders. Entities wishing to transmit a recording through an interactive service are required to negotiate with the rights holder to obtain a license. The individual rights holder can refuse to license the transmission.

The second category of transmissions are those made through a non-interactive, subscription digital transmissions. Those transmissions are subject to compulsory statutory license; copyright owners are required to grant a license, with the license rate determined by the Copyright Office. To qualify for the statutory license, transmitters are subject to technical requirements, including that they: (1) not be interactive; (2) not use a signal that causes the receiver to change from one program channel to another; (3) not pre-announce the broadcast of particular songs; (4) abide by limitations on the number of times a work or different works by the same artist may be transmitted within specified time limits; and (5) if feasible, include various

information about the recording being transmitted.

The final category of transmissions is exempt from the sound recording performance right, because they were viewed as posing little threat to sound recording sales. These exempt transmissions include non-subscription broadcast transmissions, and non-subscription transmissions other than retransmissions.

Under this framework, then, a broadcaster who webcasts or streams digital sound recordings must obtain a statutory license in addition to its licenses from performance rights organizations.

D. Infringement of Copyright

Infringement of a copyright occurs whenever a person other than the copyright owner exercises without authorization any of the rights that are exclusively reserved to the owner, namely: the right to reproduce a work, the right to create derivative works, the right to distribute a work, the right to perform a work publicly, and the right to display a work publicly. In the Internet context, the distribution right includes the transmission of electronic files, and anyone doing so without permission is committing copyright infringement. As for the display right, courts have held that only a site that maintains an infringing copy of the work on its servers is liable for copyright infringement. Thus, for example, a search engine's links to and framing of other websites that contain infringing material do *not* make the search engine liable for the material, if the search engine does not have copies of the material residing on its server.

In addition to liability for direct infringement, an individual may also be found vicariously or contributorily liable for the infringing acts of others, where he has the ability to supervise the infringing activity and has a direct financial interest in it (for example, where the infringement of an employee draws customers to an individual's business). An individual may

be found contributorily liable if he knows or has reason to know that others might infringe, and induces, causes, or materially contributes to the infringement.

This is particularly relevant in the context of peer-to-peer file-sharing on the Internet, where plaintiffs have successfully sued computer system operators and software developers due to the difficulty of seeking out individual infringers. Federal courts in California have held that a computer system operator may be liable for copyright infringement if the operator knows of *specific* infringements and has the ability to stop them from occurring, but fails to do so. For example, this situation arose with Napster's file-sharing system; Napster was found liable for copyright infringement committed by users of its system. More recently, the United States Supreme Court held that a creator of file-sharing software was contributorily liable for actively inducing others to commit copyright infringement, even though it did not know of specific infringements and did not have the ability to stop them. Whether or not active inducement is found varies from case to case. In the case described above, the Court found that active inducement occurred due to the company's manufacturing and selling file-sharing software with the intention of capturing users who sought to share copyrighted music files to which they did not hold the copyright.

E. Fair Use

There are, nevertheless, instances in which people are allowed to make certain uses of others' copyrighted works for certain purposes without incurring liability. These uses are called "fair uses." In determining whether a use is a "fair use," courts consider the following factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the material taken, and the effect of the use on the market for the copyrighted work. Courts weigh each of these factors; no one factor is determinative.

1. The purpose and character of the use

Fair use is commonly found when a person uses some portion of another person's work for purposes such as news reporting, comment, teaching, criticism, scholarship, or research. Massachusetts courts have held that it does not matter how recent the news is in order to constitute a fair use.

In addition to the purpose of the use, courts look at the degree to which the use transforms the original work. A work is "transformative" when it adds something new, with a further purpose or different character, and alters the first work with new expression, meaning, or message. One context in which this often arises is in parodies or satires. Similar to the discussion, above, in the section on commercial appropriation, the line between parody and misappropriation is not easy to draw. The Supreme Court has defined "parody" as a work that uses some elements of an existing work in order to create a new one that, at least in part, comments on the earlier work. If a work falls within that definition, it will generally be regarded as a fair use to the same extent as a work created for the purpose of comment or criticism.

Additionally, courts consider the market and medium in which the work is used. Where the work is used in a different market, or in a different style or medium, it is more likely to be considered a fair use of the work. For example, the use of a model's studio photograph in a newspaper story was held to be transformative because it was re-contextualized from the studio fashion market to the news reporting market, and from an aesthetic use to a documentary one. By contrast, the use of the photo of a mobster's arrest was held to be non-transformative where part of the photo had been cropped (but the original meaning was preserved), and where the photo was merely "downgraded from breaking news to a supplementary part of a larger [news] story." Recently, California courts held that a search engine's using thumbnail images to link to images on other websites changes the market and medium in which the work is used, from

artistic expression to electronic reference tools. This is so even where the search engines incorporate the full-sized images (without cropping) in their thumbnails.

In addition, courts look at whether the use is commercial or non-commercial, as the fair use doctrine exists to further the public interest in promotion of creative work. While commercial motivation and fair use can co-exist, this factor is more likely to weigh in favor of fair use where the use is primarily for public benefit, rather than for private commercial gain. In the context of news broadcasts, courts have considered whether a use was commercial by looking at revenues earned by the broadcaster as a result of the use, from both current advertisements and increased viewership and ratings, which could increase future commercial revenues.

2. The nature of the copyrighted work

As a general rule, the more creative the original work, the less likely it is that a use of that work will be considered fair. Thus, there is more freedom to quote from and use works of fact than works of fiction. Note, however, that there is a higher standard for finding a work "creative" for purposes of the fair use analysis than to establish threshold copyrightability. For example, the mobster photo described above was considered sufficiently creative to be copyrightable, but was held to be a factual work under the fair use analysis.

A final consideration is whether the original work has been previously published. If it has not, it is more difficult to establish fair use, because courts prefer to give the author of a work the right to decide whether to keep the work private or to expose it to the public. Consequently, in the Internet thumbnail cases described above, the works were creative, but because they had already been published on the Internet, this factor weighed only slightly in favor of the copyright owners.

3. Amount and substantiality of material taken

For this factor, the test is not the absolute number of words, but rather the importance of the portion that is taken, in relationship to the copyrighted work as a whole. Fair use is less likely to be found where the alleged infringer has used the "heart" of the copyrighted material. In making this determination, courts look at the amount of editing of the original work, and whether the meaning of the original work has been transformed or preserved.

4. Effect of the use on the market for the copyrighted work

Courts often give this factor significant weight. A use that is so substantial that it detracts from the market value of the original work, for example, by serving as a potential substitute for the original, is very unlikely to be considered a "fair use." For example, in the Internet thumbnail cases described above, the courts held that the thumbnails were a fair use because they were an inadequate substitute for the full-sized images, and thus did not detract from the market for the full-sized images. Market value typically does not include licensing fees that the plaintiff would have received if the defendant had not allegedly infringed, unless such fees are the *only* market for the plaintiff's work.

F. Copyright on the Internet

1. Access Controls and Copyright Management Information

Under the Digital Millennium Copyright Act ("DMCA"), it is unlawful to circumvent technological measures used by copyright owners to control access to their works. In other words, it is unlawful to break encryption codes used by owners of copyrighted materials to prevent unauthorized access to such materials. However, the DMCA is not violated where an encryption code used to protect material in the public domain is broken.

Additionally, it is unlawful under the DMCA to knowingly tamper with copyright management information ("CMI") with intent to enable, facilitate, or conceal copyright

infringement. CMI includes the name or other identifying information about the work, the author, the copyright owner, and, in certain cases, the performer, writer, or director of the work, as well as the terms and conditions for use of the work. A New Jersey court held that CMI does not apply to trademarks (such as logos), because doing so would blur trademark and copyright law. It is unlawful to intentionally remove or alter CMI, or to provide, distribute, or broadcast false, removed, or altered CMI.

Any person injured by a violation of the DMCA may bring a civil action in federal court for equitable relief and monetary damages. Courts have discretion to reduce or remit damages in cases of innocent violations, where the violator proves that he was not aware and had no reason to believe that his acts constituted a violation. Further, one who willfully circumvents technological measures or tampers with CMI for purposes of financial gain, may be subject to criminal penalties of up to a $500,000 fine and up to 5 years imprisonment, and subsequent offenses may carry penalties of up to a $1,000,000 fine and up to 10 years imprisonment. Broadcasters are immune from liability for the removal or alteration of CMI if there is no intent to induce, enable, facilitate, or conceal copyright infringement, and: 1) for analog transmissions, compliance is not technically feasible or would create an undue financial hardship, or 2) for digital transmissions, the CMI does not meet digital transmission standards for that category of works, or transmission of the CMI would result in a perceptible degradation of the digital signal or would conflict with applicable governmental regulations or industry-wide standards. These penalties are separate and distinct from the penalties that may ensue from the actual copyright infringement itself.

2. Safe Harbors for Online Service Providers

The DMCA's safe harbor provisions limit the liability of online service providers (OSPs) for copyright infringement committed by users of their services, as well as for linking to

copyright infringing material from other online sources, provided that the OSP establishes effective "notice-and-takedown" procedures, promptly removes any infringing content upon notice from the copyright holder, and has no actual or effective knowledge that the material in question is infringing. An OSP is not obligated to comply with the safe harbor provisions; however, it is typically in its interests to do so, as such compliance limits its exposure to liability for copyright infringement. If an OSP opts not to use the safe harbors, its liability will be governed by the principles of direct and secondary copyright infringement.

An OSP is an entity that provides online services or network access, and includes entities that offer the transmission, routing, or provision of connections for digital online communications, between or among points specified by a user, without modification to the content of the material sent or received by the users. Examples of OSPs include traditional Internet service providers such as AOL and Verizon, as well as interactive services that store, cache, or establish links to third-party material, such as website hosts, social networks, blogs, corporate intranets, and Internet auctions. The definition of “online service provider” under the DMCA is narrower than the definition for “interactive computer service” under the Communications Decency Act (“CDA”, discussed in more detail below), and not all websites that would qualify as an interactive computer service subject to immunity under the CDA would qualify for the safe harbor created for OSPs under the DMCA.

a. Storing and Linking to Copyrighted Content

There are two safe harbor provisions that potentially apply to an OSP’s online publishing activities. The first relates to materials posted to an OSP’s website or blog at the direction of a user, such as photographs, film clips, and audio files. The safe harbor provision states that an OSP will not be held liable for money damages for copyright infringement for posting content

"at the direction of a user," so long as the OSP: (1) does not have actual knowledge that there is infringing content on its servers, or know any surrounding facts that would make the infringing use apparent; (2) does not receive any financial benefit directly attributable to the infringing activity, if it has the ability to control such activity; and (3) acts expeditiously to remove or disable access to the infringing material upon learning or becoming aware that the material is infringing or upon receiving a properly drafted notice of infringement (described in more detail below).

The second safe harbor provision relates to links posted by an OSP to online material located elsewhere. This safe harbor provision states that an OSP will not be liable for money damages for copyright infringement based on its referring or linking users by a directory, index, reference, pointer, or hypertext link to an online location containing infringing material or infringing activity, provided that the OSP: (1) does not have actual knowledge that the material it linked to is infringing, or know any surrounding facts that would make the infringement apparent; (2) does not receive any financial benefit directly attributable to the infringing activity, if it has the ability to control such activity; and (3) acts expeditiously to remove or disable access to the infringing material (such as by removing the link) upon learning or becoming aware that the material is infringing, or upon receiving a properly drafted notice of infringement.

b. Administrative Requirements for Safe Harbor Protection

There are a few additional administrative steps that an OSP must complete to fall within the scope of the DMCA's safe harbor provisions.

- ***Designate a Copyright Agent to Receive DMCA Takedown Notices***

To qualify for the safe harbor provisions, an OSP must designate an agent to receive notices of claimed copyright infringement. The OSP must file notice of this designation with the

United States Copyright Office, which maintains a list of designated agents. This list enables copyright owners who believe that their work is being infringed to send complaints or "takedown notices" to the OSP hosting or linking to the disputed material.

- ***Adopt and Communicate to Users a Copyright Infringement Policy***

To qualify for the safe harbor protections, an OSP must also publish a statement on its website notifying users of its DMCA agent's contact information, its policies regarding copyright infringement, and the consequences of repeated infringing activity. The notice can be a part of the website's terms of use or some other notice displayed prominently on the site. The statement should explain that the OSP will respond expeditiously to any notices of claimed copyright infringement, and will terminate users or account holders who are “repeat infringers.” To implement this policy, an OSP should not actively prevent copyright owners from collecting information necessary to determining whether users are infringing, as such information may be necessary in order for a copyright owner to make proper notification of claimed copyright infringement.

The OSP statement should also detail the requirements of a proper notice of claimed infringement, which must include: (1) identification of the copyrighted work(s) claimed to have been infringed; (2) identification of the material that is claimed to be infringing and that is to be removed; (3) the complaining party’s contact information (address, telephone number, and/or e-mail address); (4) a statement that the complaining party has a good faith belief that use of the material is not authorized by the copyright owner; (5) a statement that information in the notice is accurate and that the complaining party is the copyright owner or authorized to act on his behalf; (6) the signature of the copyright owner or someone authorized to act on his behalf. If

the complaining party does not substantially comply with these requirements, his notice will not serve as "actual notice" under the statute.

The OSP statement should also explain the procedure for users to make a proper counter-notification (discussed in more detail below).

- ***Properly Comply with A Notice of Claimed Infringement When Received***

Upon receipt of a copyright notification that substantially meets the formal requirements described above, in order to qualify for the safe harbor, the OSP is required to: (1) expeditiously remove or disable access to the allegedly infringing material, and (2) notify the user or subscriber who posted the material that it has been removed, so that he may file a counter-notice should he wish. If proper counter-notice is provided, then to qualify for the safe harbor, the OSP must additionally: (1) notify the copyright holder, provide him with a copy of the counter-notice, and inform him that it will replace the removed materials within 10 business days; and (2) if the copyright holder does not file suit within 10 business days, restore the removed material within 14 business days.

There is no specific time limit for submitting a counter-notice, though one should not delay unreasonably in doing so. A counter-notice is warranted where the complaining party does not own a copyright in the work in question, or where the use of the copyrighted work was a fair use. A counter-notice must contain the following: (1) the submitter's name, address, and phone number; (2) identification of the material and its location before it was removed; (3) a statement under penalty of perjury that the material was removed by mistake or misidentification; (4) consent to the jurisdiction of a federal court in the district where the submitter lives (if in the U.S.) or where the OSP is located (if outside the U.S.); (5) consent to accept service of process

from the party who submitted the takedown notice; and (6) the submitter's physical or electronic signature.

VII. ADVERTISING REGULATION

A. General Considerations

Broadcasters enjoy broad discretion in accepting or declining advertising materials. At the same time, if they choose to broadcast an advertisement, they need to review the contents of the advertisement as carefully as other material that they broadcast. With minor exceptions as noted below, if an advertisement contains illegal or defamatory matter, invades someone's privacy, or otherwise infringes someone's rights, the broadcaster will generally be liable for its content, regardless of who created the advertisement. It is therefore important for broadcasters to be aware of the limitations on what can be advertised lawfully.

B. Contests and Promotions

The discussion of contests and lotteries below concerns the Massachusetts and federal laws and regulations. However, to the extent that contests and lotteries are promoted online, they are subject to the laws and regulations of all fifty states in which they may be viewed by Internet users. The laws of some states are more stringent that those under Massachusetts or federal law; for example, some states require a written disclosure on any contest or promotion materials in capital letters that "NO PURCHASE OR PAYMENT NECESSARY TO ENTER OR WIN" or "A PURCHASE WILL NOT IMPROVE CHANCES OF WINNING." Thus, a broadcaster who intends to use the Internet or mail in connection with a contest or promotion should consult an attorney about additional rules and regulations that may apply.

1. Contests and Lotteries

Contests and similar promotions where entrants are eligible to win prizes remain popular and generally create no legal liabilities. However, if a contest or promotion combines the three

classic elements of a lottery – prize, price and chance – it may be considered an illegal lottery. For this reason, it is important to structure the event with care.

The element of "prize" is anything of value that may be awarded to a person who enters the contest.

The second element, "price," is anything of value given by a contestant as a condition of entry into the contest. Any kind of payment required of a contestant to enter the contest is considered a "price," even if the entrant receives something of value besides the chance to win a prize. Thus, if a contestant is required to purchase some item at its ordinary cost in order to enter, the "price" requirement is met.

"Price" does not, however, include requiring the contestant to go somewhere or to take action in order to be eligible for a prize, so long as the contestant is not required to part with something of value. Thus, for example, there is no "price" element where all that a contestant is required to do in order to be eligible for a prize is to listen to a radio station or to visit a store or shopping mall, so long as the person is not required to make any purchase. The mere fact that a contestant's activities may generate increased traffic for a station or a retailer (and therefore increased likelihood of sales) does not alone satisfy the element of "price."

As an example to illustrate these aspects of "price," a store that awards a prize to the customer who receives the one-millionth cash register receipt issued by the store will have violated the lottery statute, because customers have to make a purchase in order to receive the prize. It does not matter for this purpose whether the customers would have made the same purchases anyway, or whether they pay nothing extra to be eligible to win the prize. In contrast, the same store will not violate the lottery statute if it gives a prize to the one-millionth person who walks into the store, as long as no purchase is actually required as a condition of winning

the prize. The store is protected, even if the person is likely to make a purchase once he enters the store, so long as the customer is not required to purchase anything as a condition of receiving the prize.

The final element, "chance," means that the likelihood of winning depends upon something other than skill. For example, a foot race that requires contestants to pay a fee in order to enter, with a monetary award given to the winner, is not a lottery. Similarly, if an organization sponsors a costume party for which tickets are sold for $5.00 and the person with the most unusual costume wins a prize during the party, that would also not be a lottery. In each case, the element of chance is missing, because the winners will be determined at least in part by the skill or talent of the contestants. In contrast, if the prize in the costume party is given to the person whose ticket number matches a number drawn at random from a hat, then the element of "chance" would be present.

Both Massachusetts law and federal law penalize advertising an illegal lottery as well as conducting one. The Massachusetts General Laws prohibit anyone, including a newspaper or radio or television station, from conducting, promoting, or advertising a lottery (with the exception of a few charitable raffles and lotteries, discussed below).

A federal statute similarly prohibits the broadcast of "any advertisement of or information concerning any lottery." However, the statute contains numerous exceptions, including exceptions for state-sponsored lotteries. The statute permits broadcasters located in a state with a state-sponsored lottery to advertise that state's lottery. The U.S. Supreme Court has struck down the statute's application in the context of private casino gambling advertisements, as a violation of the First Amendment protection of commercial speech, and other federal courts have narrowed the statute's application in other contexts as well.

While few, if any, broadcasters and publishers have been prosecuted for advertising illegal lotteries, the existence of the criminal statutes makes it important to be alert as to what kinds of activities constitute an illegal lottery. Because all three elements – prize, price, and chance – must exist simultaneously in order to create an illegal lottery, the best way to avoid lottery problems is to eliminate one of the elements. The element most commonly and easily eliminated is the element of "price." All that needs to happen in order to eliminate the element of "price" is to allow people to enter without paying anything. Consequently, one often ensures compliance with the lottery statute by structuring contests such that "no purchase is necessary" in order to enter.

2. Legal Lotteries

A limited category of lotteries are, however, legal both to conduct and to advertise. In order for a lottery to be legal in Massachusetts, it must be sponsored and conducted exclusively by a church or religious organization, a fraternal, educational, or charitable organization, or a similar non-profit entity. Furthermore, the contest must be promoted and operated solely by the members of the sponsoring organization, acting on a volunteer basis. The organization must also obtain a permit issued by the clerk of the local municipality, after approval by the Chief of Police. Before accepting an advertisement for a contest that appears to be a lottery operated by a non-profit organization, a broadcast station should check to be certain that such a permit has issued.

Poker tournaments are generally illegal in Massachusetts if they are operated as lotteries (i.e. if they contain the elements of prize, price, and chance), but qualifying nonprofit organizations may hold such tournaments if they first obtain a license from the clerk in the city/town where the tournament will be held, and follow other regulations. However, even licensed qualifying nonprofit organizations may not allow players or spectators to register bets of

money or anything else of value on the result of the game(s), or to set up a pool of money out of which prizes are awarded.

3. Other Contests and Promotions

Contests and promotions that offer a prize but lack one or both of the elements of "price" and "chance" are not considered lotteries and are generally permissible. One caveat, however, is that if a person is injured during the course of a contest that incites listeners to perform dangerous activities, the radio station may be liable for the injuries. In a well-known case, a California radio station that catered to teenagers offered a prize to the first listener to contact one of its disc jockeys. Two listeners located the disc jockey driving on the freeway and, while competing to reach him first, caused a fatal accident. The California court held that the station was negligent in the manner in which it conducted the contest and held the station liable for damages caused by the accident.

4. Online Gambling

While federal law prohibits financial transfers in aid of "unlawful Internet gambling" (described in more detail below), there is no specific prohibition on advertising gambling websites. However, websites containing hyperlinks to illegal Internet gambling sites have been the target of notice and takedown actions by federal or state authorities, and websites that display such ads have been required to forfeit the proceeds they received from displaying such advertising.

In 2003, the Department of Justice ("DOJ") issued a letter to the National Association of Broadcasters stating that it would treat the airing of advertisements for illegal Internet gambling websites as "aiding and abetting" illegal activity, since the advertisements mislead the public into believing that such gambling is legal. In 2007, a group of radio stations who broadcast infomercials by companies who claimed to provide "inside" sports betting information were sued

by a group of individuals who heard those commercials, for participating in a conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as for violating certain state laws on unfair competition and false and misleading advertising. The district court dismissed the claims against the radio station defendants, because the plaintiffs did not allege that the broadcasters did anything more than accept broadcast fees and air the infomercials; there were no specific factual allegations that they were aware of the enterprise, knew its behavior was illegal, or adopted the goal of furthering or facilitating the criminal endeavor.

Additionally, a federal district court recently held that the application of "aiding and abetting" to illegal Internet gambling advertisements does not violate the First Amendment. In that case, an Internet gambling website sought a declaratory judgment holding that advertising such websites does not constitute the "aiding and abetting" of illegal activity. The court held that the Internet gambling website lacked standing, but also stated that, in any case, the website's speech was not protected under the First Amendment because it promoted illegal activity, and conveyed the false impression that Internet gambling was legal.

In response, major media outlets, including certain national networks and broadcasters and major Internet search engines, have stopped running advertisements for illegal Internet gambling websites. In addition, in December 2007, Microsoft Corporation, Google, and Yahoo paid settlements with a total value of $31.5 million to the United States to resolve claims that between 1997 and 2007, they received advertising revenues from online gambling businesses. As part of their settlements, Microsoft and Yahoo agreed to provide advertising for a public service campaign designed to inform and educate users that online gambling enterprises that accept bets or wagers are illegal under U.S. law.

Illegal Internet gambling refers to online games involving financial bets or wagers that

are illegal in the location in which the bets or wagers are made or received. Not all gambling is illegal; for example, games that do not involve financial bets or wagers, such sports brackets, fantasy sports leagues, and poker "for fun," are not considered "illegal gambling." Bets or wagers include: 1) using money or other items of value to bet on a contest, sports event, or game subject to chance; 2) purchasing a chance to win a lottery or other prize, where the opportunity to win is *predominantly* subject to chance; or 3) providing information on how to create an account in connection with financial betting or wagering, and how to move funds through such an account. Thus, illegal Internet gambling websites include sites that accept wagers on sporting events, online lotteries that are "predominantly subject to chance," and sites where users can play poker and other casino games for money, provided that those games are subject to chance (even if they involve some degree of skill). If an online gambling site accepts a financial bet on a sporting event or runs a game of chance from a location where such bets are illegal, it will violate federal law.

Massachusetts does not have a statute specifically addressing Internet gambling; however, gambling that is illegal off the Internet is typically illegal on the Internet; conversely, gambling that is legal off the Internet is usually legal on the Internet. Websites that merely teach casino games, rather than promoting or linking to websites where one can engage in illegal Internet gambling, are generally legal.

C. Alcohol and Tobacco

1. Alcohol

Aside from industry codes, which are beyond the scope of this Guide, there is little regulation on broadcast advertising of alcohol. Massachusetts regulates only alcoholic beverage licensees, not broadcasters. Such alcoholic beverage licensees are prohibited from offering free drinks, offering drinks at a discount from the price regularly charged during that calendar week,

offering an unlimited number of drinks for a fixed price, and offering discounts to a particular group of persons. They are also prohibited from advertising such activities, but the burden of compliance with such advertising regulations falls on the advertiser, not the broadcaster.

2. Tobacco

The federal government prohibits broadcast advertising of cigarettes and "little cigars." A "little cigar" is defined to include rolled tobacco products as to which "a thousand units weigh not more than three pounds." Broadcasters are not prohibited from advertising other tobacco products, such as regular cigars and pipe tobacco.

D. Political Advertisements

In contrast to the unfettered choice that broadcasters enjoy in deciding whether to accept or reject commercial advertisements, political advertising is more highly regulated. The most important restrictions on a broadcaster's discretion to carry political advertisements are: (1) the "reasonable access" rule; (2) the "equal opportunity" rule; and (3) the "lowest unit rate" rule. Each rule has its own set of parameters as to the candidates to which it applies and the time frames within which it applies; and each rule imposes different requirements once those parameters are met. Since the exact application of these rules can be quite complex, the following summary is only a very general outline of some of the major areas to watch.

1. Reasonable Access

The reasonable access rules apply only to candidates for federal office and only during an election campaign. In such a situation, broadcasters must provide all such candidates with "reasonable access" to their broadcast facilities. Although the concept of "reasonable access" is inherently imprecise, it means generally that stations must make advertising time available when doing so will not result in substantial programmatic disruption.

2. Equal Opportunity

The "equal opportunity" rule is somewhat broader than the "reasonable access" rule in terms of the types of candidates to whom it applies and the time frames in which it applies. Whereas the "reasonable access" rule is limited to candidates for federal office and to the period of time during an actual campaign, the "equal opportunity" rule is not limited to the period of time during a campaign. Additionally, it applies to candidates for all offices, whether federal, state, or local, so long as they are legally qualified and have announced their intention to run for office.

If an appearance by a candidate meets the criteria for "use" of the station by that candidate, as described below, the "equal opportunity" rule requires the station to afford "equal opportunities" to every other candidate for that office. The station is further required to carry whatever messages the opposing candidates offer; it may not censor, alter, or refuse to broadcast the messages, regardless of how inflammatory, offensive, or otherwise objectionable the messages may be. At the same time, since the station cannot alter or control the content of such messages, it is immune from liability for whatever the candidates broadcast.

The "equal opportunity" rule applies whenever a legally qualified candidate "uses" the broadcast station. While the most common situation in which a candidate "uses" a broadcast station is through a political advertisement or other purchase of broadcast time, the definition of "use" for purposes of the equal opportunity rule is broader. The Federal Communications Commission defines a "use" of a station by a candidate as any "positive" appearance of a candidate on the station, by voice or likeness. The statute expressly provides that it is not considered a "use" of the station if the candidate appears in a "bona fide newscast," "bona fide news interview," "bona fide news documentary," or "on-the-spot coverage of bona fide news events," including political conventions and incidental activities; these exceptions have been

interpreted broadly to include appearances on entertainment shows such as The Tonight Show, Entertainment Tonight, and Howard Stern's radio show. However, appearances in movies and on television series – even when they are not political – do not fall within the exceptions; thus, when Ronald Reagan ran for president and when Arnold Schwarzenegger ran for governor of California, the airing of old movies that they appeared in gave rise to equal opportunity requirements under the statute. Similarly, when an on-air personality, such as a newscaster, talk show host, or weatherman, becomes a candidate for public office, his appearances on the air during his campaign – even when not associated with politics or the campaign – trigger the broadcaster's equal opportunity obligations.

3. Lowest Unit Rate

The "lowest unit rate" rule, like the "equal opportunity" rule, applies to candidates for all elected offices, whether federal, state, or local. It applies only during the time periods falling 45 days before a primary (or primary runoff) election and 60 days before a general or special election. To qualify for the lowest unit rate, candidates must provide written certification to the broadcaster that they will not refer to opposing candidates. However, a candidate may refer to an opposing candidate if the broadcast ends with advertising candidate's photo and a printed statement identifying himself and indicating that he has approved the broadcast, or, in radio broadcasts, an audio statement by the candidate identifying himself and the office he is seeking, and indicating that he has approved the broadcast. When those criteria are met, federal law prohibits broadcasters from charging a candidate rates that exceed "the lowest unit charge of the station for the same class and amount of time for the same period."

The Federal Communications Commission requires licensees to make certain disclosures to political advertisers regarding the concept of the same "class" of advertising and the requirements of the "lowest unit rate" rule. The disclosures include descriptions and definitions

of each of the available classes of advertising time; a complete description of the lowest unit charges and related privileges for each such class of time; and information concerning preemptable time, including the likelihood of preemption and the station's method of selling such time. Stations must also disclose discounts, bonuses, "make goods," and other similar practices.

Outside the time frames of 45 days before a primary and 60 days before a general election, the statute prohibits charging candidates rates that exceed "the charges made for comparable use of such station by other users." In those situations, there is no requirement to give preferential rates to political candidates, only a prohibition on charging candidates rates that are discriminatorily high.

E. Telemarketing and Spam

Telemarketing is the marketing of goods or services via unsolicited telephone calls. Under Massachusetts and federal law, consumers who do not want to receive unsolicited sales calls can sign up for the "Do Not Call" Registry. Telephone solicitors may not call consumers who appear in the "Do Not Call" Registry. Additionally, telephone solicitors cannot call between the hours of 8 PM and 8 AM, use a recorded message device, use a blocking device to circumvent caller ID, or contact people via electronically transmitted facsimile. Telemarketing for non-commercial purposes, such as polls and surveys, are exempt from these restrictions. Tax-exempt non-profit organizations are also exempt from these restrictions.

Spam, or unsolicited commercial e-mail, is regulated by the federal CAN-SPAM Act. Under this law, unsolicited e-mail messages, especially sexually explicit advertising, must be clearly labeled as solicitations or advertisements (rather than passed off as an e-mail from a friend, for example). Spammers must also provide opt-out functions for people who do not want

to continuing receiving spam. Additionally, subject headings cannot include false or misleading information regarding the e-mail's contents or subject matter. Finally, e-mail messages must contain legitimate return addresses (not phony return addresses that conceal their origin), the sender's postal address, and a reminder of the opt-out option. Massachusetts was the first state to file a lawsuit under the CAN-SPAM Act, reaching a $25,000 settlement with a spammer who did not use a legitimate return address.

F. Trademark Infringement

A trademark is any word, symbol, or combination that is used to designate the source of goods or services and to distinguish them from competitors' goods or services. Trademark infringement occurs when someone other than the trademark owner uses a mark in the sale or advertising of goods or services that is likely to cause consumer confusion as to the source of the goods or services, or to cause consumers to wrongly conclude that there is some association, affiliation, or sponsorship between the trademark owner and infringer. For example, if a radio station runs a promotion entitled "The Big Red Sox Giveaway," it could be viewed as suggesting that the Red Sox are sponsoring the promotion, and could potentially subject the radio station to a claim for trademark infringement if it does not have permission from the Red Sox to use the mark. However, the radio station would not be liable for trademark infringement if it merely used the name "Red Sox" in a descriptive fashion, rather than as an indicator of origin or sponsorship. For example, the radio station could run a promotion called "The Big Summer Giveaway," and lawfully advertise that Red Sox merchandise would be given away as prizes.

Broadcasters may be contributorily liable for trademark infringement if they induce someone to infringe, or if they run advertisements that they know or have reason to know are infringing. (Broadcasters, however, do not have a duty to find out whether the advertisements

are infringing; they are simply punished if they *have reason* to know.) Additionally, broadcasters may be liable if they knowingly participate in the creation of infringing advertisements. On the other hand, where a broadcaster is an innocent infringer (i.e., it did not know and did not recklessly disregard the fact that the advertisement was infringing), it will only be subject to an injunction prohibiting it from running the infringing advertisement, and will not be held liable for actual or statutory damages or for other forms of remedy for trademark infringement.

In the Internet context, advertisers may be liable for trademark infringement for using marks belonging to a third party, and websites and service providers may be subject to contributory or vicarious liability for selling or enabling the use of third party trademarks. Website designers and operators often use trademarks in various ways to attract traffic or to sell advertising. Metatags, for instance, are commonly used to ensure prominent placement in search engine results, and banner and pop-up advertisements are often triggered by key words. Reporters and broadcasters operating websites or providing other services over the Internet should watch their metatags, key words, banner ads, and mechanisms that trigger pop-up ads to make sure that they are not infringing any trademarks. The use and sale of key words has been a fertile source of litigation, and while the law is not yet settled, a number of courts have held that the unauthorized use of trademarks in metatags and key words constitutes trademark infringement.

VIII. INTERNET REGULATION

A. Internet Domain Names and Cybersquatting

As companies place an increasing amount of information on the Internet, clashes over Internet domain names have become more common. Domain names are simply web addresses. For example, the domain name for the Massachusetts Broadcasters Association's website is

www.massbroadcasters.org. Domain names are chosen by the addressee, and are usually closely associated with a particular service or product.

Domain names are divided into hierarchies. The top level domain name is the portion that appears after the last dot ('.') in a domain name. Common top level domain names include: ".com" (for commercial enterprises), ".org" (for non-profit organizations), ".net" (for network and Internet related organizations), ".edu" (for colleges and universities), and ".gov" (for government entities). The disputes that arise over domain names typically involve second level domain names, which is the term directly to the left of the top level domain name in an Internet address. For instance, in the address www.massbroadcasters.org, the second level domain name is "massbroadcasters."

In order to register a second level domain name, an application must be filed with an organization that has the power to assign names for that top level domain. Multiple registrars currently have the ability to register ".com", ".net", and ".org" domain names. These registrars are accredited by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation formed specifically to control Internet domain name management. All accredited registrars assign names on a first-come, first-serve basis, and do not conduct any research before assigning a new domain name.

Generally, a company prefers to register a domain name that is the same as its company name or otherwise relates to products or services to which it holds a trademark. Since two second level domain names cannot coexist under the same top level domain, a company seeking to register a domain name should first conduct a search to determine if that domain name is already taken. If the domain name is already taken, the company can either choose a different name or pursue a legal remedy to acquire the domain name from its current owner.

A party seeking to acquire a domain name from an earlier registrant can either turn to the courts or follow an administrative procedure used by all accredited registrars. In a court action, the moving party needs to show why a domain name that is registered to another party should be cancelled or transferred to it. In November 1999, Congress passed the Anti-Cybersquatting Consumer Protection Act, which permits individuals and companies to file trademark infringement suits against individuals and companies who set up domain names that are confusingly similar to their names or valid trademarks, upon demonstrating, among other things, that the domain name holder acted in bad faith. The plaintiff can sue to take over the domain name and, in some instances, for money damages. The statute lists a variety of factors that a court can consider in determining whether the domain name was registered in bad faith. The Act also permits an individual to file a civil suit against anyone who registers his name as a second level domain name for the purpose of selling the domain name for a profit.

As an alternative to the judicial process, ICANN created a Uniform Domain Name Dispute Resolution Policy, which has been adopted by all accredited registrars. Under this policy, a trademark owner can initiate a relatively inexpensive administrative procedure to challenge an existing domain name.

To obtain cancellation or transfer of the domain name pursuant to this administrative procedure, the trademark owner must demonstrate that: (1) it owns a registered or unregistered trademark that is the same or confusingly similar to a registered second level domain name; (2) the party who registered the domain name has no legitimate right or interest in the domain name; and (3) the domain name was registered and used in bad faith.

A domain name owner can prove a legitimate right or interest in the domain name by showing any of the following: (1) use or preparation to use the domain name in connection with

a bona fide offering of goods or services prior to any notice of the dispute; (2) that it is or has been commonly known by the domain name; or (3) that it is making a legitimate non-commercial or fair use of the domain name, without the intent of commercial gain, misleadingly diverting consumers, or tarnishing the trademark at issue.

A trademark owner can show that a domain name was registered and used in bad faith in a variety of ways, including by showing that the domain name owner: (1) registered the name primarily for the purpose of selling or transferring the name for a financial gain; (2) engaged in a pattern of registering the trademarks of others to prevent the use of the domain name by the trademark owner; (3) registered the domain name primarily to disrupt the business of a competitor; or (4) attempted to attract users to a website for commercial gain by creating a likelihood of confusion with the trademark owner's trademark.

B. Online Content Liability and the Communications Decency Act

Section 230 of the Communications Decency Act (CDA) creates an important immunity for reporters and broadcasters who maintain websites. That section protects providers and users of interactive computer services (ICSs) (i.e., Internet service providers, website hosts, and websites such as online forums, chatrooms, and dating and housing services) from liability for statements posted by information content providers (ICPs) (i.e. third party users who post messages on forums or who communicate in chatrooms). An ICS must engage in the creation or development of content before it can be held liable for a third party's content. Courts have generally held that the distribution of content does not constitute creation or development, and would not subject a website host or other ICS to liability for the content posted. For example, a court in the District of Columbia held that AOL was not responsible for defamatory statements posted by a gossip columnist, despite the fact that AOL had a licensing agreement with the

gossip columnist, paid a salary to the columnist, reserved the right to remove the columnist's work, and actively promoted and drew subscribers to the columnist's work on its website.

Courts have generally interpreted "interactive computer service" broadly, and have included within the definition online auction websites, bookstores, newsgroups, stock quotation services, and employers who provide Internet access to employees. The federal courts have held that an ICS may exercise traditional editorial functions, such as removing and correcting posted content, without becoming an information content provider and losing immunity under the CDA. Additionally, an ICS may select content for publication, decline to review posted content for errors or offensiveness, decline to remove potentially offensive content, provide forms for the entry of information by third parties that will automatically be published on a website, create or develop other content on a website apart from the particular content at issue, and publish third party statements that are posted under anonymous or false names — all while staying within the scope of the CDA's protections.

On the other hand, where an ICS shapes the content posted by third party users – for example, by creating a form that requires users to input information that violates a law – then the website may lose its status as an ICS and hence its protection under the CDA. In a Ninth Circuit case, a website (www.roommates.com) contained a form that solicited information that the court ultimately found to be in violation of the Fair Housing Act. Subscribers were required to fill out the form as a condition of using the website's services. The court ruled that the website was an ICP because it created the form that solicited the unlawful information – even though third parties were ultimately responsible for entering the content into the form. However, the court held that the website was not an ICP with respect to additional comments posted by users outside the question-and-answer framework, because such comments were left to the discretion of third

parties. Similarly, other websites (such as www.craigslist.org) that do not provide a form, but rather are a forum for users to post information at users' discretion, have been found to be ICSs and subject to protection under the CDA.

The outcomes of cases litigated under the CDA are very fact-specific and the case law continues to develop and evolve. For example, a court in Florida held that a website was not an ICP even though it supplied categories that users were required to select from in order to post messages. Although numerous negative categories, such as "con artists," "corrupt companies," and "false TV advertisements," were available to users, users could also select from neutral categories such as "seminar programs," "multi-level marketing," "financial services," and "business consulting." Additionally, although the website encouraged users to post reports about companies that rip-off consumers, it also advised users that reports should be honest, factual, and impartial, and required users to acknowledge that their reports were valid. Further, it did not charge a fee for posting the reports. The court held that although the website authored some reports and report headings, and was thus an ICP with regard to those reports, it was not an ICP with regard to the reports at issue in the case, which were written and posted on its website by third parties. Thus, the website was immune from tort liability under the CDA.

C. Data Collection and Privacy Policies

Websites with interactive features that obtain user information – such as blogs or message boards, or which offer items for sale – should create and post on their sites policies concerning data collection and privacy. Although such policies are not yet required under Massachusetts or federal law, the FTC has suggested that websites engage in "meaningful, rigorous self-regulation" and has issued guidelines for such policies, including that they: (1) prominently note their behavioral advertising practices and provide users with the ability to opt

out of such programs; (2) maintain reasonable security and retention practices with respect to any data they collect; (3) inform users of retroactive material changes to their data collection practices; and (4) receive express user consent before collecting "sensitive data" such as social security numbers and health information. Note that the federal Children's Online Privacy Protection Act ("COPPA", discussed below) and related regulations set forth specific requirements for collecting information from children under the age of 13; broadcasters are advised to consult with attorneys with experience in this area before gathering information from children or creating websites for this demographic.

It is also recommended that websites develop and post privacy policies to tell users in plain language what information is being collected, what information will remain private, and what information may be shared. Websites that post such policies should take care to ensure that they accurately describe the website's practices, because a failure to comply with the stated policies can give rise to liability as an "unfair trade practice."

D. Privacy and the Electronic Communications Privacy Act

Electronic communications—including e-mails, digitized transmissions, video teleconferences, and communications consisting solely of data (such as personal information)—are entitled to certain protections from government searches and third party inquiries under the Electronic Communications Privacy Act ("ECPA"). The ECPA most frequently pertains to Internet Service Providers, such as AOL and Yahoo, which provide e-mail services to third party users; however, reporters and broadcasters should also be aware of this Act, as it may impact the newsgathering process.

Under Title I of the ECPA, which extended the Wiretap Act to electronic communications, it is illegal for anyone other than an intended recipient to intercept, use, or

disclose electronic communications. There are, however, a few exceptions. Providers of electronic communications services may reasonably monitor electronic communications to protect their systems from fraud or theft. Additionally, law enforcement may intercept communications for up to 30 days, if authorized by the Justice Department and a federal judge. Finally, the prohibitions against interception do not apply to communications that are readily accessible to the public, such as a non-password protected website like Wikipedia.

Under Title II of the ECPA, also known as the Stored Communications Act, it is unlawful for providers of electronic communications services to knowingly divulge the contents of a communication while it is stored on their system. One court recently held that an online service provider's receipt of a civil subpoena did not, by itself, authorize the service provider to disclose the contents of its customers' electronic communications. Additionally, it is illegal for third parties to obtain an electronic communication stored on a system by intentionally accessing the system without authorization, or by intentionally exceeding the authorization given. As with the Wiretap Act, these provisions do not apply to electronic communications that are readily accessible to the public. In addition, it is permissible for service providers to provide customer records that do not contain any content (e.g. basic subscriber information, session logs, and IP addresses) to third parties that are not government entities, and to government entities under certain circumstances.

Under Title III of the ECPA, also known as the Pen Register Statute, it is illegal to use pen registers, which are trap-and-trace devices that register outgoing communications by tracking addressing and routing information. Service providers, however, are permitted to use these devices to ensure the proper functioning of their systems.

Finally, websites that collect personal information from children should be aware of the

Children's Online Privacy Protection Act ("COPPA"). COPPA is not to be confused with the Children's Online Protection Act ("COPA"), which has been repeatedly found unconstitutional by federal appeals courts. Personal information under COPPA refers to individually identifiable information—such as full name, home address, and e-mail address—as well as hobbies, interests, and other information collected through cookies and other tracking mechanisms that are linked to individually identifiable information. Websites directed to children under 13 years of age, or that are directed to a general audience but collect personal information from children, must obtain parental consent. Such websites must post privacy notices on information practices on their home pages, and at each area where they collect information from children. They must also directly notify parents regarding their information practices, the fact that they wish to collect personal information from the parent's child, that the parent's consent is required, how the parent can provide consent, and the use and disclosure of the information. The statute sets forth certain limited situations in which a website may obtain a child's personal information without first obtaining parental consent, such as when a website operator collects a child's e-mail address to respond to a one-time request from the child, and then deletes it.

E. Massachusetts Data Security Regulations

The Massachusetts Legislature recently enacted a comprehensive data security law designed to protect personal information of Massachusetts residents. In September 2008, the Massachusetts Office of Consumer Affairs and Business Regulation ("OCABR") issued regulations setting forth specific policies and practices that must be adopted to comply with the law. These regulations establish requirements that far exceed data security provisions under federal law or the laws of other states. The original date for compliance with the law was January 1, 2009; however, that date was extended to January 1, 2010. The regulations seek to

ensure the security and confidentiality of personal information, while protecting against anticipated threats to the information, including unauthorized access to or use of such information.

The laws apply to any legal entity, including individuals and businesses – regardless of size or industry – that own, license, store, or maintain "personal information" about a resident of Massachusetts. "Personal information" is defined as a Massachusetts resident's first name (or initial) and last name, in combination with at least one of the following: (a) social security number; (b) driver's license or state issued identification number; or (c) financial account number (including credit or debit card number). The law applies to all personal information, whether in print or electronic form. Personal information does not include lawfully obtained public information and government records.

All entities subject to the regulations must implement and maintain a written information security program ("WISP"). OCABR will take into account the size, type, and scope of the business, as well as the resources available to it and the amount and sensitivity of the data, in determining whether an entity's security program is sufficient. Entities that store or transmit personal information must meet security requirements for all of their systems – wired and wireless, desktop and laptop, PDA and Blackberry. In addition, entities that own, license, maintain, or store personal information must comply with certain notification obligations in the event of a breach of security or unauthorized access or use. Some of the other requirements under the regulation include data encryption and inventory, and identification of records containing personal information. Additionally, entities must take reasonable steps to verify that any third party service provider with access to personal information has the capacity to protect

such information, and, in fact, is applying security measures at least as strict as those required under these regulations to protect such personal information.

As the regulations may be subject to amendment before January 2010, it is advisable to review OCABR's website or to consult with counsel to confirm the most current state of the law in this area.

PART III

Employment

This guide contains an overview of certain employment law-related topics that frequently arise for reporters, broadcasters and other businesses. The areas discussed in this guide include federal and state laws concerning health care coverage, wage and hour requirements, family and medical leave, re-employment after military service, non-competition agreements, and employment discrimination and harassment. Please note that the information contained in this guide is intended as a general overview and should not be considered a substitute for specific legal advice from an attorney, particularly in light of the fact that the laws and statutes in this area are constantly developing and changing.

Also, it should be noted that the federal Defense of Marriage Act ("DOMA") prevents same sex spouses from receiving benefits offered under federal statutes, including those discussed in this section of the guide. However, DOMA does not prevent states from enacting legislation to include same sex marriage. Massachusetts recognizes same sex marriage, and same sex spouses are included in the definition of "spouse" under Massachusetts law. Therefore, Massachusetts laws that confer benefits upon "spouses" include same sex spouses, while federal laws offering benefits to "spouses" do not include same sex spouses.

IX. EMPLOYEE HEALTH PLANS: COBRA AND HIPAA

A. COBRA

1. Introduction

The acronym "COBRA" stands for a federal statute, the Consolidated Omnibus Budget Reconciliation Act. That statute applies to employers that have 20 or more employees (with part-time employees counted as fractions) on more than 50 percent of the typical business days in the previous calendar year. It requires covered employers to give eligible employees and their spouses and dependents (called "qualified beneficiaries") a limited opportunity to extend health coverage (called "continuation coverage") at group rates but at their own expense for a limited

period of time after those individuals would otherwise lose coverage. Under a Massachusetts law, sometimes called "mini-COBRA," the same coverage continuation requirements apply to employers with 2 to 19 employees (unless the employer's health plan is self-insured).

A federal "COBRA Subsidy" law, which became effective on March 1, 2009, requires that employers provide certain eligible employees with subsidized premium payments, for which the employer will later be reimbursed through tax credits. A discussion of this recently-enacted law is in Section IX(A)(8) of the Guide, below.

2. Qualified Beneficiaries

"Qualified beneficiaries" include the employee, the employee's spouse, and the employee's dependent child(ren) who are covered by a group health plan on the day before the occurrence of a particular event that entitles such individuals to elect continuation coverage ("qualifying event"). In addition, a child born to or placed for adoption with an employee during a continuation coverage period is considered a qualified beneficiary.

3. Qualifying Events

"Qualifying events" are certain events that cause an individual to lose health coverage. For employees, qualifying events include: (1) voluntary or involuntary termination of employment for a reason other than gross misconduct, and (2) reduction in the number of hours of employment. For covered spouses, qualifying events include: (1) the covered employee's voluntary or involuntary termination of employment for a reason other than gross misconduct, (2) reduction in the number of hours worked by the covered employee, (3) the covered employee becoming entitled to Medicare coverage, (4) divorce or legal separation from the covered employee, and (5) death of the covered employee. For covered dependent children, qualifying events include those applicable to covered spouses, as well as loss of "dependent child" status under the plan.

4. Duration of Continuation Coverage

The length of the continuation coverage period depends on the qualifying event. If the COBRA right arises because of an employee's employment termination or hours reduction, the continuation coverage period is 18 months. If the COBRA right is triggered for the spouse or dependent child by any other qualifying event, the continuation coverage period is 36 months.

Employees who are disabled within the meaning of the Social Security Act with a disability that exists any time during the first 60 days of COBRA coverage and who properly notify the employer of the disability determination, may apply to extend continuation coverage for an additional 11 months. The extended coverage period also applies to a disabled qualified beneficiary of the covered employee. An 18-month extension of coverage, up to a maximum of 36-months of continuation coverage, is available to spouses and dependent children who elect continuation coverage if a second qualifying event occurs.

5. Notice Requirements

Group health plans must provide employees and covered spouses with an initial notice that describes COBRA continuation rights within 90 days of the date when the coverage under the plan begins. The initial notice must contain the following information: (1) the name of the plan and COBRA administrator, including contact information, (2) a general description of continuation coverage under the plan, (3) the plan's requirements and notice procedures regarding qualified beneficiaries, (4) an explanation of the importance of keeping the plan notified of any address changes, and (5) a statement that the notice does not fully describe continuation coverage and that more information is available from the plan administrator and in the summary plan description ("SPD"). This initial notice may be included in the SPD.

When an employee dies, terminates employment, reduces hours, or becomes entitled to Medicare, the employer must notify the plan administrator within 30 days. Covered employees

and qualified beneficiaries must notify the plan administrator within 60 days of a divorce or legal separation of the employee and his spouse, a covered child losing dependent status under the plan, a determination of disability by the Social Security Administration, or the occurrence of a second qualifying event.

Within 14 days after receiving notice of a qualifying event, the plan administrator must provide an election notice containing certain information to each qualified beneficiary, describing his right to elect continuation coverage. Further, a plan administrator that receives notice of a qualifying event from a participant or beneficiary must provide notice to such person if it is determined that COBRA coverage is not available, including the reason for such unavailability. This notice must be provided within 14 days after receipt of the notice from the individual. If COBRA coverage is terminated early, the plan administrator must provide notice to qualified beneficiaries as soon as practicable after the determination to terminate coverage is made.

6. Coverage Election and Premium Payment

The employer must give a qualified beneficiary at least 60 days, measured from the later of the date of the qualifying event or the date the election notice is delivered, to elect continuation coverage. Each qualified beneficiary may independently elect continuation coverage, and the covered employee or the covered spouse may elect coverage on behalf of all other qualified beneficiaries. A qualified beneficiary may waive continuation coverage and revoke the waiver during the 60-day election period. The employer must give a qualified beneficiary who has elected continuation coverage at least 45 days in which to pay the initial premium, including the monthly premiums that fall due within that 45-day period. Qualified beneficiaries must be permitted to pay premiums in monthly installments, with a 30-day grace period. Therefore, premiums generally are due on the first of each month. Employers typically

do not issue monthly premium notices.

The continuation coverage premium may not exceed 102 percent (102%) of the plan's cost for active employees, consisting of 100 percent of the total coverage premium applicable to active employees (including both the portion paid by employees and any portion paid by the employer), and two percent of that coverage premium for administrative costs. For qualified beneficiaries on an 11-month disability extension, the premium for the additional months may be as high as 150 percent (150%) of the plan's total cost of coverage. Continuation coverage premiums may be increased if the plan costs increase, but the premiums generally must be fixed in advance of each 12-month premium cycle.

7. Termination of Continuation Coverage

Continuation coverage for a qualified beneficiary may be terminated before the end of the maximum period for any of the following reasons:

- The employer no longer provides group health coverage to any of its employees.
- A required premium is not paid on time.
- The qualified beneficiary becomes covered under another group health plan that does not contain any restrictions on coverage of pre-existing conditions.
- The qualified beneficiary becomes entitled to Medicare after electing continuation coverage.
- For the same reasons the plan would terminate coverage of a participant who does not receive continuation coverage (e.g., fraud).
- Following a final determination that a disabled qualified beneficiary is no longer disabled and he has already received 18 months of continuation coverage due to termination of employment or reduction in hours.

8. The COBRA Subsidy Law

A COBRA subsidy for certain qualified individuals became effective on March 1, 2009, in connection with the passage of the federal "Stimulus Bill" that was signed into law on February 17, 2009. The COBRA subsidy law requires that employers provide eligible individuals with a subsidy of 65% of the cost of COBRA continuation coverage for nine months following their involuntary termination from employment, leaving the eligible individual responsible for paying only 35% of the premium. The law indicates that premiums paid by the employer will be reimbursed through a payroll tax credit for the period during which the subsidized premiums were paid. Eligible individuals are employees (and their qualified beneficiaries) who are involuntarily terminated between September 1, 2008 and December 31, 2009, provided they were eligible to elect COBRA continuation coverage at the time of termination. The law further indicates that the subsidy may be recaptured by the IRS from individuals with an adjusted gross income over a certain threshold when they pay their income taxes for the year.

The law requires that by April 18, 2009, employers provide all eligible individuals with notice of the availability of the COBRA subsidy, and inform them of their right to receive it generally beginning on March 1, 2009 if they currently receive COBRA continuation coverage. Eligible individuals who did not elect COBRA continuation coverage at the time of termination will have 60 days from the date the employer provides such notice to elect COBRA coverage at the subsidized rate. Coverage is presumed to have begun on the date the individual first became eligible for COBRA. The COBRA subsidy law contains other provisions, including provisions concerning eligibility, coverage periods, changes in coverage, and termination of the subsidy. Thus, if a broadcaster has terminated employees since September 1, 2008, or if it may do so prior

to December 31, 2009, the broadcaster should consult an attorney for specific guidance regarding compliance with this law.

B. HIPAA

The acronym "HIPAA" stands for the federal Health Insurance Portability and Accountability Act. HIPAA applies to group health plans with two or more participants who are current employees. It limits the ability of group health plans to deny coverage for claims relating to treatment of "pre-existing" medical conditions to the extent that a participant can show sufficient previous "creditable coverage" (prior health coverage) under a current or former group health plan and the claim is otherwise covered by the current plan.

Health plans often contain exclusions for "pre-existing conditions," which are medical conditions that existed at the inception of coverage. Under HIPAA, a group health plan can exclude coverage for a pre-existing condition only if it relates to a condition for which medical advice, diagnosis, care or treatment was recommended or received within the six month period prior to the individual's enrollment date. If a plan contains a pre-existing condition exclusion period, it must reduce an individual's pre-existing exclusion period by the number of days of the individual's "credible coverage." The maximum length of the pre-existing exclusion period is 12 months from the date of enrollment unless a new employee does not join an employer's plan until a later enrollment date, in which case the plan may require up to 18 months of creditable coverage to eliminate the otherwise applicable pre-existing condition exclusion period. Any break in coverage of 63 days or more may eliminate an individual's pre-break creditable coverage under HIPAA.

There are two methods by which a plan can calculate credible coverage. Under the standard method, the plan or issuer may count all days during which the individual had one or

more types of credible coverage. Under the alternative method, the plan determines the amount of an individual's credible coverage for any of the five specified categories of benefits. Those categories include mental health, substance abuse treatment, prescription drugs, dental care and vision care. When using the alternative method, the plan or issuer determines whether an individual was covered within a category of benefits. For example, if an individual who is a regular enrollee has 12 months of creditable coverage, but dental care benefits for only 6 of those months, a preexisting condition exclusion period may be imposed with respect to that individual's dental care benefits for up to 6 months. A plan using the alternative method must notify individuals that the method is being used and provide a description of the effect of using the alternative method. A plan must also apply the alternative method uniformly to all participants and beneficiaries.

If the employee has less than the full 12 (or 18) months needed for complete elimination of the pre-existing condition exclusion, the months that the employee does have will be added to months he earns with the new employer until he has the necessary months for full coverage for pre-existing conditions. For example, if a new employee enrolls in a plan that contains a 12-month exclusion period for pre-existing conditions, and the new employee had 9 months of coverage under a prior employer's health plan (without a break of 63 or more days), the new employer's plan may impose an exclusion period of only 3 months with respect to the new employee's pre-existing conditions (if any). If the individual maintained continuous creditable coverage for 12 months (18 months for a late enrollee), the employer's plan may not apply any pre-existing condition exclusion to that individual.

A plan can only exclude coverage for a preexisting condition after individuals have been notified. Therefore, if a plan has a preexisting condition exclusion, individuals must be provided

with notice of the exclusion. Additionally, individuals must be notified of their right to demonstrate that they have prior credible coverage to reduce the preexisting condition period. A plan must notify the individual of the determination regarding the length of any pre-existing exclusion that applies to the individual. If an exclusion is applied, the notice must include the basis for the determination.

Plans are required to issue certificates of credible coverage to plan participants. When an employee loses his coverage under an employer's plan, becomes eligible to elect COBRA coverage, or exhausts COBRA coverage, the plan administrator must give the employee a certificate showing the number of months the employee and any dependents were covered under the employer's plan. The employee may use that certificate of "creditable coverage" to reduce any pre-existing condition exclusion period under his next health plan if coverage under the new plan begins within 62 days after coverage ends under the prior plan.

If the employee joins a new employer's plan, he may give the new plan administrator the certificate from his previous group health plan administrator showing the number of months of coverage uninterrupted by any break of 63 days or more. If the new employee has creditable coverage that exceeds the new employer's waiting period and joins the employer's plan at the first opportunity and before a 63-day break occurs, the employer's plan may not impose any pre-existing condition limitations upon that employee (or his dependents, if any, if their creditable coverage matches the employee's).

Generally, a plan or issuer may not establish eligibility rules that discriminate based on "health status-related" factors such as health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. For example, a health plan cannot require employees to pass a physical examination in order to enroll

in the plan or charge higher premiums or contributions based on health status-related factors.

HIPAA Privacy Rule

HIPAA also includes federal privacy requirements that are designed to restrict access to, and use and disclosure of, individually identifiable health information. Under the Department of Health and Human Services regulations, protected health information includes all medical records and other individually identifiable health information held or disclosed by a covered entity (including group health plans, health care providers and health care clearinghouses) in any form, whether communicated electronically, orally, or on paper. While most routine health information exchanges, such as one physician's discussing a patient's condition with another treating physician, do not require special consent from the patient, other uses and disclosures of health information require specific authorization. Additionally, individuals can request to restrict the use and disclosure of their information. There are limited circumstances under which covered entities can release protected information to employers without authorization.

The obligations of employers, known as "plan sponsors," under the HIPAA privacy rule will vary depending on whether the employer receives an employee's protected health information, summary health information, or no health information at all concerning an employee.

Members of the media are not "covered entities" under HIPPA. However, this statute may affect the ability of reporters and broadcasters obtain protected health information. For more information on this topic, please refer to the section of this Guide on Invasion of Privacy, entitled "Issues of Confidentiality, Special Issues Surrounding Reporting Information from Medical Records."

X. FAIR LABOR STANDARDS ACT – WAGE AND HOUR REQUIREMENTS

A. Overview

Under both federal law and the laws of Massachusetts, employees must be paid at least the minimum wage and employees must be paid overtime (150% of hourly wages) for all hours in excess of 40 hours per week, unless they fall within one of the categories of "exempt" personnel. These requirements apply only to "employees," and have no effect on independent contractors, volunteers, interns and trainees.

B. Who is an "Employee"?

1. Independent contractors

Under Massachusetts law, for work performed after July 19, 2004, there is a rebuttable presumption that a person who works for another is an employee. Any individual performing service will be considered to be an employee unless the alleged employer can prove that:

- the work has been and will continue to be free from control and direction in connection with the performance of the service, both under his contract for the performance of the service and in fact; and
- the service performed is outside of the usual course of the business of the alleged employer; and
- the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service being performed.

Determination of independent contractor or employee status requires specific analysis of the facts of each particular case. For work performed prior to July 19, 2004, courts examine the totality of the circumstances bearing on the employment relationship, including the nature and

extent to which the alleged employer exercises control, the nature and structure of the working relationship, and the economic aspects of the relationship.

2. Volunteers and Interns

a. Volunteers

A volunteer is someone who "without promise or expectation of compensation, but solely for his personal purpose or pleasure, works in activities carried on by other persons either for their pleasure or profit." Volunteers are not considered "employees" under the Fair Labor Standards Act (FLSA).

Under U.S. Department of Labor (DOL) guidance, individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable and similar non-profit corporations that receive their service. Although it is possible for someone to donate their services at a for-profit organization, such a worker would not be considered a "volunteer" under the FLSA (however, that person may be considered an "intern" under the FLSA, as discussed below). Individuals can "volunteer," under the FLSA, for public sector employers; however, public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed.

b. Interns and Trainees

Interns and trainees are not considered employees for purposes of the FLSA. The DOL has identified six criteria to determine whether an individual is classified as an "intern" or "trainee." The six criteria are:

- the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

- the training is primarily for the benefit of the trainees rather than the employer;
- the trainees do not displace regular employees, but work under close observation;
- the employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion its operations may actually be impeded;
- the trainees are not necessarily entitled to a job at the completion of the training period; and
- the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

The DOL takes the position that all six criteria must be met in order for a person to be considered an intern or trainee who is exempt from the requirements of minimum wages and overtime.

c. Impact of Minimum Compensation

An issue that sometimes arises with volunteers, interns, and trainees is whether their status is affected by the receipt of free meals, a small stipend, or other benefits. While volunteers many not receive "compensation," the FLSA explicitly permits payment of "expenses, reasonable benefits, or a nominal fee." The relevant federal regulations state "[a] nominal fee is not a substitute for compensation and must not be tied to productivity."

Thus, minimal compensation to a volunteer or to an unpaid intern generally will not change the nature of the employment relationship, unless the compensation creates a situation similar to an employment relationship. To determine whether such benefits are sufficiently minimal, courts examine the total amount of payments/benefits provided in the context of the "economic realities" of the particular situation. The regulations indicate that the following factors are among those considered in deciding whether the payments/benefits are nominal: the

distance traveled and time and effort expended by the volunteer; whether the volunteer agreed to be available around-the-clock or only during specified time periods; and whether the volunteer provided services as needed or throughout the year. The regulations indicate that an individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

C. Exempt Employees

There are several categories of employees who are considered "exempt" from overtime compensation. In the broadcasting industry, the three most important exemptions are those employees who are employed in an executive, administrative, or professional capacity. In order to fall within one of those exceptions, an employee must meet two tests. First, he must be paid a fixed amount of at least $455 per week (i.e., $23,600 per year) on a salary basis, with some limited exceptions. Second, he must perform the kind of "while collar" work that is defined in the law as exempt (e.g., the duties of an executive, administrative, or professional employee), which are described in more detail below.

1. Executive duties

An employee will be exempt as an executive employee if he has the primary duty of management of the enterprise or of one of its customarily recognized departments or divisions, and customarily and regularly directs the work of two or more full time employees.

2. Administrative duties

An employee will be exempt under the administrative employee exemption if his primary duties consist of performing office work or other non-manual work, which require the exercise of discretion and independent judgment, and which directly relate to the management policies or general business operations of the employer or the employer's customers. The exercise of discretion and independent judgment involves the comparison and evaluation of possible courses

of conduct and making or acting on decisions after consideration of the various possibilities. Lower level management may qualify for this exemption; however, clerical employees and bookkeepers, even though they perform administrative work, are generally not exempt because their work does not ordinarily entail the necessary amount of discretion and independent judgment.

3. Professional work

An employee will be classified as exempt under the professional exemption if he is a learned professional or an artistic or creative professional. The exemption for creative professionals is typically the exemption most relevant to the broadcasting industry. For an employee to qualify for a creative professional exemption, his primary duty must be the performance of work requiring invention, imagination, or talent, as opposed to routine mental, manual, mechanical, or physical work. Since the activities, duties and responsibilities of employees vary widely, determinations of exempt professional status are made on a case-by-case basis.

Most court decisions place the work of journalists outside the category of learned or creative professional. While their work requires intelligence, skill, and experience, courts have generally found it to lack the degree of originality or creativity required for the "artistic professional" exemption and to not require the formal specialized training necessary for the "learned professional" exemption. Employees that gather, organize and record information that is routine or public, or who do not contribute a unique interpretation or analysis to a news product, do not fall within the creative professionals exemption. Therefore, journalists whose primary jobs include rewriting stories from press releases or wires, or writing standard recounts of public information by gathering facts on routine community events, are not exempt creative professionals. Further, journalists do not qualify for the exemption if their work product is

subject to substantial control by the employer.

However, federal regulations indicate that journalists may qualify as exempt creative professionals if their primary duty is “work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy.” Such “creative” work includes “performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator.” Under this standard, the work of editorial writers, columnists and critics frequently entails the requisite degree of originality and creativity to place those people within the exemption.

Further, the federal regulations provide an exemption for announcers, news editors, and chief engineers of a radio or television station where the station’s primary studio is located in a city or town of 100,000 or fewer people (except where such city or town is part of a standard metropolitan statistical area which has a total population in excess of 100,000) or in a city or town of 25,000 or fewer people which is part of such an area but at least 40 airline miles from the principal city in such area.

4. Post-employment

Under Massachusetts law, after an employee resigns from his employment position, the employee must be paid his wages earned in full, on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday. Employees who are terminated must be paid in full on the day of discharge, or, in Boston, as soon as the laws requiring payrolls, bills and accounts to be certified have been complied with. Wages include any holiday or vacation payments due and "commissions when the amount of such commissions . . . has been definitely determined and has become due and payable."

5. Penalties

Violations of the FLSA carry criminal and civil penalties including fines, other money damages, and imprisonment. Under newly enacted Massachusetts' legislation, employers who violate the state wage and hour laws are subject to mandatory trebling of damages and the payment of attorneys' fees.

XI. FAMILY MEDICAL LEAVE ACT

A. Purpose

The Family Medical Leave Act ("FMLA") is a federal statute that guarantees employees unpaid leave from their employment when necessary for their own health or to care for family members. On November 17, 2008, the Department of Labor (DOL) issued revised FMLA regulations in an attempt to address a broad range of issues that have concerned both employers and employees since the FMLA first went into effect in 1993. These new regulations, which became effective on January 16, 2009, are reflected in the discussion of the FMLA below.

B. Employers Covered

The FMLA applies to a private employer that has 50 or more employees working during 20 or more weeks in the current or preceding calendar year, and any public employer, regardless of the number of persons employed. The number of employees is determined by the number maintained on the employer's payroll, including part-time employees and employees on leaves of absence.

An employer is the legal entity that employs the employee. The term "employer" includes any joint and integrated company, any person acting in the interest of the employer in relation to an employee, and any successors in interest. A corporation that has an ownership interest in another corporation is considered a separate employer unless it meets the "integrated employer" or "joint employment" test. Determining whether the subsidiary is an "integrated

employer" requires examining the entire relationship between parent and subsidiary, including: common management, interrelation between operations, centralized control of labor relations, and common ownership. A "joint employer" relationship is generally found where employers arrange to share an employee's services or to interchange employees; when one employer acts in the interest of another employer in relation to an employee; or when employers share control of an employee because one employer controls the other, or because the employers are under common control.

C. Employees Covered

To be covered by the FMLA, an employee must have the same employer for at least 12 months and must have completed at least 1250 hours of service during the 12 months preceding the commencement of the requested leave. Previous periods of employment with the same employer can count towards fulfilling the 12 month requirement, even if an employee has a gap in employment with the employer. Only hours actually worked will be counted toward the 1,250 hours required for eligibility. For example, paid time off for vacations, holidays, and sickness does not count towards hours worked under the FMLA. The recent DOL revisions provide that, with some exceptions (such as for reserve military service or National Guard obligations), a service break of seven years or more need not be counted in determining whether an employee has been employed for at least 12 months.

The FMLA only protects employees where there are 50 employees working within 75 miles of the worksite at the time that the employee requests the leave. An employee's worksite for FMLA purposes is generally the site to which the employee reports, or, if none, the site from which the employee's work is assigned. Where an employer does not have the requisite number of employees in the relevant geographic area, employees in that area are not eligible for FMLA

leave.

D. Permissible Bases for FMLA Leave

An employee may request FMLA leave for any of the following reasons:

- Childbirth or care of the employee's son or daughter;
- Placement of a son or daughter with the employee for adoption or foster care;
- To care for the employee's spouse, son, daughter, or parent with a serious health condition;
- Where a serious health condition renders the employee unable to perform the essential functions of his position.

The National Defense Authorization Act, which became effective on January 16, 2009, amended the FMLA to extend its protections to situations where eligible employees need leave (1) for "qualifying exigencies" related to a family member's call-up for or service on active military duty, or (2) to care for a family member who is recuperating from or has a "serious illness or injury" incurred in military service, including where the employee is the "next of kin" to the service member. "Qualifying exigencies" include military events related to active duty, child care (on an emergency basis) for the child of a service member, attending counseling, making financial and legal arrangements, spending up to five days with a service member who is on leave during a deployment period, spending up to seven days with a military member who is called to active duty on short notice, and attending post deployment events. An employee who takes leave to care for a covered service member is eligible for up to 26 weeks of FMLA leave within a 12 month period; however, "qualified exigency" leave does not qualify for the 26 week service member caregiver leave.

The definitions of "son" and "daughter" include a biological, adopted, foster, or step

child, or legal ward, of a person standing *in loco parentis*. The son or daughter must be under the age of 18 unless the child is incapable of caring for himself due to a mental or physical disability at the time the leave would commence. A parent includes a biological parent or a person who performs all parental duties in lieu of a biological parent. Parents-in-law are not included in the definition of "parent."

According to the DOL, under the FMLA, "[s]pouse means an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized." Unmarried couples are not covered under the definition of "spouse" in Massachusetts, because Massachusetts does not recognize common law marriage. Also, federal law does not recognize same sex partners or spouses within the definition of "spouse."

With respect to leave taken in connection with the birth or adoption of a child, the leave must conclude within 12 months of the child's birth or placement. An employee may not take the leave on an intermittent or reduced leave schedule unless the employer agrees to such an arrangement. The FMLA limits spouses who work for the same employer to a combined 12 weeks of leave for the birth or adoption of a child, unless the child has a serious health condition (in which case each spouse can take the full 12 weeks of leave). Each spouse is then entitled to use the rest of his or her 12 weeks of leave for another FMLA purpose.

FMLA regulations define a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment, specifically, any period of incapacity or treatment in connection with or consequent to in-patient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility. In addition, the following circumstances are treated as "serious health conditions" under the FMLA:

- An illness, injury, or impairment that causes incapacitation for more than three consecutive days and requires continuing treatment;
- A chronic health condition, where the condition requires periodic visits for treatment, continues over an extended period of time, and may cause episodic periods of incapacity;
- Pregnancy or prenatal care;
- A permanent or long-term condition for which treatment is ineffective;
- Treatment for restorative surgery after an accident or illness or for a condition that would result in incapacitation for more than three days in the absence of medical attention; and
- Treatment for substance abuse.

Examples of serious health conditions which qualify for FMLA leave, if all the other conditions of the FMLA regulations are met, include restorative surgery after an accident, cancer treatment, and treatments for allergies or stress. Illnesses such as the common cold, the flu, upset stomach, minor ulcers or headaches are not considered serious health conditions. Voluntary or cosmetic treatments which are not medically necessary (such as most treatments for orthodontia or acne) are not considered "serious health conditions," unless complications arise or in-patient hospital care is required. However, several minor ailments added together might reach the level of a serious health condition under the Act.

Under the regulations, "treatment" requires an in-person visit to the health care provider, which must take place within seven days of the first day of incapacity. Routine physical, eye or dental examinations are not considered "treatment." The DOL regulations include a number of situations that constitute "continuing treatment" by a health care provider. A regimen of

continuing treatment involves a course of prescription or therapy requiring special equipment to resolve the health condition. A regimen of exercise, over-the-counter medicine, bed rest, or any activity that can be initiated without a visit to a health care provider is excluded from the FMLA's definition of a treatment regimen.

E. Obligations of Employer

In situations where the FMLA applies, an employer is required to give eligible employees up to 12 weeks of unpaid leave during a 12-month period. When medically necessary, intermittent leave and reduced-leave (part-time) schedules must be made available as a part of the 12 weeks of FMLA leave for serious health conditions. An employee is entitled to any unconditional pay increases which occur during the FMLA leave period, such as cost of living increases. However, an employer is not required to grant additional paid vacation, sick, or personal days to an employee on FMLA leave. If a bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance, and the employee has not met that goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA status.

Within five days after receiving notice of an employee's intent to take a leave, the employer must provide the employee with a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The notice must advise the employee of his eligibility for FMLA leave generally, and, if he is ineligible, provide the basis for his ineligibility.

During the leave, the employer must maintain the employee's group health plan coverage (including any dental plan) and must pay the same share of premium contributions as it paid while the employee worked. The employer may recover its share of premiums paid to maintain

an employee's health benefits during unpaid FMLA leave, if the employee fails to return to work after his FMLA entitlement expires for a reason other than the continuance, recurrence, or onset of a serious health condition or for other circumstances outside the control of the employee. An employer may require an employee on unpaid FMLA leave to continue making his share of premium payments to maintain his health coverage.

At the end of the leave, the employee must be restored either to the same position held previously or to an equivalent position (with the same terms of pay, benefits and other employment terms and conditions, as well as job duties and responsibilities, and at the same geographically proximate worksite), unless the employee is a "key employee." A "key employee" is defined as one who is among the highest paid ten percent of the workforce employed within 75 miles of the employee's worksite. For such an employee, the employer may not deny the taking of FMLA leave and the maintenance of health benefits; but the employer may refuse to reinstate the employee after the FMLA leave, if denial of restoration is "necessary to prevent substantial and grievous economic injury." The employer must notify the employee in writing of his status as a "key employee" at the time the employee gives notice of the need for leave, and, if it decides not to restore the "key employee" to his position, it must notify the employee of its decision and the basis for the "substantial and grievous economic injury."

When the leave qualifies under both the FMLA and the employer's paid benefit plan, the employer may designate the leave as both FMLA leave and the benefit plan leave, and count the leaves as running concurrently. Similarly, where leave taken for the birth of a child qualifies for the employer's temporary disability leave plan, the employer may designate the leave as both temporary disability and leave under the FMLA, and have both leaves run concurrently. An employer may only designate time off as FMLA leave based on information received from the

employee or his representative, such as his spouse or doctor. Paid vacation or personal leave, including leave earned or accrued under employer plans that allow "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave.

An employer may not discriminate against or discharge any individual who asserts FMLA rights or who opposes the employer's violation of the FMLA. Thus, an employer cannot penalize an employee for taking FMLA leave. Notice of the FMLA, and procedures for filing complaints under FMLA with the DOL, must be posted in a prominent place at the employer's office, where it can be seen by employees and applicants. Employers must also distribute a general notice of FMLA rights to all new and existing employees. If the employer provides an employee handbook or other written guidance to its employees regarding employee benefits and leave rights, information on employees' rights and obligations under the FMLA must be included in the handbook.

An employer who violates the FMLA can be liable to the aggrieved employee for damages, including wages, salary, employment benefits, "or other compensation denied or lost" and for "actual monetary losses" caused by the violation. Liquidated damages equal to the total damages suffered by the employee can be recovered if the employer acted in bad faith. Equitable relief, such reinstatement or promotion, is also available under the FMLA.

F. Obligations of an Employee Taking FMLA Leave

When the leave is reasonably foreseeable, an employee must give at least 30 days notice before the date his leave is to begin, and provide the employer with a description of the condition that qualifies the employee for FMLA leave and the anticipated duration of his absence. If the need for leave is unforeseeable, the employee must provide such notice "as soon as practicable" under the circumstances. When the leave is related to a serious medical condition, an employer

may require medical certification of the condition, including an estimate of the condition's duration, within fifteen days of the request for leave. Upon receiving the medical certification, the employer must determine whether the requested leave qualifies under the FMLA within five business days. The employer must then notify the employee in writing of its determination and the amount of leave that will be counted against the employee's entitlement, as well as provide information regarding the employee's obligations upon returning to work.

The employer may require a new medical certification (as opposed to recertification) each subsequent leave year. The employer can contact directly the health care provider who signed the certificate, to authenticate and clarify it; however, the employer cannot request additional medical information from the health care provider. If the employer finds that the medical certificate does not support the leave request, the employer must state in writing the additional information necessary to satisfy the certification requirement and provide the employee with seven days to cure any deficiency. If the employee fails to do so, the employer can deny the leave. With the exception of "qualifying exigencies" leave under the National Defense Authorization Act (described above), an employer may require the employee to obtain a second opinion at the employer's expense, and if the two opinions conflict, the parties are to designate jointly someone to provide a third opinion that is final and binding (at the employer's expense). The employer may, at its own expense, request recertification at reasonable intervals, but not more than once every 30 days. If an employer requests medical certification to substantiate the need for FMLA leave due to a serious health condition, and the employee fails to provide the requested medical certification in a timely manner, then the employer may deny FMLA leave until the employee submits the certificate.

G. Return to Work Following FMLA Leave

During the leave, an employer may require an employee to periodically report on the employee's status and intent to return to work. An employer may request the employee to provide medical certification, at the employee's expense, that the employee is "fit for duty" (i.e., able to resume work and to perform the essential functions of the job) before being allowed to return to work, and may deny restoration until the employee submits the certificate. The employer can also deny reinstatement if the employer can prove that the employee would not otherwise be employed if leave had not been taken, for an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. For example, if the employer had a policy prohibiting outside employment, it would be appropriate to discipline an employee for violating the policy, even if the employee was on FMLA leave at the time the violation occurred.

The employer's obligations under FMLA to maintain health benefits and to restore the employee cease if an employee gives unequivocal notice of intent not to return to work. However, these obligations continue where an employee indicates he may be unable to return to work but expresses a continuing desire to return. Also, if the employee decides not to return from FMLA leave, the employer must still provide the employee with COBRA benefits.

H. Interplay with Other Statutes

If an employee's "serious health condition" does not rise to the level of a "disability," as defined in the Americans With Disabilities Act ("ADA," discussed in more detail below), the employee will be covered by the FMLA, but not the ADA. However, if an employee's "serious health condition" does rise to the level of a "disability" as defined in the ADA, the employee will be covered by both the FMLA and the ADA. Such an employee must be granted rights under

both statutes, that is, the employer must both grant the employee unpaid leave under FMLA, and also make reasonable accommodation for the employee under the ADA. It is an open issue whether the FMLA medical certifications must comply with the restrictions of the ADA. However, when an employee requests leave under the FMLA for a serious health condition, an employer who asks for information specified in the FMLA certification form (e.g., information about conditions related to the stated reason for the leave) does not violate the ADA, as the ADA permits such inquiries where they are "job-related and consistent with business necessity." Generally, therefore, inquiries complying with FMLA medical certification requirements will likely comply with ADA limitations as well.

1. Massachusetts Maternity Leave Act

The Massachusetts Maternity Leave Act ("MMLA") governs employers with 6 or more employees. Under the MMLA, an eligible female employee must be provided with 8 weeks of unpaid leave for the purpose of giving birth or adopting a child under the age of 18 (or 23 if the child is mentally or physically disabled). To be "eligible," a female employee must have completed a probationary period or a minimum of 3 consecutive months as a full-time employee. Additionally, she must provide her employer with at least two weeks notice of her anticipated date of departure and intention to return. If the employer and employee are also covered by the FMLA, the FMLA supersedes the state act only where the FMLA grants the employee rights that are greater than those granted in the state act.

2. Massachusetts Small Necessities Leave Act

Under the Massachusetts Small Necessities Leave Act ("SNLA"), an employee who is covered by the FMLA is entitled to 24 hours of unpaid leave during any 12-month period, to: (1) participate in school activities directly related to the educational advancement of the eligible employee's children, (2) accompany his children to routine medical or dental appointments, or

(3) accompany an elderly relative to routine medical or dental appointments or appointments for other elder care services. The SNLA leave is in addition to any leave available under the FMLA. If the leave is foreseeable, the employee must provide at least seven days notice before the leave is to begin. Only employers who are covered by the FMLA are subject to the SNLA.

An employer may require or an employee may elect to substitute accrued paid leave for any part of the leave period. However, the employer is not required to provide paid sick or medical leave in any situation in which the employer would not normally provide such paid leave. The 24-hour leave may be taken intermittently or on a part-time schedule.

Employees may file a civil action against employers who violate the SNLA. A prevailing employee may be awarded treble damages for any loss of wages and other benefits, as well as the costs of litigation and reasonable attorneys' fees. Furthermore, employers who violate the SNLA may be subject to proceedings initiated by the Massachusetts Attorney General for injunctive or declaratory relief, and a fine.

3. Reemployment after Military Service

The Uniformed Services Employment and Reemployment Rights Act ("USERRA"), as well as Massachusetts state law, provides for the reemployment of any person who is absent from a position of employment due to service in the uniformed services, including reserve components and certain disaster response work. "Uniformed service" under USERRA includes active duty, active duty training, inactive duty training, and initial active duty training, among others. USERRA covers nearly all employees, including part-time and probationary employees, and applies to all U.S. employers, regardless of size.

In order to qualify for reemployment rights and benefits under USERRA, service members must meet five criteria:

- The person must hold a civilian job;

- The person must give notice to the employer that he is leaving the job for service in the uniformed services, unless notice is precluded by military necessity or otherwise impossible or unreasonable;
- The cumulative absence for service must not exceed 5 years;
- The person must not be released from service under dishonorable or other punitive conditions; and
- The person must report back to the civilian job in a timely manner or submit a timely application for reemployment.

The period an employee has to make application for reemployment or report back to work under USERRA is based on the time spent on duty.

A service member who is reemployed under USERRA (or Massachusetts law) must be reemployed in either (1) the position in which the person would have been employed if continuous employment had not been interrupted by service, or (2) the position in which the person was employed on the date of commencement of service, but only if the person is not qualified to perform the duties under (1) after the employer has made reasonable efforts to qualify the person.

USERRA also provides for health and pension plan coverage for service members. Service members activated for duty on or after December 10, 2004 may elect to continue their employer-sponsored health coverage for up to 24 months. Those activated prior to that time can elect to extend coverage for up to 18 months. However, employers may require the service member to pay up to 102% of the total premiums for that elective coverage. For military service of less than 31 days, health care coverage is provided as if the service member had remained employed.

Leave taken pursuant to USERRA may also qualify for the rights and privileges under FMLA. For purposes of determining FMLA eligibility and whether an employee on military leave under USERRA meets both the 12 months of service and the 1,250 hour requirement, the employee must be given credit for time worked as if he had not taken the military leave and had worked continuously during that time. The new FMLA regulations make an exception to the seven year break in service rule, where the break in service is caused by fulfillment of National Guard or reserve military service obligations. Recent amendments to USERRA and FMLA provide that, in addition to family leave under the FMLA for care of a "parent, spouse, or child," an employee make take leave to care for a "covered service member." The leave can be taken to care for a covered service member with a "serious injury or illness," and need not involve a "serious health condition."

XII. NON-COMPETITON AGREEMENTS

For contracts entered into on or after November 5, 1998, Massachusetts law prohibits the enforcement of any contract "which creates or establishes the terms of employment for an employee . . . in the broadcast industry, . . . and which restricts the right of such employee . . . to obtain employment in a specified geographic area for a specified period of time after termination of employment." The statute further provides that if an employer violates the statute, the employee may recover reasonable attorneys' fees in litigation arising out of the agreement. The statute on its face is not limited to on-air personalities; rather, it applies to all employees and individuals in the broadcasting industry. However, the statute is unique to the broadcasting field, and specifically mentions television and radio stations; there are currently no comparable statutes applicable to newspapers or other members of the media.

In a recent case that involved Howie Carr's attempting to leave WRKO to work for WTKK, a Massachusetts court found no improper post-employment restriction, where Mr. Carr's

employment had not terminated and his current employer merely exercised its contractual right to extend the term of his contract. The court also noted that the statute does not contain a broad prohibition on "any restriction" on employment, as does a similar Massachusetts statute pertaining to physicians; therefore, a provision in the agreement that gave WRKO a "right of first refusal" upon Mr. Carr's receiving another job offer was enforceable.

For contracts entered into before November 5, 1998 and for any non-competition agreements that fall outside the scope of this statute, an agreement not to compete may be enforced if certain requirements are met. To be enforceable, a non-competition agreement must protect an employer's legitimate business interests (e.g., trade secrets, confidential business information, and/or good will) and be reasonable in duration and geographic scope, among additional factors. Claims of protection of goodwill (positive reputation) are more common in the broadcast industry than are claims of protection of trade secrets. Massachusetts courts are more likely to enforce non-competition agreements that satisfy the above requirements and are two years or less in duration.

XIII. DISCRIMINATION AND HARASSMENT

A. Overview

It is illegal under both Massachusetts law and federal law to discriminate in hiring or discharge, or in the terms or conditions of employment, based upon an employee's race, color, national origin, religion, sex, age, or disability. In addition, Massachusetts law also prohibits discrimination based upon an individual's sexual orientation, genetic information, or ancestry. The federal anti-discrimination laws apply to all employers with more than 15 employees (except for the Age Discrimination in Employment Act, which applies to employers with 20 or more employees), and the Massachusetts statute applies to all employers with six or more employees. Nevertheless, employers with fewer than six employees are similarly prohibited under the

Massachusetts Civil Rights Statute from discriminating on the basis of sex, race, color, creed, national origin, age, or disability, in the formation of any contract or relationship, including that of employment. Additionally, a Massachusetts executive order requires state and state-assisted contracts to have anti-discrimination provisions.

Subsidiaries and a parent company may be considered a single employer for purposes of these anti-discrimination statutes. In determining whether an employer is a single employer or a joint employer under the statutes, courts will consider, among other factors, whether there is common management, an interrelationship between operations, centralized control of labor relations, and common ownership.

B. Employees Covered

Employees protected under anti-discrimination laws do not include independent contractors. Under Massachusetts law, protected employees also do not include an individual in the employment of his parent, child, or spouse, or in domestic service. Certain non-profit social, fraternal and religious organizations are also excluded from the definition of "employers." For the purposes of determining if an employer has six or more employees, employees outside of Massachusetts as well as those in Massachusetts are counted.

C. Discrimination Based on Race, Color, National Origin and Religion

1. Unlawful Practices

The prohibition on discrimination includes both practices which involve "disparate treatment" of members of a protected group and also practices which, although facially neutral, have a "disparate impact" upon members of a protected group, as described below.

a. Disparate treatment

"Disparate treatment" means treating people differently based on one of the prohibited factors. A person claiming disparate treatment discrimination must show that the employer's

reason for its adverse treatment was intentional discrimination. Because such discrimination is often done with subtlety and direct evidence of discrimination is rarely available, an employee can prove discrimination through circumstantial as well as direct evidence. Courts generally require the employer to prove a non-discriminatory reason for subjecting an employee in a protected class to an "adverse employment action" (e.g., failing to hire the employee, firing the employee, or otherwise treating him differently from other employees).

In practice, therefore, if an employee is able to prove that he is a member of a protected class, that he was qualified for a particular position, and that he suffered an adverse employment action, then the courts may infer that discrimination was the reason for the adverse employment action, unless the employer can dispel that inference by proving some legitimate, non-discriminatory reason for its actions. If the employee presents sufficient evidence to find that the employer's reason for its conduct was merely a pretext, the court or jury may infer that the employee was a victim of discrimination, even if there is no direct evidence of discriminatory intent.

In mixed motive cases, where an employment decision is made for both legal and discriminatory reasons, the issue is whether or not a discriminatory reason played a motivating part in the employment decision. If so, the employee's claim will succeed unless the employer can show that it would have taken the same action without the discriminatory reason.

b. Disparate impact

"Disparate impact" discrimination occurs where the employer employs a facially neutral practice that has a discriminatory effect on a protected group. In a disparate impact case, it is not necessary to show that the employer intended to discriminate or had an illegal motive. An employment practice or policy may violate federal and state law if its results "fall more harshly

on one group than another and cannot be justified by business necessity." In a disparate impact case, the employer has the burden of showing that the practice or policy is a business necessity. For example, a minimum height requirement may be considered discriminatory where it excludes many more females than males, and where there is no valid business reason to justify the requirement. Discrimination may be proven by a showing that race, color, religion, sex or national origin was a motivating factor for an employment action, even though other factors also motivated the action.

2. Permissible Acts

Under federal law, an employer may discriminate on the basis of national origin, sex, or religion, if national origin, sex, or religion is a bona fide occupational qualification ("BFOQ"). In addition, under Massachusetts state law, an employer may discriminate on the basis of ancestry, race and color, if ancestry, race or color is a BFOQ. The BFOQ must be reasonably necessary to the normal operation of that particular business or enterprise. For example, religious organizations may give preference to members of the same religion. Employers should bear in mind that BFOQ's are the exception to the discrimination statutes and, therefore, will be narrowly construed by administrative agencies and the courts.

D. Sex Discrimination

1. Discrimination Generally

Discrimination in employment on the basis of sex is prohibited by federal and state laws, unless sex is a BFOQ. Thus, employment in particular jobs may not be limited to persons of a particular sex, unless the employer can show that sex is an actual qualification for performing the job. Under both federal and state law, discrimination on the basis of sex includes discrimination on the basis of pregnancy.

Federal law does not prohibit discrimination based on sexual orientation. That is,

homosexuality and bisexuality are generally not protected classifications under federal law. Massachusetts, however, has specifically recognized sexual orientation as a separate protected category.

2. Sexual Harassment

a. Definition

Both federal and state laws prohibit sexual harassment of employees. Sexual harassment is not limited to egregious sexual exploitation. It includes conduct such as sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Harassment claims may also result from offensive joking, from "friendly" touching, and from work areas decorated with suggestive images.

There are two legally recognized forms of sexual harassment, "quid pro quo" and "hostile work environment." Sexual harassment is called "quid pro quo" harassment when an employer conditions a term or condition of employment on sexual favors. It is called "hostile work environment" when an employee is subjected to a sexually harassing atmosphere that has the purpose or effect of unreasonably interfering with the employee's work performance or creates an intimidating, hostile or offensive work environment.

Sexual harassment is not limited to harassment of women by men. It also includes any combination of harassment of women by women, of men by men, and of men by women. Because "sexual orientation" is not a protected class under federal law, harassment based purely on sexual orientation is not prohibited under federal law. However, courts have recognized a theory of liability for harassment under Title VII to the Civil Rights Act, based on inappropriate "gender stereotyping." Under this theory, individuals who "fail or refuse to comply with socially accepted gender roles," either by behavior or appearance, are members of a protected class, and can bring a claim when the discrimination and/or harassment occurs due to the plaintiff's failure

or refusal to conform to gender stereotypes.

b. Training and investigating claims of sexual harassment

Under federal and state law, employers are required to "promote a workplace free of sexual harassment." Toward that end, all employers are required to adopt and disseminate anti-sexual harassment policies to their employees. The Massachusetts Commission Against Discrimination (MCAD) posts a sample sexual harassment policy on its website at: http://www.mass.gov/mcad/harassment.html.

The laws also aim to "encourage" employers to conduct training and educational programs on issues of sexual harassment. The MCAD has developed a model sexual harassment policy guide book to assist employers with this process. Employers may obtain a copy of this policy guide book at www.mass.gov/mcad/shguide.html.

E. Disability Discrimination

1. Employees Protected

a. Federal law – ADA

At the federal level, the Americans with Disabilities Act (ADA) protects all "qualified individuals" with "disabilities" from discrimination in job application procedures, hiring, advancement, discharge, compensation, job training, and any and all terms, conditions and privileges of employment. It requires employers to make "reasonable" efforts to accommodate individuals' mental or physical limitations, as long as the accommodations do not present an undue hardship to the employer. It should be noted that on September 25, 2008, the President signed the ADA Amendments Act (ADAAA) into law, which expanded the scope of ADA coverage for cases arising as of January 1, 2009.

The ADA prohibits employment discrimination against "qualified individuals with a disability," including applicants and employees. A "qualified individual with a disability" is

defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires.” “Essential functions” of the employment position are those which are fundamental to the position, rather than marginal or incidental.

An individual with a “disability” under the ADA is one who has a physical or mental impairment that substantially limits one or more of the major life activities, who has a record of such impairment, or who is regarded as having such impairment. The ADAAA provides that the definition of “disability” shall be construed broadly, and that the language “substantially limits” is a less exacting standard than “significantly restricts.” “Major life activities” are activities that are “of central importance to daily life.” The ADAAA states that “major life activities” include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA also states that the term “major life activity” includes the operation of major bodily functions, including, but not limited to, normal cell growth and functions of the immune, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive systems. A report by the U.S. House of Representatives Committee on Education and Labor indicates that other major life activities, such as interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination, are also included. The Committee’s report also indicates that an individual should be compared to “most people,” rather than to someone with the same demographics as the employee (such as gender, age, and education). The ADAAA also specifically notes that an “impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”

Therefore, an individual with a disability such as epilepsy, AIDS, a specific learning disability, or alcoholism; an individual with a record of having a disability, such as a person who has recovered from cancer or a mental illness; and an individual who may be perceived as having a disability because, for example, he has a severe facial disfigurement, are all protected under the ADA. However, minor temporary impairments, such as a broken leg that heals normally or the flu, are not considered disabilities under the statute. Under the ADAAA, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The ADAAA also indicates that disabilities must be determined without regard to corrective measures, such as medication, medical supplies or equipment, prosthetics, assistive technology, or reasonable accommodations, among other things, with one exception – individuals should be evaluated with their ordinary eyeglasses or contact lenses. Although current users of controlled substances are not protected under the ADA, recovering drug addicts and individuals who were formerly addicted to drugs are protected from discrimination based on their former drug use, provided that they are not currently using illegal drugs.

The ADAAA also changes when an individual will be considered to be "regarded as" having a disability. Formerly, the determination focused on the employer's perception of the individual. However, under the ADAAA, an individual is "regarded as" disabled if he is subjected to an action prohibited under the ADA because of "an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity," provided that the impairment is not both minor and transitory (lasting less than six months). Most employees claiming disability discrimination will include a "regarded as" claim as a basis for their adverse action claim; however, the ADAAA states that employers are not required to provide "reasonable accommodations" to individuals who are covered only under the

"regarded as" category.

If an employer violates the ADA, the employee may be entitled to the following remedies: hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages may also be available where an employer intentionally discriminates or fails to make a good faith effort to provide a reasonable accommodation.

b. Massachusetts law

Massachusetts law is similar to the ADA, except that Massachusetts extends its protection to people with disabilities that are correctable. Impairments are determined "without regard to whether [their] effect can be mitigated by measures such as medication, auxiliary aids or prosthetic devices." For example, an employee who is legally blind, but whose vision is correctable with glasses, may be considered "handicapped" under Massachusetts law because his impairment substantially limits his ability to perform the major life activity of seeing.

2. Employers' Obligation of "Reasonable Accommodation"

Under both federal and Massachusetts law, an employer must provide reasonable accommodation to disabled employees as long as the accommodation does not present an undue hardship to the employer. Generally, an accommodation imposes an undue hardship if it entails significant difficulty or expense to accomplish. The determination of whether an accommodation imposes an undue hardship on an employer depends on: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility and the number of persons employed at such facility; (3) the overall financial resources of the employer; and (4) the type of operation of the employer.

Examples of reasonable accommodations for individuals with disabilities include:

- making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities;
- modifying work schedules;
- restructuring jobs or reassigning employees with disabilities to vacant positions;
- modifying when, where or how essential job functions are performed, and/or reassigning nonessential job functions;
- acquiring or modifying equipment or devices; and
- adjusting or modifying examinations, training materials, or policies.

To ensure compliance with the reasonable accommodation requirements of the ADA, employers should:

- identify the barriers presented by the individual's disability;
- identify possible accommodations;
- evaluate the reasonableness of the accommodations;
- identify possible alternatives, such as light duty work, telecommuting, modified work schedules, job sharing, and reassignment to vacant positions; and
- identify the "essential job functions" of each position, and separate essential from non-essential job functions.

An employer may deny employment to an individual with a disability only if that person is not able to perform the "essential functions" of the position with a reasonable accommodation. Written job descriptions will be considered evidence of the essential functions of a job, if in existence before the applicant was interviewed for the job.

3. Drug Testing

Federal and state law do not protect individuals who currently engage in the illegal use of

drugs. Therefore, employers may test applicants and employees for illegal drug use, subject to privacy laws. Drug testing programs that test for "legal" drugs are prohibited under the ADA if they are likely to reveal the presence of a handicap (for example, a positive result for insulin will indicate that the individual has diabetes). However, if an applicant or employee tests positive for illegal drugs, the employer may then test for legal drugs, to seek an explanation for the positive test result. If the result of a test for illegal drugs reveals the presence of a lawfully prescribed drug or other medical information, this information must be treated by the employer as a confidential medical record.

4. Additional Requirements under the ADA

The Equal Employment Opportunity Commission ("EEOC") has promulgated extensive regulations and enforcement guidance interpreting the terms and requirements of the ADA. The following are some of the issues addressed in EEOC regulations:

a. Pre-employment inquiries (written applications, interviews, tests, and other selection criteria)

A prospective employer may make pre-employment inquiries (e.g., written applications, interviews, tests, etc.) regarding an individual's ability to perform job-related functions, including asking the applicant to describe or to demonstrate how, with or without a reasonable accommodation, the applicant will be able to perform job-related functions. An employer may not inquire as to whether an applicant, or family member, has a disability, or as to the nature or severity of such disability or medical condition(s). If it seems likely that an applicant has a disability that will require a reasonable accommodation, a prospective employer may ask if he will need one. However, in most cases, it is recommended that employers ask questions regarding reasonable accommodations *after* making a conditional job offer. Inquiries about prior workers' compensation claims are prohibited because they are likely to elicit information about a

disability. However, a prospective employer may ask about an applicant's attendance record at a prior job.

Employment tests or other selection criteria are permissible so long as they to do not tend to screen out individuals with disabilities on the basis of the disability, unless the test is related to the position and consistent with business necessity. Typically, employment tests that can be administered to individuals with disabilities and can accurately measure the individual's ability to perform the essential job functions are valid.

b. Post-Offer Inquiries

An employer may require an applicant to undergo a medical examination, but only after a conditional offer of employment has been made and several procedural steps have been taken. Further, pre-employment medical exams are lawful only if administered to all entering employees in the same job category, regardless of disability. Information from such exams must be kept confidential.

Employers may require a medical examination of an employee that is job-related and consistent with business necessity. The employer may also make inquiries into the ability of an employee to perform job-related functions.

F. Age Discrimination

Discrimination in employment on the basis of age (40 years and over) is prohibited by federal and state laws.

1. Employees Covered

a. Federal law

The federal Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age against anyone in the "protected category" of age 40 or older. The ADEA applies to companies with 20 or more employees. An independent contractor is not considered an

employee for purposes of the ADEA. Mandatory retirement is prohibited under the ADEA with certain exceptions. For example, federal law allows mandatory retirement of executives over the age of 65 (i.e. employees who were in a "bona fide executive or high policy making position" for a 2-year period or more immediately before retirement), who are entitled to retirement benefits of at least $44,000 per year.

It is permissible to make age an express employment criterion if age is "reasonably necessary to the normal operation of the particular business" (i.e., if age is a bona fide occupational qualification (BFOQ)). Further, it is not illegal to discharge an employee of any age when it can be demonstrated that the employee is not able to perform the job satisfactorily.

Age discrimination claims under the ADEA can be based on a theory of disparate impact but are more difficult to prove than cases brought under federal laws prohibiting discrimination in employment, because if an employer's practice or policy has a reasonable basis other than age, it will not violate the ADEA, even if the employer's action adversely affects older workers or job applicants.

b. Massachusetts law

Like the federal statute, the state statute protects employees age 40 or above, and it includes an exception which permits mandatory retirement of certain executives or high level policy makers and tenured faculty at institutions of higher education at or after age 65, who have at least $44,000 in non-forfeitable retirement benefits per year. Under Massachusetts law, any contract or agreement entered into after September 1, 1984 which prevents the private sector employment of any person over the age of 40 because of his age, with certain exceptions, is considered null and void.

2. Unlawful Practices

Under the ADEA, it is unlawful for an employer:

- to refuse to hire, to discharge, or otherwise to discriminate against any protected individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;
- to limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect one's status as an employee, because of such individual's age; or
- to reduce the wage rate of a protected employee in order to comply with the ADEA.

G. <u>Retaliation</u>

It is a violation of both federal and state law to demote, discharge, or otherwise retaliate against any employee for exercising any of the rights secured by anti-discrimination laws. The United States Supreme Court has determined that this prohibition on retaliation applies only to an employer's actions that "would have been materially adverse to a reasonable employee or job applicant," not merely "petty slights, minor annoyances, and simple lack of good manners." The employer's actions must be harmful enough "that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Further, the Supreme Court has held that employees who answer questions in connection with an employer's investigation of suspected sexual harassment are also protected under the statute's anti-retaliation provision.

Under Massachusetts law, in order to prove retaliation, an employee must show: (1) he reasonably and in good faith believed that the employer was illegally discriminating; (2) he acted reasonably in response to this belief; and (3) the employer's aim to retaliate was a determinative factor in its decision to take adverse action. A retaliation claim is separate and distinct from a discrimination charge; a jury or court can find retaliation even if it finds that an employer did not

discriminate unlawfully.