

Morgan Lewis

Labor and Employment Summer Webinar Series: State Employment Law Road Trip Across the United States

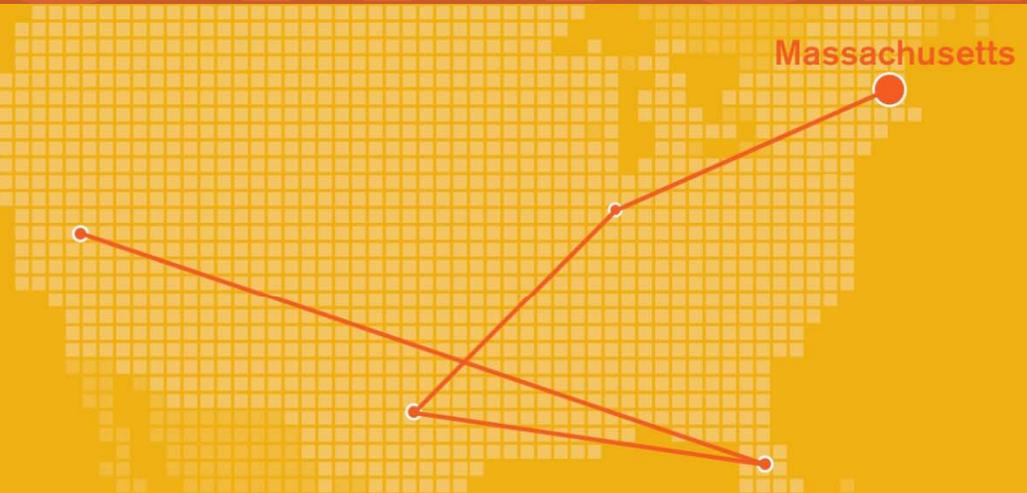
Massachusetts

June 28 | 1–2 pm ET

presenters

Lisa Stephanian Burton

Randy McGeorge



Top Ten Massachusetts Employment Law Topics

Introduction

1. Massachusetts Fair Employment Practices Law (Chapter 151B)
2. Massachusetts Independent Contractor Law
3. Criminal Offender Record Information (CORI) Reform
4. Massachusetts Wage and Hour Laws
5. Massachusetts Data Security
6. Massachusetts Leave Laws
7. Social Media and Computer Privacy
8. Employment Applications
9. What's Coming up the Coast
10. Massachusetts Health Care Reform

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Massachusetts Fair Employment Practices Law



“I am afraid that the pleasantness of an employment does not always evince its propriety.”

Jane Austen

Massachusetts Fair Employment Practices Overview

- Massachusetts Fair Employment Practices Law (Mass. Gen. Laws ch. 151B)
 - Broadly prohibits many forms of discrimination more expansive than federal laws
 - *Race, color, religious creed, national origin, ancestry, sex, age, criminal record (inquiries only), handicap (disability), mental illness, retaliation, sexual harassment, sexual orientation, genetics, and active military.*
 - Gender identity will be included effective July 1, 2012, after the MA legislature passed “[a]n Act relative to gender identity”
 - Covers employers with six or more employees
 - *Title VII applies only to employers with 15 or more employees*
 - *Employers with fewer than six employees are subject to common-law discrimination claims*

Massachusetts Fair Employment Practices Unique Components of 151B

- Massachusetts Fair Employment Practices Law (Mass. Gen. Laws ch. 151B)
 - Chapter 151B enforced by the Massachusetts Commission Against Discrimination (MCAD)
 - Claims must be filed within 300 days of the discriminatory incident
 - MCAD can conduct its own independent proceedings based on an employee's complaint
 - Requires Sexual Harassment Avoidance Policy, including how to file claims, with dissemination upon hire and annually

Massachusetts Fair Employment Practices

Key Things To Know

- Unlike Title VII, no cap on punitive damages
 - Individual liability for managers and supervisors - aiding and abetting
 - MCAD engages in employer testing

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Massachusetts Independent Contractor Law

CORRECTED (if checked)

PAYER'S name, street address, city, state, ZIP code, and telephone no.		1 Rents \$	OMB No. 1545-0115 2005 Form 1099-MISC	Miscellaneous Income
PAYER'S Federal identification number		2 Royalties \$	3 Other income \$	4 Federal income tax withheld \$
RECIPIENT'S identification number		5 Fishing boat proceeds \$	6 Medical and health care payments \$	Copy B For Recipient
RECIPIENT'S name		7 Nonemployee compensation \$	8 Substitute payments in lieu of dividends or interest \$	
Street address (including apt. no.)		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale <input type="checkbox"/>	10 Crop insurance proceeds \$	This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if this income is taxable and the IRS determines that it has not been reported.
City, state, and ZIP code		11	12	
Account number (see instructions)		13 Excess golden parachute payments \$	14 Gross proceeds paid to an attorney \$	
15a Section 409A deferrals \$	15b Section 409A income \$	16 State tax withheld \$	17 State/Payer's state no.	18 State income \$

Form 1099-MISC (keep for your records) Department of the Treasury - Internal Revenue Service

Avoid misclassification penalties

Know the law on independent contractor liability in MA

Independent Contractors

Advisory from MA Attorney General

- In 2004 MA law changed and in 2008 the MA Attorney General released an advisory (Mass. Gen. Laws ch. 149, § 148B)
 - **Classification**
 - *Employer has the burden to establish the “ABC Test”*
 - **Violation**
 - *Employer violates the statute by (1) misclassifying an employee as an independent contractor and (2) due to misclassification, the employer also violates one or more of the following laws :*
 - Wage and Hour laws (ch. 149)
 - Minimum Wage law (ch. 151, §§ 1A, 1B, and 19; CMR 2.01)
 - Overtime law (ch. 151, §§ 1A, 1B, and 19)
 - Laws regarding payroll record keeping and reporting (ch. 151, § 15)
 - Workers compensation law (ch. 152, § 14)
 - **Criminal and Civil Penalties**
 - *First offense: fine of not more than \$25,000 or by imprisonment for not more than one year*
 - *Subsequent willful offense: fine of not more than \$50,000 or by imprisonment for not more than two years, or by both fine and imprisonment*

Independent Contractors Classification

- Under MA law, an individual performing any service is presumed to be an employee unless:
 - (A) Freedom from control
 - *The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact*
 - (B) Service performed outside the usual course of the business of the employer
 - *The individual is performing services that are part of an independent, separate and distinct business from that of the employer*
 - (C) Independent trade, occupation, or business
 - *The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that which involved in the service performed for the employer*

Independent Contractors

Potential Liability for Misclassification

- Due to the strict requirements of the ABC test, there is a presumption that individuals are employees
 - Employers should be very cautious when designating a worker as an independent contractor
- Employers are subject to civil and criminal penalties for misclassification
 - If an employer violates wage and hour laws due to a worker misclassification, MA has mandatory treble damages
 - Liability extends to both business entities and individuals, including corporate officers, and those with management over affected workers
- Plaintiffs' lawyers are aggressively challenging independent contract classifications

(3) Criminal Offender Record Information (CORI) Reform



“Commit a crime, and the earth is made of glass.”

Ralph Waldo Emerson

CORI Reform Overview

- CORI reform is based on “An Act Reforming the Administrative Procedures Relative to Criminal Record Information and Pre- and Post-Trial Supervised Release”
 - Phase I became effective November 4, 2010
 - “Ban the Box”: with limited exceptions, employers cannot ask for criminal record information on employment applications, but may ask during interview
 - Employer may only ask about criminal history on a written application if:
 - The applicant is applying for a position where federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction for one or more types of criminal offenses, or
 - The employer or an affiliate is subject to federal or state law or regulation not to employ persons in one or more positions who have been convicted of one or more types of criminal offense
 - Multistate employers need specific language on applications
 - MASSACHUSETTS APPLICANTS ONLY “Under MA law, an employer is prohibited from making written, pre-employment inquiries of an applicant about his or her criminal history.”
MASSACHUSETTS APPLICANTS SHOULD NOT RESPOND TO ANY OF THE QUESTIONS SEEKING CRIMINAL RECORD INFORMATION
 - Phase II became effective May 4, 2012
 - Final Regulations 803 CMR 2.00—effective May 25, 2012

CORI Reform

CORI Phase II

- New Employer Requirements
 - Employer must now obtain an applicant's signed acknowledgement form before submitting a request, and retain the form for one year following a CORI request
 - Employer training and classification obligation
 - All employers now have "standard access" to CORI upon registration with DCJIS
 - *Access to all pending criminal charges, misdemeanor convictions for the last 5 years (from the date of disposition or release), felony charges for the last 10 years (from the date of disposition or release), and all convictions for murder, manslaughter, and sex offenses*
 - *Additional access levels for designated employers (schools, banks, etc.)*
 - Employer cannot keep a CORI record on file longer than seven years after an employee's last day or adverse hiring decision
 - Employer must keep a log of which individuals have accessed a CORI report for one year following its release, including the reason for dissemination
 - Employer must maintain a list of employees who will have access to CORI information
 - Any employer that conducts 5 or more searches (iCORI or otherwise) must have in place a written CORI policy
 - Employers must register whether accessing iCORI directly or using the services of a Credit Reporting Agency (CRA)

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Massachusetts Wage and Hour Laws



“By working faithfully eight hours a day you may eventually get to be boss and work twelve hours a day.”

Robert Frost

Massachusetts Wage and Hour Laws Overview

- Massachusetts Wage Act (Mass. Gen. Laws ch. 149, § 148) (the Wage Act)
 - The Wage Act governs how and when employees should be paid
 - *Employers must pay nonexempt employees weekly or biweekly*
 - *Employers must give employees pay stubs*
 - *Terminated employees must be paid on the last day of work; employees who quit must be paid on the next regular payday*
 - *Wages include holiday or vacation payments or employee tips and commission payments that are “definitely determined due and payable”*
 - *MA allows “use it or lose it” vacation policies*
 - *Minimum wage in MA = \$8.00 per hour*

Massachusetts Wage and Hour Laws

Deductions

- In Camara v. Attorney General, 458 Mass. 756 (2011), the SJC held that unless otherwise authorized or required by law, an employer may not deduct funds from an employee's wages except where the funds deducted constitute a "valid setoff" under chapter 149, section 150, or "where there exists a clear and established debt owed to the employer by the employee"
- Examples of improper deductions:
 - Deducting from or withholding earned wages under any special contract with an employee
 - Deductions for tardiness are forbidden beyond proportional reduction in pay due to time lost for nonexempt employees
 - Deducting from an employee's wages to pay for damages from an employee-caused accident in lieu of discipline

Massachusetts Wage and Hour Laws

Tip Pooling

- There has been a steady rise in tip pooling litigation in MA
 - It is unlawful for an employer to require or allow a tip pool arrangement in which a wait staff or service employee remits any wage, tip, or service charge to a person who is not a wait staff employee
 - *Employees with “managerial responsibilities” do not qualify as service employees*
 - Note: Employers should be careful about service staff employees with ambiguous responsibilities, and be sure to define managerial roles
- Employers who violate the tip pooling restrictions are subject to criminal and civil penalties
 - Employer must make restitution for any wrongfully accepted or retained tips with a 12% yearly interest rate

Massachusetts Wage and Hour Laws

Penalties for Noncompliance

- Penalties for wage and hour violations are significant
 - An employer can be subject to up to a \$10,000 fine and/or up to six months' imprisonment for being a first-time offender, and a fine of up to \$25,000 and/or up to one year of imprisonment for any subsequent offense
 - *A willful violation is punishable by a fine of up to \$25,000 and/or up to one year of imprisonment for a first offense, and a fine of up to \$50,000 and/or imprisonment for up to two years for any subsequent offense*
 - Mandatory treble damage of owed wages, plus costs and attorneys' fees for successful claims
 - *“Wages” includes any holiday or vacation payments due to an employee under an oral or written agreement and commissions that are “definitely determined and [have] become due and payable to such employee” (ch. 149, § 148)*

(5) Massachusetts Data Security



In God we trust.

All others, we virus scan.

Massachusetts Data Security Overview

- Goal: Protect Personal Information
 - Personal information includes a person's name along with:
 - *Social Security Number*
 - *Driver's License Number*
 - *Financial Account Number (includes credit cards, debit cards— with or without PINs or passwords)*
- Every person who owns or licenses personal information about a resident of the commonwealth must be in full compliance with the Standards for the Protection of Personal Information of Residents of the Commonwealth (201 CMR 17.00)
 - The grandfather clause for third-party contracts entered into before March 1, 2010 expired on March 1, 2012

Massachusetts Data Security Employer Requirements

- 201 CMR 17.00 requires that employers establish and adhere to a Comprehensive Written Information Security Program (WISP)
- A proper WISP should include provisions for the following:
 - Designation of one or more employees to maintain the WISP
 - Identification of internal and external risks to data security
 - Securing physical and electronic data
 - Ensuring third-party vendors have implemented proper data security policies
 - Provisions for establishment and maintenance of a security system covering computer and all wireless data

Massachusetts Data Security Employer Requirements

- A proper WISP should include provisions for the following:
 - Secure user authentication protocols (e.g., use of passwords, restricted access, control of IDs)
 - Secure access control measures (e.g., restricting files to appropriate personnel)
 - Encryption of electronically transmitted information
 - Appropriate firewalls
 - Antimalware software
 - Education and training for employees

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Massachusetts Leave Laws

“Gone Fishin’”



SNLA and MMLA:

- Small Necessities Leave Act (SNLA) (Mass. Gen. Laws Ch. 149, § 52D)
 - Provides employees with up to 24 hours of leave during any 12-month period for one or more of the following reasons:
 - *To participate in school activities directly related to the educational advancement of a son or daughter of the employee*
 - *To accompany the son or daughter of the employee to routine medical or dental appointments*
 - *To accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder's care*
 - Note: “Elderly relative” means an individual at least 60 years of age, related by blood or marriage to the employee
 - To be covered, must be covered by FMLA

SNLA and MMLA:

- Massachusetts Maternity Leave Act (MMLA) (Mass. Gen. Laws ch. 149, § 105D)
 - Unconstitutional as written as it only applies to female employees
 - Employees may take up to eight weeks of leave for:
 - *The birth of a newborn child*
 - *The adoption of a child under the age of 18*
 - *The adoption of a child under age 23 who is mentally or physically disabled*
 - Employer must have at least 6 employees to be eligible
 - Employee must give at least two weeks' notice to the anticipated date of departure and the intention to return from leave
 - Note: MCAD has issued guidelines indicating MMLA should apply to paternity leave equally

Social Media and Computer Privacy Potential Changes

- Proposed Legislation
 - House Bill No. 04323, “[a]n Act relative to social networking and employment”
 - *This bill would make it “unlawful for any employer to ask any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee’s account or profile on a social networking website or electronic mail. No employee or prospective employee shall be required to provide access to an employer for a social networking site.”*

Social Media and Computer Privacy Potential Changes

- House Bill No. 04323 would not
 - Apply to an employer that obtains information that is in the public domain or obtained in compliance with the law
 - Limit an employer's right to promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including policies regarding internet use, social networking site use, and electronic mail use

Social Media and Computer Privacy Trends

- These bills represent a growing trend in social media and compute privacy law
- Maryland was the first state to pass such a law
 - Similar laws are pending in other jurisdictions

(8) Employment Applications



“In [Boston], the people get up in your face a lot more and want to talk about baseball, the team and how you are going to do. It's more easy-going in Philadelphia.”

Former Red Sox closer Jonathan Papelbon.

Employment Applications Legal Questions

Employer may ask...

Age

- “Are you under 18, yes or no?”
- Questions about age may be allowed if necessary to satisfy the provisions of a state or federal law. Also, if MCAD has previously identified age as a bona fide occupational qualification for the position

Disability/Handicap

- No questions

National Origin/Ancestry/Citizenship

- “Are you legally authorized to work in the United States?”
- An employer may require an employee to produce documentation that evidences his or her identity and employment eligibility under federal immigration laws

Employer may not ask...

Age

- The date of birth or age of an applicant, except as indicated to the left

Disability/Handicap

- Whether the applicant has a physical or mental disability/handicap or about the nature or severity of the disability/handicap
- Whether an applicant is an alcoholic or drug addict
- Whether an applicant has AIDS

National Origin/Ancestry/Citizenship

- The birthplace of an applicant or the birthplace of his or her parent(s), spouse, and/or other close relatives
- The national origin, ancestry, or ethnicity of an applicant
- Whether an applicant for employment or an applicant's parent(s) and/or spouse are nationalized or native born citizens of the United States

Employment Applications Legal Questions

Employer may ask...

Medical Examinations

- Once an offer of employment has been made, an employer may condition that offer on the results of a medical examination conducted solely for the purpose of determining whether the employee, with or without reasonable accommodation, is capable of performing the essential functions of the job

Race/Color

- No questions

Photograph

- No questions

Religious Creed

- No questions except by religious organizations as provided in 804 CMR 3.01(7)(a)

Sexual Orientation

- No questions

Employer may not ask...

Photograph

- The race or color of applicant

Religious Creed

- The religious denomination or practices of an applicant, his or her religious obligations, or what religious holidays he or she observes

Sexual Orientation

- Applicant's sexual orientation (gay, bisexual, lesbian, or heterosexual)

Employment Applications

Legal Questions

Employer may ask...

Education/Experience/References/Organizations

- Questions about the academic, vocational or professional education of an applicant
- Inquiry into the work experience shall also contain a statement that the applicant may include in such history any verified work performed on a volunteer basis

Lie Detector Test

- No questions

Employer may not ask...

Education/Experience/References/Organizations

- Questions about education that are designed to determine the applicant's age
- If the applicant is a member of any organizations, the nature, name, or character of which would likely disclose the applicant's protected class status

Lie Detector Test

- It is unlawful to require or administer a lie detector test as a condition of employment or continued employment
 - **Note: Employer is required to include this information on the application**

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What's Coming up the Coast



What's Coming up the Coast: Noncompete

- Noncompete Bill – House No. 02018
 - Would significantly weaken the enforceability of noncompete agreements
 - Some recent legislator interest

What's Coming up the Coast: Mandatory Sick Time

- Mandatory Sick Time Legislation – House No. 03995
 - Bill would require employers to provide sick time
 - Employers with fewer than 6 employees would have to provide 40 hours of unpaid sick time to their employees annually
 - Employers of 6 to 10 employees would have to provide 40 hours of paid sick time annually
 - Employer of 10 or more employees would have to provide 56 hours of paid sick time annually
 - MA would join CT as the second state to require paid sick leave

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Massachusetts Health Care Reform And
The Impact On Employee Benefit Plans



Introduction

1. ERISA Preemption
2. Same-Sex Marriage
 - Health and Welfare Benefit Plans (Self and Fully Insured)
 - Tax-Qualified Retirement Plans
 - Impact of State Antidiscrimination Laws
3. Massachusetts Health Care Reform
4. Mini-COBRA
5. Massachusetts Data Security

ERISA Preemption

- ERISA “shall supersede any and all state laws insofar as they may now or hereafter ‘relate’ to any employee benefit plan”
 - Generally preempts state laws impacting employee benefit plans, particularly tax-qualified plans, and self-insured benefit plans
- However, state laws regulating insurance are “saved” from preemption, even though they may relate to or otherwise affect employee benefit plans

Same-Sex Marriage

- ERISA generally preempts state laws that relate to plans covered by ERISA
- Defense of Marriage Act
 - “Spouse” only refers to a person of the opposite sex
 - *Drives federal taxation issues*
 - *Drives “spouse” definition for federal statutes*
- Preemption determines which aspects of the inconsistent state law “must” be followed, “may” be followed, and “can’t” be followed

Same-Sex Marriage: ERISA Preemption

- Tax-Qualified Retirement Plans
 - Definition of “spouse” should be reviewed closely and, if necessary, clarified to reflect the employer’s intent
 - Employer “may” extend certain rights to same-sex spouses
 - Employer “can’t” extend tax benefits or Internal Revenue Code (IRC) mandates
 - *Mandatory default form of distribution*
 - *Qualified Domestic Relations Orders (QDROs) don’t apply, unless tax dependent*
 - *Rollover options*
 - *Required minimum distribution rules*

Same-Sex Marriage: ERISA Preemption

- Self-insured wage and hour plans where benefits are paid out of the employer's general assets
 - Employer “may” extend coverage to same-sex spouses
 - *Amend plan documents and third-party provider contracts and administrative rules to clearly reflect intent*
 - Even if the employer voluntarily extends coverage, it “can’t” change the federal tax ramifications
 - *Cost of welfare benefits provided by an employer to employees is generally excluded from income*
 - Exclusion doesn’t extend to nondependent same-sex spouse

Same-Sex Marriage: ERISA Preemption

- State Antidiscrimination Laws
 - MA law provides that it is unlawful for an employer to discriminate against an employee based on his or her sexual orientation
 - ERISA should preempt this law with respect to tax-qualified retirement plans and self-insured health plans
 - Self-insured plans face a litigation risk to the extent that they don't, at least, provide health benefit coverage to same-sex spouses

Same-Sex Marriage: No ERISA Preemption

- Insured health and welfare plans where benefits are paid or provided by a third-party insurance provider
 - Employer “must” extend coverage to same-sex spouses
 - *Could include mandated level of benefits, “mini-COBRA” rules, and special rules to provide benefits to ex-spouses*
 - *Ensure plan documents, employee communications, and third-party provider contracts and administrative rules address such coverage*
 - Employer “can’t” change the federal tax ramifications
 - *Exclusion for employer-provided welfare benefits does not extend to nondependent same-sex spouses*

Same-Sex Marriage: No ERISA Preemption

- **Federal Tax Issues**

- Inability to exclude employer-provided wage and hour benefits puts same-sex spouses in same place as “domestic partners”
- Under cafeteria plan rules, coverage for a nondependent same-sex spouse or nondependent children of a same-sex spouse are not among the eligible benefits
- Value of employer-paid premiums on behalf of nondependent same-sex spouse is includible in the employee’s income
- Employee-paid premium is made on an after-tax basis

Same-Sex Marriage: No ERISA Preemption

- Federal Tax Issues
 - If same-sex spouse qualifies as a dependent, the tax treatment is the same as with an opposite-sex spouse
 - Dependent means an individual who receives more than one-half of his/her support from the employee and who shares his/her primary residence with the employee
 - Tax-dependent status requires an employer to receive certifications from the employee and the dependent regarding such status
 - Company payroll and reporting need to be properly coded

Massachusetts Health Care Reform

- Key employer obligations under the Health Care Reform Act (HCRA)
 - Employers that fail to make a “fair and reasonable” contribution toward health coverage costs must pay a contribution not to exceed \$295 per employee unless
 - *Employer covers at least 25% of its full-time MA employees*
 - *Employer pays at least 33% of the premium cost for all of its full-time MA employees*
 - Employers that fail to maintain a cafeteria plan that allows employees to make pretax premium contributions owe a surcharge

ERISA Preemption

- ERISA “shall supersede any and all state laws insofar as they may now or hereafter ‘relate to’ any employee benefit plan”
 - Generally preempts state laws impacting employee benefit plans, particularly tax-qualified plans, and self-insured benefit plans
- However, state laws regulating insurance are “saved” from preemption, even though they may relate to or otherwise affect employee benefit plans

ERISA Preemption: The Courts

- Long, long (long!) line of federal cases
 - Could spend the rest of the day and tonight discussing the various twists and turns about whether a state law “relates” to an ERISA plan
- Most recent relevant example: *Wal-Mart v. Maryland*
 - Maryland law: If 10,000+ employees, spend 8% of payroll on health benefits or pay the difference to the state
 - *Held to be preempted by ERISA*
- Is an ERISA preemption challenge worth the risk/hassle?

Massachusetts Mini-COBRA

- Employers with 2 to 19 EEs must provide continuation of health benefits similar to those provided under COBRA
- Differences between COBRA and mini-COBRA:
 - Mini-COBRA does not apply to self-funded plans due to ERISA preemption
 - Mini-COBRA extends to same-sex spouses
- Similarities between COBRA and mini-COBRA:
 - Similar qualifying event and length of coverage standards
 - Similar notice requirements and election periods

Massachusetts Data Security

- Creation of a written information security program (WISP) that requires:
 - Detailed computer security protection, including the use of encryption for all personal information stored or sent out from company computers
 - Response requirements to state agencies for breaches
 - Mandatory employee training
 - Review and update of WISP annually
- “If” challenged, likely preempted with respect to tax-qualified retirement plans and/or self-funded wage and hour plans

Questions?

What is on your mind about Massachusetts employment and/or employee benefits law?

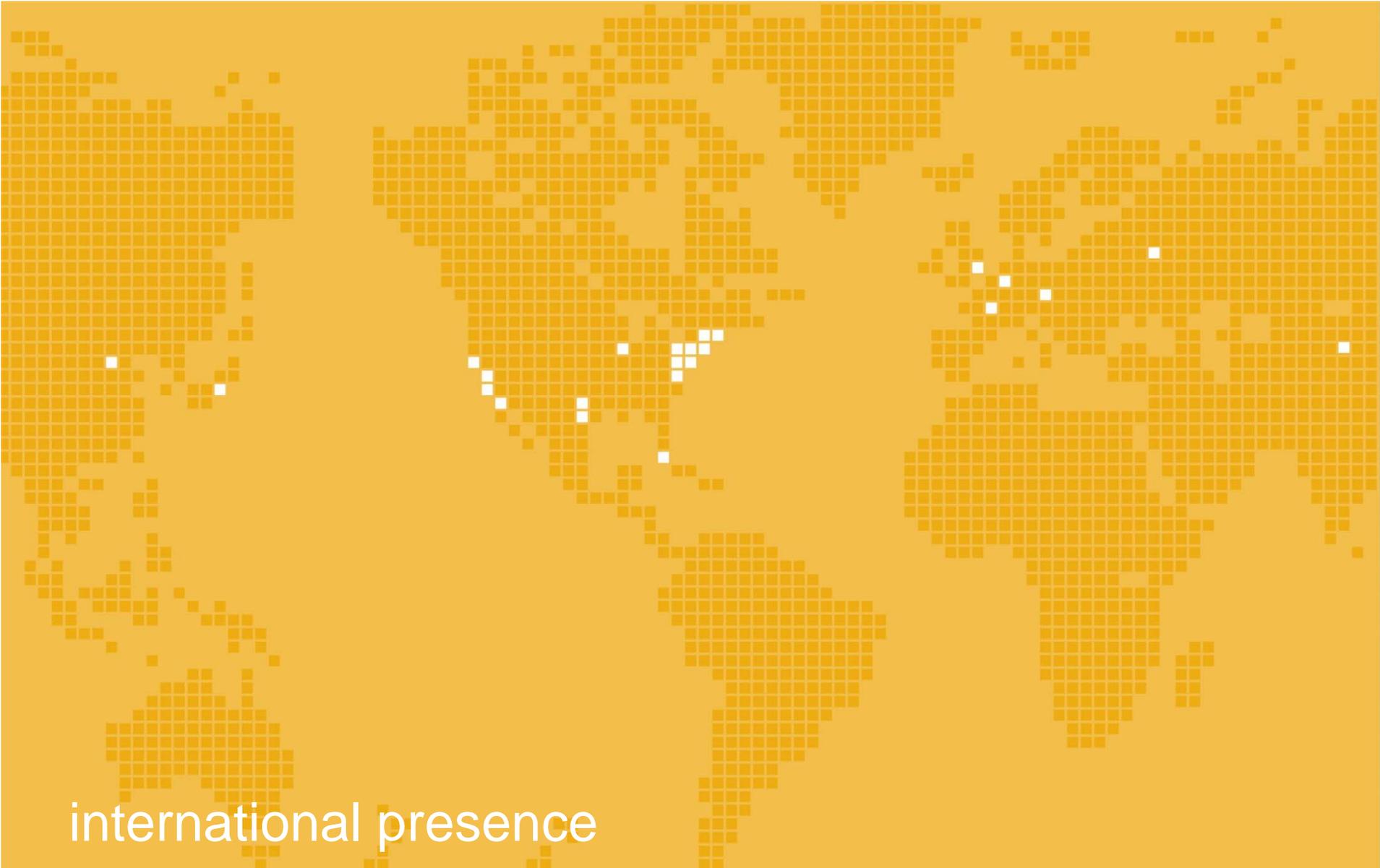
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