

SECTION REVIEW



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MARCH/APRIL 2019



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HEALTH LAW

BIG DATA, SMALL DATA, VALUE AND MONETIZING MEDICAL RECORDS: WHO OWNS THE CONTENT OF A PATIENT RECORD, AND WHY DOES IT MATTER?**BY KEN BARTHOLOMEW AND
JUDITH F. ALBRIGHT**

Health care providers and facilities often use patients' medical records in their research. The results of this research may be worth money — sometimes, quite a lot of money. Who owns the patient's medical record/the contents of that record, and the proceeds it generates?

1. HIPAA IS NOT THE ISSUE

The Health Insurance Portability and Accountability Act of 1996, (HIPAA) sets federal privacy standards for most health care records. The information in those records may be used, with certain safeguards, for research without patient authorization. Data that has been de-identified, and can no longer be connected to an individual patient, is no longer protected and simply not subject to the privacy rule. The HIPAA privacy rules also do not clearly address the issue of ownership, only of access.

2. STATE LAW: THE DOCTOR OR HOSPITAL MAY WELL "OWN" THE PATIENT RECORD

In most states, patients have a right to a copy of their health care record. Some state laws also expressly provide that, nonetheless, a health care provider "owns" the physical record (Florida Stat. 456.057); other states have no clear legal standard. New Hampshire law is different. It provides that "medical information" contained in the medical record is the property of the patient. NH RSA 332-I:1; see also NH RSA 151:21. In our present-day world of electronic medical records, what's in the medical record may be much more important than the record itself: big data.

3. INFORMED CONSENT: THAT MAY BE THE ISSUE

In the past, there were cases in which the patient's body held monetizable value leading to litigation: Tissue, organs and cells removed from the body during diagnosis or treatment had value for which researchers were willing to pay. (See Petrow, Steven, *The Washington Post* Nov. 25, 2018; see also Skloot, Rebecca, "The Immortal Life of Henrietta Lacks," MacMillan (2010)). Those cases may be instructive now, because, today, ownership of information in the health care record has value that can be monetized.

Henrietta Lacks died of cervical cancer in Maryland in the 1950s. Cells taken from her cervix during treatment were retained and used, without her permission, to create a particularly replicable, and therefore particularly lucrative, cell culture line. She saw none of the millions of dollars in royalties from those cells; her family had no knowledge of what happened to the cell line (called He-La cells, after her name) until long after she died. Eventually, her family and the National Institutes of Health reached an agreement that gave the family some control over access to the cells' DNA sequence and a promise of acknowledgement in scientific papers.

In *Moore v. Regents of the University of California*, 51 Cal. 3d. 120 (1990), John Moore argued that he retained ownership of cells removed from his body during leukemia treatment, which were then used, without his permission, for highly profitable medical research. Moore filed suit for lack of informed consent/breach of fiduciary duty and conversion. The trial court ruled against him, and he appealed. Ultimately, the California Supreme Court ruled that Moore did not retain any property right in his cells once they left his body, and that to hold otherwise would frustrate medical research. The tissue was his doctor's to sell. See *Moore*, 51 Cal. 3d. at 163-164.

However, important for our purposes, the *Moore* court stated that "liability based on existing disclosure obligations . . . protects patients' rights of privacy and autonomy." *Id.* at 144 (emphasis added). The court remanded the case back to the trial court for disposition on a theory of lack of informed consent, and the parties eventually settled for what was reported as a "token" amount. Under the logic of *Moore*, Henrietta Lacks also waived any property rights when the tissue left her body, and the intellectual property that may be derived from it belonged to someone else.

4. WHERE DOES THAT LEAVE US?

Now, flash forward to 2019: Researchers don't necessarily need access to your body when they have wide-ranging access to your (de-identified, but still all about you) health care record. De-identified health care records can hold value for a number of reasons; the data in those records can be sold or assigned for data mining, for the development of arti-

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ficial intelligence platforms, or for statistical analysis. Further, most informed consent paperwork, in the fine print, contains a waiver of at least property rights in tissues and cells removed from the patient's body.

In other words, even if no privacy right exists in de-identified records, and no property right exists in tissues taken from the body for diagnosis and treatment, does *Moore* suggest that a doctor cannot use a patient's medical record without meaningful informed consent? Is this a cautionary tale for providers and entities today? Facebook and Amazon have both seen wide-ranging scandals that directly impacted market value and arose from allegedly mishandled data. If medical providers make a profit from the information patients give them without having disclosed how that information will be monetized, is that failure an actionable lack of informed consent?

In Massachusetts, the law of informed consent has focused on disclosure of the risks and benefits of a procedure, and which risks would be "material" to a reasonable patient.

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However, at bottom, “[a] physician’s failure to divulge in a reasonable manner to a competent adult patient sufficient information to enable the patient to make an informed judgment whether to give or withhold consent to a medical or surgical procedure” is a recoverable tort. Mass. Civil Pattern Jury Instr. 4.13.

And what of New Hampshire’s statute: “Medical information” contained in the record is the property of the patient. Does the statutory language mean that doctors in that state cannot use that information unless there is a clear, knowing release, supported by con-

sideration? That statutory language has existed for over a decade, and the issue has never been adjudicated.

If *Moore* says informed consent may extend to the use of excised tissue, who knows how much further the concept may go? If we make the release of data part of the informed-consent form — and nearly every health care facility does — we have made that link. We have made the data the subject of informed consent, and now the question is whether the release is binding. And what if a patient reads that language and strikes it through before signing the consent form? Essentially, the patient has modified a contract and made a

counteroffer, which may be deemed accepted if not challenged by the health care provider or facility. However, denying care to a patient solely because they refuse to consent to such an ancillary term — which has a clear, underlying profit motive — might be viewed in a dim light by oversight agencies (including licensing boards). Providers may be well-advised to train staff to stamp such consent forms “Modified Consent — Under Legal Review” (and follow through on that) until the law catches up with big data in health care. ■

**THE DOCTOR IS DRUNK**

BY JOEL ROSEN

Jackie had a drink at lunch with a friend and went back to work at the hospital. She’s been a nurse for 30 years. Her job is mostly administrative. She wasn’t going to see patients that day. Someone smelled alcohol on her breath. Nobody said she seemed intoxicated. She submitted to a test, which showed a blood alcohol level of .05 percent.

Jackie had never been in trouble before. She had stellar performance reviews. After the event, she was evaluated for substance abuse and didn’t have a problem. The New Hampshire Board of Nursing (BON) offered her a reprimand with 12 months of probation. She signed the settlement agreement, but when it went back to the BON, they decided instead to suspend her for three years. Jackie is 60 years old. She will never go back to nursing after a three-year suspension.

This is a real case in my office, although I changed the client’s name. This article is about health care in Massachusetts — not New Hampshire — but this sad story crystallizes two questions that remain open at the different licensing boards of both states. What does it mean to be “impaired?” And how should boards deal with impaired practitioners?

WHAT IS IMPAIRMENT?

Medical professionals cannot practice while impaired. Doctors, for example, are forbidden from “practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability or mental instability.¹ The regulations do not define “impairment.” The American Medical Association says an impaired physician is one who is “unable to practice medicine with reasonable

skill and safety to patients.”²

A person can’t drive with a blood alcohol level over .08. A practitioner whose blood alcohol level is under the legal limit cannot be automatically considered impaired. In terms of driving, someone may be impaired if “his alertness, his reflexes, and that quick reaction that is necessary in order to drive safely in our community, has been affected by intoxicating liquor.”³

But driving is not surgery, and the standards may be different. Doctors and nurses shouldn’t drink when they are on call or about to start a shift, even if they are below the limit for driving. The BON could enact a regulation that forbids consuming alcohol before a doctor has clinical responsibilities. But I have found no such policy and no standard for determining if a doctor is impaired at any given moment.

A doctor is also considered impaired if he or she is “habitually drunk or ... addicted to, dependent on, or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects.”⁴ This is a separate regulation, but it vindicates the same policy. An addiction is something that can’t be controlled. Eventually, substance abuse can affect the doctor’s work, and a patient may be hurt.⁵

It is amazing how many doctors have substance problems. About 6 percent of physicians have drug use disorders and 14 percent have an alcohol use disorder.⁶ Anesthesiologists and emergency room doctors are three times more likely to abuse substances than the general population of physicians.⁷

Nurse Jackie was under the legal limit. She didn’t seem drunk. She was evaluated and had no substance abuse problem. She had

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no clinical responsibilities that day. There is no evidence that Jackie was impaired.

THE SANCTION

The Board of Registration in Medicine (BORM) requires at least 18 months of demonstrated sobriety before an impaired doctor can return to work. This requirement is not in writing. It’s just what the board has been doing for the past several years. And there is no evidence that 18 months make patients safer than six months or 24 months.

The BORM generally seeks a voluntary agreement not to practice. If the doctor does not sign this, the threat is summary suspension. Either way, the doctor stops practicing and wisely makes an appointment with Physician Health Services (PHS), a non-profit corporation that works closely with the BORM and supports doctors with health issues, including substance abuse. The doctor is evaluated and usually sent to an out-of-state counseling program for six to 12 weeks. When the doctor successfully completes the program, he or she generally signs a monitoring contract with PHS. The contract requires a breathalyzer three times a day and random drug testing. It also requires psychological counseling and other support with recovery.

The counseling programs test the doctors every day, so you would think the 18 sober

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months would include time in the program. They do not. The BORM starts the clock running after months of drug testing and counseling, when the doctor signs the PHS monitoring contract. The doctor can't even apply for reinstatement until the additional 18 months are over. Several more months will go by before the BORM hears the case and issues a decision. The practical effect is that a doctor can be out of work for two years or more after having a couple of drinks at the wrong time, even if no patients were harmed.

"With the Mass. board, there has been a creeping escalation with the level of sanction," attorney Scott Liebert said. When Liebert was chief of litigation for the BORM in 1992, "The standard time out for a doctor practicing while impaired was six months followed by five years of monitoring. They gave the doctor credit for the time he was monitored in recovery. Somehow the default became 18 months. It didn't happen in a thoughtful, planned way."

It's not just that the Massachusetts board has imposed different sanctions at different times. It also imposes different sanctions than other states. Here are a couple of Florida cases with extreme facts and moderate sanctions.

Dr. Major was involved in a stormy emotional fight with her former roommate... She went drinking at various bars after the aforesaid fight and became publicly intoxicated to the extent of a .235 blood alcohol reading... She had a physical and emotional fight with another companion while on this drinking spree and was stripped of much of her clothing... Police arrested her in a state of undress on the street for public intoxication... She violently resisted

this arrest while in a state of extreme intoxication and was ... involuntarily committed for the night.⁸

Dr. Major was already on probation with the Florida BORM when this happened, after losing her license once. The BORM extended her probation for three years. She was free to return to practice. Here's another one:

Dr. Bell had a lady friend who lived in a trailer next to him. Bell believed that the friend had stolen his carton of cigarettes and bottle of vodka while Bell was "asleep." He went to retrieve these items and entered the friend's trailer through the floor air duct. An altercation ensued involving a butcher knife... At the time of the arrest, Bell's trailer was unkempt and strewn with empty liquor bottles.⁹

Dr. Bell got a one-year suspension with conditions, followed by five years of probation.

The point is not that the Florida BORM was right in imposing probation, where the Massachusetts board would have suspended a doctor. The point is that there is no way to know who is right, because the boards have no evidence-based standards for evaluating what the doctor needs. "There is no evidence that a doctor does better with a longer term of suspension," Liebert said. The New Hampshire board was apparently willing to reprimand Nurse Jackie but, with no explanation, escalated to a three-year suspension.

A licensing board's function is not retribution. Its function is to protect the public. Doctors should be out of practice for long enough to ensure they can safely return with monitoring, counseling and other conditions appropriate to ensure their sobriety. The suspension should bear a reasonable relationship to the severity of the doctor's problem and what help he or she needs to recover. The

sanction imposed should be based on something other than the general notion that more is better.

Doctors are scientists. They are trained to assess problems empirically and to practice evidence-based medicine. No doctor would argue that, if a patient is responding to a medication, the dose should automatically be doubled. But the Massachusetts board has trebled the presumptive suspension of doctors without explaining how that helps doctors to recover.

While we have been talking about the board of registration in medicine, the same principles apply to the boards of nursing, dentistry and other health care professions. Our licensing boards need a consistent definition of impairment so licensees know in advance what conduct is forbidden. And when a doctor has a problem, the board should allow the doctor to return to work when it is safe. It should not impose a minimum sanction unless there is a scientific basis to do so. ■

1. 243 CMR 1.03(4)(a)(4).
2. AMA American Medical Association. "The Sick Physician: Impairment by Psychiatric Disorders, Including Alcoholism and Drug Dependence," JAMA 1973;223:684-687. [PubMed]. This article deals with substance abuse and not mental or physical diseases.
3. *Com. v. Gill*, 56 Mass. App. Ct. 1109 (2002)
4. 243 CMR 1.03(4)(a)(5).
5. See the list of work-related symptoms. Ross, Stephen, M.D., "Virtual Mentor," AMA J. ETHICS. 2003; 5(12): 420-422 (2003).
6. Regier, D.A., Farmer, M.E., Rae, D.S., et al, "Comorbidity of mental disorders with alcohol and other drug abuse," JAMA. 1990; 264(19): 2511-2518.
7. Mansky, P.A., "Physician health programs and the potentially impaired physician with a substance use disorder," PSYCHIATR SERV. 1996; 47(5): 465-467.
8. *Major v. Dept. Prof. Reg. Bd. of Medicine*, 503 So.2d 411, 411 (1988).
9. *Bell v. Dept. Prof. Reg. Bd. of Medicine*, No. 92-2204 (1992).

HOW TO SUBMIT ARTICLES

To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).



LABOR & EMPLOYMENT LAW

AN EMPLOYEE PERSPECTIVE ON THE NEW NONCOMPETE LAWS

BY DAHLIA C. RUDAVSKY AND
ELLEN J. MESSING

Following enactment of the Massachusetts Noncompetition Agreement Act, two of our colleagues who represent management opined in a *Massachusetts Lawyers Weekly* article that the new statute “will only create more confusion, uncertainty and litigation.” They concluded their review of the law by saying, “Nothing had to be done ... why fix something that is not broken?”

From a plaintiff/employee perspective, a great deal has been “broken” in Massachusetts for a long time. The new law — while far from perfect — constitutes an important advance over the uncertain, unregulated common-law jurisprudence that employees have been up against.

The new statute creates several important limits on employers. First — and unaccountably ignored by most early commentators — noncompete agreements cannot be enforced against workers who are laid off, nor against those terminated without “cause.” Plaintiffs’ lawyers commonly face the painful prospect of advising employees fired without cause, perhaps in a setting suggesting discrimination or other unlawful motive, who had signed a noncompete as part of their employers’ onboarding paperwork. Not only are such people out of a job through no fault of their own, but also their best prospects for new work are cut off. The new law prohibits such cruelty, preventing this particular type of insult from being added to the injury of sudden job loss.

The second highly significant feature of the new law is that it bars the draconian imposition of noncompete agreements on people who cannot in any meaningful way impair employers’ protectible interests — goodwill and trade secrets. Although it is hard to conjure a set of facts where it would be appropriate to bar blue-collar or low-level administrative workers from competing, many employers have done so, sweeping their entire staffs into the ambit of a noncompete

requirement regardless of its factual illogic. The new law forbids enforcement of noncompetes against low-wage (non-exempt) workers, students and youth. That, too, is a great improvement over the status quo.

Third, the law requires transparency. Employees must be given advance notice of an impending noncompete obligation. We have seen too many cases where a person has accepted a new position and left their former job, only to learn on the first day of work, or even later, that they’ll need to sign a noncompete to enter into or continue employment. The new statute forbids this sort of ambush.

Fourth, the employer must give “fair and reasonable” consideration beyond ongoing employment to an existing employee in exchange for the restrictions. The statute sets up as a norm the payment of half the employee’s highest annual wages (“garden leave”) for the period the noncompete is in place, and the use of the “fair and reasonable” descriptor suggests that no significant variation from that standard would pass muster.

Fifth, the new law fixes one year as the maximum duration for any noncompete, even those of highly paid employees with specialized knowledge (except in cases of misappropriation by the employee of certain employer property, where the limit is two years). The practice of employers using noncompetes to tie up their highly trained workers for years on end will no longer be tolerated.

Finally, the new statute clearly articulates standards of reasonableness for the scope of restrictions and their geographic reach. The statute does more than restate existing Massachusetts common law: It provides a template for future drafters, avoiding the in terrorem effect that so many overbroad pre-existing clauses have on employees unwilling to chance (or unable to finance) a court battle with their ex-employers.

To be sure, the new law is far from perfect. Although it went into effect on Oct. 1, 2018, it left in place existing agreements that would not survive the new restrictions. For a

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period of time into the future, Massachusetts employees who signed noncompetes that fail the new standards will have to rely on their prior employers’ discretion not to seek enforcement of now-questionable restrictions. It would have been far better to simply void noncompete terms that violate the new standards.

Second, the law should not have exempted separation agreements, which (like noncompetes presented to employees in connection with the start of employment) are often forced on employees at a time when they are uniquely vulnerable.

But in spite of these flaws, the new law is a great advance over the old, unpredictable common-law standards. It will protect the vast majority of Massachusetts workers. The next step for the legislature will be to address the negative impact of noncompetes on relatively higher-paid, higher-skilled workers, and to extend the new restrictions to noncompetes in separation agreements. ■

GENDER IDENTITY AND THE EQUAL PAY ACT

BY RYAN P. MENARD

Effective June 30, 2018, the Massachusetts Legislature enacted the Equal Pay Act, which prohibits employers from paying an employee less than “employees of a different gender for comparable work.” This new law, replacing a 1945 statute rendered ineffectual by decades of judicial narrowing, reinvigorated a key tool in redressing and reversing the systemic underpayment in the workplace of women relative to their male counterparts.

Left unclarified, however, is whether and how the Equal Pay Act applies to employees whose gender identity otherwise differs from their physiology or biological sex, including transgender individuals. Although the Legislature six years ago recognized the complexity of gender when it formally cemented gender identity as a protected class, neither the Equal Pay Act nor the attorney general’s extensive guidance directly addresses the issue.

The Equal Pay Act should, by its spirit, title, and clues to its drafters’ intent, require equal pay for all employees, regardless of gender or gender identity. But, given the complexity of gender identity and its perhaps imperfect fit within the act as written, additional statutory or regulatory guidance is warranted.

GENDER IDENTITY IN THE WORKPLACE

The Legislature’s 2012 “Act Relative to Gender Identity” amends existing antidiscrimination laws to add as a protected class “gender identity,” defined as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.” Previously, Chapter 151B’s only gender-related protected classes were “sex” and “sexual orientation.”

The Legislature’s expansive “gender identity” definition encompasses, but is not limited to, transgender individuals whose gender identity differs from the biological sex assigned to them at birth. This would include, for example, individuals who are born as one sex but identify as another or combination, whether or not the individuals conform their appearance, their gender expression or, through gender-affirming surgery, their physiology to their gender identity. Some individuals do not identify with any gender. The statutory definition even includes individuals who identify as their born sex, but do not con-

form their “appearance or behavior” to “traditional” gender norms or expectations.

Although various Massachusetts courts had already ruled or opined that an individual’s nonconformance with gender norms falls within the protected class of “sex,” the Legislature’s 2012 act added expansive protection, and public recognition, to workers of non-traditional gender identity. Further, in 2016, the Massachusetts Commission Against Discrimination issued guidance to identify several examples of prohibited gender identity discrimination, including: retaliating against a transgender employee’s medical leave for gender-affirming procedures, refusing to call a transgender employee by their chosen name and gender pronoun, and prohibiting a transgender individual from using the bathroom of their identified gender.

THE EQUAL PAY ACT

In 1945, the Massachusetts Legislature enacted its first Equal Pay Act to require male and female employees to be paid equally. That statute prohibited wage discrimination “as between the sexes” and required that employees receive the same wages as “employees of the opposite sex for work of like or comparable character or work on like or comparable operations.” But, because the 1945 statute failed to define “like or comparable,” the courts so narrowed the act’s scope that claimants largely abandoned it as a remedy.

More than 70 years later, in 2016, the Legislature enacted “An Act to Establish Pay Equity,” which rewrote the 1945 statute to restore its intended power and to address other causes of systemic pay disparity. “An Act to Establish Pay Equity” also, separately from replacing the Equal Pay Act, created a “special commission to investigate, analyze and study the factors, causes and impact of pay disparity based on race, color, religious creed, national origin, gender identity, sexual orientation, genetic information...ancestry, disability, and military status” (notably absent is sex).

The rewritten Equal Pay Act now references “gender” — undefined in the statute — instead of “sex.” Instead of prohibiting disparity between employees of the “opposite sex,” the new statute prohibits employers from wage discrimination “on the basis of gender,” including paying an employee “less than the rates paid to its employees of a different gender for comparable work[.]” Notably, the statute does not require discriminato-

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ry intent or animus; an employer violates the Equal Pay Act even by innocently paying one employee less than “employees of a different gender.” The law provides a private right of action to employees, who can recover double the amount of underpayment for the previous three years, along with a recovery of reasonable attorneys’ fees and costs.

The Legislature, in addition to providing an individual remedy, sought to reduce systemic gender-based wage disparity through other means. First, the Equal Pay Act prohibits employers from asking applicants about their wage history. This requires the employer to offer an applicant wages consistent with the work, rather than allowing the employer to continue the applicant’s gender-based historical receipt of discriminatorily low wages from previous employers. Second, the Legislature encouraged employers to proactively and voluntarily address gender-based pay disparity, by offering an affirmative defense to employers who undertake a self-evaluation of their pay practices “and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work[.]”

Finally, the attorney general is empowered to issue regulations interpreting and applying the Equal Pay Act. The Attorney General’s Office has not yet enacted formal regulations, but has issued informational guidance on its website, including a 30-page “Overview and Frequently Asked Questions” document (which, the document disclaims, “does not constitute legal advice”). The attorney general’s guidance currently is silent on issues of gender identity.

THE IMPLICATIONS OF GENDER IDENTITY AND THE EQUAL PAY ACT

Whether and how the Equal Pay Act treats transgender and other gender-nonconforming employees is a gray area that poses

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risks for employers and uncertainty for employees. The issues can become quite thorny.

Consider, for example, an employee who was born as a biological woman and, until one year ago, presented outwardly as female (all the while, in secret, identifying as a man). Last year, the employee transitioned into living publicly as a man. Suppose that this person, from years of discriminatory pay disparity while living publicly as a woman, now earns significantly smaller wages than the employee's male coworkers.

In this scenario, the employee truly suffered gender-based wage discrimination in the past while living as a woman and, even after publicly identifying as a man, continues to receive wages less than his male coworkers. But how the Equal Pay Act treats gender identity could cause diverging results.

If the statute's use of "gender" connotes only born biological sex, then the employee would be considered a woman — contrary to the employee's gender identity — and thus certainly entitled to the act's relief. The employee would receive redress, but perhaps accompanied with the repugnant implication that the law deems the employee's "gender" different from his gender identity.

If, on the other hand, the statute considers "gender" to include gender identity, other complications may arise. Is this same employee — born biologically a woman and always identifying as a man, but, until only recently, outwardly presenting as a woman — because he currently identifies as male, precluded from recovery because, as a male, his higher-paid male coworkers are not of a "different gender?" Would the law recognize a right for the employee, always identifying

as male, to recover for past wage inequality based on physiological sex?

A related question is whether the law would consider a cisgender individual (that is, one who identifies with the gender of his or her born biological sex) to be a "different gender" than an employee who is not cisgender. For example, does the law consider a person born a man to be a "different gender" from a person born a woman but with the gender identity of a man?

WHAT DID THE LEGISLATURE INTEND?

The Equal Pay Act's text, by itself, does not answer these questions. Principles of statutory construction suggest, though perhaps not conclusively, an expansive prohibition of pay disparity "based on gender," including gender nonconformance and gender identity.

The 1945 version of the Equal Pay Act, requiring one "sex" to be paid the same as the "opposite sex," clearly sought to distinguish between biological sex rather than gender identity, a concept that would not gain any measure of mainstream understanding for decades. Where the Legislature chose to repair this statute as codified, rather than enact a new section of the Massachusetts General Laws, one might argue that the Legislature intended to accomplish the statute's original goal: eliminating pay disparity between cisgender men and women.

Most compelling is the Legislature's change to the statute's terminology, surely meaningfully, from the phrase "opposite sex" to "different gender." Given that "sex" and "gender identity" are distinct protected classes under Chapter 151B, one might infer that the Legislature changed the language from "sex" to "gender" to open the door for the statute's application to gender identity. Also surely meaningful is the decision to

change "opposite" to "different." Retaining the word "opposite"— i.e., "opposite gender" — would have implied only two genders, one opposite the other; "different gender," however, can accommodate a more expansive class.

But then again, the Legislature did not employ the phrase "gender identity" anywhere in the act, despite years ago enshrining "gender identity" as a protected class and defined term. The Legislature is presumed to know how to reference its statutory definition of "gender identity," and that phrase's absence in the Equal Pay Act may also be meaningful.

Also potentially significant is that the Legislature's "An Act to Establish Pay Equity" does not only rewrite the Equal Pay Act, but also establishes a "special commission" to analyze the pay disparity of every protected class of Chapter 151B — including gender identity — except for sex. This may suggest that the Legislature did not want this statute to regulate, without further study, pay disparity based on gender identity.

CONCLUSION

The Legislature's new Equal Pay Act, while restoring clarity and force to a long-ineffectual remedy against pervasive wage disparity among men and women, is unfortunately uncertain in its application to employees of different gender identities. Particularly where statutory construction does not yield a unanimous interpretation, this important issue may remain unresolved until the Legislature amends the statute or the attorney general issues regulations. Until then, it will remain an area of uncertainty to be worked out by litigants, attorneys and the courts. ■

**NLRB PROPOSED NEW JOINT-EMPLOYER RULE****BY JAIMESON PORTER**

The National Labor Relations Board (NLRB) recently published a Notice of Proposed Rulemaking aiming to overturn the Obama-era board's standard for joint-employer relationships.

The current standard, set in 2015 in *Browning-Ferris Industries of California*, holds that two or more entities can be considered joint employers of a workforce if they "share or codetermine matters governing the essential terms and conditions of employment."

The new, stricter and more employer-friendly standard proposed by the NLRB seeks to expand the rule by requiring that two entities not just share decision-making powers over the essential terms and conditions of employment, but also that both actually exercise substantial, direct and immediate control over them.

THE TRADITIONAL JOINT-EMPLOYER RULE

For nearly 30 years before *Browning-Ferris* was decided, joint-employer status under the National Labor Relations Act (NLRA)

required proof of significant, direct and immediate control over the employees in question. The NLRB consistently held historically that indirect, minimal or hypothetical control over a workforce was insufficient to establish a joint-employer relationship between two entities.

BROWNING-FERRIS (2015)

In 2015, the joint-employer rule changed. In *Browning-Ferris*, the Democrat-majority board held that "direct and immediate control" of the workforce would no longer be

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required. Instead, to determine whether an entity was a joint employer of a workforce, the new relevant inquiry was whether the entity had the potential authority to exercise control over the primary employer's employees, and not whether the company had in fact exercised actual authority over the workforce in question.

Browning-Ferris marked a significant departure from the traditional joint-employer standard, and a victory for employees.

THE PROPOSED NEW RULE

The Trump-era board's proposed new rule would undo the more liberal *Browning-Ferris* standard and revert back to a standard more closely aligning with the traditional joint-employer rule. If the proposed new rule is adopted, indirect influence and contractual reservations of authority over a workforce (without an actual exercise of authority) will no longer be enough to establish a joint-employer relationship. Instead, a business would be responsible as a joint employer of another

company's employees only if it possesses and exercises substantial, direct and immediate control over that workforce's essential terms and conditions of employment, and has done so in a manner that is not "limited and routine."

In support of the proposed rule change, the NLRB's notice explains that the new standard would provide greater predictability, consistency and stability for all in understanding whether a joint-employment relationship is being created, or could be created, by virtue of how two entities are deciding to do business together. It would also decrease the risk that employers who have not played an active role in deciding wages, benefits or other essential terms and conditions of employment, get improperly pulled into a collective-bargaining relationship with a workforce belonging to another entity.

WHAT TO WATCH FOR

In December 2018, the D.C. Circuit Court of Appeals reviewed and upheld part of the *Browning-Ferris* decision, but remanded the case back to the NLRB for reconsideration. Shortly thereafter, in January 2019, numerous

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United States representatives and attorneys general submitted letters to the NLRB advocating for *Browning-Ferris* to be upheld. On Jan. 17, 2019, NLRB Chairman John Ring denounced those requests to stop the new proposed joint-employer rule.

Management-side and union-side attorneys should stay tuned in upcoming months to see what the NLRB decides on this important issue. ■

**PREGNANT WORKERS FAIRNESS ACT: WHAT EVERY EMPLOYER SHOULD KNOW****BY: MICHELLE M. DE OLIVEIRA**

As the new year begins, it is an ideal time for employers to assess whether their policies and procedures are compliant with Massachusetts laws — including the Pregnant Workers Fairness Act (PWFA). It goes without saying that most companies will, at one point or another, have an employee who is pregnant or who experiences a condition related to pregnancy. The purpose of this article is to examine the PWFA and provide a refresher on its requirements.

WHAT IS THE PWFA?

On July 27, 2017, Gov. Charlie Baker signed the PWFA into law. The PWFA amends M.G.L. c. 151B to include pregnancy and related conditions (e.g., breastfeeding or expressing breast milk) as protected categories under Massachusetts' anti-discrimination statute.

WHAT IS THE EFFECTIVE DATE OF THE PWFA?

April 1, 2018.

WHAT ARE THE PROTECTIONS SET FORTH UNDER THE PWFA?

- The PWFA expressly prohibits employ-

ment discrimination or retaliation against an individual on the basis of a pregnancy or a condition related to pregnancy.

- An employer cannot deny an employment opportunity to, or take an adverse action against, an employee who requests or uses a reasonable accommodation on the basis of a pregnancy or a condition related to pregnancy.

WHAT IS A "CONDITION RELATED TO PREGNANCY?"

- A condition related to pregnancy can be either during or after a pregnancy (e.g., morning sickness, lactation or a need to express breast milk).

WHO IS PROTECTED BY THE PWFA?

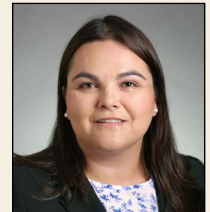
Current and prospective employees of employers that are covered under c. 151B (generally, an employer with six or more employees is covered under c. 151B).

WHAT ARE THE NOTICE REQUIREMENTS SET FORTH UNDER THE PWFA?

- An employer must:
 - (1) provide *all employees* written notice of their rights under the act no later than April 1, 2018;

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- (2) provide written notice to *new employees* of their rights under the act either at or prior to the commencement of their employment; and
- (3) provide written notice — within 10

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days — to an employee who notifies the employer of a pregnancy or pregnancy-related condition of the employee's rights under the PWFA.

HOW SHOULD AN EMPLOYER HANDLE A REASONABLE ACCOMMODATION REQUEST FROM AN EMPLOYEE WHO IS PREGNANT OR HAS A CONDITION RELATED TO PREGNANCY?

- **FIRST:** Determine whether the reasonable accommodation is listed in the PWFA. Although the list is non-exhaustive, it is an important guide. Under the PWFA, reasonable accommodations may include:
 - (1) more frequent or longer breaks;
 - (2) time off to attend to a pregnancy complication or recover from childbirth;
 - (3) acquisition or modification of equipment seating;
 - (4) temporary transfer to a less strenuous or hazardous position;
 - (5) job restructuring;
 - (6) light duty;
 - (7) private, non-bathroom space for expressing breast milk;
 - (8) assistance with manual labor; or
 - (9) a modified work schedule.
- **SECOND:** Engage in a timely, good-faith and interactive process with the individual. What this boils down to is simply having a discussion(s) with the employee about the reasonable accommodation and the employee's needs. Employers should memorialize these discussions in writing and ensure they have adequate written documentation describing these discussions.
- **THIRD:** Depending on the reasonable accommodation sought, do not ask for medical documentation. The PWFA prohibits employers from asking for medical

documentation if the reasonable accommodation sought is:

- (1) more frequent restroom, food or water breaks;
- (2) seating;
- (3) limits on lifting over 20 pounds; or
- (4) private, non-bathroom space for expressing breast milk.

If the requested accommodation is not something on this list, the employer may ask for medical documentation from a health care professional that describes what accommodation the employee needs.

- **FOURTH:** Conduct an “undue hardship” analysis. If the employer will not suffer an “undue hardship,” then the employer must grant the reasonable accommodation. An undue hardship is a significant difficulty or expense to the employer. Factors considered include: “(1) the nature and cost of the needed accommodation; (2) the employer's financial resources; (3) the overall size of the business; and (4) the effect on expenses and resources of the accommodation on the employer.”
- **FIFTH:** Grant the reasonable accommodation request so long as doing so will not cause an “undue hardship.” Please remember that if there is a reasonable accommodation that would allow the employee to perform the essential duties of the job without undue hardship to the employer, the employer cannot require an employee to accept a particular accommodation, or begin disability or parental leave.

DO BREAKS TO BREASTFEED OR EXPRESS BREAST MILK NEED TO BE PAID?

Breaks can be paid or unpaid. The key is that an employer needs to treat breaks, under the PWFA, the same way that it treats other types of breaks. So, for example, if an employer provides paid rest breaks to employees, then an employee who uses the break to express breast milk should be paid for that

break as well.

PRIVATE, NON-BATHROOM SPACE TO EXPRESS BREAST MILK OR TO BREASTFEED



Employers must provide private, non-bathroom space for an employee to breastfeed or express breast milk. Although the PWFA does not impose requirements on what the private space must look like, the Massachusetts Commission Against Discrimination (MCAD) has spoken on this issue, stating that it should: be a private space free from intrusion by others; be convenient for employees so that getting to and from the space does not “materially impact the employee's break time[;]” and include outlets, a surface to set up equipment, and seating.

If an employer does not have a current or prospective employee who needs a private space to breastfeed or to express breast milk, the employer does not need to make the space available. However, employers should be thinking about this to ensure that if an employee needs private space to breastfeed or express breast milk, the employer will be able to meet its obligations under the PWFA — and provide the space.

WHO WILL ENFORCE THE PWFA?

The MCAD. Additional resource materials from the MCAD can be found at <https://bit.ly/2ITjTsl>.

Looking forward, employers should have processes in place concerning how to address requests for reasonable accommodations from employees who are pregnant or suffer from conditions related to pregnancy. Employers should also have processes in place for issuing employees and prospective employees the written notices required under the PWFA. Please contact your employment law attorney if you have any questions or concerns. ■

WHAT EMPLOYERS NEED TO KNOW ABOUT MASSACHUSETTS' NEW REQUIREMENTS FOR CALCULATING TIPPED EMPLOYEES' WAGES

BY FRANCESCO DeLUCA AND
ROBERT M. SHEA

In June 2018, Massachusetts Gov. Charlie Baker signed into law “An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday.” As one part of that so-called “grand bargain” legislation, effective Jan. 1, 2019, employers in Massachusetts with tipped employees are now required to calculate tipped employees’ wages at the end of *each shift* instead of at the end of each pay period. This change not only presents an additional administrative challenge, it also makes it more likely that employers will be required to pay employees additional amounts to ensure that they receive at least minimum wage during slow shifts.

Like many states, Massachusetts allows employers to pay tipped employees at a rate (\$4.35 in 2019) less than the basic minimum wage (\$12 in 2019) by claiming a “tip credit.” To claim a tip credit: (1) the employer must inform affected employees in writing of how a tip credit works; (2) the employees must regularly receive gratuities exceeding \$20 each month; (3) the employees must retain all tips received by them, or tips must be distributed to them through a valid tip-pooling arrangement; and (4) the sum of the service rate and the tips received by the employees must equal or exceed the basic minimum wage. If the sum of an employee’s service rate and tips is less than the basic minimum wage, the employer is required to pay the employee an

amount sufficient to make up the difference. (Note: The Massachusetts minimum wage will rise \$0.75 per year until it reaches \$15 per hour in 2023; the service rate will rise \$0.60 per year until it reaches \$6.75 in 2023.)

Before Jan. 1, 2019, employers were allowed to perform this calculation at the end of each pay period. Effective Jan. 1, 2019, however, employers are required to perform it at the end of the employee’s shift. Notably, while this change affects when employers must determine whether they owe tipped employees any amounts in addition to the service rate, it does not affect when employers must pay tipped employees.

To illustrate how the new law is to operate, the Massachusetts Office of the Attorney General has provided the following example of how employers are required to calculate a tipped employee’s compensation:

- The example assumes that the minimum wage is the 2019 rate of \$12 per hour and the service rate is \$4.35 per hour.
- “A restaurant server works one 5-hour shift on Tuesday and one 5-hour shift on Saturday during the same pay week.
- On Tuesday, the slow day, the employee earns \$21.75 in service rate wages + \$20 in tips for a total earned of \$41.75.
- The law requires that the employee receive at least \$60 for the shift (5 hours x \$12 minimum wage rate).
- The employer is required to add \$18.25 to the employee’s next pay check to cover the differential for this shift.
- On Saturday, the busy day, the employee earns \$21.75 in service rate wages + \$100 in tips for a total earned of \$121.75. Since this total exceeds the \$12 per hour minimum wage rate for each hour worked, the employer is not required to add any amount to the employee’s next pay check for this shift.
- Total gross wages to be paid to this employee for this pay week = \$181.75.”

As this example shows, calculating a tipped employee’s compensation at the end of a shift, as opposed to the end of a pay period, is more likely to result in the employer being required to pay the employee an amount in addition to the service rate. Before Jan. 1, 2019, the employer in the example would not

have been required to add any amount to the employee’s paycheck, as the higher tip total on the “busy day” would have offset the lower total on the “slow day.” By contrast, under the new law, the employer owes the employee an additional \$18.25.

EMPLOYER TAKEAWAYS

The new law does not change when tipped employees must be *paid* in Massachusetts. Rather, for most Massachusetts employers with tipped employees, the law requires employers to change when they *calculate* tips to ensure that tipped employees receive at least minimum wage for hours worked during each shift. This change is likely to be challenging for many employers.

Massachusetts employers with tipped employees may want to review their payroll policies and practices to evaluate what steps they can take to comply with the law’s requirement that tipped employee compensation be calculated, and the minimum wage rate met, on a shift-by-shift basis. In Massachusetts, failing to calculate and pay employee wages properly exposes employers to mandatory treble damages and attorneys’ fees, as well as potential criminal penalties.

This article was drafted by the attorneys of Ogletree Deakins, a labor and employment law firm representing management, and is reprinted with permission. This information should not be relied upon as legal advice. ■

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PUBLIC LAW

DUE PROCESS GUARANTEES APPLY TO FIREARMS REGULATIONS

BY DAVID R. KERRIGAN

Few public policy issues generate such polarized viewpoints as efforts to regulate firearms. Firearm owners, through national organizations such as the National Rifle Association (NRA), and locally through the Gun Owners' Action League, do not hesitate to express their views on gun regulation, while those favoring greater regulation have recently become more vocal and organized in pursuing their goals. Regardless of one's stance on the policy debate, everyone must acknowledge that efforts to regulate firearms face several constitutional hurdles, including limitations imposed by the Second and 14th amendments to the United States Constitution. This article will focus on one recent Massachusetts regulatory effort rife with constitutional challenges.

REGULATORY BACKGROUND

Massachusetts regulates firearms on multiple levels, including requiring licenses for firearms sales and ownership. For example, to sell, rent or lease firearms or ammunition, G.L. c. 140 §122 requires an individual or business to obtain a license from their local police department. Local police chiefs must also approve all firearms identification cards, which permit the purchase and possession of non-large-capacity rifles and shotguns. Local police departments issue licenses to carry that allow individuals to purchase, possess and carry all large- and non-large-capacity handguns, rifles, shotguns and feeding devices, as well as handguns. In addition, each firearm transaction must be recorded with the Massachusetts Department of Public Safety.

In addition to transactional licensing, the federal and state government place limitations on what types of firearms may be purchased and sold. For example, in 1994, Congress enacted the Public Safety and Recreational Firearms Use Protection Act, prohibiting the manufacture, transfer or possession of narrowly defined, so-called "assault weapons."² 18 U.S.C. § 921(a)(30). The 1994 federal statute defined "assault weapons" to include a short list of specifically identified semi-automatic firearms, the so-called "enumerated" firearms,³ and "copies and duplicates" of those listed firearms. 18 U.S.C. § 921(a)(30). In addition to the specifically enumerated firearms and their copies and duplicates, the federal legislation banned any semiautomatic

rifle, pistol or shotgun that had two or more specific features that Congress found transformed legal firearms into "assault weapons." Under the "features test," a rifle is an assault weapon if it has the ability to accept a detachable magazine and has at least two of these features: a folding or telescoping stock; a pistol grip that protrudes conspicuously beneath the action of the weapon; a bayonet mount; a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and a grenade launcher.⁴

MASSACHUSETTS ADOPTS THE FEDERAL "ASSAULT WEAPON" DEFINITIONS

In 1998, the Massachusetts Legislature amended the firearm licensing statute, G.L. c. 140, to mirror the federal ban on assault weapons. G.L. c. 140, § 12. For the nearly two decades between 1998 and the summer of 2016, all parties involved in the sale and regulation of firearms narrowly interpreted G.L. 140 § 12 and its copies and duplicates language. Everyone interpreted the law to apply only to the specific, enumerated firearms: those firearms that did not meet the features test were considered illegal under the law.

This consistent statutory interpretation changed suddenly in July 2016, when, without notice, hearing or public comment, Attorney General Maura Healey issued what she called an Enforcement Notice, which defined further what the terms "copy and duplicate" mean in G.L. c. 140. According to the notice, copy includes firearms whose "internal functioning components are substantially similar in construction and configuration" to the enumerated firearms, as well as other firearms that have interchangeable receivers. The attorney general announced the notice at a press conference and warned that violating the statute, as defined by the notice, carries criminal penalties, as well as the threat of G.L. c. 93A enforcement.

Upon receiving the notice in the mail, the licensed retailers realized that the notice expanded the law's scope far beyond how stores and individuals had interpreted it for nearly two decades. The stores also had a number of questions concerning its application to various types of firearms, so they called and wrote the Attorney General's Office to ask if the notice applied to specific firearms. Many faced no luck. In most instances, they were told to "use their best judgment," a discon-

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certing response by the drafter and chief law enforcement officer of the commonwealth. If the Attorney General's Office could not tell how to apply the law to specific firearms, how could the law-abiding public know how to conform their conduct to the law?

CONSTITUTIONAL PRINCIPLES AFFECT REGULATORY EFFORTS

One of the fundamental principles of our criminal laws is that persons subject to the law's application need to know what conduct is prohibited. Unduly vague laws run afoul of this principle in at least two respects: First, vague laws prevent those affected from conforming their conduct to the law. Second, vague laws allow enforcers to interpret and apply the laws unevenly and perhaps discriminatorily against individuals, groups, or classes of disfavored citizens.⁵

Drawing on these principles, several store owners and the National Shooting Sports Foundation (NSSF) brought a due process challenge to Attorney General Healey's July 2016 enforcement notice. The complaint alleged that the notice was too vague to apply properly and described how the notice's new definition presented a conundrum to manufacturers and retailers trying to decide what firearms fell under its scope. Read broadly, "substantially similar" operating systems could mean that *all* semi-automatic rifles were now outlawed because the three basic operating systems are arguably similar on basic physics principles. In addition, store owners were unable to determine whether certain firearms types had a "substantially similar" operating system to the enumerated firearms

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depending on the interpretation of what “substantially similar” meant.

The Attorney General’s Office moved to dismiss the complaint on various technical grounds, including the inability to make a facial due process challenge outside of the First Amendment, and that the 11th Amendment allegedly barred the claim.

After a hearing, the United States District Court (Hillman, J.) found that the store owners’ complaint could proceed on an as-applied vagueness challenge because the notice’s scope was difficult for the store owners to discern and apply to the firearms described in the complaint. The court stated that “[t]he Attorney General’s Notice and subsequent failure to clarify arguably has resulted in a lack of fair notice of which conduct will be subject to criminal sanction. It is in the interest of all parties that this be resolved in order to effectuate a clear and effective regulatory regime in which sanctionable conduct is properly prescribed.”⁶ As a result, the case will proceed to discovery to allow the stores to demonstrate the scope of the uncertainties they face.⁷

The vagueness challenge may be difficult for the Attorney General’s Office to

overcome, particularly when, in a related case, one of the attorney general’s experts acknowledged in a deposition that he could not tell whether a firearm he helped construct to comply with New York law would comply with the Massachusetts enforcement notice. He testified as follows:

Q. And do you know if your AR-15 that you constructed has internal functional components that are substantially similar in construction and configuration to the Colt AR-15?

A. That would be reluctant to say without — I would be reluctant to say.

Q. What additional information would you need to know?

A. Well, it depends on what these internal parts are that you’re referring to are and to what extent they do or do not appear in other subsequent versions.

When an expert is reluctant to say whether a firearm he helped construct complies with the law as interpreted through an enforcement notice, it is easy to see why store owners are likewise confused about its application to other firearms. Store owners and individuals should not depend on whimsical, case-by-case interpretations by law enforcers to provide them with the means to determine

whether the law applies to their conduct. Regardless of which side of this policy debate one takes, laws and regulations should be clear to provide those affected and those enforcing the laws with the means to interpret them consistently and correctly. ■



1. The author is one of the lead counsel on the case discussed in this article.
2. The term “assault weapon” is a statutory creation and has no technical meaning.
3. For example, the Norinco, Mitchell and Poly Technologies Avtomat Kalashnikovs (also known as AK-47s); UzIs Beretta Ar70 (SC-70); and Colt AR-15, along with other specific, enumerated firearms.
4. Various aspects of the federal legislative history indicate that Congress did not intend the statute to apply to other firearms beyond the enumerated firearms and those meeting the features test.
5. *Draper v. Healey*, 98 F. Supp. 3d 77, 83 (D. Mass. 2015) aff’d 827 F.3d 1 (1st Cir. 2016).
6. *Pullman Arms Inc. et al. v. Healey*, 301 F. Supp. 3d 227, 231-232 (D. Mass. 2018).
7. The Attorney General’s Office recently filed a motion to stay the Pullman action, relying on the Colorado River abstention doctrine. The court has not ruled on that motion as of the time this article was written.
8. Deposition of Robert Spitzer, taken in *Worman v. Healey*, C.A. No. 17-CV-10107-WGY, p. 124, filed with the cross-motions for summary judgment.



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