INSIDE THE LAW

Spring 2015

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NEW MASSACHUSETTS SICK LEAVE LAW TO TAKE EFFECT JULY 1, 2015

By Joseph T. Bartulis, Jr., Esq.
508-459-8214 | jbartulis@fletchertilton.com

In November 2014, Massachusetts voters passed a ballot question that will soon require all Massachusetts private sector employers to grant employees time off from work for sick leave. The law, which takes effect July 1, contains a number of interesting nuances that will require all employers to familiarize themselves with the law and which will require employers that presently offer paid sick days to their employees to make sure that their sick leave policies are compliant with the new law. This article will briefly detail the most significant elements of the new law.

OVERVIEW OF THE NEW LAW

Beginning on July 1, all private sector employers in Massachusetts are required to afford employees up to 40 hours of sick leave per year. Whether the sick leave is paid for or not turns on the number of employees the employer has. If the employer has 11 or more employees, the employer must provide these days as paid leave. Conversely, while those employers with 10 or fewer employees also need to allow for the use of up to 40 hours of sick time, the employees' use of those hours need not be paid.

NUMBER OF EMPLOYEES

Unlike employment laws which define employees by the number of hours they work or by some other measure, the new sick leave law does not define employee with any degree of precision. It merely defines an employee as "any person who performs services for an employer for wage, remuneration, or other compensation." Accordingly, unless and until further insight is provided in the regulations anticipated from the Attorney General's office before the effective date of the law, one should consider all employees as counting toward the 11-person threshold — regardless of whether they are full-time, part-time, seasonal, temporary, etc. Suffice it to say, any person who is working as a W2 employee should be counted. Absent contrary information contained in the forthcoming regulations from the Attorney General's office, temporary workers who provide services to your company as employees of another employer (e.g., temp/staffing agency) and those people who provide services as independent contractors need not be counted. (For guidance on whether a worker may be properly classified as an independent contractor rather than employee, see my prior article on our website, *A Quick Look at the Rigid Massachusetts Independent Contractor Law*.)

HOW SICK TIME IS EARNED

The new sick leave law provides that employees will accrue, beginning on July 1, one hour of sick leave for every 30 hours of work performed by hourly paid employees, to a maximum accrual of 40 hours. Salaried employees are assumed, for sick leave accrual purposes, to work 40 hours per week. Once an employee has accrued 40 hours of sick leave in a given year, he or she will not accrue any more sick days regardless of the number of hours he or she actually worked during the rest of the year. Newly hired employees may not access any accrued statutory sick leave until they have completed 90 days of employment with that employer. Not surprisingly, there is nothing in the new law, for example, which requires an employer that presently has a more generous sick leave accrual policy from granting more than 40 hours of sick leave in a year, or from allowing new hires to access their sick leave earlier than after 90 days of employment.

WHAT SICK TIME MAY BE USED FOR

While many Massachusetts employers, understandably, have generous sick leave policies and broadly define the allowable uses for sick time, there are some employers that offer sick time only when their employee is actually the one who is sick. Those employers do not allow it to be used for the sickness of another person. Under the new law, limiting sick leave use to an employee's illness will not be permitted. In addition to allowing sick employees to access their sick leave when they are sick, injured, etc., the new law also provides that employees may use their accrued sick time to care for any sickness, injury or medical condition of one's children, spouse, parent or spouse's parents. Additionally, employees may use accrued sick time to address issues related to the effects of domestic violence – including psychological and legal effects, in addition to physical effects. (For more guidance on domestic violence leave, please see my prior article on our website, *Massachusetts Passes Legislation Requiring Covered Employers to Provide Domestic Violence Leave for Employees*.)

Just as many employers presently have sick leave policies that cover only sick employees and not their family members, many employers with paid sick leave require that employees take sick leave in increments of full, half, or quarter days of work. Under the new law, employees may use sick time in increments as small as one hour (or even smaller increments if the employer provides for it.)

LOGISTICAL QUESTIONS RAISED BY THE NEW LAW

Beyond the scope of this short article, Massachusetts employers may have a number of additional logistical questions regarding the new sick leave law. I will now briefly detail a few of the most common areas.

- First, there is nothing in the new law which requires that employers who presently offer more generous sick leave and/or who offer one broad category of paid leave time which encompasses vacation, personal and sick time which collectively meets or exceeds the statutory sick leave requirements to change their current leave time offerings, so long as the accrual and usage elements of the employer's policy also meet or exceed the requirements of the law.
- Second, as is the case presently, there is nothing in the new law which requires an employer to pay an employee for unused sick time when he or she leaves the employer's employ.
- Third, the new law does allow employees to carry over unused sick time from one year into the next. Employees may now carry over as many of their then-current year's sick days as they have remaining, up to a maximum of 40 hours, into the next year. When this carryover occurs, the employer is not required to allow the employee to accrue additional sick days.
- Fourth, the new law is very precise about when an employer may request the production of documentation regarding the illness. An employer may not request medical documentation regarding an employee's absence unless the employee has missed 24 or more consecutive scheduled work hours.
- Fifth, for employers with unionized employees who are covered by a collective bargaining agreement, the new sick leave law makes it clear that nothing in the new law creates a unilateral right of an employer to alter a more generous sick leave benefit in the bargaining agreement. Likewise, the new sick leave law does not absolve an employer from having to bargain over sick leave, which is a mandatory subject of bargaining, if the union makes a proposal to do so at collective bargaining negotiations.
- Sixth, an employer may not require an employee to look for nor find a replacement worker to fill in for him or her as a prerequisite to being allowed to access accrued sick leave.

CONCLUSION

While we await further guidance from the Attorney General's office regarding some of the intricacies of the new law in the forthcoming regulations, all private sector employers in Massachusetts will need to review their current employee handbooks and revise them as needed to comply with new requirements regarding, among other things, how sick time is accrued, what it can be used for, how it can be carried forward into the next year, and when documentation can be required, etc. If you would like to have your company's employee handbook reviewed to make sure it is compliant with this and the myriad of other employment laws that have changed in recent years, please contact me at *jbartulis@fletchertilton.com* or *508.459.8214*. FT

LIFETIME ALIMONY STILL EXISTS FOR SOME IN MASSACHUSETTS

By Marisa W. Higgins
508-459-8041 | mhiggins@fletchertilton.com

The Massachusetts Supreme Judicial Court ("SJC") recently decided three cases (*Rodman v. Rodman, Doktor v. Doktor*, and *Chin v. Merriot*) that significantly impact a payor's right to seek modification of alimony orders issued prior to the enactment of the Alimony Reform Act ("Act") on March 1, 2012. In short, the SJC determined that the retirement and cohabitation sections of the Act apply prospectively and not retroactively. In other words, payors divorced prior to March 1, 2012, cannot seek to terminate alimony based on the retirement or cohabitation sections of the Act.

BACKGROUND

The Act represents a sweeping overhaul of alimony laws in Massachusetts. Pursuant to the Act, any alimony obligations in existence prior to the Act are deemed general term alimony. With respect to retirement, the Act provides that general term alimony shall terminate upon the payor attaining full social security retirement age. With respect to cohabitation, the Act provides that general term alimony shall be suspended, reduced or terminated upon cohabitation of the recipient if the payor is able to show that the recipient has maintained a common household with another person for at least three continuous months. The Act further establishes durational limits for the payment of alimony for marriages of less than 20 years (50% of marriages up to 5 years long, 60% of marriages 5-plus to 10 years long, 70% of marriages 10-plus to 15 years long and 80% of marriages 15-plus to 20 years long).

RODMAN V. RODMAN

After a marriage of 39 years, George and Roberta Rodman were divorced in 2008, prior to the enactment of the Alimony Reform Act. A separation agreement of the parties was incorporated and merged into the Judgment of Divorce. Pursuant to the Judgment, George was ordered to pay Roberta alimony of $1,539 per week until Roberta's remarriage or either party's death. In 2013, George filed a Complaint for Modification seeking to terminate his alimony obligation on the basis that he had attained full social security retirement age and that Roberta was cohabitating with a third party. The trial court determined the Act was not to be applied retroactively to judgments entered prior to the Act. George appealed to the Appeals Court, arguing that because his separation agreement was merged into the Judgment of Divorce,

The court rejected the argument that durational limits are meant to include attaining full retirement.

it was always subject to modification based on a material change of circumstances. The case was transferred to the SJC on direct review.

The SJC determined that the Legislature intended that the retirement and cohabitation provisions of the Act apply only prospectively. As such, the retirement and cohabitation provisions of the Act are not material changes of circumstance with regard to modifying alimony judgments entered prior to March 1, 2012. Only a Complaint for Modification based on exceeding the durational limits set forth in the Act applies retroactively.

DOKTOR V. DOKTOR

In 1992, after a marriage of more than 20 years, Joe and Dorothy Doktor were divorced. At the time of the divorce, the parties executed a separation agreement which was incorporated and merged into the Judgment of Divorce. The Judgment required Joe to pay Dorothy $200 per week in alimony until her death or remarriage. In 2013, Joe filed a Complaint for Modification alleging that he had attained full social security retirement age and was, in fact, retired and that Dorothy no longer needed alimony. Joe cited M.G.L. c. 208, sec. 49(f), which provides that general term alimony terminates upon the payor attaining full social security retirement age, in support of his request to terminate his alimony obligation.

After trial, the trial court dismissed Joe's Complaint for Modification, finding that the retirement provision of the Act does not apply to cases decided before March 1, 2012, and that Dorothy continued to need alimony. Joe appealed and the SJC affirmed the trial court's decision. Relying upon Section 4 of the Act, which was not codified, the SJC determined that the retirement provisions apply prospectively only. Section 4 makes an explicit exception for retroactive application only for alimony judgments that exceed the durational limits set forth in M.G.L. c. 208, sec. 49 applicable to those married for less than 20 years. The court rejected Joe's argument that durational limits are meant to include attaining full retirement.

CHIN V. MERRIOT

In 2011, after a marriage of 12 years' duration, Chester Chin and Edith Merriot were divorced. At the time of the divorce, Chester was 67 years old and Edith was 69 years old. Incorporated and merged into the Judgment of Divorce was a separation agreement of the parties which provided, in pertinent part, that Chester would pay alimony to Edith of $650 per month until either party's death or Edith's remarriage. Approximately a year and a half later, in 2013, Chester filed a Complaint for Modification seeking to terminate his alimony obligation since he had attained full social security retirement age. He subsequently filed an Amended Complaint for Modification alleging that Edith was cohabitating with a third party. After trial, Chester's Complaint was dismissed and he appealed.

Relying on its decision in both *Doktor* and *Rodman*, the SJC found that the retirement and cohabitation provisions of the Act apply prospectively only. The SJC determined the Legislature's intent was unambiguous in this regard, given Section 4 of the Act: "Sections 48 to 55, inclusive, of said chapter 208 shall not be deemed a material change of circumstance that warrants modification of the amount of existing alimony judgments; provided, however, that existing alimony judgments that exceed the durational limits under section 49 of said chapter 208 shall be deemed a material change of circumstance that warrant modification."

These recent decisions establish that lifetime alimony may not be over in Massachusetts. For those who were divorced prior to the Act, relief from existing alimony awards upon attaining full retirement age or upon a recipient's cohabitation is not automatic. **FT**

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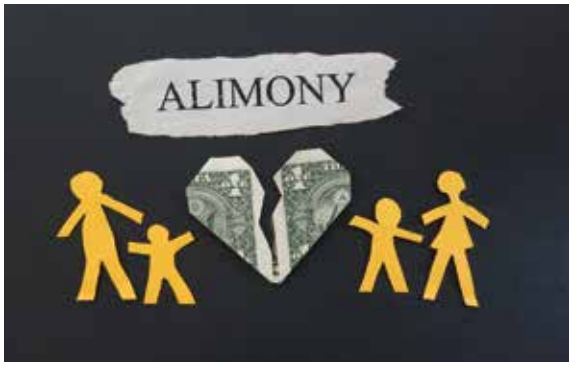

WHY YOU SHOULD CHOOSE YOUR OWN LAWYER WHEN YOUR INSURER ISSUES A RESERVATION OF RIGHTS

By Adam C. Ponte
508-459-8012 | aponte@fletchertilton.com

You or your business is served with a lawsuit. It could be for a slip-and-fall, construction defect or even wrongful death. In any event, you paid those hefty insurance premiums for this very moment — right? After receiving the plaintiff's Complaint, you likely send it to your insurance agent or your carrier. In the next week or so, the insurer could (i) agree that the claim is fully covered and agree to defend you; (ii) notify you that the claim is not covered, at all; or (iii) reserve its right to disclaim coverage, but provide you with a legal defense (at least for the time being).

Under the last scenario, the insurer will send you a letter telling you all of the reasons why your insurance policy may not cover the plaintiff's claims. This letter, also known as the insurer's Reservation of Rights, is the insurer's message, to you, that it is reserving the right to disclaim coverage. In the meantime, the insurer undertakes your defense by providing you with a lawyer. Yes, the insurer would be paying your legal fees, but significant conflicts could arise between you and the insurer. That is, the insurer could contend that the loss, or a portion of the loss, is not covered under the policy. You, on the other hand, want the entire loss covered. This awkward situation could cause the insurance defense lawyer to defend your case in a manner that better suits the insurer, perhaps winning against the plaintiff on the covered claims and losing on the non-covered claims. Under this scenario, although the insurer may have footed the legal bill, the insured would pay the plaintiff for the non-covered damages, and the insurer would have no further liability. Additionally, a lawyer frequently hired by the same insurer will have an incentive to please the insurer, not the insured. There is nothing like a steady stream of business.

Under a Reservation of Rights, the insured must be wary of the possibility that the insurer-provided attorney may favor the insurer over the insured in the course of litigation. The good news for insureds in Massachusetts is that you may be entitled to choose your lawyer, with the insurer paying the bill. Therefore, when the insurer issues a Reservation of Rights, you should choose your own lawyer.

STANDARD GENERAL LIABILITY POLICIES AND MASSACHUSETTS LAW

Standard general liability policies provide that the insurer will (i) *defend* the insured against claims, including attorney's fees; and (ii) *pay* damages for which the insured is held liable. This is known as the insurers "duty to defend" and "duty to indemnify." Of course, the insurer narrows its duty to defend and/or indemnify only to policy-covered claims.

> *We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.* ISO Form CG 00 01, Section I (1)(a)

Generally, an insurer's duty to defend is broader than its duty to indemnify the insured. See *Boston Symphony Orchestra v. Commercial Union Ins. Co.*, 406 Mass. 7, 10 (1989) ("It is axiomatic that an insurance company's duty to defend is broader than its duty to indemnify … the duty to defend is based on the facts alleged in the complaint and those facts which are known by the insurer"); *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 368-69 (1996).

Accordingly, if the plaintiff's complaint against the insured contains multiple claims, only one of which is covered by the policy, the insurer likely remains obligated to defend the entire action, including the non-covered claim. *Aetna Cas. & Sur. Co. v. Cont'l Cas. Co.*, 413 Mass. 730, 732 n. 1 (1992) ("[T]he weight of authority places the duty to defend all counts on an insurer which has a duty to defend at least one count of a complaint, barring a contrary agreement with the insured"); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 394 (2003) ("[I]f the allegations of the complaint are reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense.").

THE INSURER'S RESERVATION OF RIGHTS CREATES THE INSURED'S RIGHT TO CHOOSE COUNSEL

In the scenario where some of the plaintiff's claims arguably are not covered, the insurer is required to notify the insured of such potential lack of coverage. See *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 112 (1983); *Salonen v. Paanenen*, 320 Mass. 568, 573 (1947) ("Where an insurer seasonably notifies its insured that it is continuing to defend the case subject to its right to disclaim later, the insured is in no position to say that he has been misled, and can take the necessary steps to protect his rights"); *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276 (1970) ("A reservation of rights ... notifies the insured that the insurer's defense is subject to the later right to disclaim liability.").

Hence, after the insured notifies the insurer of the claims, the insurer likely will send the Reservation of Rights to the insured. Upon receiving the Reservation of Rights, you, the insured, **now have the right to select your lawyer**. See *Magoun v. Liberty*

Mut. Ins. Co., 346 Mass. 677, 684 (1964) ("Where the insured's interest in controlling tort litigation against him conflicts with the similar interest of the insurer, the insured may have good cause to ask that he be represented by counsel independent of the insurer"); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 407 (2003) ("[T]he insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.").

Forcing the insurer to allow you to select counsel certainly is in your best interest. An attorney hired by the insurer likely will not represent you with an eye toward maximizing coverage of the claims asserted against you. In fact, insurance defense counsel probably cannot assist you with coverage-related issues, because he or she would be representing both you and the insurer. Increasing the insured's chances for maximum coverage would run afoul of that same attorney's obligation to the insurer. Thus, you should choose your own counsel, who not only will defend the claims against you, but also will keep tabs on maximizing coverage — all while the insurer pays the bill.

MAKE SURE TO ASSERT THE RIGHT TO CHOOSE COUNSEL PROPERLY

If you receive an insurer's Reservation of Rights, you should immediately contact your attorney so that he or she can begin to create a record establishing coverage of the claims and to *preserve your right to demand your own counsel*. Your attorney should promptly send a letter to the insurer, opposing the Reservation of Rights and stating the insured's intention to engage an independent attorney, at the insurer's expense. Indeed, failure to timely oppose the insurer's selection of counsel could prohibit the insured's right to seek his or her own attorney. See *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 407 (2003) ("There is no indication in the record that [insured] either insisted on having the reservation of rights removed or, in the alternative, insisted on assuming control of its own defense … [a]s such, we conclude that [insured] acquiesced in the legal representation provided by [insurer].").

Of course, by opposing the Reservation of Rights and demanding your own attorney, this could compel the insurer to drop its reservation to disclaim coverage and accept full coverage of the claim. To that end, the insurer essentially would indemnify the insured up to the policy limits.

CONCLUSION

If your insurer reserves its right to disclaim coverage via a Reservation of Rights, it is imperative that you oppose such reservation and notify your insurer of your intent to select independent counsel to represent you. Your attorney will defend the actual claim *and* keep an eye toward preserving insurance coverage. Do not let the insurer control the defense of the claim against you if the insurer will not commit to full coverage. **FT**

FIRM **NEWS**

FLETCHER TILTON PC IS PLEASED TO ANNOUNCE TODD E. BRODEUR HAS RECENTLY BEEN NAMED A DIRECTOR OF THE FIRM

Todd Brodeur joined the firm as an Associate back in 2004 and has recently been named Director. He concentrates his practice in real estate, land use permitting/zoning, leasing, and commercial lending. Attorney Brodeur has been recognized for his work as a real estate attorney, named as a Rising Star, Top Massachusetts Lawyers by both Boston Magazine and Law & Politics Magazine. A member of various professional and community organizations, including the Worcester and Massachusetts Bar Associations, the Real Estate Bar Association for Massachusetts, and the Worcester Young Businessmen's Association. Attorney Brodeur also serves on the Board of Trustees at the EcoTarium in Worcester. He is a graduate of Trinity College and earned his J.D. from Suffolk University Law School. Mr. Brodeur works out of our Worcester office and can be reached at *508.459.8038* or *tbrodeur@fletchertilton.com*.

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Fletcher Tilton PC
Attorneys at law

The Guaranty Building
370 Main Street, 12th Floor
Worcester, MA 01608-1779

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