

## Employment News

CURRENT ISSUES IN EMPLOYMENT LAW

SUMMER 2001

### Choice of Law Provisions in Non-Competition Agreements May Not Be Enforceable, But Trade Secrets Can Still Be Protected

In an attempt to assure uniformity and predictability in their multi-state operations, many employers include two special provisions in their employee non-competition agreements. First, they specify where any suit must be filed (the “choice of forum”) and second, they specify which state’s law will apply regardless of where a suit is filed (the “choice of law”). However, two recent rulings by the Massachusetts Business Court demonstrate that, despite these specific contractual provisions, a court may direct the case to be filed in a place other than that specified in the agreement and may direct that the law to be applied will be the law of a state different from the state specified in the agreement. The decisions in these cases are significant to employers because other states are much less willing or, such as California, not willing at all to enforce non-competition agreements.

The first case, *Aware, Inc. v. Ramirez-Mireles*, involved a California resident employed by a Massachusetts-based corporation at its California research facility. The employee had come to Massachusetts for initial training and, while there, signed the employer’s standard trade secret, non-disclosure and non-competition agreement which stated that it would be governed and interpreted by

Massachusetts law (favorable to the employer). When the employee later quit his job and joined a California-based competitor, the employer brought suit in Massachusetts to enforce the non-compete.

In an initial ruling, the Business Court held that it would not abide by the parties’ agreement to apply Massachusetts law. The Court ruled that since almost all the employee’s work took place in California, it would be more appropriate to apply California law (which would not allow the employer to enforce the non-compete). Later, the Court dismissed the Massachusetts case entirely, holding that Massachusetts was an “inconvenient forum” and that any suit would need to be filed in California.

In *E Ink Corp. v. Drzai*, the Business Court refused to enforce a choice of forum provision. There, the California-based employee’s non-compete with his Massachusetts-based employer contained a provision under which the employee agreed that suits against him could be brought in Massachusetts. The Court ruled that, despite this choice of forum provision, the case should properly proceed in California because so much of the evidence and many of the witnesses were in California. In a major victory for the employer, however, before sending the case to California the Court granted the employer an injunction prohibiting the employee from using or disclosing his former employer’s confidential business information and trade secrets—protections which even California recognizes and enforces.

The practical lessons of these cases are clear: when drafting an employee contract, include both a “choice of law” and a “choice of forum” provision,

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## When Is A Job Function Essential Under The ADA?

The Americans With Disabilities Act (“ADA”) requires employers to provide “reasonable accommodations” to “qualified individuals” with disabilities, if those accommodations allow the individual to perform the “essential functions” of his or her job. But how does the employer decide if a function is essential?

Under federal regulations, there are two basic inquiries: (1) does the employer actually require employees in the position to perform the function; and (2) would eliminating the function “fundamentally alter” the position. The relevant factors that need to be considered are:

- Is the main or only reason the position exists to perform the particular function? If so, the function is probably essential.
- Could another employee perform the function? If the employer has only a few employees, another employee might not be available to perform the function, making it essential.
- Are special skills or expertise necessary to perform the function? Employees hired for their skills or expertise are probably performing an essential function when using those skills or expertise.

Two United States Court of Appeals decisions illustrate different aspects of the essential function issue.

In *Webb v. Clyde L. Choate Mental Health and Development Center*, a psychologist claimed that he was disabled by asthma, osteoporosis and a weakened immune system. He asked to be excused from interaction with violent patients or those with infectious diseases.

The Court found that contact with potentially violent patients was an essential function of his counseling job at the state hospital; that is, his job existed to treat patients who were likely to be violent, and

special skills were needed to perform that function. As a result, the court found that the Center did not have to excuse him from interaction with potentially violent patients.

In *Phelps v. Optima Health, Inc.*, the plaintiff was a staff nurse, one of whose functions was lifting patients. Because of a back injury, she could not lift 50 pounds, an essential function of the staff nurse position according to the employer. To get around her limitation, the nurse had other nurses help her lift patients. She was terminated when a new manager refused to go along with that arrangement.

The Court of Appeals in Boston held that the 50-pound requirement was an essential function of the nurse’s job. It also held that the employer was not required to allocate an essential function of her position to other employees. According to the Court, although a “reasonable accommodation” may include job restructuring, an employer is not required to allocate an essential function to other employees.

These decisions interpret the ADA and are dependent on the facts of the cases. Although state courts often follow Federal decisions when interpreting state handicap laws, employers must be sensitive to the possibility that particular state laws may be interpreted differently.

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SARAH KELLOGG  
[skellogg@kl.com](mailto:skellogg@kl.com)

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HENRY T GOLDMAN, Editor

*Kirkpatrick & Lockhart’s Labor and Employment Group* is dedicated to helping employers anticipate and cope with legal issues in a manner which contributes toward a productive work environment. Consistent with this goal, this newsletter will be published quarterly to provide information on current issues in employment law.

The Labor and Employment Group has experience in many aspects of employment law, including the myriad state and federal laws regulating employment relations, benefit issues, and labor relations. The Group also represents clients in litigation, including proceedings before administrative agencies and in state and federal courts.

This publication is for informational purposes only and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting with a lawyer.

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### Quick Quiz YES OR NO

- 1 Y / N - Massachusetts employers may pay their employees semi-monthly.
- 2 Y / N - A supervisor or manager can be held personally liable for sexual harassment.
- 3 Y / N - The Federal plant closing law (WARN) applies to employees with more than 50 employees.

## OUR CLIENTS ASK US

**QUESTION:** A female employee recently asked to take 10 weeks of maternity leave. Can we make her use personal or vacation time during that maternity leave? Our company is located in Massachusetts and is covered by the FMLA.

**ANSWER:** The answer is mostly “no” but a bit “yes.”

The FMLA permits you to require employees taking maternity leave to use personal and vacation time. However, the Massachusetts Commission Against Discrimination has issued guidelines on the Massachusetts Maternity Leave Act, and under those guidelines you cannot impose that requirement. Therefore, so long as the employee is using her 8 weeks

of Massachusetts maternity leave, even if that leave is concurrent with her family and medical leave, you cannot make her use vacation or personal leave.

However, your company is allowing the employee to take 10 weeks of maternity leave, so 2 of the 10 weeks are not leave which you are required to give her under the Massachusetts Maternity Leave Act. For those 2 weeks, you can require her to use personal or vacation time.

You should also be aware that the MCAD guidelines do not allow you to force the employee to use sick leave during the 8 week leave under the Massachusetts Maternity Leave Act.

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HENRY T GOLDMAN  
bgoldman@kl.com

*If you have any questions you would like addressed in this column, please let us know.*

## Return to Work Exam Held Lawful

According to a recent federal case, an employer may not be found liable under the Americans with Disabilities Act (“ADA”) for requiring an employee to submit to a medical examination, so long as the employer has a good reason for doing so.

In *Tice v. Centre Area Transportation Authority*, Randy Tice, a bus driver, sued his former employer, Centre Area Transportation Authority (“CATA”), for violations of the ADA. Among other violations, Tice alleged that CATA violated the ADA by requiring him to take a medical examination before he returned to work after a prolonged absence due to a back injury. Tice argued that he shouldn’t have been required to submit to an examination because he had followed CATA’s policy of submitting a Return to Work Certificate from his doctor, who said that Tice could return to work. Tice also argued that the court should consider the fact that CATA had never before required an employee to submit to an independent medical examination.

The court rejected both of Tice’s arguments. Under the ADA, an employer may require an employee to submit to a medical examination so long as it is job-related and consistent with business necessity. In this case, the employer did not have to rely on Tice’s treating physician’s Return to Work Certificate because (1) the doctor had changed his mind about Tice’s condition and failed to explain his reasoning, (2) the doctor’s diagnosis rested primarily upon Tice’s own evaluation of his

abilities and (3) the certificate stated only that Tice could perform his job duties to the best of his abilities.

In addition, the fact that the employer had never required another employee to submit to an examination was not dispositive. An employer’s practice, although relevant to whether an examination was necessary, was not sufficient in this case to show that CATA violated the ADA. CATA’s actions in requiring Tice to submit to a medical examination were reasonably based on business necessity—the employer had an objectively reasonable belief that Tice would not be able to perform his job duties. Therefore, CATA did not violate the ADA.

The *Tice* case offers useful lessons for employers considering whether they should require employees to undergo medical examinations. First, employers should make sure they can document why they believe the examination is required. Second, if an employer wants to require an employee to undergo an examination by a physician other than the employee’s physician, then the employer must be able to point to reasons why that particular examination is necessary and must follow the ADA regulations. Third, an employer should be wary of requiring an employee to undergo a medical examination if the employer has not required similarly situated employees to undergo examinations.

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KATHERINE WATRAS  
kwatras@kl.com

# Erroneous Classification of Worker as Independent Contractor is Costly

In a recent Massachusetts Superior Court case, *Eastern Casualty Insurance Co., Inc. v. EDJS Floor Covering, Inc.*, the courts again showed the consequences of erroneously classifying a worker as an independent contractor when in fact the person should have been classified as an employee.

EDJS Floor Covering purchased workers' compensation coverage and was obliged to report and pay premiums for coverage for all employees. In a routine audit, the insurer discovered that EDJS had been hiring installers to perform work without listing these installers as employees or paying workers' compensation premiums. Instead, EDJS had treated the installers as independent contractors.

The insurance company sued to collect over \$130,000 in unpaid insurance premiums due under its workers' compensation policy. The court held that the installers were employees of the company rather than independent contractors, and therefore held that EDJS was responsible for the unpaid premiums. The court noted that EDJS initiated contact with customers, estimated prices, provided supplies and materials, determined the scope of work, monitored the progress of jobs, and scheduled and assigned specific installers to specific jobs. In addition, the company was responsible for compensating the installers every Friday. In sum, the company's exercise of control over the installers was so significant that they were employees.

While this case addressed the employer's obligations to an insurance company, an employer may face numerous other consequences as a result of misclassifying workers. For example, state law may and often does impose serious civil and criminal penalties on an employer who fails to provide workers' compensation

## Choice of Law Provisions

*Continued from Page 1*

make sure both provisions are brought to the attention of the employee, and include a separate and specific non-use/non-disclosure provision covering trade secrets in addition to any general non-compete. But you must also be prepared for the possibility that the court will refuse to follow your choice of law or choice of forum provisions.

insurance to its employees. In addition, an employer may be responsible for a worker's federal and state income taxes if it fails to withhold these taxes. An employer may also be liable for employee payments to Social Security whether or not the employee has made those payments as a self-employed person, and misclassification may result in employer liability for the Federal Unemployment tax. Moreover, the IRS may impose additional penalties for failure to withhold taxes, file returns, or deposit taxes with the government.

However, it is not only insurance companies and the federal and state governments which can be troublesome to employers. For example, employees who are misclassified as independent contractors, whether or not they agreed to the misclassification, can sue the company for inclusion in benefit programs to which they are denied as a result of being misclassified. Therefore, because of the considerable risks involved with such a decision, employers should be very careful to properly determine whether a worker is an employee or independent contractor.

STEVEN WRIGHT  
[swright@kl.com](mailto:swright@kl.com)

## Quick Quiz ANSWERS

- 1 NO** - Only certain exempt employees may be paid semi-monthly. MGL c. 149, §148.
- 2 YES**
- 3 NO** - With some exceptions, it applies to employers with 100 employees. 29 U.S.C. §2901.

For additional information about this issue or to discuss other legal issues, please consult with:

Boston	Henry T. Goldman	617.951.9156	hgoldman@kl.com
Harrisburg	Andrew H. Cline	717.231.4514	acline@kl.com
Los Angeles	Paul W. Sweeney, Jr.	310.552.5055	psweeney@kl.com
Miami	Carlos M. Sires	305.539.3336	csires@kl.com
Miami	Daniel A. Casey	305.539.3324	dcasey@kl.com
New York	Loren Schechter	212.536.4008	lschechter@kl.com
Pittsburgh	Hayes C. Stover	412.355.6476	hstover@kl.com
Pittsburgh	Stephen M. Olson	412.355.6496	solson@kl.com
San Francisco	Charles L. Thompson IV	415.249.1017	cthompson@kl.com
Washington	Lawrence C. Lanpher	202.778.9011	llanpher@kl.com



Kirkpatrick & Lockhart LLP  
*Challenge us.*

KEITH LONG  
[klong@kl.com](mailto:klong@kl.com)