Employers walk fine line to avoid misclassification suits

Substance over form defining ‘contractors’

By Pat Murphy

Employers have their work cut out for them if they want to ensure that workers they consider to be independent contractors do not at some point in the future have tenable grounds to claim they should have been classified as employees entitled to certain benefits, protections and rights to overtime pay. The days of companies hiring people and simply labeling them independent contractors are over in Massachusetts, according to James W. Bucking, a management-side attorney at Foley Hoag in Boston. Bucking sees the key to future litigation as being whether the alleged independent contractor truly runs a business of his or her own.

“The dividing line is going to be between shams businesses forced upon a worker by the company and legitimate businesses that are really doing business,” Bucking said. “The solo consultant who’s a part-timer is done.”

Barrington attorney Chip Muller chairs the Rhode Island Bar Association’s Labor Law & Employment Committee. Muller said the fact that an individual may be defined as an independent contractor by an agreement with the employer matters little in misclassification cases. “This wouldn’t be such an angst-ridden area of the law if it were that simple,” Muller said. “Courts tend to give that little weight, if any.”

Litigation over alleged employee misclassification is one of the more active fields of litigation in the country, according to Bucking. He attributes the trend to two factors. First, he points to the “new economy” in which companies increasingly look to outsource functions that in the past might have been a regular part of their business. Second, though companies may view

Continued on page 14

Meredith L. Aimbinder’s path to working in higher education hasn’t been a straight line, but the Boston lawyer is confident she’s ended up where she belongs. Aimbinder became deputy general counsel at Emerson College in 2016, after stints as a litigation partner at Sunstein, Kann, Murphy & Timbers and as senior litigation counsel at global lighting tech company Oram Syntania.

Though Aimbinder’s career path may have zig-zagged, her passion for innovation and creativity has been the consistent driving force, she says. Practicing intellectual property law at Sunstein, she found the essence of the work was “promoting people who are coming up with great ideas,” and her subsequent roles have presented new ways to continue that mission.

“It’s taking that same interest and funneled it through different areas of law,” she explains. As one of just two lawyers at Emerson, Aimbinder feels deeply ingrained in the Boston school’s community and appreciates the opportunity to wear different hats in working with faculty and students.

“It’s such a generalist position that it allows me to be really sharp and constantly thinking of new things as they come in the door,” she says. Outside the office, Aimbinder recently began a one-year term as president of the Women’s Bar Association of Massachusetts, an organization that she says has been “a rock” for her throughout her legal career.

She recently sat down with New England In-House’s Matthew Cove.

Q. What’s been the biggest adjustment in working in-house at a higher education institution?

Continued on page 15

FMLA retaliation suit allowed even though employer not covered

By Eric T. Berkman

An employee could bring a retaliation claim under the federal Family and Medical Leave Act even though his employer was not covered by the statute, a U.S. magistrate judge has ruled.

The plaintiff employee, Joseph Reid, took 17 weeks of medical leave after being put on a performance improvement plan. Defendant employer Centric Consulting labeled the middle 12 weeks as FMLA leave, even though Centric did not have the requisite 50 employees within 75 miles of Reid’s workplace for the law to apply. Reid was fired, allegedly for performance reasons, three months after he returned. He brought an FMLA retaliation claim, arguing that Centric, having represented that he was entitled to FMLA leave, was equitably estopped from denying him the protections of the statute.

Centric argued in response that while the 1st U.S. Circuit Court of Appeals may have recognized equitable estoppel for FMLA interference claims, the doctrine did not apply to retaliation claims. U.S. Magistrate Judge Judith G. Dein disagreed. “[T]here is no First Circuit precedent to limit the application

Continued on page 13
ERISA fiduciary manager didn’t breach ‘duty of prudence’

1st Circuit: question of conduct, not results

By Barry Bridges

A recent holding from the 1st U.S. Circuit Court of Appeals is a reaffirma-
tion that ERISA’s “duty of prudence” for fiduciary managers of employer-spon-
sored retirement plans speaks to pro-
cess, not investment results, attorneys say.

The plaintiffs in the case contended that a “stable value fund” offered through their employer’s retirement plan was imprudently managed and monitored and resulted in depressed returns because it was invested too heavily in cash or cash equivalents, an allocation they characterized as a “rad-
cial departure” from the practice of sim-
ilar funds.

However, a three-judge panel agreed with the U.S. District Court in finding that the plaintiffs’ complaint was mere “hindsight criticism” of the investment strategy and that there was no breach of duty since the funds were invested as advertised.

Following closely on the heels of the court’s similar decision in Ellis v. Fidel-
ity Management Trust Company in

Pension Funds

January, 1st Circuit Judge David J. Bar-
ron wrote that although the fund man-
ger, Galliard Capital Management, may have followed a more “cash-foc-
cused” course than similar funds, “we do not see how that fact alone can suf-
cice to support a plausible claim that such decision-making was imprudent.”

The 30-page decision is Barchock, et al. v. CVS Health Corporation, et al.

Process-based test

Robert C. Corrente was local counsel for the defendants and its benefits plan

Committee.

The Providence, Rhode Island, law-
said the opinion reflects the pre-
vailing rule that a conduct-based test is
going to be applied “in cases like this, rather than looking at the ultimate re-
turn on investment.”

In arguing that industry surveys of similar funds are an indicator of the
appropriate percentage of monies to be held in cash, the plaintiffs looked past the fact that the CVS fund made investments in the way it said it would, Corrente added.

“It did exactly what it promised to do,” he said, noting that the stable val-
ue fund — or SVF — at issue was the second most conservative investment

Approach among the retirement plan
options available to the employees.

Although the Ellis holdings foreshad-
owed the outcome here, Corrente said the new question in Barchock was whether the plaintiffs could use what they termed as the plans “radical de-
parture” from the practice of like funds as a basis of liability, a view that the 1st Circuit rejected.

“You have to be able to show that the actual investments were such a depar-
ture from how the funds were repre-
sented that it becomes a misrepresen-
tation,” said Pierce Atwood’s Brooks R. Magratten of Providence. “You are not going to have a cause of action simply because a fund is an outlier. That by it-
self will not carry the day.”

The ruling is a practical one, he added, with the panel not wishing to get into the business of micromanaging pension funds.

“The court seems to be saying that as long as you can still call this a stable value fund and the participants have

not been misled in a material way, it is not going to jump in and tell Galliard what to do,” Magratten said.

McCarthy recognized the ruling’s re-
al-world approach.

“No one knows how the stock market will go, and that’s why we can’t have a rule on results,” she said. “In fact, the goal of ERISA is not to maximize prof-
its, but diversification and a long-term view to make sure plan participants are protected.”

The holding also is a reminder for ERISA practitioners to make sure in-
vestment policy statements are updat-
ed and followed, McCarthy said.

“That was the keystone of this case — that the investments matched the policy,” she said.

With the recent decisions in Ellis and Barchock, Magratten observed that the door for suing a fund manager in the ERISA context is not absolutely closed. Success will depend on showing a fund-
damental disconnect between the way the fund is described and the way it is actually invested, he said.

Another takeaway, Magratten said, is that plan fiduciaries have a duty to monitor and make sure that monies are being invested in accordance with the fund’s philosophy.

McCarthy offered a cautionary note that nothing in Barchock should be in-
terpreted as holding out a stable value fund as a preferred qualified default in-
vestment alternative, or QDIA.

“In fact,” she said, “the Department of Labor recently said that target date funds are the safe harbor for QDIAs.”

Sonja L. Deyoe, local counsel for the plaintiffs, declined to comment on the ruling.

‘Radical departure’ or conservative management?

The plaintiffs, employees of CVS, each allocated a portion of their re-
tirement investments to a stable value fund, part of a mix of “conservative” options available for their 401(k) de-
finied contribution plan.

In 2016, they filed suit in federal court, contending that the plans fidu-
ciary, Galliard Capital Management, breached its duty of prudence under ERISA by investing 27 to 55 percent of the fund’s assets in short-term debt ob-
jigations equivalent to cash, as opposed to intermediate-term investments that generally provide higher returns.

The plaintiffs further argued that such an allocation “departed radical-
ly” from the investment standards of similar funds and was a “severe outlier” when compared to the stable value in-
dustry as a whole.

The District Court judge dismissed the complaint for failure to state a claim, finding that plaintiffs were merely criticizing the performance of the fund with the benefit of hindsight. Such second-guessing could not sup-
port a claim under ERISA for breach of the duty of prudence, the judge found.

The 1st Circuit affirmed.

Considering the CVS stable value fund’s stated objectives, the panel found that the complaint failed to provide context for evaluating Galliard’s invest-
ment choices, and further concluded that the conservative investment goals disclosed to plan participants had been met.

Drawing upon the 1st Circuit’s recent holding on the duty of prudence in El-
lis, Barron emphasized that “miscon-
Sideration in the management of a stable value fund — when consistent with the fund’s objectives disclosed to the plan participants — is no vice.”

But the panel went further than El-
lis and weighed in on the plaintiffs’ novel claim that imprudence can be inferred solely from an allegation that a cash-equivalent allocation “departs radically” from industry averages.

Barron exposed weaknesses with that theory, primarily that such an argument did not supply the required context for the plaintiffs’ imprudence claim.

“The complaint does not allege any-
thing about the particular circum-
stances that Galliard faced in managing the fund,” Barron wrote. “It is hard to see how the fact that a stable value fund was run conservatively indicates that it was being run imprudently, because plaintiffs make no argument that of-
fering more conservative investments (such as money market funds) would constitute an ERISA violation.

And, even if the court accepted the “radical departure” premise, the plain-
tiffs did not put forth sufficient evi-
dence to make their case, he said.

“Given the paucity of allegations that the complaint makes about the circum-
stances facing the CVS stable value fund, it would be pure speculation to infer that Galliard did not have a good reason to make those ‘cash-heavy de-
cisions,” Barron wrote. “We see no rea-
son to accept the plaintiffs’ implicit as-
sertion that, in managing a stable value fund, a decision to take the path less traveled is for that reason imprudent.”

The argument that the underlying rationale of SVFs worked against Gal-
liard’s allocation percentages was also rebutted, since the plan allowed the

Trustee to offer a theory for determining, based on the financial logic of SVFs, how much liquidity is “too much” so that impru-
dence could be reasonably inferred.

With the claim against Galliard

thrown out, the 1st Circuit panel also
dismissed imprudent monitoring claims against the CVS defendants.
Employer bound by handbook’s pay policy at time of interview

By Thomas E. Egan

The amount of holiday and vacation compensation owed to an employee should be calculated based on an insert in an employee handbook she received during her interview in December 2008, a Superior Court judge in Rhode Island has ruled.

The employer contended that the employee was put on notice of a different holiday and vacation pay policy “with every passing holiday where her paycheck did not include holiday pay.” Judge Kristin E. Rodgers did not agree.

“There is no evidence that [the employer] provided [the employee] with an updated handbook concerning holiday and vacation pay,” the judge wrote.

The 10-page decision is LVD Staffing, Inc. v. State of Rhode Island, et al.

Matter of credibility

Pawtucket attorney Bernard P. Healy represented the Department of Labor and Training. He said the result in the case came down to a matter of credibility.

Healy also said Rodgers’ decision is a warning to employers to be careful before handing over written policies to employees during the hiring process.

“Just the fact there was a stated policy,” Healy said, adding that the employer attempted to set forth oral testimony trying to rescind that.

“Both the department and the judge were entitled to reject that argument,” he said.

Rhode Island attorney Bernard P. Healy said the decision is a warning to employers to be careful before handing over written policies to employees during the hiring process.

The employer’s counsel, Craig J. Watkinson of Warwick, declined to comment, noting that his client was considering a further appeal.

Employment history

Appellee Carolyn B. Charnley filed a complaint with the Department of Labor and Training’s Division of Labor Standards alleging non-payment of holiday and vacation wages due at the time of her separation from appellant LVD Staffing. LCD was a local franchise of Express Employment Professionals, a national chain providing staffing services.

Charnley had interviewed at Express in December 2008, at which time she was given an employee handbook that included an insert entitled “Holiday and Vacation Pay.”

On the insert, “Holiday Pay” was followed by a single asterisk and text that read: “When your normal work schedule is less than 8 hours per day, holiday and vacation pay will be adjusted accordingly.” “Vacation Pay” was followed by double asterisks and text that stated: “Benefits may vary at different locations.”

According to the employee’s testimony, an Express representative name Elaine informed her that those pay provisions applied to her.

Thereafter, Charnley worked with Express from Sept. 22, 2009, through March 3, 2011, and was placed at Wild Tree Herbs. She was assigned to one job during that time and was ultimately hired by Wild Tree Herbs, resulting in her separation from Express in March 2011.

The employee did not receive any holiday or vacation pay during the time she worked with Express.

On Sept. 23, 2011, a hearing was conducted by hearing officer Valentino D. Lombardi. The employee testified at the hearing, as did Maria Lopes and Susan Esposito on behalf of Express.

The hearing officer found that, based on the holiday and vacation pay plan included in the handbook that Charnley obtained in her December 2008 interview, she was entitled to pay consistent with the terms set forth therein.

The hearing officer explained that Express “presented no credible or substantial testimonial or other evidence to dispute the testimony of [Charnley]” that she had received a document detailing holiday and vacation pay and discussed the same with a representative of Express.

‘More than a scintilla’

The employer contended that the hearing officer erred in awarding holiday and vacation pay “precisely as stated in a Franchisor produced handbook and flyer dated (01/08) and notwithstanding language in close proximity that stated ‘benefits may vary by location.’”

Furthermore, the employer argued that the department’s decision was “made notwithstanding the employer provided two credible witnesses who gave testimony that LVD Staffing Inc. maintained a policy of no holiday pay and no vacation pay.” The employer contended that the hearing officer improperly rejected the testimony of Esposito and Lopes.

“Express essentially asks this Court to substitute its judgment on the weight of the evidence presented and conclude that its two witnesses and the practice of the company warrant reversal of the DLT Decision.” Rodgers wrote.

The judge found that to be an impermissible request in light of the competent, relevant evidence in the record that supported the agency’s decision.

The employer asserted that the employee was put on notice of a different holiday and vacation pay policy than she had been given in writing in December 2008 with every passing holiday in which her paycheck did not include holiday pay. That argument was based on the Rhode Island Supreme Court’s 1981 decision in Oken v. National Chain Co. But Oken was distinguishable, the judge said, finding that “Charnley’s receipt of paychecks without holiday pay included does not rise to the level of a written notice of modification, a subsequent discussion and an ultimatum as was the case in Oken.”

Rodgers pointed out that the evidence before the hearing officer did not demonstrate that, during the course of her employment, the employee had been expressly told that the holiday and vacation pay policy was anything other than what she was given in writing in December 2008.

“The Hearing Officer in the instant case relied upon the testimony of Charnley, the Holiday and Vacation Pay insert was provided at her December 2008 interview, and the company’s inability to present credible evidence to refute the information that Charnley claims she was provided in advance of her hiring by Express,” the judge found.

“This is surely more than a scintilla of relevant evidence which reasonable minds would accept as adequate to support a finding in Charnley’s favor,” Rodgers concluded.
Independent entity’s medical billing data ruled inadmissible

In separate cases, panels rule against FAIR Health

By Kris Olson

Trial judges did not err in declining to admit medical billing data compiled by the independent nonprofit FAIR Health under two arguably applicable exceptions to the hearsay rule, separate District Court Appellate Division panels in the Northern and Southern districts in Massachusetts have found.

Other judges have taken an opposing view of FAIR Health data, which is believed to be considered at trial. As a result, there is no end in sight to the admissibility battles, attorneys say.

The FAIR Health database was created in response to an investigation by the New York attorney general. That investigation forced a number of the country’s largest insurance companies to abandon the use of a similar but less comprehen- sive database created and maintained by a wholly owned subsidiary of one of those companies. As with its predecessor, the new database was created to identify the usual charge for similar medical services in a geographic area.

FAIR Health states its case

In an amicus brief submitted in the 2013 Massachusetts Supreme Judicial Court case N.E. Physical Therapy Plus, Inc. v. Liberty Mu- tual Insurance Company, FAIR Health argued that its database passed the test for admissibility under G.L.C. 233, §79B, in matters in which the reasonableness of health care charges, or the range of usual and customary charges, are at issue.

FAIR Health cited its “sound statis- tical methods,” which were over- seen by a team of disinterested experts based at Syracuse University.

In part, FAIR Health argued that its database is too big to be unreliable. As of five years ago, it contained information related to more than 15 billion medical and dental procedures.

At the time, the database cap- tured medical and dental services paid for by plans covering more than 129 million Americans, or approximately 70 percent of those covered by employer-provided pri- vate health insurance plans, accord- ing to FAIR Health.

FAIR Health contended that providers and government agencies had come to rely on “compiled” data sources such as its database “precisely because there is no equally reli- able and cost-effective alternative.”

The brief continued: “If actors in the healthcare industry must and do depend on compilations of data like FAIR Health’s, then it would make little sense to exclude information from the same sources when market- place disputes are submitted for resolution in the legal system.”

In the two recent cases, the insurer decided to pay less than the full amount that the providers had billed, deeming its payments “fair and reasonable” after consulting the data- base. The providers then sued to have the balances they believed they were due.

In both cases, the trial judge decided the data qualified for neither the hearsay ex- ception for “statements of fact published for persons in a particular occupation” un- der G.L.C. 233, §79B, nor for business records under G.L.C. 233, §78. The Ap- pellate Division has now validated those decisions.

The Northern District panel found that the trial judge had reasonably relied on the findings of a Salem District Court judge in a previous case.

The Salem judge wrote that FAIR Health “did not offer sufficient evidence to detail: an objective gathering of data; assurances that the data gathered was neither biased nor self-serving; the ex- act methodology for its calculation; nor assurance that the data gathered, in the states from which it is gathered, has cre- ated a set of facts relevant to [the case].”

In the Southern District case, the trial judge had appropriately determined that the FAIR Health data “was not relevant to the question of whether [the provider’s] charges were reasonable under G.L.C. 90, §34M, or alternatively, if marginally relevant, had the potential to mislead or confuse the jury,” the panel wrote.


Suspect sources?

It is not the first time state courts in Massachusetts have had to grapple with the reliability of a massive compilation of records of medical charges. In its 2013 decision in N.E. Physical Therapy Plus, Inc. v. Liberty Mutual Insurance Company, the Supreme Judicial Court identified flaws with a database maintained by Ingenix, a wholly owned subsidiary of United Health Group, one of the coun- try’s largest health insurers.

With its decisions, the Appellate Di- vision is implicitly recognizing that many of those flaws remain, despite the fact that FAIR Health is an independent nonprofit, said Salem lawyer Matthew T. LaMothe, who represented the plaintiff in Lomito. LaMothe’s colleague, Brian P. McNiff, represented the plaintiff in Pat- riot All Pro.

In an amicus brief submitted in N.E. Physical Therapy Plus, FAIR Health said its founding principle was to “bring fairness and transparency to health in- surance information.” That goal has not been realized, according to LaMothe, because FAIR Health relies on voluntary submissions from health insurers and does not include any information from auto insurers or medical providers.

“Generally, the sources of the data are suspect,” he said, adding that auditing of the data is lacking.

Rather than continue to try to rely on FAIR Health data, the Massachusetts PIP statute, G.L.C. 90, §34M, permits the insurance companies to hire their own medical providers to review bills. LaMo- the noted. The Legislature apparently preferred that alternative to a reliance on “hearsay a few times over” available through the database, LaMothe said.

The FAIR Health database was created in response to an investigation by the New York AG that forced a number of the country’s largest insurance companies to abandon the use of a similar database created and maintained by a wholly owned subsidiary of one of those companies.

Newton attorney Francis A. Gaimari, who represented the plaintiff in N.E. Physical Therapy Plus, said the recent Appellate Division decisions are a natu- ral consequence of not just his case but its 2008 precursor, Davovex v. Liberty Mutual Insurance Company, decided by the Northern District Appellate Di- vision.

“Under the state’s law, Gaimari said he was surprised that some insurance companies are still fighting to introduce aggregated data on the reasonableness of medical charges.”

“It’s almost like it has a cult following,” Gaimari said of the data.

But Milton attorney Jason J. Mellon, who represented Vermont Mutual in the two recent cases, said it is hardly a set- tled issue and pointed to decisions from 10 judges across the state finding FAIR Health data admissible after full eviden- tiary hearings.

For example, on May 2, Springfield District Court Judge William P. Hadley found in Valley Chiropractic & Rehabilitation, LLC v. Metropolitan Property and Casualty Insurance Company that the FAIR Health data met the requirements of G.L.C. 233, §79B, and was “ distinguishable” from the Ingenix database considered in N.E. Physical Therapy.

Hadley added: “As to the question of trustworthiness, I am satisfied that FAIR Health has sufficient safeguards in place to justify an imputing of reliability, which is demonstrated by the fact that multiple agencies from Florida to Alaska rely upon and use its data.”

But in comparing the Ingenix and FAIR Health data, Gaimari said he saw “no practical difference” in terms of transparency. He added that there also is no practical way to verify the data, even through the normal discovery process.

Boston attorney Marc L. Breakstone said he, too, thinks there are too many unknowns with FAIR Health data.

“There was no foundation provided for any indicia of reliability that would gesture the data from the usual bar on the admissibility of hearsay,” he said.

According to Gaimari, the last word on the subject of whether insurance companies can use FAIR Health data should be the Appeals Court’s 2014 deci- sion in Hurtanian v. Pilgrim Insurance Company.

In Hurtanian, the court held that the insurance company’s use of a computer program to assess the reasonableness of a doctor’s charges not only did not com- ply with the clear requirements of G.L.C. 90, §34M, but its use as a substitute for a practitioner’s review of billing state- ments and underwriting services provided an additional basis for an inference of the insurance company’s lack of good faith under Chapter 93A.

Rather than get into the weeds over whether the database was accurate or not, Gaimari said Hurtanian stands for the proposition that it is “still not statu- torily permissible” to use FAIR Health data.

He acknowledged that G.L.C. 90, §34M, enacted in 1970, pre-dates sophis- Continued on page 13
Nursing home entitled to arbitrate wrongful death suit

By Pat Murphy

A wrongful death suit against a nursing home fell within the scope of an arbitration agreement signed by a family member under a power of attorney shortly after the decedent’s admission to the facility, a U.S. District Court judge has determined.

The personal representative of the decedent’s estate argued that claims of wrongful death beneficiaries are independent of claims of the estate and, therefore, not subject to an arbitration agreement executed on behalf of the decedent.

Judge Douglas P. Woodlock concluded that, under Massachusetts law, the claims of wrongful death beneficiaries are “derivative” of the decedent’s claims.

“I am persuaded that the Supreme Judicial Court of Massachusetts, if presented directly with the question, would conclude that a wrongful death claim is a derivative claim as to which the decedent’s representatives and beneficiaries would be bound by an agreement to arbitrate,” Woodlock wrote.


Common sense and plain meaning?

Newton Center attorney Krzysztof G. Sobczak argued the arbitration issue in U.S. District Court in Massachusetts on behalf of the estate. Sobczak has since withdrawn from the case and the estate is now represented by David J. Hoey of North Reading, who also originally filed the underlying personal injury action in Middlesex Superior Court.

In an email, Hoey wrote that the estate is filing a motion to amend, alter or set aside Woodlock’s order. Hoey said the SJC has already made clear that wrongful death claims are not derivative of a decedent’s claims, citing the SJC’s 1995 decision in Thibert v. Milka, as well as a 1972 case, Gaudette v. Webb.

But Boston attorney Joseph M. Desmond, who represented the nursing home, maintained that Woodlock’s decision was consistent with the language of Massachusetts’ wrongful death statute, which limits beneficiary recovery to what the decedent could have recovered for personal injuries had death not resulted.

“Applying common sense and the English language, they are claims derived from the decedent’s claim. They are not an independent claim,” Desmond said.

Desmond successfully argued in favor of the general validity of arbitration agreements executed in the context of nursing home admissions in the 2007 SJC case Miller v. Cotier.

“It’s functionally the same arbitration agreement 11 years later,” Desmond said.

“We have legal authority that, in the absence of fraud, duress or unconscionability, you have a binding, enforceable agreement.”

Quincy personal injury attorney Kathryn J. Wickenheiser took issue with Woodlock’s ruling that wrongful death claims are derivative. She said Woodlock should have followed the reasoning of U.S. District Court Judge Rya W. Zobel in her 2011 decision Chung v. StudentCity.com. In Chung, Zobel held that statutory wrongful death beneficiaries are not bound by a decedent’s decision to sign an arbitration agreement.

“The Chung case hit the nail on the head,” Wickenheiser said. “It’s impossible to have the meeting of the minds that’s needed to enforce a contract. A signature beneficiary to an arbitration clause cannot possibly predict the future. The [decision to] take legal action should be left to those still alive.”

Charlestown personal injury attorney Susan M. Bourque questioned the application of traditional contract principles in determining the enforceability of arbitration clauses in the nursing home context. According to Bourque, such an approach fails to take into account the climate in which families typically place a loved one in a nursing home.

“People assume they have to sign all the forms in order to get their loved one in,” she said. “They’re usually not told they don’t have to sign the arbitration agreement. They’re signing not knowing the implications of what they’re signing, not knowing that they’re waiving a pretty important right.”

Motion to compel

According to Woodlock’s findings of fact, on Feb. 4, 2013, Emma Schrader was transferred by ambulance and admitted to Golden Living Center Heathwood, a nursing facility operated by the plaintiff. Although defendant Jackalyn Schrader did not sign admission documents for her mother at that time, within several weeks the defendant signed a number of admission documents under a power of attorney, including an arbitration agreement.

According to the defendant’s state court complaint, her mother died on Dec. 3, 2013, as a result of a severe sepsis infection caused by pressure sores. The defendant was subsequently appointed personal representative of her mother’s estate.

In 2016, the defendant as personal representative sued in Middlesex Superior Court, asserting claims of negligence and wrongful death against the nursing home. The plaintiff responded by filing an action in U.S. District Court to compel arbitration pursuant to the Federal Arbitration Act.

Wrongful Death

Derivative claim

In deciding to grant the plaintiff’s motion to compel arbitration, Woodlock first turned to the question of whether the plaintiff’s arbitration agreement was enforceable against the defendant as a matter of general contract law. The judge found no evidence that the defendant did not consent to the terms of the arbitration agreement she signed and therefore concluded a valid contractual agreement to arbitrate existed.

The judge further found no basis for invalidating the arbitration agreement on the ground of unconscionability. With respect to procedural unconscionability, the judge concluded that the arbitration agreement given to the defendant “clearly indicated” in bold-face capital letters that the agreement was not mandatory for continued care and warned the defendant she should read the entire agreement.

The judge likewise found no substantive unconscionability.

“The agreement here is bilateral because both parties are bound to arbitrate,” Woodlock observed. “Jackalyn Schrader had the right to rescind the arbitration agreement within 30 days of signing.”

The defendant argued that her wrongful death claim could not be arbitrated because the wrongful death beneficiaries were not parties to the arbitration agreement.

Woodlock explained that the question of whether non-signatory beneficiaries of an estate are bound by an arbitration agreement entered into by the decedent turned on whether wrongful death claims in Massachusetts are considered “derivative” or “independent.” He found only one other case directly on point.

In Chung, Judge Zobel held that an arbitration agreement signed by a student who died on a tour to Mexico did not bar his parents’ wrongful death claims against the travel company that organized the trip.

But Woodlock “respectfully disagreed” with the holding in Chung, reading the law in Massachusetts as moving toward interpreting wrongful death claims as derivative of the decedent’s cause of action. He found support....

Continued on page 15
Sarah Walters is a partner in MDer- mot, Will & Emery’s white collar and securities defense group and a former assistant U.S. attorney in Boston. She conducts internal investigations and assists companies in developing compliance policies and training programs.

Sarah Walters and the #MeToo movement have made very clear, actually investigating and addressing misconduct allegations is the right thing to do. Complainants deserve it, and so do the accused. The media is not the right place to debate what did or did not happen. Too much is on the line for the individuals involved.

In addition, a thorough investigation will help protect the company from potential liability. The crux of so many of the lawsuits that have been filed — whether by the complainants, the accused, or the shareholders — is that management did not adequately investigate complaints of harassment before taking action, or not taking action.

A company can have the most robust policies and training programs in place yet fail to adequately investigate and address complaints makes those efforts meaningless. Ultimately, it is the strength of the investigation that will set the right tone and protect the company from liability. And it will be scrutinized by the media and potential litigants. So you need to do it right.

What are the key components of a good investigation in the era of #MeToo?

**Independence**

The investigation must be independent. Not only must the investigation be independent, meaning that it must be conducted by disinterested parties, but it must be viewed as independent by those involved and by the outside world.

An investigation conducted by individuals who are close to those involved has no chance of uncovering what really happened, which is of course the ultimate goal. Witnesses are unlikely to be candid, and none of the parties will feel that their interests were taken seriously.

In addition, an investigation that lacks the appearance of independence will not protect the company from claims challenging the sufficiency of the response. If the response to a complaint of misconduct is a sham investigation, that in and of itself can form the basis of corporate liability.

The need for independence does not necessarily mean that the investigation must be handled by investigators outside the company. In larger companies especially, it may be possible for in-house lawyers or trained investigators within the human resources department to conduct the investigation. It is critical, however, that those conducting the investigation be entirely removed from the employees involved. If the investigators know the employees at all, even in passing, the air of independence is lost.

If the complainant or the accused are senior managers, it will almost always be necessary to bring in outside resources to conduct the investigation. It is simply not possible for subordinates to conduct an independent investigation involving senior managers. Even if the reporting structure is such that the investigators are in a separate chain of command, the profile of those involved within the company will influence how the investigation is conducted and the conclusions reached.

Equally important, as recent media reports have made clear, when a high-level or prominent individual within the company is involved, the investigation will not be viewed by other employees or the public as independent if it is conducted by internal investigators.

**Comprehensiveness**

The investigation must be thorough. These are complicated investigations. Often, investigators may be dealing with “he said, she said,” with very few, if any, witnesses to the alleged conduct.

If there are witnesses, then investigators must speak to everyone they can, and expand the scope when new issues arise. Documents can and should be re-viewed. Emails, text messages and social media all are rich sources of information not only about a specific incident, but about how the employees have interacted over time.

Even in the “he said, she said” situation, those documents may still exist. As experienced investigators know, even absent witnesses, reviewing this and other information can help corroborate what is provided directly by both the complainant and the accused and allow investigators to make those critical credibility determinations.

**Proper reporting**

There must be a plan for how to report the results of the investigation. There are a number of important factors to consider. The conclusions must of course be reported to those within the company who have the authority to make the ultimate decision about whether to take any employment action. As a general matter, then, the investigation should be report-ed to the general counsel’s office.

If the investigation involves a higher-level executive, someone to whom the general counsel may report or an equal to the general counsel, then the report should be made to the board, or a special committee of the board. This comes back to issues of independence. An independent investigation is critical, and the decision-makers within the company must be independent as well. If the general counsel even appears interested or conflicted, the report should be made to members of the board.

In addition to reporting the results of the investigation to the right decision-maker, it also is important to report the results to the individuals involved. This can be complicated because there are privacy concerns and, if the investigation has been conducted by counsel, there may be issues with privilege as well.
For employer, paid admin leave not always a safe harbor

A recent ruling from the U.S. District Court in Massachusetts may surprise employers who order paid administrative leave for employees being investigated. The lesson of the case is that, depending on circumstances, paid administrative leave might constitute a materially adverse employment action sufficient to prove an unlawful retaliation claim against the employer.

Judge Rya W. Zobel issued the opinion in U.S. ex rel. Herrman v. Coloplast Corp. And although the 1st U.S. Circuit Court of Appeals itself has not addressed this paid administrative leave issue directly, five other federal circuits have ruled contrary to Coloplast that paid administrative leave during a disciplinary investigation had not been an adverse employment action.

Part of the reasoning in the other federal circuits has been that an employee generally does not suffer a materially adverse change in the terms and conditions of his employment when placed on paid administrative leave during an investigation, because those terms and conditions do not include a right to expect being allowed to continue with normal work responsibilities while serious charges are pending.

An employment claim based on unlawful retaliation typically requires the employer to prove that he was harmed by the employee's materially adverse action. Some materially adverse actions are recognized easily. They include employment terminations; demotions evidenced by a decrease in compensation; a less distinguished title; a material loss of benefits, or significantly reduced responsibilities; and other changes unique to a particular situation.

But placing an employee on paid administrative leave has been seen by many employers, as well as many courts, as a relatively risk-free way to proceed. The theory has been that even though the employee may have engaged in some type of protected activity (such as, e.g., complaining of unlawful discrimination), the employer cannot be liable for unlawful retaliation because paid administrative leave is not a materially adverse change in the employee's circumstances.

For example, as the U.S. Supreme Court has explained, an employee complaining of unlawful discrimination under Title VII generally is protected “not from all retaliation, but from retaliation that produces an injury or harm,” and to prevail on a retaliation claim he therefore “must show that a reasonable employee would have found the challenged action materially adverse,” meaning that it might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2415-16 (2006).

When the employee has engaged in protected activity, all possible ramifications of the administrative leave have to be scrutinized in advance.

Coloplast involved the anti-retaliation provision of the False Claims Act. That provision shields employees who engage in protected FCA conduct from being “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment.”

The plaintiff in Coloplast had been one of the defendant’s key account managers, or KAMs. The plaintiff also had engaged in protected activity under the FCA by filing a qui tam action alleging that her employer had engaged in fraudulent activity. And according to the employee, an unlawful retaliation claim was warranted as well, because her employer took various administrative actions against her during its investigation of a third-party’s demand that she be removed from one of her accounts.

As the judge noted, those administrative actions, depending on one's viewpoint, could be labeled either a “suspension” or a “paid administrative leave.” The key dispute was whether the interim administrative actions had been “materially adverse” and therefore sufficient to constitute retaliation under the FCA.

A major lesson in Coloplast thus turned out to be one that we have seen many times in other cases—that is, mere labels (e.g., “suspension” or “paid administrative leave”) do not determine liability.

And even though a particular administrative action may be intended as a “no harm to the employee, therefore no exposure by the employer” measure, a more nuanced analysis is required that will go beyond the labels to determine the merits of an unlawful retaliation claim.

It was, for example, obvious in Coloplast that the employer had made an effort to maintain many of the positive aspects of the status quo during the employee’s administrative leave. The employer had advised in advance that salary and commission would be paid according to the regular process; guaranteed a minimum commission payment of 100 percent of the eligible target incentive for each month; and promised full eligibility for enrolled benefits would continue.

And, in fact, the employer had paid the employee $80,000 in commissions while on leave whereas the average KAM commission had been less than $68,000 during the same period.

The employer also had given the employee a raise during her leave; allowed continued use of the company-issued vehicle and fuel card; allowed accrual of paid time off; continued making contributions to the employee’s 401(k); and maintained health, disability and life insurance benefits.

But those non-adverse circumstances, by themselves, were not the end of the analysis. The judge also found that, while on leave, the employee had been prohibited from performing any services on behalf of her employer or having any contact with her employer's customers or employees relating to her accounts or the employer's business. Those prohibitions, the employee said, showed that she "could not grow herself professionally."

Further, the employee also had lost opportunities to attend a "President's Circle trip" and earn commissions above the 100 percent quota level.

As a result, Zobel denied the employer's motion for summary judgment on the unlawful retaliation claim. Her rationale was that a jury could conclude that a reasonable employee in the plaintiff's position might be dissuaded from engaging in protected activity by the threat of such materially adverse changes in his circumstances at work.

The bottom line for employers thus is clear: Because paid administrative leave can have many ramifications, it may not always be a safe harbor for an employer during an employee investigation.

When the employee has engaged in protected activity, all possible ramifications of the administrative leave have to be scrutinized in advance, because any materially adverse ramifications may be claimed by the employee as evidence of unlawful retaliation.

Providing Exceptional Legal Services
Client by Client. Case by Case.

Corporate Tax
Trusts & Estates Litigation
Education Employment Health Care
Intellectual Property Privacy & Data Security
Energy Environment Real Estate & Land Use
Personal Representation Bankruptcy
Government Investigations Criminal Investigations

McLane.com
Massachusetts: Woburn | Boston
New Hampshire: Manchester | Concord | Portsmouth

David C. Henderson is a partner in the litigation department and member of the labor, employment and benefits practice group at Nutter in Boston.
New EU data protection requirements pose challenges

The GDPR gives EU data subjects greater rights regarding their ability to access and control their personal data, while also imposing certain requirements on entities that maintain or process personal data.

The GDPR replaces the DPD, most notably by expanding the territorial scope of existing EU data protection laws. Among other things, the GDPR dictates how companies with no physical presence in the European Union must collect, store, process and destroy the personal data of EU citizens who work (or apply to work) outside the EU. The GDPR also provides that employers who do not comply with the GDPR may be subject to fines up to 4 percent of annual global turnover — a large sum in Europe and Asia that is synonymous with “revenue” or 20 million euros (whichever is greater).

The GDPR gives EU data subjects greater rights regarding their ability to access and control their personal data, while also imposing certain requirements on entities that maintain or process personal data. Those requirements include, by way of example, the following:

- **Legal basis for processing data.** To the extent that covered employers process the personal data of covered employees, they must have a specified, legal basis for doing so. The most common of these legal bases is consent. However, the GDPR defines consent narrowly, requiring, among other things, that consent to processing personal data be irrevocable and freely given for a specific purpose. Additionally, in the employment context, consent will be deemed freely given only under exceptional circumstances, given the imbalance of power between the parties. Therefore, employers may have to rely on one of the other five specified bases for processing personal data — for example, when processing is necessary for the legitimate interests of the business or the performance of an employment contract.

- **Data protection officer.** Organisations may be required to designate a data protection officer (DPO) to ensure compliance with the GDPR.

- **Data protection regulations.** The GDPR includes numerous regulations on how personal data should be processed, including rules on data retention, data security, and data breaches.

- **Data subject rights.** EU citizens have the right to access, correct, or delete their data, as well as the right to be informed about how their data is being used.

- **International data transfers.** The GDPR imposes strict rules on the transfer of personal data outside the EU, requiring appropriate safeguards to be put in place.

Employers with questions regarding their obligations under the GDPR are advised to consult with legal counsel familiar with EU data protection laws.
SPECIAL FEATURE

10 FAQs about MEPA’s compensation history prohibition

Barry J. Miller and Hillary J. Massey

A new prohibition on requesting the compensation history of an applicant prior to making an offer of employment will take effect on July 1, as part of the legislative amendments to the Massachusetts Equal Pay Act. Employers and their counsel may want to consider these 10 Frequently Asked Questions and the attorney general’s informal guidance about the law. (https://www.mass.gov/maassachus-etts-equal-pay-law).

1. What does the law prohibit?
The law prohibits seeking the “wage or salary history” of a prospective employee from the prospective employer or a current or former employer, or requiring that the person’s prior wage or salary history meet certain criteria. If an applicant has “voluntarily disclosed” the information, the employer may “confirm” it. The prospective employer may also seek or confirm salary history after making an offer of employment with compensation.

The attorney general has explained that questions about compensation “expectations” are permitted but employers “should proceed with caution when asking such questions and ensure that such questions are not framed or posed in a way that is intended to elicit information from the prospective employee about his or her salary or wage history," e.g., “what is that expectation based on?” Employers should carefully consider whether to ask any follow-up questions about compensation expectations that a candidate might interpret as connected to his or her compensation at a current or previous job.

2. Which employers are covered by the law?
All employers except the federal government are covered. “Employer” includes “any person acting in the interest of an employer directly or indirectly.” G.L.c. 149, §1.

The AG’s guidance provides that the law covers nearly all employers in Massachusetts, including state and municipal employers, irrespective of size. It does not apply to the federal government as an employer. It also explains that “MEPA’s prohibition on employers seeking the salary or wage history of prospective employees means that employers may not seek information on their own or through an agent (e.g., a recruiter or job placement service).” As noted below, the law may also reach employers that are not based in Massachusetts but have employees in the commonwealth.

3. What should employers do now to get ready?
Employers should consider reviewing and revising their job applications and policies applicable to workers in Massachusetts to remove any questions about compensation expectations. It is not clear whether a “disclaim er” (e.g., “Candidates for employment in Massachusetts need not respond to this question”) will be sufficient under the new law, and officials in some other jurisdictions with similar salary history bans, including New York City, have opined that such disclaimers are not sufficient.

The safest practice therefore is to eliminate questions on any such forms that will be completed by potential Massachusetts employees. Employers also should consider training recruiters, managers and other employees involved in the hiring process. This training should include admonitions to such employees not to ask information about an applicant’s compensation history, and some employers may also want to arm their recruiting personnel with prophylactic disclaimers about any information that an applicant may voluntarily choose to provide.

4. How is wage or salary history defined?
“Wages” are defined as “all forms of remuneration for employment.” Salary history is not defined. Though not addressed, it likely does not include competing offers from other prospective employers or the applicant’s current employer because such offers are not wage or salary “history.”

5. What is the reach of the law, i.e., may employers ask about compensation history of a candidate who is applying for a job outside of Massachusetts or at an interview held outside of Massachusetts?
The statute does not address the extraterritorial reach of the law. The AG’s guidance takes the position that the law will apply to employees with a “primary place of work in Massachusetts,” regardless of where the employee lives. It explains: “For most employees, the location where they do most of their work for their employer is their primary place of work,” and provides five examples, including:

“1) If the employee spends work hours traveling outside Massachusetts (making deliveries, engaging in sales, etc.) but returns regularly to a Massachusetts base of operations before resuming a new travel schedule, Massachusetts is the primary place of work."

2) If an employee is constantly switching locations of work, the primary place of work may be determined by assessing the state in which the employee spent the plurality of his or her working time over the previous year. For new employees, employers should make a reasonable assessment of the primary place of work.”

The guidance also explains: “It is possible that prospective employees will be chosen or assigned to work in Massachusetts (or to have Massachusetts as their primary place of work), employers should take care to ensure that they do not ask questions or seek information that violates MEPA. The fact that an employer initially was unsure where an employee would be located is not a defense to liability under the law.”

6. Does the law apply to applicants for internal transfer or promotion with their current employer?
No, according to the AG. However, the AG’s guidance reminds employers that “at no time will an employee’s salary history — with any employer — justify paying that employee less than an employee of a different gender who performs comparable work.”

This dynamic can create a trap for the unwary. It is a relatively common practice to maintain an employee’s rate of compensation when he or she is transferred (or even demoted) into a position that otherwise would pay less than the employee’s current position. If an employee’s historical compensation with the employer is not a valid defense under MEPA, then such transfers may create pay equity claims on behalf of all other employees of the opposite gender in the position to which the individual is transferred.

7. If an applicant volunteers information about compensation history, may an employer rely on it in setting compensation?
This is not addressed and is risky. The law allows employers to “confirm” salary history that is voluntarily disclosed and provides that an employee’s salary history is not a defense to an equal pay action. It does not address reliance on voluntary disclosures.

However, in response to an FAQ about publicly available information, the AG’s guidance explains: “[R]egardless of the source of the information, employers should keep in mind that at no time will an employee’s salary history justify paying that employee less than an employee of a different gender who performs comparable work.”

The circumstances in which it makes sense to rely on such information are limited. Continued on page 14
You don’t have a choice when it comes to the ‘digital economy’

Stephen M. Honig

“The last 10 years of IT have been about changing the way people work. The next 10 years of IT will be about transforming your business.”

— Aaron Levie, CEO of Box

This is a shallow dive in a deep pool. What is the digital economy? What does it mean for companies that must operate within it? What does counsel need to know in order to advise management? What does counsel tell its board of directors?

What is it?
The digital economy is an inclusive catch phrase understood to capture the impact of digital technologies on everything in your business. The definition includes what happens inside your company: how your people work together, how you communicate, how you market and sell, how you order parts or services and manage inventory, how you bill and collect, how you hire, how you use big data and artificial intelligence (AI) to achieve efficiency, identify opportunities and increase profitability, how you determine what business you should be in (if not the business you conduct today). The digital economy is about using hard tools (computers and communication systems) and soft tools (software that connects your people, including APIs [application programming interfaces that permit various software programs to communicate]). Digital expertise is essential to future internal operations, external operations, and achieving profitability by defining your market and your deliverables.

Disintermediation
It is an economy that will cause significant disintermediation. Part of it is blockchain, a method of open record-keeping that eliminates intermediaries, steps and entities. (This extends far beyond cryptocurrency, and is far more important.) In the financial sphere, blockchain may eliminate or alter the functions of banks, credit cards, securities exchanges, accounting and auditing firms, and other intermediaries. Blockchain is further described below.

Big data also disintermediates: it can obsolete consultants, surveys, market researchers, pricing firms, financial analysts, headhunters and HR people. It can identify where you make and lose money. It can tell you which products and services to provide, where and at what price point. The internet also disintermediates. It can replace entire intermediation functions: real estate brokers, physical stores, supply chain players like wholesalers, distributors, warehouses and sales people. Internally, it can reduce your staff. Speed your production, cut your costs, and solve delivery issues where speed is king (plotting routes, robots, self-driving vehicles, things that fly).

Digital economy skill is a mindset that is the ultimate future weapon in the business world. Your company plays in that world whether you know it or not. And knowing it is not enough, you need to be ahead of it. Ask Blockbuster, Ask Toys R Us, Ask Kodak, which is now remaking itself entirely.

What laws apply?
The law of the digital economy is scattered and nascent. The reason is that digitization of business affects everything. The law cannot keep pace. Counsel needs to search for the ever-expanding legal impact of the digital revolution by looking for the newest developments relating to the various applicable legal issues present in transactions currently effected by traditional means. Today, the most obvious area of legal involvement is dealing with cyber risk, which can be catastrophic but, in the long term, will not be the most profound legal issue.

There are multi-volume treatises covering the law of the internet, and how to sell, contract and communicate. Companies providing the hardware and software must deal with all the IP issues, and push antitrust concepts in that inter-connectivity requires competitors or future competitors to work together on standards, interfaces and connectivity with each other’s technology. Users of digital technology must adapt promptly to rapidly changing methods of internal and external operation. Non-users of digital technology run a good chance of being left in the dust.

Sellers of goods and services (not to mention political parties) need to be aware of future laws that will limit access to data amassed from social media and databases through “scraping” or analysis. Use of improper data creates reputational risk and ultimately will create legal liability. Congress presently is considering regulation of these practices. Sellers also need to learn how to protect their copyrights, marks, and trade dress in electronic commerce. Companies in health care already have their data closely regulated. Offshore legislation impacts what data an online vendor may gather from a foreign jurisdiction (see the new EU GDPR regulations effective May 25).

But these issues in current awareness are only the tip of the iceberg. The digital revolution will remake hiring, labor and discrimination laws. It will ultimately force alterations in the Uniform Commercial Code and will change our structure of dispute-resolution mechanisms (courts, arbitration, other tribunals) and issues of choice of law and forum. It will compel changes in laws controlling undesirable business behavior: contract remedies, tort definitions, business and product libel, credit facilities and regulation, product disclosure and misstatement, definitions of who can sue whom for what. We see the current debate as what digitization means to the definition of money, with implications for the role of the national states.

Today, blockchain technology reportedly is being used as a simple ledger for numerous purposes, including for example the sale of livestock, inventory control, bitcoin transactions and management of securities portfolios. You also could record stock trades directly, eliminating brokers and registrars and exchanges. Delaware has legislated permission for the blockchain maintenance of corporate ownership data. You also could replace registers of deeds, lawyers and title insurance policies by recording realty transfers and liens.

Blockchain contracting
The entire contracting process can be disrupted. Counsel needs to become adept at contract formation using blockchain. We have been trained to prepare “wet contracts,” those embodid in “hard copy.” Disputes arise in identifying definitive copies or tracking amendments. Who has the paper for the definitive deal? Using software, a “smart contract” can be created and performed through blockchain technology. A draft can be negotiated, accepted by all parties and electronically signed using electronic code “keys,” and locked into an unalterable data block.

But you also have created a “smart” contract that can facilitate actual contract performance. Let us say it calls for delivery of goods followed by payment. Protocols for proof of receipt of goods — say, from a shipper — can provide delivery confirmation. On receipt of that information, funds could be automatically transferred electronically. No human being need participate in any of these performance steps.

Technology does not eliminate all risk of error or fraud. Companies will need to address it at its source. Data relating to proof of performance may be compromised. Poor processes may permit unauthorized access to a party’s key. Insurance against such risks may be indicated. There will be legal issues in ascribing liability for design or technology failure, or for non-compliance with law relating to the subject matter of the contract (rather than to its manner of formation), and issues of enforcement (jurisdiction, venue, service).

But blockchain is disruptive and expanding quickly. Per the National Association of Corporate Directors’ Directorship magazine, “Companies today that do nothing about blockchain are at risk because you have consumers running hard on adopting new technologies. … If you are not in those conversations from a strategic point of view, there is a risk on the horizon of not understanding the changes that are coming.”

Counsel and boards
Counsel needs to understand the digital economy and take the lead in implementation. But boards are responsible for overseeing strategy, and its handmaiden, risk mitigation. Counsel needs to remind boards that they must monitor company response to all aspects of the digital economy: how the compa-
Sharing, mining patient data in digital health and telemedicine

Interoperability of shared data is one of the most important aspects of this industry trend. Even Bruce Greenstein, chief technology officer of the federal Department of Health and Human Services, pledged at HIMSS18 to share more health data between federal departments and with the public. “The American people own the data that is in HHS, not a bureaucracy that has been there for 20 years and thinks that they have the control because other people might misuse it,” he said. “People outside of our building will do much better things with it than we are doing with it alone right now.”

Data sharing must be done in a meaningful, cohesive manner. Shared data must be readable, usable and available to other providers. As data sharing becomes more accepted throughout the health care industry, companies must take steps to ensure their data sharing complies with state and federal regulations that protect patient privacy and the choice not to share PHI.

Health data mining, sharing under HIPAA

The Health Insurance Portability and Accountability Act is a federal law that governs the use and disclosure of PHI by covered entities, defined as health plans, health care clearinghouses, and health care providers that electronically transmit PHI.

The general rule is that PHI cannot be disclosed without the patient’s authorization. However, certain uses and disclosures of PHI for treatment, payment and health care operations, or TPOs, do not require patient authorization if the TPO conditions under HIPAA are met. Fortunately, many data sharing arrangements can be structured to meet the TPO exception and therefore would not require the patient’s authorization. Even if a provider shares PHI under the TPO exception, it must still comply with minimum necessary disclosure requirements, agreed-upon patient restrictions to the use and disclosure of PHI, and other state laws that may be more stringent in how providers can share patient data.

Monetizing health data and using patient info for marketing

As with many things, the rules get more complex — and restrictive — when money gets involved. If PHI is shared (or even used) in exchange for remuneration or for marketing purposes, additional requirements must be met. This sometimes includes the requirement that the provider obtain the patient’s express authorization to use or share the data, even if the disclosure would otherwise have met the TPO exception. For example, if the covered entity receives payment for sharing or using the data, that disclosure no longer meets the TPO exception (e.g., a third-party vendor wants to pay the provider to send an email blast to a select group of the provider’s patients). In that case, the covered entity must obtain a valid patient authorization that specifically states the disclosure will result in remuneration to the covered entity.

A practice pointer regarding authorizations: An authorization is not the same thing as patient consent. An authorization is a detailed document that gives covered entities permission to use PHI for specified purposes, which are generally other than TPO, or to disclose PHI to a third party specified by the individual.

A valid authorization must specify a number of elements, including a description of the PHI to be disclosed and the person authorized to make the use or disclosure, the person to whom the covered entity may make the disclosure, an expiration date and event, and, in some cases, the purpose for which the information may be used or disclosed.

With limited exceptions, covered entities may not condition treatment or coverage on the individual providing an authorization.

Another tip: HIPAA prohibits the use of compound authorizations in this context. That means the provider cannot combine into one document, or into any merger of TPOs, the patient’s authorization to use or disclose his or her PHI for remuneration or marketing. Thus, providers should not tuck this authorization into an informed consent, payment agreement or online terms of use. Instead, they must use a standalone authorization for the patient to sign.

Data sharing in research or clinical trials

HIPAA contains specific rules related to the use and disclosure of patient data for research or clinical trials.

For example, if PHI is used for research or clinical trials, providers must obtain approval from an institutional review board or privacy board waiver of authorization, receive an authorization from an individual to create a research repository, use the PHI through the collection and use of a limited data set, or use the PHI through the collection and use of de-identified information.

Data is de-identified by removing individually identifiable health information from patient information, leaving no reasonable basis to believe that the de-identified information can be used to identify an individual.

Under HIPAA, de-identified information is not considered PHI and is therefore not subject to HIPAA’s privacy regulations.

However, de-identification of data is not a substitute for privacy and security compliance, and there are use cases and applications when it is beneficial to use the complete PHI data set.
You don’t have a choice when it comes to the ‘digital economy’

Continued from page 10

ny works inside, what products and services it delivers, what data tools should be instituted, what major changes may be needed to stay competitive.

Though directors typically understand this fiduciary obligation, the pace of change is such that counsel needs greatly to make sure that these matters get the attention they deserve, and to facilitate the communication channels between management and the board.

I see boards struggling to understand the issues and the depth of focus they must apply, not to mention the bravery it takes to engage major rapid change. I also see would-be board members, often with a technology background, searching to join boards so that they may participate in this sensitive task.

Being a director at this moment of the burgeoning digital age is not necessarily only a young person’s game. Directors don’t need to be MIT graduates to play. Directors need to be wide-eyed, however, to make sure that management is aware of change and is retaining the requisite implementation talent and tools.

The average age of a public company director (2016 data) is 63, and the average for a newly hired director is 57. I would not be surprised if successful privately held companies reflect a similar board demographic. Boards tend to be contemplative. Holders of traditional views must be motivated to move quickly. A static strategy today is an unmitigated risk. Management often is not the driver of this strategic imperative to respond rapidly. Management may be of an older generation, or used to an older pace of change. Management may not have experience in elements of the digital marketplace. Management may not be in a position properly to assess risk. Management also may be enjoying current profitable performance, feeling safe during “normal” earnings lulls, and reaping the compensation benefits from cash bonuses and in-the-money options. Management also may believe, often rightly, that rapid major change is risky, may lose money, will temporarily depress earnings and share price, and surely will fail in at least some areas.

Role of counsel

What does counsel do to assist its company?

I am a believer in providing education and exposure to both management and boards; creating an awareness of the growing buzz and pervasiveness of the digital economy is a way to make sure that focus is fostered at every level, and a sense of appropriate urgency created.

Looking around, there is a huge, varied and exploding readable literature about the digital economy. Accounting firms, law firms, consulting companies, journals and business associations are publishing constantly. Indeed, the general press often runs articles on aspects of the digital revolution; for example, a recent Economist issue (March 31) contained agranular analysis of the expansion of AI from the technology sector to the governance sector, focusing on supply chains, customer service, HR and the workplace of the future.

Publications of the NACD, both online and in its Directorship magazine, should be shared with management and the board as suggestive of specific topics for focus. Recent articles have highlighted the role of millennials in fostering change, their appropriate challenge to preconceptions, their impact on work environments and the “gig” economy. An awareness over the broad spectrum of digital impact also may well help a board identify skill gaps in board membership which can be addressed by adding director expertise.

Indeed, a recent NACD Board Leaders’ blog post, noting that “our experience indicates that most boards do not fully grasp the opportunities and risks associated with digital transformation,” suggests four specific actions that boards might call upon management to institute: First, conduct a corporate assessment of the competencies digital leaders must have. Assessments should cover the disciplines of vision and strategy, culture, organizational structure, communications and sales; technological innovation; and, big data analytics.

Second, adopt a clear digital strategy. Should your company lead as an industry disruptor, or alternately monitor and follow the competition, reacting only to defend market share?

Third, trust in people to effect changes that are clearly defined. Identify the desired processes and policies, assess the risks, and then implement. “Digital thinking requires organizations to solve the problem of rapid growth and scalabil- ity to rely primarily on technology rather than people, as opposed to the traditional focus on scaling ahead of demand.”

Fourth, continually monitor products, services and processes and rapidly adjust strategy to make sure that your business is focused on what is expected from an enterprise-wide digital strategy. It is the job of the board to ensure the alignment of the organization and to “recognize the signs of organizational short-termism and executive management’s emotional investment in traditional business models.”

Exposure to current literature and learning, together with insistence on board leadership in driving an enterprise-wide focus on the digital economy, should lead to boards placing all things digital on their regular agenda. This is an instance in which, if management is not placing elements of AI, big data and the digital economy on most or all of the board dockets, then the board itself needs to call for its inclusion.

Counsel can assist in this process, so that the relationship between management and the board remains cordial while the board can push the issue to the extent not being pursued with vigor by management. Indeed, the global impact of the digital economy is so broad that for almost all companies that it may well be best served by suggesting a retreat where outside expert advice can be shared with management and the board, and then institutional alignment addressed.

Key director attribute

A recent panel discussion among sitting directors, held at a Boston break- fast meeting of the NACD (New England chapter), gave practical guidance for meeting the difficult role required of boards. Aside from asserting the pervasive and rapid impact of the digital economy and expressing amazement that so many companies with seemingly robust boards got blindsided (Polaroid, Circuit City, newspapers, box retailers), the panel identified the key underlying theme for directors: courage.

Boards need to understand, but be willing to undertake, identified risks to effect necessary change. Failure to act can be fatal.

Sharing, mining patient data in digital health and telemedicine

Continued from page 11

What if I’m not a covered entity?

Not all digital health or telemedicine companies are covered entities under HIPAA. But even if HIPAA does not apply, standards such as TLS can cover information broader than just PHI.

In addition to patient privacy protections under federal law, it is important to be aware of state law restrictions, which are often more broad, nuanced and stringent than the requirements under HIPAA. A privacy law must be read together in harmony, applying the most stringent provisions from each in the event of a conflict.

Additionally, there may be unique requirements related to patient authorizations, including reduced notification time limits. There are many other nuances such as California’s 14 point font requirement.

Moreover, the nature of the clinical records affects the applicable privacy and security laws. Mental health treatment records, substance abuse records, and HIV diagnoses are typically considered ultra-sensitive records that require providers to take additional actions to maintain their privacy.

For these reasons, many digital health and telehealth companies voluntarily choose to follow the HIPAA guidelines, even if they are not formally a covered entity.

Cyberattacks vs. deliberate privacy violations

Most cybersecurity experts concur that no company’s data security is absolutely impervious. Addressing ransomware and hack-based breaches, including developing a cybersecurity incident response plan, has become part of doing business in the healthcare industry. These are essential compliance considerations.

Though big data breaches make the headlines, and sometimes result in government settlements, the public can be forgiving, particularly if the data breach was a cyberattack not attributable to the provider’s carelessness.

In contrast, there has yet to be a notable HHS Office of Civil Rights settlement based on a covered entity sharing/selling PHI to a third party without first obtaining proper patient authorization. When such an event occurs, the public may be less likely to forgive and forget, as the company made a deliberate decision to sell patient data without authorization and was not the victim of a cyberattack.

The White House’s FY 2019 proposed budget cut OCR funding by approxi- mately 20 percent compared to last year, which left some uncertainty as to the level of enforcement actions. (Congress ultimately did not follow those proposed budget cuts for OCR.)

Protection of patient privacy is not only important to the federal government; it is important to many patients who feel they should own and control their health data.

Outside OCR, the FTC has issued fines and settlements against online health companies for improper online privacy practices based on the notion that they are “unfair and deceptive acts or practices.” The two primary concerns in this niche are: 1) truthful advertising of the health app’s capabilities, and 2) transparent privacy practices regarding user data.

Fortunately, the FTC has published a number of helpful resources for health technology companies, including “Best Practices for Mobile Health App Developers,” “Marketing Your Mobile App,” and the “Mobile Health Apps Interactive Tool.”

The opportunity for big data to drive transformative healthcare care solutions is evident, but the challenges in achieving these goals are numerous: technological, institutional, operational or legal — are complex. The regulatory landscape, which seeks to limit the misuse of confidential health information and protect legitimate privacy and security concerns, must be navigated by those digital health or telemedicine companies seeking to mine or monetize health care data.
FMLA lawsuit allowed even though employer not covered

Continued from page 1

of equitable estoppel to interference claims," she wrote, denying Centric’s motion for summary judgment.

Moreover, there are strong policy rea-
sons to hold otherwise," Dein continued. "It would defeat the basic purpose of applying the doctrine of equitable estoppel if an em-
ployer was allowed to rely on an employee’s misrepresentation to take leave, but could then be freed for doing so."

The 10-page decision is Reid v. Centric Consulting.

Correct decision

Plaintiff’s counsel Corrine Hood Greene of Charlestown, Massachusetts, said Dein was correct in determining that the 1st Cir-
cuit would apply the doctrine of equitable estoppel in circumstances like this.

“This allows plaintiffs who are told by their employer that they can take FMLA time and who then rely on their employer providing that protective leave to get the protection of the FMLA, even if it later turns out they weren’t eligible,” she said.

This is important because employers are not experts in the law, she said. “They should be able to rely on the employer’s as-
sertion that they are in fact protected.”

The defendant’s attorney, Shannon M. Lynch of Boston, could not be reached for comment prior to deadline.

But Susan G. Fentin, a management-side employment lawyer in Springfield, Massa-
echusetts, said it is common for employers, particularly smaller ones, to mistakenly treat employees as though they are covered by the FMLA when they are not.

“We see this all the time when reviewing handbooks,” Fentin said. “Lots of compa-
nies have FMLA policies in their handbook even though they’re not covered entities. And employees may have multiple offices in other states or in localities more than 75 miles from their headquarters, and those satellite offices may not be FMLA covered entities.”

But by having FMLA policies in their handbook, they’re suggesting to employ-
ees that they’re potentially FMLA-covered, and when an employee takes leave covered by the FMLA, he or she is going to be pro-
tected by the statute, she said.

“There’s no intent required,” Fentin said. “Employers could be doing this completely innocently and they don’t realize they’re cre-
ating liability for themselves.”

So you have a situation where the FMLA leaves the employer with a real collection of potential FMLA leave, and was also allegedly held be ineligible for such leave until December 2014, at which point Reid has completed the requisite 12 months of employment to become eligible.

HR also apparently told him, however, that he had other non-FMLA options, in-
cluding short-term and long-term disability leave.

Reid requested and was granted a non-FMLA leave of absence for surgery and recovery. His leave began on Nov. 19, 2014. On Dec. 9, 2014, the leave of absence continued as “FMLA leave” for the full 12 weeks required under the statute. On March 2, 2015, the employer switched the leave back non-FMLA leave until Reid’s return two weeks later.

At that point, he resumed the PIP with the sales requirements designated before his leave. In June 2015, he was fired for his alleged failure to meet the goals established in the PIP.

Reid subsequently filed suit in U.S. Dis-

circuit Court, alleging that he was really ter-
minated in retaliation for exercising his FMLA rights.

Centric moved for summary judgment, arguing that Reid was never eligible for FMLA benefits in the first place because

Independent entity’s medical billing data ruled inadmissible

Continued from page 4

ticated computer-aided statistical analysis. But it is the Legislature’s job — not the courts’ — to revise the statute, he said.

Upon further review

Plaintiff Brittany Waugh sought and received physical therapy from Patriot All Pro after an Oct. 11, 2011, car accident. Af-

ter treating Waugh for two months, Patri-
opt submitted a bill to Vermont Mutual for $2,845.

Vermont Mutual paid $2,099.11 on the claim, which according to the FAIR Health database represented the 80th percentile of the cost of comparable services in the same geographic area. Patriot sued to collect the balance of $745.89, along with costs and attorneys’ fees.

The stakes were similarly modest in the Lomibo case, in which plaintiff Lomibo LLC, which operated under the name All State Pain Treatment and Therapy Center, sought payment from Vermont Mutual of $3,628, and Vermont Mutual paid Lomibo $579.43 less after review.

In Patriot All Pro, the battle over the ad-


To be listed in the NEIH Directory, call Elaine Fanning at (617) 218-8822 or email efanning@lawyersweekly.com

Classifieds

ALTERNATIVE DISPUTE RESOLUTION

WE’RE NOT NEUTRAL ON THE SUBJECT OF LEADERSHIP

The MDRS Advantage

• Panel of 16 Ameriprep neutrals
• Full service mediation and arbitration firm
• Exceptional range of case matter experience
• Commitment to continuing education and industry training
• Approved OR provider MA Superior and Land Courts

Brian R. Jerome, Esq. | Founder and CEO | 800-516-5520 | www.mdrs.com

MASSACHUSETTS DISPUTE RESOLUTION SERVICES

235 Commonwealth Ave., Suite 302
Boston, MA 02215
Tel: 617-277-9329 • Fax: 617-277-1699
www.TMGmediationGroup.org

The Mediation Group
Brad Honosoff • Marie Honosoff • Dave Matz • Amy Gordon
Resolving legal, family and organizational disputes since 1985.

MAY 2018 | New England IN-HOUSE | page 13

Centric did not have 50 employees within a 75-mile radius from his workplace.

Reid countered that because Centric had treated him as FMLA eligible, it was equita-

...
Employers walk fine line to avoid misclassification suits

continued from page 1

outsourcing as smart business, plaintiffs’ attorneys and government regulators are more concerned than ever that such arrangements may be a means for avoiding protections and benefits afforded employees under state and federal law. “Litigation comes in part because there are people using these [business] models, but it’s coming in large part because the people using these models are getting sued or prosecuted by the government for treating the employees as independent contractors,” Bucking said.

The ABC test

Distinguishing employees from independent contractors through litigation is a fact-intensive inquiry that could expose companies to unexpected liability, practitioners say.

In Massachusetts, the Legislature has codified a three-factor test for determining independent contractor status—commonly called the “ABC test”—in G.L.C. 149, §148B. “The Massachusetts test presumes that anyone doing any kind of work is an employee,” Bucking said. “That’s the presumption going in, and then the [statute] puts the burden of proof on the company to meet three very specific standards in order to overcome that presumption.” Specifically, §148B creates a presumption that “an individual performing any service” is an employee unless the employer can show: (1) the individual is free from control or direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.”

Michael A. Gamboli, a management-side lawyer at Partridge, Snow & Hahn, calls Massachusetts’ ABC test “extremely restrictive.”

Defendants often have a hard time showing that the plaintiff performed work outside the regular course of the company’s business, said Gamboli, who practices in Boston and Providence. “The nightmare situation is where you have an accounting firm that needs to outsource accounting work to some independent contractors who may be taking on work a couple hours here or there,” Gamboli said.

Bucking recently won a signal management-side victory in a misclassification case in Suffolk Superior Court, Weiss v. Loomis

MEPA comp history ban: FAQs

continued from page 9

a business’s customer information about salary history information provided by an employee may thus be quite limited.

8. May an employer search

for publicly available information about compensation history?

Yes, but only after an offer of employment with compensation has been made.

10. Is the salary history ban susceptible to legal challenge?

Yes, on the basis of violation of employers’ constitutional rights. In fact, the Chamber of Commerce for Greater Philadelphia filed a lawsuit in federal court challenging a similar salary history ban, arguing that the ban violates employers’ First Amendment and other rights by chilling their protected speech and impairing their ability to make hiring decisions. The Philadelphia law has been enjoined during the pendency of the lawsuit.
Nursing home entitled to arbitrate wrongful death suit

Continued from page 5

for that conclusion in the operation of the state’s wrongful death statute.

“Massachusetts law only allows one to bring a wrongful death claim as the executor or administrator of the decedent’s estate, and there is no separate cause of action for surviving family members,” the judge wrote. “In other words, unlike some states in which individuals may bring their own wrongful death claims, Massachusetts does not ‘segregate the right to recover for wrongful death by claimant.’”

Woodlock found further support for

the compelling defendant to arbitrate her claims in the SJC’s Miller decision. In that case, the court addressed whether to compel arbitration in a wrongful death suit brought by the son of a man who died in a nursing home.

“While not directly discussing the question of whether the son’s wrongful death claim was subject to the [nursing home’s] arbitration agreement, the court granted the motion to compel arbitration,” Woodlock wrote. “This evidences the SJC’s effective, albeit less than fully articulated acceptance of the proposition that, under Massachusetts law, arbitration with respect to wrongful death actions is not disallowed as a matter of law.”

Woodlock observed that courts in other jurisdictions are split on the issue.

“But I am of the view that the weight of persuasive authority treats wrongful death claims as derivative,” he wrote. Moreover, Woodlock found giving effect to the plaintiff’s arbitration agreement was consistent with the U.S. Supreme Court’s recognition that the FAA is designed to place arbitration agreements on an “equal footing” with all other contracts.

“A compelling argument can be made that treating arbitration agreements as without force in the wrongful death context has the indirect but practical effect of singling arbitration agreements out for special treatment,” the judge wrote. “A reading of Massachusetts law that fails to accommodate this firm and current jurisprudence developed by the Supreme Court of the United States runs the risk of being in contravention of the Federal Arbitration Act.”

Key components of a good investigation in #MeToo era

Continued from page 6

well. But it is important to communicate with the complainant.

If employment action is taken, the accused obviously will have some indication of what happened with the investigation, but if not then there must be some type of communication to him or her as well. While the substance obviously will vary greatly, the communication should make clear that the allegation was taken seriously and an investigation was conducted.

Highly regulated companies will have to consider whether and how the investigation should be disclosed to regulators and possibly the public. To the extent that there has been media coverage regarding the allegation, the company must have a media plan in place and determine what, if anything, will be shared with the press.

Privilege and other considerations

When planning an investigation, other considerations include whether to conduct the investigation under privilege and literally who (what people) will conduct the

investigation. Given the volatility of these issues right now, it generally will make sense to conduct a privileged investigation by outside counsel for the simple reason that it gives the company control over whether and how the report and ultimate conclusions are disclosed. There is a common misperception that if an investigation is privileged it becomes so secret as to be useless in defense of the company absent a full waiver. That is not the case.

Details about who conducted it, how it was conducted (e.g., 20 people interviewed and 1,000 documents reviewed), to whom the results were reported and even underlying facts that were uncovered can, as a general matter, be revealed to third parties without waiving the privilege.

Moreover, while it may make sense to conduct a privileged investigation initially so that the company can control its disclosure, waiver may also be appropriate. Experienced investigators conduct investigations, especially in this arena, knowing that the company may elect to waive the privilege and they conduct the investigation accordingly.

Lastly, even after determining whether the investigation will be conducted internally or externally and whether it will be conducted under privilege or not, consideration should be given to the individuals chosen to conduct the interviews.

These investigations are focused on sensitive topics. To the extent there is diversity among those involved in the conduct, the investigative team should also be diverse. When a complainant or a witness or an accused is being asked to describe incredibly personal or potentially embarrassing interactions, the person asking the question matters. Think about that, and who might be best suited to ask those questions, at the outset of the investigation.

Conclusion

The investigation is not only a mechanism for uncovering what happened in order to make employment decisions, but is an important part of establishing a supportive and inclusive workplace. A properly designed and implemented investigation will give employees the process to which they are entitled, make employees feel that they have been treated fairly, and protect the company from liability.
‘In-House Leaders’ feted at annual awards dinner

More than 400 guests headed to the Renaissance Boston Waterfront Hotel recently for the annual Leaders in the Law reception and awards dinner hosted by Lawyers Weekly and New England In-House. The event recognized the outstanding work of the 2017 Lawyers of the Year and the 2018 In-House Leaders. Keynote speaker Allison F. Bauer of the Department of Public Health’s Bureau of Substance Addiction Services discussed current efforts to address the opioid crisis.

1. Jessica Collins of athenahealth (left) with Margaret Seif of Analog
2. The Leaders in the Law honorees
4. Robert A. Kubica of the Davis Companies (left) with Nora E. Field of Boston College and Charles R. Whipple of Wellforce
5. Guests dine and chat as they await the ceremony.
6. Lawyers of the Year honorees, from left: Lisa M. Kavanaugh and Emma Winger, both of the Committee for Public Counsel Services; a guest; Dana A. Carhan; and Susan B. Church of Demissie & Church
7. From left: Sean C. Flynn of Abiomed, Matthew J. Fogelman of Fogelman & Fogelman, Halley E. Gilbert of Ironwood Pharmaceuticals, and Nicole R. Hadas of Akebia Therapeutics
8. Keynote speaker Bauer
9. From left: Scott Ziegler of New England In-House, Lisa M. Kavanaugh, Frederick Clay and Jeffrey G. Harris
10. Robert K. Blaisdell of Barrett & Singal
11. Austin V. Shapard, Thanda Brassard (center) and Kelly Guarino, all of Fiduciary Trust
12. The group from Tufts Health Plan

THANK YOU, SPONSORS!

Barrett & Singal, Haug Partners, Jones Day, Tufts Health Plan, GT Greenberg Traurig, Analog Devices, Ropes & Gray, athenahealth, Citizens Bank