Ending the myths about the Domestic Workers’ Bill of Rights

By Ida Edwards and Rebecca G. Pontes

Domestic workers’ vulnerability to exploitation and abuse is deeply rooted in historical, social, and economic trends. Domestic work is largely women’s work. It carries the long legacy of the devaluation of women’s labor in the household. Domestic work in the US also carries the legacy of slavery with its divisions of labor along lines of both race and gender. The women who perform domestic work today are, in substantial measure, immigrant workers, many of whom are undocumented, and women of racial and ethnic minorities. These workers enter the labor force bearing multiple disadvantages.

— Home Economics, The Invisible and Unregulated World of Domestic Work, by Linda Burnham and Nik Theodore for the National Domestic Workers Alliance

In the 1970s, under the leadership of Melena Cass, an African-American woman and civil rights leader, Massachusetts granted domestic workers the right to collectively bargain, eligibility for workers’ compensation, the right to be paid the state minimum wage and overtime by the state’s overtime laws. In December 2010, the Massachusetts Coalition for Domestic Workers continued her work, starting the modern movement for domestic workers. On July 2, 2014, Massachusetts took a lead in inclusivity and civil rights. General Laws c. 149 § 190 brought domestic workers “out of the shadows.” Demonstrating the need for this new law and its popularity, it passed in a legislative session with a unanimous Senate and bipartisan veto majority in the House.

Despite the popularity and passage of virtually no opposition, dispelling misconceptions and myths about the new law abounds. The authors of this article aim to correct the myths and explain why employment at-will is entrenched in Massachusetts’ citizens generally are protected from “unreasonable, substantial or serious interference” of their privacy. These rights are associated with the job and are enforced to collect workers’ compensation if injured; and the required notice of employment termination by either party.

Employment at-will is entrenched in the United States. It allows employers to terminate the employment relationship for any reason and without notice. The employee has the same right to end the relationship. Because the employee is the individual with much less power, this “equality” calls to mind Annette France’s quote, “In its majestic equality, the law forbids rich and poor alike to sleep under bridges, brick in the streets and steal loaves of bread.” Discussion about this labor of this interpretation is for another day.

Our point is that, before proclaiming the end of employment at will, a little perspective is needed. Since the adoption of employment at will, the law has swarmed a plethora of exceptions to the at-will rule, both through statute and the common law, including a public policy exception; exceptions banning discrimination based on race, ancestry, gender, sexual orientation, and other protected classes; and exceptions banning retaliation against whistleblowers. Beyond these widely known exceptions, it is also illegal to fire someone for having made a claim under the workers’ compensation statute (M.G.L. c. 116 § 22), for refusing to perform an abortion (M.G.L. c. 112, §12D), for a public employee doing blood donation (M.G.L. c. 149 § 35D), for expunging tenant’s records (29 U.S.C § 207 (g)(1)), and, most recently added, for being a victim of domestic violence (M.G.L. c. 149 § 12D). So, employment at-will “we know it” already has many exceptions — one could argue so many that it swallows the rule.

In short, many employers are subject to non-competing and non-solicitation agreements. These agreements generally alter the employer’s side of the at-will relationship by prohibiting an employee from moving to a competitor for a period of time. These agreements place significant practical constraints on the employer’s ability to leave for any reason or no reason.

Sections (i) and (j) are right in character with the other exceptions.

There is no just cause requirement to fire a domestic worker. The modification to employment at-will is the notice provision. The law requires that written notice of employment termination must be provided with 30 days notice when the notice is to be terminated without cause. This was intended to address both obligation to pay for the unintended consequence of “at-will” employment for live-in workers: instant homelessness. Furthermore, the law allows an employee to refuse the notice provision entirely if the employer pays two weeks’ severance, or if necessary, provides a written good faith allegation of abuse, neglect or other harmful conduct.

The second modification, the written agreement requirement, only applies to workers who work more than 16 hours a week. The provision was a direct response to employer requests that had nothing to do with the care of the house or family, job creep (increase of duties without corresponding increase in pay). These provisions were to assure clarity and boundedness. The agreement encourages communication at the beginning of the relationship that will help both the family and the employer.

The bill forces use of an agency

Given the pre-enactment state of the law, so confusing and full of issues and with the vast majority of the law. In addition, employers will also have access to a sample notice of rights (also required by the law M.G.L. c. 149 § 190 (m)) that they will provide to workers. While it is tempting to resist them because of a common view that a domestic worker is similar to a teenage babysitter or a relative who comes to help with care giving, if a family wants to employ someone for care giving, they have not engaged an employee.

You can’t monitor your nanny

Untrue. Section 190 (b) specifically addresses communication and bathroom monitoring. And does not go beyond the privacy that workers have in their homes. Massachusetts’ citizens generally are protected from “unreasonable, substantial or serious interference” of their privacy. This reaction is unfounded when considering the needs of domestic workers.

The new law specifically addresses issues particular to domestic workers to clarify boundaries for privacy purposes. Unlike a worker who goes to an office to work, the domestic worker generally goes to a private home. The privacy protections prevent cameras in a person’s private bathroom and bedroom (if that type of personal living space is provided to the worker). They also prevent listening to private calls. An employer could still tell a worker not to use his or her cell phone during work time except for emergencies.

The law also combats human trafficking. Domestic workers are the second largest group of victims to be trafficked into this country behind sex trafficking victims. Surveillance by an employer is one way to control trafficked victims — without the means to report their situation secretly, victims will remain unable to extricate themselves from their situation.

The bill will hurt immigrant workers

Likely false. The authors know of no study that has shown that immigrant workers are being harmed by being given the rights the law provides. In any event, it’s unlikely that the few, and small, boundaries on employers of domestic help will stifle the ability of workers who want to find work and employers who want to hire them to employ them. Notably, this industry has rising pay. At some point, a domestic worker raises on their own. Many people couldn’t function without assistance with house cleaning or nannies for the sample notice that employers are to give to workers. The agreements, if followed and completed will help employer to comply with the vast majority of the law. In addition, employers will also have access to a sample notice of rights (also required by the law M.G.L. c. 149 § 190 (m)) that they will provide to workers. While it is tempting to resist them because of a common view that a domestic worker is similar to a teenage babysitter or a relative who comes to help with care giving, if a family wants to employ someone for care giving, they have not engaged an employee.

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The authors of this article aim to correct the myths and explain why employment at-will is entrenched in Massachusetts. They also aim to show why the new law is needed and what it means for workers and employers.
MEDICAL MARIJUANA

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tested positive for marijuana in a random drug test. Costa, confined to a wheelchair after a debilitating car accident, uses medical marijuana to control seizures and muscle spasms he suffers due to his injuries. Costa was never impaired at work and his employer does not allege otherwise. Rather, he argues that his extramural medical marijuana use is protected by Colorado’s Lawful Activities Statute. Dish Network disagrees, relying on its zero-tolerance drug policy and asserting that Costa’s activities were not “lawful activities” since marijuana use is illegal under federal law. Two Colorado courts agreed with Dish Network, holding that the state’s Lawful Activities Statute applies only to acts that are legal under both state and federal law. It remains to be seen what Colorado’s highest court will do.*

*Although Massachusetts does not have a Lawful Activities Statute, a victory for Dish Network could offer support for application of zero-tolerance drug policies in other contexts. For example, Costa could assert claims under the Privacy Act (M.G.L. c. 214 § 1B), which grants individuals the right against governmental action taken in an “unreasonable, substantial or serious interference” with their privacy. What constitutes “private” employee conduct and “unreasonable, substantial or serious interference” by an employer is determined by a balancing test. Massachusetts courts generally support an employer’s interest in a drug-free workplace and have held that this interest trumps employee privacy rights. Employers may be able to argue that employees who smoke marijuana off duty, even if permitted to do so under state law, are still violating federal law and impeding the employer’s strong interest in maintaining a safe, drug-free workplace. Therefore, the employer’s application of a zero-tolerance policy is not an unreasonable invasion of privacy.

Similarly, employers may be able to defend claims of wrongful termination in violation of well-established public policy (i.e., the statutory right to use marijuana for medical purposes) if they can show that there is, in fact, no public policy protecting employees from termination under a private employer’s drug-free workplace policy. Employers could point to federal law prohibitions on use as well as Massachusetts regulations stating that employees’ rights under other laws are not limited. At least one jurisdiction offers support for this argument: the 6th Circuit, interpreting a medical marijuana statute similar to the one in Massachusetts, found that law did not restrict a private employer’s ability to discipline employees for out-of-work medical marijuana use, and affirmed dismissal of the employee’s wrongful termination claim. Cartas v. Wal-Mart Stores, Inc., 995 F.3d 428 (6th Cir. 2012).

Employers would be wise to tread more carefully, however, when faced with reasonable accommodation requests by employees for whom medical marijuana use is a pre-treatment of a disabling condition. Presumably the requested accommodation would be an exception to the employer’s zero-tolerance drug policy, allowing off-duty medical marijuana use. On one hand, the Americans with Disabilities Act (ADA), a federal statute, does not require employers to accommodate the use of illegal drugs, and since marijuana (for now) remains illegal under federal law, employers have no obligation to provide this accommodation. On the other hand, under the state analog to the ADA (M.G.L. c. 151B) employers may be required to provide this accommodation if the employee is, in fact, disabled, and the accommodation enables the employee to perform her essential job functions. Therefore, the employer’s application of a zero-tolerance policy is not an unreasonable invasion of privacy, and there is no undue hardship to the employer. As with all disability accommodation analyses, employers should examine each situation on its own merits and engage in the interactive process to determine whether a reasonable accommodation is required.

An employer could argue that requiring an employee to use drugs that remain illegal under federal law is an undue hardship. However, the force of this argument is questionable given the difficulty of proving undue hardship in disability cases since the federal government’s retreat from enforcing federal laws against medical marijuana in states where it is legal. In addition, an employer merely “allows” off-duty medical marijuana use by refraining from disciplining its employees does not actually violate federal law; were that the case, employers might be on more solid footing to argue undue hardship.

Depending on the particular facts, the argument may be that even off-duty use of marijuana does not extinguish the possibility of impairment on the job, posing a clear and present danger to the employer’s business (including the safety of others and/or federal contract compliance) that is sufficient to establish undue hardship. In this regard, using medical marijuana is similar to OxyContin or other narcotics: individuals may legally possess and use such drugs with a written prescription or certification, but physicians are not license to employ someone solely because he or she is registered to use medical marijuana and the accommodation enables the employee to perform her essential job functions.

For now, employers should review their drug policies, understand how legalization of medical marijuana in Massachusetts may impact the administration of those policies, and be on top of changes in federal law, while fine-tune as needed. Employers also should review any policies relating to off-duty conduct to the extent they may be implicated by medical marijuana use that is permitted under state law, but still prohibited under federal law. Finally, employers should review their disability accommodation processes to determine whether adjustments may be needed. Individualized evaluation of accommodation requests is still the best practice (especially when safety-sensitive positions are at issue) and, knee-jerk reactions of requests involving medical marijuana could result in an employee becoming a test case for Massachusetts. While lawsuits involving employer discipline for marijuana use across the country have tended to favor employers, there is no guarantee Massachusetts will follow suit.

DOMESTIC WORKERS

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DOMESTIC WORKERS

Expanded the commission’s jurisdiction duplicates rights

Pale, Chapter 151B, the state employment anti-discrimination statute, only applies to employers with more than six employees. Its more current disability definition is the only employee, putting him or her outside the purview of Chapter 151B and the Massachusetts anti-discrimination law (Discrimination (MCAD). Prior to the law’s passage there was a clause that specifically excluded those “in the domestic service of another,” meaning virtually all domestic workers had no access to the MCAD.

While Chapter 214, Section 1C does provide that all individuals “within the household” are to be free from sexual harassment, and the Massachusetts Equal Rights Act Chapter 93, §§ 102 and 103, prohibits discrimination protections based on race, national origin, age, disability and gender, the recourse for both is filing a complaint in the Superior Court. Most domestic workers lack the funds to retain an attorney, pay the filing fee, and bring suit against their employer. Giving the domestic worker access to the commission allows them to file a charge for free. It also gives them access to the commission’s procedures that offer assistance to those without counsel, including the conciliation process and an investigatory hearing before a finding is made. The information that the commission generates is the only means available to address the claims of a domestic worker against a family.

Conclusion

This new law is a long-awaited covering of rights to some of the nation’s wealthiest working individuals. It provides them rights and recourses that many workers already enjoy. Its aim is to attempt to address the particular vulnerabilities of individuals whose job is to “care” in a private home. The law will only increase communication and negotiation between domestic workers and their employers, families or other entities, empowering both the domestic workers and the workers to answer the question “What is respect and dignity” for their relationship.