

## Maine

### Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

#### Topics

##### **I. Discrimination**

Maine law prohibits discrimination against people using service animals in certain situations. These amendments distinguish between service animals and assistance animals. "Assistance animals" are defined as animals determined by a health care provider or social worker to be necessary to mitigate the effects of a person's physical or mental disability, or animals individually trained to do work or perform tasks for the benefit of a person with a mental or physical disability, such as guiding an individual with impaired vision, pulling a wheelchair, or retrieving dropped items. Prior to the amendments, the preceding definition was included in the definition of "service animal." Under the amendments, the definition of "service animal" includes only dogs individually trained to do work or perform tasks for the benefit of a person with a disability, and specifically excludes other species of animals. In addition, the amendments make clear that the crime-deterrent effects of an animal's presence or the provision of emotional support, well-being, comfort, or companionship do not constitute the work or tasks of a service animal. Under these amended definitions, a service animal is always an assistance animal, but an assistance animal need not be a service animal.

The amendments clarify that public accommodations may not refuse to permit the use of a service animal or discriminate against a person with a disability who uses a service animal, but specifically exclude persons using an assistance animal from those protections.

The amendments also impose a fine for keeping a dog that attacks, injures, or kills a service or assistance animal while it is performing its duties and a fine for a person who knowingly misrepresents an animal as a service animal or assistance animal.

5 M.R.S. § 4553, 5 M.R.S. § 4582-A, 7 M.R.S. § 3907, 7 M.R.S. § 3961-A, and 17 M.R.S. § 1101, 17 M.R.S. § 1312, 17 M.R.S. § 1314 (Effective Date 07/29/2016).

##### **II. Pre-Employment Inquiry Guidelines**

No new laws or regulations enacted in 2015 or 2016.

##### **III. Family and Medical Leave**

Maine has amended the penalty provisions of its law governing employment leave for victims of violence to provide that, if the state labor department gives an employer notice of a violation within six months of its occurrence, the following penalties may be assessed:

- Unlawfully denying leave: A fine up to \$1,000 per violation, payable to the state. Additionally, the employer must pay liquidated damages to the affected individual equal to three times the amount of total assessed fines.
- Termination connected with an individual exercising a leave law right: A penalty equal to the aforementioned liquidated damages or reemployment with back wages.

Before the amendments, the statute included only a civil penalty up to \$200 per violation.

26 M.R.S. § 850 (Effective Date 10/14/2015).

#### **IV. Wage and Hour Laws**

Maine voters approved Question 4, which amends Maine law to increase the minimum wage in yearly steps to \$12.00 per hour by January 1, 2020. The amendment does not affect the tip credit, which remains at \$3.02.

For non-exempt Maine workers, the amendment implements incremental increases to the minimum wage as follows:

- \$9.00 per hour on and after January 1, 2017 (\$5.00 per hour plus tips for tipped employees);
- \$10.00 per hour on or after January 1, 2018 (\$6.00 per hour plus tips for tipped employees);
- \$11.00 per hour on or after January 1, 2019 (\$7.00 per hour plus tips for tipped employees);
- \$12.00 per hour on or after January 1, 2020 (\$8.00 per hour plus tips for tipped employees); and
- Continued incremental increases based on the cost of living as measured by the Consumer Price Index for Urban Wage Earners and Clerical Workers, for the Northeast Region.
- The minimum wage for tipped workers will continue to increase by \$1.00 per year after January 1, 2020 until it matches the non-tipped hourly wage and is eliminated.

26 MRSA §664 (Effective Date 01/07/217).

#### **V. Drug Testing**

No new laws or regulations enacted in 2015 or 2016.

#### **VI. Noncompete and Other Employment Agreements**

No new laws or regulations enacted in 2015 or 2016.

#### **VII. Workplace Safety**

##### **A. Reporting Deaths & Serious Physical Injuries**

Maine's workplace safety provisions have been amended. First, reporting requirements for reports of deaths or serious physical injuries have been amended. The amendments require that reports of deaths or serious physical injuries must be sent to the Bureau of Labor Services Director or his or her designee. Under the amendments, reports must be sent by phone or electronically, instead of in writing or by phone. Second, the definition of "serious physical injuries" has been expanded to include formal admission to the inpatient service of a hospital or clinic for care or treatment.

26 M.R.S. § 2 (Effective Date 06/03/2015).

## **B. Handheld Devices and Learner's Permits**

Maine has amended its vehicle safety provisions to prevent the use of a handheld electronic device while operating a vehicle under a learner's permit. The amendment fills an apparent gap in the statute, which bars drivers with learner's permits from using a mobile telephone while driving but is silent regarding texting. Pursuant to the amendment, drivers licensed with a learner's permit are prohibited from operating a motor vehicle while using a handheld electronic device. "Operate" means driving a motor vehicle on a public way with the motor running, including remaining temporarily stationary because of traffic, a traffic light or a stop sign. "Operate" does not include operating a motor vehicle with or without the motor running when the operator has pulled the motor vehicle over to the side of, or off, a public way and has stopped in a location where the motor vehicle can safely remain stationary. "Handheld electronic device" means any handheld electronic device that is not part of the operating equipment of the motor vehicle, including but not limited to an electronic game, device for sending or receiving electronic mail, text messaging device, or computer.

29-A M.R.S. § 1304 (Effective Date 10/15/2015).

## **C. Commercial Motor Vehicles**

Maine has amended its vehicle safety provisions to prevent the use of a handheld electronic device while operating a commercial motor vehicle. Drivers are prohibited from texting or using a mobile telephone while driving, and a motor carrier is prohibited from permitting or requiring its drivers to engage in such use. "Driving" means operating a commercial motor vehicle with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running after the vehicle is moved to the side of, or off, a highway.

29-A M.R.S. § 558-A (Effective Date 10/15/2015).

## **VIII. Workers' Compensation**

Maine has amended its Workers' Compensation Act to clarify its criminal and penalty provisions. The Act provides that failure to comply with its terms is a Class D crime and that the employer is subject to a penalty and revocation or suspension of its licenses and authority to do business. The amendments clarify that the employer is guilty of a Class D crime only if the employer has committed a knowing violation. To determine the penalty amount, the Workers' Compensation Board will consider the employer's efforts to comply with the requirements of the Act. The amendments also clarify that the suspension and revocation provisions apply only when the employer has committed a knowing violation, has failed to pay an assessed penalty, or continues to operate without required coverage after a penalty has been assessed.

Further, the amendments explain what is considered a "knowing violation." An employer commits a knowing violation if:

- The employer's workers' compensation insurance has been cancelled or not continued or renewed, unless it is due to a substantial change in the employer's operations that is unrelated to the classification of employees or independent contractors;
- The employer has been notified in writing by the Board of the need for workers' compensation insurance;

- The employer has had previous violations for failure to secure payment of the compensation provided for under the Act; or
- The employer misclassifies an employee as an independent contractor despite a contrary determination by the Board.

39-A M.R.S. § 322 and 39-A M.R.S. § 324 (Effective Date 07/29/2016).

## **IX. Miscellaneous**

### **A. Disability Insurance**

Under the new law, Maine employers may offer group disability income protection insurance in the form of a group short- or long-term disability policy that provides income benefits to an employee who cannot work for an extended period due to an accident or illness. An employer's group disability income protection plan must provide for appropriate disclosure regarding the plan chosen, a method of enrollment that allows employees to opt out of coverage, and an appropriate time period in which employees may voluntarily terminate coverage. Before any wage deductions may be taken to pay for premiums, an employer must provide its employees with two notices—one at least 30 days prior to the deduction and one at least 10 days prior to the deduction. The notifications must include:

- A statement of the employee's right to opt out of coverage.
- The process by which the employee may exercise the right to opt out of coverage.
- Any deadline to opt out of coverage.

Employers receive a tax credit of up to \$30 for each employee enrolled in a qualified disability income protection plan.

24-A M.R.S. § 2804-B and 36 M.R.S. § 5219-NN (Effective Date 07/29/2016).

### **B. WARN Act Amendments**

Maine law provides protections to employees subject to a mass layoff due to an employer relocation or termination. These protections are available in addition to those provided by the federal Worker Adjustment and Retraining Notification Act (WARN). The amendments define several relevant terms.

- "Mass layoff" means a reduction in force, not the result of a closing, that results in an employment loss for at least six months of at least:
  - 33% of the employees and at least 50 employees, or
  - 500 employees.
- "Eligible employees" are those who have been continuously employed for at least three years, have not been terminated for cause, and have not accepted new employment at an establishment operated by the employer or remain employed at the covered establishment. Eligible employees include those who voluntarily quit to take a new job within the 30-day period prior to the date set by the employer in its initial notice for the closing or mass layoff.

- “Gross earnings” include all pay for regular hours, shift differentials, premiums, overtime, floating holidays and holidays, funeral leave, jury duty pay, sick pay, and vacation pay earned within the 12 months prior to the closing or mass layoff.

The amendments clarify that an employer initiating a mass layoff at a covered establishment must notify the Director of the Maine Department of Labor as far in advance as practicable and at least before seven days of the layoff. The employer must provide the expected duration of the layoff and when it is expected to terminate the employees. The employer must provide a report to the director that contains all information regarding a potential recall at least every 30 days so the director may determine whether the mass layoff constitutes a closing.

The amendments also provide that when an employer closes a site or engages in a mass layoff, it is liable for severance pay for eligible workers at the rate of one week’s pay for each year and partial pay for any partial year, from the last full month, of employment. Employers are not liable for severance pay, however, when the closing or mass layoff is caused by a physical calamity or the final order of a federal, state, or local government agency. An employer is not exempt from liability for severance pay solely because it voluntarily files for Chapter 7 or Chapter 11 bankruptcy or because an involuntary bankruptcy petition is filed against it.

26 M.R.S. § 625-B (Effective Date 07/30/2016).

### **C. Employer Access to Social Media**

New Maine laws restrict employer access to an employee’s or applicant’s social media account, which is an account with an electronic medium or service through which users create, share and view user-generated content including but not limited to videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online service accounts and website profiles and locations. Under the law an employer cannot:

- Require or coerce an employee or applicant to disclose, or request that s/he disclose, the password or any other means for accessing a personal social media account.
- Require or coerce an employee or applicant to access, or request that s/he access, a personal social media account in the presence of the employer or its agent.
- Require or coerce an employee or applicant to disclose any personal social media account information.
- Require or cause an employee or applicant to add anyone, including the employer or its agent, to his/her personal social media account’s contacts list.
- Require or cause an employee or applicant to alter, or request that s/he alter, settings that affect a third party’s ability to view the contents of a personal social media account.
- Threaten to or actually discharge, discipline or otherwise penalize an employee, or fail or refuse to hire an applicant, because s/he refused to comply with any of the above prohibited requests.

However, the law contains exceptions relating to investigations, employer devices and accounts, the public domain, and compliance with screening and monitoring requirements:

- **Investigations:** An employer can require an employee to disclose personal social media account information the employer reasonably believes to be relevant to an investigation of allegations of employee misconduct or a workplace-related violation of applicable laws, rules or regulations if requiring disclosure is not otherwise prohibited by law, and as long as the information disclosed is accessed and used solely to the extent necessary for purposes of that investigation or related proceeding.
- **Employer Devices & Accounts:** Social media account does not include an account opened at an employer's behest, provided by an employer, or intended to be used primarily on an employer's behalf. Additionally, the law does not limit an employer's right to promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including a requirement that an employee disclose to the employer his or her username, password or other information necessary to access employer-issued electronic devices, including but not limited to cellular telephones and computers, or to access employer-provided software or e-mail accounts.
- **Public Domain:** The law does not apply to information about an applicant or employee that is publicly available.
- **Screening & Monitoring:** The law does not prohibit or restrict an employer from complying with a duty to screen employees or applicants before hiring or to monitor or retain employee communications that is established by a self-regulatory organization (as defined by the federal Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(26)) or under state or federal law, regulation or rule to the extent necessary to supervise communications of regulated financial institutions or insurance or securities licensees for banking-related, insurance-related or securities-related business purposes.

An employer that violates the law is subject to a fine of not less than \$100 for the first violation, not less than \$250 for the second violation, and not less than \$500 for each subsequent violation.

Note that the law does not contain an exception related to trade secrets, nor does it provide for a private right of action for violations.

26 M.R.S. § 615 through 26 M.R.S. § 619 (Effective Date 10/15/2015).