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CLIENT ALERT: Massachusetts Supreme Judicial Court Rules Employer's Alcohol Abuse Policy Did Not Create Employer Liability For Injuries Caused By Intoxicated Employee

On July 7, 2010, the Massachusetts Supreme Judicial Court in *Lev v. Beverly Enterprises-Massachusetts, Inc.*, SJC-10597 held that an employer's substance, drug, and alcohol abuse policy did not create a duty of care to a third party injured by the negligent actions of the employer's intoxicated employee. In *Lev*, Beverly's employee John Ahern, hit and injured the plaintiff after Ahern left a restaurant where he had been drinking alcoholic beverages while discussing work issues with his supervisor. Ahern had ordered and purchased the drinks, which were served by the restaurant's bartender. The employer's alcohol policy prohibited employees from "possessing, consuming, selling, distributing, or being under the influence of alcohol on company premises or while conducting company business off company premises" and subjected the employees to discipline for violating the policy. The Massachusetts Appeals Court ruled that the employer's policy did not create employer liability for Ahern's actions, and the SJC affirmed.

Although the policy applied to employee conduct off company premises, the SJC declined to find that this created a duty to third parties. "Imposing a potentially onerous burden on employers to monitor the off-premises conduct of all of their employees to ensure that no harm comes to third parties is a duty that we have not previously recognized, and do not recognize now." The Court also found that the policy, by its terms, was not designed to protect the public at large. Rather, the policy stated that it was intended to foster a "safe environment that promotes the welfare of [the employer's] residents, associates and visitors [only]" both on and off company premises. If the SJC had found that the policy was designed to protect the public, the employer's failure to enforce its policy could have been used as evidence of the employer's negligence.

The SJC also emphasized that under different factual circumstances, it could find an employer liable for the injuries caused by its employee. The SJC concluded that under the so-called "coming and going" rule, Ahern was not acting within the scope of his employment when he struck the plaintiff because he was driving home at the time. If, however, Ahern had been driving to an employer-mandated meeting when he struck the plaintiff, Beverly would likely have been liable for his conduct. Also, if Ahern's manager had provided or served the alcoholic beverages Ahern consumed, this could have created another basis for liability. Finally, if the employer had facilitated Ahern's causing harm to the plaintiff, such as by providing him with a place to drink on company premises or providing him with the car he drove, the SJC may also have found the employer liable.

This decision makes clear that there are significant risks involved when an employer provides alcohol to its employees. If an employer elects to do so, it should normally have independent, professional third-parties serve and control the alcohol served. Also, in order to further avoid potential liability, an employer should consider holding any company meetings or parties with alcohol off company

premises and not during working hours. Finally, employers should carefully review any handbook policies governing employees' use of alcohol to avoid creating legal duties to the public that may be inherent in the manner the policy is written.

If you have any questions about your substance, drug, and alcohol abuse policy or other labor or employment related issues, please contact your MBJ attorney.

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This alert was prepared on July 9, 2010.