



Employers' Guide to Massachusetts Wage & Hour Law

EMPLOYERS' GUIDE TO MASSACHUSETTS WAGE & HOUR LAW

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Adapted from a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

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Introduction

Employers that operate in Massachusetts continue to face substantial risks under the Commonwealth's wage and hour laws. With a patchwork of arcane and complex statutes that impose many non-intuitive requirements, Massachusetts laws far exceed the scope of federal law. Compounding the risks of non-compliance with these laws is the Commonwealth's statute mandating liquidated treble damages for wage and hour violations.

This publication is a brief overview of Massachusetts wage and hour laws. It is our goal to identify key provisions that may expose Massachusetts businesses to risks, but with the caveat that as an overview, it is not intended to provide an in-depth analysis of the many exceptions and nuances that exist under Massachusetts law. For a more detailed summary and analysis, the fourth edition of our comprehensive guide, *Massachusetts Peculiarities: An Employer's Guide to Wage and Hour Laws in the Bay State*, is expected to be published in 2019. Employers interested in reserving a copy now should email MApecs@seyfarth.com.

I. HOURS OF WORK

Both Massachusetts and federal wage and hour law use the “workweek” as a basic unit of measurement. The workweek consists of seven consecutive twenty-four hour periods and can begin on any day of the week and at any hour of the day.

A. Sunday and Holiday Work

The Massachusetts laws governing work on Sunday and holidays, commonly referred to as the “Blue Laws,” are complex and the source of much confusion.

1. Sunday Work

The default rule under the Blue Laws is that a business may not operate on Sunday.¹ However, there are fifty-five exemptions to this default rule that allow certain businesses to operate legally on Sunday.² If a business does not qualify for an exemption, it may not legally operate in Massachusetts on Sundays unless it obtains a permit from the chief of police of the town or city in which the business is located.

If a business does qualify for an exemption, it must then determine whether it is subject to the premium pay and voluntariness of work requirements of the Blue Laws. Specifically, a retail business that “employs more than a total of seven persons, including the proprietor, on Sunday or any day throughout the week . . .” is required to provide premium pay for Sunday work.³ Currently, premium pay is no less than 1.4 times an employee’s regular rate of pay.⁴ In addition, no employee of a retail employer can be required to work on Sunday.⁵

2. Legal Holidays

The Sunday closure requirements extend to Memorial Day, Independence Day, Labor Day, Columbus Day before noon, and Veterans Day before 1 p.m.⁶ Currently, the provisions regarding premium pay and voluntariness of work that apply to retail employers operating on Sunday also apply to retail employers operating on these holidays.⁷

¹ M.G.L. ch. 136, § 5.

² M.G.L. ch. 136.

³ M.G.L. ch. 136, § 6(50).

⁴ *Id.*

⁵ *Id.* However, the premium pay requirement for retail workers working on Sundays will be phased out by 2023. The current premium rate will be reduced annually by one-tenth each year and ultimately eliminated. *See* 2018 Mass. Acts ch. 121.

⁶ M.G.L. ch. 136, §§ 13-16.

⁷ M.G.L. ch. 136, §§ 6(50), 13, 16. However, the premium pay requirement for retail workers working on holidays will be phased out by 2023. The rate will be reduced annually by one-tenth each year and ultimately eliminated. *See* 2018 Mass. Acts ch. 121.

Other holidays have additional requirements unique to retail employers. For example, while New Year's Day is not subject to the closure requirements, retail employers that operate that day must abide by the premium pay and voluntariness requirements.⁸ Retail businesses may not open at all on Thanksgiving Day or Christmas Day without a permit from the Department of Labor Standards ("DLS").⁹

Manufacturing employers are subject to a unique statutory provision. If a factory or mill falls within one of the exemptions to the Blue Laws, it may operate on legal holidays. However, employees may not be required to work on legal holidays unless the work is "absolutely necessary and can lawfully be performed on Sunday" ¹⁰ To qualify as work that "can lawfully be performed on Sunday," the work must "for technical reasons require continuous operation" ¹¹

3. Penalties for Violation of Sunday and Holiday Work Laws

The Office of the Massachusetts Attorney General is charged with enforcing the Blue Laws. An employer operating in violation of the Sunday or holiday work laws may be subject to a fine of not less than \$20.00 and no more than \$100.00 for a first offense, and a fine of not less than \$50.00 and no more than \$200.00 for each subsequent offense.¹² In addition, employers that violate the rules regarding premium pay and voluntariness of work may be fined up to \$1,000.¹³

B. Day of Rest Laws

The "One Day of Rest in Seven" statute requires that manufacturers, mechanical establishments, and mercantile establishments (other than those that fall under a specified exception) give employees at least twenty-four consecutive hours of rest in every seven-day period.¹⁴ The twenty-four hour time period must include an unbroken period comprising the hours of 8 a.m. and 5 p.m.

A separate statutory provision entitled, "Sunday Work Without a Day Off," requires that an employer give an employee a twenty-four hour period off within the six days following a Sunday on which the employee works. This statute applies to two categories of employees: (1) those engaged in any commercial occupation or in the work of any industrial process who do not work in a "manufacturing, mechanical, or mercantile establishment"; and (2) those engaged in transportation or communication work.¹⁵

⁸ M.G.L. ch. 136, § 13.

⁹ M.G.L. ch. 136, § 15.

¹⁰ M.G.L. ch. 149, § 45.

¹¹ M.G.L. ch. 136, § 6(6).

¹² M.G.L. ch. 136, § 5.

¹³ M.G.L. ch. 136, § 13 (applying penalties of M.G.L. ch. 149, § 180A).

¹⁴ M.G.L. ch. 149, § 48.

¹⁵ M.G.L. ch. 149, §§ 47-48.

Employers that violate the One Day of Rest in Seven or the Sunday Work Without a Day Off statutes are subject to a fine of not more than \$300.00 per violation.¹⁶

C. Compensable “Working Time”

Both Massachusetts and federal law require that employees be paid for all “working time.”¹⁷ Working time encompasses not only those hours spent by employees actively engaged in work, but also the time during which employees are required to be on the employer’s premises or in the service of the employer off-premises.¹⁸

1. Meal Breaks

Massachusetts law mandates that all employees (including exempt employees) receive an unpaid, thirty-minute meal break after six hours of work.¹⁹ The meal break must be the employee’s free time, meaning the employee must be relieved of all duties and free to leave the workplace during that time.²⁰ Otherwise, the time is compensable.

The Attorney General has enforcement authority for the meal break statute. Any employer that violates the provisions of the statute may be subject to fines ranging between \$300.00 and \$600.00 for each violation.²¹

2. On-Call Time

Both Massachusetts and federal law dictate when an employee must be paid for on-call time. If the employee must remain on the employer’s premises, or is so restricted off-premises that he or she cannot use the time freely, then the employee must be compensated.²² Employers must also pay on-call employees who are permitted to leave the premises if they must remain so close to the work site that they cannot use the time effectively for their own purposes.²³

3. Reporting Pay

Under Massachusetts law, if an employee is scheduled to work a shift of three or more hours *and* reports for duty, he or she is entitled to at least three hours of pay even if the employee is not

¹⁶ M.G.L. ch. 149, §§ 47-48.

¹⁷ Massachusetts law defines “working time” as “all time during which an employee is required to be on the employer’s premises or to be on duty, or to be at the prescribed work site” 455 C.M.R. § 2.01.

¹⁸ 29 C.F.R. § 785.7; 454 C.M.R. § 27.02.

¹⁹ M.G.L. ch. 149, § 100.

²⁰ DLS Opinion Letter MW-2003-008 (Aug. 5, 2003).

²¹ M.G.L. ch. 149, § 100.

²² 29 C.F.R. § 785.17; 454 C.M.R. § 27.04(2).

²³ 29 C.F.R. § 785.17; 454 C.M.R. § 27.04(2). *See also* DLS Opinion Letter MW-2002-019 (June 28, 2002).

assigned any work.²⁴ For the hours actually worked, the employee must be paid his or her regular rate. Employers that pay wages that exceed the minimum wage may opt to pay only the minimum wage for any hours not actually worked.²⁵

4. Sleep Time

Any employee who is required to be on duty at the work site for *less* than twenty-four hours must be paid for the time even if the employee is allowed to sleep or conduct other personal activities during that time.²⁶ If the shift *exceeds* twenty-four hours, the employer and employee may agree that up to eight hours total of sleep and meal time will be unpaid so long as the employer provides adequate sleeping arrangements and the employee can enjoy an uninterrupted night's sleep.²⁷

5. Compensable Travel Time

Massachusetts regulations generally conform to the federal regulations in defining the types of travel time that constitute compensable work time.²⁸ An employee's regular commute to and from work is generally not considered work time, and thus it is not compensable under either Massachusetts or federal law.²⁹ Much of employee travel time other than an employee's regular commute to and from work is compensable.³⁰

All travel time that occurs during an employee's regular workday is worktime because "[t]he employee is simply substituting travel for other duties."³¹ This rule is applicable not only to the employee's regular working days, but also to the corresponding hours on non-working days.³² The U.S. Department of Labor (DOL) has stated that, with respect to enforcing the travel time regulations, it "will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile."³³ Massachusetts regulations explicitly adopt the DOL's position.³⁴

²⁴ 454 C.M.R. § 27.04(1).

²⁵ DLS Opinion Letter MW-2007-002 (July 9, 2007).

²⁶ 29 C.F.R. § 785.21; 454 C.M.R. § 27.04(3)(a).

²⁷ 29 C.F.R. § 785.22; 454 C.M.R. § 27.04(3)(b).

²⁸ 29 C.F.R. §§ 785.35-785.41; 454 C.M.R. § 27.04(4).

²⁹ 29 C.F.R. §§ 785.35-785.41; 454 C.M.R. § 27.04(4)(a). *See also* DLS Opinion Letter MW-2002-019 (June 28, 2002).

³⁰ 454 C.M.R. § 27.04(4).

³¹ 29 C.F.R. § 785.39; 454 C.M.R. § 27.04(4)(e) (applying requirements of 29 C.F.R. § 785.39 to overnight travel).

³² 29 C.F.R. § 785.39. *See also* DLS Opinion Letter MW-2002-012 (Apr. 17, 2002).

³³ 29 C.F.R. § 785.39.

³⁴ 454 C.M.R. § 27.04(4)(e) (adopting provisions of 29 C.F.R. § 785.39).

II. MANDATED TIME OFF AND MASSACHUSETTS LEAVE LAWS

A. Time Off to Vote

Under Massachusetts law, an employee in a manufacturing, mechanical, or mercantile establishment who is eligible to vote is entitled to time off to do so during the two-hour period after the polls open, *if the employee requests the time*.³⁵

B. Court Appearances

Massachusetts law prohibits the discharge of an employee for missing work due to service on a jury.³⁶ Employers must pay regular wages for the first three days of jury duty served by any regular employee, including any part-time, temporary, or casual employee.³⁷

Employers may not discharge or penalize employees on account of absences for witness service in criminal actions.³⁸ An employer that violates this rule may be punished by a fine of \$200.00 or less or by imprisonment for one month or less, or both a fine and imprisonment.³⁹

C. Leave for Veterans Participating in Memorial Day or Veterans Day Activities

Massachusetts employers are required to grant a leave of absence to employees who are veterans and wish to participate in a Memorial Day or Veterans Day exercise, parade, or service.⁴⁰ The leave of absence must provide the employee sufficient time to participate in such services in his or her community of residence.

Employers that employ fifty or more employees must provide *paid* leave for veterans participating in Veterans Day services, provided that the employee gives “reasonable” notice of his or her intention to take such leave.

D. Small Necessities Leave Act

The Massachusetts Small Necessities Leave Act (SNLA) applies to employers that are subject to the federal Family and Medical Leave Act (FMLA)⁴¹ and allows FMLA-eligible employees to

³⁵ M.G.L. ch. 149, § 178.

³⁶ M.G.L. ch. 268, § 14A.

³⁷ M.G.L. ch. 234A, § 48.

³⁸ M.G.L. ch. 268, § 14B; M.G.L. ch. 258B, § 3(1).

³⁹ M.G.L. ch. 268, §§ 14A and 14B; M.G.L. ch. 258B, § 3(1).

⁴⁰ M.G.L. ch. 149, § 52A 1/2.

⁴¹ See 29 U.S.C. §§ 2601-2654.

take twenty-four additional hours of leave during a twelve-month period. Leave under the SNLA may be taken for any of the following purposes:

- To “participate in school activities directly related to the educational advancement of a [child] of the employee, such as parent-teacher conferences or interviewing for a new school”
- To “accompany [a child] of the employee to routine medical or dental appointments, such as check-ups or vaccinations”
- To “accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder’s care, such as interviewing at nursing or group homes”⁴²

The SNLA authorizes the Massachusetts Attorney General to initiate a complaint or criminal action against an employer that violates the Act.⁴³ Any employer convicted of a criminal violation of the Act will be subject to a fine of \$500.00 or less.⁴⁴ In addition, any aggrieved employee may institute a civil action against his or her employer for monetary damages or injunctive relief. A prevailing employee is entitled to treble damages, costs of the litigation, and reasonable attorneys’ fees.⁴⁵

E. Massachusetts Parental Leave Act

The Massachusetts Parental Leave Act (MPLA) entitles an employee to take up to eight weeks of unpaid parental leave for the birth, adoption, or placement per a court order of a child under the age of eighteen (or a mentally or physically disabled person under the age of twenty-three).⁴⁶

F. The Massachusetts Earned Sick Time Law

The Massachusetts Earned Sick Time Law (ESTL)⁴⁷ entitles all employees in Massachusetts to earn up to forty hours per year of sick time. Under the ESTL, sick time may be used for the following purposes:

- To care for the physical or mental illness, injury, or medical condition of the employee or the employee’s child, spouse, parent, or parent of a spouse

⁴² M.G.L. ch. 149, § 52D(b).

⁴³ M.G.L. ch. 149, § 150.

⁴⁴ M.G.L. ch. 149, § 180.

⁴⁵ M.G.L. ch. 149, § 150.

⁴⁶ M.G.L. ch. 149, § 105D.

⁴⁷ M.G.L. ch. 149, § 148C.

- To attend medical appointments, including routine medical appointments, of the employee or the employee's child, spouse, parent, or parent of a spouse
- To address the psychological, legal, or physical effects of domestic violence
- To travel to and from an appointment, pharmacy, or other location related to the purpose for which the statutory sick time was taken

Employees must be permitted to earn sick time at a rate of no less than one hour of sick time for every thirty hours worked, up to forty hours per year, or as permitted by regulation. Employees must be allowed to use sick time no later than ninety days after hire. Employers with eleven or more employees must provide *paid* sick time.

The law prohibits employers from retaliating against employees for exercising or attempting to exercise their rights under the ESTL.⁴⁸

G. Massachusetts Leave for Domestic Violence Victims and Family Members

An employer of 50 or more employees must allow an employee who is a victim of abusive behavior or who has a family member who is a victim of abusive behavior to take up to fifteen days of leave during a twelve-month period to address issues relating to the abusive behavior.⁴⁹ An employee is eligible for such leave if the following criteria are met: (1) either the employee or his or her family member (as defined below) is the victim of abusive behavior, such as domestic violence, stalking, sexual assault, or kidnapping; (2) the leave is sought to obtain victim services directly related to the abusive behavior against the employee or family member of the employee; and (3) the employee is not the perpetrator of the abusive behavior. Leave taken under the statute can be paid or unpaid. When an employee returns from leave, the employee must be returned to his or her original job or an equivalent position.

An employer may not discriminate or retaliate against an employee for taking leave under the statute.

⁴⁸ 940 C.M.R. 33.08.

⁴⁹ M.G.L. ch. 149, § 52E.

III. PAYMENT OF WAGES

The Massachusetts Wage Act governs the timing and frequency of wage payments by nearly all employers in the Commonwealth and defines what constitutes wages.⁵⁰

A. Frequency and Timing of Payment

In general, Massachusetts employers must pay hourly employees on a weekly or biweekly basis. Employers may pay exempt and salaried non-exempt employees biweekly or semi-monthly—or, at an employee’s option, monthly. With some exceptions, employees must be paid their wages—including overtime—within six days of the end of the pay period in which the wages were earned.

An employer must pay an employee who voluntarily terminates his or her own employment for all hours worked on the next regular pay day following the end of employment. When an employee’s termination is involuntary, the employer must pay the employee all wages owed, including overtime and accrued but unused vacation time, on the day of termination.

B. Wages Under Massachusetts Law

The Wage Act applies to an employee’s regular weekly wages or salary. The statute specifically states that wages include commissions that are due and payable, as well as holiday and vacation pay due under an oral or written agreement.

Commissions are included in the definition of wages, provided that “the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to [an] employee.”⁵¹ Courts consider commissions to be “definitely determined” if the amount due can be precisely ascertained, and to be “due and payable” when any contingency that must occur for the employee to receive the commissions has occurred.

C. What Deductions Can an Employer Make from an Employee’s Wages?

Both Massachusetts and federal law require mandatory deductions from employee wages for state and federal income tax withholdings, and for contributions, imposed on employees and employers, made in compliance with the Federal Insurance Contributions Act (FICA), including deductions for Social Security and Medicare.⁵²

⁵⁰ M.G.L. ch. 149, § 148

⁵¹ *Id.*

⁵² 26 U.S.C. § 3102; M.G.L. ch. 62B, § 2.

Employers may deduct from the basic minimum wage a sum per week for lodging provided to an employee.⁵³ A deduction for lodging is not permitted unless the employee wants the lodging and actually uses it. Deductions shall not exceed the following rates:

- Thirty-five dollars per week for a room occupied by one person
- Thirty dollars per week per employee for a room occupied by two persons
- Twenty-five dollars per week per employee for a room occupied by three or more persons

While employers may make deductions for meals, meal deductions from the minimum wage may not exceed:

- One dollar and fifty cents for breakfast
- Two dollars and twenty-five cents for lunch
- Two dollars and twenty-five cents for dinner⁵⁴

Further, deductions may not exceed the actual cost of the meal to the employer.

Both Massachusetts and federal law allow other deductions, such as union dues, purchase of stock pursuant to an employee stock purchase plan, and an employee's portion of health care premiums, if authorized by the employee.⁵⁵ Beyond mandatory or specifically authorized deductions, employers are limited in the deductions they can make from employee paychecks.

IV. MINIMUM WAGE

With certain exceptions, currently all Massachusetts employees must be paid a minimum wage of \$12.00 for each hour worked.⁵⁶ Some employees who earn more than \$20.00 per month in tips may be paid a "service rate," which is currently \$4.35 per hour.⁵⁷

⁵³ 454 C.M.R. § 27.05(2). *See also* 29 C.F.R. § 778.304(a)(1).

⁵⁴ 454 C.M.R. § 27.05(3). For federal regulations regarding deductions for meals, *see* 29 C.F.R. § 778.304(a)(1).

⁵⁵ *See* M.G.L. ch. 154, § 8; M.G.L. ch. 180, § 17A; 29 C.F.R. § 778.304(a)(3).

⁵⁶ M.G.L. ch. 151, § 1. The state minimum wage will increase over 5 years to \$15 per hour by 2023, including annual increases to \$12.75 in 2020, \$13.50 in 2021, \$14.25 in 2022, and then \$15 in 2023. *See* 2018 Mass. Acts ch. 121.

⁵⁷ *See* M.G.L. ch. 151, § 1. The minimum "service rate" for eligible customarily tipped employees will increase to \$6.75 per hour by 2023. *See* 2018 Mass. Acts ch. 121.

V. OVERTIME

Under both Massachusetts and federal law, employers must pay certain employees at a rate of one and one-half times their “regular rate of pay” for all hours worked in excess of forty hours per workweek.⁵⁸ Federal overtime requirements are contained in the Fair Labor Standards Act (“FLSA”).⁵⁹ While similar in many respects to the FLSA overtime provisions, Massachusetts has adopted its own overtime requirements as part of the Massachusetts Minimum Fair Wage Law.⁶⁰ Massachusetts employers must apply whichever law provides the greatest protection for their employees.

A. Calculation of the Regular Rate of Pay

Overtime must be paid at a minimum of one and one-half times the employee’s “regular rate of pay.”⁶¹ The “regular rate of pay” is the amount of compensation that an employee receives for a typical hour of the workweek, including certain additional types of compensation.⁶²

Both federal and Massachusetts overtime laws regulate the types of compensation that must be included in an employee’s regular rate for purposes of calculating overtime. Because the types of compensation included are not identical, in certain circumstances the overtime compensation owed an employee will differ under federal and Massachusetts law. Employers should pay the employee the higher of the federal or state overtime rate.

1. Calculation of the Regular Rate Using the Fluctuating Workweek Method

Under both Massachusetts and federal law, employers may pay a non-exempt employee a fixed salary intended to cover all hours worked each workweek where the employee’s number of hours worked each week varies (fluctuates).⁶³ Because the fixed salary is intended to compensate the employee at straight-time rates for whatever hours are worked in the workweek, the employee’s regular rate will vary from week to week and must be calculated for each week. The regular rate is determined by dividing the number of hours worked in the workweek into the amount of the weekly salary to obtain the applicable hourly rate for that week. The employee is then entitled to overtime compensation in the amount of one-half times the regular rate for all hours worked over forty hours per week (because the salary provides straight-time pay for all hours worked).

⁵⁸ 29 U.S.C. § 207(a)(1); M.G.L. ch. 151, § 1A.

⁵⁹ 29 U.S.C. § 207.

⁶⁰ M.G.L. ch. 151.

⁶¹ M.G.L. ch. 151, § 1A; 29 U.S.C. § 207.

⁶² 454 C.M.R. § 27.03; 29 U.S.C. § 207(e).

⁶³ 29 C.F.R. § 778.114. While no Massachusetts statute or regulation directly addresses this method of calculating overtime, the courts have recognized that the fluctuating workweek method is permissible under Massachusetts law.

2. Calculation of the Regular Rate Using the Fixed Salary Method

Under federal law,⁶⁴ non-exempt employees may be paid a salary for a fixed (as opposed to a fluctuating) number of hours. Under this model, the salary covers the employee's straight-time pay up to the specified number of hours, and the employer pays a separate half-time overtime premium for the hours between 40 and the specified number of hours (assuming the specified number of hours is greater than 40). Because the salary does not include straight-time for hours worked in excess of the specified number of hours, those hours must be compensated at one and one-half times the regular rate.

3. Calculation of the Regular Rate for an Employee Working at Two or More Rates

When an employee performs two or more types of work for an employer and receives different pay rates for each type of work, in Massachusetts (unlike many other states) the employee's regular rate will be a weighted average of those pay rates.⁶⁵

VI. EXEMPTIONS FROM OVERTIME

Under both the Massachusetts Minimum Fair Wage Law and the FLSA, employees who meet certain specified requirements are exempt from overtime pay.⁶⁶ To be exempt from overtime under state *and* federal law, an employee must fall within *both* a Massachusetts and federal exemption.

A. White Collar Exemptions

Under federal law, workers employed in a “bona fide executive, administrative, or professional capacity” are exempt from the overtime pay requirements.⁶⁷ The Massachusetts Minimum Fair Wage Law includes the white collar exemptions for bona fide executive, administrative, and professional employees,⁶⁸ and the associated regulations provide that those terms “shall have the same meaning” as those set forth in the federal regulations.⁶⁹

According to the federal regulations, to qualify as exempt pursuant to the white collar exemptions, an employee must:

⁶⁴ Massachusetts law is silent as to whether the fixed salary method is available.

⁶⁵ See DLS Opinion Letter MW-2001-014 (Nov. 27, 2001).

⁶⁶ 29 U.S.C. § 213; M.G.L. ch. 151, § 1A.

⁶⁷ 29 U.S.C. § 213(a)(1).

⁶⁸ M.G.L. ch. 151, § 1A(3).

⁶⁹ 454 C.M.R. § 27.03.

1. Be paid at or above a certain compensation level;
2. Be paid on a salary, rather than hourly, basis;⁷⁰ and
3. Perform certain exempt duties.⁷¹

There are separate “duties” tests for each of the executive, administrative, and professional exemptions.

To qualify for the executive employee exemption, the employee must meet the following duties test:

1. The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
2. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
3. The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.⁷²

To qualify for the administrative exemption, an employee must satisfy the following duties test:

1. The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.
2. The employee’s primary duty must involve the exercise of discretion and independent judgment with respect to matters of significance.⁷³

There are two types of professionals – learned and creative. To qualify for the learned professional exemption, an employee must meet all of the following requirements:

⁷⁰ Some of the white collar exemptions provide for exceptions from the minimum salary level and salary basis requirements.

⁷¹ 29 C.F.R. § 541.400.

⁷² 29 C.F.R. § 541.100.

⁷³ 29 C.F.R. § 541.200. The regulations provide separate requirements for academic administrative employees in educational establishments whose primary duty is performing administrative functions directly related to academic instruction in an educational establishment. *See* 29 C.F.R. § 541.204.

1. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character.
2. The advanced knowledge must be in a field of science or learning.
3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.⁷⁴

To qualify for the creative professional employee exemption, the employee's "primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, as opposed to routine mental, manual, mechanical, or physical work."⁷⁵

In addition, the FLSA exempts computer professionals from mandatory overtime compensation.⁷⁶ Massachusetts has not specifically adopted this exemption, and it is unclear whether the federal exemption applies to Massachusetts employees. To qualify for the the exemption, an employee must meet the following requirements:

1. The employee must be compensated either on a salary or fee basis at a rate not less than \$455.00 per week, or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour.
2. The employee's primary duty must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
 - Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications
 - The design, documentation, testing, creation, or modification of the computer programs related to machine operating systems
 - A combination of the aforementioned duties, the performance of which requires the same level of skills⁷⁷

⁷⁴ 29 C.F.R. § 541.300.

⁷⁵ 29 C.F.R. § 541.302(a).

⁷⁶ 29 U.S.C. § 213(a)(1)(17).

⁷⁷ 29 C.F.R. § 541.400.

Both Massachusetts and federal law exempt certain “highly compensated employees” from overtime requirements. Massachusetts law relies on the definition for “highly compensated employees” set forth in the federal regulations.⁷⁸ Under this exemption, employees are exempt from overtime if:

1. The employee earns a total annual compensation of \$100,000 or more, which includes at least \$455.00 per week paid on a salary basis.
2. The employee’s primary duty includes performing office or non-manual work.
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.⁷⁹

According to the federal regulations, because a high level of compensation is a strong indicator of an employee’s exempt status, a detailed analysis of the employee’s job duties is unnecessary.

B. Other Exemptions

1. Outside Sales Exemption

Both the Massachusetts Minimum Fair Wage Law and the FLSA provide an exemption from overtime requirements for outside sales employees. Outside sales employees are those who spend time calling on customers and sales prospects outside of the office. The Massachusetts and federal exemptions for outside sales employees overlap considerably, but their specific requirements differ.

Under the FLSA, an individual must satisfy two criteria to qualify for the outside sales exemption: (1) the employee must be employed either to make sales or to obtain orders or contracts for services or for the use of facilities; and (2) the employee must be customarily and regularly engaged away from the employer’s place or places of business.⁸⁰

There are two distinct outside sales exemptions under the Massachusetts Minimum Fair Wage Law. The first, which exempts outside sales employees from both the Commonwealth’s minimum wage and overtime requirements, applies to an individual who (1) regularly sells products away from the employer’s place of business; and (2) refrains from making daily reports or visits to the employer’s offices.⁸¹ The second Massachusetts outside sales exemption applies

⁷⁸ DLS Opinion Letter MW-2008-004 (July 14, 2008).

⁷⁹ 29 C.F.R. § 541.601.

⁸⁰ 29 C.F.R. § 541.500(a).

⁸¹ M.G.L. ch. 151, § 2.

only to the Commonwealth's overtime pay requirements, and it covers an employee who is "employed . . . as an outside salesman or outside buyer."⁸²

2. Federal Commissioned Inside Sales Exemption

Under the FLSA, certain retail and service employees who work on commission are excepted from federal overtime requirements.⁸³ Massachusetts law does *not* contain a similar exception for inside sales employees. Retail and service employers should consider whether employees who satisfy the federal exception satisfy a state exemption. To qualify for the federal exception, a business must be considered a "retail or service establishment." In order for a business to meet this requirement, (1) the business must be recognized as a retail sales or service provider in its particular industry; and (2) 75 percent of its annual dollar volume of sales of goods or services must not be for resale.⁸⁴

Additionally, retail and service employees must satisfy the following two requirements: (1) their regular rate of pay must be at least one and one-half times the federal minimum wage;⁸⁵ and (2) more than half of the employee's compensation for a "representative period" of not less than one month must derive from commissions on goods or services.⁸⁶

3. Motor Carrier Exemptions

Both the Massachusetts Minimum Fair Wage Law and the FLSA exempt certain employees working with large motor vehicles from overtime pay requirements.⁸⁷ In general, the Massachusetts motor carrier exemption closely tracks the Motor Carrier Act (MCA) exemption under the FLSA.⁸⁸ The FLSA's MCA exemption applies to (1) drivers, drivers' helpers, loaders, and mechanics (2) who are involved in the transport of goods in interstate commerce and (3) whose work directly affects the safety of operation of a commercial vehicle (4) that weighs more than 10,000 pounds.⁸⁹ The FLSA also exempts other groups from its overtime requirements regardless of vehicle weight, including those working on certain passenger vehicles, including school buses, chartered passenger vehicles, and buses engaged in public transportation.

The primary difference between the Massachusetts motor carrier exemption and the corresponding federal exemption is that, in Massachusetts, the exemption covers a narrower

⁸² M.G.L. ch. 151, § 1A(4).

⁸³ 29 U.S.C. § 207(i); 29 C.F.R. § 779.414.

⁸⁴ 29 C.F.R. § 779.411.

⁸⁵ 29 U.S.C. § 207(i)(1); 29 C.F.R. § 779.412(a).

⁸⁶ 29 U.S.C. § 207(i)(2); 29 C.F.R. § 779.412(b).

⁸⁷ 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782.1 *et seq.*; M.G.L. ch. 151, §§ 1A(8) and (11).

⁸⁸ DLS Opinion Letter MW-2002-008 (Feb. 26, 2002).

⁸⁹ 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782.1 *et seq.*

group of employees. Specifically, the Massachusetts exemption applies only to drivers and drivers' helpers.⁹⁰

Massachusetts also has a second exemption that applies to common carriers of passengers by motor vehicle.⁹¹ This additional exemption covers common carriers operating some passenger vehicles, including public transportation, charters, and other for-hire passenger vehicles.

4. Seasonal Exemptions

The FLSA contains one exemption that is applicable to seasonal establishments, while Massachusetts law contains two exemptions that may apply to such businesses. The requirements of the federal and state exemptions overlap but are not identical.

The FLSA exempts employees of certain amusement or recreational establishments that operate on a seasonal basis from both its minimum wage and overtime requirements.⁹²

Massachusetts law provides two overtime exemptions that may cover seasonal employees. Both of these provide an exemption *only* from overtime, not minimum wage. The Massachusetts "amusement park exemption" applies to employees of amusement parks that contain "a permanent aggregation of amusement devices, games, shows, and other attractions" and that operate for less than 150 days in any one year.⁹³ Additionally, the Massachusetts "seasonal exemption" applies to employees of businesses that are seasonal in nature and are open for business for less than 120 days in any one year.⁹⁴

5. Blanket Exemptions for Certain Businesses

Massachusetts overtime law provides blanket exemptions for employees of certain types of businesses, including hotels, restaurants, hospitals and nursing homes, gas stations, non-profit schools and colleges.⁹⁵ Because the FLSA does not contain any similar blanket exemptions, Massachusetts employers in those businesses must find an applicable federal exemption before denying overtime wages to their employees.

⁹⁰ See M.G.L. ch. 151, § 1A(8); DLS Opinion Letter MW-2002-008 (Feb. 26, 2002); DLS Opinion Letter MW-2002-022 (Aug. 6, 2002).

⁹¹ See M.G.L. ch. 151, § 1A(11); M.G.L. ch. 159A.

⁹² 29 U.S.C. § 213(a)(3).

⁹³ M.G.L. ch. 151, § 1A(20).

⁹⁴ M.G.L. ch. 151, § 1A(9); DLS Opinion Letter MW-2005-001 (Feb. 3, 2005).

⁹⁵ M.G.L. ch. 151, § 1A.

VII. MASSACHUSETTS EQUAL PAY ACT

The new Massachusetts Equal Pay Act, effective as of July 1, 2018, prohibits differences in pay on the basis of gender for “comparable work.”⁹⁶ “Comparable work” is defined as work that is “substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.”

An employer can avoid liability for a wage differential between employees of opposite genders only if it can establish that the difference is based on one of the following factors:

- A system that rewards seniority; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave shall not reduce seniority
- A merit system
- A system that measures earnings by quantity or quality of production, sales, or revenue
- Geographic location in which a job is performed
- Education, training, or experience to the extent such factors are reasonably related to the particular job in question
- Travel, if the travel is a regular and necessary condition of the particular job

An employee’s previous wage or salary history is not a defense to a claim of wage discrimination.

However, the law recognizes an affirmative defense to liability for an employer that has (1) completed a self-evaluation of its pay practices that is “reasonable in detail and scope in light of the size of the employer” within the three years prior to commencement of the action; and (2) made “reasonable progress” toward eliminating pay differentials uncovered by the evaluation.

The law also prohibits Massachusetts employers from requesting the compensation history of a prospective employee prior to making an offer, but a prospective employee may “voluntarily” disclose such information. The law also make it unlawful for employers to prohibit employees from discussing or disclosing their own or other employees’ wages.

⁹⁶ M.G.L. ch. 149, § 105A.

VIII. TIPS AND SERVICE CHARGES

The Massachusetts Tip Statute defines the charges that are considered tips, gratuities, or service charges, and it regulates which employees may receive them.⁹⁷

The Tip Statute defines a “tip” as “a sum of money, . . . a gift or a gratuity, given as an acknowledgment of any service performed by a wait staff employee, service employee, or service bartender.” A “service charge” is defined as “a fee charged by an employer to a patron in lieu of a tip to any [covered employee], including any fee designated as a service charge, tip, gratuity, or a fee that a patron or other consumer *would reasonably expect* to be given to [a covered employee] in lieu of, or in addition to, a tip.”

The Tip Statute permits an employer to retain “administrative” or “house” fees charged to customers, if “the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for [covered employees].”

The Tip Statute establishes three categories of employees who are eligible to share in tips and service charges:

- A wait staff employee, defined as “a person, including a waiter, waitress, bus person, and counter staff, who: (1) serves beverages or prepared food directly to patrons, or who clears patrons’ tables; (2) works in a restaurant, banquet facility, or other place where prepared food or beverages are served; and (3) who has no managerial responsibility.”
- A service employee, defined as “a person who works in an occupation in which employees customarily receive tips or gratuities, and who provides service directly to customers or consumers, but who works in an occupation other than in food or beverage service, and who has no managerial responsibility.”
- A service bartender, defined as “a person who prepares alcoholic or nonalcoholic beverages for patrons to be served by another employee, such as a wait staff employee.”

A. Mandatory Pooling of Tips and Service Charges

The Tip Statute explicitly allows compulsory tip-pooling, stating: “An employer may administer a valid tip pool and may keep a record of the amounts received for bookkeeping or tax reporting purposes.” Thus, employers may require tip-pooling among a group of employees or mandate that employees share tips with other eligible employees.

⁹⁷ M.G.L. ch. 149, § 152A.

Employers administering tip pools must ensure that “[a]ny service charge or tip remitted by a patron or person to an employer shall be paid to the wait staff employee, service employee, or service bartender by the end of the same business day, and in no case later than the time set forth for timely payment of wages [in the statute].”⁹⁸

B. The Tip Credit and Service Rate

Both Massachusetts and federal law allow employers to pay a cash wage below minimum wage to customarily tipped employees if other statutory requirements are met.⁹⁹ Under Massachusetts law, the current “service rate” is \$4.35 per hour.¹⁰⁰

To qualify as a “tipped employee,” one must customarily receive tips of more than \$30.00 per month.¹⁰¹ The combination of tips and the service rate earned by the employee must meet or exceed the Massachusetts minimum wage.¹⁰² The tipped employee may receive tips directly or through a valid tip pool.¹⁰³ Currently, an employer is supposed to calculate at the end of a shift whether an employee’s earned tips combined with the service rate meet or exceed the minimum wage.

Massachusetts also stipulates that employers that pay less than minimum wage to tipped employees must inform those employees in writing of the applicable law and must make clear to them that the employer will be paying the lower rate.

C. Liability for Violations

Both companies and individuals may be liable for violations of the Tip Statute.¹⁰⁴ The statute defines an “employer” as “any person or entity having employees in its service, including an owner or officer . . . or any person whose primary responsibility is the management or supervision of wait staff employees, service employees, or service bartenders.”¹⁰⁵ Employees who prevail on a claim under the Tip Statute are entitled to restitution of any tips or service

⁹⁸ M.G.L. ch. 149, § 152A(f).

⁹⁹ 29 U.S.C. § 201 *et seq.*; M.G.L. ch. 151, § 7.

¹⁰⁰ M.G.L. ch. 151, § 7; 454 C.M.R. § 27.02. The minimum “service rate” will increase gradually to \$6.75 per hour by 2023. *See* 2018 Mass. Acts ch. 121.

¹⁰¹ 29 U.S.C. § 203(t). Massachusetts defines “tipped employees” as those receiving more than \$20.00 in tips each month. 454 C.M.R. § 27.02.

¹⁰² M.G.L. ch. 151, § 1; 454 C.M.R. § 27.02.

¹⁰³ 454 C.M.R. § 27.03(2).

¹⁰⁴ Massachusetts Attorney General Advisory 2004/3, at 3.

¹⁰⁵ M.G.L. ch. 149, § 152A(a).

charges that they should have received but did not, plus 12 percent annual interest.¹⁰⁶ Prevailing employees may also recover treble damages, plus reasonable attorneys' fees and costs.¹⁰⁷

IX. POSTING REQUIREMENTS

Massachusetts employers must display posters informing employees of their rights under state and federal wage and hour laws. Employers must display a poster setting out the Massachusetts wage and hour law requirements in a conspicuous location, and they must provide free copies of the poster to employees upon request.¹⁰⁸ The poster must state the Massachusetts minimum wage and must summarize the Commonwealth's laws regarding the payment of wages, tips, meal breaks, earned sick time, non-discrimination and equal pay, child labor, overtime, retaliation, the SNLA, inspection of payroll records, and the employee's right to sue.

If an employer operates its business on a Sunday, it must first post a list of employees who will work that day.¹⁰⁹ The list must specify which alternate day of rest those employees will receive, and it must be on display in a conspicuous location.

Employers of minors must post each minor's weekly schedule in a conspicuous location within the minor's work area.¹¹⁰ The posted schedule must indicate the start and stop times for each day of work, the total hours worked per day, the precise times of meal breaks each day, and the total number of work hours for the week. An employer may not change this schedule once the workweek has begun without the Attorney General's written consent, and employers may not permit or require minors to work during their scheduled time off for that week.

X. CLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS

The Massachusetts Independent Contractor Statute is one of the most restrictive in the country, sharply limiting who may legitimately be classified as independent contractors.¹¹¹ Under that statute, an individual who provides services is presumed to be an employee, unless the company receiving the services proves all of the following, commonly referred to as the ABC test:

- A. the worker is free from its control and direction in performing the service, both under the contract and in fact;

¹⁰⁶ M.G.L. ch. 149, § 152A(f).

¹⁰⁷ M.G.L. ch. 149, § 150.

¹⁰⁸ M.G.L. ch. 151, § 16; 454 C.M.R. § 27.07(1).

¹⁰⁹ M.G.L. ch. 149, § 51 (this also includes employers affected by M.G.L. ch. 149, § 50, discussed in Section I.C).

¹¹⁰ M.G.L. ch. 149, § 74.

¹¹¹ See M.G.L. ch. 149, § 148B.

- B. the service provided by the worker is outside the employer's usual course of business; and
- C. the worker is customarily engaged in an independent trade, occupation, profession, or business of the same nature as that involved in the service performed.

Failing to establish even one prong may be fatal to independent contractor status.

An employee misclassified as an independent contractor has a private right of action against his or her "employer." To recover damages, a misclassified employee must demonstrate that, in the course of receiving the individual's services, the employer violated one or more of the wage and hour laws specified in the statute. A prevailing plaintiff is entitled to recover treble damages, as well as litigation costs and reasonable attorneys' fees.

The business may also be subject to significant civil or criminal penalties for misclassifying independent contractors. The amount of the fine depends on whether the violation is deemed willful and whether it is a first or subsequent offense.

XI. OTHER MISCELLANEOUS MASSACHUSETTS LAWS

A. Massachusetts Personnel Records Law

The Massachusetts Personnel Records Law requires an employer with twenty or more employees to maintain certain information or documents (to the extent they are available) within an employee's "personnel record."¹¹² "Personnel record" is defined broadly to include any record that identifies an employee "to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action." An employer has a duty to notify an employee within ten days of placing negative information into the employee's personnel record if the "information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action."

Under the law, an employer and an employee may agree to remove information from a personnel record "for any reason." If there is a disagreement as to whether information should be included in the record, "the employee may submit a written statement explaining the employee's position," which will become part of that employee's personnel record and must be included when the record is transmitted to a third party. If an employer includes information in a personnel record that it knows or should have known to be false, the employee can seek to have the information expunged.

Employers are required to provide an employee or former employee with an opportunity to review his or her personnel record during normal business hours at the employee's place of

¹¹² M.G.L. ch. 149, § 52C.

business within five business days of the employee's written request. The law also requires employers to provide an employee or former employee with a copy of his or her personnel record within five business days of the employee's written request. Employers may limit the frequency of employee requests to review personnel records to twice per year.

B. Deductions by Staffing Agencies from the Wages of Temporary Employees

Pursuant to the Temporary Workers Right to Know law, "staffing agencies" are required to provide temporary employees with comprehensive, individualized, pre-employment information regarding each new work assignment.¹¹³ The law also limits the fees and costs for which staffing agencies and work site employers may charge temporary employees, and requires staffing agencies to reimburse temporary employees sent to work sites where no work is available for the cost of transportation.

C. Retaliation for Complaints Regarding Wage and Hour Violations

An employer may not retaliate against an employee for exercising his or her rights under Massachusetts wage and hour law.¹¹⁴ The employer can incur liability for retaliation even if the employee's underlying wage and hour complaint has no merit. Retaliatory actions, termed "adverse employment actions," can include termination or any other type of discrimination.¹¹⁵ Constructive discharge is also unlawful retaliation in Massachusetts.

XII. ENFORCEMENT

An employee seeking redress of certain wage and hour violations is expected to file a complaint with the Office of the Massachusetts Attorney General,¹¹⁶ which then will choose to dismiss the complaint, investigate it, or authorize the employee to pursue an independent civil action.¹¹⁷ While criminal punishments are exceedingly rare in the wage and hour context, the Attorney General has discretion to pursue criminal prosecution where an employer has committed previous offenses and the present violation was willful.¹¹⁸ Alternatively, the Attorney General may issue a written warning or a civil citation.¹¹⁹ The amount of a civil fine depends on whether the employer

¹¹³ M.G.L. ch. 149, § 159C.

¹¹⁴ See M.G.L. ch. 149, § 148A and M.G.L. ch. 151, § 19.

¹¹⁵ M.G.L. ch. 149, § 148A.

¹¹⁶ M.G.L. ch. 149, §§ 2 and 150. While the statute contemplates that employees may not sue employers for certain wage and hour violations without first exhausting their administrative remedies with the Attorney General, a plaintiff's failure to file a complaint with the Office of the Attorney General prior to filing a private lawsuit was not a jurisdictional bar to the lawsuit, provided that the Attorney General is notified of the suit during its pendency.

¹¹⁷ See M.G.L. ch. 149, § 150.

¹¹⁸ M.G.L. ch. 149, § 27C(a)(1)-(2).

¹¹⁹ M.G.L. ch. 149, § 27C(b)(1).

specifically intended to commit the violation, and whether the incident was a first offense.

An employee may file a civil wage and hour suit against an employer.¹²⁰ In addition to corporate liability, the Wage Act provides that “[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation” can face individual liability for wage and hour violations in Massachusetts.¹²¹ A plaintiff may bring an individual action or a class action on behalf of himself and other similarly situated employees. If successful, the plaintiff-employee can win a court order directing the employer to stop the challenged practice, and will recover lost wages, attorneys’ fees, and litigation costs. Further, treble damages are mandatory for most wage and hour violations.¹²²

Employees must bring civil wage and hour claims against employers within three years of a violation, depending on the type of violation involved.¹²³ Many plaintiffs also bring contract and tort claims against employers because these causes of action have longer statutes of limitations than wage and hour claims.

XIII. ARBITRATION

Claims under the Massachusetts Wage Act are arbitrable, provided that the language of the agreement is broad enough to encompass those claims. The Federal Arbitration Act limits a court’s authority to find that an arbitration agreement is unenforceable under state contract law. While states may find arbitration agreements unenforceable because of defenses that would apply equally to all types of contracts (e.g., duress), states cannot impose rules or laws that hinder the enforceability of arbitration agreements specifically. Further, the United States Supreme Court has held that states cannot force companies with arbitration provisions to allow class arbitrations and that class action waivers in arbitration agreements are neither illegal under federal labor law nor against public policy.

¹²⁰ M.G.L. ch. 149, § 150.

¹²¹ M.G.L. ch. 149, § 148.

¹²² M.G.L. ch. 149, § 150.

¹²³ M.G.L. ch. 149, § 150; M.G.L. ch. 151, § 20A.



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